

**MAKING THE SYSTEM WORK:  
Reforming family court processes  
to support abused women and their children**

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A brief for the Attorney General of Ontario**

**Prepared by Luke's Place Support and Resource Centre**

**Endorsed by:**

Action ontarienne contre la violence faites aux femmes  
Assaulted Women's & Children's Counsellor/Advocate Program, George Brown College  
Barbra Schlifer Commemorative Clinic  
Canadian Council of Muslim Women  
Canadian Federation of University Women, Ontario Council  
Centre for Research and Education on Violence Against Women and Children  
DAWN Ontario  
Jewish Women International Ontario  
Metropolitan Action Committee on Violence Against Women and Children  
Ontario Coalition of Rape Crisis Centres  
Ontario Association of Interval and Transition Houses  
Springtide Resources  
Woman Abuse Council  
YWCA Toronto

## Introduction

We want to commend the Attorney General for his commitment to addressing family law issues and his publicly stated understanding of the need for a specialized family court approach in cases involving violence against women.

We agree that the family courts are in dire need of attention and that reforming process is an important part of improving access to justice for Ontarians. We note, in particular, the Attorney General's December 17<sup>th</sup> announcement that, as part of this process, he plans to increase early access to family law information in Brampton and Milton in upcoming months.

We think that the Attorney General's Four Pillars of family court process reform<sup>1</sup> offer a useful starting point for the discussions and reforms that are needed. As the Attorney General has said, we need a process that creates more court time for the cases that need it, including cases involving violence.<sup>2</sup>

Women, especially but not exclusively those with children, face significant barriers when entering the family court process. Those barriers have been well elaborated in a number of reports.<sup>3</sup> We will say here simply that the experiences of abused women in family court are unlike those of other litigants and involve serious issues of safety, including lethality. Any response to the need for family court process reform must make this reality a guiding principle. In the words of two survivors:

*[You] walk into the family court and you feel strangled and you hit a brick wall and someone is stepping on your throat.<sup>4</sup>*

*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.<sup>5</sup>*

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<sup>1</sup> Pillar 1: Early information

Pillar 2: Triage

Pillar 3: Legal advice and alternatives to litigation

Pillar 4: Streamlined litigation process

<sup>2</sup> Remarks made at the Third Annual Warren Winkler Lecture on Civil Justice Reform: Perspectives on Procedural Reform in Family Law Matters, University of Ottawa, October 6, 2009.

<sup>3</sup> *Transforming our Communities* (2009, Domestic Violence Advisory Council), *Study on the Experiences of Abused Women in the Family Court in Eight Regions of Ontario* (2008, Luke's Place Support and Resource Centre for Women and Children), *Through the Looking Glass* (2008, Luke's Place Support and Resource Centre for Women and Children), *Survivor Voices: Welcoming women to make change. Calling on service and policymakers to include survivors in their work* (Ontario Association of Interval and Transition Houses, 2008), various submissions made to the Standing Committee on Social Policy with respect to Bill 133, annual reports of the Domestic Violence Death Review Committee

<sup>4</sup> *Through the Looking Glass*, p. 4.

Over the past several years, violence against women advocates have enjoyed a positive, collaborative relationship with the Attorney General and the Ministry of the Attorney General. This collaboration has resulted in a number of significant family law improvements that have had a direct impact on abused women. These include:

1. Changes to the *Arbitration Act* to ensure that Canadian principles of equality and fairness were extended to the family law arbitration process,
2. Revisions to the best interests of the child test in the *Children's Law Reform Act* to include mandatory consideration of family violence, and
3. Important changes to restraining order legislation that will keep women in Ontario safer.

We believe a collaborative working relationship such as the one that resulted in these significant changes is critical to achieving effective results in the future. For this reason, we are disappointed that, to date, there has been little opportunity for consultation with respect to the present family law initiatives and announcements by the Attorney General.

Because we have not had the same opportunity to collaborate as in the past, and because the Attorney General has announced his plans to move ahead with some changes very quickly, we have prepared this brief to provide our initial input on those elements of the Attorney General's Four Pillars that appear to be most urgent.

