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Waitakere Anti-Violence Essential Services

WAVES Trust

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## Law Commission

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## Submission on the Alternative Trial Processes Project

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### We wish to speak with the Commission about our submission if that is possible

WAVES Trust is an interagency family violence (FV) network organisation. The membership is primarily government and non-government service providers who work in the area of FV. There are also members who are not specifically FV agencies but their work complements or supports efforts to reduce violence in Waitakere. We currently liaise with representatives from over 50 agencies working in Waitakere and with networks covering other areas of Auckland.

We are committed to strengthening the work of those who support and inform victims of FV and those who hold offenders accountable and support them to make positive changes to their behaviour. WAVES acts to support and resource all member agencies to practice to the highest standards of integrity and professional ethics.

WAVES Trust provides:

- A networking forum to encourage and support statutory and community services to provide integrated and collaborative services to reduce FV
- Links to other organisations through the interagency network
- Community advocacy and representation on initiatives that target FV
- Information about best practice in FV intervention and support for the implementation of best practice

- Primary prevention, capacity building and education opportunities for those working to reduce FV
- Contract management of interagency projects and contracts
- Access to current, relevant research Monitoring of community initiatives such as the Waitakere Family Violence Court
- An overview of information deficits and initiation of local research

WAVES Trust is a charitable trust. Governance is vested in the Board chaired by trustee Waitakere Family Court Judge David Mather. There are 5 trustees including David Mather, Penny Hulse (Auckland Council Deputy Mayor), Howard Dawson (CEO Man Alive), Steve Kehoe (NZ Police) and Tiaria Fletcher (Lifewise Family Services).

There are currently four staff members – a Manager, two part-time Coordinators, and an Administrator, as well as one contracted part-time Project Leader.

### **Summary**

We thank the Law Commission for giving us the opportunity to submit on this Project.

Our submission takes two parts:

1. Endorsing the proposed changes in relation to sexual violence criminal court cases with some provisos and suggestions for further thought, and
2. Suggesting ways that family violence criminal court cases and related Family Court matters could be improved.

In our submission we are generally supportive of the proposed changes in relation to sexual offence cases and we suggest that the Family Violence Courts model would provide an ideal platform for the implementation of similar reforms in relation to Family Violence. Finally we suggest improvements in information sharing between the Family Violence/District Court and Family Court to improve the safety of victims and children.

## Background

Family or domestic violence (FV) is defined by the 1995 Domestic Violence Act (sections 3 & 4) as a single act or a pattern of behaviours including physical, sexual, or psychological abuse (no matter how trivial acts may seem individually) that is perpetrated on another person with whom there is a domestic relationship such as a family member, a current or former intimate partner, or other form of close personal relationship or shared domestic arrangements such as a flatmate. Psychological abuse covers a broad range of acts including intimidation, threats, damage to property and psychological abuse of children. The Act also defines the perpetration of abuse within children's sight or hearing or which puts children at risk of seeing or hearing as psychological abuse of children.

In the experience of our network members the most common type of FV is seen in male intimate partner violence against current or former female partners. But FV is not limited to this phenomenon and includes a wide variety of abuses (including financial and emotional abuse and neglect) perpetrated by men and/or women against other adults including same-sex partners, against children and vulnerable adults such as elders and the disabled, and also includes adolescents' violence against their parents or siblings.

The FV sector agree that perpetrators of FV use such tactics to gain power and control over others through fear and intimidation. Whilst perpetrators may direct their abusive behaviour at one specific family member it is widely accepted that other family members will be affected, especially children, and that abuse of one individual or even pets can be used to control other family members.<sup>1</sup>

We acknowledge that victims' experience of sexual violence may not always be limited to the context of family or domestic relationships. However it is important to note that there are strong relationships between sexual violence and FV. Historic cases of childhood sexual assault are very likely to be FV-related, as recent research has demonstrated that between 17% and 35% of New Zealand women experienced sexual assault during childhood (rural Maori women having the highest prevalence, urban non-Maori the lowest) and most perpetrators were identified as male family members.<sup>2</sup> In terms of intimate partner violence (IPV), research conducted in 2004 found that 5.7% of the ever-partnered Auckland women experienced at least one event of physical and/or sexual violence at the hands of a

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<sup>1</sup> For recent research on the relationship between pet abuse and FV see Michael Roquski, *Pets as Pawns: The Co-Existence of Animal Cruelty and Family Violence*, Wellington, 2012, <http://www.womensrefuge.org.nz/users/Image/Downloads/PDFs/Pets%20as%20Pawns.pdf>

