



Women's Legal  
Education and  
Action Fund | Fonds d'action et  
d'éducation juridiques  
pour les femmes

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January 15, 2016

Dear Ms. Squires:

**Re: Development of Legal Aid Ontario's "Domestic Violence Strategy"**

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The Women's Legal Education and Action Fund (LEAF) is pleased to make this submission in response to Legal Aid Ontario's (LAO) public consultation process regarding the development of a 'Domestic Violence Strategy'.<sup>1</sup> LEAF welcomes this initiative aimed at improving legal aid services for survivors of domestic violence<sup>2</sup> in Ontario.

LEAF is a national, charitable, non-profit organization dedicated to promoting substantive equality for women and girls through litigation, law reform and public education. LEAF has intervened in dozens of cases since its founding in 1985 and is a leading expert in the inequality and discrimination experienced by women and girls in Canada. Advocacy aimed at eliminating the legal and systemic access to justice

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<sup>1</sup> LEAF is grateful for the assistance of volunteers Sasha Hart and Julie Lassonde in the preparation of this submission.

<sup>2</sup> We understand that LAO has adopted a broad and inclusive definition of "domestic violence" as including multiple forms of physical and non-physical abuse occurring within a familial context, including "intimate-partner violence, child abuse, elder abuse, and abuse in a care-giving relationship." Legal Aid Ontario, "Consultation Paper: Development of a Domestic Violence Strategy" (July 2015) at p 8, online: <http://legalaid.on.ca/en/publications/downloads/domesticviolencestrategy/2015-07-DVS-Consultation-Paper.pdf?t=1449927073767> [Consultation Paper].

barriers faced by women who experience violence continues to be a significant aspect of LEAF's work.

Having reviewed LAO's consultation paper entitled "Development of a Domestic Violence Strategy", LEAF makes the following submissions for LAO's consideration in the development and implementation of this proposed strategy.

### **1. Consideration of the 'Blueprint for a National Action Plan on Violence Against Women and Girls'**

As part of a coalition of over twenty non-governmental organizations and independent experts working in the violence against women (VAW) sector, LEAF was actively involved in preparing a blueprint for a national action plan on violence against women and girls ("the Blueprint"), which was made publicly available in 2015 and is enclosed, for your convenience.

The Blueprint outlines the pressing need for a national action plan on VAW and provides recommendations to the federal government in terms of the development and content of such a plan. It could serve as a helpful resource to LAO in the current context, and LEAF therefore suggests that LAO take this Blueprint into account in developing its Domestic Violence Strategy.

The following recommendations and action items outlined in the Blueprint are particularly relevant to LAO's role:

- Offer free legal aid representation and information for abused women including free information about rights and entitlements for criminal and family court systems;
- Ensure women have access to legal representation, advice and information for all processes;
- Recognize and offer support to survivors who engage with the criminal justice systems, as well as those who choose not to for various reasons;
- Ensure that lawyers receive training in intersectional gender-based analysis of family and sexual violence, including an understanding of the tactics an abuser will use during court proceedings;

- Ensure perpetrators are held responsible for their behaviour without exposing women who experience violence to unfounded charges.

LAO should ensure these objectives constitute central components of its Domestic Violence Strategy.

Based on the Consultation Paper, we understand that many of these objectives are among those that LAO has been striving to meet, but that there is a demonstrated need to expand and improve on the delivery of legal aid services to clients experiencing domestic violence. According to LAO's "Client Needs Analysis", the following groups of women continue to face considerable challenges in accessing legal aid services: women in family court, women experiencing domestic violence who are charged or cross-charged in a criminal domestic assault matter, immigrant and refugee women, elderly women, women with disabilities, and women living in rural locations.<sup>3</sup>

We note that LAO is seeking to improve access to its services for these vulnerable population groups by expanding its financial eligibility requirements for legal aid certificates in criminal, family, and refugee/immigration law; by making certificates available for the first time to survivors of domestic violence who are charged with assault against their violent partner while attempting to defend themselves; and by expanding the delivery of legal services in community settings.<sup>4</sup> While these are all critical steps, LEAF also urges LAO to continue to explore whether there are additional initiatives that may be necessary to address the full range of barriers abused women face in accessing its services. Further consultations with women from these particularly vulnerable population groups, as well as with the frontline workers who engage with them, may be required in order to identify further innovative solutions for improving their access to LAO services.

