



**Response to the White Paper on *Family Relations Act* Reform
October 2010**

**Submission of West Coast Women's Legal Education and Action Fund
(West Coast LEAF) to the Ministry of Attorney General, Justice Services Branch,
Civil and Family Law Policy Office**

I. Introduction

West Coast LEAF commends the drafters of the White Paper for their increased consideration and understanding of family violence. While West Coast LEAF is pleased to see many of the changes in the White Paper (subject to the specific suggestions below), we urge the Ministry to ensure that the actualization and enforcement of these laws maintains a strong focus on violence against women, gendered power imbalances within some families and the massive and growing problem of inaccessibility of state funded legal counsel in this province. Moreover, it is vital that the Ministry ensure that these provisions are as meaningful to newcomers to BC as they are to long time residents, including by understanding the growing linguistic and cultural diversity of BC families. While many of the proposed changes are laudable on paper, these provisions will mean little if those working within the system have not been adequately trained on the broadened scope and legal implications of violence, and where women lack the ability to enforce their rights because they do not have access to legal aid or adequate translation services.

The proposed legislation also places a renewed focus on integration between different legislative schemes and social services. Indeed, the success of the new Act will depend on coordination between the Ministry of Attorney General, Ministry of Children and Family Development, Family Court, Criminal Court, the bar and other agencies serving children and families. This coordinated approach is particularly important for families and women experiencing violence; the failure of systemic coordination in these circumstances can at best have negative impacts on child development and increase family stress, and at worst be fatal.

Our suggestions are premised on the understanding that this paper is in the final stages of revision before being turned into a bill, and that the most useful suggestions will be those that are specific and targeted at the anticipated harm. We have not commented those areas of the paper where we have no specific suggestions.

II. About West Coast LEAF

The West Coast Women's Legal Education and Action Fund (West Coast LEAF) formed in 1985 when the equality guarantees of the *Canadian Charter of Rights and Freedoms* came into force. Our mission is to achieve equality by changing historic patterns of systemic discrimination against women through BC-based equality rights litigation, law reform and public legal education.

Governed by an elected Board of Directors and supported by members, volunteers, and staff, West Coast LEAF is an affiliate of National LEAF. West Coast LEAF is an

incorporated non-profit society in British Columbia and a federally registered charity. West Coast LEAF has a breadth of experience in family law reform, access to justice issues and the application of substantive equality principles to a wide range of laws.

West Coast LEAF made extensive submissions on the proposed revisions to the *Family Relations Act* in 2007, and was cited in the Report of Public Consultations prepared by the Ministry of the Attorney General. For further information about the organization and our approach to family law, we refer you to our 2007 submissions (Phase III consultations can be found on our website at:

<http://westcoastleaf.org/index.php?pageID=43&parentid=29#Familyrelationsact>).

III. Feedback on White Paper

A. Non-Court Dispute Resolution and Agreements:

- West Coast LEAF is pleased that the White Paper both demonstrates an increased focus on non-court forms of dispute resolution and includes the intent to exempt victims of family violence from such mandatory mechanisms. However, the phrase “appropriate assistance” in s.4(1)(a) needs to be defined in order to ensure that families where violence is involved are not pushed into dispute resolution at the discretion of family justice professionals. While s.4(1)(a) requires family justice professionals to “make inquiries to assess whether family violence may be present, and if so, provide the party with appropriate assistance”, there is no further direction in this section or the proposed Act to guide the professional on what kind of assistance is appropriate or whether such families are eligible for non-court dispute resolution services at all.
- In order to make the proposed exception effective (as described on p.13), family justice professionals must be adequately trained on the new definition of family violence in the Act, how to “assess whether family violence may be present” (as per s.4(1)(a)), and the dynamics of violence against women in relationships. Further, judges should be screening for violence and trained on how to deal with it. The Ministry must commit to working closely with the Law Society, the judiciary and other regulatory and training bodies to ensure that professionals are adequately trained (for example, by making family violence a component of the Professional Legal Training Course for law students preparing to write their bar exams). This is not only a desirable addendum to the new legislative scheme; it is an imperative.
- In addition, the question of funding for the increased services outlined in the proposed Act is paramount. Without increased funding for mediation services

for those who cannot afford to pay for it themselves, the increased focus on non-court dispute resolution services will be meaningless.

- Where a person is unrepresented in a dispute resolution process, we submit that person should be allowed to be accompanied by a community support person.
- West Coast LEAF submits that the Act itself must provide for the right of all parties to translation services where necessary, including for all dispute resolution mechanisms. In particular, the Act must provide for translation of parenting coordinators, family justice counselors and mediators. Translation should be provided by the state where the parties cannot afford to pay for it themselves. This is a matter of right, and of law, and cannot be left to the discretion of individual decision makers, government policy or the regulations.

