

**Review of the Family Relations Act
Family Violence Discussion Paper**

***Submission of the
BC Association of Specialized Victim Assistance & Counselling
Programs (BCASVACP) and its Community Coordination for Women's
Safety Program (CCWS)***

***To the BC Ministry of Attorney General Family Relations Act Review -
Family Violence Discussion Paper***

September 27, 2007

I. About BCASVACP and CCWS

The BCASVACP works to coordinate and support the work of over 200 victim-serving and other anti-violence programs in BC through the provision of issue based consultation and analysis of resource development, training, research and education. These programs include Community-Based Victim Assistance, Stopping the Violence Counselling Programs and Sexual Assault Centres. BCASVACP also manages the CCWS program.

The CCWS program works with emergency responders in rural and isolated communities, and at the provincial and national level, to support the development of an integrated, coordinated response to gender-based violence. The CCWS program includes a Provincial working Group made up of senior police and RCMP members, provincial justice officials, major provincial non-profit organizations and members of the civil and criminal bar. It also includes members who represent women with disabilities, Aboriginal women and immigrant and refugee women. Working Group members provide technical expertise and liaison between their sector and CCWS. Specific local or regional concerns that have broader implications are also considered by the Working Group.

II. General

We commend the Ministry of Attorney General for undertaking this project to review and change the Family Relations Act and accompanying programs. Our members have been supporting victims of violence through criminal and civil court processes for decades and have witnessed many problems related to such processes as determining custody and access in the context of violence against women in relationships. These issues include the need for a more integrated approach between the civil and criminal arms of the justice system, more specialized training for judges, lawyers and other family court practitioners, and an operational recognition of the substantial contributions of anti-violence workers to women's safety. These concerns and many more have been detailed in other publications, such as the report *Family Law Services for Women Who Are Victims of Violence: What Can Be Done? Issues and Options for BC*¹. Attached for your information is the title page, forward and recommendations. The complete document can be accessed at www.endingviolence.org (bcasvacp publications).

The BCASVACP and its CCWS program have serious concerns about the impact of some themes addressed in the Family Violence Discussion Paper on the safety of women and children leaving a violent relationship. In particular we are concerned about the terminology and definition of family violence, the focus on "false allegations", and the use of consensual dispute resolution in violence against women in relationships (VAWIR) cases.

The scope of research necessary to fully respond to this discussion is beyond the capacity of BCASVACP, as it will be for many of the over-worked, under-funded anti-violence programs. BCASVACP has been in contact with West Coast Legal Education and Action Fund (LEAF) and fully supports the extensive research that is being done by LEAF in responding to the discussion papers in this phase of the consultation. We particularly support their efforts to connect with front-line workers.

It is critical to consider the current context for the Family Relations Act review; one in which the civil justice system, victim support, offender services and legal aid systems, among others, are desperately underfunded and working beyond their capacity. Despite welcome increases to Legal Aid coverage and other Legal Services Society (LSS) funding and services in 2005 and 2006, significant gaps remain in Legal Aid coverage and other family law services for women who are victims of domestic violence. This has a particular impact on marginalized women such as those who live in rural communities where court houses have been closed.

Some of the recommendations in this submission are beyond the scope of legislative change, including such recommendations as restoring adequate levels of legal aid funding. We include this type of information in the submission because of our belief that the Family Relations Act cannot exist in a vacuum, but needs instead to be

¹ Light, Linda. 2005. *Family Law Services for Women Who Are Victims of Violence: What Can Be Done? Issues and Options for BC*. Vancouver, BC: BC Association of Specialized Victim Assistance and Counselling Programs.

coordinated with other systems involved. We believe that this coordination must happen at every level, and that government needs to ensure that legislative changes are considered in a multidisciplinary setting that includes other branches of government responsible for program funding and other decisions.

III. Defining Family Violence

The Family Violence Discussion Paper starts out with the following statement: “Violence is an issue for some families in B.C. Both men and women report having experienced family violence, although the nature and consequences are typically more severe for women.”

In this submission we refer to “family violence” as “violence against women in relationships” (“VAWIR”). The use of terminology such as “family violence” can easily give the impression that men and women are victims of violence at the same rate. This is not the case. The overwhelming majority of assailants in all cases of violence are men, and in cases of intimate violence—violence in relationships, sexual assault, stalking, abduction, spousal homicide—women are overwhelmingly the victims.²

We suggest that a definition of family violence be included in the FRA. We also recommend that in defining family violence, it is essential to provide a context for understanding this violence that addresses systemic and institutional oppressions that impact gender, race, First Nations heritage, ability, sexuality, class, literacy, language, and immigration status, as well as other realities. It is also essential that the definition addresses the dynamics of power and control. The following definition has been excerpted from the BC Ministry of Attorney General Violence Against Women In Relationships Policy:

