

# **Seeking A Better Judicial Process for Sexual Crimes**

**Background Paper  
for Dialogue with Penang Judiciary**

P R E P A R E D B Y



**Women's Centre for Change (WCC) Penang  
November 2007**

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# Background to the Research

## Introduction

The Women's Centre for Change (WCC) Penang has been involved in providing services for women, especially those who are the victims of domestic and sexual violence, since its inception in 1985. Through this experience of more than twenty years, WCC has gained an intimate understanding of the issues and problems faced by rape and sexual assault victims. We have seen the trauma suffered by our clients as a result of sexual assault. This trauma may become more intense as victims experience the criminal justice system. They are all too often uncertain of the procedures, uncertain if they can rely on any support system, uncertain if their day in court would bring them justice, and uncertain of their safety.

As sexual crime victims have been known to lament, *"There is no difference between being raped and giving evidence as a key witness at the trial of your alleged rapist, except that this time it happens in front of a crowd"*. Some victims have even indicated that this 'second rape' is more traumatic than the first. WCC has tried to help prevent the first rape through our advocacy and education programmes. We have also tried to stop the second rape through our advocacy and service programmes. This is based on the knowledge that although conviction of the accused has been found to be the single most important factor in re-establishing the mental health and stability of the victim, a generally positive experience of the criminal justice system, whatever the outcome, has also been shown to play a major part in the victim's path to recovery. An effective judicial system is therefore very important to the victim's healing process.

This is a major reason why we have undertaken this research. From our experience, we know that victims' responses to rape and other sexual assault are very varied and that their complaints and cases in court have been negatively affected by society's stereotyped views about women and sexual assault. In focussing this research on how the criminal justice system responds to sexual crime victims, WCC wishes to extend our understanding of whether the victims gain justice in outcome and whether they receive adequate victim support throughout the process.

Motivated by these factors, this research<sup>1</sup> had the following objectives:

- To gain an insight into how the legal and judicial systems deal with cases of sexual crime which are filed in court;
- To gain an overview of the gender awareness and sensitivity of the judiciary;
- To gauge the extent to which myths and stereotypes about victims of sexual crime influence the conduct, outcome and sentencing of trials concerning sexual crime, and the media reporting thereof; and

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1. This research was part of the wider European Commission funded project entitled 'Building Greater Democratic Processes and Citizens' Participation through Advocacy, Education and Reforms and Enhancing the Monitoring of the Commitments of the Malaysian Government (2005 -2007)'.

- To assess the court processes to determine whether the victims of sexual crime obtain justice by analysing the conviction rates and sentencing patterns.

## **Methodology and Limitations**

The project comprised two main components, the media research and the court research. The media research involved analysis of the reports of court trials of sexual crime published by three newspapers (New Straits Times, The Star and Utusan Malaysia) during the period 2000-2004. For the court research, our researchers collated and analysed data from the records of 439 completed cases of sexual crime heard in the subordinate courts in Penang, also over the period 2000-2004.

The data covered a variety of factors, including the type of crime, details of judges, prosecutors and defence counsel, length of time the trial took, defence arguments, the verdict, and the sentence, as well as detailed profiles of the victim and the accused. In addition, direct observation of some trials were undertaken (court watch); certain cases were studied in more detail; interviews of key players in court trials were conducted; judgements on sexual crime for the years 2000-2004 that were published in key local law journals were analysed; and some preliminary background research done with the police and other agencies involved in responding to sexual crime. The findings in this paper are drawn from both the media and court research.

The WCC research team was fortunate in obtaining considerable cooperation and assistance from the Penang judiciary and many other people in conducting this research. However, it is inevitable that limitations still remain. The incomplete recording of certain information in the court files prevented the compilation of a comprehensive profile of the cases. This might have been compounded by the ambition of the questionnaire in attempting to cover so many areas (there were a possible 336 data entries). Scheduling difficulties compromised the ability of the court watch to follow trials from start to finish, to give the full flavour of the 'culture of the courtroom'. Further, the lack of official data and statistics in the public domain limits possibilities for comparisons and further analysis, although the Royal Malaysian Police is one agency which has taken positive steps to collate and publish statistics on reported cases of sexual crime. These limitations notwithstanding, the research team managed to compile a large amount of information which makes this project a pathbreaking one.