## **2. Necessity of a Gender-based, Survivor-directed approach**

We are pleased that LAO has indicated its support for a gender-based approach to the development of its Domestic Violence Strategy.<sup>5</sup> LEAF underscores the importance of such an approach, which must be grounded in an understanding of the following:<sup>6</sup>

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<sup>3</sup> Consultation Paper, pp 15-26.

<sup>4</sup> Consultation Paper, pp 37-38.

<sup>5</sup> Consultation Paper, pp 9-10, 46.

<sup>6</sup> See enclosed "Blueprint for Canada's National Action Plan on Violence Against Women and Girls" at pp 3, 9 ("Blueprint").

- Domestic violence is a gendered crime whereby women are overwhelmingly the victims and men most often the perpetrators;
- Domestic violence is a form of gender-based discrimination that perpetuates and sustains women's inequality both in and outside of the home; and
- Women's experiences are shaped by multiple forms of intersecting discrimination. Women may be subjected to discrimination on the basis of their sex and/or gender identity, as well as their race, sexual orientation, disability, class, ethnic origin, and/or religion, among others. Such women are particularly vulnerable to violence.

It is essential that the development and implementation of the Strategy be survivor-directed, so as to ensure that it is responsive to the lived realities of women facing violence. The Strategy must be appropriate to the diverse communities of women being served, taking into consideration culture, language, race, geography, religion, nationality, physical and mental ability, sexual orientation, gender identity and economic status.

To that end, LEAF suggests that LAO establish a formal mechanism for facilitating meaningful and ongoing participation of survivors and frontline workers from diverse communities of women—throughout the planning process as well as throughout the course of the implementation of the Strategy.<sup>7</sup> LAO should also review all of its programs using a gender-based analysis and train all service providers on gender-based/intersectional analysis (LEAF comments further on the issue of training in the section below).

Furthermore, in order to reflect the full range of women's experiences of domestic violence, LEAF encourages LAO to adopt an inclusive definition of "women" as encompassing all self-identified women and girls, including trans women and girls.

### **3. Adequate Training for Staff and Legal Service Providers**

LEAF also underscores the importance of ensuring that all LAO staff, community legal clinics, and private bar panel lawyers who may interact with domestic violence survivors receive adequate and ongoing training. We are pleased to note LAO's plan to expand the delivery of its current "Domestic Violence Awareness Training", so that it is made

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<sup>7</sup> See Blueprint, p 8.

available to not only LAO staff, but also to community legal clinic staff and private bar panel lawyers.<sup>8</sup>

LAO should ensure that this training includes an intersectional gender-based analysis of family and sexual violence cases and an understanding of the tactics an abuser will use during court proceedings.<sup>9</sup> The training should also tackle myths and stereotypes about VAW and promote awareness about how these myths and stereotypes persist in the legal system (i.e., for example, the myths and stereotypes that continue to underlie certain evidentiary rules, as well as judicial and defence counsel approaches in some cases).<sup>10</sup>

LEAF's advocacy work provides examples of areas that would appropriately be covered in LAO's domestic violence training, and that also represent key systemic access to justice challenges of which LAO service providers should be aware:

- The law of "consent" in the context of sexual assault<sup>11</sup> and spousal relationships;<sup>12</sup>
- The criminal justice treatment of violence against Indigenous women;<sup>13</sup>
- Complainants' right to wear a niqab when giving evidence in court proceedings;<sup>14</sup>
- The availability of the defense of duress in the domestic violence setting;<sup>15</sup>

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<sup>8</sup> Consultation paper, p 40.

<sup>9</sup> Recommended in the Blueprint, p 6.

