



Luke's Place
Change her experience. Change their lives.

IT SHOULDN'T BE THIS HARD

*A gender-based analysis of family law,
family court and violence against women*

Prepared by:

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Luke's Place Support & Resource Centre for Women & Children

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Executive Summary

Women who leave abusive partners and turn to family law and family court face many challenges. Community-based violence against women and women's equality organizations have amassed considerable knowledge by listening to the experiences of the women who turn to us for support. We have conducted research, engaged in collaborations with government, academics, our communities and others and worked on law reform initiatives. Throughout these endeavours, we have seen women and their children continue to struggle through the family court process only to emerge with orders that do not keep them safe and do not enable them to move on to lives free from violence. Almost without exception, this is because family law and family court process do not apply a gendered lens to their understanding of violence within families.

This paper examines Ontario family law and the family court system, including recent and anticipated changes to both, through a gendered intersectional lens. In particular, it provides a gender-based intersectional analysis of the implications of family law and the family court system for women who have experienced violence and their children.

The paper has three principle goals. The first is to provide support to frontline workers who assist women involved with family court. The second is to increase the ability of women to negotiate their way through this system so they emerge at the other end with their legal rights respected and with outcomes that keep them and their children safe.

The third is to provide violence against women workers, advocates, and activists with the tools they need to work for change at the community, provincial, and national level.

We begin this paper by sharing with you the story of a courageous woman named Kate Schillings, whose son was killed by his father on an unsupervised access visit, after Kate had sought supervised access through the family court. Every woman's story is unique, but the story of Kate and Luke tells us much of what we need to know about the failures of Ontario's family law and family court process.

Violence against women must be understood from a gendered intersectional perspective if we are to find solutions to the problems and challenges faced by most women who seek to leave an abusive relationship. We cannot solve the problem if we do not identify it correctly.

Using a gendered intersectional analysis, this paper provides a summary of the work done in Ontario to address family law issues as they relate to violence against women. It reviews family law issues such as custody and access, child protection, child support

and restraining orders, changes to family court process, the use of alternative dispute resolution, and the increasing reliance on access to legal information rather than legal representation and examines the impacts – positive and negative – on women who have left abusive relationships. Because women’s lives are not neatly siloed, the paper also explores the role of other areas of law – in particular, criminal and immigration law – on women’s experiences in family court.

Of course, it is not only law that shapes women’s experiences, so the paper also looks at the impact of many provincial policy initiatives, including the Domestic Violence Action Plan, the Domestic Violence Advisory Council, the Domestic Violence Death Review Committee, the Sexual Violence Action Plan, the Strategic Framework to End Violence Against Aboriginal Women, various public education projects, and the Family Court Support Worker program.

After this review, the paper focuses on key issues that arise again and again for women leaving abusive relationships who are involved with the family court system:

- the lack of legal representation
- ongoing challenges with custody and access
- the reality of post-separation violence, including legal bullying, and the lack of attention to this in the family court process
- the challenges presented by the intersectionalities of women’s lives: the kinds of violence they experience, women’s diversities, and the multiplicity of legal issues many women face once they leave an abusive relationship.

As noted above, the primary purpose of this paper is to provide a gender-based analysis of Ontario family law and family court process and violence against women to assist those engaged in frontline work supporting women involved

Such an analysis makes it abundantly clear that change must happen at every level of family law and family court process if the needs of families dealing with woman abuse are to be met appropriately.

With one important exception, it is not the place of this report to repeat excellent recommendations for both short and long term change already made in previous reports referenced throughout this paper. We encourage readers to review those documents.¹ Rather, it suggests some new strategies or variations on old strategies that are intended

¹ In particular, the research and forum reports produced by Luke’s Place and the Barbra Schlifer Clinic between 2008 and 2012, where detailed recommendations for specific and systemic change to family law, family court process and related laws and systems have been developed by violence against women and women’s equality advocates from across the province.

to assist women and others within flawed systems and move us closer to comprehensive systemic change.

Above all, these proposals reflect a gender-based analysis set within an intersectional feminist framework and understand the profound limitations of the present court system. Any suggestion for law, policy or process reform set out below must be read with that as the starting point.

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.

2. 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 and of the high rate of family law cases where woman abuse is a factor.

3. 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 the work done in British Columbia, where changes to its family law legislation are set to come into effect in March 2013.

4. 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 for more than 20 years.

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

One of the challenges for those who support women through family court 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. The FCSW program does not provide formal protocols for these workers, who face the same challenges.

We suggest that family court community resource committees work with violence against women advocates and frontline workers to develop protocols to support their work.

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.

7. Expanded availability of Family Law Education for Women materials

FLEW materials should be available in all Family Law Information Centres, at all Mandatory Information Program sessions and at all court-based mediation offices.

8. 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. 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 in a non-courthouse setting, such as a women's shelter or community counselling agency.

9. 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.

10. 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 recently completed work on a project to develop a framework and curriculum suggestions for just such an initiative.² 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.

11. 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.

12. 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.

13. 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.

14. 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 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.

15. Development of best practice guidelines for lawyers

In 2000, Durham Region undertook an initiative to develop a community response to custody and access issues affecting woman abuse survivors and their children. Lawyers created a working group which, among other activities, developed innovative best

² Law Commission of Ontario. "Violence Against Women and the Law: A framework for VAW curriculum in Ontario law schools." Summer 2012.

practice guidelines for lawyers representing women who have experienced violence and for those representing abusers.

We suggest that the Ontario Bar Association, Family Law Section, provide funding to Luke's Place to update these resources and to develop a standardized intake and screening protocol/tools for voluntary use by lawyers across the province.

16. Establishment of formal co-led collaborations between the legal and violence against women sectors

In most communities, there is an imbalance of power between the violence against women and legal sectors. If the legal sector does not wish to engage, it does not have to; and, when it does, the engagement is often on its terms. Many of those in the legal sector take the position that engaging with or even acknowledging the violence against women sector is a demonstration of bias that affects so-called judicial neutrality. The reality of violence against women and the expertise and professionalism of those in the violence against women sector need to be recognized by the legal sector so the two can work together, within a fair and impartial but properly informed family law system, for outcomes that keep women safe and reflect the best interests of children.

17. Centre of Excellence

We propose the establishment of a provincial Centre of Excellence to support abused women through the family court system, funded by government, foundations, and the private sector. Such a centre would build on, complement, and enhance work already being done. We strongly urge government at both the provincial and federal levels to consider providing financial support for the development of a Centre of Excellence.

The Story of Kate and Luke

It was late June of 1997. I'd done the hard work over many months of reaching the place where I could make the decision to take Luke and leave. My decisions about when and how to leave were based on my ability to cope all at once with a full time job, a very active little boy, making my exit plans in secret, and the oppressiveness of my husband's emotional and psychological abuse. To make sure he wouldn't find out any of my plans, I didn't tell a soul, other than one friend whose path would not likely cross his. I planned to leave in mid-August that same year.

In late June I first contacted the lawyer who was recommended to me. I asked to meet with her right away, I really wanted and needed to start learning about the legal process, about what to expect. I needed to gain a measure of relief at this point, some clarity in the world of unknowns I was facing every day now.

My lawyer, however, suggested that meeting a couple of weeks before my planned leave date was sufficient. I remember feeling very vulnerable during those intervening weeks – the legal part of leaving was the biggest unknown for me.

So I carried on, slowly and secretly removing as many important papers from the house as I could safely do, getting through one agonizing day after another. But I had hope. After all, I had a lawyer who was going to be looking out for the best interests of my little boy and me. Surely things would be okay once I got to court.

I met with my lawyer some 15 days before my planned date of leaving. By now, I was battle-weary and mentally exhausted with the stress and worry of every day in a house which was anything but a home. Yet, I was ready to learn what I had to do within the law, what my next steps were. In these meetings, we discussed the history of my marriage and the reasons I had for leaving, most especially my concerns over my husband's mental stability. We talked about supervised access. I asked if my husband could be made to seek professional help so he could be diagnosed. My lawyer suggested this was unlikely, so I asked if it could be ordered for both of us to undergo a psychiatric evaluation so it could be demonstrated that my concerns over his mental stability were well-founded. Once again, I was told it was unlikely he could be made to seek help, nor would the court likely order an evaluation for both of us.

My affidavit asked for sole custody of Luke, some measure of support for him, and, in view of my well-expressed concerns over my husband's mental stability, that his access to Luke be supervised until such time as it could be seen how he would respond to our departure from the home. After all, he had uttered time and time again that he wasn't going to let me leave with Luke, and that I wasn't going to take Luke from him.

While I was permitted to ask for supervised access in the affidavit, I recall my lawyer saying the program was overburdened and it might be difficult to get. However, at no time was I told it would be impossible. And so I believed that my lawyer would fight for this, that it was understood this was of great concern for me.

My plan to leave mid-August had to be abandoned when, during the first week of August, my husband's behavior worsened dramatically, becoming even more erratic and unpredictable. I was terrified and I could see Luke was now becoming stressed. My phone calls were monitored; my car and house keys were taken from me. He insisted on driving me to work and picking me up. I knew Luke and I had to get out of there right away, we couldn't wait another day for the original plan to unfold. There was a palpable feeling of evil in the house; I had such a feeling of impending doom.

I took advantage of a very short five minutes when my husband stepped outside the house, and was able to reach my brother and convince him to call me at work the next day to devise a plan of escape. That same day (Friday), I contacted my lawyer from my office and left a message that I needed to speak to her urgently.

Luke and I did escape that Friday night after work, even though my husband pursued my brother's truck and tried to force us to pull off the road. However, we made it to the local shelter with my husband still in pursuit. They had been alerted that I was on the way but being pursued so they contacted the police to attend at the shelter.

In the parking lot of the shelter, my husband pushed and shoved me with force trying to grab Luke from me, but I was able to move past him and into the shelter. The police arrived sometime after. Outside, they spoke with my husband, and those who had aided my escape. They ordered my husband to leave the premises and not to return. As for me, they made sure I knew that my husband had a right to take Luke back to the marital home anytime until interim custody was established in the court. I was dealing with all the stresses of that week, the weeks and months before, and now the added stress of looking over my shoulder every minute of the day, wondering if my husband would get to us before I got to court.

I didn't hear from my lawyer that day or over the weekend. On Monday, I met with her and re-worked the information in the affidavit to reflect the most recent events. I remember being asked to read what was then written, and I requested some phrase changes to make sure they would accurately represent what I needed to convey. I recall that my lawyer was impatient with me during this process, but I was determined that everything that was written sound like me.

I learned that my husband was to be served two days later, on the Wednesday, and that we would be in court on the Friday. I asked my lawyer to explain exactly what would happen when we got to court. I told her I needed to know, that it would help me get

through the next couple of days, and that I needed to feel prepared. She said she was busy, and that I should come to her office at 8:30 on Friday morning and she would brief me. This was only half an hour before we were supposed to be in court. I felt really distressed and frustrated at her apparent lack of concern for my well-being and my right to know.

Friday morning came, and I arrived by 8:30 a.m. to my lawyer's office as planned. She emerged from her office at 8:55 a.m. with another client, and actually asked that client to fill me in a little on what to expect in court while she went off and did something else. That client started relating how many times she'd been to court and what her husband was allowed to get away with. Hardly what I needed to hear!

My anxiety level by now was very high. I fought to quell the uneasiness and rising fear. As we made our way to the court, I tried again to ask questions about what was about to happen, and essentially the response I got was, "Don't worry, I do this every day." There was no real acknowledgement of my need to know and understand. I was already frightened at the prospect of seeing my husband in court, and instead of my lawyer easing some of my trepidation in a meaningful way, I just felt dismissed.

My sister was waiting for me at court. My lawyer motioned for us to take a seat and said she would come and get us when it was time. I assumed she meant to go into the courtroom before a judge. She gave no idea when that would be, and disappeared through one of the doors. I was really nervous and uncomfortable in this room, I felt exposed.

My husband then entered the room with one of his sisters. I went cold with fear as he spotted me and started toward us. I buried my head in my sister's shoulder. He touched my shoulder and asked, in a sudden and great show of concern, how I was. I shriveled at his touch. My sister asked him to move on, and he sauntered away, taking a seat about six chairs away from me.

There was much activity, much going in and out of doors that led from this waiting room. I saw my lawyer re-enter the room several times only to disappear out another door without stopping to let me know what was going on. I felt so vulnerable sitting in the same room and for so long with this man who struck such fear in my heart.

My husband approached me again, touched my shoulder, and with the same great show of concern, asked how Luke was. Again, my sister asked him to move away.

It was some three hours later when my lawyer finally came out to speak with me. She delivered the news that I had been granted sole custody of Luke. I was overcome with sheer relief at this news. I had expected a battle from my husband over this and recall uttering that this was not like him at all. My lawyer mentioned something about the

opposing lawyer telling my husband that he wouldn't get joint custody, and that he'd better get a job. My lawyer clarified that this was only interim sole custody, and that permanent custody still had to be decided.

I asked about access, and was told those details were still to be worked out, but that I was not going to get supervised access. I felt stunned. I tried to ask questions when my lawyer cut me off and made a point of suggesting that my husband had "made a great concession here" and that was now my turn to "show some faith." What had just happened? I remember thinking that it would not be my husband making the concession, rather his lawyer.

Everything felt different now. I was one minute filled with relief at gaining sole custody of Luke, and the very next thrown back into the feeling of dread. Supervised access was abruptly out of the question. I felt pressured, and quite of bit of the hope I was hanging on to faded. My lawyer, I guess in an attempt to lessen my anxiety, commented about the fact that she was wearing her power suit for a reason, and that I shouldn't worry. I found no comfort in this.

We were led back to the open waiting room where my husband's lawyer was talking with him. My lawyer left the room and then returned to say that the court was breaking for lunch.

After the lunch break we returned to the waiting room and found seats as far away from my husband as possible, yet the cold fear I felt in his presence was still very real. We sat for another long stretch of time with no idea what was going on.

At one point, my husband's lawyer came out to speak with him. He seemed to feel it was necessary to speak loud enough for everyone in the room to hear him. He appeared to be letting my husband know what to expect when we entered the courtroom. He said something like "you might hear me call your wife's lawyer my learned friend, but don't worry, that doesn't mean we're friends, that's just how lawyers address one another."

The afternoon wore on. We never did go before a judge as I was still expecting, especially having heard my husband's lawyer talking so freely about it. When my lawyer next came to speak to me, this and subsequent discussions were all about the negotiation of access times. During each of these discussions I tried to revisit the question of supervised access and was briskly reminded of the need to cooperate, and that if I didn't I would appear as hostile and uncooperative. I was warned that it would not bode well for me if the judge had to decide our case, especially when my lack of cooperation would be considered when permanent custody would be decided in a month's time. My sister tried to intervene and ask questions as well, but was summarily dismissed and asked not to speak on the subject again.

The pressure to acquiesce, to conform and agree to the access arrangements that were being hashed out between the two lawyers was by now enormous. Any hope I had was consumed by the day's events and I felt defeated.

I was presented with a hand-scribbled access order to sign and felt I had no choice but to sign it. The order came with police enforcement which did little to ease my mind. My fears over my husband's mental stability were still present, still real.

At no time during the day's proceedings did I see my husband's answer-claim by respondent. At no time was I informed that I could or should see it.

I was ordered to present Luke for his first access visit the very next morning (Saturday). I had no car (my husband had taken my keys and the car remained at the marital house) and so a friend brought Luke and me to the exchange point.

My husband drove away with Luke and that is the last time I saw them. Luke was brutally murdered that day, strangled by his father and then doused with an accelerant and set on fire. My husband slit his own wrists and died in the same fire which was intended to burn the entire house. He wanted to take everything from me, and did! He made good on his threat to not let me leave with Luke. And the court decision let that happen!³

³ Many thanks to Kate Schillings, after whose son Luke, Luke's Place is named, for her courage and generosity in telling her story and sharing it with us.

There is no family law case more complicated than a case in which the safety issues are present and the abuser uses the legal system to continue to harm and harass. These cases are both challenging and time-consuming.⁴

Introduction

The paper

This paper examines Ontario family law and the family court system, including recent and anticipated changes to both, through a gendered intersectional lens. In particular, it provides a gender-based intersectional analysis of the implications of family law and the family court system for women who have experienced violence and their children.

The paper has three principle goals. The first is to provide support to frontline workers who assist women involved with family court. The second is to increase the ability of women to negotiate their way through this system so they emerge at the other end with their legal rights respected and with outcomes that keep them and their children safe.

The third is to provide violence against women workers, advocates, and activists with the tools they need to work for change at the community, provincial, and national levels.

The paper initially sets the context by acknowledging its limitations, briefly describing the issue of women, violence, and the law, providing information about Luke's Place Support and Resource Centre, introducing the rationale for using a gender-based analysis and incorporating survivors' voices, and providing some general statistical information.

Following this, the paper summarizes and analyses the current state of affairs in Ontario with respect to family law and court process, other related areas of law and government policy. It then identifies and discusses a number of key issues: legal representation, custody and access, court process, and intersectionalities.

Understanding that we can learn from the experiences of others, the paper provides a brief overview of how other jurisdictions are dealing with these issues.

The paper concludes with some suggestions for change and possible next steps.

⁴ Domestic Violence Death Review Committee Report, 2004.

Limitations of this paper

This paper examines family law, family court, and violence against women using a gender-based intersectional analysis. We have framed our analysis largely by examining violence against women perpetrated by men because, statistically, that is the most prevalent kind of violence. We know this is a serious limitation of this paper.

We acknowledge the reality of violence in same-sex relationships and as experienced by trans people. Lesbian mothers and trans parents face particular challenges and barriers when dealing with family law and family court. Their abusers use the court system, the lack of knowledge and awareness on the part of many court personnel including lawyers and judges, and societal ignorance and stereotyped lack of understanding as weapons in their attempts to continue to control and/or punish their former partners.

While this paper does not address these issues in depth – that is the work for another paper – it does identify issues specific to lesbian mothers and trans parents as they arise.

As noted above, this is a paper primarily about family law. While we do touch on other areas of law as they relate to women's experiences in family court, we do not explore these areas of law in depth.

Women, violence and the law

Women do not experience family law and family court in isolation. Rather, they are involved with multiple systems at the same time. There may be a criminal proceeding underway because either their partner or they have been charged as a result of the violence within the family. The woman and/or her partner may have immigration issues that require resolution. There may be child protection proceedings.

In addition to this multiplicity of legal issues that a woman may be facing, she is likely also dealing with a number of other systems. If she has just left her abuser, she (and her children, if she has any) may be living in a shelter and looking for permanent housing. She may be applying for financial assistance through Ontario Works or Ontario Disability Support Plan. She may be looking for work or starting a new job and needs to find day care for her children. The children may need to be registered in a new school if she has left the neighbourhood where she used to live.