With the information and insights gained, WCC hopes to work together with all associated parties, including the judiciary, prosecutors, the police and other agencies, to effect the necessary changes and improvements that would guarantee a fair and speedy delivery of justice for the victims of sexual crime.

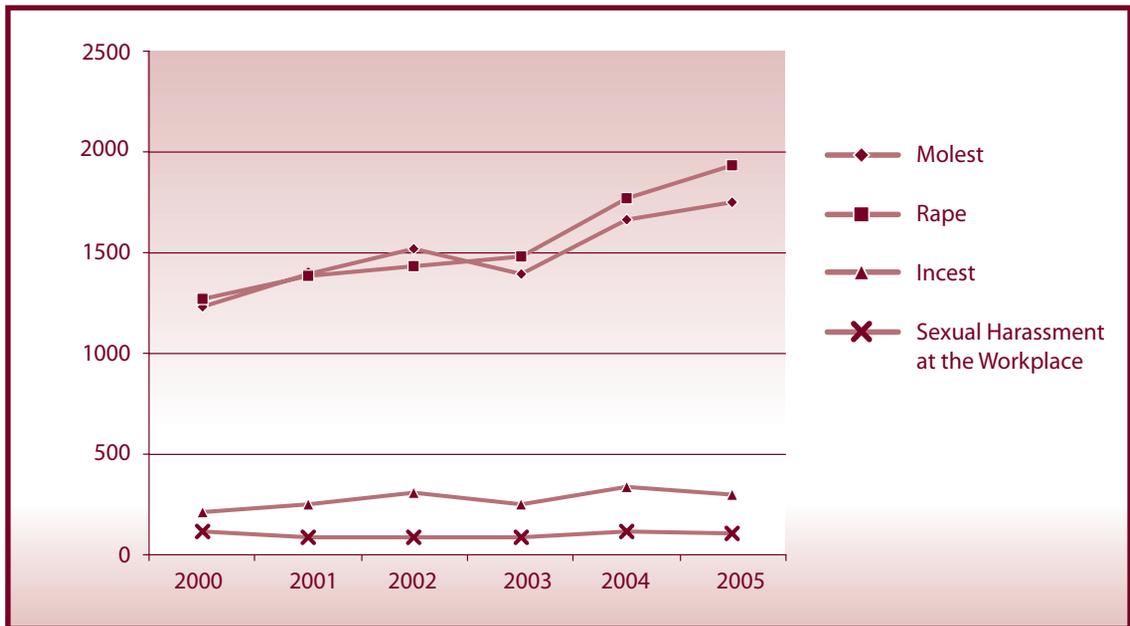
## Some Key Statistics

Some key statistics collected in the course of this research show the need for urgency in improving the way we deal with sexual crime. These statistics include the rising incidence of sexual crime, the high rate of discharge not amounting to acquittal (DNAA) once the accused is charged in court (45 per cent in our sample), and the very low rate of conviction where the accused claimed trial (four per cent in our sample).

### Rising Rate of Sexual Crimes

As Figure 1 shows, there has been a steady upward trend in the number of sexual crime cases reported to the police. This is especially true of molest and rape cases, which increased by 41 per cent and 59 per cent respectively over the 2000–2005 period. The number of incest cases fluctuated but the total number of cases in 2005 (295) exceeded that of 2000 (213) by close to 40 per cent. It was only in the case of sexual harassment at the work place that the numbers remain largely unchanged.