“For the purposes of this policy, violence against women in relationships is defined as physical or sexual assault, or the threat of physical or sexual assault of women by men with whom they have, or have had ongoing or intimate relationships, whether or not they are legally married or living together at the time of the assault or threat. Other behaviour, such as intimidation, mental or emotional abuse, sexual abuse, neglect, deprivation and financial exploitation, must be recognized as part of the continuum of violence against young and elderly women alike.”³

² *Spousal Abuse Policies and Legislation: Final Report of the Ad Hoc Federal Provincial Territorial Working Group Reviewing Spousal Abuse Policies and Legislation*, April 2003. Available at <http://canada.justice.gc.ca/en/ps/fm/reports/spousal.html#11>. *Assessing Violence Against Women: A Statistical Profile* prepared by Federal Provincial Territorial Ministers Responsible for the Status of Women, 2002. Available at www.swc-cfc.gc.ca/pubs/0662331664/200212-0662331664_e.html; *Uniform Crime Reporting Survey (UCR2)*, 2002. Available at www.statcan.ca; *Spousal Abuse: A Fact Sheet from the Department of Justice Canada*. Available at <http://canada.justice.gc.ca/en/ps/fm/spouseafs.html>; *Family Violence in Canada: A Statistical Profile 2005*. Available at http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/famvio_e.html

³ *Violence Against Women in Relationships Policy*, British Columbia’s Ministry of Attorney General and Ministry of Solicitor General and Public Safety, available online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf

Concerns about the use of gender neutral language have been expressed by numerous and diverse groups including Statistics Canada.

Generic programs meant to address violence against all Canadians risk [fail] to adequately address women's experiences of violence. Gender-specific data can pinpoint those areas where the need for support services is different for women and men. It is also important to further disaggregate data (for example, by race, ethnicity, age, sexual orientation, socioeconomic status or ability) in order to fully understand the situation of different groups of women. Data that are made available by gender demonstrate the specific risk areas for men and women and highlight the need for targeted programs to address violence for each gender.

Measuring Violence Against Women: Statistical Trends 2006. Canadian Centre for Justice Statistics
<http://www.statcan.ca/english/research/85-570-XIE/85-570-XIE2006001.pdf>

Another concern is that some VAWIR victims do use violence for a variety of reasons. These include those acknowledged in the Family Violence Discussion Paper (acts of self-protection or protection of another person). In fact, experts who work with women accused of violence state that **“The majority of women who use violence against their male partners are battered themselves”**.⁴ When this violence is de-contextualized and viewed as isolated incidents the consequences put victims at heightened risk.

We believe that framing the legislation with a pre-amble or application piece that addresses systemic oppression and power and control dynamics will guide how aspects of the legislations such as allegations of abuse and exclusions from CDR processes will be interpreted.

IV. Specialized Support Services

For the last several decades in British Columbia, a complex network of specialized services has developed to respond to violence against women including VAWIR. These services have developed a huge amount of expertise about key concepts and best practices. This complex network of specialized services includes women's centres, sexual assault centres, transition houses, community based victim assistance programs, outreach workers, Aboriginal healing programs, Immigrant, Refugee and Multicultural Services, safe homes and second stage homes.

We are concerned that within the Family Violence Discussion Paper there is no reflection of the work these specialized services do to fill the gaps of legal services and advocacy. There is no acknowledgement of the expertise and critical work front-line advocates and organizations do to assist women and children facing violence.

⁴ *Towards an understanding of women's use of non-lethal violence in intimate heterosexual relationships.* Shamita Das Dasgupta, 2001. Retrieved from www.vaw.umn.edu/documents/vawnet/towards/towards.html

This oversight has important implications for the safety of victims and for the effective functioning of the family law system. It is critical for practitioners in the family law system to understand the key role these services provide, and to proactively involve them. For example, the Family Violence Discussion Paper recommends training for judges, lawyers and law students. We are pleased to see this recommendation and believe it is critical that this training utilizes the enormous expertise of these specialized support services. It is also important that direct victim access to the appropriate specialized services or referrals to these services is built-in to any response system being considered in the proposed reforms, whether it is the family law HUB or some other model⁵.

V. False Allegations

The section on false allegations includes a discussion of the punitive options for those falsely accusing the other parent of violence. There is no discussion about abusive parents making false allegations. The discussion questions are whether the existing civil and criminal remedies for false allegations are enough or if there is a need for other remedies such as those offered by an addition to the Family Relations Act. In order to assess existing remedies it would be critical to assess who is making the false allegations of violence. Are they being made by people who use violence in their relationships and then attempt to increase their power and control using the legal system? Are they being made by people who have well-founded concerns about their children's safety but are unable to provide evidence accepted by the justice system?