<sup>10</sup> See the analysis of defence counsel's continued reliance on stereotypes about women's sexuality in sexual assault cases in Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51:2 *Osgoode Hall LJ* 427. See also the following sources on the myths and stereotypes that pervade the law of sexual assault: Elizabeth Comack and Tracey Peter, "How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage between 'Responsibilization' and 'Blaming the Victim'" (2005) 17 *Canadian Journal of Women and Law* 283; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22 *Canadian Journal of Women and Law* 397.

<sup>11</sup> See LEAF factum in *R. v. Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 (SCC):

<<http://www.leaf.ca/wp-content/uploads/2010/12/LEAF-Ewanchuk-factum-1.pdf>>.

<sup>12</sup> See LEAF factum in *R. v. J.A.* 2011 SCC 28: <[http://www.leaf.ca/wp-content/uploads/2011/05/Factum\\_Finale\\_JA\\_Filed\\_SCC.pdf](http://www.leaf.ca/wp-content/uploads/2011/05/Factum_Finale_JA_Filed_SCC.pdf)>.

<sup>13</sup> LEAF recently filed a motion to intervene in the case of in *R. v. Barton* at the Alberta Court of Appeal, where at trial the jury accepted the defence argument that an Indigenous woman, Cindy Gladue, had consented to "rough sex" and acquitted the man accused of her murder.

<sup>14</sup> See LEAF factum in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726: <<http://www.leaf.ca/wp-content/uploads/2012/12/NS-SCC.pdf>>.

- Access to justice for sexual assault complainants with intellectual and other disabilities, and barriers to the receipt of testimony from these women;<sup>16</sup>
- Discriminatory beliefs about sexual assault complainants invoked by judges;<sup>17</sup>
- Police duties in sexual assault investigations, and the myths and stereotypes that can influence police actions in these cases;<sup>18</sup>
- The right to compensation for survivors of domestic violence;<sup>19</sup>
- Complainants' privacy rights in sexual assault court proceedings;<sup>20</sup>
- Immigration policies that heighten migrant/refugee women's vulnerability to domestic violence.<sup>21</sup>

LEAF has developed considerable expertise delivering public legal education on the myths and stereotypes surrounding the legal treatment of violence against women for the last thirty years. We would welcome the opportunity to serve as a resource for LAO in the development of this component of the training.

#### 4. Engagement in Systemic Law Reform Advocacy

LEAF notes with particular interest the following discussion question raised in the Consultation Paper, which asks whether LAO should contribute to systemic law reform advocacy in areas of relevance to legal service delivery for domestic violence clients:

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<sup>15</sup> See factum of LEAF and the Canadian Association of Elizabeth Fry Societies (CAEFS) in *R. v. Ryan*, 2013 SCC 3: <<http://www.leaf.ca/wp-content/uploads/2013/02/LEAF-CAEFS-FACTUM.pdf>>.

<sup>16</sup> See factum of LEAF and the Disabled Women's Network Canada (DAWN-RAFH) in *R. v. DAI*, 2012 SCC 5: <[http://www.leaf.ca/wp-content/uploads/2011/10/Factum\\_D-A-I\\_Finale\\_LEAF\\_DAWN-CANADA\\_SCC.pdf](http://www.leaf.ca/wp-content/uploads/2011/10/Factum_D-A-I_Finale_LEAF_DAWN-CANADA_SCC.pdf)>.

<sup>17</sup> See LEAF's Motion for Leave to Intervene in *R v. Rhodes* [2011] MJ No 67 (QL) (QB): <<http://www.leaf.ca/r-v-rhodes/>>.

<sup>18</sup> See *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CanLII 14826 (ON SC).

<sup>19</sup> See LEAF factum in *L. (A.) v. Saskatchewan (Crimes Compensation Board)*, 1992 CanLII 8238 (SK CA): <<http://www.leaf.ca/wp-content/uploads/1992/1992-AL.pdf>>.

