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**STATEMENT OF THE NEW YORK CITY BAR ASSOCIATION  
SANDRA PARK, CHAIR, COMMITTEE ON DOMESTIC VIOLENCE  
NEW YORK STATE DEMOCRATIC CONFERENCE PUBLIC FORUM  
MAY 30, 2012**

Thank you for the opportunity to participate in today's Forum on behalf of the New York City Bar Association. The City Bar's Committee on Domestic Violence engages in policy and legal analysis, and attorney and public education on issues relating to domestic violence and other forms of gender-based violence. Our committee members are employed in a variety of arenas, including legal and social service agencies, district attorneys' offices, law firms, policy positions and academia. The City Bar supports legislation addressing housing discrimination against victims of domestic violence and the sentencing of victims who are convicted of committing crimes where abuse was a significant contributing factor to the criminal behavior. Enacting laws addressing these issues would strengthen our state's recognition of the myriad ways that domestic violence impacts victims, such as in housing and the criminal justice system, and we therefore urge the legislature to do so expeditiously.

**Housing Discrimination Against Survivors of Domestic Violence**

The City Bar has long advocated for legislation to include victims of domestic violence in state laws prohibiting housing discrimination. The need is particularly compelling with the ongoing economic and housing crises.

Victims of domestic violence frequently lose housing due to discrimination based on their status as victims of such violence. They often face eviction based on the violent acts of their abusers or because they have sought protection from the police and/or courts; they also report being denied housing due to their past experience as victims. Because many landlords and management companies penalize the entire household for "criminal activity" pursuant to zero tolerance for crime policies, victims are likely to be evicted when they reach out for police assistance and landlords then become aware of the abuse.

The U.S. Congress, in passing and reauthorizing the Violence Against Women Act, has recognized that evicting victims is a common response by landlords to domestic abuse and related criminal activity. Congress also found that this response has serious consequences for women and their children who are dealing with violence, because many victims may decide to stay silent about the abuse they are experiencing in order to avoid losing their housing.<sup>1</sup> Studies

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<sup>1</sup> See Violence Against Women and Department of Justice Reauthorization Act of 2005, 42 U.S.C. §§ 14043e(3) and (4).

have repeatedly found that domestic violence, including related housing discrimination based on abuse, is a primary cause of homelessness for women and families with children. Yet, without the security of safe and affordable housing, victims of violence and their children lack a critical tool to leave a dangerous situation.

Discrimination exacerbates victims' lack of access to housing in the current economy, where many victims have few safe options. Communities have been forced to freeze their federally subsidized ("Section 8") housing voucher programs and project-based Section 8 programs due to federal funding cuts, and it often takes years to get off a waiting list for public housing.

Proposed legislation, such as S.6994 and S.3784, would address housing discrimination against victims by amending the state's Human Rights Law, N.Y. Exec. L. § 296, to add victims of domestic violence to the list of groups protected from housing discrimination. Such an amendment would make it unlawful for a landlord to refuse to sell or rent, or to discriminate in the terms or conditions of providing housing based on status as a victim of domestic violence. The City Bar has endorsed S.6994, which would amend section 292 of the Executive Law to cross-reference the definition of "victim of domestic violence" with the definition found at section 459-a of the Social Services Law, which is the definition used to determine who qualifies for domestic violence services and which has been updated to incorporate the family offense definition from the Family Court Act.<sup>2</sup>

Significantly, legislation of this nature would fill a gap in VAWA. VAWA protects victims of domestic violence, stalking and dating violence from discrimination in access to federal public housing and Section 8 housing, and provide those victims with defenses to eviction.<sup>3</sup> Since its enactment, VAWA has helped preserve the housing of victims, including those living in New York. One of the first published cases dealing with the enforcement of VAWA rights arose in New York City, where a court concluded that a Section 8 landlord violated VAWA when trying to evict a tenant based on domestic violence perpetrated against her. *Metro North Owners LLC v. Thorpe*, 870 N.Y.S.2d 768 (N.Y. Civ. Ct. 2008). However, these protections do not apply to victims living in *private* housing. Because of the temporary nature of shelters and the shortage of public housing and subsidized housing in New York, numerous victims fleeing their abusers seek shelter in the private housing market and are not afforded such protections.