There are legitimate issues related to proof of claims but it should be appreciated that denial and minimization of abuse by genuine abusers are more common than false or exaggerated claims of spousal abuse by alleged victims.

“Typologies of Family Violence” in Peter G. Jaffe, Ph.D., C.Psych. et al., (Sept. 2005) “Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices,” p.8. Retrieved from: http://hspc.org/policy_forums/pdf/JaffePaper_JusticeReport_Sept05.pdf

This issue is a concern for many reasons, the most pressing of which is the impact on the safety of VAWIR victims and their children. Front-line workers have repeatedly raised concerns about this issue in the context of the family law system. Proving abuse and violence, especially in cases of the sexual abuse of children, is very complex and difficult. For many years VAWIR victims have encountered systemic disincentives effectively discouraging them from raising concerns about the impact of their ex-partners' abusive behaviour on their children. For example, VAWIR victims may be advised that they should not raise these issues for fear that they will be viewed by the court as an uncooperative co-parent and that this might work against a possible custody claim. In the end this pressure to remain silent increases the risk to the safety of victims and their children. Adding penalties such as costs to the FRA may act as another disincentive for women considering whether to report abuse. For

⁵ Community based victim assistance programs are mandated to provide risk and safety planning for survivors of violence in relationships and sexual assault.

example, some women may be discouraged by their legal counsel from raising child abuse issues given the possibility of costs being imposed against them if the allegation cannot be adequately proven. (This scenario assumes these women have legal representation which many may not).

...provisions in the Act such as awarding of cost against a person for “false allegation” of domestic violence/ child abuse will actively militate against women disclosing domestic violence and/or child abuse.

Inquiry into Impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth). NSW Women’s Refuge Resource Centre on behalf of the NSW Women’s Refuge Movement Working Party Inc.

[http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/58ac3dd964b8c572ca25721800166251/\\$FILE/ATT68NAP/sub%2015.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/58ac3dd964b8c572ca25721800166251/$FILE/ATT68NAP/sub%2015.pdf)

At the same time, research such as that cited above by Knott et. Al. demonstrates that people who are the primary aggressors in VAWIR cases often try to continue their power and control through court processes, including making false allegations of abuse. Any attempt to address the issue of false allegations must take this context into account.

VI. Orders to Ensure Safety

The Family Violence Discussion Paper focuses on orders available under the Family Relationships Act, and discusses temporary emergency orders available under family violence laws in other provinces and territories. These orders are presented as simplified, more flexible and having more options for the types of conditions.

CCWS has been doing extensive work to address the complex issue of criminal and civil protection orders and we are concerned about the challenges and problems in the use of existing orders which make it hard to consider proposing new orders. For example, civil orders require an enforcement clause in order for police to be able to act when conditions in the orders are not complied with. The consistent inclusion of a standardized enforcement clause has not yet been implemented. At the same time, our research supports the importance of some of the themes in the discussion paper such as simplifying and speeding up procedures for obtaining protection orders.

The relationship between the family law practitioner, Crown Counsel and Police in enforcing breaches of restraining orders under the FRA and orders pursuant to the inherent jurisdiction of Supreme Court need to be clarified. If these orders are not being actively enforced by Police and Crown because they are not perceived as “criminal orders” or because there are questions about the legal authority of police and Crown to respond to breaches, then it may put the woman in greater danger for family law practitioners to seek these orders in the first place. For example, the woman may believe she is being protected when she isn’t--she may be lulled into a false sense of security and not take active measures to protect herself under the mistaken assumption that police and crown are now monitoring the accused’s behaviour and responding to any identified risk posed by a breach, when they are not.

It is critical that family law practitioners, as well as police and Crown counsel, recognize that even a breach perceived as relatively “minor” can be an indicator of potential lethality for the woman. Any breach needs to be considered as a high risk factor.

There is some uncertainty regarding police ability to enforce FRA and Supreme Court Restraining Orders. Police are uncertain as to whether they have the legal authority to enforce the Order unless it contains a specific enforcement clause. While the form of both Supreme and Provincial Court orders is prescribed, the practice of not following the prescribed forms is common. It is not unusual to find Orders that do not include enforcement clauses, complicating the issue of whether police will act to enforce the order. Not following the prescribed form can also make it more difficult for court registry staff to enter the orders in the provincial Protection Order Registry, or POR. This is of critical importance since it is the POR that police will access in order to determine whether there is an outstanding protection order in place and what conditions it includes. The detailed information on the POR helps police uphold the terms of the order. Unlike other databases, the POR includes all the terms contained in the order and not just the fact that there is an order in place.