<sup>2</sup> Janet Fanslow, Elizabeth Robinson, Sue Crengle, Lana Perese, 'Prevalence of Child Sexual Abuse Reported by a Cross-sectional Sample of New Zealand Women', *Child Abuse & Neglect*, 31, 9, 2007, p.935.

current or former male partner in the previous 12 months.<sup>3</sup> Psychological abuse is the most commonly disclosed form of FV.<sup>4</sup>

Anecdotal information received from the FV sector suggests that sexual violence is often the last form of violence to be disclosed by victims, meaning that many FV victims receiving services in response to disclosed physical or psychological abuse in the family context are likely to have also experienced sexual assault or, more commonly, various forms of sexual control and/or coercion.<sup>5</sup> Crisis services now provide support and services to women addressing sexual health concerns suggesting sexual coercion and control as evidenced by the elevated risk to FV victims of unwanted pregnancy, abortion, and sexually transmitted infections.

In terms of responding to FV, a Coordinated Plan for Community Action is considered best practice both nationally and internationally.<sup>6</sup> Within such a plan the Justice system, including the police, plays an important role in protecting victims and their children, holding perpetrators accountable for their actions, and providing strong referral pathways into support services which aim to address the harms caused by violence and reduce recidivism. In Waitakere, the FV sector enjoys robust relationships with the judicial arms of government in particular the Police and Waitakere Family Violence and Family Courts. These relationships are evidenced by the presence on the WAVES Trust Board of Family Court Judge David Mather and Waitakere Police Area Commander Steve Kehoe both of whom also contribute to the Waitakere Taskforce on FV.<sup>7</sup> The WAVES network of FV service providers recognises that these relationships reflect the strength of commitment to responding to FV that exists at the highest levels of our local judicial authorities.

Therefore, we present this submission from the point of view of FV services working with clients who have experienced or perpetrated sexual violence at the hands of relatives or others with whom they have a domestic relationship.

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<sup>3</sup> Fanslow and Robinson, 'Violence against Women in New Zealand: Prevalence and Health Consequences', *New Zealand Medical Journal*, 117, 1206, 2004, pp. 4–5. The lifetime prevalence of experiencing at least one act of physical or sexual violence was 33%.

<sup>4</sup> Fanslow and Robinson, 'Sticks, Stones, or Words? ? Counting the Prevalence of Different Types of Intimate Partner Violence Reported by New Zealand Women', *Journal of Aggression, Maltreatment & Trauma*, 20, 7, 2011, p. 756. Some 17.2% of ever-partnered Auckland women reporting at least one experience of psychological abuse from a current or former male partner in the previous 12 months with a lifetime prevalence of 51.5%.

<sup>5</sup> Some of these forms of abuse in the context of men's violence towards female intimate partners might include rape/sexual assault; women coerced into high-risk sexual activities, e.g. engaging in prostitution or acting for pornographic images, sex with strangers; men's refusal to use or allow use of contraceptives; multiple unwanted pregnancies; women coerced into obtaining abortions; women repeatedly subjected to sexually transmitted infections by a male partner.

<sup>6</sup> See Supplementary Document attached with this submission.

<sup>7</sup> The Taskforce was initiated in 2007 co-chaired by then Mayor Bob Harvey and Dr Pita Sharples to bring high level local service executives and political leaders into conversation with the FV WAVES network.

## Submission

In the interests of promoting greater transparency in sexual offence cases we support the following reforms:

- Reform 2A – complainants able to request a review of initial charging decisions.
- Reform 2B – complainants able to request a review of decisions to amend or drop charges.
- Reform 2C – establishment of guidelines for the prosecution of sexual offence cases.
- Reform 2E – reduction in the number of formal court hearings.
- Reform 3B – Judge and/or jurors give written reasons for the verdict.
- Reform 3C – Judge uses verdict reasons to make sentencing decisions.
- Reform 3D – specialist training programme for Judges required to be completed before Judges can preside over sexual offence cases.
- Reform 3E – both prosecution and defence counsel be accredited before they could act on sexual offence cases.
- Reform 4D – fast-tracking cases involving vulnerable witnesses or pre-recording evidence and cross-examination, as well as provision of assistance in developing questions.
- Reform 4E – Victims have an independent Sexual Violence Advisor assigned from first contact on the matter to support, advise and assist until their complaint is resolved.
- Reform 4F – in relation to accusations of sexual offences against children (current or historic) an automatic referral is made to the Family Court to assess risk to that child or others, and the criminal court would also be able to make protection orders in relation to the accused.