**Figure 1: Number of Sexual Crime Cases, 2000-2005**



Source: Royal Malaysian Police, Bukit Aman, 2006

### High Rate of DNAA

As Table 1 shows, the 439 sexual crime cases analysed by our research covered a range of sexual crimes. 42 per cent were outrage of modesty cases and 33 per cent were rape cases (23

per cent statutory rape, one per cent incest and nine per cent rape of an adult). There were also significant numbers of cases related to prostitution (including suppression of brothel cases) and involving ‘word or gesture intended to insult the modesty of a woman’. Overall, the majority of cases can be considered as ‘sexual assault’ cases, and it is on these that much of our analysis and conclusions centre.

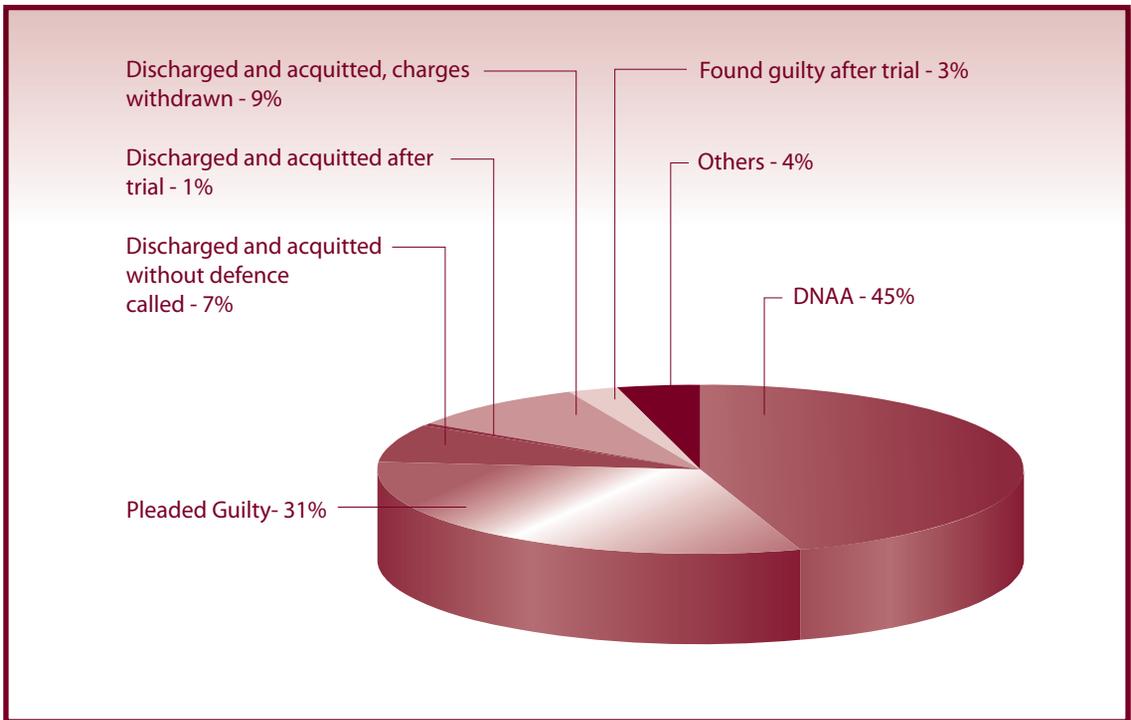
**Table 1: Types of Sexual Crime Tried in the Subordinate Courts of Penang, 2000-2004**

		Frequency	Percent
<b>Penal Code</b>			
S354	Outrage of Modesty	184	41.9
S366	Kidnapping or abducting a woman to compel her to marriage, etc.	1	0.2
S372A	Persons living on or trading in prostitution	3	0.7
S375	Rape	39	8.9
S375(f)	Statutory rape (sexual intercourse with person under 16)	101	23.0
S376A	Incest	5	1.1
S377A	Carnal Intercourse against the order of nature	12	2.8
S377C	Carnal Intercourse against the order of nature without consent	5	1.1
S377D	Outrage of decency	4	0.9
S377E	Inciting a child to an act of gross indecency	5	1.1
S509	Word or gesture intended to insult the modesty of a woman	25	5.7
S511	Attempt (to do any of the above)	4	0.9
<b>Women and Girls Protection Act 1973 (repealed 2001)</b>			
S16(1)(l)	refers to the Use of females for prostitution	4	0.9
S19(1)	refers to Living off the earnings of a prostitute	10	2.3
S21	Suppression of brothels	36	8.3
<b>Child Protection Act 1991 (repealed 2001)</b>			
S26(1)	Abuse, neglect or abandonment of a child	1	0.2
<b>Total</b>		<b>439</b>	<b>100.0</b>

Source: WCC Court Research 2007

The verdict in 45 per cent of all these cases was DNAA, as shown in Figure 2. In other words, nearly half of all the cases were not heard in full.