We are encouraged by the Attorney General's statements on December 17<sup>th</sup> that he will be looking to stakeholders for guidance and advice, and look forward to being consulted as part of that process.

## **Principles**

As noted above, this brief is focused on some specific elements of the Attorney General's four pillars. First, we wish to set out the overarching principles that we believe need to guide any work to reform family court processes:

1. A clear definition of violence against women must be developed for use in family court.
2. Cases involving violence against women must be seen as unique and as requiring a different approach from cases where the parties have a relatively equal balance of power.<sup>6</sup>

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<sup>5</sup> *Survivor Voices*, p. 6

<sup>6</sup> We continue to be concerned by the commonly held belief that all cases, including those involving violence, can be effectively managed using alternative dispute resolution such as mediation and collaborative law, simply by

3. Family law and family court processes must respect and reflect the reality that violence does not end at the point of separation but rather changes to new strategies, including stalking (both physical and emotional) and legal bullying and often increases, sometimes to the point of lethality.<sup>7</sup>
4. One size does not fit all when it comes to family court processes. Reforms must be based on an equity framework in order to take into account the different realities of families in different circumstances. In particular, reforms must acknowledge the unique realities of Aboriginal and Francophone families, families living in rural, Northern and remote communities, families dealing with disability issues and families that do not speak English or French.<sup>8</sup>
5. Reforms as substantive as those suggested by the Attorney General's Four Pillars need to happen in a timely manner, after adequate consultation with a diversity of stakeholders.<sup>9</sup>
6. Reforms to family court processes need to reflect the Province's commitment to ensuring that family law disputes are dealt with in a public, not private, arena.<sup>10</sup>
7. Family court processes must understand the differences between unrepresented and self-represented parties.<sup>11</sup>

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implementing screening tools and professional training. It is our opinion that these are not appropriate options in violence against women cases.

<sup>7</sup> The reports of the Domestic Violence Death Review Committee, the Domestic Violence Advisory Council and other research shows that violence often escalates for at least several months post-separation. Women are often murdered by their former partner at the point of separation or while family court proceedings, especially those involving custody and access, are underway. The phenomenon of legal bullying is well explored in the Luke's Place Support and Resource Centre for Women and Children research paper, *Through the Looking Glass*.

<sup>8</sup> This includes ensuring that processes acknowledge the lack of lawyers who speak French, the uneven application of legislation dealing with French-language services, the jurisdictional issues that arise on reserve with respect to enforcement of provincial court orders, the isolation in rural, Northern and remote communities and physical and other access issues for people with disabilities.

<sup>9</sup> While family court process reforms are badly needed and while the Attorney General already has access to a number of valuable reports and research papers as noted above, none of these was written to speak specifically to his proposed "Four Pillars" approach. There have been no in-person consultations with violence against women stakeholders. Furthermore, the Law Commission of Ontario is mid-process in its research project entitled *Best Practices at Family Justice Systems Entry Points: Needs of Users and Responses of Workers in the Justice System*, which may offer significant insight into these very issues. It would be unfortunate if far-reaching reforms were implemented without seeking this additional input as this could lead to any number of unintended negative consequences for families using the family court.

<sup>10</sup> The Premier and the Legislature demonstrated this commitment when, in 2006, legislation that banned the use of private laws and imposed a system of public accountability in the arbitration of family law disputes was introduced and passed. As we found at that time, there is significant public support for this "public vs private" approach to family law.

<sup>11</sup> We define unrepresented parties as those who wish to have a lawyer but do not because they cannot afford one and they do not qualify for legal aid and self-represented parties as those who could have a lawyer but choose to represent themselves. Self-representation is a strategy used by some abusers to maintain control over their former partner, who may be unrepresented. This presents significant safety concerns for the woman as well as serious

8. Any reforms to family court processes must respect the right of abused women to access family court litigation without prejudice and without penalty.<sup>12</sup>
9. Process reforms cannot be used as a replacement for an infusion of monies specifically for family law legal aid certificates. Women leaving abusive relationships have a right to high-quality legal representation, regardless of their financial situation.<sup>13</sup>

### **The most urgent issues**

The Attorney General has indicated that he intends to move ahead quickly on some aspects of family court process reform. We will focus on two areas in this brief, with the expectation that there will be opportunities for ongoing consultation on other areas.

