

## **FAMILY AND CIVIL LEGISLATION, REGULATIONS AND PROCESSES REVIEW**

### **Submission from Luke's Place Support and Resource Centre for Women and Children July 19, 2019**

#### **Introduction**

Luke's Place provides direct-service supports to women in Durham Region who have been subjected to family violence who are engaged with the family law system. We also engage with systemic issues at the provincial and federal levels.

For example, we have developed and delivered domestic violence training to more than 2,000 LAO staff, including staff lawyers, community legal clinic staff and lawyers and per diem duty counsel and domestic violence panel lawyers. Last year, we were funded by Department of Justice Canada to conduct research on the use of family violence screening tools by family law practitioners and to provide a report with recommendations. We have developed a number of trainings and resources to support frontline workers who assist women to address the family law issues that arise when they leave abusive relationships.

We sat on the province's Violence Against Women Roundtable and are frequently consulted by government and legal policy makers on a wide variety of issues related to violence against women and the law.

We read the recent call for submissions with respect to improving family legislation, regulations and processes with great interest and are pleased to offer the following comments, which we have framed within the parameters of the review topics as set out by the Ministry of the Attorney General in its news release.

#### **Key Issues**

##### Directing family law matters out of a combative court process, where possible:

There is no doubt that Ontario's family courts are overloaded. This results in excess financial costs to both the system and the families engaged with it. It can also lead to proceedings that take too long to reach resolution. Both have significantly negative impacts on families who turn to the courts for assistance when they are highly vulnerable.

Alternate dispute resolution (ADR) is an effective way for many litigants to resolve their family law disputes. Not only can this process be quicker and cheaper than litigation; it can result in better outcomes in which both parties feel invested and which they are more likely to follow.

However, cases where there is a history of family violence need to be approached differently. While ADR may be appropriate in some, it is not appropriate in all.

Relationships involving coercive controlling violence, in particular, are not well suited to ADR. These cases involve a pattern of behaviour by the abuser that, over time, leaves the victim living in constant fear of their partner, with little or no power or autonomy. While the abuser's tactics may change post-separation, the abuse almost always continues. The ongoing threats, stalking, intimidation and coercion drives some victims back into the abusive relationship. Others quickly concede to any demands made by their former partner with respect to family law issues.

Neither the victim nor the abuser is well suited to ADR in these cases. The victim is, simply put, too afraid of their former partner to engage in any kind of negotiated process. The abuser seldom enters ADR with a willingness to negotiate or with a focus on the best interests of the children.

Even a highly skilled and trained ADR professional may miss the hidden cues from the abuser to the victim or be unable to effectively manage the dynamics of abuse.

Shuttle ADR can assist during the session itself, but it takes more than that to protect a victim from out of court stalking and harassment, abusive use of technology (spyware, obsessive texting, use of social media, etc.) and threats by the former partner. This ongoing abuse often leads to trauma in the victim, which has a significant and negative impact on their ability to engage meaningfully in ADR.

For these reasons, we believe any move to direct family law matters out of a court process must be undertaken with extreme care. Family violence experts must be involved at all stages to ensure the processes and those implementing them reflect a comprehensive understanding of:

- the dynamics of abuse, in particular coercive controlling violence
- the seriousness and frequency of post-separation abuse, including legal bullying
- the limitations of ADR in these cases, and
- emotional and physical safety issues for victims of family violence, including children

To ensure only appropriate cases are directed out of a court process, we strongly recommend that Ontario implement mandatory family violence screening for all family law cases. We refer you to our research report on screening, which can be found at:

<https://www.justice.gc.ca/eng/rp-pr/jr/can-peut/index.html>

Where the parties are legally represented, this screening could be conducted by their lawyer. Where they are not, this responsibility should rest with the appropriate court staff (Family Law Information Centre, duty counsel, Family Court Support Workers). This screening would be a precursor to a decision to move the case out of a court process. It is in addition to any screening that would be done by the ADR professional.

Finally, we want to be clear that we do not oppose ADR, including in some cases involving family violence. However, victims should never be or feel required to enter into ADR, and careful attention needs to be paid to any overarching plan to encourage a systemic move away from court processes and towards ADR.

