



Standing Committee on Justice Policy

**Submission on Bill 27: An Act to amend the *Arbitration Act*,
1991, the *Child and Family Services Act*, the
Family Law Act and the *Children's Law Reform Act*.**

**Ontario Association of Interval and Transition Houses (OAITH)
Phone: 416-977-6619
Email: oaith@web.ca**

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Introduction

The Ontario Association of Interval and Transition Houses (OAITH) is a 75-member coalition primarily of first-stage shelters for abused women and their children across the province. It is the largest women's shelter association in Canada. Since its inception in 1977, OAITH has been monitoring the progress of governments and systems with regard to programs, policies and legislation to address women's equality issues, with specific emphasis on those affecting women who experience intimate violence and their children.

We appreciate the opportunity to make a submission to the Standing Committee on Justice Policy on this important piece of legislation. Elements of the *Bill* could have significant impacts on women and children who must use the systems and tenuous supports currently in place to assist them in escaping abusive situations. Responses to women and children within family law and related practices are particularly important to ending violence against women and to protecting children from exposure to violence against their mothers.

We are pleased to support this *Bill* in its intent to restrict arbitration within the laws of Ontario and Canada and to disallow any legal effect of arbitrations conducted outside of those laws and legal entitlements. We are also very supportive of amendments made to the *Children's Law Reform Act* to ensure that woman abuse is considered in determinations of custody and access.

We do, however, have some reservations about the amendments and some suggestions for improvement and evaluation. We would like to focus primarily on the amendments to the *Arbitration Act* and touch on the *Children's Law Reform Act* as well.

The Arbitration Act, 1991

As noted above, we very much support the restriction of arbitrators with regard to the legal frameworks within which they may create agreements or make awards, and to ensure that any religious or other arbitration based on laws outside of Ontario or Canada will be considered advice only. It is largely because of the efforts of women's and equality-seeking groups that this important amendment has been introduced. They have brought to the government the critical information about women's experiences in religious arbitration to create the foundation for government to enshrine a 'one law for all' principle in this *Bill*.

We are pleased that the *Bill* ensures that parties to an agreement must receive independent legal advice before making the arbitration agreement and that a party's failure to object to any irregularity in the arbitration/mediation will not be considered a waiver of the right to object later. This will be important to women who are caught in mediation under pressure and only later realize the unfairness of the 'agreement' that they have made. It is also vital that women receive appropriate legal advice and the resources to make that support available to them in order to help offset the creation of agreements that are legally unfair.

Some problems with arbitration/mediation of family law matters

While we applaud the government for addressing these concerns from women's and equality-seeking groups, we must express concern that the *Bill* creates a new 'family arbitration'

system in Ontario for the first time without careful consultation and examination of its potential impacts on those same women. In this regard, government has not listened to the voices of women and their advocates who have long rejected mediation in family law. In particular, OAITH and other anti-violence groups have over many years shared concerns about the pressures placed on abused women to enter mediation with abusive partners. We have often talked about the failure of mediation to protect women and their children from both woman abuse, child exposure to violence and legal unfairness.

The *Arbitration Act*, as you know, was created primarily as a means to settle disputes of a commercial nature. As such, it was never intended to be a framework for the settlement of complex, multi-layered disputes between couples where equality issues and concerns regarding the welfare of children are critical to the rights of both women and children.

There are reasons why arbitration/mediation does not work for most women, and in particular for women in abusive situations. Here are only a few:

- Mediation and arbitration require relatively equal bargaining power between parties. There are numerous ways in which women in relationships are not in equal bargaining positions with their partners. Sexist abuse and violence are obvious examples of extreme power imbalance, but there are others: language, race, disability, educational opportunity, sexual orientation, employability, poverty, child care giving responsibilities and more. Many mediators are not educated about intersecting equality issues or the role of family in perpetuating power imbalances between women and men. Women are not safe in mediation just because mediators set up “shuttle” mediation settings or claim that they will balance the power. Mediators often do not identify tactics of intimidation and coercion that only the victim sees. Mediators do not have any special skills to change an abusive partner.
- Mediation in family law promotes the creation of a private agreement rather than a public judgement based on legal fairness and rights. Private justice does not serve women, in particular women who experience violence and inequality. Because of the numerous power imbalances that disadvantage women in these processes, and the goal of reaching an agreement rather than determining a legally fair outcome, women often feel that they must trade away their legal rights to protect themselves and their children. Mediators engage in negotiation, a concept that is alien to abusive, manipulative and controlling male partners. If we are concerned about private justice in a religious arbitration situation, should we promote it in other contexts?
- Family mediators/arbitrators often promote “shared parenting,” an arrangement that has not been proven to be in the best interests of children, in particular children who have been exposed to violence against their mothers. Even when fathers are granted joint custody in courts in Canada, mothers are still most often the primary caregiver and custodial parent of the children. Abusive fathers seek “shared parenting” as a means of controlling their families, not of caring for their children.
- Mediators often promote a focus on the future and discourage parties from discussing the past. For women in abusive situations, this is clearly unfair, as the best predictor of future behaviour is past behaviour. A focus on the future allows abusers to make promises for change, child support and care giving that women experiencing violence

have often heard in the past, but which never materialize in the future.

