January 14, 2021

Via Email (cfcsa@bcli.org)

British Columbia Law Institute
1822 East Mall
University of British Columbia
Vancouver, BC, Canada V6T 1Z1

Attn: Child Protection Project Committee (Committee):

Dear Committee Members:

Re: Joint Submissions in response to the British Columbia Law Institute Consultation Paper on Modernizing the *Child, Family and Community Service Act*

Thank you for the opportunity to provide input into your project on Modernizing the Child, Family and Community Service Act (*CFCSA*). We provide these submissions in hope of ensuring that the Committee's recommendations align with the leading research, advocacy, and community-based practice in the field of child welfare. These submissions were developed in consultation with a group of front-line family support organizations, anti-violence advocates, family law experts and feminist legal advocates with expertise in child protection law and practice.

Overview

Some of the recommendations made in the consultation paper are a significant departure from the direction taken by leading provincial and federal reports on the child protection system, as well as the language proposed in the recent federal legislation governing the treatment of Indigenous children by provincial and federal institutions. Some of the proposed amendments would move the legislation toward a greater focus on apprehension rather than prevention and family unity. Moreover, the recommendations also fail to address the most long-standing problem with the current framework: accountability. The failings of this approach have been addressed at length in the following foundational reports: The Final Report of the National Inquiry on Missing and Murdered Indigenous Women and Girls, Indigenous Resilience; Connectedness and Reunification - from Root Causes to Root Solution the Final Report of Special Advisor Grand

Chief Ed John; the various reports produced by the Representative for Children and Youth; and Red Women Rising Indigenous Women Survivors in Vancouver's Downtown Eastside.

We are especially concerned that the Committee's approach does not adequately appreciate how deeply harmful family separation is for many families and Nations. Indigenous and family-support advocates have amply demonstrated that children and caregivers experience significant harm when families are separated. Indigenous families, communities and Nations have advocated to specifically highlight the harms they experience from this system and from an approach to child protection that disregards or otherwise minimizes these harms.

The legal community shares a responsibility in its decolonization efforts to narrow the gap between community advocacy and legislative language. The chasm that currently exists between the efforts that are keeping families from thriving and the legislative realm within which child protection social work practice occurs undermines the wellbeing of children and families. We urge you to work to bridge this gap by ensuring your recommendations are in line with Indigenous child welfare practices. In particular, we note the following principles:

1. ***Decolonizing approaches*** seek to recognize how historical harm continues to impact Indigenous people and how relationships between Indigenous people and the land continue to be disrupted.[1] They involve culturally specific interventions, programs, services, and approaches to supporting Indigenous families.

2. ***Wholism*** is a concept that can be described as a process of engaging and acknowledging all aspects and dimensions of a person and family: mental, physical, spiritual, and psychological.[2] In some Indigenous Nations and communities this is described through the teachings of the Medicine Wheel, which has four parts: mental, physical, spiritual, and psychological. All four parts must be in balance with one another to achieve wellness. In a child welfare context, a wholistic approach to supporting families and children can provide an important shift from helping children survive to helping families thrive. It can also expand what constitutes prevention for Indigenous Nations and communities.

3. ***Trauma-Informed practice*** involves trauma awareness; an emphasis on safety and trustworthiness; opportunities for choice, collaboration, and connection; the development of skills and recognizing and fostering strengths.[3]

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[1] Sarah Flicker et al, "'Because we have really unique art': Decolonizing Research with Indigenous Youth Using the Arts" (2014) 10:1 ijih 16 at 17.
[2] Kathy Absolon & Cam Willett, "Aboriginal research: Berry Picking and Hunting in the 21st Century" (2004) 1:1 13; John, *supra* note 4; Cyndy Baskin, *Strong Helpers' Teachings: The Value of Indigenous Knowledges in the Helping Professions*, second ed, CSPI Series in Indigenous Studies (Toronto, Ontario: Canadian Scholars' Press) at 144. [We are spelling wholism, with a 'w' acknowledging the assertions of Indigenous scholars about the importance of incorporating 'whole,' into the concept to signify completeness, circularity, and balance.]
[3] Cristine Urquhart, Fran Jasiura & TIP Project Team, *Trauma-Informed Practice Guide* (British Columbia: BC Provincial Mental Health and Substance Use Planning Council, 2013) at 12. [Indigenous scholars, such as Natalie Clark and Sandrina de Finney, have raised caution about the Western conception of trauma as an individual health problem. They argue that this conceptualization of trauma can mistakenly

