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LAW INSTITUTE

MODERNIZING THE CHILD, FAMILY AND COMMUNITY SERVICE ACT

## Backgrounder Report on Modernizing the Child, Family and Community Service Act

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### An overview of the report

The *Child, Family and Community Service Act* is the central statute in British Columbia's child protection system. Among its provisions are those that establish and define the best interests of the child as the leading organizational principle of child protection law, set out the grounds under which children in need of protection (due to abuse, abandonment, or neglect) may be removed from their families and taken into the care of a director, and set out the court orders, procedures, and safeguards that govern the process of taking a child into care.

This report contains 39 recommendations to reform the *Child, Family and Community Service Act*. While these recommendations don't constitute a front-to-back review and overhaul of the Act, they do cover a wide range of important subjects encompassed by the Act. The report's recommendations address topics ranging from modernizing the Act's terminology, to enhancing several court procedures and orders, to providing clear guidance on incorporating a child's views within a child protection proceeding. The report also contains draft legislation, which illustrates how these recommendations could be implemented by the legislative assembly.

### About the Modernizing the Child, Family and Community Service Act Project

The Modernizing the *Child, Family and Community Service Act* is a major law-reform project. This report contributes to one of the goals of the project, which is to recommend specific

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reforms to improve the *Child, Family and Community Service Act*. (The project has a second goal, which is to examine legislation on youth aging into the community. BCLI plans to publish a study paper on this subject in 2021.)

This report's recommendations to reform the *Child, Family and Community Service Act* are intended to identify outdated provisions and operational incompatibilities and gaps within the statute itself and with legislation and regulations that intersect with this Act. This means that the report's scope isn't so expansive as to include all aspects of the *Child, Family and Community Service Act* or the broader child protection system. This report represents a focused review of selected aspects of the Act.

A focused review is appropriate because the *Child, Family and Community Service Act* and the child protection system are undergoing significant change. A stream of recent reports has recommended reforms to the system. The coming into force this year of new federal legislation on child welfare for First Nations, Inuit, and Métis children, youth, and families has highlighted the need for amendments to the *Child, Family and Community Service Act* to respond to that federal legislation. BCLI does not seek to re-do the work that has been carried out elsewhere. It has carefully crafted the scope of this project to make a distinctive contribution to a multifaceted reform effort.

## **Our supporters and the project committee**

The Modernizing the *Child, Family and Community Service Act* Project has been made possible by project funding from the Law Foundation of British Columbia.

In carrying out the project, BCLI had the assistance of the Child Protection Project Committee. This committee is made up of experts in the child protection field in British Columbia. It includes members of the legal and social work professions, as well as officials from the Ministry of Children and Family Development for British Columbia, the Office of the Representative for Children and Youth of British Columbia, and the Office of the Public Guardian and Trustee of British Columbia.

## **The public consultation**

This report was preceded by the committee's *Consultation Paper on Modernizing the Child, Family and Community Service Act*, which was published in October 2020. The consultation paper's publication opened up a three-month consultation period, ending 15 January 2021. During this consultation period, the public was invited to respond to the committee's 38 tentative recommendations for reform of the *Child, Family and Community Service Act*. The committee has fully considered the responses it received in the public consultation in crafting the final recommendations contained in this report.

## Content of the report

### *Introduction*

The report begins with a short introductory chapter. This chapter describes the goals of the project, summarizes the *Child, Family and Community Service Act*, discusses other law-reform work, and gives an overview of the seven substantive chapters to follow.

### *Definitions and terms*

A number of key terms in the *Child, Family and Community Service Act* derive from older family law legislation. With the advent of British Columbia's *Family Law Act* (in force 18 March 2013) and significant amendments to the federal *Divorce Act* (in force 1 March 2021), this terminology has fallen out of use in major family law statutes, replaced by newer terms. In some cases, older terms such as *custody* and *access* have taken on negative connotations.