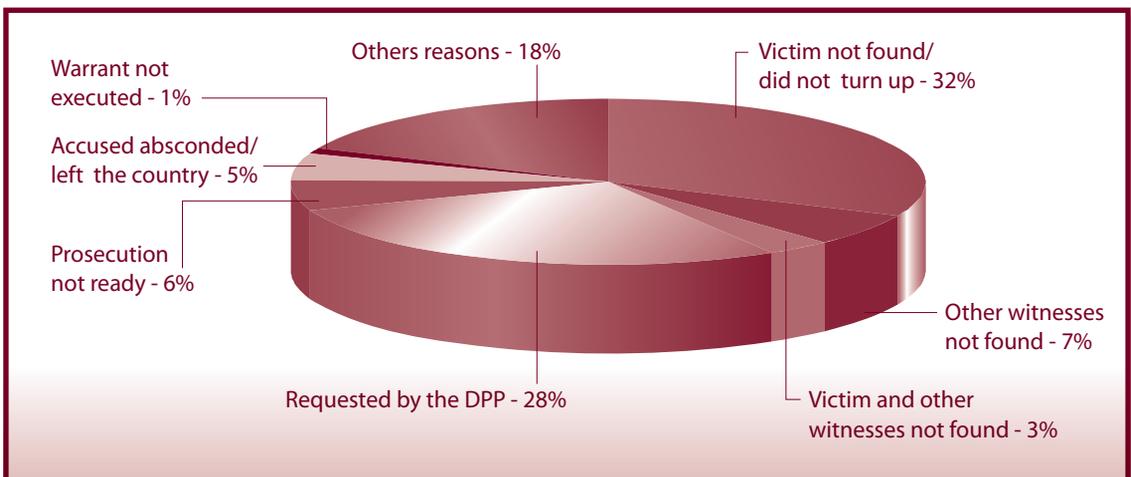
**Figure 2: Verdict in Sexual Crime Cases Tried in the Courts of Penang, 2000-2004**



Source: WCC Court Research 2007

From the court files, the single biggest reason for DNAA was to do with victims and/or witnesses not turning up. This is seen in the categories ‘victim not found or did not turn up’ (32 per cent), ‘other witnesses not found’ (7 per cent) and ‘victim and other witnesses not found’ (3 per cent), in Figure 3. We can also note that in 28 per cent of the cases, DNAA was granted at the request of the DPP.

**Figure 3: Reasons for DNAA**



Source: WCC Court Research 2007

In a recent dialogue with prosecutors held on 27 October 2007 in Kuala Lumpur, it was noted that, from their experience, a key factor leading to DNAA decisions was the reluctance of either victims or their families to proceed with the cases. A number of related factors were described, including the reluctance of a victim to give evidence in cases where she is not the complainant; the situation where there is an existing relationship between the victim and the accused; victims being threatened by the accused's family; or victims agreeing to settle the case with the accused's family. Repeated postponements of cases fixed for trial could also add to the victims' overall frustration and may lead to them giving up on attending court altogether. It was also noted that some victims or witnesses face financial difficulties which mean they cannot afford to come to court.

Key suggestions made by this dialogue included the scheduling of fewer cases per day, searching for ways to provide better victim support, and ensuring that subpoenas are served efficiently.