4. ***Family-centred practices*** recognize the importance of working collaboratively with parents and other caregivers (such as grandparents, aunties, older siblings, cousins, and so on). These practices identify the family as the expert in anything that impacts them. Family-centered practices place value on supporting families to maintain a sense of dignity and hope and working with each family's unique circumstances regardless of their complexity including substance use, poverty, and family violence.[4]

5. ***Relationship-Centred approaches*** focus on building genuine, transparent, and approachable collaborative relationships to support families.[5]

6. ***Cultural safety*** is an approach which involves recognizing that historical, economic, and social contexts, coupled with structural and interpersonal power imbalances, shape people's outcomes and experiences with systems like the child welfare system.[6] Cultural safety also requires the people who hold positions of power in these systems to actively reflect and challenge the "largely unconscious and unspoken, assumptions of power held"[7] in their roles, including the policies and culture of their institutions and systems. The outcome of safety is not determined or defined by those inside the institutions but by those accessing the services or supports.

7. ***Harm reduction*** principles seek to recognize the harms people are experiencing, facilitate opportunities to meet people where they are, and work within a context of dignity and compassion for all people.[8] Harm reduction in child welfare may require social workers to consider a range of options that could diminish instead of increase harm for families. This

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justify separating Indigenous children from their communities. Their analysis demonstrates the importance of these principles and practices being developed by and for Indigenous families, communities, and Nations for their unique knowledge, needs and strengths.]

[4] Deborah Schwartz, *Promising Practices in First Nations and Aboriginal Maternal and Child Health Programs: Community Perspectives on What Works* (2015) at 16.

[5] Cyndy Baskin, *Strong Helpers' Teachings: The Value of Indigenous Knowledges in the Helping Professions*, second ed, CSPI Series in Indigenous Studies (Toronto, Ontario: Canadian Scholars' Press) at 179; Judy Hughes, Shirley Chau & Cathy Rocke, "'Act Like my Friend': Mothers' Recommendations to Improve Relationships with Their Canadian Child Welfare Workers" (2016) 33:2 Canadian Social Work Review 161 .at 167.

[6] Cheryl Ward, Chelsey Branch & Alycia Fridkin, "What is Indigenous Cultural Safety—and Why Should I Care About It?" (2016) 11:4 Visions Journal 29, para 7.

[7] Elaine Papps & Irihapeti Ramsden, "Cultural safety in nursing: The New Zealand experience" (1996) International Journal for Quality in Health Care, 8, 491-497. doi:10.1093/intqhc/8.5.491; Irihapeti Ramsden, "Kawa Whakaruruhau: Cultural safety in nursing education in Aotearoa" (1993), Wellington; Vicki Smye & Annette J. Brown, 'Cultural safety' and the analysis of health policy affecting aboriginal people (2002), Nurse Researcher, 9(3), 42-56 as cited in Alison J Gerlach, "A Critical Reflection on the Concept of Cultural Safety" (2012) 79:3 Can J Occup Ther 151 at 152.

[8] Elizabeth Cooper, S Michelle Driedger & Josée G Lavoie, "Employing a Harm-Reduction Approach Between Women and Girls Within Indigenous Familial Relationships" (2019) 43:1 Culture, Medicine, and Psychiatry 134 at 150.

would include potential harms caused by the proposed intervention itself, such as removing a child from their parents and community.[9]

8. ***Self-Determination*** in the context of Indigenous child welfare can be understood as efforts and approaches aimed at realizing the full return of authority over child welfare to Indigenous communities and Nations. This is rooted in the understanding that Indigenous peoples are in the best position to make decisions that impact Indigenous children, youth, families, and communities.[10]

These approaches provide a basis for some of the work that Indigenous organizations and Nations are doing to change the child welfare system and guidance on how Indigenous approaches to child welfare depart from the colonial child welfare model. We encourage the Committee to assess how its recommendations align and/or depart with these principles of child welfare.