B. Children's Best Interests:

- West Coast LEAF is very pleased that the White Paper includes an expanded definition of "family violence" that includes psychological and emotional abuse but does not include acts of self-protection or protection of another person. However, West Coast LEAF encourages the drafters to change s.1(b)(i) to include threats concerning deportation or immigration status. West Coast LEAF has heard repeatedly from advocates and the legal community that it is common for sponsors or other spouses with legal status in Canada (usually men) to threaten sponsored or spouses without legal status (usually women) with deportation in order to wield power in a family law dispute. The revised law should account for such power abuses in its definition of threats for the purposes of defining psychological violence. Threats of deportation from one's new or established home, with or without one's children, should be considered serious threats under the law.
- We applaud the revisions to the best interest of the child factors to include the impact of family violence directed towards the child or another family member. However, we urge the government to include in s.43(3)(b)(vii) of the Act a presumption that violence against a child or their family member is not in the child's best interest and/or a presumption that such violence will have a negative impact on the health, emotional well-being and safety and security of the child.
- We also applaud the inclusion of "the history of care of the child" and consideration of any civil or criminal proceedings relating to the child's safety or well being in the best interests of the child provision.

C. Guardianship:

- West Coast LEAF understands that the intent of the drafters was not to include a presumption of shared parenting. However, the wording of s.45 of the proposed Act contains just such a presumption. This section requires greater clarification to ensure that the presumption is not included in the new law. This section should contain language suggesting that guardianship duties will be limited where it serves the best interests of the child.
- We are concerned that the changes to the language of custody and access, and the expanded flexibility around the meaning of guardianship, will increase litigation in custody matters rather than decrease it according to the goal of the new Act. In particular, the expanded list of parental responsibilities, while laudable for adding greater clarity and specificity to this area of law, may be problematic in relationships involving control issues or an abuse of power between the spouses. In order to remedy this issue while maintaining the proposed Act's clarity in this area, s.48(2) should be amended to include the power of the Court to appoint one parent as the ultimate decision maker if the parties cannot agree about a major decision despite their best efforts, although the non-decision-making parent has a right to ask the Court to review the decision if he or she does not believe it to be in the child's best interest. This is a feature of the Master Joyce Model, which we suggest should be imported into the new legislative structure.
- We are also concerned that the new provisions allowing for court-ordered counseling, and other related services, do not come with directions to guide judges on the distribution of costs of such services. While increasing the non-litigious options available to separating families is a commendable goal, provision must be made for who bears the costs of such options. Since women are disproportionately low-income, particularly post-separation, this failure to provide for costs will disproportionately impact women.

D. When orders or agreements for time with a child are not respected:

- West Coast LEAF is pleased to see that failures to exercise parenting time now face consequences under the Act.
- West Coast LEAF is pleased by the inclusion of s.64(4), which lists the circumstances in which a denial of parenting time or contact is not wrongful. However, we strongly urge the drafters to add another subsection to this provision to provide for where the guardian reasonably believes that the

guardian may suffer from family violence during the transfer of the child between parents, where third-party transfer is unavailable.

- Although we appreciate that s.65(1)(a) is listed as a last resort where parenting time or contact has been wrongfully denied, we submit that jail should not be attached as a consequence to decisions about family law matters, except where family violence is involved.
- Further, s.65(1)(b) should be amended to include a social worker rather than a peace officer alone, in order to reduce the potential trauma for the child(ren) involved.

E. Relocation:

- West Coast LEAF is pleased with the inclusion of s.68(2). In addition, the shifting burden outlined in this Part of the Act recognizes the complex power dynamics that may occur around a family's relocation in some circumstances.

F. Property Division:

- West Coast LEAF is pleased at the inclusion of s.85(1), which provides for interim orders respecting property.
- On p.93, the White Paper asks whether the increased and decreased equity of excluded assets be subject to division under the proposed property division rules. West Coast LEAF submits that the division of increased and decreased equity of excluded assets should be dependent on the direct or indirect contributions of the spouse. For example, if the husband has an inheritance that he chooses not to touch during the duration of his marriage, and his wife contributes to his education during that time, she should then receive the benefits of any increased value of his inheritance.

G. Support:

- While West Coast LEAF understands that the provisions for parental support were rarely used, we see no reason for such provisions to be eliminated. While the White Paper notes that "there are a wide variety of programs that address issues of seniors' poverty more effectively than parental support...", in fact many of the social supports that may have addressed these issues have been eroded or eliminated in recent years. Poverty and neglect of seniors is a significant problem, and one which impacts women more than men in part because of the

longer span of women's lives and women's hampered ability to earn income during their working lives. The provision for parental support provides one tool for seniors to address these concerns.

