PUBLIC REPORT NO. 24

PUBLIC RESPONSE TO REQUEST FOR SUGGESTIONS FOR LEGISLATIVE CHANGE TO FAMILY AND CHILD SERVICE ACT

FEBRUARY, 1991

OMBUDSMAN
Legislative Assembly
Province of British Columbia

Please respond to:

8 Bastion Square
Victoria, British Columbia
V8W 1H9
Telephone: (604) 387-5855
Long Distance:
(toll free) 1-800-742-6157
FAX: 387-0198

202, 1275 West Sixth Avenue
Vancouver, British Columbia
V6H 1A6
Telephone: (604) 660-1366
Long Distance:
(toll free) 1-800-972-8972
FAX: 660-1691

February 21, 1991

Honourable N. Jacobsen
Minister of Social Services
and Housing
Parliament Buildings
Victoria, B.C.
V8V 1X4

Dear Mr. Jacobsen:

Re: Public Response to Request for Suggestions for Legislative Change to Family and Child Service Act

Thank you for the opportunity to provide you with our observations on possible amendments to the Family and Child Service Act. Our investigations of the cases featured on Rafe Mair's talk show as well as our own observations of the some 1,500 cases per year we receive regarding children that relate to the administration of the Family and Child Service Act have given rise to the following observations. Although the Act has withstood legal challenge over the past decade our experience with it and its administration points to a number of issues that we believe should be addressed by both government and the community at large if the Act is to fulfil its intended purpose. We understand that it is your intention that these suggestions be made public.

1. Best Interest of the Child. It has been recognized in the Family Relations Act, under the UN Convention on the Rights of the Child, and in other legislation (for example, the province of Nova Scotia) that the best interest test should be the guide when decisions are made concerning custody, access and guardianship of infants. Under the existing Family and Child Service Act of British Columbia, the Court must base its decisions solely on whether or not the child is "in need of protection". The interpretation of "in need of protection" does not specifically include emotional abuse. If the best interest test is adopted it broadens the scope of the court to consider the long term effects of the province's intervention in the life of the child. The best interest test would provide an option to give services intended to support the integrity of the family in situations where the child may not be directly at risk (for example, in cases of repeated exposure to spousal abuse) but may be seriously affected by the environment in which the child is living. If the best interest test was to be used it should include the rights of the child

was to be used it should include the rights of the child to have a voice in the decision-making process and if the child is too young to express his or her opinion or requires assistance, then an advocate on behalf of the child could be provided. The best interest test will place a greater onus on the Ministry to establish that apprehension would be better for the child than care provided by his or her parents or any other alternative means of family support.

2. Prevention and Family Support. The Family and Child Service Act does not provide for an adequate range of family support alternatives to apprehension. While there is a provision for voluntary care agreements under the legislation, we believe that the range of alternatives is too limited. Our sense is that some children's interests are not well served in the foster care system, and even where abuse has occurred, a child may wish to return to his or her natural parents. This may be assessed to be the preferred alternative provided that the home could be adequately supervised (for example, in the case of an older child who is resistant to all of the services offered by the Ministry). If there were specific statutory provisions and available services to allow alternatives (for example, family support within the home environment, placement with an appropriate relative or family friend, or an agreement or restraining order forbidding the alleged abuser from entering the family home), the necessity of apprehending the child may decrease considerably. The onus would be on the Ministry to show that other less intrusive methods have been tried unsuccessfully or seriously considered prior to seeking an order for temporary or permanent custody. No doubt the community and your staff will have some excellent proposals for family support services.

The U.N. Convention on the Rights of the Child recognizes that the child should grow up in a family environment "in an atmosphere of happiness, love and understanding". The family is recognized as the "fundamental group of society" which should be afforded necessary protection and assistance.

The 1988 B.C. Royal Commission on Education detailed the impacts on the family of rapid socio-economic changes and noted the transformation of the family...

> ...from a generally stable social unit, which ideally provided children with the means for growth and subsistence as well as the confidence to participate in the social life of the community, to a more fragile institution, which may not always have the resources to ensure the proper development of the young or their preparedness to succeed in school.

It has long been recognized, at least informally, that parenting is a highly demanding task requiring extraordinary skill and ability. Parenting skills and abilities are not always naturally inherited. Parents, like other professionals, learn and develop their skills through experience and, increasingly, through educational opportunities offered through public health, education, and community agencies. To blame parents for inadequate parenting skills may be akin to "blaming the victim" for we are all products of our own upbringing. In the long run, it may be harmful to the best interests of many children to approach family problems in an adversarial, or blaming manner. In turn, parents must acknowledge the reality that their children are not their "personal property" but persons in their own right. The healthy development of children is a shared responsibility of parents, children and the community at large. This shared responsibility was well recognized by the B.C. Royal Commission on Education which found that parents were increasingly asking for school based support to ensure the well being of their children.