There is also inconsistency in Crown practice in BC with respect to enforcement of civil restraining orders. Both Provincial and Supreme Court have the jurisdiction to make these orders. Failure or refusal to comply with FRA orders is addressed in section 128 of that act. Breaches are currently prosecuted as Summary Conviction Offences under the Offence Act. In some parts of the province, Crown counsel will not lay charges for breaches of Supreme Court restraining orders while they will pursue charges for Provincial Court orders. The result is that the victim must herself pursue contempt proceedings in Supreme Court for enforcement of orders issued by that court. If she does not qualify for legal aid, she will need to bear the cost of retaining her own lawyer.

Inconsistent enforcement practices raise serious questions about the usefulness of a civil restraining order, particularly the Supreme Court Orders. How does a Restraining Order without an enforcement clause help protect an abused woman? Is there a practical rationale for the difference in enforcement practices between Provincial and Supreme Court orders, or are the differences due to legal or jurisdictional technicalities which may be overcome by law reform and policy changes at the provincial level? Inconsistent practices also have the potential to create confusion for family law practitioners, the client and police. If some civil restraining orders are not being actively enforced by Police and Crown counsel, it also creates the perception among other justice system professionals as well as the abuser, that none of these orders need to be taken seriously.

The family law practitioner can play a key role in ensuring that the restraining order is part of, and seen in the context of, the overall safety plan. It is important for the family law practitioner to inquire about safety concerns and make a referral to specialized support services. Even if a safety plan is already in place, it may need to

be updated in light of the initiation of legal proceedings which regularly leads to further violence. The family law practitioner should make reference to the safety plan to help determine what type of restraining order the client needs. For example, in some cases clients do need to be able to communicate with the abusive partner but still want other safety related conditions such as non-entry or non-harassment. Subject to the client's consent, the family law practitioner can provide copies of the restraining order to schools or neighbours who may be able to assist with safety planning. The family law practitioner should inform their client that if the accused is subject to bail conditions a restraining order might still be important in the event that the criminal bail conditions fail. They should inform their client that enforcement of Supreme Court Restraining Orders is available from legal aid for people who are financially eligible. If their client already has an order that is not in the prescribed form or does not include an enforcement clause, the family law practitioner could seek an amendment to strengthen the order. If problems arise with enforcement of the order, the family law practitioner could liaise with police and Crown regarding enforcement of the order.

Breaches of orders

Vigorous enforcement of protection orders has been shown to enhance victim safety.⁶ In VAWIR cases, the rate of non-compliance with protective conditions is relatively high.⁷ Some research suggests that Criminal Protection Order breach charges are uncommon and that convictions for a breach are rare.⁸ A number of studies based on interviews with justice system professionals and victims have also identified the need for more effective enforcement of orders.⁹ Similar concerns have been raised about the enforcement of other protection orders including civil orders.

⁶ Russell, Mary (2001) Pro-arrest Vigorous Prosecution and Coordinated Functioning: Three Elements of an Effective Criminal Justice System Response to Domestic Violence An Annotated Bibliography. Community Justice Branch, MPSSG, Vancouver BC Bibliography 2001; Russell, Mary 2002 *Measures of Empowerment for Women who are Victims of Violence and who Come into Contact with the Justice System*. Community Justice Branch Ministry of Public Safety and Solicitor General, Vancouver BC; Randall, Melanie 2006 in: Farraday et al editors, "Making Equality Rights Real: Securing Substantive Equality under the Charter". Toronto Ont. Irwin; EKOS Research Associates Inc. (December 2000) *New Identities for Victims of Abuse: Client Survey Final Report*. NIVA Human Resources Development Canada, Ottawa Ontario.

⁷ Plecas, D., Segger T., and Marsland L. March 2000. *Reticence and Re-assault among Victims of Domestic Violence in Abbotsford BC*. Ministry of Attorney General, Victoria BC.; EKOS Research Associates Inc. (December 2000) *New Identities for Victims of Abuse: Client Survey Final Report*. NIVA Human Resources Development Canada, Ottawa Ontario. ; Lloyd, Tracy. (2000) *Women's Perspectives on the Zero Tolerance Policy and the Criminal Justice System in Manitoba*. Fort Garry Women's Resource Centre, Winnipeg Manitoba. ; Varcoe, Colleen Jaffer, Fatima & Kelln, Pat. (2000) *Protecting Women? Women's Experiences of Seeking Protection from Abuse by Intimate Partners*. British Columbia Health Research Foundation, Vancouver B.C. [draft only].