H. Case Management and Enforcement Tools:

- West Coast LEAF applauds the clear rejection of the calls to include remedies for “child alienation” and “false allegations of family violence”. We are pleased to see recognition of the following facts: there may be many valid and complicated reasons why contact between a child and a parent diminishes over time; remedies for false allegations will deter reporting of legitimate concerns; and deliberately false or maliciously false allegations of violence are much less common than denials or failures to report real abuse.

I. Protection Orders:

- West Coast LEAF is pleased to see that the new law will clarify some of the confusion around civil and criminal orders, and will provide for the creation of protection orders which fall within the civil standard of proof but are criminally enforceable. However, we are concerned that the proposed changes will result in *contempt orders* requiring a criminal standard of proof. By way of illustration, under the proposed provisions, a woman will only need to meet a balance of probabilities standard to obtain an order, but will have to show beyond a reasonable doubt that the order was breached in order to get a remedy on the breach. This is a higher standard that currently applies to restraining orders, and therefore is an additional burden for women experiencing family violence. The proposed Act must address these concerns and ensure that women's ability to obtain effective protection orders is helped with the new Act, rather than hindered.
- In addition, the role of Crown counsel in the enforcement of such orders must be clarified. The criminal law system is designed around an adversarial relationship between the accused and the Crown, with strong protections for the accused and no formal role for the victim. It is in this context that the role of Crown counsel, and their relationship to protecting the interests of the abused woman, requires further clarification.
- This change in law will require training for the municipal police forces and the RCMP on their new role in enforcing all protection orders. Again, this training cannot be viewed as secondary to these legislative changes; rather, legislators

must understand that the law will be ineffective, and in fact will likely be counter-productive, without this educational component.

- Section 144.1 should be extended to include protections for the safety and security of family members *or other affected persons*, in order to protect the safety of witnesses or informants.
- We are also concerned that, while a year expiry date for most protection orders may be appropriate, the proposed law does not adequately provide for those cases involving family violence with a high risk of fatality or serious harm. We suggest that s.146 be amended to read: “A protection order expires 1 year after the date it is made, unless a different term is provided for in the order, *including a term of indefinite duration*”.

J. Court Processes

- West Coast LEAF is pleased to see a further elaboration of the expert witness provision in s.169 of the proposed Act. However, advocates and women involved in family law matters have repeatedly reported to West Coast LEAF that the so-called “s.15 reports” (that is, assessments of parents for use in custody and access decisions) are fraught with systemic challenges, including reports that assessors have not sufficiently accounted for the impacts of family violence, and that women who have English language barriers are penalized for not being able to adequately communicate with their children or the assessors in English¹. For these reasons, West Coast LEAF urges the drafters to ensure that revised legislation take into account these important elements of women’s experiences and family dynamics.

For example, s.169(1) could read “For the purposes of a proceeding under this Act, the court may, by order, appoint a person to assess the needs of a child and the ability and willingness of a party or parties to satisfy the needs of the child, taking into account any violence within the family”. In addition, s.169(5) should ensure that the parent has translation services where necessary, and to make provision for such services where that parent does not have the ability to pay for a translator themselves. Finally, s.169 should ensure that a parent’s language of choice in communicating with their child does not work against them in the assessment of their parenting skills.

¹ West Coast LEAF is in the process of conducting research and producing a policy paper on the process of such parental assessments, and some of the attendant challenges for women. This report will be completed in 2011.

IV. Conclusion

Principles of substantive equality must be central to any revisions to the family law system. Women, particularly Aboriginal women, immigrant women, women with disabilities and other marginalized women suffer disproportionately from the economic consequences of relationship breakdown. Women, particularly marginalized women, are the vast majority of those subject to domestic violence. An effective legislative structure must account for women's experiences of violence, poverty and abuses of power within the family. Subject to our concerns outlined above, West Coast LEAF is pleased that, in many ways, the proposed legislation takes into account women's experiences of violence and dis-empowerment.

However, we re-iterate that the words of the proposed Act will have no meaning, and may well cause greater harm than good, without a strong focus on training for all family justice professionals on the dynamics of violence including a standardized tool for risk assessment for lethality and serious harm; in addition to training, there must be provisions to hold family justice professionals accountable for their application of this training to the family law field. These words will also have no meaning without a solution to the growing crisis in civil legal aid in this province; without access to comprehensive legal advice and representation, women will have no means to enforce these new provisions. These words will have no meaning for women who have English language barriers, unless they have access to translators and the means to engage them. These words will have no meaning unless the broadened definition of violence is integrated into every level of the implementation of this Act.

West Coast LEAF is pleased to have been involved in this consultation and looks forward to the introduction of an amended version of this proposed law.