Finally, we are concerned that the framing of this legislative review as a 'modernization' of the *CFCSA* will deter community participation in the process. We appreciate that there are elements of the work the Committee has undertaken that focus on modernizing the legislation. However, we think the work of the committee goes beyond simple, straightforward modernization and has significant implications for the regime as a whole. We are deeply concerned that the framing of this work as 'legislative modernization' may unintentionally discourage participation among community-based organizations and thus inadvertently further the divide between the institutions that oversee the child protection system and the families and communities that will bear the brunt of the legislative changes proposed. We suggest that the committee consider including terms such as *community engagement* and *legislative reform* in the project description to ensure that affected peoples, Nations and organizations understand the importance of participating in this dialogue. We also recommend that the Committee reach out to Nations and front-line organisations who work with parents to seek their input through an accessible consultation process. Relatedly, we encourage the Committee to extend the timeframe for seeking consultation to ensure greater community participation.

Issue 1 – Least Disruptive Means and Reassessment

The "least disruptive means" principle is an important prevention concept that, if consistently and effectively applied, can ensure that families are actively supported to remain connected, and that the significant trauma caused by family separation can be limited or avoided altogether. Yet, this foundational prevention-based tool is all too often poorly exercised by social workers. In a 2009

[9] Aron Shlonsky, Colleen Friend & Liz Lambert, "From Culture Clash to New Possibilities: A Harm Reduction Approach to Family Violence and Child Protection Services" (2007) 7:4 Brief Treatment and Crisis Intervention 345 at 353.
[10] Cindy Blackstock, First Nations Child & Family Caring Society of Canada & National Indian Child Welfare Association, *Reconciliation in child welfare touchstones of hope for indigenous children, youth, and families* (Ottawa, Ontario: First Nations Child & Family Caring Society of Canada, 2006) at 10.

study, only 29% of social workers indicated they could "always" or "usually" fully explore less disruptive options prior to a child's removal.[11]

Not only do the majority of social workers report that they do not routinely undertake an assessment of less disruptive measures prior to removal, case law indicates that many social workers fail to even consider less disruptive measures when brought to their attention. In *British Columbia (Director of Family & Child Services) v G. (A.),*[12] the court found that the Ministry of Child and Family Development (MCFD) had failed to consider less disruptive measures even though the child's father and aunt had expressed willingness in caring for the child and the child's mother a commitment to improving her parenting skills.[13] In *LC v British Columbia (Director of Child, Family and Community Services),* the court was dismayed at MCFD's failure to respond to viable alternatives from the Huu-ay-aht Nation in favour of removing a newborn baby from the mother's care. [14] In *Director v LDS and CCC*, the court found that the director had failed to consider the least disruptive means available to her when she refused to consider whether, with the support offered by the First Nation community, the child could stay with the mother in Port Alberni, instead placing the child with the paternal grandmother, in Courtenay.[15]

These cases are not outliers. We know these cases reflect the experiences of a significant number of families who come into contact with the child protection system. These cases also demonstrate that the current legislative framework is failing to drive communication, collaboration and creativity among social workers, families, and communities. We understand the reasons for this to be both a lack of resources —staff managing high caseloads, and the limited availability of programming, supportive housing and other supports — and a lack of accountability embedded within the child protection system.

Ministry staff's failure to take a robust and creative approach to adopting less disruptive means may be addressed, at a starting point, through strong legislative language. However, the language proposed by the Committee is unlikely to produce a significant shift in the current practice.