Researchers have noted the cyclical nature of social problems including family dysfunction, poverty, child abuse and neglect etc. The public and private interests coincide in their desire to ensure that the best interests of children are of paramount concern and this will most likely be achieved within a stable, loving family. An increase in the diversity of flexible approaches to family support and child welfare issues - preventative services, parent education services, counselling, mediation, fair due process etc. - will increase the potential for consensus and reduce the likelihood of conflict in individual cases and reduce or eliminate unhelpful and adversarial debates about "parent vs child rights".

3. <u>The Role of the Superintendent</u>. There is a legislative ambiguity with regard to the role of the Superintendent. The Ministry has recently acted to redefine the Superintendent's role as an arm's length standard setter and monitor of services. Currently, the Superintendent appears to have statutory responsibility for the administration of the current Act without the administrative authority to direct the staff who are operating with her delegated powers. The Superintendent's role has also been described as one of an advocate. The roles of standard setter, service monitor, inspector/auditor, guardian and advocate have all been ascribed to this position with little statutory guidance. This should be clarified in the legislation.

4. <u>Mediation and the Court Process</u>. The Court of Appeal of British Columbia in the <u>Grant</u> case referred with approval

to the Hopkinson case regarding the intent of the Family and Child Service Act, as follows:

> The Act is intended to deal with children who are in need of protection. While the enquiry provided for by the Act is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings it is not an adversary proceeding and there is no lis before the Court. It is an enquiry to determine whether a child is in need of protection, and as the statute directs, the safety and well being of the child are the paramount considerations (our emphasis).

In theory this may have been the intent of the legislation. In practice, the parents that complain to this office believe that they are involved in an adversarial process. The Social Worker, who may have offered family and support services in the past, takes on a new role as child apprehender. Any positive relationship that may have developed is now lost in the apprehension process. The Ministry should consider how best to separate the investigative/apprehension and family and child support functions. In addition, legislation should specifically allow for mediation. The legislation should seek to offer mediation opportunities at every stage of proceedings.

Effective mediation could often provide an alternative to the court process following an apprehension or could be used as a means of resolving disputes between the Ministry and custodial parents as an alternative to apprehension. In cases where an apprehension has taken place and mediation has failed to resolve the protection concerns the matter would continue through the Courts for decision. If mediation were successful, a mediation agreement could be registered with the Court in order to formalize the outcome and monitor the result. Mediation in child protection cases would require qualified mediators knowledgeable about child protection and child development issues. Well articulated standards would be necessary to ensure consistency and service quality. Mediation, by definition, also requires the voluntary participation of all parties to the process. The Provinces of Saskatchewan and Nova Scotia have recently introduced child welfare legislation supporting the use of mediation (copies enclosed). Mediation is currently available to families in Family Relation Act matters through Family Court Counsellors. Again, with respect to the child's right to be heard, it may be necessary to involve a family advocate on behalf of the child or consider a guardian ad litem program such as exists in England or in many States, (for example in the State of Washington).

5. Due Process

a) Apprehension and Warrant. Few would doubt that the apprehension of children is one of the most serious interventions the province can make into family lives. In a few cases it is necessary to apprehend children immediately for safety and health reasons. In some of these cases, it may be necessary to have a police officer in attendance. However, in most instances a family in distress is well known to Ministry officials and the sense of urgency in apprehending the child may not be present. In those circumstances we think it would be worthwhile for the Legislature to consider rewriting the apprehension procedures to provide for the issuance of a warrant by a justice of the peace or Judge prior to the apprehension of the child. Ontario's legislation provides for the issuance of a warrant. In applying for such a warrant the onus would be on the Ministry to demonstrate to the satisfaction of the Judge or justice that it was necessary for the protection of the child and in the best interest of the child to come into the province's care. At the hearing stage, and prior to making a decision, the court would review a written plan for the future care of the child.

b) Delay. A major concern raised by many of the cases we have investigated involves the delay in the process. There are various causes of delay ranging from length of trial, adjournments by counsel and, in some instances, changed circumstances. However, if we are to consider the best interest of child as the test for apprehensions and are to appreciate the child's sense of time, inappropriate delay should be removed wherever possible. The passage of time after apprehension may significantly weaken the ties between the parent and child and is not in the child's or the family's best interest. Reducing delay could be accomplished by specific legislative provisions that bind the Courts and all parties to strict time frames, or by negotiation with the judiciary to give priority to apprehension cases.

c) Notification of Third Parties. Another area of concern relates to notification of and advice to the child and to persons involved with the child who do not qualify as "parents" but may be used as a resource in the child's best interest (e.g. foster parents, relatives, etc.). All individuals who have a significant interest in the matter and who have an ability to assist in the resolution of it should be notified and involved in the process.