The committee recommended updating the terminology used in the *Child, Family and Community Service Act* to allow it to keep pace with these developments in family law. In making its recommendations in this chapter, the committee carefully considered the effect of new terminology on child protection law. In some cases, it found that direct adoption of a term from the *Family Law Act* or the *Divorce Act* would have negative effects for child protection law, which outweighed the positive benefits of harmonization. In these cases, the committee has modified the proposed terminology, attempting to strike a balance between the benefits of modernization with the special considerations of child protection law.

### *Disclosure*

The *Child, Family and Community Service Act* has a rudimentary provision on disclosure of information in child protection proceedings. The committee recommended amendments to the Act to enhance its disclosure requirements. It recommended specific amendments to the Act's main disclosure provision, which are intended to incorporate points made in the case law interpreting this provision. In particular, the committee recommended requiring parties to a child protection proceeding to disclose all documents to which the party intends to refer to at trial and setting a requirement for the director to disclose to the other parties all documents that are or have been in the director's possession or control and that could be used by any party at trial to prove or disprove a material fact. Finally, the committee recommended that the disclosure provision expressly state that there is an onus on the director to disclose all documents within the scope of the provision (except for those covered by solicitor-client privilege), or to prove that a given document may not be disclosed.

### *Independent legal advice*

The Act makes a handful of references to independent legal advice. The committee recommended enhancing this concept by amending the Act in two distinct ways. First, it recommended amendments to provide that parents and children (if 12 years of age or older)—and, in some cases, other parties to an agreement—must be advised of the right to inde-

pendent legal advice before entering into a voluntary care agreement, a special needs agreement, or an agreement with the child’s kin or others. Second, it recommended an amendment to provide that a child (if 12 years of age or older) must be offered independent legal advice whenever the child is served with an application for an order under the Act.

### *Court procedures and orders*

The committee made a series of recommendations intended to fine-tune the Act’s system of procedures and safeguards for court orders. It recommended that the Act’s provision on consent orders be streamlined by giving the court the power to dispense with the written requirement for a consent order. The committee recommended requiring the director to provide reasons when an extension to an order is sought. It also recommended that a court be allowed to make a continuing custody order as an outcome of a hearing under section 54.01. And it recommended clarifying that an order granting guardianship of a child under that section is sole guardianship, ending parental rights.

The committee examined the provisions in the *Family Law Act* dealing with misuse of court process and respecting litigants’ conduct. These provisions create an expanded regime in family law for dealing with litigation misconduct, supplementing the *Supreme Court Act’s* provision on vexatious litigants. In the end, the committee decided that these provisions shouldn’t be extended to the *Child, Family and Community Service Act*. The stricter vexatious-litigant provisions should continue to set the standard for this Act.

Finally, the committee considered the Act’s provision that empowers a court to order that a person be made a party to a child protection proceeding. The committee recommended that this provision be amended by adding new language that deals with when a child (aged 12 years old or older) should be granted party status.

### *Selected protection issues*

The committee recommended that violence be split off from the ground for protection dealing with emotional harm, to form a new ground for protection in its own right.

The committee recommended adding a provision to the Act requiring a director to regularly reassess whether a child should remain in care. In particular, this requirement would be triggered prior to any subsequent custody application before the court.

The committee recommended that the Act be amended to adopt provisions enhancing contact between children and parents, siblings, and other extended family.

### *Incorporating children’s views in child protection proceedings*

The committee recommended that a new enabling provision be added to the Act, listing for the court specific options to be used to incorporate a child’s views in a child protection proceeding.

### *Legal representation for children in child protection proceedings*

The committee recommended amending the Act to adopt an enabling provision for legal representation for a child in a child protection proceeding.

### *Draft legislation*

The report contains draft legislation, which sets out legislative amendments that could be used to implement the committee's recommendations. This draft legislation takes the form of amendments to the *Child, Family and Community Service Act*, which is one of a range of ways in which the Legislative Assembly of British Columbia could choose to implement the committee's recommendations.

## **Conclusion**

The committee calls on the provincial government to act on its final recommendations for reform of the *Child, Family and Community Service Act*. In considering the committee's recommendations, the provincial government should take into account the need for broader consultations than BCLI is capable of carrying out, bearing in mind (in particular) the provincial government's obligation to consult with Indigenous communities, who are particularly affected by legislation on child welfare.