MINISTRY OF THE ATTORNEY GENERAL
FAMILY JUSTICE CONSULTATION SUBMISSION
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Introduction

The following are comments and submissions with respect to the matters presented at the Consultation hosted by the Ministry of the Attorney General on January 23rd, 2014. These comments will address the consultation itself, the key issues raised by the consultation about the proposals presented at that time, a background framework for consideration of the proposals made by the Ministry and some recommendations with respect to further processes.

The Consultation

It is our understanding that the Ministry had originally planned two separate consultations with interested justice system professionals to review and discuss its most recent proposals for two possible pilots for the processing of family law disputes and two other matters: a model for an "administrative child support calculation service" and a proposal for legislative changes to the *Family Law Act* to align it with provisions of the *Divorce Act* relating to child support obligations for adult child with disabilities. This submission addresses only the two possible pilots for the processing of family law disputes.

Unfortunately, the unavailability of most invitees to the initial consultation resulted in the facilitation of one meeting with a large number of consultees. These individual consultees included members of the Judiciary, the family law Bar, representatives of mediation associations, and representatives of Legal Aid Ontario. The violence against women (VAW) sector was represented by the Barbra Schlifer Commemorative Clinic, Luke's Place, Action Ontarienne and the Ontario Native Women's Association. It is not known whether other VAW organizations were invited to the consultation. The meeting was also attended by a large number of Ministry staff.

Prior to the consultation meeting, invitees were provided with a brief overview of the two pilot project proposals being made by the Ministry: 1) The Presumptive Mediation Model and 2) the Enhanced Information and Triage Model. The first model provides for an introductory and mandatory mediation session in cases found to be appropriate for such; the second provides for a joint information session for parents that offers

information, early evaluation and triage services. Participants were asked for comments and suggestions relating to these two proposed models. Approximately one hour was allotted for this discussion.

Clearly the time allotted for meaningful review of these models and discussion thereof was highly inadequate. The majority of participants were unable to respond to questions posed and those who did respond could do so only in a very cursory fashion. The facilitation was also not conducive to an in-depth analysis of potential benefits or pitfalls from the perspective of each sector of legal professional present. In particular, the presence of only 3 VAW agencies made effective participation difficult.

The VAW sector has registered its concerns about the use of mediation in domestic violence cases, and in particular the risks of imposing mandatory mediation on assaulted women, for many years. The information provided prior to the consultation was insufficient to permit an analysis of its essential elements and anticipated outcomes, and to reply to same in a meaningful way; the consultation itself was not structured (number of participants and time allotted) in a manner that would permit an identification of concerns relating to the Ministry's proposals and/or an exchange of ideas.

Key Issues

A cursory consideration of the information provided to participants in the Ministry's consultation, raises the following concerns:

- As a general rule, mediation puts abused women and their children at risk. Mediation that would be imposed, as a matter of course, at the highly-volatile/risky time of separation between the parties (as contemplated by the Presumptive Mediation Model) is fraught with heightened risks. It is also imposed at a period of time when an abused women remains without supports and other essentials (housing, income support) that provide stability. In the immediate aftermath of separation, abused women require the protections of the law as they are provided for through interim custody orders, child support orders, and restraining orders/exclusive possession orders. The absence of these protections increases women's vulnerability to violence. Further, without these supports, abusers are enabled to continue to harass, intimidate and control their partners who may be living in dire circumstances.
- The Presumptive Model provides for identification of cases as appropriate or inappropriate for mediation through 'screening'. However, experience teaches us

that 'screening' is not a precise science and relies almost entirely for its effectiveness, upon the screener's knowledge, expertise and understanding of the dynamics of woman abuse. This expertise must weigh in most heavily in the individual's proficiency in identifying the factors that may cause an abused woman to conceal, downplay or deny or misapprehend abuse. Expertise must also be well developed as it relates to the identification and understanding of the personality profiles of abusers. To date, screening, as used within mediation, has been a cause of concern to VAW advocates. Among other concerns, screening is premised upon a particular framework that has as its starting point the identification of so-called "high conflict families". "High conflict" families that are engaged in mediation are too often those where violence is present if, in the opinion of the mediator, the conflict can be reduced or controlled during mediation.

- The anticipated "Benefits' as outlined in the description of the Model, particularly those relating to compliance with mediated agreements, better protection of children and increased numbers of agreements, are general *assumptions* that lack an air of reality as it relates to abused women entering into mediated agreements.
- There is no consideration of the relationship, if any, between mediation that is mandated and the effectiveness, quality or longevity of mediated agreements.
- As always, achieving agreements remains the sole goal and purpose of mediation, with little or no attention to whether women's legal rights are protected within the process.
- As it relates to the involvement of 'qualified 'Information and Referral Coordinators', no information is provided about qualifications, training and/or evaluation of such individuals.

Framework for Discussion

Post-separation Violence

Violence does not end just because a woman stops living with her abusive partner. In fact, ongoing violence throughout the separation process can have significant long-term consequences, including death.

This initial period of separation, when the violence continues and often escalates, is also when separating couples are the most likely to be involved in difficult 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.

Because the abuser no longer has unfettered and private access to his former partner in the family home, his violence and abuse moves into her workplace, the children's school or day care centre, public places like grocery stores and libraries where he knows he can find the woman and, of course, family court. The violence and abuse take on new forms, too – stalking/criminal harassment, threats to take or harm the children, manipulation of the children and, in the family court context, legal bullying.