6. Costs. A number of complainants to our office have raised the issue of their legal costs in "defending" against an apprehension by the Ministry. The Ontario Court of Appeal has said in cases involving custody,

where the paramount consideration is the best interests of the children, the participation of the adversaries is not like that in ordinary litigation so that, except in very exceptional cases, costs should not necessarily go to the party that proves its case.

Where costs have been awarded at the Provincial Court level in Ontario, if the Judge decides that there has been bad faith or negligence by either the Ministry or the parents, then the opposite party should be awarded costs. Again, the decision as to the failure of a party to act appropriately would lie with the Judge, along with a determination of the amount to be paid, and these matters would be subject to the normal taxation and appeal processes. This right should be clearly set out in legislation.

7. Native Lay Panels. Native organizations have, in the past, accused the Ministry of "cultural genocide", meaning that the Ministry has apprehended a great number of Native children and taken them out of their communities to reside with non-Native families leading to their cultural estrangement. Indeed a large number of children in care are Native Indians, and while it is the policy of the Ministry to place these children with Native families, in many instances this may not be possible. Under the Protection of Children Act which preceded the Family and Child Service Act, there was a provision for Native Lay Panels to sit with a Provincial Court Judge. The Judge had to determine whether or not a child should be apprehended on the basis of the evidence presented. However, it would be up to the Native Lay Panel to make recommendations to the Judge on the disposition of a particular case (that is, where and with whom the child should reside). In this way Native communities would have some participation in the decision-making process. This legislation, though proclaimed, was never used. It may be worthwhile to reconsider this provision, especially in light of the Ministry's recent initiatives with the Native communities. In this regard, it is interesting to note that Judges in several recent B.C. custody cases have directly involved Native Elders in placement decisions.

8. Integration

a) Consolidation of Child, Youth and Family Legislation

There are at least two jurisdictions in Canada which have recently amalgamated legislation regarding children, youth and families into one Act. We have recommended in Ombudsman Public Report #22 that existing legislation, regulations and policies establishing the rights of special needs children, youth and their families be consolidated into Provincial Statement of Principles for children, youth and their families that is consistent

with the provisions of the Canadian Charter of Rights and Freedoms and the UN Convention on the Rights of the Child. There are other areas in which legislation can be consolidated to ensure an effective integration of services and a better understanding by the public of the law as it relates to children, youth and their families. There can be confusion in matters relating to children's legislation where a Family and Child Service Act application and a Family Relations Act matter are to be heard at the same time.

Matters currently under review which cross Ministry and legislative jurisdictions include a) the Child Abuser Registry, b) secure treatment facilities for children who are not treatable under the Mental Health Act or the Young Offenders Act, c) child abuse allegations in Family Relations Act applications, d) responsibility for health, safety and care standards in licensed programs, e) children's treatment needs and f) Adoption Act matters. Enclosed is a copy of the Nova Scotia legislation which we are advised will be proclaimed in September of this year. It may be worthwhile for your Ministry, in conjunction with the Ministry of Attorney General, to discuss the feasibility of consolidating various pieces of children's legislation under one Act and adding enabling authority so that some of these issues can be dealt with more specifically through regulations. It may still be possible for separate ministries to administer various sections under a consolidated statute. We believe there may be some real advantages to consolidating different statutes which have the same focus. Special emphasis should be given to mental health and alcohol and drug services for youth, children and their families that are not specifically covered in the current legislation. The new Children and Youth Secretariat's mandate to undertake a comprehensive review of public services to children, youth and their families will be integrally linked to the current review of the Family and Child Service Act, the Mental Health Act and the Community Care Facility Licensing Act.

b) <u>The Rights of Children.</u> - The Government of British Columbia has supported ratification of the UN Convention on the Rights of the Child. We believe that the Province is, for the most part, in compliance with the Convention, both from a legislative and administrative point of view. Ombudsman Public Report #22 addresses the UN Convention and suggests that the Province adopt principles in keeping with the Convention to guide it in the delivery of all children, youth and family services. While we can appreciate the sensitivity in attempting to define the rights of children in relation to their families, we believe that the province could lead by example by entrenching the rights of children in government

operated, funded or regulated programs. There are already a number of initiatives within your Ministry and other ministries that are clearly in keeping with the provisions under the UN Convention. (For example, the Standards Committee established by the Superintendent of Family and Child Services and the appeal mechanisms for children recently established under the Mental Health Act).

c) Standards and Accountability. When a child is placed in the Ministry's care by agreement with parents or by the Court, assurance must be provided that the child will receive an acceptable quality of care. Standards of care and matters related to licensing or certification of alternate care resources are addressed in considerable detail in Ombudsman Public Report #22. The Community Care Facility Act and Child Care Regulations as well as the Mental Health Act are, we understand, also under review by the Ministry of Health. This provides a unique opportunity to ensure the effective integration of legislated standards in the field of child, youth and family services. It would be more effective to enshrine broad expectations about standards of care and treatment within a single Act.