Even this is not the extent of what she is confronting. She and her children are no doubt experiencing some level of trauma as a result of the abuse and the rapid changes in their lives. She may be trying to find counselling for herself and her children to help

them deal with the trauma, likely finding that her name goes at the bottom of a lengthy waiting list. They likely continue to be fearful of the possibility of ongoing violence and abuse, even though they have left the abuser. Whether or not there are any formal court arrangements in place, the woman may be managing the children's access with their father, attempting to ensure they have time with him in a way that is safe and that ensures their return to her.

This paper explores family law and family court issues in this intersectional context, looking at gaps and flaws in the system as well as possible strategies for dealing with them in the real-life manner in which women experience them.

Who we are

Luke's Place was established as part of a community response to the murder of a young boy on his first access visit with his father after his mother had unsuccessfully sought supervised access through the family court because of her concerns for her son's safety.

Luke's Place is an independent community agency providing support and resources to women who have experienced abuse and their children as they proceed through the family law/court process. Our programs and services include:

- one to one support through our staff team of legal support workers who, in 2011, supported more than 420 women in their journeys through family court, an increase of 20 percent over 2010
- access to legal advice through our Pro-Bono Legal Clinic, staffed by volunteer community lawyers and used by more than 80 women in 2011
- a Resource Manual and Emergency Motions Toolkit and related training for staff and volunteers who support women through family court
- community education and collaboration
- developing and delivering training and ongoing legal support to Ontario's Family Court Support Workers through a 3-year training initiative
- developing and delivering legal information workshops for women who have experienced abuse
- research on issues related to violence against women and family law
- systemic law and court process reform

Luke's Place envisions a family court system that responds efficiently to end violence against women and effectively provides for the safety, emotional, and financial needs of abused women and their children after leaving a situation of abuse.

A gender-based analysis

A gender-based analysis (GBA) is generally accepted to mean an examination of the differential impact of policies and programs on women and men. This kind of analysis has been and continues to be important as we consider women's inequality relative to men, the markedly different gender impacts of public policy and programs, and the ongoing discrimination against women that continues to exist.

Too often, public discourse and policy about violence against women has been based on a gender-neutral analysis, with the result that outcomes are often unsuccessful, inadequate or counter-productive, even, at times, worsening the problem.

Women's equality organizations have long called for the use of a gender-based analysis in addressing the issue of violence against women. In its 1996 report on the impacts of the province's Conservative government on violence against women services, the Ontario Association of Interval and Transition Houses (OAITH) found that funding generally went to gender-neutral programs and services and that the focus was on generic services, rather than on services applying a gender-based analysis.⁵

Some years later, a community research project examining the response to violence against women noted:

The challenge is to name the problem accurately and not to be silenced by the reaction. The mission is a monumental one – to reclaim expertise and reflect the truth about women's lives as seen, known and understood on the front lines of the violence epidemic. The conclusion reached in this document is that a gender-neutral analysis of woman abuse, which assumes a level playing field between men and women, does not aid equality but rather renders invisible the inequalities that exist between the genders.⁶

Research conducted in 2009 that examined the impact of a gender-neutral analysis of family violence data was assessed to incorrectly describe the reality of this violence:

Most readers lacking expertise on woman abuse research would probably not realize that respondents were not asked questions about the context of the incidents, including whether these acts were defensive or offensive.

⁵ Ontario Association of Interval and Transition Houses. "Locked In Left Out: Impacts of the Progressive Conservative budget cuts and policy initiatives on abused women and their children in Ontario." October 1996.

⁶ Sinclair, Deborah. "Overcoming the Backlash: Telling the Truth about Power, Privilege and Oppression. 2003, p.

Nor would many readers likely detect that the types of acts and outcomes reported by men and women are significantly different, or that the similar prevalence numbers are generated only when serious forms of violence like sexual assault and homicide are omitted.⁷

DeKeseredy and Dragiewicz go on to posit that there are two principal reasons for this use of bi-directional terms to describe what is very much a uni-directional problem. First, this renders the discourse gender-neutral. This way, same sex violence and violence against women, which might otherwise be excluded if a strict gender-based analysis were used, are included. Second, and more important in our opinion, a gender-neutral or bi-directional analysis of violence against women repudiates feminism and the richness of its understanding of misogyny, women's inequality and the many kinds of violence experienced by women and replaces it with a simple "people do the darnedest things to one another" approach, which relieves everyone of any sense of responsibility for structural or systemic change.

In its 2009 report, the Domestic Violence Advisory Council noted:

Gender neutral language misrepresents research on the nature of violence, impeding development of appropriate empirical work, policy and programs. Instead of making the discourse more inclusive, gender-neutral language promotes understandings of woman abuse as mutual, reciprocal or bi-directional, recalling the days before battered women's advocates created shelters and fought for legal reforms, and scholars conducted hundreds of studies documenting survivor experiences."⁸

Despite the value of a GBA, Canada in the 21st century requires a different approach. We live in an increasingly globalized world. Our understanding of gender is moving beyond the binary, heterosexual relationships are no longer the norm. Many families who turn to Ontario's family courts have come here from cultures that define violence, roles within the family very differently and bring different values to marriage, divorce, responsibility for children, and other family law issues.

Indeed, our definition of violence itself has been challenged by many, as we try to make it fit these new situations.

⁷ DeKeseredy, Walter S. and Dragiewicz, Molly: "Shifting Public Policy Direction: Gender-Focused vs Bi-Directional Intimate Partner Violence." March 2009, p. 8

⁸ Domestic Violence Advisory Council. "Transforming our Communities." May 2009, pp. 23 – 24.

As a result, many have come to believe that, on its own, a GBA is not adequate and may, in fact, misrepresent the complex diversity of women's lives, and have moved to use what is called an intersectional feminist framework (IFF).

IFFs attempt to understand how multiple forces work together and interact to reinforce conditions of inequality and social exclusion. IFFs examine how factors including socio-economic status, race, class, gender, sexualities, ability, geographic location, refugee and immigrant status combine with broader historical and current systems of discrimination such as colonialism and globalization to simultaneously determine inequalities among individuals and groups.

IFFs are an acknowledgement that looking at gender alone is not sufficient to provide an adequate analysis, particularly with respect to advancing the equality interests of women from the most marginalized communities.

This is true when we examine the issue of violence against women. While it is, at its essence, a gendered problem inasmuch as the vast majority of victims are women, the vast majority of perpetrators are men, and violence against women exists because of women's ongoing inequality, other causal factors such as race, sexual orientation, class, ability, geographic location, religion, culture, and so on, must also be considered if appropriate policies and programs are to be developed.

As Sinclair puts it:

Viewing woman abuse through the single lens of gender has alienated many marginalized and racialized women, since they may not see gender as their primary form of oppression.⁹

We cannot solve the problem if we do not describe it correctly: "Decision makers require a clear understanding of the nature and severity of social problems in order to develop effective responses."¹⁰

A 2008 report prepared by Luke's Place Support and Resource Centre set out a number of principles to frame policy initiatives intended to address family court front door services for women leaving abusive relationships. These principles included the use of a gender-based, anti-oppression/anti-racist analysis to underlie and frame all

⁹ Ibid, p. 18

¹⁰ Johnson, Holly. "Measuring Violence Against Women: Statistical Trends 2006." Statistics Canada 2006, p. 7

recommendations for change.¹¹

In order to explore the complexities described above and to craft realistic and effective strategies and solutions, this paper uses a gender-based analysis within a broader intersectional feminist framework.

Note: Because we bring a gender and IFF lens to this work, we use the language of violence against women. Where other terms are used, it is because that is the language used by the institution or system being described.

Survivors' voices

The integrity of both gender-based and intersectional frameworks relies on incorporating the voices of those who have experienced that which is being analysed: in this case, women survivors of violence. While these women may not be “experts” in the same way that a patient is not a medical expert and should not be expected to, for example, conduct surgery on herself, survivors’ voices provide us with something at least as important as professional expertise: their lived experiences of the systems that so often completely fail them. It is these lived experiences that must form a central component of proposed solutions.

We have included women’s voices and stories throughout this paper but we want to set out some framing principles at this point. To do so, we refer to an important project conducted by the Ontario Association of Interval and Transition Houses in 2008, which conducted surveys and meetings with women from across Ontario to seek out “the ideas, insights and advice of woman abuse survivors about participating in policy development and systemic change.”¹² Women had a great deal to say. As one woman put it:

*Make these services more aware of the continued abuse of the family court system. I was traumatized by my husband, then by the criminal court system and I am continuing to be abused by the very family court system that is supposed to help me. He has continued to manipulate the system for his continued abuse.*¹³

¹¹ Luke’s Place Support and Resource Centre. “Provincial Needs Assessment and Gap Analysis of Front Door Services for Women Within the Family Court Process: Final Report and Recommendations.” December 2008.

¹² Ontario Association of Interval and Transition Houses. “Survivor Voices: Welcoming women to make change. Calling on services and policymakers to include survivors in their work.” December 2008, p. iv.

¹³ Ibid, p. 6.

The majority of women who participated in this project (62%) said that they wanted systems generally to have a better understanding of violence.¹⁴

With respect to family court, women talked about the court's lack of understanding about the impacts of abuse and the need to hold the abuser accountable, mediation, lack of legal representation, length of proceedings because of delays caused by the abuser, problems with restraining orders and joint custody arrangements and legal bullying.

Women suggested that more education for judges and children's lawyers on impacts and complexities of woman abuse would be helpful. They were interested in workshops so they could fill out court forms more effectively. More legal aid and specialized violence against women lawyers were also seen as helpful ideas.

Overwhelmingly, the message was clear: the family court system needs to listen, understand and believe what survivors are saying, to take what they say seriously and then to act on what it has heard to ensure the safety and well-being of women and their children.

What the numbers tell us

Using statistics to define and analyze the legal and policies responses to violence against women is a mistake. Numbers cannot convey the complexities and nuances of the issue and, as has been said frequently, anyone can find a set of statistics to support a particular point of view.

Nonetheless, having some sense of numbers is helpful. The following statistics are provided in order to help set a demographic framework for the substantive analysis that follows. They are not intended to be definitive or exhaustive:

¹⁴ Ibid, p. 9

Demographics

To understand the impact of law, policy, and process, it is important to have a sense of who Ontarians are. In its report on the family law system, the Law Commission of Ontario identified a number of interesting trends in Ontario's population:¹⁵

Eighty-five percent of Ontarians live in urban areas, which has a significant impact on the availability of and access to legal and other services for the 15% of people who do not.

More than 60% of Ontario's population growth occurs through immigration, with more than half the country's immigrants coming to this province. This is significant when considering appropriate responses to violence against women and family breakdown, since cultural values about family, children, marriage, and divorce are often quite different.

Twenty percent of the province's residents are visible minorities. Ten million speak English, 290,000 French, and 2 million another language.

Seventy percent of the population identifies as Protestant or Catholic, 3% as Muslim and 2% as Aboriginal.

Sixty percent of Aboriginal people live off reserve and away from family, even though traditionally the family "is the all-encompassing mediator between the individual and the social, economic and political spheres of the larger society" for Aboriginal people.

Thirty-two percent of mothers work part time and most lone-parent families are headed by women, but 10 to 12% are men-led.

Rates of violence

According to Statistics Canada,¹⁶ in 2010, victims of family violence accounted for 25% of all victims of violent crime. Women have more than twice the risk of becoming a victim of family violence, with girls or women accounting for 7 out of 10 victims of such violence.

Intimate partner violence is highest among young women aged 25 to 34.

¹⁵ Law Commission of Ontario. "Towards a More Efficient and Responsive Family Law System." February 2012, pp 6 – 9. All statistics and quotations in this subsection appear on these pages of the LCO report.

¹⁶ Statistics Canada. "Family violence in Canada: A statistical profile, 2010." May 12, 2012, p. 5 - 6 (Note: this study examines police-reported violence only.)

The same research showed that 56% of family violence incidents resulted in charges being laid or recommended, which is higher than the 43% rate of charging in non-family violence incidents.

Over the past decade, 65% of spouses accused of homicide had a history of family violence involving the victim, most often when the victim was estranged from the partner.

The Strategic Framework to End Violence Against Aboriginal Women sets out the realities of family violence for Aboriginal women.¹⁷ Aboriginal women experience spousal violence at a rate three times higher than that of non-Aboriginal women. In some northern Aboriginal communities in Ontario, it is believed that between 75% and 90% of women are battered. Children witness more than half the violence that occurs between the adults in the house.

In its work to address missing and murdered Aboriginal women, the Native Women's Association of Canada identified 153 cases of murder in its database between 2000 and 2008. This makes up 10% of total female homicides in Canada, even though Aboriginal women make up only 3% of the total female population.¹⁸

Family court cases

According to the Law Commission report, 40% of marriages and relationships break down. The year 2009/2010 saw 107,822 active family breakdown cases. Of these, 57,000 had been in the system for less than one year, 34,000 for one to two years, 9,000 for two to three years, 3,700 for three to four years, and 4,300 for more than four years.¹⁹

Access to legal representation

The statistics about access to legal representation in family court paint a gloomy picture. In a very recent paper examining the rise of self-representation in family courts across Canada, Rachel Birnbaum and Nicholas Bala found that either one or both parties were unrepresented in 50 to 80% of cases.²⁰

¹⁷ Ontario Native Women's Association and the Ontario Federation of Indian Friendship Centres. "A Strategic Framework to End Violence Against Aboriginal Women." September 2007.

¹⁸ Native Women's Association of Canada. "What Their Stories Tell Us: Research findings from the Sisters in Spirit Initiative." 2010.

¹⁹ Law Commission of Ontario, *Ibid*, p. 44

²⁰ Birnbaum, Rachel and Bala, Nicholas. "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants." 2012.

This trend has been identified by others for many years. OAITH found, in its 1998 report, that the number of family law legal aid certificates dropped by 77% between 1995 and 1997.²¹

Largely as a result of this, a 1998 survey of shelters undertaken by OAITH found that 45% of them were offering court support to women.²² Just over a decade later, in research conducted by Luke's Place, these numbers had increased substantially, with 81% of violence against women agencies surveyed responding that they provide women with general information about how family court process works. In addition to this kind of support, 73% of respondents said they provide court accompaniment, 60% give legal information to women and 56% assist women in completing paperwork.²³

Other research conducted by the Ontario Shelter Research Project in 2011 found that 97% of shelters "routinely or often provide services to women to help them navigate family law systems," because their residents either do not have lawyers or have lawyers who do not understand the issues related to violence against women.²⁴

While shelters and other violence against women organizations have done an outstanding job in providing women with support and assistance through the family court process, it must be noted that this is not the primary responsibility of most of these organizations. This work is added to already full job descriptions, and is done by committed and dedicated workers who have little access to training, resources or support. In other words, it is not an acceptable alternative to proper representation for women.

²¹ Ontario Association of Interval and Transition Houses. "Falling Through the Gender Gap: How Ontario Government Policy Continues to Fail Abused Women and Their Children." November 1998, p. 24

²² Ibid, p. 7.

²³²³ Luke's Place Support and Resource Centre for Women and Children. "A coordinated response between the VAW sector and the family law system: Pre-Think Tank Report." September 2011, p. 7.

²⁴ Ontario Shelter Research Project, Violence Against Women Executive Directors Survey of Supports and Services, 2011.

Where we are and how we got here

The legal situation of women who leave abusive relationships has without doubt improved since the mid-1980s, when the House of Commons thought it appropriate to laugh when the issue of wife assault was raised. New laws have been created, old laws have been amended, legal and court professionals have received training and education, a diversity of resources and legal services have been developed and are available to many women.

However, serious challenges remain, which will be explored below and on the following pages.

Some women face greater barriers and challenges than others, and this reality must be remembered at all times when discussing public policy and law and process reform. Women living in remote parts of the province, women with disabilities, poor women, Francophone women, newcomer women (especially those whose immigration status in Canada is tied to their abuser), and Aboriginal women in particular do not find the existing family law or family court process to be accessible or equitable. Lesbian and trans mothers often face enormous barriers when dealing with custody and access issues.

Family law

While all aspects of family law are important, certain issues are particularly critical for women who are leaving abusive relationships. For women with children, establishing a custody and access regime that is in the best interests of the children and that takes into account the history of violence and abuse, the impact it has had and continues to have on the children, and ongoing safety issues is usually the highest priority. Often, when children have been exposed to the violence, child protection authorities are involved with the family, and women must deal with these proceedings as well as their own family law case.

For many, establishing a child support regime is critical to ensuring that children experience as little economic disruption as possible and to avoid having to turn to social assistance for financial support.

Whether or not a woman has children, she may have ongoing concerns for her safety. She may turn to the family court for a restraining order because of threats her abuser has made prior to separation as well as his post-separation actions and threats.

Also important to women, although often not a first priority, are issues of property

division and spousal support. Too often, women trade away property rights and their own economic security in exchange for promises by the abuser (which he almost never keeps) not to fight for custody.

CUSTODY AND ACCESS

As the result of ongoing collaboration between violence against women advocates and the provincial government, the best interests of the child test contained in the *Children's Law Reform Act*, section 24 has been expanded to include mandatory consideration of family violence.

24(2) The court shall consider all the child's needs and circumstances, including,

- (a) the love, affection and emotional ties between the child and,
 - (i) each person entitled to or claiming custody of or access to the child,*
 - (ii) other members of the child's family who reside with the child, and*
 - (iii) persons involved in the child's care and upbringing;**
- (b) the child's views and preferences, if they can reasonably be ascertained;*
- (c) the length of time the child has lived in a stable home environment;*
- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;*
- (e) any plans proposed for the child's care and upbringing;*
- (f) the permanence and stability of the family unit with which it is proposed that the child will live;*
- (g) the ability of each person applying for custody of or access to the child to act as a parent; and*
- (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.*

24(3) A person's past conduct shall be considered only,

- (a) in accordance with subsection (4); or*
- (b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent. 2006, c. 1, s. 3 (1).*

24(4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

- (a) his or her spouse;*
- (b) a parent of the child to whom the application relates;*
- (c) a member of the person's household; or*

(d) any child.

24(5) *For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse. 2006, c. 1, s. 3 (1).*

These provisions acknowledge the reality of violence within families. In the past, judges were not specifically required to consider spousal violence and abuse in their custody and access decisions. Before the law changed, some judges would disregard evidence of violence or abuse because they believed that woman abuse had nothing to do with parenting skills and that it ended on separation.²⁵

Creating the statutory framework as has been done with the changes to section 24 of the CLRA is an important step towards making it clear that violence or abuse perpetrated by a parent is relevant to his or her abilities to act as a parent and requiring the judge to consider it. Much work remains to be done to ensure that lawyers understand the most effective way to present evidence of violence and abuse to the courts and that judges understand their obligation to consider it as part of the best interests of the child test, applying the family law “on a balance of probabilities” standard of proof.