## Q What role can the courts play in helping to reduce the high rate of DNAA?

### Low Rate of Conviction

In 137 of the 439 cases (31 per cent), the accused pleaded guilty. But in the remaining 302 cases where the accused claimed trial, only 12 resulted in a guilty verdict. This is shocking because it only works out to a **four per cent conviction rate**. This means that if the accused choose not to plead guilty, they stand a 96 per cent chance of being acquitted and/or discharged.

Taking together the high percentage of DNAA verdicts and the extremely low conviction rate after trial, a review of the situation becomes especially critical. There is not only a huge waste of police and court time and resources, but the situation also seriously undermines the confidence of victims and the public in the criminal justice system.

## Q What factors affect the conviction rate? What can be done to improve conviction rates for sexual crimes?

## Factors Affecting Outcomes of Sexual Crime Cases

In exploring the factors that affected the outcome of our 439 cases, we looked at two broad categories: the structural and the attitudinal. Structural factors affect the criminal justice system as a whole and are not confined to sexual crime cases.

The attitudinal factors derive from the fact that sexual crime, especially sexual assault, is usually a crime committed by a male against a female. This gives sexual crime a special dynamic, in which gender issues and attitudes become essential ingredients.

Efforts to tackle low conviction rates and high rates of DNAA will need to consider what can be done, in both categories.

### A: Structural Factors in Sexual Crime Trials

#### Resources

The fundamental issue here is obviously the amount of resources available within the system, and how these resources are allocated. The allocation of resources impacts on a number of factors. These include:

- The recruitment and retention of enough human resources, which affects the workloads that they (including judges and magistrates) have to bear;
- The effectiveness of professional orientation, monitoring of performance and support for professional development;
- The extent and impact of training, especially in terms of awareness of gender issues;
- The provision of adequate victim, family and witness support;
- The provision of appropriate assistance, especially in the lower courts, to allow speedy and effective dealing with cases (this includes additional help to judges and magistrates in preparing and recording the cases; and the provision of other necessary additional court personnel, such as interpreters); and
- The transfers of judges and magistrates and the impact these have on the continuity of cases.

Our research emphasises that these are crucial areas to consider and in which appropriate reforms need to be undertaken. Some of our recommendations at the end of this report refer to them.

#### Victim Support

Victim support is a key area. From our research and from the discussion with prosecutors, it is clear that the way victims behave both before and during the court case can pose serious difficulties for both themselves and the prosecution. Family dynamics may result in the victim

being pressured to give up the case. In cases where the complainant is not the victim, there may be special difficulties once the victim comes to give evidence – she may be a reluctant or indeed a hostile witness. Other factors, including the effects of the trauma of the attack and/or financial considerations, may affect the quality of the victim’s evidence, if she turns up to court at all.

By providing good victim support, confidence in the system will increase. A victim who is given emotional support and who is properly briefed on court procedures, for example, would feel much more confident, less anxious and be better able to give evidence in a coherent manner in court.

Part of victim support is the exploration of courtroom facilities and procedures which are more ‘victim-friendly’. These might include separate waiting-rooms, providing various options for giving evidence (including the use of video) and addressing the issue of victim compensation.

Better victim support that translates into a more effective trial process does not only benefit the victims but also serves the public interest in helping to increase the conviction rate.

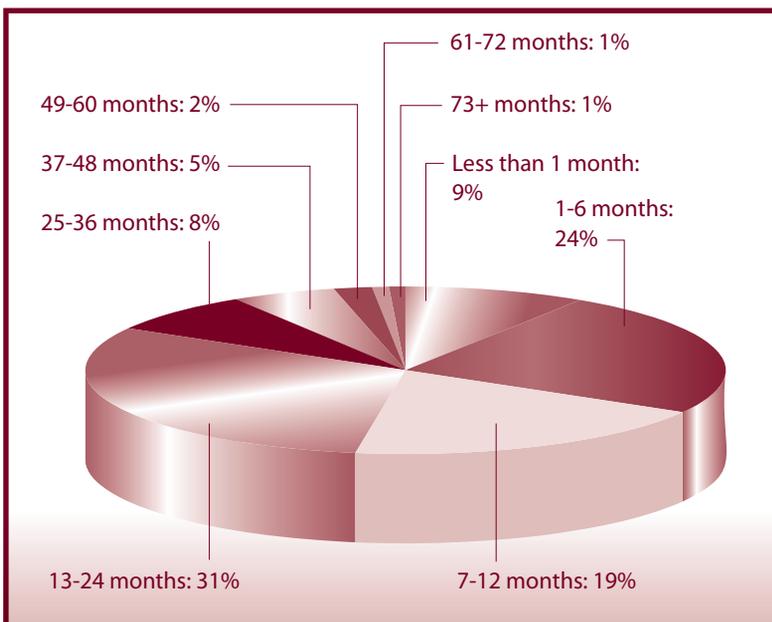
Models of victim support are available in other jurisdictions, and this is one area we would urge the government and all interested parties to explore urgently and thoroughly.