Our support for the following list of reforms is provisional on enactment of Reform 3D, as we believe that 3D is necessary to provide consistently good outcomes particularly in cases decided by a Judge alone:

- Reform 2D – pre-trial case assessment by the trial judge.
- Reform 3A – the facts decided by a Judge alone or a Judge and two trained Jurors.
- Reform 4A – the Judge controls the how evidence is presented and in what order.
- Reform 4B – the defendant gives evidence first in answer to questions put by the Judge, unless the Judge decides on a different order.
- Reform 4C – relaxed rules of evidence in cases heard by a Judge alone or Judge and two Jurors.
- Reform 5 – specialist sexual violence court for sentencing.
- Reform 6 – alternative process for sexual offence cases.

Further comments on:

*Reform 2E – establishment of guidelines for prosecution of sexual offence cases.*

In our view many of the reforms proposed in the Law Commission’s Alternative Trials Processes Project have similar aims to that of the specialist Family Violence Courts. Therefore we recommend that Reform 2E go further than simply the production of guidelines for sexual offence cases and include the establishment of a court Protocol for Sexual Offences following the example of the 2005 Waitakere District Court Family Violence Court Protocol.<sup>8</sup> All parties to the court including specialist judges, accredited counsel, and community agencies providing ISVA services should be signatories to the Protocol, which should aim to improve the timeliness of hearings, the safety of victims and witnesses, and concentrate specialist services within the court process. In our experience, and in an evaluation conducted by the Ministry of Justice, the Family Violence Court and its protocol have been shown to address these issues in relation to FV, suggesting that a similar court protocol for Sexual Offences may be warranted.<sup>9</sup>

*Reforms 3A and 3D – decisions by a Judge alone or with two Jurors, and specialist training for Judges.*

We thank the commission for its cogent and thoughtful commentary on these two proposed reforms. It is our view that Reform 3A should preferably vest decision-making to a Judge and two lay Jurors, especially in cases of a serious nature. We have formed this view because the combined weight of all the proposed reforms will considerably increase Judges’ direction and control of cases. Whilst other proposed changes will increase the transparency of decisions we feel that the inclusion of two trained lay Jurors is a necessary safeguard to ensure Judges cannot be criticised for holding too much power within the process. Likewise, we see the proposal for specialist training of Judges as a further positive safeguard for Judges, accused, and victims alike. We recommend that Judges should undertake training before being able to preside over sexual offence cases and leave it up to the discretion of the Law Commission to decide how this might be best implemented.

*Reform 4E – who can be an Independent Sexual Violence Advisor (ISVA)?*

We support the institution of ISVAs assigned to support and advise victims/complainants from their first contact with the judicial system through to its conclusion. We suggest that the Law Commission investigate the Community Victim Services model currently defined by the 2005 Waitakere District Court Family Violence Court Protocol as a model that might be

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<sup>8</sup> <http://www.justice.govt.nz/publications/global-publications/t/the-waitakere-and-manukau-family-violence-courts-an-evaluation-summary-august-2008/appendix-3-waitakere-district-court-family-violence-court-protocol-2013-june-2005> (Accessed 20 April 2012).

<sup>9</sup> These are some of the aims of the aforementioned Family Violence Court Protocol.

suited to expansion to provision of ISVA services.<sup>10</sup> Given the nature of sexual offending and its impact on victim wellbeing, we believe that ISVA personnel should be sourced from community agencies working in the field of sexual violence. These positions must be supported by robust agreements between the Courts and agencies such as court protocols that enable ongoing information sharing to support the safety and confidence of the victim within the court system and enable easy access to therapeutic and support services.

#### *Reform 4F – child protection orders*

We support the proposal to allow the criminal court to directly introduce final protection orders against the accused for the protection of children and to refer information to the Family Court for the same purpose. This is one step towards much needed reform to reduce the gaps between criminal and family jurisdictions in order to improve the safety of children, aspects of which we have discussed in other submissions including our submission on the Family Court Review and on the Child and Family Protection Bill (2010).

However, we would also like to see Reform 4F extended to include automatic final protection orders issued for adults as well as children. Currently the Family Violence Court can issue protection orders on behalf of adult victims; it is up to the victim to then decide if she/he wishes to activate the order. We believe that this opportunity should also be made available to adult victims in sexual offence cases.

#### *Reform 6 – alternative process for sexual offence cases.*

We support the development of alternative processes for sexual offence cases with two provisos: firstly access to these processes should always be at the direction of the victim and secondly, robust assessment processes must be in place to ensure victims are not pressured to take this option if it means that there will be no conviction for the offender.