Until that work is done, women will continue to be profoundly let down by lawyers and judges who downplay or completely ignore their stories of violence.

CHILD PROTECTION

The relationship between the violence against women sector and child protection authorities has long been a difficult one, fraught with a lack of trust by each sector towards the other. Each sector operates within a distinct framework, and those frameworks at times conflict. The violence against women sector works with an intersectional, gendered analysis of violence against women. Survivor voices play an

²⁵ It is interesting to compare these changes with family law reform in British Columbia, where the *Family Relations Act* will be replaced with the *Family Law Act* in March 2013. The new legislation places a much greater emphasis on family violence in custody and access determinations and, in fact, goes considerably farther than Ontario’s *Children’s Law Reform Act*. For instance, the B.C. legislation embeds a required consideration of family violence directly in the best interests of the child test, talks about the need to consider whether any cooperative post-separation parenting scheme (ie joint or shared custody) would increase safety risks for the child or other family members, requires the court to look for patterns of coercive and controlling behaviour and sets out situations in which it is “not wrongful” to deny access (where a parent reasonably believes the child might suffer family violence or that the other parent is impaired by drugs or alcohol, where the child is sick or where there have been repeated failures to exercise access during the preceding 12 months)

important role in the work, and women engage with community-based violence against women organizations voluntarily. Shelters and other VAW services have no statutory mandate or responsibilities.

Child protection, on the other hand, has historically applied a gender-neutral lens to its work related to what it calls family or domestic violence. It does have a statutory mandate and responsibility and can engage with families whether or not they consent.

Changes to the *Child and Family Services Act* in 2000 did nothing to improve relations between the sectors. The legislative amendments focused on child exposure to adult conflict as a matter that could find a child to be in need of protection. Violence within the family, even if not directed at the child, became a risk indicator and new eligibility criteria were developed to ensure such children qualified for child protection.

Duty to report obligations for both professionals and members of the public were expanded to cover this new focus, and the rate of child welfare reports about children exposed to woman abuse increased significantly.

A 2002 comparison of data from both the 1993 and 1998 Ontario incidence studies of reported child abuse and neglect in Ontario found a stunning 870% increase in substantiated emotional maltreatment reports since 1993, largely as a result of exposure to domestic violence.²⁶

OAITH's report noted the importance of developing services and protocols to meet the needs of children without compromising the victimized parent, but, unfortunately, this development has not come to fruition over most of the past decade.

Initially, there was inconsistent interpretation of the legislation, with some child protection authorities expecting that all shelter admissions by women with children would lead to a report. More importantly, perhaps, not all child welfare workers understood the complex nature of woman abuse dynamics, and mothers were too often blamed for any exposure of the children to violence.

Failure to protect is a concept deeply embedded in child welfare legislation and while meant to uphold parental obligations to protect their children from avoidable harm, this premise becomes problematic in cases of domestic violence. There is failure to acknowledge that often victims of domestic violence have limited means to leave abusive relationships often

²⁶ Ontario Association of Interval and Transition Houses. "In the Best Interests of Children and Mothers: A Proposed Child Welfare Response to Violence Against Women." March 2003, p. 7.

*due to structural constraints and who believe leaving would actually put themselves and their children at increased risk of harm.*²⁷

Recently, child protection authorities have taken some steps that indicate an increasing awareness of the problem. There have been, at least on paper, changes to the focus of the work that could improve safety for mothers and children and hold the abuser accountable for his abuse rather than taking a punitive approach with the mother if she is not able to limit the children's exposure to the violence being perpetrated against her.

However, the lived experiences of women within the child protection system – particularly women who are poor, Aboriginal and/or racialized, whose families continue to be significantly over-represented in child welfare files – make it clear that these changes have yet to be felt on the ground, where women report little improvement in the response of child protection authorities.

The Domestic Violence Death Review Committee (DVDRC) has made a number of child protection related recommendations over the years. Most notably, the DVDRC has suggested that:

- the Ontario Association of Children's Aid Societies and the Ontario Family Law Bar Association develop protocols limiting interim unsupervised access where children appear to be in danger in the context of parental separations where there has been a history of domestic violence
- there be formal risk management during custody and access disputes in cases involving domestic violence
- family lawyers receive continuing education on domestic violence
- research be undertaken into the association between contact with child protection services and lethal domestic violence
- that there be greater communication between criminal and family courts

As noted by Peter Jaffe, a member of Ontario's DVDRC:

What may appear to be conflict or minor allegations of an assault may pose a significant danger to adult victims and their children. Judges need to be more aware of risk assessment strategies and safety planning in domestic violence cases, . . . Supervised visitation and a thorough assessment of domestic violence perpetrators are essential tools for the

²⁷ Alaggia, Ramona and Vine C. Cruel but not Unusual: Violence in Canadian Families. Wilfred Laurier University Press. 2006.

*family court.*²⁸

OAITH's report set out principles for a model for child welfare response to child exposure to adult violence against women. These included:

- the need to recognize that the safety and well-being of child witnesses is inextricably linked to the safety and well-being of their mothers, which must be the first consideration
- the necessity of holding abusive partners solely accountable for their actions
- the importance of using an intersectional feminist perspective
- the need for a specific response for First Nations women and children

These principles are as relevant and needed today as they were at the time the report was written in 2003.

CHILD SUPPORT

The introduction of federal and provincial child support guidelines in the 1990s unleashed an unanticipated backlash from some non-custodial fathers, who were almost successful in derailing this important piece of public policy/law reform by raising claims that family law, particularly custody law, discriminated against men.

However, despite the problems created by the nascent fathers' rights movement at the time, the regime of child support guidelines has, overall, been helpful to women. It has removed most of the judicial discretion in determining the amount of support to be paid and has vested government agencies (in Ontario, the Family Responsibility Office) with the authority to collect and disperse child support, thus removing this responsibility from the recipients, who are most commonly women. In cases of abuse, this is very important.

Nonetheless, challenges remain, particularly when the potential payer is an abuser. Some of these men seek joint or sole custody or extensive access (40% or more of the child's time) in order to avoid paying child support. Many women are reluctant to even seek child support because they fear retribution in the form of further abuse from their former partners. It is not uncommon for abusers to become under or unemployed in order to evade child support obligations or to argue over every additional expense for which the mother seeks assistance.

Enforcement bodies are under-funded and under-resourced, with the result that child

²⁸ Jaffe, Peter and Juodis, Marcus. "Children as Victims and Witnesses of Domestic Homicide: Lessons Learned from Domestic Violence Death Review Committees." *Juvenile and Family Court Journal*. Summer 2006, p. 25

support payments in Ontario are significantly in arrears. According to a recent Toronto Star article, profiling one father who moved from Ontario to the Philippines to evade his court-ordered child support, more than 120,000 parents are in arrears, owing collectively more than \$1.8 billion.²⁹

The Family Responsibility Office does not begin enforcement proceedings until the payer is at least three months in arrears. For a woman on a limited income, three months is a very long time to go without child support. The amount of social assistance a woman receives is based on the amount of child support her former partner is paying – when he does not pay, the amount of social assistance she receives does not increase. In either situation, the short and long term consequences of unpaid child support are serious.

Some of the enforcement tools are counter-intuitive inasmuch as they can reduce the payer's ability to make payment. For example, the Family Responsibility Office can suspend a person's hunting, fishing, or driver's licence for non-payment of child support. For a payer who makes his living hunting, fishing, or truck driving, this strategy, while punitive, is not effective in getting child support paid.

RESTRAINING ORDERS

In 2010, the government, as the result of ongoing collaborations with violence against women advocates, made important amendments to the restraining order provisions of the *Family Law Act*.³⁰

Breaches of restraining orders, which had previously led to a charge under the *Provincial Offences Act*, can now result in criminal charges.

Restraining orders are issued on stand-alone standard form orders, which contain a

²⁹ Toronto Star, Monday July 2, 2012, p. 1. "Dad picks flight over costly fight: Ordered to pay \$4K a month to ex-wife and 4 kids, man flees Canada and 'will never return.' "

³⁰ The revisions to family law legislation in British Columbia, noted above at footnote 25, also include changes to the restraining order regime. While clearly modeled on Ontario's changes, the B.C. revisions go farther. In particular, the new *Family Law Act* sets out mandatory factors for the court to consider in determining whether to issue a protection order. These include the history of family violence, whether that violence is repetitive or escalating, whether the abuse constitutes or is evidence of a pattern of coercive and controlling behaviour, the current status of the relationship, including a recent or pending separation, circumstances related to the abuser such as substance abuse, employment or financial problems, mental health problems associated with risk of violence and access to weapons that could increase the risk of family violence, the victim's perceptions of her level of risk and any circumstances that could increase her vulnerability such as pregnancy, age, family circumstances, health or economic dependence.

statement that the order is enforceable by the police, removing the responsibility from women to ensure that this clause is contained in the order.

Accompanying the changes in law, the Ministry of the Attorney General, working in consultation with women's advocates, developed a plain language guide to applying for a restraining order to assist women who may not have legal representation.

These changes all have the potential to improve women's safety by holding abusers accountable when they fail to follow the provisions of a restraining order.

Anecdotal information indicates that the criminalization of restraining order breaches has not been positively received by some family court judges. Women's advocates report that some judges prefer now to issue restraining orders under the provisions contained in the *Children's Law Reform Act*, where breaches are not criminalized. Others indicate that some judges are, informally, applying a criminal law (beyond a reasonable doubt) rather than a family law (on a balance of probabilities) standard of proof to applications for restraining orders, which can have a significant and negative impact on outcomes.

Some police continue to enforce restraining orders without acknowledgement of the reforms to the legislation, telling women there is nothing they can do or laying a charge under the *Provincial Offences Act* rather than under the *Criminal Code*. Further education and training are needed.

Family Court Process

For many women, the process of taking a case through family court is as challenging as the law itself. Particularly for women who do not have legal representation, sorting out the various steps in the process, the forms that need to be completed, arranging for service of court documents and learning about the Family Law Rules, can be a daunting, even forbidding task. Where their partner uses the case to continue his abuse and control over her, the situation is even more serious.

RECENT AND ONGOING PROCESS REFORMS

The Ministry of the Attorney General undertook significant reforms to family court process, beginning in 2008. The reforms were built on four pillars:

- providing more legal information to families early in the process about the steps they have to take and about the impact of separation on children
- identifying cases that are appropriate for mediation and other means of alternative dispute resolution as well as cases that require immediate judicial attention so those cases have faster access to the courts

- improving access to legal advice as well as less adversarial means of resolving issues
- streamlining and simplifying the steps involved for those cases that must go to court

While dealing with cases involving violence against women was not the focus of these reforms, obviously the changes have had an impact on women leaving abusive relationships. As noted by Birnbaum and Bala in their study looking at the rise in unrepresented parties in family court:

*Too frequently, services have been put into the family justice system without proper evaluation and understanding the impacts. . . Policy and structural reforms remain scattered and limited, despite the increasing number of self-represented litigants in the family courts and the concerns that outcomes, especially for children, vulnerable women and victims of domestic violence may be negatively effected by the lack of advice and representation.*³¹

The issues of lack of legal representation and the ongoing focus on alternative dispute resolution (mediation, in particular) are raised more than any others as highly problematic by both women and the frontline workers who support them.³²

CONTINUED EMPHASIS ON ALTERNATIVE DISPUTE RESOLUTION

The violence against women sector has raised serious concerns about the use of alternative dispute resolution (ADR) for decades. ADR, including mediation, arbitration, and collaborative law, can be an effective technique where the parties have an equal interest in working towards a positive outcome, come to the process in good faith, have similar levels of information and understanding about their legal rights and responsibilities, have similar levels of language skills and confidence, and bring a willingness to treat their former partner with respect.

³¹ Birnbaum and Bala. Ibid, p. 29

³² Luke's Place Support and Resource Centre for Women and Children: "A Needs Gap Assessment Report on Abused Women Without Legal Representation in the Family Court." March 2008; "Provincial Needs Assessment and Gap Analysis of Front Door Services for Abused Women Within the Family Process: Final Report and Recommendations." December 2008; Luke's Place Support and Resource Centre for Women and Children. "The Impacts of Recent Law Reforms on Abused Women Involved in the Family Court Process in Ontario: An Environmental Scan of Violence Against Women Service Providers." October 2011; Barbra Schlifer Commemorative Clinic "Justice Done: Crafting Opportunity from Adversity: Barbra Schlifer Commemorative Clinic Forum Final Report." 2011 and others.

Unfortunately, few if any of those factors are present in woman abuse situations. The abuser wants to use the process to continue to manipulate and control his former partner and is not focused on the best interests of the children. His behaviour, both in ADR sessions and outside them, may be threatening and bullying. The woman often does not feel she has equal bargaining power because she is focused on her safety and that of her children. She may concede to outcomes she does not want or that she knows are not in the best interests of the children because she is too frightened of her abuser to challenge his position.

Nonetheless, and even though there is no mandatory mediation in family law in Ontario, many women feel they must enter this process or they will be seen as unreasonable or not caring about their children.³³ This places already vulnerable women in a highly precarious situation that jeopardizes both their present and future physical and emotional safety and well-being.

This is also an issue in child protection cases, which strongly promote the use of various forms of alternative dispute resolution.

INCREASED FOCUS ON LEGAL INFORMATION AND NOT LEGAL REPRESENTATION

Lack of access to legal representation remains a serious problem for family court litigants. The recent reforms to family court process have done nothing to alleviate this problem. In fact, they may have worsened it, inasmuch as there is now a perception that access to other kinds of services is adequate:

With the growing range of services available for the self-represented and changing social attitudes and knowledge, expectations of those who are going through separation and divorce have changed. There is an understanding and expectation having a family lawyer as one option, but self-representation is also an option, especially for those who have limited means. Reforms to substantive family law in Canada, especially the introduction of guidelines for spousal and child support, have also made the law more accessible and clearer, especially for those with limited incomes, suggesting that there is less need for a lawyer if these are the matters at issue. . . .³⁴

³³ While there is no mandatory mediation in family law in Ontario, Legal Aid Ontario has the authority to withhold further hours on a legal aid certificate until the parties attend a mediation session. The purpose of this session is to see if there are any issues that can be resolved without the need for further litigation. Women can refuse to attend such a mediation session, but risk losing their legal aid certificate if they do so.

³⁴ Ibid, p. 26/27.

The Law Commission provides a lengthy and impressive list of sources of family law information available to the public, including:

- Ministry of the Attorney General's online court forms assistant
- Ministry of the Attorney General's website
- Community Legal Education Ontario
- Family Law Education for Women
- Law Help Ontario
- Legal Aid Ontario
- Service Canada

However, the Commission then notes in its report:

*We reiterate, however, that the concerns with respect to access to justice are mostly related to a lack of legal representation, rather than a lack of information and that self-help can only assist persons with significant legal literacy in less complex cases. . .*³⁵

*While the individual sources of written information may address the needs of specific user groups, when they are offered online they become part of a vast amount of information that can be hard to access without a clear entry point. The LCO's own review of the various websites with family law on-line information revealed that it was often complex and detailed and, in the case of the Ministry of the Attorney General's website, at least, highly reliant on legal language.*³⁶

EMERGENCY MOTIONS

Women who leave abusive relationships often need an urgent court response to ensure that they and their children are safe. For example, the abuser may be threatening to take the children and not return them or to cause serious physical harm to the woman and/or the children.

The only means available to address these concerns in the family court is through an emergency, possibly *ex parte* (without notice to the other party), motion.

Frontline workers report two challenges in particular faced by their clients when bringing an emergency motion:

- inconsistent responses to motions from different judges across jurisdictions but

³⁵ Law Commission of Ontario. *Ibid*, p. 66.

³⁶ *Ibid*, p. 22

- also in the same jurisdiction
- a generally low (and significantly lower than in the past) rate of issuing orders in emergency motions³⁷

A third challenge for women is that abusers may bring an emergency motion, especially if their partner is unrepresented, to get an upper hand with respect to custody of the children. It is not uncommon for an abuser to claim, for instance, that his partner has abducted the children, he has no idea where they are, and all he wants is to have his children back with him. When the judge hears no evidence from the mother, the missing information and outright lies in the abuser's affidavit go unchallenged, with the result that his motion may well be successful.

Workers across the province have noted specifically that many judges seem to feel that an emergency motion, particularly for a restraining order, is not needed if a woman and her children are living in a shelter, because the shelter provides them with a safe haven.³⁸ While shelters do provide a place of safety for women and their children, it is not accurate to interpret this to mean no further protections are needed. Women and their children are not captive in shelters. They come and go for all kinds of reasons – to go to school or work, to play in the park, to visit friends or to go shopping. All of these are situations where an emergency order could provide important protections, especially given the length of time it is likely to take for the court application to wend its way to a conclusion.

In addition to these serious concerns is the fact that bringing such a motion is a complicated process and beyond the capacity of many unrepresented women, who are entering the process already traumatized by the abuse. Even if successful, the order will be for a very short time – possibly as little as a week. This means the woman must begin to prepare for the return date almost as soon as she has received her emergency order. She has to prepare new and more detailed documents and respond to whatever claims and allegations her former partner raises in his documents. Few women who have just left an abusive relationship and already dealt with an emergency motion are ready for such an engagement.

Related areas of law

Most women do not experience family court in a silo. Many are also dealing with other

³⁷ This information has been gathered anecdotally in discussions at the Ministry of the Attorney General funded Family Court Support Worker trainings held across Ontario between December 2011 and June 2012.

Approximately 150 frontline workers providing family court support to abused women, many of them for more than two decades, participated in these trainings.

³⁸ Ibid.

legal and service issues. For example, as a woman is beginning her family law case, she may also be looking for housing, trying to get child care so she can go back to school or find a job, looking for work, or dealing with Ontario Works. She may also be involved in immigration proceedings or a criminal court case. Child protection authorities may be involved with the family, which creates yet another set of legal proceedings for her to manage.

When examining the impact of family law and court on a woman who has left an abusive relationship, it is imperative to consider the impact of these other systems with which she may be involved. Each on their own and the intersections among them create challenges, barriers and, occasionally, opportunities. The totality of their impacts cannot be under-valued or dismissed when crafting strategies to assist and support women in family court.

CRIMINAL COURT

Mandatory charging

At one time, women's involvement with criminal court was almost always in the role of witness as a result of charges being laid against their partner. However, the past 20 years has seen a dramatic increase in the number of women who find themselves facing criminal charges, usually as the result of inappropriate interpretation of mandatory charging policies.

Mandatory charging policies were introduced in the mid-1980s in most Canadian jurisdictions, including Ontario. The intention was to relieve a woman of the responsibility to charge her partner; instead requiring the police to lay charges in all cases of domestic violence where they felt there was a reasonable possibility of a conviction at trial.