### Length of Time

One impact of limited resources is on the length of time a trial takes. This is presented in our research as a key area in need of attention. From our sample of 439 sexual crime cases, just over

half of the cases took less than a year, 83 per cent were dispensed with within two years, and one in six cases took more than two years (see Figure 4). In just under half of the cases that took less than a year, the accused pleaded guilty.

**Figure 4: Length of Time of Trial**



*Note: We have no information for eight cases (hence this breakdown is for 431). Two cases took more than eight years.*

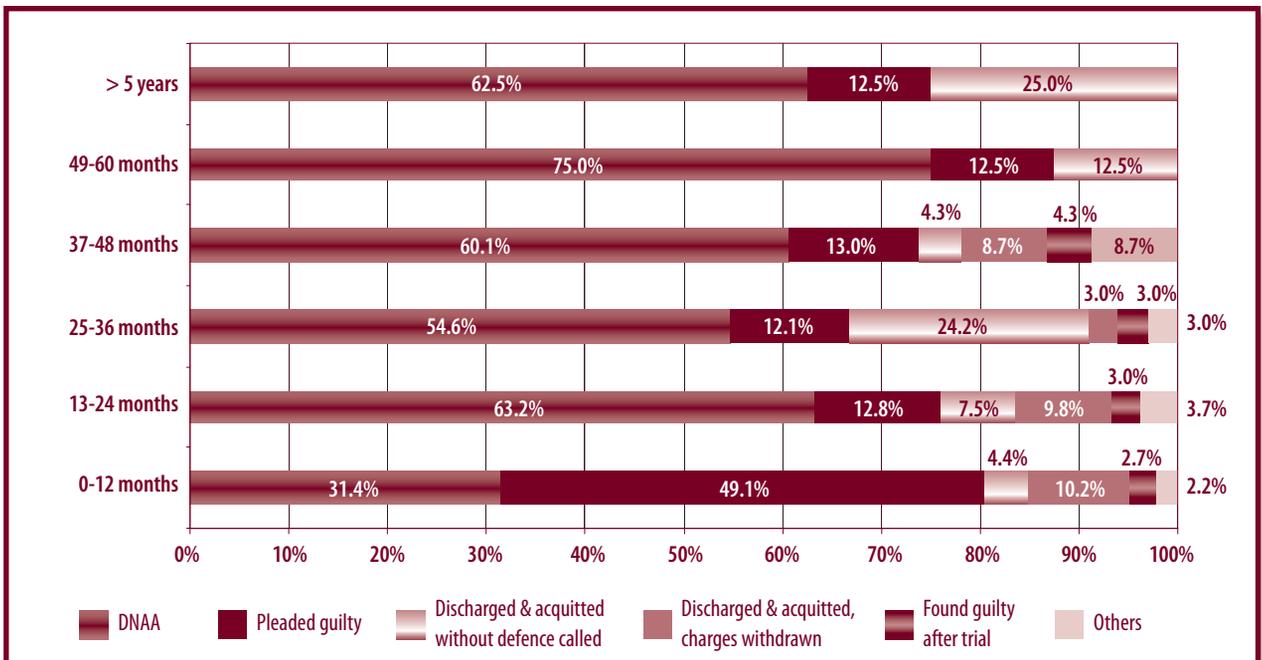
Our research notes that, in terms of length of time, although the picture is generally similar, differences include the fact that S509 cases were dealt with relatively quickly (not least because 72 per cent pleaded guilty), and statutory rape (S375(f)) trials took relatively long. Two out of three of the latter lasted more than a year, with the majority of these dispensed with within two years.