#### Information sessions:

We understand that the Attorney General is seeking input as to whether or not information sessions provided to parties at the beginning of the court process should be made mandatory across Ontario.

Violence against women advocates have different positions about whether or not this is appropriate and would welcome the opportunity to provide our input to this discussion.

We do agree that access to information for women is crucial.

We also agree that these information sessions, mandatory or not, need significant change if they are to be helpful to women who have experienced abuse:

- Ø The curriculum is old, and needs to be updated;
- Ø Review of the curriculum material and process should involve violence against women advocates to ensure that the unique needs of abused women are addressed appropriately;

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trial management issues for the court. Process reforms cannot treat these two very different kinds of litigants as though they are the same.

<sup>12</sup> For instance, as we elaborate later in this brief, any information sessions provided to litigants must include information about all forms of dispute resolution equally, no incentives should be introduced to encourage parties to move their cases out of the litigation stream and parties who wish to remain in the litigation stream should not face financial or other penalties.

<sup>13</sup> We are concerned by the Attorney General's statements that we can achieve a level of excellence without more lawyers, that paying for more lawyers is not the right choice, that we can fix the problems in family court without spending more money. Put simply, all women dealing with family law issues with an abusive ex-partner have a fundamental right to legal representation.

- Ø In particular, the information needs to be presented so that women do not feel that using strategies such as mediation and collaborative law is necessarily preferable to litigation<sup>14</sup>;
- Ø The sessions and supporting materials need to be made accessible to a diversity of people including those who do not speak or understand English or French, those with low literacy levels and those who require alternative formats;
- Ø Information sessions, while they must include some core material about court and other processes, must also include specialized, differentiated information for survivors;
- Ø Delivery systems should be broadened and, wherever possible, moved out of the courthouse and into community agencies such as settlement service organizations, women’s shelters and community-based programs for women, with appropriate funding. Abused women will be better able to assimilate and consider the important information contained in these sessions if they are in surroundings with which they are familiar and where they feel secure;
- Ø Information sessions for abused women should be delivered by violence against women advocates who have received legal training and/or by teams that include a violence against women advocate as well as a lawyer.

Case management:

We believe that when a family law dispute reaches court, it deserves to be adjudicated with consistency by someone who has expertise in family law. This will result in more appropriate outcomes, delivered more economically and in a more timely fashion.

Violence against women advocates urge the Attorney General to consider the use of specialized family court judges and a “one family/one judge” approach to case management, while taking into account and understanding the unique situations particularly of families in remote, Northern and Aboriginal communities.

**Next Steps**

Survivors tell us powerful stories of their challenges with family court:

*It’s abusive all over again.*<sup>15</sup>

*It’s a vicious circle and there’s no way out as far as I’m concerned.*<sup>16</sup>

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<sup>14</sup> We are encouraged by the Attorney General’s December 17<sup>th</sup> statement that not every case is appropriate for ADR and that cases that need the full court process will get it.

<sup>15</sup> *Through the Looking Glass*. p. 17

It is important for any reforms to take these voices into account.

It is our expectation that this brief will be helpful with respect to the Attorney General's immediate decisions.

We realize there are many other aspects to the process reforms being considered by the Attorney General, including case triage, extension of legal aid to cover mediation, arbitration and collaborative law, changes to the Family Law Information Centres, evaluation of any initiatives undertaken on reforming the process and more.

We have many ideas for reform related to the above-mentioned issues that we would like to share with the Attorney General and the Ministry. For instance, the requisite risk assessment and prioritizing of cases that triage entails is a particular expertise of the violence against women sector.

We look forward to ongoing collaborations and to the opportunity to participate in discussions with the mandate of improving the family court process so that abused women and their children can truly access justice in the family court as they move into lives free from violence.

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<sup>16</sup> *Ibid.* p. 18