



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

**Submission to the Law Society of Ontario Access to Justice
Consultation**

LEAF (Women's Legal Education and Action Fund)

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ABOUT LEAF

The Women's Legal Education and Action Fund (LEAF) works to advance the substantive equality rights of women and girls through litigation, law reform, and public education. Since 1985, LEAF has intervened in landmark cases that have advanced equality in Canada—helping to prevent violence, eliminate discrimination in the workplace, provide better maternity benefits, ensure a right to pay equity, and allow access to reproductive freedoms. The value of LEAF's work in developing law and policy to advance women's equality depends on women being able to access the benefit of those developments in their individual lives.

INTRODUCTION

Access to justice is an equality rights issue. While access to justice is important for all Canadians, obstacles to access have a particularly acute impact on women and marginalized groups. Women require access to justice to ensure the equal benefit and protection of the law – including freedom from discrimination and freedom from violence.

Feminists have used the courts – and the law reform process more generally – to ensure women have the equal benefit and protection of the law. For example, thanks to the legal battles fought by feminists, certain acts that were once accepted in Canadian society – or at least tolerated – are now widely recognized as contrary to law, including marital rape, sexual harassment, and the unfair apprehension of Indigenous women's children. While these legal victories have been significant, without access to justice – or recourse to the legal system to enforce these rights in individual cases – the apparent gains in women's equality rights will ring hollow.

This submission explains why the LSO's Access to Justice Initiative must be attentive to women's equality, and proposes some specific mechanisms to do so.

ACCESS TO JUSTICE IS AN EQUALITY ISSUE

1. Women experience disproportionate rates of poverty

First, as women experience disproportionate rates of poverty,¹ it follows that women are less able to afford legal fees. Women comprise 62% of Ontarians who earn less than \$20,000 per year, the lowest-income group.² While finances are a major barrier to access to justice for most Ontarians, this is all the more pronounced for women. Simply put, the justice system is too expensive for many women. In a 2010 report, the Ontario Civil Legal Needs Project noted that women in Ontario are “among the groups

¹ Statistics Canada, *Women in Canada: A Gender-based Statistical Report*, “The Economic Well-Being of Women in Canada”, by Dan Fox and Melissa Moyser, Catalogue Number 89-503-x (Ottawa: Statistics Canada, 2018), online (pdf): <<https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54930-eng.htm>>

² Statistics Canada, *Low Income Statistics by Age, Sex and Economic Family Type*, Table 11-10-0135-01 (Ottawa: Statistics Canada, 2016), online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110013501>>

more likely to decide not to seek legal assistance for a problem, even though they believed it would have helped them.”³

2. Barriers to justice exacerbate women’s pre-existing inequality

Second, obstacles to accessing legal information and representation perpetuate women’s inequality and poverty. The feminization of poverty is often a result of discrimination at work and in the home⁴ in a manner prohibited by law, including pay inequity or unfair division of resources after a relationship breakdown. Many of these legal wrongs could be at least partly corrected for women through access to legal representation and advocacy.

Women need legal representation to ensure the protection (and enforcement) of their constitutional and human rights.⁵ Groups who face higher rates of discrimination and violent victimization may have a disproportionate need to access the justice system to enforce their legal rights. Women’s lack of access to justice, a product of their inequality, is therefore self-perpetuating. The relationship between women’s equality and access to justice highlights the need to ensure that women are expressly and specifically considered in the LSO consultation.

3. Women have disproportionately less access to the kinds of legal aid services that women, in particular need

Third, although women experience disproportionate rates of poverty, there is less government funding available for the kinds of legal assistance women need. Well over half of certificates issued by Legal Aid Ontario (LAO) are allocated to criminal law.⁶ Albeit crucial, this does not necessarily meet the particular justice needs of women. As noted by Statistics Canada, “The involvement of women and girls in the criminal justice system has largely been as crime victims rather than as perpetrators. While females make up about half of violent crime victims, they represent a minority of offenders.”⁷

On the other hand, women are more likely to need assistance with civil and family proceedings. The Civil Legal Needs report found that “women were among the groups more likely to identify experiencing a

³ The Ontario Civil Legal Needs Project Steering Committee, “Listening to Ontarians: Report of the Ontario Civil Legal Needs Project” (May 2010) at 12, online (pdf): *The Ontario Civil Legal Needs Project* <https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110_oclnreport_final.pdf>

⁴ Steven Pressman, “Feminist Explanations for the Feminization of Poverty” (2003) 37: 2 J of Economic Issues at 353-61.