⁸ Randall, Melanie 2006 [article in: Farraday et al editors, "Making Equality Rights Real: Securing Substantive Equality under the Charter". Toronto Ont. Irwin.] Meredith, Colin. (1995) Review of the Use and Effectiveness of Judicial Recognizance Orders and Civil Restraining Orders. Department of Justice, Ottawa Ont.; Lloyd, Tracy. (2000) *Women's Perspectives on the Zero Tolerance Policy and the Criminal Justice System in Manitoba*. Fort Garry Women's Resource Centre, Winnipeg Manitoba.

⁹ EKOS Research Associates Inc. (December 2000) *New Identities for Victims of Abuse: Client Survey Final Report*. NIVA Human Resources Development Canada, Ottawa Ontario.; Lloyd, Tracy. (2000) *Women's Perspectives on the Zero Tolerance Policy and the Criminal Justice System in Manitoba*. Fort Garry Women's Resource Centre, Winnipeg Manitoba. ; Varcoe, Colleen Jaffer, Fatima & Kelln, Pat. (2000) *Protecting Women? Women's*

Major risks are associated with the breach of a protective condition in a VAWIR situation because of the recognized dynamic of escalating violence after separation. The person who is subject to the order has a strong desire to prevent their partner from pursuing any legal remedies. An effective response to a reported breach of a protection order in VAWIR situations must take this added risk factor into account.

Implementation of the Family Law Reform Package must include training for members of the Family Bar or at the very least, the provision of tools and resources to better enable them to coordinate with police and Crown and facilitate effective safety planning for their clients who are seeking protection from harassment or abuse in the context of family breakdown. This training and/or tools and resources should include information on the importance of including enforcement clauses in any restraining order sought from the court.

The BC Ministry of Attorney General Criminal Justice Branch once had a specific policy guiding practice of Crown counsel in enforcing FRA orders under s. 128 and the Offence Act.¹⁰ This Policy is no longer in effect. We urge the Civil and Family Law Policy Office to recommend that as part of the Family Law Reform Package, that CJB establish policy guidelines clarifying Crown's role in enforcing FRA and Supreme Court orders. These guidelines should be shared with members of the private bar and should also include reference to Crown's role in liaising with members of the Family Bar if there is family law proceeding underway and violence is involved. Such a Policy for Crown counsel will better enable members of the Family Bar to advise their client as to the effectiveness and enforceability of FRA orders and to liaise with Crown counsel regarding breaches and safety issues.

We suggest that FRA amendments require that all restraining orders issued under that act include an enforcement clause and that the wording for such a clause be standardized.

We note that several times in the Family Violence Discussion Paper there is mention made of other provinces' civil family violence legislation - there is no specific discussion of it but it comes up many times, usually in reference to the issue of protection orders. Often it is with statements such as "unlike BC, most of these provinces and territories also have a separate civil (non-criminal) law that covers family violence" (p. 6). We would like to know if the legislation is being contemplated again.

Experiences of Seeking Protection From Abuse by Intimate Partners. British Columbia Health Research Foundation, Vancouver B.C. [draft only].

¹⁰ Ministry of Attorney General Criminal Justice Branch. Crown Counsel Policy Manual Family Relations Act- Section 128 Prosecutions, Oct. 1999

VII. Family Violence and Collaborative Decision-Making

The overall message of this section of the Family Violence Discussion Paper is that CDR could be appropriate when there is a history of violence, even though the examples of other jurisdictions are all ones where an exemption from CDR is made if there is a history or risk of violence. We are concerned about the risks involved in using CDR processes in cases involving VAWIR.

In the past, the justice system response has been to consider “spouse assault” primarily a domestic or social problem, which is best handled outside the criminal justice system. In practice, that has meant criminal justice personnel often directed a couple towards counselling or conciliation services rather than dealing with the criminal nature of the assault. That approach has been ineffective in reducing the incidence of violence against women in relationships and has been inadequate in terms of protecting women.

Violence Against Women in Relationships Policy, British Columbia’s Ministry of Attorney General and Ministry of Solicitor General and Public Safety, available online:

http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf

Concerns raised over the years by those who are well versed in the complexities of power based crimes¹¹, who are working with victims, or who are victims themselves, point to victims’ vulnerability to coercion, fear of retaliation, dependence upon the perpetrator, and pressure from their community as some of the reasons for a victim’s inability to act on her own behalf in CDR processes.

“It is extremely difficult for a victim - enmeshed in an abusive relationship of unequal power or faced with society’s or her own culture’s views about women who have been sexually assaulted - to speak with an independent voice. The victim’s experience may have been that attempts in the past to assert her autonomy have been met with ‘punishment’ in the form of increased violence and increased control over her behaviour. She may have internalized the view that women are responsible for men’s sexual impulses or that being raped is shameful or that a woman brings shame on her family or her community if she is not chaste when married. Women of all cultures, all social classes, all ages are faced with enormous pressures to stay put and to stay silent.”