Accountability mechanisms can also be strengthened to ensure appropriate planning and case management for children and youth in care. Options for consideration may include provisions for ensuring regular written progress reports to the Minister or the Superintendent for each individual permanent ward.

In line with the Child and Youth Secretariat's mandate to undertake a comprehensive review of services, this would appear to be an important time to ensure integration between the legislative and administrative review processes. This could include a close examination of the most effective organizational means to deliver and integrate services at the local level while reinforcing the provincial government's role as funder, policy developer, standard setter, and monitor of services to children, youth and their families.

9. Anonymous Complaints. The Ministry of Social Services and Housing is required by law to investigate all allegations that a child may be in need of protection. The Supreme Court of British Columbia in the Litwin case has refused to order the identification of a person who reported child abuse to the Ministry and caused an investigation to be initiated under the Family and Child Service Act. In this case, the investigation did not substantiate the report and the child was not apprehended.

The Court noted that the Act imposed a duty on all persons having reasonable grounds to believe a child is in need of protection to report to the Ministry. The legislation makes failure to report an offence. The Ministry then has the obligation to investigate the allegation. It exempts a person who has made a report from liability except if the report is made maliciously or without reasonable grounds. The Act also makes it an offence for any person to disclose information obtained as part of an investigation except under specifided circumstances. Disclosure of informants' names does not fall within that category. The Court ruled that the Minister was required to comply with the Act and could not disclose the identity of the person.
It is interesting to note that although the original complaint may be from a person who will remain anonymous, after the Ministry investigation is commenced it no longer has that characteristic as it is the Ministry, through the investigating social worker who becomes the source of the complaint. There is good reason for treating the information received as confidential. However, if information is found to be malicious or without reasonable grounds or belief, it would be more effective if the legislation allowed for the Ministry to pursue the malicious complainant, where the identity is known, rather than put the onus on the maligned family to pursue the matter through the civil courts.

10. Public Participation. We understand that your Ministry has not yet made decisions on the process by which amendments to the Family and Child Service Act will be decided. We strongly recommend that you consider either a White Paper or an invitation for submissions from the public before any new legislation is drafted. We have been impressed by the number of informed organizations in the community who are genuinely concerned with and have a legitimate interest in child welfare legislation. We are sure they will be prepared to provide you with thoughtful responses to a call for participation. It may be that the recently formed Child and Youth Secretariat could invite and coordinate the responses of the various community groups through the local and regional Child and Youth Committees.

We think that the result would justify the extra time and energy to undertake such a process. This process would be built on the belief that the review of interdependent child, youth and family legislation requires an integrated approach among the various Ministries, community groups and organizations as well as the direct caregivers.

11. Appeal and Administrative Review. While the majority of apprehension cases under the Family and Child Services

Act will end up before the courts, it may be worthwhile for the Ministry to consider internal review and external appeal mechanisms on other issues, (for example, the availability of support services). Under the Guaranteed Available Income for Need Act and Regulations, income assistance issues are appealable. However, the section on appeal mechanisms for "social services" has not yet been proclaimed. If the Ministry social workers were required to offer the least intrusive services to families before they consider apprehension, it would seem reasonable to allow families who are refused those services the ability to have an internal administrative review and an external appeal system available similar to income assistance appeals. We also believe that social services to children, youth and their families which are currently in the GAIN Act would be better housed and described in an amended Family and Child Service Act, together with these review and appeal mechanisms.

12. Transitional Support. We know that a number of children on reaching the age of majority (19 years) are not prepared to take on adult responsibilities. Your Ministry has contracted with some private agencies to provide services in some of these instances. There is no specific legislative authority to do so, although there appears to be a real need in the community. Age 19 is arbitrary at best and, in cases of children with developmental disabilities, often irrelevant. This is a concern that affects not only your Ministry but also others providing social services. If consolidated legislation is to be considered, it would be advisable to review the age requirements, restrictions and limitations governing the delivery of services to and acceptance of responsibility by young people making the transition from youth to adulthood. The legislation should allow for discretion to be exercised in individual situations to take into account the unique personal circumstances, and in particular any disabilities of the youth involved.

We have avoided being specific with respect to the wording for amendments to legislation and have rather concentrated on principles and process. We believe that the community and your staff can supply you with valuable insights into this complex area. The list of concerns is by no means exhaustive and over the next few months, if other information or issues come to our attention which may assist in your deliberations, we will be pleased to send them to you.

We appreciate the invitation to share these observations with you and would be pleased to meet with you and your officials to discuss them in greater detail.

Sincerely,

Stephen Owen

Stephen Owen
Ombudsman

enclosures

c.c. R.K. Butler
Deputy Minister