⁵ International Development Law Organization, “Strengthening Women’s Access to Justice: Making Rights a Reality for Women and Girls” (November 2017) at 1, online (pdf): *International Development Law Organization Centre* <<https://www.idlo.int/system/files/event-documents/IDLO%20CN%20-%20Access%20to%20Justice%20for%20Women%20and%20Girls%20NO%20CONTACTS.PDF>>

⁶ Legal Aid Ontario, “2017-2018 Annual Report” (2018) at 24, online (pdf): *Legal Aid Ontario* <<https://www.legalaid.on.ca/en/publications/downloads/LAO-annual-report-2017-18-EN.pdf>>

⁷ Statistics Canada, *Women in Canada: A Gender-based Statistical Report*, “The Economic Well-Being of Women in Canada” by Tina Mahony, Catalogue Number 89-503-x (Ottawa: Statistics Canada, 2011), online: <<https://www150.statcan.gc.ca/n1/pub/89-503-x/2010001/article/11416-eng.htm>>

civil legal problem in the last three years – and, in particular, they were among the groups more likely to mention family relationship problems.”⁸

Access to justice in civil law, and in particular family law matters, is crucial for women’s equality. While both men and women may have a difficult time accessing affordable legal representation in family law, the ramifications of lack of access are likely more severe for women. “Almost all research on economic consequences of marital dissolution suggests that women and children suffer more financial loss than men do,”⁹ with most studies indicating a decline of about 30% in women’s income in the year following a divorce.¹⁰ As such, women may experience disproportionately negative consequences in family law disputes and have greater need for legal representation.

Further, women navigating family violence have a particularly acute need for legal representation. The ongoing operation of power imbalances inherent in domestic relationships characterized by violence can make self-representation incredibly difficult. A woman without legal representation who is intimidated by her ex-partner during family court proceedings is more likely to make concessions that are not in her best interests and/or the best interests of the children.¹¹ Additionally, some decision makers or mediators may have a difficult time grasping the severity of the violence, and may issue judgments or support settlements that endanger women and children’s safety and wellbeing. Examples of potential dangerous outcomes in family law include: requiring mothers to disclose their address to or live in the same city their abusive ex-partner who is their children’s father, or allow abusive partners shared custody and thereby control over the women’s life.¹² As such, in many family law cases, the consequences of an inaccessible legal system are particularly severe for women.

LAO covers limited family law services.¹³ However, the income cut-offs are low¹⁴ and family law proceedings are expensive, leaving many women without access to meaningful legal representation. This means that some women could be left alone to navigate very significant hearings that directly affect their fundamental rights, such as child apprehension hearings or mobility hearings – which determine whether a custodial parent is allowed to move cities or even neighbourhoods. Again, as women are overwhelmingly more likely to be the custodial parent, the consequences of an inaccessible justice system in this area are particularly acute for them.

⁸ The Ontario Civil Legal Needs Project, *supra* note 3 at 12.

⁹ Tahany M. Gadalla, “Impact of Marital Dissolution on Men's and Women's Incomes: A Longitudinal Study” (2008) 50:1 J of Divorce and Remarriage at 56.

¹⁰ *Ibid.*

¹¹ Pamela Cross, “Through the Looking Glass: The Experiences of Unrepresented Abused Women in Family Court” (March 2008) at 35, online (pdf): *Luke’s Place Support and Resource Centre* <<http://www.oaith.ca/assets/files/Publications/Family%20Law/Through-the-looking-glass.pdf>>

¹² For an in-depth discussion of such tactics of “legal bullying” see e.g. : Janet E Mosher, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners” (2015) 32 *Windsor Y B Access Just.*

¹³ Legal Aid Ontario, “Family Law: How LAO Can Help”, online: *Legal Aid Ontario* <http://www.legalaid.on.ca/en/getting/type_family.asp>

¹⁴ Legal Aid Ontario, “Need a lawyer but can’t afford it?”, online: *Legal Aid Ontario* <<http://www.legalaid.on.ca/en/getting/eligibility.asp#amountyouearn>>

Women require greater access to legal representation to navigate the legal system as victims of crime and discrimination. That one in three Canadian women experiences sexual assault in her lifetime¹⁵ signals the pressing need for women's to be able to access to justice in sexual violence proceedings. It is well documented that women who rely on criminal prosecutions of offenders to access justice for sexual assault face significant barriers, including through the operation of discriminatory myths and stereotypes throughout the justice system.¹⁶ Moreover, defence counsel often resort to abusive tactics such as filing superfluous applications to access third party and/or sexual history evidence designed to intimidate the complainant.¹⁷ These tactics, which in some cases seem decidedly inconsistent with the LSO's *Rules of Professional Conduct*, too often go unchallenged.