#### Reducing the cost of the process to families and taxpayers:

Any steps to reduce the cost of the family court process must prioritize the needs of the most vulnerable of those involved with the process. In particular, this includes victims of family violence and their children.

Assessment of cost needs to incorporate an analysis of not just money spent on the initial case but also the cost – financial and other – of poor outcomes.

For example, when a victim of family violence is unrepresented, the outcome of the case may leave them and their children exposed to ongoing abuse, up to and including death. (Ontario's Domestic Violence Death Review Committee has noted, repeatedly, that women are at highest risk of being killed by their partner at the time of separation, which is also when many of them are embarking on a family law case.)

A poor outcome may mean the victim must return to court to seek an amendment to or enforcement of the initial order, whether that is an order with respect to the custody and access of children, support, property division or safety.

Abusers often manipulate both the court process and court orders, which can result in both lengthening the proceedings (see below) and increasing costs. The victim should not be penalized because of the abuser's behaviour by any measures implemented to reduce costs.

#### Streamlining the processes to shorten the time to resolution:

We fully support the notion of shortening the time it takes for a case to be resolved through the family court process. We offer the following suggestions to this end:

- Ontario should move to a one-family-one-judge case management system for all family law cases, but for cases involving family violence in particular. This will make it more

difficult for an abuser to draw out the case unnecessarily and to engage in legal bullying and will make it easier for the judge to witness and identify patterns of ongoing coercive controlling violence

- Ontario's Family Court Support Workers (FCSWs), funded by the Ministry of the Attorney General, provide invaluable assistance and support to victims of family violence during their family law case. This assistance includes safety planning, supporting clients collect and organize evidence of abuse, providing clients with information about family court process and helping clients access family court related services such as FLIC, duty counsel and legal aid, all of which can shorten the time to resolution as well as increase the likelihood of the client obtaining an appropriate outcome that is safe for them and their children. This program is overwhelmed by the demand for its services and requires increased financial support from the provincial government
- Legal bullying is a serious problem in cases involving family violence. In addition to the obvious negative impact on the victim, legal bullying slows down progress of the case. Common legal bullying tactics include:
  - Seeking repeated adjournments
  - Changing lawyers frequently
  - Failing to file complete documents in a timely manner
  - Unnecessary self-representation
  - Intentional misrepresentation of financial information
  - Bringing of repeated frivolous and vexatious motions
  - Refusing to follow court orders

It is critical that any changes to family court legislation, regulations and processes reflect a commitment to addressing legal bullying quickly and unequivocally.

- Lack of legal representation, for both victims and abusers, significantly slows down family court proceedings. Legal Aid Ontario must be funded adequately to ensure that parties in cases involving coercive controlling violence have lawyers with the necessary training and expertise

Other:

The federal government recently passed Bill C-78, which significantly amends the *Divorce Act*.

We recommend that this review consider amendments to the *Children's Law Reform Act* to ensure it is consistent with the *Divorce Act* by:

- Changing the language of custody and access to parenting time, parenting responsibilities and decision-making responsibilities
- Expanding the criteria for the best interests of the child test
- Including an extensive definition of the term "family violence"

## **Moving Forward**

Considerable research has already been conducted on challenges in the family court system for survivors of family violence. We strongly encourage those tasked with this review to consider the recommendations made in reports such as:

<https://lukesplace.ca/wp-content/uploads/2018/11/NAWL-Lukes-Place-Brief-on-C-78-final-for-submission-2.pdf>

<https://lukesplace.ca/wp-content/uploads/2013/01/The-Special-Needs-of-Survivors-of-Family-Violence-in-the-Family-Court-Process-Comments-on-Justice-Annemarie-E.-Bonkalo%E2%80%99s-Report-%E2%80%9CFamily-Legal-Services-Review%E2%80%9D.pdf>

[https://lukesplace.ca/pdf/It\\_Shouldnt\\_Be\\_This\\_Hard.pdf](https://lukesplace.ca/pdf/It_Shouldnt_Be_This_Hard.pdf)

<https://lukesplace.ca/for-service-providers/toolkits-papers-presentations/through-the-looking-glass/>

## **Conclusion**

Luke's Place can offer considerable expertise to this review. We have briefly identified a number of the issues that should be considered in this process, each of which we would like to discuss in greater detail with you. We can be available for an in-person meeting at your convenience.