Nature and Dynamics of Violence Against Women, Children, Seniors and People with Disabilities: Implications for Alternative Measures and Restorative Justice Approaches. Light, Linda, (Victim Services Division) May, 2000.

As described in the CCWS preliminary submission to this reform process, there are serious concerns about the issue of mandatory participation and what that means for

¹¹ See for example, *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia*, Stewart, W., Huntley, A., Blaney, F. July, 2001. Stephen Hooper and Ruth Busch, “Domestic Violence and the Restorative Justice Initiatives: The Risks of a new Panacea” (1996) 4 Waikato LR 101; Hillary Astor: ‘Swimming Against the Tide: Keeping Violent Men out of Mediation’ in Julie Stubbs, ed, *Women, Male Violence and the Law* (1994).

abused women, even with statements about possible exceptions for VAWIR. We have seen in other contexts that statements about exceptions can be misinterpreted. For example, a number of participants in the BCASVACP Family Law Services project indicated that in LSS practice, eligibility is sometimes based on physical violence only, and that some women are being asked to provide 'evidence' of the abuse (p. 17).

Another concern related to the use of CDR processes is the need for monitoring to ensure that planned safeguards are implemented. For example, if the legislation directs exemptions for VAWIR cases, or modified processes such as shuttle mediation, the legislation might not be followed in practice. In the Family Violence Discussion Paper there is mention of a California study that showed that family mediators held joint sessions in nearly half of the cases in which an independent screening interview had identified allegations of spousal violence, in direct violation of state regulations for separate sessions (p. 19). It is also critical that VAWIR victims be referred to specialized support services to facilitate coordinated safety planning (see section on Specialized Support Services).

Adequate resources and procedures must be in place to ensure protection of the victim in any procedures related to screening. For example, if a separating couple is interviewed and the victim discloses violence which results in the case being screened out of mediation, procedures must be in place to address the risk created when their ex-partner finds out about the disclosure.

People still need legal representation in CDR processes, particularly those who are vulnerable because of the ongoing impact of violence from their ex-partners. It is crucial not to under-estimate the danger that may result for abused women when they make the difficult decision to leave their abusive partners. While intervention by skilled family law lawyers may not, in isolation, avert such tragedies, timely support, advice and representation by a family law lawyer who understands the dynamics of violence against women in relationships and who is trained to conduct a thorough risk assessment, may be a central component of a coordinated response that can help keep women safe.

There need to be guidelines and training for the family bar and for mediators that includes experts from specialized support services such as community-based victim services.

If lawyers are to be directed to tell their clients about CDR and the benefits, as suggested by the Family Justice Reform Working Group, it is important that this includes an explanation about exceptions for VAWIR and the reasons behind the exception.

This section of the Family Violence Discussion Paper mentions that the Ministry of Attorney General has completed further research into the use of mandatory and quasi-mandatory CDR in family law disputes. We would be interested in seeing this research made available on the Ministry of Attorney General website.

VIII. VAWIR and Arrangements involving Children

The Family Violence Discussion Paper discusses adding in a specific mention of VAWIR as a factor judges must consider when determining the “best interest of the child”. It also discusses other jurisdictions (U.S. and New Zealand) where there is direction within the law about how VAWIR should be taken into account. For example in Arizona “there is a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child’s best interests”.

We agree that it is important to recognize the impact of VAWIR on determining the best interests of the child. At the same time, the above discussion under False Allegations points to the reality that many people who are abusive will make allegations of experiencing violence in order to gain an advantage in custody and access decisions. As stressed in the section on False Allegations, it is critical to consider the context of abuse allegations.

We believe that it is equally important to include consideration of pre-existing day to day care of the child - a detailed examination of past and present parenting practices. It is all too common for VAWIR victims to be responsible for the day to day care of their children prior to separation, only to end up in situations where their ex-partner obtains access that is not healthy for the children due to the ex-partner’s lack of experience as a primary caregiver.

There is a lot of not caring, about [the child’s] welfare. It’s like [my ex spouse] thinks “these are my rights and I am going to use them. I know he loves the child but he does not know how to care. He should be thinking about [the child’s] future education and welfare. There is none of that. My son says, ‘My Dad does not care for me; he just takes me from one house to another drinking’. He will take the child because it is his right. But it should be about privilege with obligations and responsibilities, not just rights.”¹²

Another key consideration in determining the best interests of children is the fact that child safety is interwoven with and dependent on the safety of their caregiver. There is acknowledgement throughout the Family Violence Discussion Paper that VAWIR has an impact on children whether they witness it directly or not, and that Family Law decisions should reflect this. There is no reference made to the safety of their caregiver as connected to this.