We consider that effective legislative language in this regard must do the following:

a. Explicitly direct the Ministry to actively consider least disruptive measures throughout their engagement with the family

The federal standard set out in Bill C-92 - *An Act respecting First Nations, Inuit and Métis children, youth and families*, now requires that a reassessment of available alternative placements is "conducted on an ongoing basis."[16] While this language is an improvement on the current least disruptive means provision of the *CFCSA*, many Indigenous advocates have called for even

[11] Darcie Bennett et al, *Hands tied: child protection workers talk about working in, and leaving B.C.'s child welfare system* (Vancouver, British Columbia: Pivot Legal Society, 2009) at v.
[12] *Director v AG and RL*, [2004] 2004 BCPC 314 (British Columbia Provincial Court).
[13] *Director v AG and RL*, [2004] 2004 BCPC 314 (British Columbia Provincial Court).
[14] *LC v British Columbia (Ministry of Children and Families)*, [2005] 2005 BCJ 2692 (BCSC) at 25.
[15] *Director v LDS and CCC*, [2018] 2018 BCPC 61at para 87 (British Columbia Provincial Court).
[16] Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, cl 7 (assented to June 21, 2019) 1st Sess, 42nd Parl (2019), cl 16(3). [Bill C-92]

stronger language to be put in place. For example, the Yellowhead Institute, a First Nations-led research centre, has noted that the federal language does not go far enough in ensuring that decision makers will be proactive in searching for less disruptive options.[17] It recommends that Canadian legislation mimic the language of the US *Indian Child Welfare Act*, which requires evidence that social workers have made "active efforts" that "proved unsuccessful."[18]

Given the nature of the recommendations made by Indigenous advocates and the significance of least disruptive measures in supporting families to remain together, it is particularly surprising that the language proposed by the Committee does not go as far as the language enshrined in Bill C-92. Bill C-92*,* as you know, sets the minimum standard for how social workers must treat Indigenous families and will trump provincial legislative provisions where they set a lower standard than that set by the Bill. Accordingly, any amendments to the *CFCSA* should move the provincial legislation toward uniformity with the federal legislation. With respect, the Committee's reason for rejecting the language of Bill C-92 is short sighted. It is precisely the failure of social workers to undertake ongoing assessments of less disruptive measures that can produce and entrench long-term administrative burdens to the system, as the consequences of removal and family separation have devastating, long-term negative impacts on children and families. This is especially true for Indigenous children.

b. Include a broad array of less disruptive measures

The Committee has chosen to forego the language of "less disruptive measures" in favour of the limited alternative measures of placing the child with their parents or another adult member of the child's family. Unfortunately, the proposed language does little to reorient child protection social workers away from undertaking only a precursory analysis of the least disruptive measures available into a deeper consideration of what alternatives exist to support a particular child and family. This narrow list of least disruptive options leaves little room for social workers to consider adults in the child's life who, while not family members, have played a significant role in the child's upbringing — an analysis that is essential for Indigenous children and children from gender and sexual minority groups who often have strong relationships with adults in their immediate community who may not be blood relations.

The Committee's choice to depart from the concept of "less disruptive measures" for a list of people for social workers to consider, signals an approach to child welfare work that has been rejected by communities across Canada. Families are understandably reluctant to contact the Ministry for support and respite for fear of having their children removed. The state's focus and allocation of funding should be on prevention in the form of early intervention and robust support, rather than removal after the fact.

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[17] Naiomi Walqwan Metallic et al, *An Act respecting First Nations, Inuit, and Métis Children, Youth and Families: Does Bill C-92 Make the Grade?* (Yellowhead Institute, 2019) at 9–10.

[18] *An Act to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the break-up of Indian families, and for other purposes.*, 8 November 1978, Public Law 95-608 at s 1912(d). [*The Indian Child Welfare Act*]

Families who come into contact with the child protection system need creative out-of-the-box solutions. There are numerous examples of Indigenous communities, front-line family support organizations and social workers who are actively pursuing alternatives to family separation, such as by creating safety plans and developing support systems to prevent family separation and to enable parenting. The legislation should encourage creative solutions by providing for a broad spectrum of least disruptive measures social workers must regularly consider. We recommend language that places an obligation on the Ministry to actively consider all least disruptive measures.

