

**The Special Needs of Survivors of Family Violence in the Family Court Process:
Comments on Justice Annemarie E. Bonkalo's Report
"Family Legal Services Review"**

May 2017

Introduction

Luke's Place and the Barbra Schlifer Clinic have a unique perspective on the complex realities of family law and courts for survivors of family violence. This comes from our combined work with women who have left abusive relationships and are engaged with family law/family court process, particularly through the work each of our agencies does delivering the Ministry of the Attorney General funded Family Court Support Worker program in Durham and Toronto, respectively.

In addition to delivering the services, Luke's Place is responsible for initial and ongoing training of these workers across the province, and has recently completed a 3-year contract with Legal Aid Ontario to provide domestic violence training to its staff as well as community legal clinics and per diem lawyers.

The Schlifer Clinic's 30-year history of delivering family law representation, support and advice in its intersections with criminal and immigration law, adds to the gravitas of this perspective.

Our perspective and concerns are based on our deep experiential knowledge and are supported and underscored by reports, inquests and academic research. We reference in particular the regular reports of the Domestic Violence Death Review Committee, *Transforming our Communities* (Domestic Violence Advisory Council Final Report 2009) and *It Shouldn't Be This Hard: A gender-based analysis of family law, family court and violence against women* (Luke's Place, 2012).

We shared our perspective and knowledge with Justice Bonkalo during the consultation process, as did a number of our colleagues.

We are extremely disappointed by the thin reference to family/domestic violence in Justice Bonkalo's final report.

These cases make up some of the most serious that move through Ontario's family courts: serious in terms of immediate and long-term physical and emotional safety for litigants and their children and serious in terms of legal outcomes that can impact a family for many years into the future. Cases involving family violence make up a

significant portion of all cases in family court. They also use significant court resources and take a great deal of time.

Any discussion of changes to the court process, including a potential change as significant as the licencing of paralegals to provide family court legal services, must include an examination of the needs of survivors of family violence if those changes are to provide meaningful increase in access to justice and ensure the safety of those most at risk of lethal outcomes.

Below are our recommendations to assist those who will be leading the next steps in considering Justice Bonkalo's report.

1. Adequate and effective legal representation for all women in family court proceedings regardless of their financial situation

Women have a fundamental right to representation by a lawyer who has the required knowledge, understanding, and skills to handle cases involving woman abuse, regardless of their financial situation. This cannot be replaced by licensing paralegals to provide legal services in family court. The government must ensure that Legal Aid Ontario is adequately funded to be able to provide family law certificates to all those who require them. These certificates should come with additional hours from the beginning of domestic violence files.

2. Cautious use of unbundled legal services

The provision of unbundled legal services can be very helpful to litigants of limited means. It is a measure the Schlifer Clinic has adopted in the face of great demand and no expansion of resources. It can also save money for such systems as Legal Aid Ontario and can be attractive to private bar lawyers who stand a greater chance of actually getting paid by clients when the legal services the lawyer offers are limited.

However, it is important to be cautious about the use of unbundled services in cases involving family violence, because specific legal issues may be more difficult to separate out. For example, if the abusive spouse is engaging in legal bullying, dealing only with the issue of custody and access without also addressing safety issues through a restraining order, could expose the other spouse and the children to the serious and ongoing risk of harm. Further, many abusers "bundle" all the legal issues together, refusing to talk about custody without also talking about financial/property issues.

Unbundling of legal services can also leave a woman on her own, in a very vulnerable position, on the eve of trial.

3. Expansion of the Family Court Support Worker Program and training initiative

While the present Family Court Support Worker (FCSW) pilot program is excellent, it is already stretched beyond its capacity. The program needs to be made permanent, with annualized funding, and expanded to encompass the many frontline violence against women workers who have been supporting women through family court on a shoestring. The situations these workers triage are frequently life-threatening, and the resourcing of the program does not reflect the focused application of resources that high-risk scenarios warrant.

With additional resources for training and legal support, FCSWs could take on some of the responsibilities that Justice Bonkalo has proposed for paralegals. In particular, properly supported FCSWs could draft documents for unrepresented litigants, provide legal coaching, handle simple adjournments, have a formal role at Family Law Information Centres and assist with some other court appearances.

FCSWs have the expertise required by litigants who have left abusive relationships and are dealing with ongoing bullying and harassment throughout the family court process, matters that require many skills in addition to strictly legal ones.

4. Development of protocols with family court for Family Court Support Workers

One of the challenges for FCSWs is that they have no official role or standing. Their ability to provide support is often dependent on the attitude of the judge, duty counsel, court clerks, lawyers, and others. We suggest that family court community resource committees work with violence against women advocates and frontline workers, with the support of the Ministry of the Attorney General, to develop protocols to support their work.

5. Cautious, if any, movement towards licensing of paralegals to provide legal services in family court

We have a number of concerns about the value of licensing paralegals to provide family court services, if the primary purpose is to address the rate of unrepresented parties.

First, many of the women we serve who do not qualify for legal aid and cannot afford a lawyer would also be unable to afford to pay for a paralegal, especially if the paralegal can only offer limited services.