While these policies have been helpful, increasingly there are concerns about the unintended consequences for women.

Ongoing police training is needed, as some officers still ask women if they want charges to be laid against their partner, rather than making this decision as dictated by the policy.

Many times, women call the police because they need immediate assistance during an assault. They have no knowledge that once the police respond to the call, it is the police who will control what happens next.

For some, having charges laid against their abuser helps them take the next steps in

developing a plan to move forward that will keep them and their children safe. In these cases, mandatory charging has a positive impact on the family; particularly if the charges lead to the abuser being held accountable and being offered opportunities to change his behaviour.

For other women, having charges laid against their abuser makes their lives more difficult. The violence may escalate; the family may lose its primary or sole breadwinner, bail conditions may make it impossible for the family to function as it did previously; families in the midst of an immigration or refugee process may have their status in Canada placed in jeopardy; child protection authorities may become involved with the family in a way that is not helpful.

When the police use mandatory charging policies to justify charging women whose use of force has been to protect or defend against an attack or anticipated attack³⁹, the implications for the woman are very serious. She now faces the possibility of bail conditions that could limit her contact with her children. If she pleads guilty, as many women do simply because they do not have access to legal representation and want to deal with the criminal case as quickly as possible, or is found guilty, this outcome will affect her family court case as well as child protection proceedings; it may have an impact on her employment and her ability to travel outside Canada; it could affect her housing status and, if she is a newcomer to Canada, it may affect her immigration.

There is room for more police training to ensure that the primary aggressor model of investigation is properly understood and applied. This approach to investigating “domestic violence” calls requires police to gather evidence about the history of the relationship, so they do not make the decision about who to charge based only on the presenting incident.

The Woman Abuse Council of Toronto has studied and reported on the inappropriate charging of women. Its 2005 report⁴⁰ identified four main findings:

- i. Women arrested, either solely or dually, were living with men who were abusive: 90% of women interviewed said there was a history of abuse. A number had called police for protection but were themselves arrested.

I couldn't think of any other way to get him off of me. I couldn't push him off of me because he had my arms pinned behind me, so the only way I could think of

³⁹ It is important to note that abusers sometimes create a situation that will provoke a physical response by a woman – for instance, by blocking her access to a crying child or physically preventing her from leaving a room.

⁴⁰ Woman Abuse Council of Toronto. “Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies.” March 2005.

was to bite him and the pain would probably get him up off of me. (Renee)

. . . he was physically pushing me away, and I was trying to grab the phone . . . while he was pushing me, I grabbed the phone and I hit him with the phone, which is my ‘assault with a weapon,’ I tried to run from him, and he grabbed, and got me on the ground, and smashed my head onto the ground. (Coco)⁴¹

- ii. Gender neutrality of mandatory charge policies decontextualizes abused women’s use of force. Due to the incident based nature of criminal law, each case is treated as an isolated, separate occurrence, which makes it difficult for the criminal system to identify a persistent pattern of primary aggression by one partner towards the other.

Nothing was brought to court. No. Absolutely nothing. It was just the charge on me. That’s it. And that’s what I didn’t agree with, still don’t . . . His record, his past record should’ve been looked in more. Who he assaulted in the past. (Maria)⁴²

[The Court and Crown] weren’t getting a chronology of what was going on outside of the courts with him, with the stalking, with the . . . other issues at hand. They didn’t have the context for the relationship, they were incident-oriented. (Doris)⁴³

- iii. There are serious socio-economic and emotional consequences of criminalizing women’s self-protective use of force for both women and their children: jail time, implications for custody and child protection, immigration issues, separation from children, employment.
- iv. Criminalizing women’s responses to male violence increases their vulnerability to further abuse because women don’t call police the next time.

I wouldn’t call the police, that’s for sure. (Tanya)

The message is that if you hit back at any point, you’re going to get charged, and that is a big fear that I wouldn’t put myself through anymore. (Harmony)⁴⁴

The report concludes with this statement:

⁴¹ Ibid, p. 9.

⁴² Ibid, p. 10.

⁴³ Ibid, p. 13

⁴⁴ Ibid, p. 22.

*Mandatory charge policies were implemented in order to send a social message that male abuse of women is not only unacceptable, but it is also a crime. However, the response of the criminal justice system (discourse, policies, court and police procedures, interventions) in domestic violence cases assumed gender equality. . . . such an approach ignores the reality that gender inequality exists and in the vast majority of cases it is male partners who are abusing women. By ignoring and obscuring the reality of gender inequality, such an approach decontextualizes women's experiences by failing to take into account women's motivations for aggressive behaviour and the nature of the relationship.*⁴⁵

Caught between two systems

Women involved in both family and criminal courts face real challenges because of the differences between the two systems.

The purpose of criminal court is to determine the guilt or non-guilt of people charged with criminal offences. The purpose of family court is to help a family make a plan for how it will operate post-separation. There is no accountability to the public in family court and often seemingly little accountability expected of the abuser, whereas there is in criminal court.

The standards of proof are different. In criminal court, the standard of proof is beyond a reasonable doubt; in family court, it is on a balance of probabilities, although some family court judges appear to apply a criminal standard of proof when assessing allegations about violence.

In criminal court, unless she has been charged, the woman is not a party to the proceedings; she is merely the witness. She has no right to legal representation and does not direct how the case unfolds. She is required to testify as the Crown Attorney wishes, and can be subpoenaed or even charged if she does not cooperate. The Crown Attorney is not her lawyer. In family court, she is a party to the proceedings, can be represented by a lawyer and has access to legal aid if she qualifies financially and if her issues meet the legal aid criteria.

Outcomes in the two courts are also different in the sense that criminal court outcomes can include a punishment for the accused if he is found guilty, whereas family court

⁴⁵ Ibid, p. 25

outcomes are not, even if they might feel like it some of the time. No one goes to jail because of what happens in family court.

Not only are outcomes different, they can conflict with one another. In particular, bail conditions may conflict with an existing custody and access, child protection, or restraining order.

The abuser may try to convince the family court judge (and may succeed) that small inconsistencies between the woman's testimony in criminal court and her evidence in family court are proof that her allegations are not true or that she is not a credible witness.

Furthermore, the two court systems (with the exception of the Integrated Domestic Violence Court pilot underway in Toronto, which has yet to be evaluated) do not communicate or share information with one another.

The impact of all of this on a woman who is navigating both systems is immense. She may be confused about what information has been provided to which court, what role she is supposed to play, the roles of others such as judges, lawyers and the Crown, and she may be frustrated by orders from two courts that conflict with one another. Her abuser may use the criminal proceedings to slow down the family court proceedings or may try to "bargain" with her between the two. For example, he may try to persuade her to recant her statement in criminal court in exchange for a "promise" from him that he will not pursue custody of the children in family court.

Bail safety programs

Despite the many challenges for women involved with criminal court, there have been some positive initiatives undertaken by the provincial government. In particular, the bail safety programs in place in 10 Ontario communities have proven helpful to women whose partners have been charged.

The primary focus of this program is to gather information at the bail stage that can contribute to the safety of the victim through an appropriate outcome at the bail hearing.

Before the bail hearing, a woman is invited to participate in a meeting with designated staff from V/WAP, the Crown's office, and police so information can be shared with her about the process and community resources, safety planning can be begun, and information can be gathered from her about her assessment of risk factors presented by her abuser.

Early evaluations of the program show it has had a positive impact on the woman's experience, in terms of both her safety and her feelings of engagement/being listened to. Key to the program's success is its acknowledgement that the victim is the one who holds the information about the history of the relationship and its potential lethality.

One of the chief challenges to the effectiveness of the bail safety program is that, because there has been no finding of criminal guilt at the bail stage, Justices of the Peace are often reluctant to impose highly restrictive bail conditions lest they appear punitive.

There can be little doubt that when women feel safer in the criminal process they will be able to engage with all legal systems more fully and more effectively.

IMMIGRATION LAW

Newcomer women who leave an abusive relationship and then engage with family court face enormous challenges. The immigration and refugee regime in the *Immigration and Refugee Protection Act* was already highly problematic for many reasons, and passage of Bill C-31 on June 28, 2012 has made matters worse. This paper is not intended to provide a comprehensive examination of Canada's immigration and refugee legislation and policy, but an overview of the key concerns is important to the discussion and recommendations.

Some common scenarios involving women survivors of violence seeking to enter and remain in Canada include:

- women fleeing abuse at the hands of an intimate partner. Often women arrive in Canada not knowing about or understanding the refugee determination system
- women arriving in Canada with an abusive partner, whose claims for refugee protection are joined. Typically women in this situation have very little or no direct involvement in making their claim for refugee status
- women leaving an abusive partner in Canada while an inland spousal sponsorship application is in process, resulting in a 'sponsorship breakdown' situation⁴⁶

The new immigration regime created by Bill C-31 has the potential to have enormous – and negative – impacts on women in these and other situations:

- impose unreasonably short deadlines on asylum-seekers, thereby preventing legitimate claims from being properly presented

⁴⁶ Barbra Schliifer Commemorative Clinic. Metropolitan Action Committee on Violence Against Women and Children, Women's Legal Education and Action Fund. "Submission to the Parliamentary Standing Committee on Immigration regarding the Committee's review of Bill C-31." April 2012, p. 2

- designate certain countries as “safe” when in fact they are not safe for women
- lead to the deportation of women survivors of violence prior to an individualized risk assessment
- arbitrarily detain groups of women and children upon arrival based solely on their mode of travel to Canada
- severely limit access to vital humanitarian and compassionate applications, which are often the last resort for women refugees and their children
- prevent family reunification for at least five years for certain refugees, endangering women and children who are waiting for sponsorship⁴⁷

As the Schlifer et al submission concludes:

If Bill C-31 is passed into law, a significant number of women may never have their own risks or hardships assessed prior to being removed from Canada. It is a common scenario that an abused woman never substantively participates in a refugee claim, appeal, or judicial review, instead being subsumed in the claim of her abusive partner. . . . many women, including survivors of some of the most horrendous forms of violence, will never have their voices heard in the Canadian refugee and humanitarian system.

*Bill C-31 will have a severe impact on women refugees by denying them a fair opportunity to have their refugee claims considered with a reasonable time to prepare, and distinct from an abusive partner. It has the potential to increase abused women’s exposure to violence in Canada by increasing the abuser’s power and control over her as a dependent to his claim.*⁴⁸

As with family and criminal law, the legal framework itself creates opportunities for abusers to further bully and intimidate their partners. If, as is common, the abuser speaks better English than the woman, authorities may rely on him to provide information without taking the time to ask the woman for her perspective or to verify what he is telling them. The abuser may be the woman’s primary source of information, which allows him to provide her with misinformation about the law and her vulnerabilities. He may lie about the status of a sponsorship, for example, or tell her she will be deported if she leaves him, even if this is untrue. He may withhold critical information about the family’s refugee claim so she cannot make informed decisions. He may threaten to report her to immigration authorities or tell her that she will be deported

⁴⁷ Ibid, p. 2

⁴⁸ Ibid, p. 9

but the children will remain with him. Any ambiguity or room for interpretation in the statutory framework or legal process creates an opportunity for an abuser to further manipulate the system to his advantage.

Provincial policy initiatives directly related to violence against women

Without a doubt, the most challenging period in Ontario in terms of public policy related to violence against women was during the years of the Harris Conservative government. Almost immediately upon election, this government began systematically making deep cuts to violence against women services. These included cuts to emergency shelters, second stage housing (which lost all of its funding), crisis lines, community counselling, multi-service agencies, culturally specific services, community and systemic advocacy, housing, child care, social assistance, and legal aid.⁴⁹

Both before and after this era, there have been some important and positive policy initiatives focused expressly on domestic violence undertaken by the Ontario government. At their best, these initiatives are collaborative undertakings between government and violence against women advocates.

DOMESTIC VIOLENCE ACTION PLAN

In December 2004, the provincial government announced its Domestic Violence Action Plan (DVAP). As stated by Premier Dalton McGuinty in introducing it:

Our government is committed to protecting women and children from domestic violence. We believe that women and children have the right to live free from fear and violence.

One of the most positive aspects of the DVAP was its explicitly stated gendered analysis: “Violence against women in Ontario is a serious, pervasive problem that crosses every social boundary.”⁵⁰

The Plan identified a number of strategies to strengthen the justice system’s response to violence against women. These included:

- making amendments to the *Children’s Law Reform Act* to make consideration of family violence mandatory
- working with the federal government to improve funding for family law legal aid
- working with stakeholders to examine other models to better support abused

⁴⁹ Ontario Association of Interval and Transition Houses. “Locked In Left Out: Impacts of the Progressive Conservative budget cuts and policy initiatives on abused women and their children in Ontario.” October 1996.

⁵⁰ Government of Ontario. “Domestic Violence Action Plan.” December 2004, p. 1

women in family law disputes

- using community legal education publications to increase awareness of family law and domestic violence
- making improvements to restraining orders and breaches
- improving coordination between family and criminal courts by examining ways to improve communication
- developing a protocol to improve communication
- funding a symposium to examine different models of integrated services
- discussing with the Law Society of Upper Canada a program to educate criminal and family lawyers about how each system deals with domestic violence issues and to identify cross-over issues and ways systems could better work together to support victims, and
- funding the National Judicial Institute to develop education about domestic violence for judges.⁵¹

In its 2012 report,⁵² the government presented a rather cheerful assessment of its perceptions of its progress on a number of the strategies that had been identified in 2004:⁵³

- establishment of the Domestic Violence Advisory Council
- introduction of mandatory consideration of family violence in the best interests of the child test in the *Children's Law Reform Act*
- implementation of reforms to restraining order provisions in the *Family Law Act*
- introduction of the Family Court Support Worker program
- creation of a two-year Integrated Domestic Violence Court pilot: "The IDV court will allow people to appear before a single, dedicated judge for both their family and criminal matters. The "one family, one judge" approach allows the judge to have more complete information about the families and to monitor them more effectively."⁵⁴
- development of online assistance with court forms through the Ontario Court Forms Assistant
- changes at Legal Aid Ontario (LAO), which "has transformed its family law service delivery model, making basic legal advice available by telephone, and

⁵¹ Ibid, pp 12 - 14

⁵² Government of Ontario. "Domestic Violence Action Plan Progress Report." May 2012.

⁵³ Please note that this list is provided free of editorial comment for the purposes of information. The perspective of those working with women who have experienced violence is not as positive about the progress made by government, as is discussed below in this paper.

⁵⁴ Ibid, p. 12. Note that while this is listed as progress in implementing the Domestic Violence Action Plan, the Integrated Domestic Violence Court is, in fact, the result of efforts by a small group of judges and is not, at least at this time, government-led.

- increasing access to duty counsel for family law clients.”⁵⁵
- changing the LAO practice to allow lawyers who have acted for a woman as duty or advice counsel to be retained by her with a legal aid certificate when to do so is in the best interests of the client
 - ongoing work to the LAO domestic violence protocol with respect to two-hour emergency authorizations, a quick turnaround time for applications, less stringent eligibility rules that recognize abused women may not have access to documents, bank records and funds, increasing the time by 8 hours on a family law certificate where violence is an issue⁵⁶
 - support for professional training, including seminars on the intersection between criminal and family law developed with the Ontario Bar Association and the Ministry of the Attorney General, family law training for domestic violence Crowns, development of violence against women law school curriculum, domestic violence training for FLIC staff in 2009, and ongoing educational opportunities on domestic violence for judges through the National Judicial Institute

⁵⁵ Ibid, p. 12. While this paper explores problems with Legal Aid Ontario more fully below, it is important to point out that the “transformation” described in the DVAP report is not one that has been observed by those supporting women, who report almost without exception that the move to telephone-based services has resulted in long waits and poor service. Above all, the changes at Legal Aid Ontario entrench the new reality: numbers of certificates issued for family law matters are on a decline that is expected to continue.

⁵⁶ Please see notes accompanying footnote 51, above.

DOMESTIC VIOLENCE ADVISORY COUNCIL

The Domestic Violence Advisory Council (DVAC) was established in 2007 by the Minister Responsible for Women's Issues to provide recommendations to improve the existing system of services to better meet the diverse needs of abused women and their children, and to focus on components and/or issues within the broader system of services supporting abused women and their children. In its final report,⁵⁷ the Council focused on five areas where reforms were recommended:

- access and equity
- education and training
- child welfare
- legal response
- threat assessment and risk management

Within the legal response area, the Council's recommendations identified entry points where services could be improved. A total of 16 recommendations were made about access to legal representation, safety and security, access to information, access to services, and relationships with the criminal court.

In framing its legal recommendations, the Council noted:

Separation is a critical time when many divorcing parents negotiate post-divorce parenting plans. At the most dangerous juncture in their relationship, abused women enter the family law system to make decisions about their children. Current custody laws and family court procedures and practices, emphasizing gender equity that does not exist in woman abuse cases, private dispute resolution and the "best interests of the child" standard, deny the reality of ongoing abuse, are not designed to address women's safety issues, and may also provide abusive men with a forum for separation assault.⁵⁸

SEXUAL VIOLENCE ACTION PLAN

When the government's Domestic Violence Action Plan was introduced in 2004, violence against women advocates expressed disappointment with the fact that it did not also address sexual violence or the intersectionality of most women's experiences of multiple kinds of violence.

The government introduced its Sexual Violence Action Plan (SVAP) in March 2011 to bring a coordinated and collaborative approach to preventing sexual violence and

⁵⁷ Domestic Violence Advisory Council. "Transforming our Communities." May 2008.

⁵⁸ Ibid, p. 64

improving supports for survivors. The SVAP will address sexual assault, human trafficking, and sexual exploitation through technology and the Internet.

The introduction to the SVAP clearly articulates the reality of sexual violence: “Sexual violence is a gender-based crime most often perpetrated by men against women.”⁵⁹

The plan identifies a number of areas where work is needed:

- leadership and accountability
- prevention
- improving services
- strengthening the criminal justice response
- working collaboratively

VIOLENCE AGAINST ABORIGINAL WOMEN

The province has endorsed the Strategic Framework to End Violence Against Aboriginal Women, developed in 2007 by the Ontario Native Women’s Association and Ontario Federation of Indian Friendship Centres. This framework is based on a number of foundational principles.⁶⁰

- violence against Aboriginal women must end
- all people affected by violence against Aboriginal women (victim, abuser, families, witnesses) must have specific supports
- the community as a whole has a central role to play
- violence against Aboriginal women is rooted in systemic discrimination
- a social/health determinants model must be used
- there needs to be government and community coordination and collaboration
- all activities must be directed, designed, implemented, and controlled by Aboriginal women
- implementation of a framework will mean changes in research, legislation, policy, programs, education, community development, leadership, and accountability
- a gender-based analysis must underlie all work coming from the framework
- the capacity of Aboriginal communities and governments to respond to violence against Aboriginal women must be strengthened
- all perpetrators of violence against Aboriginal women must be held accountable and offered culturally-based healing programs

A number of the actions called for in the framework are directly relevant to the family law context. For example: the creation of specialized courts to deal with violence against Aboriginal women; culturally specific sensitivity training for judges, police and

⁵⁹ Government of Ontario. “Changing Attitudes, Changing Lives.” March 2011, p. 3.