<sup>20</sup> See LEAF factum in *R v Mills*, <[1999] 3 SCR 668: <http://www.leaf.ca/wp-content/uploads/1999/1999-mills.pdf>>.

<sup>21</sup> See LEAF, the Barbra Schlifer Commemorative Clinic, and METRAC submission on Bill C-31, the *Protecting Canada's Immigration System Act*: <<http://www.leaf.ca/wp-content/uploads/2012/05/2012-04-24-Submission-Bill-C-31-English-1.pdf>> ("Bill C-31 Submission").

Stakeholders suggest that more active engagement in systemic law reform initiatives is an important contributor to the promotion of client-needs based approaches in the delivery of social and legal services. What areas of systemic law reform are needed with respect to family, criminal and immigration law? What opportunities exist for LAO to become more involved? What should the scope of LAO's intervention be?<sup>22</sup>

LEAF supports LAO playing a greater systemic advocacy role in this area. Given its frontline legal work with domestic violence survivors, LAO is well placed to identify pressing and emerging legal issues, and potential areas for law reform that must be addressed in order to promote access to justice for this vulnerable client group. Secondly, given that LAO does not have the resources to assist each and every individual Ontarian in need of legal aid services, engaging in this type of advocacy work would allow LAO to have a more far-reaching impact in eliminating the systemic barriers that so many individuals/survivors continue to face.

Possibilities for the nature and extent of LAO's involvement in systemic law reform work could include:

- Consulting, connecting and partnering with organizations (such as LEAF and others) who are already working on systemic law reform initiatives in this area;
- Establishing a formal mechanism whereby frontline LAO service providers can monitor and report on the systemic barriers and legal issues they encounter in their representation of clients who experience domestic violence;
- Identifying potential cases of interest that could be ideal for test case litigation, and either intervening in those cases, or supporting intervention work of other stakeholder organizations.

The following are specific areas of law reform for which LAO support is important to create necessary change for women facing intimate partner violence:<sup>23</sup>

- Raising social assistance rates;
- Ensuring that minimum wage is sufficient to provide a living wage;

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<sup>22</sup> Consultation Paper, p 51.

<sup>23</sup> See Blueprint, p 7.

- Ensuring supports for women to enter/re-enter the paid labour force;
- Implementation of a national plan to end women's homelessness and a national housing strategy;
- Ensuring that immigration policy does not increase the vulnerability of sponsored immigrants and migrants to domestic violence;
- Ensuring migrant workers have full access to services and are not legally dependent on remaining with abusive sponsors or employers;<sup>24</sup>
- Ensuring that employers take effective measures to address the impact of domestic violence at work;
- Challenging legislation, common law interpretations, and evidentiary requirements that continue to disadvantage women survivors of domestic violence in the legal system.<sup>25</sup>

LEAF trusts that LAO will respond proactively to the proposals from various stakeholders during this consultation to develop a robust domestic violence strategy that will lead to tangible improvement in the delivery of legal services to clients experiencing or who have experienced domestic violence. LEAF would be pleased to engage in further discussions with LAO about this important initiative.

All of which is respectfully submitted,

The Women's Legal Education and Action Fund Inc. (LEAF)

Encl.

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<sup>24</sup> See Bill C-31 Submission, *supra*, regarding the then-proposed *Protecting Canada's Immigration System Act* and its impact on abused refugee women. See also the following study on the systemic barriers immigrant women face in seeking services for intimate partner violence: Alaggia, Ramona, Cheryl Regehr, and Giselle Rishchynski. 2009. "Intimate Partner Violence and Immigration Laws in Canada: How Far Have We Come?" *International Journal of Law and Psychiatry* 32 (6): 335-341.

<sup>25</sup> See the issues raised in the LEAF facta and court interventions cited in the previous section. See also the analysis of law reform needed with respect to elements of the criminal harassment offence in the context of intimate partner violence: Isabel Grant. "Intimate partner criminal harassment through a lens of responsabilization" (2015) *Osgoode Hall Law Journal* 52(2).