LAO only supports sexual assault complainants with the specific issue of third party disclosures. However, as Professor Elaine Craig notes, "Sexual assault complainants are often woefully under prepared for the criminal trial process," and would be better served with legal representation throughout the legal process.¹⁸ The limited Independent Legal Advice program recently implemented by the Ontario government provides only 4 hours of legal advice, which is insufficient and not the same as full representation.¹⁹ Outside the criminal context, women may not be able to access legal representation in other legal responses to sexual assault, including civil suits.

Women often seek justice for sexual harassment and violence through administrative tribunals. Two key avenues that women rely on to seek justice for sexual harassment and violence are currently facing funding cuts and staffing shortages: the Criminal Injuries Compensation Board²⁰ and the Human Rights Tribunal.²¹ These are important resources for women to seek compensation for the harms of sexual violence, which is not a remedy available through the criminal process. Without funding for legal aid in civil law, they may be the only avenues for women to recoup some of the very significant financial costs caused by sexual violence.²² The LSO's access to justice proposals should, in no uncertain terms, clarify the significance of tribunal-based avenues to seek compensation for discrimination and sexual assault.

¹⁵ Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy and Adam Cotter, Catalogue Number 85-002-x (Ottawa: Statistics Canada, 2017), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>>

¹⁶ David Tanovich, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2014) 45:3 *Ottawa L Rev* at 498-499.

¹⁷ *Ibid.*

¹⁸ Elaine Craig, "The Inhospitable Court" (2016) 66:2 *UTLJ* at 236.

¹⁹ Ontario Ministry of the Attorney General, "Independent Legal Advice for Survivors of Sexual Assault Pilot Program" (27 November 2018), online: *Ontario Ministry of the Attorney General* <<https://www.attorneygeneral.jus.gov.on.ca/english/ovss/ila.php>>

²⁰ Tim Meeks, "Province terminates compensation for victims of violent crimes", *The Intelligencer* (2 May 2019), online: <<https://www.intelligencer.ca/news/local-news/province-terminates-compensation-for-victims-of-violent-crimes>>

²¹ Paola Loriggio, "Delays at Ontario human rights tribunal could undermine cases, say lawyers", *The Toronto Star* (11 Jan 2009), online: <<https://www.thestar.com/news/canada/2019/01/11/delays-at-ontario-human-rights-tribunal-could-undermine-cases-say-lawyers.html>>

²² Department of Justice, Research and Statistics Division, *An Estimation of the Economic*

4. Access to justice includes access to just outcomes

Finally, women continue to struggle to achieve equality in law. Equality in the substance as well as the process of the law must be a central concern. As noted in *A Roadmap for Change*, the final report of the National Action Committee on Access to Justice, "Providing justice—not just in the form of fair and just process, but also in the form of fair and just outcomes—must be our primary concern."²³

Women – particularly those who are Indigenous, racialized, living with disabilities, or living in poverty -- continue to suffer from discrimination and inequality in Ontario, and Canada more generally. As the Supreme Court of Canada recently explained in *R v Barton*:

We live in a time where myths, stereotypes, and sexual violence against women^[1] — particularly Indigenous women and sex workers — are tragically common. ... While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can — and *must* — do better.²⁴

RECOMMENDATIONS

In light of the above, LEAF makes the following recommendations to the LSO.

1. First and foremost, the LSO should focus on the needs of marginalized groups, including women's need to enforce their equality rights, in access to justice consultations;
2. Given the recent funding cuts announced in Ontario, the LSO must take a strong stance in favour of fulsome funding for legal aid, in particular for family and civil legal services. The LSO should also advocate for continued funding and staffing for Ontario's legal tribunal.
3. To better facilitate service delivery, the LSO should advocate for the integration of lawyers into existing avenues of service delivery such as transition houses, and examine means to connect lawyers with other professionals such as social workers or counsellors. As explained by West Coast LEAF, access to justice is advanced by ensuring that legal services are placed "in the path of the client,"²⁵ rather than restricting their availability to centralized entry points.