⁶⁰ Ontario Native Women’s Association and Ontario Federation of Indian Friendship Centres. “A Strategic Framework to End Violence Against Aboriginal Women.” September 2007, pp. 4 – 5.

court officers; a review of relevant legislation using a gender-based analysis and from an Aboriginal perspective and conducted by a working group of Aboriginal representatives and taking steps to address the over-representation of Aboriginal children in the child welfare system.

A review of progress on the Strategic Framework was released in 2010.⁶¹ The Report Card noted that, while a number of initiatives have been identified as being of high priority, little has been done to actually implement those initiatives. This includes the establishment of an Aboriginal PAR program, a province-wide Aboriginal-specific Domestic Violence Coordinating Committee and an Aboriginal Women's Helpline in the north.⁶²

PUBLIC EDUCATION

The provincial government has made the development of public education on violence against women/domestic violence and the law a high priority. This report provides an overview of two of the largest public education campaigns to date.

Neighbours, Friends and Families was introduced in 2006 as a province-wide public education/awareness campaign. It now has distinct components for Aboriginal and Francophone communities as well as for workplace settings. It is intended to provide communities with information about how to:

- recognize warning signs of woman abuse
- support women and other members of the community who are affected by woman abuse
- find supportive resources in the community
- talk to abusers

Family Law Education for Women (FLEW) evolved from the campaign to end the use of religious laws in the arbitration of family law disputes. The work of that campaign highlighted the need for widespread public family law education and outreach to women

⁶¹ Ontario Native Women's Association, Ontario Federation of Indian Friendship Centres, The Independent First Nations and the Metis Nation of Ontario. "Report Card: A Strategic Framework to End Violence Against Aboriginal Women 2007 – 2010." 2010.

⁶² The Canadian Association of Elizabeth Fry Societies and the Native Women's Association of Canada has examined the situation of women within the Canadian legal system. They describe the "hyper-responsibilization" of Aboriginal women who experience abuse – an approach by the criminal system that "deputizes" women to protect themselves and their children from partner abuse and then criminalizes them when they do just that. See *Women and the Canadian Legal System: examining situations of hyper-responsibility* in the Journal of Canadian Women's Studies, January 2008.

– in particular, isolated and vulnerable women – across the province.

FLEW provides basic information on 12 areas of family law in 12 languages as well as in multiple formats. There are specialized materials for women who face unique challenges due to the cultural or religious practices of their communities.

While the focus of FLEW is not specifically on violence against women, the materials developed in this project are readily accessible and directly relevant to women in or leaving abusive relationships who need easy to understand, basic information about their rights and responsibilities.

DOMESTIC VIOLENCE DEATH REVIEW COMMITTEE

Ontario established Canada's first Domestic Violence Death Review Committee in 2003, as the result of recommendations made in a number of inquests into the murders of women by their former partners (most notably, the Arlene May and Gillian Hadley inquests). The DVDRC operates under the authority of the *Coroner's Act* with a mandate to investigate and review deaths involving domestic violence and to make non-binding recommendations aimed at preventing deaths in similar circumstances and reducing domestic violence in general.

Over the past nine years, the Committee has identified a number of common themes. First, most are both predictable and preventable. Second, most take place when separation is either underway or pending and when there has been a history of domestic violence.

The 2010 report identified "safe separation" as a key theme:

*In many cases, the most difficult decision is whether or not to separate. . . . Victims of domestic violence are at risk staying in the relationship and they are also at risk when separating. Research has indicated that leaving a relationship can lead to further, more extreme abuse and possibly death for the victim and children. . . . The most common risk factor identified in the cases reviewed by the DVDRC from 2003 – 2010 was an actual or pending separation; 78% of all domestic homicides reviewed by the DVDRC during this time involved a perpetrator and victim who were separated, or in the process of separating.*⁶³

⁶³ Domestic Violence Death Review Committee. "Eighth Annual Report." Office of the Chief Coroner, Province of Ontario. 2010, p. 37.

FAMILY COURT SUPPORT WORKER PROGRAM

Ontario's Ministry of the Attorney General introduced the Family Court Support Worker (FCSW) program in 2011, after years of consultations with and advocacy by the violence against women sector, which has provided support to women in family court for decades. This work is often unfunded and added to the top of an already heavy workload of counselling, outreach or transitional support work.

The FCSW program provides funded positions through fee for service contracts with community agencies. Family Court Support Workers provide assistance and support to victims of domestic violence as they move through the family court process.

The program has four objectives:

- to provide supports for victims of domestic violence in the family court process
- to enhance victim safety by reducing the risk of future violence
- to increase the victim's access to services and supports
- to build the core competencies of service providers to support victims who are abused and involved in the family court system.

Workers have a number of responsibilities related to providing information to clients about the family court process and family law: assisting clients with safety planning, recording the history of abuse, through the legal aid process, and supporting clients to follow through on requests received from lawyers. Family Court Support Workers also debrief and discuss court outcomes, lawyer appointments, Family Law Information Centre meetings, consultations with duty counsel and next steps, make referrals to appropriate community agencies, communicate with criminal court based services (in particular the Victim/Witness Assistance Program), communicate with other family court based services, and accompany the client to court proceedings where appropriate.

To date, close to 150 workers have been trained through the English-language training initiative and 13 through the French-language training initiative.

COMMUNITY COLLABORATION

The government has imposed and funded some collaboration at the community level through the establishment of 42 domestic violence coordinating committees across Ontario. These committees bring together all the partners serving abused women to improve local support systems. Membership typically includes the shelter, sexual assault centre and/or hospital based Sexual Assault/Domestic Violence Treatment Centre, family services, police, V/WAP, the Crown, other social services such as child protection and the health and education sectors.

Related provincial policy

As noted above, women leaving abusive relationships must deal with a wide array of

services mandated and administered under provincial legislation and policy. All can either assist her or place roadblocks in her journey to a life free of violence.

SOCIAL ASSISTANCE

Social assistance can be a lifeline for women and their children, especially where the mother does not have employment and child support from the abuser is not immediately available.

However, a 2004 report examining the experiences of abused women in the welfare system, found that, "For many, the experience of welfare is like another abusive relationship."⁶⁴ It also noted that many workers have little knowledge about the dynamics of abuse, which affects their ability to provide appropriate support to clients.

The program guidelines allow women not to apply for child support where there has been violence and there are concerns that such an application could create safety issues for the woman. However, not all workers advise women of this. Even when women are aware of this option, many choose not to disclose the abuse. There are many reasons for this:

It's crazy to have women track men down (for support), you're running from him for God's sake.

I'm scared to disclose . . . if he gets to know this, what would happen to my children or me? This fear always keeps my mouth shut.

They won't tell workers. It's embarrassing. It's shameful.

The most significant over-arching concern about social assistance is that the rates are inadequate, which forces women and their children into unsafe living arrangements, including returning to their abuser because they cannot support themselves and their children adequately.

In addition, if custody is shared or the children spend a significant amount of time with their father (40% or more), this can have a dramatic impact on the mother's income, as the amount of social assistance and Child Tax Benefit she will receive will be reduced.

Upcoming changes will exacerbate an already unacceptable situation: as of January

⁶⁴ Mosher, Janet (principal investigator). "Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System." April 2004, p. v.

2013, the government will be ending the Community Start Up, Maintenance benefit and Home Repairs program, all of which are very important to women seeking to leave abusive relationships and find affordable, decent housing.

Mosher's report makes a number of important recommendations. Of particular relevance to family court, the report suggests that more attention be paid to safety issues associated with a woman making a claim for child support before she can qualify for Ontario Works and that workers be trained to better understand why women are reluctant to disclose abuse.⁶⁵

Women in rural communities face additional challenges and barriers in their relationships with Ontario Works, including an urban bias to Ontario Works policy that "assumes that there are jobs to get, affordable and safe places to live, available childcare, available transportation and that anonymity and privacy are obtainable. . ."⁶⁶

As one participant in the study put it:

The government is doing everything possible to hurt us, to make us dependent. I don't mean dependent on the welfare system, but I mean dependent on men.

HOUSING

Secure, affordable and appropriate housing is critical for women who are making the decision to leave an abusive relationship:

From the early days of acknowledging woman abuse, the knee-jerk response has been "why doesn't she just leave?" Increasingly, it is becoming clear that a lack of affordable and safe housing has a significant impact on women's decision making. Can she find adequate resources to live separately from an abusive partner? For some abused women, leaving becomes a path to homelessness.⁶⁷

As noted in another report, violence against women in their intimate relationships is

⁶⁵ Ibid, p. 67.

⁶⁶ Women Today of Huron. "Woman Abuse and Ontario Works in a Rural Community: Rural Women Speak About their Experiences with Ontario Works." P. 10

⁶⁷ Tutty, Leslie M. et al. "I Built My House of Hope: Best Practices to Safely House Abused and Homeless Women." September 2009, p. 1.

among the most commonly cited causes of homelessness for women and children.⁶⁸

Victims of domestic violence are given priority to social housing under the *Social Housing Reform Act (2000)* through the Special Priority Program (SPP). This offers important support to women fleeing violence; however, there are very long wait lists even so (up to 12 months) and the quality of housing is often very poor. In order to qualify, women must have lived with the abuser within the preceding three months. This requirement, coupled with the proof of cohabitation that is required, make many vulnerable women ineligible. There also appears to be an inconsistent interpretation of the SPP, with women sometimes being denied when they are clearly eligible.

Bill 53, the *Escaping Domestic Violence Act (2010)*, currently with the Standing Committee on Social Policy for review, offers the potential of further support to women leaving a violent relationship. If passed into law, it would require landlords to release tenants who are victims of domestic violence from responsibility for any lease on 28 days' notice. However, this would require proof of police involvement, which would create a barrier for women who choose not to involve the police.

Key issues related to violence against women and family law

Clearly, there are many issues – complex and intersecting with one another – that arise for women in or leaving abusive relationships as they enter and travel through the family court process in Ontario. Much has already been written about these issues, and there is little value in simply rehashing work already done.

Below, we explore those legal issues that seem endemic, given their repeated identification in research, literature, public policy, and women's stories about their lived experiences in the family court system and look towards solutions.

However, before doing so, we must make note of an important, non-legal, issue: women's poverty.

Large numbers of women (12%) in Canada live in poverty. For single mothers, the rate is much higher – 51.6%⁶⁹Inadequate social assistance – particularly since serious cutbacks to social assistance during the mid-1990s and the failure of subsequent

⁶⁸ Metropolitan Action Committee on Violence Against Women and Children. "No cherries grow on our trees: A Social Policy Research Paper for the Take Action Project, a public policy initiative to address women's poverty and violence against women." October 2008, p. 30.

⁶⁹ Statistics Canada. "Women in Canada: A Gender-based Statistical Report." 2010, p. 133.

governments to raise rates even to those in place before those cuts – inadequate enforcement of child support orders, lack of employment opportunities, women’s earning power compared to men’s,⁷⁰ and a lack of affordable, quality child care all contribute to this reality.

Women’s poverty has an enormous impact on women’s experience of violence and their ability to leave it. Many poor women decide to stay in an abusive relationship because they cannot imagine how they could survive if they left:

You feel stuck. You need him in order to pay off rent and your bills. It (poverty) keeps you in the relationship.⁷¹

Having a low income was a factor that prevented me from leaving a violent relationship. I felt how in the hell am I going to do this?⁷²

The METRAC paper also comments that violence limits women’s opportunities by undermining and eroding their capabilities, jeopardizing their physical, psychological and economic security and undermining their power.⁷³

Research conducted by the Social Planning Council of Toronto that examined the situation for low income women of colour in Toronto found that there were many reasons why women of colour did not leave abusive relationships:

*Mothers fear losing custody of their children, because they cannot show enough independent income to demonstrate their ability to provide for them. Some have neither the financial means nor the social capacity to live alone and survive outside of family and community supports. Others have no idea what their rights are, what supports are available for them and where they can go.*⁷⁴

Legal bullying by abusers, which makes an already lengthy and costly family court proceeding longer and more expensive, adds to the poverty faced by women and children.

⁷⁰ Women in Canada earn approximately 72 cents for every dollar earned by men, with women of colour, Aboriginal women and women with disabilities earning considerably less than this.

⁷¹ Metropolitan Action Committee on Violence Against Women and Children. “No cherries grow on our trees: A Social Policy Research Paper.” October 2008, p. 7

⁷² Ibid, p. 7

⁷³ Ibid, p. 7

⁷⁴ Khosla, Punam. “If Low Income Women of Colour Counted in Toronto.” 2003, p. 58

It is beyond the scope of this paper to forge recommendations to end women's poverty; however, we wish to acknowledge the seriousness of this entrenched problem and the need for it to be eradicated.

Legal representation

ACCESS TO LAWYERS

No single issue arises more often as a serious concern among women experiencing violence and frontline violence against women service providers than the lack of access to legal representation in family court.

We contend that 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.

Any strategy to deal with the experiences of abused women in family court must see this as an overarching right to be addressed before examining any other possible recommendations for law reform, policy change or service delivery.

If it is not given this position of prominence, it will be too easy for law and policy makers to focus on improving services and supports at the expense of increasing access to legal representation.⁷⁵

There is no doubt that the number of litigants in family court who do not have lawyers has reached a critical state, with between 50 and 80% of family court cases now involving at least one party who is unrepresented. This is not surprising: the average fee for a contested divorce in Ontario is \$12,000 per party, rising to \$45,000 per party if the case goes to trial.⁷⁶

Much of the responsibility for this rests with Legal Aid Ontario, which has historically underfunded certificates for family law, a pattern it seems determined to continue. Comments from Attorneys General past and present make it clear there is no plan to increase the availability of family law certificates. Many of the family court process "reforms" are designed specifically to accommodate unrepresented parties and even positive initiatives such as the Family Court Support Worker program can be seen as an acknowledgement that increasing numbers of people will be proceeding through family

⁷⁵ Cross, Pamela. "Through the Looking Glass: The Experiences of Unrepresented Abused Women in Family Court." Luke's Place Support and Resource Centre. March 2008, p. 38.

⁷⁶ Law Commission of Ontario. Ibid, p. 23.

court without a lawyer.

The financial criteria to qualify for a legal aid certificate are onerous, as the chart below illustrates:

Family size	Will likely qualify financially for a certificate if annual gross family income falls below:	A contribution agreement might be required if annual gross family income is within these ranges:
	↓ \$10,800	↔↔ \$10,800 - \$12,500
	↓ \$18,684	↔↔ \$18,684 - \$22,500
	↓ \$21,299	↔↔ \$21,299 - \$26,220
	↓ \$24,067	↔↔ \$24,067 - \$30,120
	↓ \$26,714	↔↔ \$26,714 - \$33,960
Single boarders (paying and non-paying)	↓ \$7,100	↔↔ \$7,101 - \$8,200

While slightly less stringent, the financial eligibility criteria to qualify for assistance from duty counsel or summary legal advice through Legal Aid Ontario's toll-free number or at a Family Law Information Centre are also unreasonably low.⁷⁷

As the Law Commission of Ontario's report says, quoting the 2011 Auditor General's Annual Report:

[T]he financial eligibility cut-offs for qualifying [for legal aid] have not changed since 1996 and 1993, respectively. This, combined with an escalation in the average legal billing for each certificate issued, has meant fewer people over the last couple of years have been provided with certificates and more clients have been required to rely on duty counsel, legal advice, and information from Legal Aid Ontario's website for legal services.⁷⁸

Even for those who manage to qualify financially, there is no guarantee that the legal issue they are dealing with will meet LAO's criteria. With the centralization of LAO's service delivery, many violence against women workers report that fewer of their clients are receiving certificates because there is no opportunity to advocate with an Area Director on behalf of a client. Women report long wait times on the telephone when they call the toll-free number, often only to be told they will not qualify for LAO-funded legal

⁷⁷ For example: less than \$18,000 for a woman with no children, less than \$26,999 if she has one child, less than \$31,999 if she has two, less than \$36,999 if she has three and less than \$43,000 if she has 4 or more.

⁷⁸ Ibid, p. 98.

advice or representation. In some cases, women are told that if more than three months has passed since they left their abuser, they cannot cite domestic violence as a grounds to receive legal aid assistance.

On the other side of the table, few lawyers want to accept family law legal aid certificates. The rate of acceptance is both lower and slower for family law cases than it is for criminal law cases. There are a number of reasons for this: the cases, especially those involving violence against women, are long, with insufficient hours generally granted on the certificate. The issues are emotionally draining. The hourly rate paid to lawyers is far lower than the hourly rate they can bill to clients who pay them privately.

The net result is that only the very, very poorest qualify for legal aid assistance and, at the other end of the spectrum, only the wealthy or those who can access the wealth of others⁷⁹ are likely to enter the family court system with legal representation.

Birnbaum and Bala note:

[T]here has been a significant increase in the number of self-represented family litigants, with over half the family cases in Canada's courts now having one or both parties without a lawyer.⁸⁰

They comment that the family court system has in many ways become a two-tier system:

[W]ith those who are wealthier tending to resolve disputes with lawyers outside the court system, and those with more limited means tending to resolve family disputes in a stressed family justice system, often without adequate legal advice or assistance.⁸¹

While most people without lawyers are in that position because they cannot afford to pay for one and do not qualify for legal aid, there are other motivations in play as well. Of most relevance to this paper is the observation made by lawyers and judges that there is a significant gender difference in why parties are not represented in family court proceedings:

These professionals [judges and lawyers] believe that women are more

⁷⁹ It is not uncommon for elderly parents to mortgage their home or borrow money to help their daughter pay for a lawyer or for women to go into debt that will take them many years to repay.

⁸⁰ Birnbaum and Bala, *Ibid*, p. 5

⁸¹ *Ibid*, p. 5

*likely to be self-represented due to lack of finances or of the inability to afford a lawyer [stet], while for men self-representation may be more likely due to wanting to confront a former partner. . . . men's lack of representation is more likely to be a result of the desire to directly engage with their former partner.*⁸²

As one lawyer interviewed for the study put it: "Sometimes abusive men want to be able to have direct contact with their partner."⁸³

Both lawyers and judges noted concerns about a lack of legal representation in cases involving violence. Lawyers observed that when it is the victim who does not have a lawyer, she may be coerced into accepting a settlement that does not adequately protect her or her children.⁸⁴ As one judge said:

*There is always the fear that this category of self rep is not truly or accurately articulating their position because of fear or intimidation.*⁸⁵

Lawyers dealing with an unrepresented party on the other side must tread carefully. In this situation, s/he must take extra care in documenting communication, which can add to the client's costs. Costs also mount because an unrepresented party on the other side means the case takes longer to resolve and is less likely to settle.