c. Build accountability by asking the Ministry to respond in detail to the proposals made by family members and present its written reasons to the court

As noted above, Indigenous community-based organizations and advocates have shown tremendous commitment and resilience in supporting families throughout the stages of parenting. Often these advocates have developed and suggested to the Ministry a plan for keeping the children with their family and community. Yet, many advocates report being met with resistance from social workers who reject suggestions without providing due consideration or reasons for their decision. Family members who come forward to offer support are frequently dismissed as alternate caregivers for minor reasons such as a historical possession charge for marijuana, or not residing in an appropriate home or neighbourhood – with some low-income neighbourhoods deemed unsafe or inappropriate without regard to the type of supports the family can access in those neighbourhoods. Another barrier to timely placement with a capable caregiver in the parent's circle of support are lengthy delays on social worker assessments and criminal record checks which can often take several weeks. MCFD should develop a fast-track approval process for prospective caregivers to keep children in their families and communities and to avoid the well-known harms associated with foster care placements.

Given the significance of considering least disruptive measures, the legislation should include language that places a responsibility on the Ministry to respond in writing to alternative proposals by parents, Nations, and community-based organizations that support the parent. The Yellowhead Institute recommends that the legislation include "affidavit evidence from the Indigenous group that there is no available placement."[19] We also recommend language that directs courts to consider and be satisfied that all less disruptive measures have been considered and proven unsatisfactory or rejected by the family. We recommend language akin to the Nova Scotia *Child and Family Service Act* which states that judges "shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family" have been attempted, refused by the parent, or would be inadequate to protect the child.[20] This legislative language would only encourage consistency among judicial decision-making given that many judges already undertake this analysis.

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[19] Naiomi Walqwan Metallic et al, *An Act respecting First Nations, Inuit, and Métis Children, Youth and Families: Does Bill C-92 Make the Grade?* (Yellowhead Institute, 2019) at 9–10 at 8.
[20] *Nova Scotia Children and Family Services Act*, *supra* note 282, s 42(3).

Issue 2 – Emotional Harm and Violence

The Committee recommends expanding the ground of protection based on emotional harm to include the likelihood of future harm. Notably, the recommendation is made without an analogous recommendation to add factors social workers and courts should consider when assessing future harm. It is unclear what the impetus for this change is beyond the harmonization of the language with the other grounds for protection set out in section 13. To the best of our knowledge, this change is not driven by a concern that children who are at risk of future emotional harm are currently not receiving the care they are due or, to put it in the Committee's own words: *every* child is not benefiting from protection because of the limited language of section 13(1)(e). We are concerned the Committee has suggested an expansion of the protection grounds, a factor that the Committee itself acknowledges may result in more children being brought into care, for the sole reason of harmonization of legislative language. The recommendation suggests that the court must assess future harm in an evidentiary vacuum without any guidance on the factors it should consider. This is a departure from other legislative contexts where courts are asked to make assessments of the likelihood of future harm. Notably, the *FLA* Protection Order regime requires courts to assess whether "family violence is likely to occur" with reference to a broad list of factors that the court must consider in making its determination.

Collectively, we are not aware of a single instance of a child who was not afforded protection because of this temporal limitation in section 13(1)(e). Assessing the likelihood of future harm is an exceptionally challenging undertaking. From our experiences, social workers are often inclined to apply a broad and conservative lens to assessing future harm which often results in significant delays to children being returned to their families even when the parent has met the social worker's often extensive requirements. This is especially the case with children who are removed from the non-abusive parent and kept in care because of the social worker's concern that the non-abusive parent may not be able to fully sever ties with the abusive parent. As you know, section 13 limits the ground of protection pertaining to a child living in a situation where there is domestic violence in the home to past and present circumstances.

Accordingly, we suggest that social workers are already exercising their authority in a manner that keeps some children out of the family's care when they have any inclination of future emotional harm. A further expansion of this ground will undoubtedly sway social work conduct toward an even more protectionist analysis of the likelihood of emotional harm leading to a higher number of children in care, slower assessments of less disruptive measures and longer periods of separation.