- The *Bill* may regulate mediators to screen for abuse, but it does not require such cases to be screened “out” of arbitration.
- Mediators focus on achieving agreement, not fairness or equality. Women in abusive situations may “trade off” their equality and legal rights in order to be safe or to protect their children as a way of meeting expectations of “give and take” encouraged by mediation.

We cannot support the introduction of amendments to create a codified family arbitration system that may further entrench mediation in family law matters.

Regulating family arbitration/mediation

If it is clearly the intention of the Province to go forward in this *Bill* with a regulated system of family law arbitrators and mediators, despite its challenges, implementation of the amendments will be critical to whether or not the family arbitration system continues to disadvantage women and children to the extent that it currently can.

We are not aware of any consultation or fulsome examination of the impacts of codifying family arbitration and mediation in Ontario. Regulation of family arbitration is a big step to take without consultation.

There is much that women’s advocates and feminist/equality based legal experts could contribute to the government’s understanding of issues within mediation as it currently operates in Ontario. Training and education of mediators on all forms of unequal power, in particular knowledge of the dynamics of woman abuse, cultural competency of mediators, record keeping and reporting, relationships between mediator/arbitrators and family courts, legal aid and community-based supports for women and children, language interpretation and accommodation for parties with disabilities: these are but a few of the areas that would be critical components of a thoughtful implementation plan.

The list of areas on which the Lieutenant Governor in Council may make regulations, as noted in Section 58 of the *Bill*, clearly does not provide a comprehensive list of the areas that arbitrators and mediators must be required to address or the practices they must follow in order to respond to unequal power imbalances. The process for review and public input on this *Bill* has been swift, but within this rushed context we would make some initial recommendations for change to the regulatory process.

Recommendation 1:

If regulation of arbitration and mediation proceeds, that a clause be added to the legislation per se that requires anyone engaged in any form of family law mediation to immediately screen out and refer to independent legal counsel, as well as to appropriate community-based services that provide advocacy and intervention on issues of abuse, any cases in which they identify abuse, violence or power imbalances based on any of the equality provisions under Section 7 and Section 15 of the *Canadian Charter of Rights and Freedoms*.

Recommendation 2:

That the training of mediators and arbitrators require all such persons to receive ongoing education on issues of equality based on Section 15 of the *Charter of Rights and Freedoms*, information about the legal rights of parties in family law matters, education on the impact of woman abuse on both women and their children, and information on the resources for referral available within their community.

Recommendation 3:

That ongoing monitoring of arbitrations and comprehensive record keeping within such processes be maintained on an ongoing basis and that sufficient resources are allocated to ensure that mediators and arbitrators are held accountable within the regulated system in a full and comprehensive way.

Recommendation 4:

That legal aid funding be provided to ensure that parties streamed into arbitration and mediation have the resources to seek independent legal advice comparable to parties within the family law system to support them throughout the mediation process. The *Act* should specifically state that without proof of independent legal advice, an arbitrated agreement is of no effect.

Recommendation 5:

That resources be provided to ensure that all women and children have access to supports that would facilitate their equal access to justice, including cultural and language interpretation, accommodations for parties with disabilities, and advocacy support from community-based services, where appropriate.

Recommendation 6:

Given that the amendments to the *Arbitration Act* under *Bill 27* create, in effect, a regulated system of family arbitration in Ontario for the first time, that the *Bill* is amended to include a clause requiring evaluation and review of Sections of the *Act* applicable to family law matters, in their entirety, three years after the date the amendments are proclaimed.

The Children's Law Reform Act

We are delighted to support the amendment to the *Children's Law Reform Act*, Section 24: Merits of application for custody and access. This amendment is a very positive step forward and long overdue within family law. We thank the Ministry of the Attorney General for taking this step to better protect women and children who experience the challenges of escaping an abusive situation.

The amendment to require courts to consider “domestic violence” in the determination of a person’s ability to act as a parent is critical to the best interests of children and to women’s right to safety and security of the person under the *Charter of Rights and Freedoms*.