Unrepresented parties have implications for judges too:

*There are obligations to assist an unrepresented party without being an advocate – the judge must be very careful to explain the process and evidentiary or procedural issues to self-represented parties – the judge must be especially alert to fairness issues.*⁸⁶

An attitude exists among many in the family law system, including policy makers, that access to legal information is a reasonable alternative for those who do not have a lawyer. However, the research does not seem to support this notion. One litigant interviewed in the Birnbaum/Bala study explained why she is glad she has a lawyer:

There is a lot of information available for people to learn about the

⁸² Ibid, pp. 12 – 13.

⁸³ Ibid, p. 13

⁸⁴ Ibid, p. 23 – 24.

⁸⁵ Ibid, p. 24

⁸⁶ Ibid, p. 15.

court system but reading all of that information is just too much. I might as well go to law school to learn all of these things. I am happy that I decided to get a lawyer.⁸⁷

Both this study and the Law Commission of Ontario report on family law point out the shortcomings in a system that relies on legal information as a replacement for legal representation.

To start, it may be as difficult to access legal information as to get access to a lawyer. Most respondents to a survey conducted by the Law Society of Upper Canada were unaware of public online legal information resources: only one in eight had heard of any of the government sites mentioned.⁸⁸

According to Birnbaum/Bala, only 37% of unrepresented litigants they interviewed had used the Ministry of the Attorney General website and, of those, just 21% found it very helpful.⁸⁹ Fewer than half of these litigants (42%) found the family court information sessions, which are now mandatory, to be helpful for learning about the family court system.⁹⁰ Only 40% used the materials available at the Family Law Information Centres (FLICs), of whom 18% said they found those materials very helpful.⁹¹

One litigant who relied on this information because she did not have a lawyer said:

The information provided is practically in another language. You can't understand it. It's in court legalese and nobody understands it. They can't break it down in laymen's terms and a hell of a lot of these people are not upper class. They probably don't understand 85% of what is written down and handed to them.⁹²

Research has solidly established that the learning needs and abilities of people who have experienced trauma are very different from those who have not, and women are leaving an abusive relationship fit this category. As a result, they face particular hurdles in understanding complicated legal information without assistance from a lawyer.⁹³

⁸⁷ Ibid, p. 17.

⁸⁸ Law Society of Upper Canada. "Listening to Ontarians, Report of the Ontario Civil Legal Needs Project. May 2010. P. 28

⁸⁹ Ibid, p. 19

⁹⁰ Ibid, p. 19.

⁹¹ Ibid, p. 20.

⁹² Ibid, p. 20.

⁹³ Horsman, Jenny. Too Scared to Learn: Women, Violence and Education. McGilligan Books, 1999.

The Law Commission of Ontario's report noted a number of challenges for a system that increasingly relies on legal information as a substitute for legal representation. It found that the FLICs were inconsistent in terms of hours, services provided and quality of service. As well, some users indicated the FLICs were too visible and too intimidating to use.⁹⁴

The report questions whether brochures and other written resources are useful at all, given different levels of education, literacy and confidence in unrepresented parties, as well as the very different facts and circumstances of every family's legal issues.

Unbundling of legal services – a frequent suggestion as a way to make some degree of legal services more affordable to some clients – raises concerns, among them that people may not understand enough about the seriousness or complexity of the legal issues they face to make good decisions about which issues require a lawyer and which can be managed without one.⁹⁵ Indeed, in many cases, people may not even know what legal issues they face.

All of these issues – lack of a lawyer, a partner who self-represents, access to legal information, unbundling of legal services – raise particular challenges for women who have left abusive partners.

These women are often poor, but not poor enough to qualify for legal aid.⁹⁶ They may not know what their options are with respect to legal representation:

*Many women were not aware of their legal rights and didn't know how to access the legal system. . . There is an almost complete lack of options for poor women to get legal support on family law issues.*⁹⁷

Their abusers may choose to self-represent in order to maintain a direct line of communication with the woman and to attempt to continue to control, intimidate, and manipulate her. This creates serious concerns for the woman's physical and emotional safety.

Without a lawyer, she may be unable to present important and relevant evidence or to argue points of law (for example, the provisions of the best interests of the child test that

⁹⁴ Law Commission of Ontario. Ibid, p. 20.

⁹⁵ Ibid, p. 27.

⁹⁶ Ibid, p. 99. According to the Law Commission, 80% of successful applicants for legal aid have incomes under \$10,000. It is harder to qualify for family law legal aid in Ontario than in any other province.

⁹⁷ Khosla. Ibid, pp 73 – 74.

relate to family violence). She may not know she can call expert witnesses or have the financial resources to pay for them.

She may enter mediation because she does not have a lawyer and, without a lawyer to review any agreements reached in this process, she has no guarantee that the outcome upholds her legal rights or that it will keep her and her children safe.

It is more likely a woman may concede on important legal issues because she does not have access to a lawyer to assist her in making these decisions or because she is exhausted from managing the legal process or because her abuser's ongoing bullying of her has worn her down, used up her financial resources, and left her terrified for her safety.⁹⁸

The legal issues are more complex and the appropriate solutions more nuanced in cases involving woman abuse. Access to generic legal information, no matter how good, is not good enough for women in this situation, yet it is all that many have. Women interviewed as part of Luke's Place 2008 research put it baldly:⁹⁹

Then the judge says you have to call a motion. For the love of God, if I have to call another motion, I might as well bring my sleeping bag . . . what motion do I bring, what motion do I need for abuse, what motion do I need for this and that and the other thing? Like, honestly, I'll be on their doorstep forever.

I looked him [the judge] right in the eyes and said I'm not a lawyer. I'm not duty counsel. I'm not him. I am me and I don't understand this. I don't understand your language . . . Your Honour, but with all respect to you, have you ever tried to go and file information and tried to get information from the family information centre?

One of the judges interviewed in the same research project commented:

They [the women] are being asked to participate in a system that they don't understand and that ultimately works against them because they don't understand.¹⁰⁰

⁹⁸ In its research on the experiences of unrepresented abused women in family court in 9 locations in Ontario, Luke's Place Support and Resource Centre found that fully 63% of women feared for their lives through their family court proceedings.

⁹⁹ Luke's Place Support and Resource Centre. "A Needs Gap Assessment Report on Abused Women without Legal Representation in the Family Court. March 2008, p. 20

¹⁰⁰ Ibid.

INADEQUATE LEGAL REPRESENTATION

Many would argue that access to any lawyer is better than access to none, and to some extent that is true. A reasonably competent lawyer, whether or not familiar with the dynamics of violence against women, can at least provide a client with information about the law and court processes, complete required forms, deal with the lawyer on the other side or, if the abuser is self-representing, with the abuser himself, make court appearances and so on.

However, the subtleties, complexities, and nuances as well as the serious and ongoing safety issues involved in violence against women can only be appropriately handled by lawyers who have specialized knowledge, understanding and skills.

It is critical that women receive the level of legal advice and representation they're entitled to – namely information about the legal process, adequate time and respect from lawyers and recognition of the impact of abuse, in each and every step in the process of dealing with custody and access disputes.¹⁰¹

Concern about lawyers' awareness of and attitudes to violence against women was underlined by a recent article in the Law Times, which took the position that false allegations of domestic violence in order to advantage one party's position in family court are a "trend on the rise," leaving Ontario court's to "struggle to identify legitimate complaints."¹⁰²

Joseph Neuberger, a criminal defence lawyer told the reporter:

Over the past 10 years, I have seen an increase in the prevalence of these types of offences with a disturbing trend to use the criminal process as a quick means to obtain exclusive possession of the matrimonial home and thwart custody and access to the children of the relationships.

He claims that he has "established fabrication" in at least 15 per cent of the more than 400 such cases he has defended.

¹⁰¹ Vancouver Custody and Access Support and Advocacy Association. Women and Children Last: Custody Disputes and the Family "Justice" System. 1996, p. 48.

¹⁰² Law Times. "Lawyers alarmed at criminal charges in family cases: Trend on the rise as Ontario's courts struggle to identify legitimate complaints." June 4, 2012.

His position is supported by a family law lawyer, Murray Maltz, who contends that “if you want to play the game ‘I want custody, I want to control the situation,’ often people will take the position, ‘I’m going to call the police.’”

The comment by a third lawyer, who practices both family and criminal law, is perhaps the most troubling. Esther Daniel says:

Domestic violence is something that needs to be taken seriously. But, at the same time, you do have to uphold the integrity of the justice system.

The implication is clear: women cannot be trusted when they raise the issue of abuse, particularly if they call the police and criminal charges are laid, because they are likely doing so to create an advantage for themselves in family court.

Linda Nielson, in her exhaustive 2001 study, points out that one of the dangers of lawyers without the necessary knowledge handling these cases is that they do not understand the importance of the abuse in custody and access cases and so do not gather the evidence needed to raise the issue. In fact, in some cases, lawyers actually discourage their clients from raising allegations of abuse in their pleadings: “(S)urvivors of abuse, primarily women, spoke of pressures to abandon allegations of abuse and claims for denial and/or restrictions on access.”¹⁰³

Her research found what she calls a “siphoning effect”:

*[I]nformation about abuse and irresponsible parenting is excluded or omitted at each stage in the legal process: during lawyer-client interviews, during legal interpretations of those interviews, during preparation of court documents, during negotiations between lawyers, and during the presentation of evidence to judges. Thus, by the time cases reach judges, for decisions or confirmation of ‘consent’ orders, much of the evidence of abuse and irresponsible parenting has been screened from the legal process.*¹⁰⁴

As one woman in a research project conducted in 2000 said:

My lawyer said that the abuse didn’t need to be mentioned and that the court

¹⁰³ Nielson, Linda C. “Spousal Abuse, Children and the Legal System Final Report.” Canadian Bar Association, Law for the Futures Fund. March 2001, iii.

¹⁰⁴ Ibid, p. iii.

didn't like to hear about these kinds of things.¹⁰⁵

Custody and access

Despite considerable progress in the areas of law reform and case law, custody and access remain highly problematic for women with children who leave abusive partners.

Unlike some other jurisdictions, Canada has no formal presumption in favour of joint custody or shared parenting. Nonetheless, women often experience their custody case as though they have to justify their reluctance to co-parent with an abuser. Frontline workers report that the women they support through family court routinely feel pressured to accept a joint custody/shared parenting outcome even in the face of documented, serious, and ongoing post-separation abuse by their former partner.¹⁰⁶

Ontario's requirement for judges to consider family violence as part of the best interests of the child test has been described earlier in this paper. This revision to the law has created an important and potentially effective tool to ensure that proper consideration is given to this issue. However, "many judges, lawyers and other professionals tend to underestimate the impact of woman abuse on children,"¹⁰⁷ with the result that joint custody orders are not uncommon, even in cases involving woman abuse.

Problematic as the issue of woman abuse is in custody deliberations, it is even more so in access determinations. Neilson's research found that:

*It [woman abuse] is considered far less important in access or contact matters. Instead, maximum contact seems to be considered a right.*¹⁰⁸

It is her conclusion that maximum contact presumptions should be limited to non-abuse cases and to parents able to demonstrate an ability and desire to provide responsible care for their children. As she writes:

The current focus on rights to contact and the onus to prove continuing and or additional harm appears, in such cases, to be grounded less in

¹⁰⁵ Sinclair, Deborah. "In the Centre of the Storm: Durham Speaks Out." (2000) p. 30.

¹⁰⁶ This information has been gathered anecdotally in discussions at the Ministry of the Attorney General funded Family Court Support Worker trainings held across Ontario between December 2011 and June 2012. Approximately 150 frontline workers providing family court support to abused women, many of them for more than two decades, participated in these trainings and discussions, sharing devastating stories about the family law experiences of the women they work with.

¹⁰⁷ Cross, Pamela. "With the Disruptive Force of a Hand Grenade: Women's post-violence experiences of recent legal and process reforms in Ontario." Barbra Schlifer Commemorative Clinic. March 2011, p. 25.

¹⁰⁸ Neilson. Ibid, p. ii.

*concerns about the welfare of children than in concerns about parental rights. Once partner abuse (and or irresponsible parenting) is established, the onus ought to be on the parent with primary responsibility for the abuse or irresponsible parenting to demonstrate how they can ensure that contact will be safe and beneficial for the children.*¹⁰⁹

When women raise the issue of abuse or refuse to follow court-ordered access arrangements, parental alienation syndrome (PAS) can become a convenient label for the father to put forward. Once raised, the case becomes refocussed on the mother's post-separation behaviour and not on the underlying issues in the family that have led to this point. This labelling makes it even more difficult to raise legitimate issues of abuse, violence and control.

Mothers must spend years monitoring access to ensure that the safety and well-being of their children is not jeopardized by the abuser when they are with him. When they have concerns, they have great difficulty finding anyone who will take them seriously. If they deny access because of their concerns, they run the risk that the abuser will take them back to court for breaching the order.

It is not uncommon for an abuser to use his access time as a means to continue to control and intimidate the woman. He may use a number of tactics: peppering the children with questions about their mother, her friends and her activities; speaking badly about the mother to the children; trying to bribe or intimidate the children into living with him; engaging in verbal, emotional, or physical abuse towards the mother during access exchanges; failing to return the children on time; threatening not to return the children; making false allegations about the mother to various systems such as child protection; taking the mother back to court repeatedly for no good reason, and so on.¹¹⁰

Family court process

[You] walk into the family court and you feel strangled and you hit a brick wall and someone is stepping on your throat.¹¹¹

Procedure, or law in practice, is not merely process of action, it is action embedded in social as well as legal context. The social context of legal procedure or action – the social attributes of the participants (clients, lawyers, judges, mediators), the relationships among them, and the attributes of the legal system itself – all play a part in shaping both the

¹⁰⁹ Ibid, p. 209.

¹¹⁰ Ibid, p. 53 – 57.

¹¹¹ Luke's Place, March 2008. Ibid. Focus group participant describing her experience with family court process.

*delivery and receipt of law and legal services. The contention is that the demands of the legal system and the relationships among mediators, lawyers, judges, court staff and family law clients are as important to an understanding of law in practice in abuse cases as are legal rules, principles or procedures.*¹¹²

As Neilson says, family court process can be as problematic as family law – and in some cases, more so – for women leaving abusive relationships. A process that encourages friendly litigation as well as friendly parenting can have deadly consequences for women with persistently abusive partners.

Furthermore, family court tends to focus on encouraging families to “move on,” to put the past behind them. For a woman whose former partner continues to abuse her after they separate, there is no clear delineation between before and after; women in this situation can only “move on” when the systemic response acknowledges the ongoing safety issues and puts measures in place to limit them.

Unfortunately, not enough professionals understand the danger for women and their children following separation from an abuser. Family court processes do not adequately acknowledge the unique needs of women who have been abused. As a result, processes themselves place women at risk, court orders often do not address the very real safety issues for women and children, and the enforcement (or lack thereof) of those orders further perpetuates the problem.

*Enough can't be said about the roadblocks spouses and judges throw at you when you are not really able to think your way out of a paper bag some days. Judges hold the power and do not assess cases carefully enough to see that stalling has been going on or that there is a lack of good faith [on the part of the abuser] before they force women out of a system that should be protecting them.*¹¹³

POST SEPARATION VIOLENCE

One of the most serious and troubling issues for many women who have left an abusive relationship when they are dealing with the family court system is the misapprehension held by many professionals in that system that the abuse ends at the time of separation. In fact, post-separation violence – any tactics used by an abuser that stop a woman

¹¹² Ibid, p. 64.

¹¹³ Comment from a member of the Luke's Place Women's Advisory Group, who reviewed this paper and provided feedback, about her own experience with family court. July 2012.

from leaving, retaliate for her departure or force her return – can have significant long-term consequences and can even result in death.

Women and their children are often left unsafe because the abuser's behaviour is not recognized by those who have the power to challenge and control him. And yet, as is well known, the rate of homicide risk for women increases six-fold when they leave an abusive partner. The first two to six months after separation are often the most dangerous in terms of both lethal and non-lethal but serious violence.

Threatening violence is a common tactic of an abuser. Even if he does not carry out his threats, the fear created by the threat itself can be extremely damaging to the woman's sense of safety and will have an impact on the decisions she makes, because her focus will be on protecting herself and her children above everything else.

This initial period of separation, when the violence continues and possibly escalates, is also when separated couples are the most likely to be involved in difficult and contested family court proceedings. Emotional and stressful for any separating couple, these proceedings can take on a deadly tone for families where there has been a history of woman abuse.

It is not only women who are affected by post-separation violence; it has a significant impact on children, too. Unfortunately, interventions by police and child welfare agencies are often focused on the abuse children witness prior to the parents' separation. Separation is seen by many as the end of the violence or, minimally, as removing the immediate risk to the children. There is an expectation that, at this point, mothers can and should protect their children from exposure to further violence and that any exposure to ongoing violence is a failure on the part of the mother.

While children may face fewer episodes of physical violence post-separation, this is the time when they, too, are at the greatest risk of increased severity of harm, including death or abduction.

When women report their concerns about their children they often find that they are not taken seriously or that they are seen as attempting to circumvent the legal system. The abuser may even make an allegation of parental alienation against the mother.

Outside the courtroom itself, the abuser uses the children as pawns in what can become a deadly game as he attempts to extend his hold over his former partner. Access exchanges can be dangerous and terrifying – women are verbally abused,

threatened, beaten, and sometimes killed. Any communication about the children provides the abuser with an arena for his violence.

IMPACT ON WOMEN

Women who have experienced abuse enter the family court process severely disadvantaged. They require specialized support if they are to emerge with effective outcomes that will keep them and their children safe and enable them to move on to violence-free lives.

In the family court context, abusive men turn to new tactics to maintain their power and control. This includes the increasingly well-known phenomenon of legal bullying, in which the abuser uses the family court process itself as a means to intimidate, harass and induce fear in his former partner.

Ongoing fear leads to trauma, which can create further challenges for a woman who is involved with family court proceedings. She may have difficulty concentrating on her case; listening to and retaining the information and advice her lawyer is providing; accepting strategies that are presented to her. She may appear hard to get along with or unreasonable. She may engage in avoidance behaviours or be unreliable in terms of showing up for appointments or completing paperwork when required. Her affect may be flattened, with the result that she appears disengaged or even uncaring about her children or the outcome of her case. She may make decisions that seem counterproductive to her best interests, simply because she cannot bear for the case to continue on and on. She may even be hostile to those who are supporting her.