We must as a community reject the harmful trend of pathologizing the trauma of children in contact with the child protection system. As Indigenous scholars have highlighted, this pathologizing process has created new grounds to remove children from their families versus understanding and addressing the systemic issues present.[21] While it is important to ensure that children are

[21] de Finney, S. (2017) Indigenous girls' resilience in settler states: Honouring body and land sovereignty, Agenda, 31:2, 10-21, DOI: 10.1080/10130950.2017.1366179; Clark, N. (2016). Shock and Awe: Trauma as the New Colonial Frontier. *Humanities 5*(14).

receiving the support they need, particularly in the case of Indigenous children, the system cannot continue to prescribe and enforce Western approaches about what is understood as "support" that undermine sovereignty and Indigenous ways of knowing.

Instead of an expansion of the grounds of protection, we suggest the Committee recommend non-discriminatory language be added to the *CFCSA* to ensure that children are not removed from their families for reasons beyond the caregiver's control. We suggest that the Committee recommend the addition of a provision to the *CFCSA* which reflects the right of the child not to be separated from their family by reason only of their parent or guardian lacking the same or similar economic and social advantages as others in BC society, or having a disability including engaging in substance or coping with an addiction. The addition of these provisions will help harmonize the legislation with the *Human Rights Code*[22] and Bill C-92,[23] as well as bring it in line with highly regarded amendments that have been introduced in other provincial child protection legislation. Lastly, we wholeheartedly endorse the Committee's recommendation that the same standard be applied to the assessment of past and future harm.

Issue 3 – Independent Legal Advice

The removal of a child is one of the most intrusive authorised exercises of state power that exists in Canadian law. In *New Brunswick (Minister of Health and Community Services) v G (J),* the Supreme Court of Canada (SCC) recognized that "state removal of a child from parental custody ... constitutes a serious interference with the psychological integrity of the parent."[24] Many parents compare the impact that family separation has on their lives as akin to the impact that imprisonment has on those convicted of a crime. The impact of child removal cannot be overstated: one recent study found that mothers whose children are removed from their care are twice as likely to accidentally overdose.[25]

Given the significant impact of state apprehension of children, parents should have the right to independent legal advice throughout their engagement with the child welfare system. The Committee's reforms, however, will not allow parents to meaningfully access independent legal advice. The proposed language does not address the profound power imbalance that exists between parents and social workers. In our experience, the nature of the parent - social worker relationship and the timeframe for signing agreements with the Ministry makes it such that parents are frequently discouraged and disincentivized from accessing independent legal advice. Even where social workers do proactively suggest that parents obtain independent legal advice, many parents often feel – with valid reason – constrained in being able to assert themselves vis-à-vis a state representative who has a high degree of control over their family's future. In our experience,

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[22] *Human Rights Code of BC* [RSBC 1996] CHAPTER 210 s. 8.
[23]Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, cl 7 (assented to June 21, 2019) 1st Sess, 42nd Parl (2019), cl 15.
[24] *New Brunswick (Minister of Health and Community Services) v G (J),* [1999] 1999 CanLII 653, [1999] 3 SCR 46, paras 61 and 63.
[25] Meaghan Thumath et al., "Overdose among mothers: The association between child removal and unintentional drug overdose in a longitudinal cohort of marginalised women in Canada" International Journal of Drug Policy, 2020, 102977, ISSN 0955-3959 <https://doi.org/10.1016/j.drugpo.2020.102977>.

parents report social workers saying things like “you could get a lawyer, but you do not need one” or “getting a lawyer will cause a delay, this is a voluntary agreement.” We have heard from many parents that they have regretted signing a voluntary agreement or a safety plan. Some parents have told us they did not know what they were signing, or that they signed so as not to be seen by Ministry staff as “uncooperative.” Such agreements or safety plans are anything but “voluntary” when the consequence of not signing is the threat of a legal removal of one’s children.