Extending anti-discrimination protections to victims will not impose an undue burden on landlords. Like other anti-discrimination laws, the bill prohibits adverse actions against tenants

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<sup>2</sup> On April 13, 2011, Governor Cuomo signed A.627/S.4222 into law (as Chapter 11 of the Laws of 2011), which amended and updated Soc. Serv. L. § 459-a to: (i) include the expanded definition of "family or household member" found in Family Court Act § 812, and (ii) include all conduct that qualifies as a family offense under Family Court Act § 812. With the amendments to § 459-a, the Committees support the proposed bill's use of a cross-referenced definition of "victim of domestic violence".

<sup>3</sup> See 42 U.S.C. §§ 1437d(c)(3), 1437d(l)(5) & (6) (2006); 42 U.S.C. §§ 1437f(c)(9)(A); 1437f(c)(9)(B) & (C) (2006).

only when those actions are based on impermissible, discriminatory reasons.<sup>4</sup> This bill would only protect a tenant who is discriminated against “because of” his or her status as a victim of domestic violence.

The District of Columbia, Indiana, North Carolina, Oregon, Rhode Island, Washington State, Wisconsin, and Westchester County, New York already have enacted laws prohibiting housing discrimination against victims of domestic violence.<sup>5</sup> New York State should follow suit.

### **Domestic Violence Survivors Justice Act**

The City Bar also supports S.5436, which would amend New York’s penal and criminal procedure law to give greater discretion to judges when sentencing defendants who are survivors of domestic violence. The legislation would allow a judge to impose an alternative sentence if he or she finds that:

- 1) the defendant, at the time of the offense, was a domestic violence victim subjected to substantial physical, sexual, or psychological abuse inflicted by a member of the same family or household;
- 2) the abuse was a significant contributing factor to the criminal behavior; and
- 3) a sentence under the general sentencing provisions would be “unduly harsh.”

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<sup>4</sup> We are confident that courts, drawing on experience and extensive case law in other areas of anti-discrimination law, could distinguish between unlawful discrimination based on the stereotyping of victims of abuse (such as the eviction of a tenant solely because the landlord learned she or he was a victim of violence), and adverse actions based on legitimate tenancy requirements that apply to all tenants, regardless of their status. As early as 1985, the New York State Attorney General opined that a categorical refusal to rent to victims of domestic violence based on the fear of harm to other tenants would violate the fair housing provisions of the state Human Rights Law. See 1985 Op. Atty. Gen. N.Y. 45 (Nov. 22, 1985). See also *Metro North Owners LLC v. Thorpe*, 870 N.Y.S.2d 768 (N.Y. Civ. Ct. 2008) (dismissing an eviction case because it arose from a domestic violence incident in which the tenant was the victim); *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. 2005) (denying landlord’s motion for summary judgment and finding domestic violence victim stated prima facie claim of sex discrimination under federal Fair Housing Act when she was evicted after obtaining an order of protection). The federal Department of Housing and Urban Development recently issued guidance to help assess claims of discrimination against domestic violence survivors under the federal Fair Housing Act. Office of Fair Housing and Equal Opportunity, HUD, Memorandum for FHEO Office Directors and FHEO Regional Directors re: Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHA) and the Violence Against Women Act (VAWA) (Feb. 9, 2011), available at <http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf>. (Last visited May 29, 2012).

<sup>5</sup> See D.C. CODE § 2.1402.21; IND. CODE ANN. § 32-31-9-8; N.C. GEN. STAT. §§ 42-40, 42-42.2 42-42.3 & 42-45.1; OR. REV. STAT. ANN. § 90.449; R.I. GEN. LAWS §§ 34-37-1, -2, -2.4, -3 & -4; WASH. REV. CODE ANN. §§ 59.18.570, 575, 580 & 585; WIS. STAT. ANN. § 106.50; Westchester County Code §§ 700.02, 700.05, 700.11(h)(2).

Alternative sentences would include indeterminate sentences of imprisonment, shorter, determinate periods of imprisonment, and community-based alternatives to incarceration.