...the most important factors in the post divorce welfare of children from high conflict families are the health and welfare of primary caregivers and protection of the child from ongoing conflict between parents.

Putting Revisions to the Divorce Act Through a Family Violence Research Filter: The Good, The Bad and The Ugly.
Linda C. Neilson, Canadian Journal of Family Law [Vol. 20, 2003]

¹² Mother & victim of abuse quoted in: Linda Neilson, “Children and Family Violence in the New Brunswick Legal System: How Responsibilities Get Lost In Rights” in *Understanding Abuse: Partnering for Change*, University of Toronto Press. 2003.

Supervised Access and Safety Exchange Services: this is an old and ongoing issue - We raise it in this context because in talking about other jurisdictions where VAWIR is a factor in custody and access decisions, the paper mentions that supervised access is a possible condition to address concerns. Because of the lack of affordable and trained services for safe exchange and supervised access, front-line workers report that women are often left responsible for arranging appropriate supervision when supervised access is ordered. This is a common area for violence and harassment for women and their children. The Discussion Paper on Meeting Access Responsibilities highlights this issue in talking about other jurisdictions where legislation has been changed, stating that increased funding for supervised access services accompanied legislative changes in England and Australia.

Some other considerations in addressing arrangements involvement children:

- **Ministry for Child and Family Development:** there is considerable overlap between the family court system and child protection system. Coordination between these two systems is a safety issue for VAWIR victims and their children. For example, child protection workers may direct a victim to not allow contact with the abusive parent and the children. If family court orders are made which allow access, this creates a conflict which places the victim in the position of ignoring a family court order, or risking child protection removal of her children.
- **Temporary Guardians:** if the custodial parent is temporarily unable to care for the children (for example if they are hospitalized), there needs to be an easier process for that parent to delegate temporary guardianship, such as a representation agreement that does not involve going to court or involving the Ministry for Child and Family Development.
- **Custody of children whose mothers have been killed by their fathers:** Serious questions are raised in situations where a father convicted of murdering his spouse later seeks custody or access to the children. Concerns also arise if the offender's parents are seeking custody or access.

IX. Family Justice Information Hubs:

As described in the CCWS preliminary submission, development of these Hubs will need to allow for the many implications for the safety of victims of violence, including physical safety for people accessing the hubs, particularly in small communities. For example, the FJRWG report states that “the telephone offers privacy” (p. 28), which we know is not the case for many rural communities where there are radio phones, or where individuals access the telephone via a satellite phone at nursing station, a phone at the band office, or a payphone at the local store. There is an emphasis throughout the report on using the internet, including for videoconferencing. Aside from the issues of a lack of computers and internet for many people, there is also the issue for rural and isolated communities that there may be

internet access, but it is dial-up and therefore does not have the capacity to download large files or support such things as videoconferencing.

CCWS Staff toured the Nanaimo Family Justice Information Hub and found that there were many positive aspects such as public access computers with assistance, a room with access to the Law Line and assistance, legal aid screening 2 afternoons/week, pro-bono lawyer 1 afternoon/week. There were also several concerns: the assessment for VAWIR is good but it is all self disclosure based, with no access to JUSTIN or the POR. [JUSTIN is the database used by Crown counsel and the criminal courts. It includes information on past court dispositions related to a particular person. The Protection Order Registry is a database used by police. It enables them to access information regarding registered protection orders. The POR includes all orders containing a condition that affords safety and security to a specific (named) person, including FRA Restraining Orders.] There are no anti-violence professionals involved directly with the Hub and the list of community resources does not include the Community Based Victim Assistance Program. CCWS Staff suggest that CBVAP could be onsite one afternoon/week.

**Family Law Services
for Women Who are Victims of Violence:
What Can Be Done?**

Issues and Options for BC

**Paper prepared by
Linda Light**

**for
BC Association of Specialized Victim Assistance
and Counselling Programs**

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Foreword Note

Recent Announcements Affecting Family Law Legal Services in BC

On February 1, 2005 the BC Government announced a \$4.6 million funding increase to the Legal Services Society for legal services for “families in crisis”. The Government news release states that this funding will go towards “additional family legal services in cases involving domestic violence; the provincial family duty counsel program; a new Supreme Court family duty counsel program; and a limited Supreme Court Family Referral program.” The release also states: “These programs support government’s plan to provide alternative methods to resolving disputes and encourage people to work together to solve their problems collaboratively.”

This Issues and Options Paper was prepared before this funding announcement. The Association would like to acknowledge the new funding, however, a decision was made not to revise the content of this paper as a result of the announcement. While the funding is welcome, it does not substantially change the central messages of this paper.