The two reasons proposed by the Committee for rejecting the inclusion of a provision in the *CFCSA* ensuring a right to independent legal advice require further consideration. First, the concern around the delay in signing agreements is short sighted. If anything, social workers usually have parents sign agreements within days of a protection concern being raised. We would argue that parents’ access to independent legal advice promotes less disruption in the child’s life and better long-term outcomes. A system designed to ensure that parents fully understand their rights and obligations and benefit from the advice of someone who can explain the Ministry’s own legal obligations, including the obligation to provide services and to apply the least disruptive measures, permits a more robust consideration of prevention-based measures. If families are connected with counsel immediately following a protection concern being raised, any delay in reviewing the agreement can be almost entirely minimized.

Second, cost to the province should never be a reason to deny due process to people whose fundamental rights are at stake. Because of our significant national wealth, international law places a higher duty on the Canadian state to ensure that children are not separated from their parents or guardians, including through the provision of adequate support to the family unit. The government itself has assessed that it can cover the cost of providing free legal advice to parents engaging with the child protection system as evidenced by its funding of legal aid through Legal Aid BC. Any increase in government spending would arise from the legislation promoting greater use by parents of the free legal advice to which they are entitled. Accordingly, we recommend the inclusion of language that requires that parents be provided meaningful access to legal advice prior to the signing of an agreement under sections 6, 7 and 8. It is important to note at this point that parents’ access to counsel must not run afoul of the least disruptive means principle. Specifically, parents’ access to counsel should not come at the cost of being denied access to support services, or to otherwise justify taking a more intrusive approach.

Issue 4 – Definitions and Terms – “Domestic Violence or Family Violence”

We appreciate the Committee’s reservation with including an expansive definition of family violence in the *CFCSA*. We share the concern that an expanded definition may result in greater numbers of children being separated from their families, and in particular from the non-abusive parent. We believe, however, that the concerns flagged by the Committee may be addressed in a manner that both allows for consistency between the *Family Law Act* and for a legislative approach that reflects the complexity of family violence and its application to child protection matters.

Studies have shown that current social work practice where family violence is present involves contradictory over- and under-reactions.[26] These contradictory approaches arise from differences in opinion among social workers about the impact of family violence on children.

Under-reactionary social work practices are grounded in attitudes and perceptions of family violence as fundamentally a private matter between caregivers that should not trigger state involvement.[27] Mothers who come into contact with this group of social workers report facing disbelief, retribution, or claims that they are fabricating allegations of family violence.[28] Social workers that tend to view family violence through this lens are more likely to close child protection files without undertaking an assessment of the nature of the family violence or the likelihood that the violence will escalate, or without offering parents and children with supports to address the root causes of the violence.[29]

Conversely, over-reactionary social work practices are likely to place a high burden of responsibility on the non-abusive parent to protect the child from the abusive parent, albeit without providing adequate counselling or other supports to assist the non-abusive parent, who may herself be coping with the trauma of a history of violence. In these cases, social workers view parents that do not immediately leave their abusive partners as uncooperative, unwilling, or incapable of protecting their child from harm and can act in a punitive manner toward the parent even where the parent is doing their best to end contact with the abusive family member.[30]

Both practices diverge from MCFD's practice standards which encourage social workers to take family violence seriously and focus efforts on developing safety plans for the parent and child and engaging the non-abusive family member throughout the child protection process.[31] The legislation should seek to strengthen the application of the best practice standards — developed in close collaboration with anti-violence organizations. To that end, it must include a comprehensive definition of family violence. One of the primary rationales for an expansive definition in the *FLA* is that incidences of family violence are very rarely isolated. Instead, they form part of an ongoing and often escalating pattern of violence that can be lethal for parents and children. For this reason, anti-violence advocates reject the creation of a hierarchy of violent

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[26] Judy Hughes & Shirley Chau, "Making complex decisions: Child protection workers' practices and interventions with families experiencing intimate partner violence" (2013) 35:4 Children and Youth Services Review 611 at 611.

[27] Judy Hughes & Shirley Chau, "Making complex decisions: Child protection workers' practices and interventions with families experiencing intimate partner violence" (2013) 35:4 Children and Youth Services Review 611 at 614.