Second, any issue in a case involving family violence is complex because of the dynamic of the abuse, which continues long after separation. These cases require a highly specialized response. Only in recent years are lawyers starting to receive the education and skills development, in addition to their law school education, they need to

provide services appropriately in cases of family violence. We do not believe that paralegals generally would bring the level of legal education that these cases require, even if they are provided with gender-based violence training. This could lead to the ongoing increased risk of harm to survivors of family violence and their children.

If paralegals are to be licensed, we strongly disagree with Justice Bonkalo's recommendation that they be permitted to provide services with respect to custody and access. These two issues are very often a lightning rod for an abusive spouse, who uses the threat of taking the children as a means of intimidating his former spouse. Here is where loss of legal rights and threats of harm to former partners are in their most volatile combination. This is the stuff of tragedy and headlines.

6. Development of a central online portal for legal information for women who have experienced violence

Women who have experienced violence need easy access to information that is specific to their situation. This means information presented from a gendered intersectional perspective, written to acknowledge the factual realities of who is most often in these situations (women), and what other barriers they may be facing (language, other legal proceedings, child welfare concerns).

7. Delivery of Mandatory Information Program by violence against women workers

Many women who have left abusive partners have safety concerns associated with attending the Mandatory Information Program (MIP) at the family court. They also have concerns about the focus in many MIP sessions on mediation and conciliation. As well, these women need additional and specialized information, including information about court-related safety planning, as they begin the court process. This information, as well as the regular MIP curriculum, could be best provided by violence against women workers, often in a non-courthouse setting, such as a women's shelter or community counselling agency.

8. Institution of a court preparation program for women

We strongly encourage the provincial government to address some of the issues raised by the lack of legal representation for women by funding the development and delivery of a program to assist women preparing for court. This program would be developed at the provincial level, but would be delivered by community organizations across the province who could enrich the core curriculum by providing local information, resources, and strategies.

9. Family court process reforms that reflect a gender-based intersectional analysis

Problems with family court process create a serious barrier for women experiencing violence in obtaining appropriate outcomes. Reforms must apply a gender-based intersectional analysis and must reflect the reality of the prevalence of violence in Ontario families, the high rate of family law cases where woman abuse is a factor and the serious impact on children of inappropriate custody and access arrangements.

10. Further reforms to provincial family law legislation

Recent reforms to both the best interests of the child test in the *Children's Law Reform Act* and to restraining orders in the *Family Law Act* are important and offer the potential for improved outcomes for women and their children. However, further reforms are needed. These could be modeled on British Columbia's new *Family Law Act*. Our Clinics can be resources to this discussion.

11. Implementation of violence against women training for law students

Both the Domestic Violence Death Review Committee and the Domestic Violence Advisory Council have called for the integration of violence against women/domestic violence curriculum in law schools. The Law Commission of Ontario has developed a framework and curriculum suggestions for just such an initiative.¹ Law schools should be strongly encouraged to use this work so that all students, regardless of their post-law school employment plans, are exposed to the issue of violence against women. A recent Clinical program between Osgoode Law School and the Barbra Schlifer Clinic is an example of a voluntary curriculum and practicum that could be a helpful starting point.

12. Increased continuing legal education opportunities for lawyers

We suggest that the Ontario Bar Association and the Law Society of Upper Canada work with violence against women advocates in the development of educational modules for use at such existing events as the Family Law Summit as well as in webinars that are recognized for the purpose of lawyers' required Continuing Legal Education (CLE) hours. The recent Legal Aid Ontario domestic violence training and the Luke's Place online training for lawyers could be used as models.

13. Education for all players connected to the family court system

We suggest that the Ministry of the Attorney General fund and lead implementation of regular, mandatory education/training about violence against women, developed and delivered from a feminist intersectional perspective, for all court-related staff. Our

¹ Law Commission of Ontario. "Violence Against Women and the Law: A framework for VAW curriculum in Ontario law schools." Summer 2012.

agencies can be curriculum resources to this.

14. Judicial education

The issue of education for judges is also important. The National Judicial Institute has developed excellent educational materials on managing domestic violence trials for both family and criminal court judges. We suggest ongoing financial support for the development and promotion of such initiatives.

15. Case management where violence against women is a factor

We strongly suggest the implementation of a case management approach within the family court system (one family-one judge) for all files where violence against women has been raised. We believe this would allow for more effective management of these complex cases where the safety of the woman and children is often at stake and would lead to earlier interventions to stop legal bullying and other harassing or intimidating behaviours on the part of the abuser.

16. Development of best practice guidelines for lawyers

Luke's Place has developed best practice guidelines for lawyers acting for survivors of family violence, and the Schlifer Clinic has developed guides for litigants in speaking to their lawyers, as well as a Lexus Nexus legal commentary on working with women who have experienced violence. These could be used as the framework to build more comprehensive guidelines for all lawyers practicing family law in Ontario.

Conclusion

We hope that these recommendations are helpful as you consider the recommendations contained in Justice Bonkalo's report. We would be more than happy to consult with you further if that would be of assistance.

Respectfully submitted,

Carol Barkwell, Executive Director, Luke's Place Support and Resource Centre
Pamela Cross, Legal Director, Luke's Place Support and Resource Centre
Amanda Dale, Executive Director, Barbra Schlifer Commemorative Clinic
Deepa Mattoo, Legal Director, Barbra Schlifer Commemorative Clinic.