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<sup>10</sup> <http://www.justice.govt.nz/publications/global-publications/t/the-waikare-and-manukau-family-violence-courts-an-evaluation-summary-august-2008/appendix-3-waikare-district-court-family-violence-court-protocol-2013-june-2005> (Accessed 20 April 2012).

## **Suggested reforms to consider in relation to Family Violence Offences and Orders**

FV is a pervasive problem in New Zealand and the cause of more than 50% of police callouts here in Waitakere. As discussed in the Background section of this submission, there are strong interconnections between FV and sexual violence. Anecdotal evidence within the FV sector suggests that sexual violence as a form of FV often remains undisclosed even when victims seek help for other forms of abuse. A victim of FV whose public life and liberty has been controlled through physical, psychological and/or financial abuse is unlikely to enjoy the same sexual integrity and autonomy within their relationship as their peers in non-abusive relationships. Even though sexual abuse is unlikely to be verbally disclosed by victims, crisis services often work to address physical and sexual health needs indicating sexual abuse has occurred. For these reasons we believe that any changes in court and trial structure for sexual offences should be mirrored in FV offence cases as far as possible.

Many of the problems identified in the Law Commission's Alternative Trials project in relation to sexual offence cases also existed in relation to FV offences. Efforts to improve court performance in relation to FV resulted in the implementation of 8 specialist Family Violence Courts in the North Island.<sup>11</sup> The FV Courts were formed with the intention of promoting offender accountability, victim safety, reducing turnaround time and providing access to specialist services. Reviews of the FV Courts have generally been favourable, indicating that the courts are meeting their objectives, although some issues remain to be addressed.<sup>12</sup>

We support the suggestion in the Law Commission Alternative Trials Processes Project that aspects of its proposed reforms could extend to FV offences. However, we wish to point out that some of these reforms have already been implemented within the FV Courts including Judge-only hearings and specialist training for Judges. We note, however, that only the Waitakere FV Court has implemented independent advocates for victims provided by the Community Victim Services. Therefore we make the following recommendations:

We recommend that that FV Court model be extended across all District Court jurisdictions in New Zealand, rather than remain limited to only 8 North Island sites as is currently the case.

We recommend that the independent victim advocates such as those provided in the Waitakere FV Court by the Community Victim Services under the Waitakere FV Court Protocol be extended across all FV Court sites in New Zealand and suitable protocols developed to ensure that services are provided by community agencies local to the relevant courts.

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<sup>11</sup> <http://www.justice.govt.nz/publications/global-publications/f/family-violence-courts/publication> (Accessed 23 April 2012). FV Courts are located at Waitakere, Whangarei, Auckland, Manukau, Palmerston North, Masterton, Porirua, and Lower Hutt.

<sup>12</sup> <http://www.justice.govt.nz/publications/global-publications/t/the-waitakere-and-manukau-family-violence-courts-an-evaluation-summary-august-2008/executive-summary> (Accessed 23 April 2012).

We recommend that the Law Commission undertake a similar review of FV Court processes.

There remain longstanding issues relating to the lack of interface between the various jurisdictions of the court system in relation to FV that have yet to be addressed. In particular the FV sector has concerns about the lack of information-sharing between the Family Court and the District or Family Violence Court that need to be addressed. Therefore we recommend:

1. When a defendant is charged with either breach of a Protection Order or assault of the protected person then affidavits from the prior Family Court Protection Order proceedings should be provided as a matter of course to subsequent bail hearings in the FV or District Court.
2. Risk assessment material both from Police and victim advocates should be used routinely in FV or District Court bail hearings in relation to FV offences.

Some processes within the Family Court also need to be addressed to improve the transparency of the Court and improve the safety of victims and children. Therefore we recommend:

1. Family Court Judges should give reasons in writing for declining Protection Order applications or for putting these on notice.
2. Development and adoption of Family Court FV best practice principles to ensure consistency in approach to FV across Judges within courts and between regions.<sup>13</sup>
3. Protection Order respondents representing themselves should not be allowed to personally cross-examine applicants or witnesses during defended hearings in the Family Court.
4. When the Family Court institutes proceedings to examine contact arrangements for children in relation to allegations of FV a full information check of the Family Court database and criminal court records should be undertaken to ensure orders are based on the most up to date information available to support children's safety.

We thank the Law Commission for giving us the opportunity to submit on their proposed reforms and we look forward to seeing substantial and meaningful change in the way that sexual offences, and we hope FV offences, are pursued in the courts.

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<sup>13</sup> See for example

<http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb6f65040e33d79/FVBPP%20Report%20Final%20July%202011.pdf> (Accessed 23 April 2004).