[28] Laura Track, *Able Mothers: The intersection of parenting, disability and the law* (Vancouver, British Columbia: West Coast LEAF, 2014) at 31.

[29] Judy Hughes & Shirley Chau, "Making complex decisions: Child protection workers' practices and interventions with families experiencing intimate partner violence" (2013) 35:4 Children and Youth Services Review 611 at 611.

[30] Judy Hughes & Shirley Chau, "Making complex decisions: Child protection workers' practices and interventions with families experiencing intimate partner violence" (2013) 35:4 Children and Youth Services Review 611 at 611.

[31] Leslie Anderson et al, "Best Practice Approaches" (2014) Ministry of Child and Family Development 74 at 33.

behaviour in favour of a comprehensive definition that recognizes the many ways family violence is experienced by survivors and their children.

Consequently, we recommend that the *FLA* definition be introduced in the legislation to ensure continuity with the legal understanding of family violence — a key aim of the *FLA* amendments. However, we agree with the Committee that it is essential that the addition of a comprehensive definition of family violence does not have the unintended consequences of increasing the removal of children from non-abusive parents. We recommend language akin to that included in the Alberta *Child, Youth and Family Enhancement Act* which provides that the best interests of the child assessment requires decision makers to provide children who have been exposed to family violence any intervention service that "supports family members and prevents the need to remove the child from the custody of an abused family member."[32] This is a key framing of some of the programming needed to address family violence in the case of the child welfare system and is the approach that many Indigenous community-based family service organizations effectively employ to keep families together.

This recommendation may require the addition of a stand-alone legislative section which addresses the approach social workers must take when dealing with some of the most common systemic inequities faced by families engaging with the child protection system. This section could provide that, when considering the best interests of the child, children should not be removed from their families for reasons solely related to family violence, poverty and the parent or child's disability, including the parent's substance use. Instead, resources should be put in place to support the parent and promote the parent-child relationship.

Numerous legislative frameworks have already incorporated parallel equality-based language. Bill C-92 explicitly prohibits the apprehension of children on the basis of the child's "socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider."[33] The guiding principles of the Manitoba *Child and Family Services Act* state that "decisions to place children should be based on the best interests of the child and not on the basis of the family's financial status."34 prohibiting the removal of a child "only by reason of their parent or guardian … lacking the same or similar economic and social advantages as others in Manitoba society." The Nova Scotia *Child and Family Service Act* recognizes that "social services are essential to prevent or alleviate the social and related economic problems of individuals and families"[35] and it also designates a duty to the Ministry to "work with other community and social services to prevent, alleviate and remedy the personal, social and economic conditions that might place children and families at risk."[36]

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[32] *Alberta Child, Youth and Family Enhancement Act*, RSA, c C 2000 [*Alberta Child, Youth and Family Enhancement Act*], s 2(1)(i).
[33] Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, cl 7 (assented to June 21, 2019) 1st Sess, 42nd Parl (2019), cl 15.
[34] *Manitoba Child and Family Services Act*, 11 July 1985, CCSM c 17(3).
[35] *The Child and Family Services Act*, 11 July 1985, CCSM c C80 [*The Child and Family Services Act*] s 17(3).
[36] *The Child and Family Services Act*, 11 July 1985, CCSM c C80 s 9(b).

Conclusion

In conclusion, we urge the Committee to ensure its recommendations align with the knowledge and advocacy undertaken by Indigenous families and communities, family advocates, and the leading social science research on child welfare law and policy. The Committee should frame its recommendations around a prevention-based framework aimed at providing early, preventive supports for families and encouraging social workers to provide robust support and family-led care throughout their engagement. The overarching failure of the current legislation to build accountability into one of the most intrusive areas of state authority must be remedied. Finally, for the Committee's recommendations to reflect the perspectives of those who will be most impacted by the legislative reform, the Committee must actively seek out input from First Nations, front-line advocates, and families themselves through an accessible consultation process.

Thank you for the opportunity to provide feedback on your review of the *CFCSA*.

Sincerely,

Elba Bendo
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West Coast LEAF

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