All of these behaviours can combine to sabotage a woman in family court, particularly if her abuser – as is common – is charming and gracious to those he encounters and she appears to be unreasonable, suspicious, withdrawn, and/or hostile.

Many women fear that they will not be believed because the abusive partner can be very charming and convincing. Abusive men threaten that they will obtain custody of the children if the woman does not give up her financial rights. This can be a deadly combination for women, who may assume their partner's version of events will be given more credibility than their own, and who will do anything to make sure they maintain custody of their children.

LEGAL BULLYING

When an abuser uses the family law and court processes as a strategy to try to maintain his power and control over his former partner, it is called legal bullying. There are few protections in the family court process to stop him. Those that do exist are

underused by lawyers and judges, with the result that the process itself can be seen to encourage bullying.

Commonly, a legal bully may choose to represent himself in order to maintain a high level of contact with his former partner. Delaying the process by failing to file documents in a timely manner, refusing to follow court orders, bringing the woman back to court repeatedly on motions that have no chance of success, and making malicious reports about her to systems such as child protection and social assistance are some other common and effective tactics used by an abuser – none of which is barred by the family court process.

His overarching goal, which he often achieves, is to maintain his control over his partner, to intimidate her, to prevent her from moving on with her life and/or to wear her down to the point she agrees to return to him or to accept an inappropriate settlement. As one woman described her experience in a focus group held by Luke's Place:

[T]hat's what they [the abusers] do and they bully and they bully and they bully until you will break.¹¹⁴

A woman's advocate interviewed in the same research project had her own comment about legal bullying and family court process:

It keeps coming back to the fact that, if the person who is abusing the system is not being held accountable, there are so many loopholes in the system that allow him to get away with it.¹¹⁵

The very nature of family law makes it difficult to deal with legal bullying. There are many legitimate reasons to return to court over time to deal with changes in the circumstances of the family that could mean a variation to custody, access or support is in order. Because family law is so open-ended, it is easy for an abuser to find ways to manipulate the system and the process.

ALTERNATIVE DISPUTE RESOLUTION

The ongoing focus on alternative dispute resolution (ADR), mediation in particular, compounds difficulties, as many women worry that they will be seen as uncooperative if they decline to participate.

¹¹⁴ Luke's Place Support and Resource Centre. "Needs Gap Assessment." March 2008.

¹¹⁵ Ibid.

In some family law cases, mediation can be better than going to court. Participants can have more control over their cases and the final settlement, and mediation can be faster, cheaper, and more private than a court case.

However, it is not appropriate for all kinds of disputes. In particular, it may not be appropriate if the woman's partner was abusive or violent, or tries to bully or scare her. If one partner has more power than the other (whether because of abuse, level of education, self-confidence, familiarity with Canadian laws, or ability to speak English), mediation does not necessarily offer all of the protections that may be available in a court proceeding.

Mediation is only likely to be successful if both participants can listen, be honest in their communications, and are willing to compromise in order to reach an agreement that is acceptable to both of them. It is not likely to be successful for a woman who has left an abusive partner, because he can use the process to continue to manipulate, intimidate, and control her to get what he wants.

By its very nature, ADR assumes the people have a relatively equal ability to negotiate about important issues. If a woman is threatened or intimidated by her abusive partner, she may be coerced into making agreements that do not ensure safety and freedom from control for herself and her children. Women often hope that this process will help them resolve issues with an abusive and controlling spouse more quickly and may reduce their demands in the hope of reaching an easier settlement, only to find that the abuser continues to exert control and make more demands. This can replicate the dynamics of abuse, and severely disadvantage the woman and her children.

The woman may still be experiencing threats and may still fear for her own safety and her children's safety, given past abuse, and/or ongoing abusive behaviour and threats of abuse. When a woman has been previously raped or assaulted, it can be very difficult for her to speak up about her needs or her fears in front of the abuser in the mediation process. Even in shuttle mediation (where the mediator meets with the parties in separate rooms and goes back and forth), if her reports or requests are communicated to the abuser, she may be placed at risk of further abuse or harassment.

PROCESS REFORM

It is clear the family court system is broken. As former Attorney General Chris Bentley said when he introduced his four pillars of family court process reform in November 2009: "[T]he system has for many become unaffordable, for many is too slow, for many is far too combative, a system that really does need a very significant structural

change.”

Chief Justice of Ontario Warren Winkler was even more blunt in his remarks to the opening of the courts in 2010:

I do not believe [the changes to the family law system] can be achieved by tinkering at the edges of the existing family law system or by grafting new procedures and services onto the existing system.”¹¹⁶

As further reforms are introduced and implemented, they need to reflect the realities of violence in Canadian families and of which families are turning to the family courts for assistance in resolving their family law disputes. In other words, they must be designed with violence against women at their centre.

Intersectionalities

This paper provides a gender-based analysis set within an intersectional feminist framework, so it is important that it discuss some of the many ways in which intersectionality can arise for a woman leaving an abusive relationship.

DEFINITION OF VIOLENCE AGAINST WOMEN

How we define violence determines how we identify solutions. A definition that is too narrow – for instance, a gender-neutral definition of domestic violence – will not lead to effective strategies for responding to and preventing violence that is gender-based. However, a gendered definition alone is not sufficient. Increasingly, women entering the family court system in Ontario – or, of equal or greater concern, women who do not enter that system – are fleeing diverse forms of violence, not all of which have been correctly or adequately acknowledged:

Diverse forms of patriarchal violence designed to control a woman’s movement, sexuality, life choices and sometimes her ability to remain alive, are not addressed by conventional definitions of “domestic violence” (intimate partner abuse). Forms of violence that are intended to control women’s behaviour and sexuality (such as those named as “honour-based”) are increasingly challenging the 1980s definition of partner assault as the most salient form of violence against women. As a result of staid paradigms, some communities of women find themselves either under-responded to or inappropriately responded to by a reflexive attribution of violence to ‘culture’: this manifests itself equally as a reluctance to

¹¹⁶ Law Commission of Ontario. Ibid, p. 84.

*‘interfere’ or as an over-intrusive response that demands severance from her community and her culture. This is a serious issue that can leave a woman in an impossible position of having to choose between safety and her community. The continuum of violence that women experience must be seen as such, and our services need to adapt openly and with nuance to this changed environment.*¹¹⁷

THE DIVERSITY OF WOMEN

Women enter the family court process from a wide and diverse range of circumstances. Most women’s lives are an intersection of multiple diversities, so their situations cannot be defined by one characteristic or factor. Women may leave an abusive relationship at any age, from very young to very old. They live in rural communities, small towns, and large urban centres. They speak many languages and, for many, English is not one of them. Women live with a variety of abilities, disabilities, strengths, challenges. They have different skin colours and different legal statuses in Canada. Some women are part of cultures that live with the history of Canada’s genocide of Aboriginal peoples. Some women come from deeply religious communities. Some women come from cultures with very different definitions of family, gender roles and violence which can affect the kinds of violence they experience and the societal and legal responses to those kinds of violence.¹¹⁸ Many women are poor, while others are financially comfortable or even wealthy.

Legislation exists to address some of Ontario’s diverse communities. For example, the *Accessibility for Ontarians with Disabilities Act (AODA)* provides a formal, statutory framework to ensure equal access for people with disabilities. However, this formal framework does not, yet, mean women with disabilities can expect substantive equality. In fact, a woman with disabilities who leaves an abusive relationship can expect to face many challenges and barriers. She may have difficulty finding a shelter or short- or long-term housing that can accommodate her needs. Her abuser/partner may also have been her primary caregiver. She may face a child protection system that doubts her ability to parent effectively, especially if her abuser raises allegations about her fitness as a parent. These same issues may arise in her custody and access case.

While the *French Language Services Act (FLSA)*, as the *AODA (Accessibility for Ontarians with Disabilities Act)*, sets out a formal, statutory framework with respect to the rights of French-speaking Ontarians, there are similar limitations to the achievement

¹¹⁷ Barbra Schlifer Commemorative Clinic. “Justice Done,” p. 7

¹¹⁸ For instance, women in some immigrant communities must deal with forced marriage either in Canada or in their country of origin, polygamy and its impact on family law issues such as property division and spousal support, and violence based in what the culture may call “family honour.”

of substantive rights.

A report prepared by Action ontarienne contre la violence faite aux femmes looked at services for francophone women in Ontario and concluded:

*The limited access to French-language violence against women services throughout the province, despite the requirements of the French Language Services Act, raises the question of equity.*¹¹⁹

Only 5 of 96 shelters for battered women and 3 of 34 sexual assault centres in Ontario offer a range of full-time anti-violence services. There is no French-language second stage housing.¹²⁰

The report sets out a number of guiding principles for the development of French-language violence against women services, starting with the right of women to receive services in French regardless of where they live.

While these principles are based in the statutory rights set out in the FLSA, they could be applied to the situations of other women whose first language is neither English nor French.

The Law Commission report identified a number of challenges for Aboriginal people attempting to use the family court system, all of which apply to Aboriginal women leaving an abusive relationship. As the report notes, especially for Aboriginal people living in remote locations, physically accessing the system alone is a serious challenge. There are also cultural, educational, and language barriers, with little recognition in most family law legislation of Aboriginal histories or perspectives.¹²¹

There are some very specific challenges for Aboriginal women with abusive partners. These include issues with respect to enforcement of provincial court orders on reserves, which fall under federal jurisdiction, division of matrimonial property on reserve, and cultural beliefs that place a high value on keeping the family together and providing healing opportunities for all its members.

It is true that there are patterns to men's abuse of women. Nonetheless, each woman's experience of violence is also unique to her; creating yet another diversity of

¹¹⁹ Action ontarienne contre la violence faite aux femmes. "Doing so much with so little . . . Overview and profile of French-language violence against women services (1994 – 2004)." December 2004, p. 24.

¹²⁰ Ibid.

¹²¹ Law Commission of Ontario, Ibid, p. 48.

circumstance. The tactics and patterns of abuse are different, resources available to the woman and the abuser are different, the capacity of each of them to manage possible legal outcomes is different.

This reality is poorly understood by the law and the legal systems and processes, with the result that legal solutions are often of the cookie-cutter or one-size-fits-all variety. These solutions are seldom appropriate and are often set aside, ignored, or breached by the parties, leaving women and children once again at risk of ongoing violence and abuse.

MULTIPLICITY OF LEGAL ISSUES

If there was ever a time when the legal issues arising for women leaving abusive relationships were simple, those times are long gone. Issues that arise within family law itself are complex and overlapping – often violence in the family has intergenerational aspects to it; the woman may be entering the family court process reluctantly, still wishing and believing her partner can stop abusing her; poverty may make notions of child and spousal support a theoretical nicety with no semblance of reality, and so on.

But for many women, family law is but one of the legal issues she must deal with. If she is a newcomer woman, she may need to sever her refugee claim from that of her partner, clarify or change her sponsorship status, or find a new immigration lawyer who does not act for her former partner. Her partner may be threatening to expose her lack of legal status in Canada to the authorities, which could increase her chances of deportation. She and her children may have different citizenships or immigration status in Canada. Her partner may threaten to take the children and return to the family's country of origin.

Other women are involved with child protection proceedings, which can have an impact on custody and access and other family law issues.

For some women, there are criminal court proceedings. She may be involved as a witness, willing or not, in a case in which her partner has been charged or she may be the accused, if her partner has persuaded police that he is the victim and she the perpetrator of the abuse.

A woman may also find herself involved with quasi-legal systems ranging from the Criminal Injuries Compensation Board,¹²² the Landlord and Tenant Board,¹²³ Ontario Works, housing authorities, and others.

¹²² If she has filed a claim for compensation as a result of the abuse she has experienced.

¹²³ For instance, if she has had to break a lease in order to leave her abuser.

Each of these systems alone is complicated to negotiate, especially for a woman who is dealing with ongoing fear of violence on the part of her abuser and whose abuser may be attempting to sabotage her efforts to move on.

In combination, these systems become overwhelming. What happens in one has an impact on what happens in another, but often the woman does not know what information is shared and what is not or how what happens in one system/process can affect what happens in another. Each system expects her to function as though it is the only system with which she is dealing. Few, if any, of them assist her in navigating through more than one system at a time. She may need a different lawyer for each legal system with which she is involved. This is, of course, an economic hardship but it also adds to the complications the woman must manage. Her family law lawyer, for instance, may know nothing about immigration law and vice versa, so each lawyer may be providing advice that is appropriate for her/his area of law but that might not be helpful in the other areas of law the woman is dealing with.

The results can be devastating: orders from one court or system conflict with another; information that should be shared is not, with the result that women's and children's safety is compromised and information that should not be shared is and women's privacy is breached.

And, not uncommonly, women disengage from all systems because it is simply too much to manage. In these situations, professionals in the various systems often see the woman as unreasonable or uncooperative rather than understanding why she has withdrawn, and women are left with few or no protections for themselves and their children.

What other jurisdictions are doing

One of the most striking observations of an even cursory review of what is happening in other jurisdictions is that women's experiences and the failures of the legal system to respond appropriately in cases involving woman abuse are remarkably similar.

Australia

Australia introduced major changes to its custody and access legislation in 2006.¹²⁴ These changes included a new "friendly parent" provision, a presumption in favour of shared parenting and a more restrictive definition of family violence. As described in a

¹²⁴ Note: Family law in Australia is federal.

2010 Australian research report:

*Some aspects of this legislation . . . led to concerns about whether victims of domestic violence would be able to raise these concerns in family law proceedings, despite explicit reference in the legislation to the need to protect children from child abuse and from exposure to family violence.*¹²⁵

In looking at the impact of the 2006 reforms, Laing conducted intensive interviews in 2008 with women who had turned to the family court system after leaving an abusive relationship.

The report identifies five key themes:

- Violence against women and children is interconnected, with post-separation violence often taking place when children are transferred from one parent to another;¹²⁶
- The legal response is a complex and uncoordinated system. Women have to navigate a fragmented and uncoordinated service system rife with delays and barriers to accessing accurate information. In particular, they noted a lack of coordination between the state civil protection order system and the family courts and between the state child protection agencies and the family courts;¹²⁷
- Those in the legal and related systems hold a range of beliefs about women, violence and family law, in particular post-separation parenting, that shape how women's concerns about safety were viewed. Some of these beliefs are that:
 - children need a relationship with their fathers even when violence is present,
 - women fabricate allegations of child abuse and domestic violence,
 - mothers attempt to stop contact, including by alienating children from their fathers,
 - women should not raise allegations of violence and abuse in the family law system,
 - shared care or at least some contact is inevitable no matter what violence or abuse has occurred prior to separation, and this can be negotiated;¹²⁸
- There is a systemic lack of understanding about domestic violence dynamics and consequences. This includes a lack of recognition of domestic violence tactics and women's traumatic responses to those tactics;¹²⁹ and

¹²⁵ Laing, Dr. Lesley. "No way to live: Women's experiences of negotiating the family law system in the context of domestic violence." University of Sydney. June 2010, p. 4.

¹²⁶ Ibid, p. 7.

¹²⁷ Ibid, pp 7 – 8.

¹²⁸ Ibid, pp. 8 – 9.

¹²⁹ Ibid, p. 12

- The flaws in the system create significant consequences for women and children. Women are silenced about violence and abuse; there is inadequate risk assessment, including a failure to focus on the safety of either women or children; the abuse takes an emotional toll on children who are often denied counselling; women experience a significant emotional toll and parent under adverse conditions; inadequate responses in one part of the system flow into the family court and perpetrators are not held accountable.¹³⁰

The research report ends with a number of recommendations aimed at addressing these inadequacies. Laing calls for:

- national coordination of strategies to keep women and children safe
- legislative reform with respect to the friendly parent provision and the definition of family violence
- training for family law professionals
- improved responses from state-level agencies, and
- community-wide education

In October 2010, the Law Reform Commission of Australia and the New South Wales Law Reform Commission released two reports addressing the legal response to family violence.¹³¹

These developed out of an inquiry into family violence conducted by the Australian Law Reform Commission and the New South Wales Law Reform Commission, which had the objective of improving safety for women and children in the context of family violence through recommendations for reform of legal frameworks, including education, information-sharing, and other measures to improve police and prosecutorial practice.

Family law is but one of several aspects of women's and children's safety addressed by the Inquiry, and the recommendations reflect this broad mandate. Of particular interest to this paper are recommendations for:

- a common interpretative framework, core guiding principles and objects, and a better and shared understanding of the meaning, nature and dynamics of family violence, including a recognition that violence within families is predominantly committed by men
- corresponding approaches in different jurisdictions
- improved quality and use of evidence
- increased specialization of judges and legal services

¹³⁰ Ibid, pp. 13 – 15.

¹³¹ "Family Violence – A National Legal Response" and "Family Violence and Commonwealth Laws – Improving Legal Frameworks."

- education and training
- development of a national family violence bench book¹³²
- a more integrated legal response to family violence, including better information sharing and coordination
- establishment of a national register of relevant court orders and other information.¹³³

In 2011, the Australian government amended the 2006 shared custody provisions to emphasize safety as the priority. Funding was also established for a sophisticated screening system for domestic violence to keep victims safe.

Great Britain

The past two decades have seen considerable discussion about shared parenting presumptions in Great Britain, as has been the case elsewhere. No such presumption exists as of yet; however, in February of this year, the government introduced reforms that would make a presumption of shared parenting legally binding:

*Some claim Downing Street has been eager to demonstrate that the government is responsive to claims by fathers' rights groups that women receive more favourable treatment in family court disputes.*¹³⁴

This reform flies in the face of a study commissioned by the government to investigate these matters.¹³⁵

Not surprisingly, there are been considerable opposition to these proposed reforms. *Guardian* columnist Ellie Mae O'Hagan wrote:

*[I]t seems counterintuitive for a government to introduce a set of policies that are predicated upon the belief that we all fit into the mould of a traditional nuclear family. . . . Life isn't perfect, and laws made on the basis that it is trap vulnerable people in situations they can't escape from. If the [government] wants an ideal, it should consider a society where women are safe, valued and happy.*¹³⁶

¹³² Such a tool for judges already exists in Canada as the result of work done by the National Judicial Institute.

¹³³ "Family Violence - - A National Legal Response, pp. 16 - `7.

¹³⁴ The *Guardian* newspaper. "Family court pioneer shared parenting orders." February 9, 2012 *The Guardian*.

"Shared custody: why play happy families when it can be dangerous?" May 2, 2012.

¹³⁵ Norgrove, David. "Family Justice Review." November 2011.

¹³⁶ The *Guardian*. "Shared custody: why play happy families when it can be dangerous?" May 2, 2012.

O'Hagan later points out that, in fact, there is no evidence to suggest that courts are biased against fathers: in 2010, she says, only 300 of 95,000 litigated custody cases (and this is only 10% of all child custody cases) resulted in the father being prevented from seeing his child. She further cites a 2008 study that showed fathers almost always get what they are asking for when they make requests for contact.