Of the myriad of cases of separation and divorce that come before courts in Canada, only a small minority reach court. Of these, a large percentage represents cases in which there is abuse or violence against women. Is it now well documented that abuse against mothers has an impact of children exposed to the violence and abuse and that appropriate fathering does not include abuse against mothers. Indeed, in Ontario, child exposure to abuse is now considered reportable to child welfare authorities. It has also been well documented that the well being of children is linked to the well being of their primary caregivers, largely their mothers.

Failure of courts to consider abuse against not only children, but against their mothers, has resulted in some family court custody and access decisions that have had tragic outcomes, including the deaths of children and their mothers. Courts have often made the misguided assumption that abuse and violence against women will stop when couples separate and that separation alone will protect children from exposure to abuse. On the contrary, however, we now know as a result of inquests into the deaths of women in Ontario, that abuse and control often escalate into murder after separation and that we must do much more to protect women and children and to support their effective escape into new non-violent lives.

The amendment to the *Children's Law Reform Act* proposed in *Bill 27* will go a long way to ensuring that lawyers will be able to raise issues of abuse without fear that courts will dismiss them or see them as irrelevant to the well-being of children in custody and access decisions. We are particularly pleased that the amendment mentions both abuse and violence, as many courts assume that non-criminal acts of abuse are 'safer' than those of physical or criminal violence. They could not be more wrong in this. We hope that the inclusion of both violence and abuse will provide courts the ability to consider forms of control and psychological violence that women experience from abusive partners on an ongoing basis.

Although there are additional amendments that could and should be included in the 'best interests of the child' test, especially the history of primary care giving of the child, for example, we are pleased to support this current amendment and urge the Opposition parties to support the government to ensure its passage.

We also fully support the intention of the government to repeal old sections of the *Children's Law Reform Act* that were adopted, but not proclaimed in 1989 and we urge Opposition parties to also support these changes as recommended.

Family Law Reform in Ontario

While we have opposed the use of arbitration and mediation using legal practices outside the laws of Ontario and Canada and the recognition of decisions and awards made within them by the government of Ontario in the past, we also recognize that current family law systems across Canada, including within Ontario, have a long way to go before they are truly receptive to women and children from all communities and cultures, all races, all sexual orientations, all abilities and all economic circumstances.

In particular, we continue to press for additional progress on family law system challenges—from the misuse of mediation to under funded legal aid, from discrimination and racism to stereotyping of women with disabilities, from discrimination against lesbian mothers to disenfranchisement of Aboriginal people, from lack of community-based women's advocacy

in courts to educational shortfalls in all *Charter* equality provisions for lawyers, including Children's Lawyers, assessors and judges. We could go on.

Women who experience violence and their children are much too familiar, often tragically so, with these challenges. While we recognize the problems of supporting processes and practices that do not conform to Ontario family law, we also recognize the shortcomings of that same law for women and children, and particularly for women from Aboriginal, racialized and immigrant communities in the Province.

We strongly urge the Province of Ontario to move as quickly as it has moved on this legislation to remedy all of the current imperfections in the formal family law system, including within legislation governing family law matters. In doing so, it would have the contribution, expertise and support of women's advocates and violence survivors for any progressive changes it proposes.

Conclusion

As women's advocates who have worked on issues of security and equality for all women and their children in Ontario for almost 30 years, the Ontario Association of Interval and Transition Houses (OAITH) is pleased to support the amendments to the *Arbitration Act* which would restrict legally recognized arbitrations and mediations to those conducted solely under the laws of Ontario and Canada. We also very much support the amendments proposed to the *Children's Law Reform Act* and believe they will be an significant positive support to all women and their children who use the family courts in Ontario.

At the same time, we are concerned about the codification of what amounts to a new regulated family arbitration system in Ontario to entrench what we believe is already a problematic practice of arbitration and mediation of family law matters, particularly dangerous and troubling for abused women and their children.

In that light, we have made some recommendations that we hope the Committee will take seriously in an effort to protect the most vulnerable women and children you represent across the Province.

Finally, we raise the concern that while recognizing the issues inherent in arbitrations outside of the Ontario family law, we also seek reform within the formal family law system in Ontario, which often fails women and children, especially those who are vulnerable to power imbalance, abuse and violence, racism, inequality and discrimination in all its forms. We look forward to swift and comprehensive work with the Ontario family law system to ensure that all women have equal treatment under these laws, as is their right, and that they are provided with adequate legal aid resources to access the justice to which they are entitled.

Respectfully submitted:

Ontario Association of Interval and Transition Houses (OAITH)
January 16th, 2006

Summary of OAIH Recommendations

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