By legal bullying, we mean the use/abuse by an abuser of family law and court processes as a strategy to try to maintain his power and control over his former partner.

A legal bully may choose to represent himself in order to maintain a high level of contact with his former partner, manipulate the ADR (particularly mediation) process by triggering her fears of him in a way that is difficult if not impossible for an outsider to identify, delay the process by failing to file documents in a timely manner, refuse to follow court orders, bring the woman back to court repeatedly on motions that have no chance of success or make malicious reports about her to systems such as child protection and social assistance.

Any of these tactics, alone or in combination, have a considerable negative impact on women and their ability to function effectively in the family court system. They have particular needs that must be met 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.

Access to legal representation

The evidence of the increasing lack of legal representation in family court is undeniable. In their 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.[1]

There are many reasons for this, including the historic underfunding of family law certificates by Legal Aid Ontario, onerous financial criteria that have not changed in many years, inappropriate responses by some in the LAO system to women who have experienced violence, and a reluctance by many lawyers to accept LAO family law certificates.

The net result is that only the very, very poorest qualify for and find legal aid assistance

[1] 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.

and, at the other end of the spectrum, only the wealthy or those who can access the wealth of others[2] are likely to enter the family court system with legal representation. The result is a two-tiered family law system, as noted by Bala and Birenbaum:

[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.[3]

Lack of legal representation is a serious issue for any litigant. For a woman who has left an abusive partner, it can be a deadly issue, whether it is the woman or her partner (or both) who are unrepresented.

If the woman is unrepresented, 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 relate to family violence). She may not know she can call expert witnesses.

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.[4]

Women interviewed as part of Luke's Place 2008 research spoke frankly about what lack of legal representation meant to them:[5]

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[2] 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.

[3] Ibid, p. 5

[4] 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.

[5] 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

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.*[6]

As noted above, it is a common tactic of an abuser to represent himself. This gender difference in the reasons for self-representation is noted by Bala and Birnbaum:

> *These professionals [judges and lawyers] believe that women are more 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.*[7]

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.[8] 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.*[9]

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[6] Ibid.

[7] Birnbaum, pp. 12 – 13.

[8] Ibid, p. 23 – 24.

[9] Ibid, p. 24

Further, there is no guarantee that, even if a woman has a lawyer, s/he will understand the issue of violence against women and its importance in the legal issues the woman is dealing with and in the family court process itself. 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.*[10]

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."[11]
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.*[12]

It is our position that women have a fundamental right to representation by a lawyer who

[10] Vancouver Custody and Access Support and Advocacy Association. Women and Children Last: Custody Disputes and the Family "Justice" System. 1996, p. 48.
[11] Nielson, Linda C. "Spousal Abuse, Children and the Legal System Final Report." Canadian Bar Association, Law for the Futures Fund. March 2001, iii.
[12] Ibid, p. iii.

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.*
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> *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.*[13]

Legal information is not a replacement for legal representation:

Both the Birnbaum/|Bala 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 almost 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.[14]

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.[15] 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.[16] Only 40% used the materials available at the Family Law Information Centres (FLICs), of whom 18% said they found those materials very helpful.[17]

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

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[13] 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.

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

[15] Ibid, p. 19

[16] Ibid, p. 19.

[17] Ibid, p. 20.

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.[18]

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.

> *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. . .*[19]
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> *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.*[20]

In cases involving woman abuse, the legal issues are especially complex and the appropriate solutions more nuanced. Safety is a serious and ongoing issue. As a result, access to generic legal information, no matter how good, is not good enough, even for women who are able to find and understand it.

Challenges with the culture of family court

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

[18] Law Commission of Ontario. Ibid, p. 20.

[19] Law Commission of Ontario. Ibid, p. 66.

[20] Ibid, p. 22

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.

Alternative dispute resolution/mediation

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.

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.

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.

Mediation offers the possibility of success only 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.

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.[21] This places already vulnerable women in a highly precarious situation that jeopardizes both their present and future physical and emotional safety and well-being.

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. Changing the name to Consensual Dispute Resolution does not change the risks for abused women. Presumptive Mediation, at least in the format presently proposed by the Ministry of the Attorney General, still looks and sounds a lot like mandatory mediation.

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 (sometimes called co-parenting or parallel 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.[22]

[21] 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.

[22] 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

The inclusion of family violence in the best interests of the child test 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,"[23] 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.*[24]

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 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.*[25]

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

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than two decades, participated in these trainings and discussions, sharing devastating stories about the family law experiences of the women they work with.

[23] 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.

[24] Neilson. Ibid, p. ii.

[25] Ibid, p. 209.

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.

Recommendations:

Given the above, the writers respectively propose that the Ministry undertake an additional consultation process with the VAW community that will address the proposed models. Such consultation should include VAW advocates from across the province generally, including representatives of unique communities of women such as francophone women, women with disabilities, aboriginal women, culturally diverse women, immigrant women and others. Participants in the consultations should be provided with background information relating to the purposes of such proposals, the issues of concern that such proposals are intended to rectify and policy directives/procedures that would accompany and support the proposed models.

Further, it is our recommendation that the Ministry forestall any further action with respect to implementation of these proposals until such time as the VAW consultation takes place.