The funding cuts made in 2002 resulted in cutbacks of almost 40% to a Legal Aid system already seriously inadequate. These and preceding cuts disproportionately affected the family law system. An increase of \$4.6 million to the family law area, while greatly needed, does not come close to addressing the severe shortages of Legal Aid funding for family law legal services, particularly for women who are victims of violence and abuse.

The Association is pleased to note that the proposed allocation of the \$4.6 million is consistent with some of the recommendations made in this paper. Legal Services Society has announced that “the new family program funding will cover continuing the current Provincial Court family duty counsel services and developing three new programs: extended family services for clients at greatest risk and whose issues cannot be resolved through mediation because of the high level of conflict involved; limited Supreme Court family referrals for clients who have no alternative to litigating in Supreme Court; and Supreme Court family duty counsel services.”

LSS announced that some of the increased funding will be directed toward increasing financial eligibility limits for family law representation services, extending family services to provide lawyers with an additional 40 hours for court attendance and preparation time to help clients in high conflict cases, and developing a limited referrals program for eligible clients who are forced to use the Supreme Court. These enhancements address, to a limited extent, Recommendation 1 in this paper for funding for adequate family law services at both the Provincial and Supreme Court levels, and for eligibility criteria that allow women who have a genuine need for Legal Aid to access it.

LSS also announced that it will continue the Provincial family duty counsel services and extend duty counsel services to Supreme Court. These announcements are consistent with Recommendation 5 in this paper to continue and enhance the availability and accessibility of family duty counsel in both Provincial and Supreme Court locations.

Another announcement made since the preparation of this paper is the establishment of the Unbundling Task Force of the Law Society of British Columbia. Already this Task Force has reached out to advocates for their input. The establishment of this Task Force and its involvement of advocates are welcome developments, given the continuing inadequate levels of funding for Legal Aid in BC and the increasing numbers of unrepresented litigants. However, unbundling of services (lawyers offering clients the option of limited legal assistance in certain areas of their case rather than full representation in every aspect of their case) will not adequately address the fundamental problem of a lack of sufficient funding for Legal Aid for those who need it.

Refer to the Legal Services Society website (<http://www.lss.bc.ca>) and the Law Society of BC website (<http://www.lawsociety.bc.ca>) for further information and updates on how these announcements may affect the information and issues discussed in this paper.

Summary of Recommendations

A full list of recommendations and their rationale begins on page 13.

a. Legal Aid

- **Provide adequate funding for Legal Aid to cover legal advice and representation for abused and at-risk women as their cases proceed through the family law system at both court levels.**
- Take appropriate steps to clarify LSS eligibility guidelines for Legal Aid.
- Consider expanding the use of staff lawyers and family law Legal Aid clinics for the delivery of Legal Aid services.
- Consider ways to provide flexibility in intake services to meet the needs of, for example, working women, women with children, women who live in poverty or women who speak languages other than English.

b. Victim Support and Legal Advocacy

- Develop and fund an approach to providing technical, practical and emotional support to women as they proceed through the family law legal system, parallel to and in conjunction with the support that is available to abused women as they proceed through the criminal justice system.

c. Collaboration with Family Justice Counsellors

- Develop strategies for facilitating closer collaboration among Family Justice Counsellors and other players in the family law system, including family law lawyers, family law advocates, victim services, women-serving agencies, immigrant-serving agencies and Violence Against Women in Relationships Coordinating Committees.

d. Information for Women on their Rights, Obligations and Opportunities

- Develop strategies to help ensure that abused women, including women whose first language is not English and women who face other communication challenges, are informed about their legal rights in the family justice process, including print as well as web-based resources, resources in languages other than English, grants for PLE events at the local level, and use of innovative approaches to disseminate information to those who need it.

e. Family Duty Counsel

- Continue and enhance the availability and accessibility of family duty counsel at both court levels.

f. Revised Use of Supreme Court

- Take steps toward a long-term goal of simplifying and restricting the use of Supreme Court in family law matters.

g. Multi-disciplinary Service Approach

- Establish a multi-disciplinary working group, including representatives from government, LSS, women-serving agencies, diversity groups, the Bar Association, the Law Society, provincial anti-violence organizations, provincial educational institutions and potential funders to explore the development of a multi-disciplinary approach to family law services.

h. Effective Intake Function

- Whatever the family law service, incorporate effective intake procedures so that women are directed to the most appropriate service from the outset, starting with the most appropriate and cost-effective service.

i. Training

Facilitate opportunities for high quality specialized training on violence against women that includes an analysis and practical information on conducting risk assessments as well as on relevant family law issues for all those working in the family law area. This specialized training would be provided to family law lawyers, law students, family justice counsellors, family law legal advocates, victim service workers and intake workers.