Abusers use violence, fear and control to manipulate their victims, including manipulating victims to commit criminal activity directly leading to their present incarceration. Many incarcerated survivors have committed criminal activity to protect themselves from further violence, and others have convictions stemming from acts taken as a result of an abuser's coercion. A 1996 study found that a majority of women incarcerated in the New York City jail system reported engaging in illegal activity in response to the experience of abuse, threat of violence or coercion by their partners.<sup>6</sup> Another study found that of 525 abused women evaluated at a mental health center who had committed at least one crime, nearly half had been coerced into committing crimes by their batterers as "part of a structural sequence of actions in a climate of terror and diminished, violated sense of self."<sup>7</sup>

As other testimony and the report, *From Protection to Punishment*,<sup>8</sup> have established, survivors do end up with convictions and long prison terms for criminal activity arising from the abuse they experienced. The consequences to children and society are especially severe when victims of domestic violence are incarcerated due to actions taken as a direct result of the abuse. Healing the scars of domestic violence and affirming the relationships between parents and children is particularly difficult when the survivor and her children are separated by prison walls. New York taxpayers do not fare much better as a result of victims' incarceration, as they are often left to pay for both the children's care and the hefty cost of incarceration.

Currently, although New York law may permit a defendant to raise duress or self-defense arguments prior to conviction, the law fails to give discretion to judges to ameliorate sentences for domestic violence survivors who are defendants. Most violent felony offenses and some higher level non-violent offenses carry mandatory prison penalties, constraining a judge's ability to take into account domestic violence and its effects and order alternate sentencing. For example, if a person is charged with a class B violent felony, such as assault in the first degree or manslaughter in the first degree, and then convicted, the judge must sentence the defendants to a mandatory prison term of between 5 and 25 years. Abuse victims may find themselves with such convictions when, in fear for their safety, they assault or kill their abuser. This was the scenario faced by Victoria, a woman featured in the *From Protection to Punishment* report, who ultimately served 17 years in prison though she had no prior criminal record.<sup>9</sup>

The exception to "Jenna's Law," which was passed in 1998 and ended parole for most people convicted of first-time violent felony offenses, does not adequately address problems that

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<sup>6</sup> Beth E. Ritchie, *Compelled to Crime: The Gender Entrapment of Battered Black Women* (1996).

<sup>7</sup> Marti Tamm Loring & Pati Beaudoin, *Battered Women as Coerced Victim-Perpetrators*, 2 J. Emotional Abuse 3, 13 (2000).

<sup>8</sup> Avon Global Center for Women and Justice at Cornell Law School & the Women in Prison Project of the Correctional Association of New York, *From Protection to Punishment: Post-Conviction Barriers to Justice for Domestic Violence Survivor-Defendants in New York State* (2011).

<sup>9</sup> See *id.* at 12-13.

arise with sentencing of domestic violence victims. The exception, codified at Penal Law § 60.12, allows judges to impose indeterminate sentences and thus preserves the possibility of parole for domestic violence victims convicted of crimes against their abusers. However, this provision does not accomplish the goal of more compassionate sentencing for domestic violence survivors, because it applies only to certain homicide and assault offenses and only where the abuser is the victim. Furthermore, it does not allow judges to sentence defendants to alternatives to incarceration programs and can actually result in longer prison terms.

The bill in no way diminishes the seriousness of criminal activity. It includes appropriate safeguards: a judge would need to make specific findings regarding a defendant's status as a victim of domestic violence who was subjected to substantial abuse at the time the crime was committed, that the abuse was a significant contributing factor in the commission of the crime, and the harshness of a sentence under the generally applicable provisions. And, the prosecutor would have the opportunity to object to the imposition of an alternative sentence under the facts of a particular case. Thus, the bill would not allow defendants to claim that abuse from a time prior to the commission of the crime, or that abuse unrelated to the commission of the crime, would make them eligible for alternate sentencing. Moreover, the judge would always have the discretion to deny an alternate sentence, even where a defendant showed that she was a victim at the time she committed the crime and the abuse was a significant contributing factor, if the judge believes the sentence under the general guidelines is appropriate.

In addition, eligibility for alternative sentencing and re-sentencing is particularly appropriate for women survivors as they have extremely low recidivism rates, and often have no prior criminal record or history of violence.<sup>10</sup> And in this time of economic crises, it is important to note that pursuing alternatives to incarceration will save much needed dollars for the state.

S.5436 is a step forward towards achieving fairness in New York's justice system for victims of domestic violence, and will save taxpayer funds in these difficult financial times. Most importantly, it acknowledges the role that abuse plays in the commission of crimes and allows survivors to maintain ties to children who have already been traumatized by domestic violence.

For these reasons, the City Bar recommends enactment of this legislation.

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<sup>10</sup> New York State Department of Correctional Services, *2008 New Court Commitments to NYSDOCS*, Table 1C: Crime by Predicate Felony Status by Gender.