On a more positive note, a recent legal aid bill that would have restricted legal support for victims of domestic violence was defeated by the House of Lords in March of this year.¹³⁷ Under the proposed but defeated provisions:

*[S]omeone who has made use of a women's refuge would no longer have been able to use that experience as evidence of domestic abuse. Nor would police attendance at a domestic violence incident or medical records have been deemed sufficient proof of eligibility for legal aid.*¹³⁸

In speaking against the revision, former attorney general Lady Scotland warned that it would:

*[r]isk turning the clock back by at least a decade and placing a number of victims at unacceptable risk . . . we know from a recent survey that 54.4% of victims today would not get through the evidential gateway created by this bill.*¹³⁹

Also speaking against the bill, Sadiq Khan, the shadow justice secretary for the Labour Party, said:

*The government has shown itself out of touch throughout the bill, refusing to listen to [women's organizations] and victims of abuse. The Tory-led government have proven themselves to be out of touch with the needs of women in the criminal justice system on a number of occasions and they need to accept this vote and get on with the important work of actually protecting victims from abusers.*¹⁴⁰

In 2011, the United Kingdom Supreme Court made an important decision with respect to public policy related to violence against women when it decided that a woman and her children should be permitted to access subsidized housing after they fled an

¹³⁷ The Guardian. "Legal aid bill defeated in Lords." March 5, 2012.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

emotionally abusive situation.

The housing authority had initially denied the woman's application because officials deemed her not to be homeless since her husband had not actually hit her or threatened to do so. In making its decision, the court said that it would ensure victims would not have to stay in homes where they are at risk of harm. The court unanimously ruled that domestic violence in homelessness cases includes psychological as well as physical abuse.¹⁴¹

United States

There are a number of interesting American initiatives with respect to responding to and preventing violence against women.

The *Violence Against Women Act of 1994 (VAWA)* is a federal law that provides support for a number of initiatives aimed at responding appropriately to and ending violence against women. One such support is the establishment of an Office on Violence Against Women within the Department of Justice. Despite repeated attempts by Republican governments to overturn the *Act*, it has been consistently upheld and renewed.

The *VAWA* is the result of grassroots efforts by violence against women advocates, law enforcement agencies, prosecutors, courts, and lawyers. It emphasizes a coordinated community response to all forms of violence against women and funds services to protect victims of domestic violence and sexual assault as well as the work of community-based organizations engaged in work to end violence.

With respect to the legal sector, the American Bar Association's Commission on Domestic Violence has the mission of increasing access to justice for victims of domestic violence, sexual assault and stalking by mobilizing the legal profession. The Commission is a permanent, funded entity with paid staff. Some of its activities include the development of curriculum on domestic violence for law schools, training for lawyers, research, and leading law reform initiatives. It provides an important voice and resource within the legal and policy sectors.¹⁴²

A 2003 study examined the legislative approaches of each state to custody cases involving allegations of domestic violence. The report begins by stating:

There is ample evidence that judges fail to take the violence seriously and award sole or joint custody to wife beaters. . . . Many judges believe that women either exaggerate

¹⁴¹ *Yemshaw (Appellant) v London Borough of Hounslow (Respondent)* [2011] UKSC 3.

¹⁴² www.americanbar.org/groups/domestic_violence.html

*men's violence or otherwise deliberately alienate their children from their fathers to gain a custody advantage.*¹⁴³

The researchers found that 46 of 50 states and Washington, DC had adopted one of two regulatory schemes in custody cases involving domestic violence:

- i. A rebuttable presumption standard (10 states) or
- ii. A factor test approach (34 states and the District of Columbia)

The remaining four states did not include considerations of domestic violence in their custody statutes.¹⁴⁴

Where there is a rebuttable presumption, the law states that sole custody by or joint custody with an abusive parent is not in the best interests of a child. Some go farther to say that unsupervised access by an abusive parent is not in the best interests of the child, and any access arrangements must protect the safety of both mothers and children.¹⁴⁵

An abuser can rebut the presumption by, for instance, satisfying the court he has successfully completed a treatment program for batterers.

Where the legislation uses the factor test approach, domestic violence is one factor for judges to consider. In some cases, the legislation requires the domestic violence factor to be weighted more heavily than others, but most mandates that all factors are weighted equally.¹⁴⁶

The paper points out that one of the weaknesses of the rebuttable presumption is that women who are improperly charged become labeled perpetrators of domestic violence and now must rebut the presumption in their custody case.

The authors identify the primary weakness of the factor test as the latitude for judicial discretion, which carries with it the real risk of judicial bias influencing the custody and access decision inappropriately.

¹⁴³ Levin, Amy and Mills, Linda G. "Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws." *Social Work*, Volume 48, Number 4, October 2003, p. 463.

¹⁴⁴ *Ibid*, p. 464.

¹⁴⁵ *Ibid*, p. 467.

¹⁴⁶ Ontario uses a factor approach. It was not until 2006 that family violence was included as a factor. Unlike the American experience, the legislation does not speak to how the several factors are to be weighted as against one another. This is a decision made by the judge depending on the facts and circumstances of the family.

Strategies for change: working within flawed systems

*Domestic violence remains a serious concern, despite many efforts to address it, and must be taken into account in considering the responses of the legal system to the breakdown of families . . . It can be the reason for family breakdown, while in some cases the family continues with a constant threat of domestic violence and its impact on the victim, usually women, and children. It can continue after the family separates.*¹⁴⁷

An environmental scan conducted by Luke's Place in 2011 examined a number of changes in the various legal systems that have an impact on women experiencing violence. The research identified that the violence against women sector is often the first to identify problems, including unintended negative consequences, of those changes and that, although the sector does its best to respond to those problems, its solutions are often short-term because of a lack of adequate resourcing.¹⁴⁸

The primary purpose of this paper is to provide a gender-based analysis of Ontario family law and family court process and violence against women to assist those engaged in frontline work supporting women involved

Such an analysis makes it abundantly clear that change must happen at every level of family law and family court process if the needs of families dealing with woman abuse are to be met appropriately.

With one important exception, it is not the place of this report to repeat excellent recommendations for both short- and long-term change already made in previous reports referenced throughout this paper. We encourage readers to review those documents.¹⁴⁹ Rather, it suggests some new strategies or variations on old strategies that are intended to assist women and others within flawed systems and move us closer to comprehensive systemic change.

Above all, these proposals reflect a gender-based analysis set within an intersectional feminist framework and understand the profound limitations of the present court system.

¹⁴⁷ Law Commission of Ontario. *Ibid.*, p. 10.

¹⁴⁸ Luke's Place Support and Resource Centre. "The Impacts of Recent Law Reforms on Abused Women Involved in the Family Court Process in Ontario: An Environmental Scan of Violence Against Women Service Providers." October 2011.

¹⁴⁹ In particular, the research and forum reports produced by Luke's Place and the Barbra Schlifer Clinic between 2008 and 2012, where detailed recommendations for specific and systemic change to family law, family court process and related laws and systems have been developed by violence against women and women's equality advocates from across the province.

Any suggestion for law, policy, or process reform set out below must be read with that as the starting point.

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

The issue of access to effective legal representation has been made earlier in this paper and recommendations about this have been made many times. Nonetheless, we feel this issue is so important that it must be raised again here.

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.

Legal Aid Ontario must take steps immediately to:

- change the financial eligibility criteria so women who are poor or of modest means qualify for family law legal aid certificates
- improve the quality and accessibility of its telephone services
- Make the prioritizing of domestic violence cases effective for women who seek legal aid certificates
- increase both the number of hours and hourly rate paid to lawyers who accept family law legal aid certificates
- consider implementing an incentive system to encourage lawyers to accept family law legal aid certificates
- end the required mediation in cases where lawyers seek additional hours on a certificate

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

As this report makes clear, problems with family court process create a serious barrier for women experiencing violence in obtaining appropriate outcomes. Further reforms must apply a gender-based intersectional analysis and must reflect the reality of the prevalence of violence in Ontario families and of the high rate of family law cases where woman abuse is a factor.

Only when reforms are developed and implemented from this perspective will the needs of women experiencing violence and their children be addressed.

3. 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 the work done in British Columbia, where changes to its family law legislation are set to come into effect in March 2013. In particular, Ontario should consider:

- embedding a mandatory consideration of family violence directly in the best interests of the child test
- requiring the court to consider whether cooperative post-separation parenting arrangements increase safety risks for the child or other family members
- including an examination of patterns of coercive and controlling behaviours in the assessment of family violence
- providing a clause that sets out situations in which denying access is not wrongful; these situations to include when a parent reasonably believes the child might suffer family violence or reasonably believes the other parent is impaired by drugs or alcohol, when the child is sick or when there have been repeated failures to exercise access
- providing the court with a list of mandatory factors to consider when determining whether a restraining order should be issued, including:
 - the history of family violence
 - whether the family violence is repetitive or escalating
 - whether psychological or emotional abuse constitutes or is evidence of a pattern of coercive and controlling behaviour
 - the current status of the relationship, including a recent or pending separation
 - circumstances related to the abuser such as substance abuse, employment or financial problems, mental health problems associated with the risk of violence and access to weapons that could increase the risk of family violence
 - the at-risk person's perceptions of the level of risk to self
 - any circumstances increasing the at-risk person's vulnerability such as pregnancy, age, family circumstances, health or economic dependence

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

While the present 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 for more than 20 years.

These workers, much of whose work is supported by privately fundraised dollars or who “tack on” this work to an already full job description, need to have their positions funded. Both the in-person training and online resources and support components of the FCSW

training initiative which has been made available to FCSWs and a small number (50) of others doing similar work, should be broadened and made available to all those doing this work.

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

One of the challenges for those who support women through family court 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. The FCSW program does not provide formal protocols for these workers, who face the same challenges.

We suggest that family court community resources committees work with violence against women advocates and frontline workers to develop protocols addressing such issues as:

- court accompaniment
- accompaniment to duty counsel meetings
- access to family court file
- onsite office space

This would ensure that women would have access to the same level of family court support regardless of their location.

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

This suggestion is a variation on one of the recommendations made by the Law Commission of Ontario, which suggests such a portal generally. As noted earlier in this report, there is a considerable amount of legal information available online, but people don't know about it, don't know how to find it or don't know how to use it.

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.

Development of increased online resources should also include the creation of a plain-language guide to the use of those resources.

Online resources should follow the FLEW model and be available in multiple languages and formats to ensure accessibility.

7. Expanded availability of Family Law Education for Women materials

FLEW materials should be available in all Family Law Information Centres, at all Mandatory Information Program sessions and at all court-based mediation offices.

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

Many women who have left abusive partners have safety concerns associated with attending the MIP at the family court. 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 in a non-courthouse setting such as a women's shelter or community counselling agency.

9. 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 prepare for court. This program would be developed at the provincial level but would be delivered by community organizations across the province that could enrich the core curriculum by providing local information, resources, and strategies.

10. 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 recently completed work on a project to develop a framework and curriculum suggestions for just such an initiative.¹⁵⁰

The Law Commission framework makes reference to the extensive work done in this area by the American Bar Association Commission on Domestic Violence:

Teaching law students about domestic violence issues should be an inherent part of legal education, rather than a specialized track taught only by professors who are experts in domestic violence law. Raising domestic violence issues provides students with an opportunity to engage in profound debate about the law's role in shaping social policy. The diversity of approaches to the criminal, civil, and federal aspects of domestic

¹⁵⁰ Law Commission of Ontario. "Violence Against Women and the Law: A framework for VAW curriculum in Ontario law schools." Summer 2012.

*violence law allows students to consider a range of perspectives across the political spectrum.*¹⁵¹

Law schools across the country are beginning to place increased emphasis on ethics and professionalism, with mandatory numbers of hours now designated for formal learning in this area. Law schools should be strongly encouraged to use the work of the Law Commission to support this new emphasis so that all students, regardless of their post-law school employment plans, are exposed to the issue of violence against women.

11. Increased continuing legal education opportunities for lawyers

There are presently insufficient opportunities for lawyers to learn about violence against women. Even lawyers who have a commitment to doing this work are hard-pressed to find educational offerings to assist them. As noted above with respect to law students, all lawyers need exposure to learning about violence against women.

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 CLE hours.

Trade publications such as *Law Times* and *Briefly Speaking* should be encouraged to run regular features on legal and practice issues related to violence against women.

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

Women access many services associated with the family court – FLIC, MIP, duty counsel, mediators, clerks and other court staff as well as police who may be called upon to enforce a family court order – and often find they are disbelieved or their stories of abuse are minimized. The domestic violence training that these professionals have received often does not provide a gendered analysis, with the result that women receive a response that maintains gender neutrality and does not address their needs.

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.

¹⁵¹ ABA, *When will they ever learn?* p. 2.

13. 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.

While judges cannot be mandated to participate in such educational seminars, we suggest ongoing financial support for the development and promotion of such initiatives.

14. Case management where violence against women is a factor

As discussed earlier in this paper, legal bullying is a serious problem for women with abusive partners. While there are responses available to judges, these are not often employed. One reason for this is that most cases are seen by different judges each time the parties come to court. Multiple judges reviewing the file mean it is less likely that patterns of behaviour will be identified in a timely manner.

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 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.

15. Development of best practice guidelines for lawyers

In 2000, Durham Region undertook an initiative to develop a community response to custody and access issues affecting woman abuse survivors and their children. Many sectors came together to participate in this project, and the final report describes some exciting initiatives.¹⁵²

Lawyers created a working group which, among other activities, developed innovative best practice guidelines for lawyers representing women who have experienced violence and for those representing abusers.

The guidelines for lawyers representing women cover such topics as:

- the lawyer's competence to take the case
- screening and intake tools
- working collaboratively with community resources
- developing appropriate support systems and resources
- establishing boundaries with clients with respect to support and outcomes
- safety planning

¹⁵² Sinclair, Deborah. "In the Centre of the Storm: Durham Speaks Out." June 2000

- specifics about starting a family court case, involving police and criminal court, recordkeeping, and gathering evidence

The guidelines for lawyers representing abusers focus on understanding the dynamics presented by an abuser while providing the client with professional advocacy.

Twelve years after they were developed, some aspects of these guidelines require updating. However, they remain a strong resource.

We suggest that the Ontario Bar Association, Family Law Section, provide funding to Luke's Place to update these resources and to develop a standardized intake and screening protocol/tools for voluntary use by lawyers across the province.

16. Establishment of formal co-led collaborations between the legal and violence against women sectors

In most communities, there is an imbalance of power between the violence against women and legal sectors. If the legal sector does not wish to engage, it does not have to; and, when it does, the engagement is often on its terms. Many of those in the legal sector take the position that engaging with or even acknowledging the violence against women sector is a demonstration of bias that affects so-called judicial neutrality. The reality of violence against women and the expertise and professionalism of those in the violence against women sector need to be recognized by the legal sector so the two can work together, within a fair and impartial but properly informed family law system, for outcomes that keep women safe and reflect the best interests of children.

17. Centre of Excellence

Frontline violence against women agencies and workers provide critically needed support to women experiencing violence in the family court system. Those same workers and agencies also identify trends, initiate law reform, and engage in education with professionals and the public in their communities.

All are underfunded and over-extended with the result that there are not enough opportunities for formal collaboration, advocacy or learning.

For this reason, we propose the establishment of a provincial Centre of Excellence to support abused women through the family court system, funded by government, foundations, and the private sector. Such a centre would build on, complement and enhance work already being done. It could provide:

- a coordinated and cohesive network of supports for women, regardless of where they are in Ontario

- training and education for frontline violence against women workers across the province, delivered both in person and electronically
- resources to support frontline workers, available both in hard format and online
- workshops and resources for women, both hard format and online
- online/telephone support connecting frontline workers with the Luke's Place pro bono clinic Legal Support Workers and pro bono lawyers
- online supports such as a moderated chat room so workers can discuss challenging cases, common barriers, and strategies for dealing with them
- training, resources, and support to the provincial family law bar to enhance the knowledge and skills of lawyers who represent abused women
- offer resources and supports to law faculties
- analysis of systemic issues and advocacy to address them
- an opportunity for ongoing academic research to evaluate effective family law supports for women

Working collaboratively, Luke's Place and Action ontarienne contre la violence faite aux femmes have prepared a vision and outline of a Centre of Excellence, have engaged in an environmental scan, and have led a discussion with violence against women advocates from across the province, which concluded with consensus reached on a number of aspects, including principles, proposed role and identification of potential challenges and next steps. Luke's Place and Action ontarienne continue to play a leadership role and have initiated discussions with potential funders as an important next step.

We strongly urge government at both the provincial and federal levels to consider providing financial support for the development of a Centre of Excellence.

Conclusion

You get victimized by these men and then you go into the court system and they try to victimize you too.¹⁵³

It is time for this story, experienced by too many women who enter the family court system, to change.

It is our hope that the analysis and suggestions contained in this paper can provide part of what is needed for that change to happen. The women we work with deserve no less.

As noted by an RCMP officer who participated in a focus group in a national research project undertaken by YWCA Canada:

These women are exceptional, and they keep going and keep going and keep going. And I think that's admirable, but it shouldn't be the way people should have to function. It shouldn't be that hard.¹⁵⁴

¹⁵³ Sinclair, Deborah. "In the Centre of the Storm." Ibid, p. 29.

¹⁵⁴ YWCA Canada. "Life Beyond Shelter: Toward Coordinated Public Policies for Women's Safety and Violence Prevention." October 2009, p. 7

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Pamela Cross is a feminist lawyer who works in the violence against women sector. She is well known and respected in legal reform circles, particularly for her expertise on family law issues as they relate to violence against women. Pamela works primarily with Luke's Place Support and Resource Centre for Women and Children.

Pamela has worked as an educator and trainer on the topic of violence against women and the law for many years. She is an experienced trainer on the topic of recordkeeping, confidentiality and production of third party records as well as on family and criminal law, particularly as these topics relate to violence against women.

While she was the Legal Director at METRAC, she was responsible for the development of extensive public legal education materials and trainings for frontline workers and for women experiencing violence. She also developed the Ontario Women's Justice Network. She was a member of the Management Committee of Family Law Education for Women (FLEW), Ontario's largest public legal education project about family law for women. She has developed and delivered a number of online courses on family and criminal law and violence against women. Pamela is a member of the teaching faculty with the National Judicial Institute, where she plans and delivers educational programs on violence against women to Canadian judges. She is leading the development of violence against women curriculum for law schools in a project with the Law Commission of Ontario.

With Luke's Place Support and Resource Centre, Pamela is leading the development and delivery of online resources and training for frontline workers who support unrepresented women through family court as well as in-person training on the family court process for unrepresented women. She is also the lead trainer for Family Court Support Workers in Ontario.

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