Impact of Violent Victimization in Canada, 2009, by Josh Hoddenbagh, Susan McDonald, and Ting Zhang, Catalogue Number J4-34/2014E-PDF (Ottawa: Department of Justice, 2014) at 148-150, online (pdf): < https://www.justice.gc.ca/eng/rp-pr/cj-ip/victim/rr14_01/rr14_01.pdf >

²³ Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil and Family Justice: A Roadmap for Change" (October 2013) at 9, online (pdf): *Action Committee on Access to Justice in Civil and Family Matters* < http://www.cfcj-fcj.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf >

²⁴ *R v Barton*, 2019 SCC 33 at para 1.

²⁵ Laura Track, "Putting Justice Back on the Map: the Route to Equal and Accessible Family Justice" (February 2014) at 37, online (pdf): *West Coast LEAF* < <http://www.westcoastleaf.org/wp-content/uploads/2014/10/2014-REPORT-Putting-Justice-Back-on-the-Map.pdf> >

4. The LSO has the opportunity to be a leader in advocating for broader legal aid funding – including covering a wider range of legal matters and increasing the income cut-off, which currently ensures that many Ontarians have no meaningful access to legal representation. In addition, the LSO can lead by advocating for equality-informed funding decisions consistent with the *Charter of Rights and Freedoms*. As Professor Mossman et al write, “if the overall purpose of section 15 of the *Charter* is to promote substantive equality, this purpose requires that legal aid programs be designed to remedy social disadvantage.”²⁶
5. The LSO’s own legal guides should be more responsive to women’s justice needs. In particular, the LSO should have a guide for women deciding how to seek justice for sexual assault, with explanations of the role of a witness in a criminal trial, complainants’ right to counsel in applications seeking to admit evidence of prior sexual history or third party records, and other non-criminal venues for pursuing justice; guides to civil proceedings; and guides to pursuing claims before the human rights tribunal, including one specific to sexual harassment;
6. The LSO should take steps to proactively enforce the rules of professional conduct regarding equity, discrimination, and civility, especially in the context of sexual assault trials. The use of abusive tactics against witnesses and perpetuating discriminatory myths and stereotypes in court should be considered conduct unbecoming of a lawyer and in violation of the LSO’s standards on civility.

To that end, LEAF endorses two recommendations by Professor Craig.²⁷ First, the LSO should encourage defence and Crown attorneys to reflect on their practice through the lens of legal ethics, perhaps through mandatory reporting requirements. Second, the LSO should enforce its *Rules of Professional Conduct* against counsels who exhibit questionable behaviour with respect to complainants in sexual assault proceedings. Section 5.1-1 of the *Rules* on “Advocacy” requires that lawyers represent the best interest of their clients with “candour, fairness, courtesy, and respect.”²⁸ Additionally, section 5.1-5, titled “Courtesies,” requires lawyers to be “courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.” While these sections can act as a starting point to ensure that lawyers respect the equality rights of all witnesses, the LSO may also revisit the *Rules* to set firmer standards on defence lawyers’ latitude to rely on third party records or problematic lines of questioning.²⁹ The LSO should also make clear that seeking to distort the search for truth through the introduction of discriminatory myths and stereotypes, which are grounded in prejudice rather than fact, violates the lawyer’s obligations to the administration of justice.³⁰

²⁶ Mary Jane Mossman, Karen Schucher, Claudia Schmeing, “Comparing and Understanding Legal Aid Priorities: A Paper Prepared for Legal Aid Ontario” (2010) 29:14 Windsor Rev Legal & Soc at 187.

²⁷ Elaine Craig, “The Ethical Identity of Sexual Assault Lawyers” (2016) 47:1 *Ottawa L Rev* at 120-121.

²⁸ Law Society of Ontario, “Rules of Professional Conduct” (2000), online: *Law Society of Ontario* <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>>

²⁹ Elaine Craig, “The Ethical Identity of Sexual Assault Lawyers” (2016) 47:1 *Ottawa L Rev* at 120-121.

³⁰ Law Society of Ontario, “Rules of Professional Conduct” (2000), online: *Law Society of Ontario* <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>>

7. The LSO should facilitate *pro bono* work by all members of the bar. The LSO should revisit the need for LawPRO insurance for lawyers providing pro bono representation. While many in-house lawyers, including those working at non-profit organizations and unions, do not have insurance, many would be willing to provide pro bono representation to those who face barriers in accessing justice. We recommend providing an exception for uninsured lawyers who are actively practicing in-house. In the alternative, LawPRO could offer insurance on a “per-case” basis.

All of which is respectfully submitted.