It was also found that, although just over half of outrage of modesty (S354) cases were completed within a year, one in five of these cases lasted more than two years. It would be important to investigate why the hearing of many of these cases took so long.

**Q What would be considered a reasonable length of time for concluding a case, based on international benchmarks?**

The impact that the length of time of a trial has on the verdict of the case is a highlight of our research. As Figure 5 shows, the longer the trial took, the more likely it was to result in a DNAA verdict. For cases lasting less than a year, just under a third resulted in a DNAA verdict. This proportion rose the longer the case went on. The period between one and two years would seem to be especially significant. In 75 per cent of cases which took four to five years, the accused was given a DNAA. The statistics also show that no trial lasting more than four years resulted in a conviction.

**Figure 5: Length of Time of Trial Against Verdict**



Source: WCC Court Research 2007

Note: We have no information for eight cases. The category ‘others’ includes discharged and acquitted after trial, discharged (accused died), or accused absconded (case cancelled).

There is also a correlation between the length of time a trial takes and the number of judges or magistrates involved in it, as Table 2 shows. Inadequate resources, as reflected in insufficient number of judges and magistrates, has a definite impact on length of trial. A prolonged trial may also lead to the involvement of more judges or magistrates as some of them might have retired, been transferred or promoted before the trial is completed. The change of judges and magistrates in the course of a trial can lead to further delay. Thus, as Table 2 shows, 94 per cent of the cases that lasted less than a year involved only one or two judges, whereas this is true of only 54 per cent of the cases which lasted more than two years.

**Table 2: Length of Time the Case Takes to Complete by Number of Judges/Magistrates**

Length of trial	One or two judges		Three or more judges		Total	
	Count	Percentage	Count	Percentage	Count	Percentage
Less than a year	213	94.3%	13	5.7%	226	100.0%
13 – 24 months	91	68.4%	42	31.6%	133	100.0%
More than 2 years	36	54.2%	33	45.8%	72	100.0%
<b>Total</b>	<b>343</b>	<b>79.6%</b>	<b>88</b>	<b>20.4%</b>	<b>431*</b>	<b>100.0%</b>

\* Note: We have no information for eight cases.

Source: WCC Court Research 2007

As well as creating continuity issues for those hearing, prosecuting and defending the case, our interviews told us that an increased length of time can pose serious difficulties for key witnesses such as medical personnel. Last minute notification of court hearing dates and times, postponements which waste key witnesses' time and affect their subsequent confidence and motivation to turn up, and lack of support for the victims and witnesses may all affect evidence in support of the prosecution's case, which in turn could affect chances of a conviction.

## Court Recording of the Notes of Proceedings

One factor that increases the length of the trial is the present manual system of court recording where judges and magistrates use their discretion when recording notes of proceedings. As the notes are written by hand, it is impossible to expect the judges and magistrates to capture everything that has been argued in court. Modernising the system of court recording can bring many benefits: it would relieve the extra burden on judges and magistrates, help speed up trials, and help provide a more accessible and comprehensive transcription of court proceedings which would in turn help speed up appeals, if any.

Furthermore, having to attend to court recording may constrain the ability of judges and magistrates to watch the demeanour of the witnesses and the accused. In sexual crime trials, being able to make such observations more freely would be an advantage.

An improvement of the court recording system would also generally help research. This links to a more general observation of our research that there is insufficient data in a number of areas in the criminal justice system. In order to plan appropriate initiatives and changes, we do need a comprehensive picture of what is happening. Thus, one of our recommendations is that all involved agencies make data collection more systematic, extensive and available in the public domain.

## **Q** How do we ensure a shorter trial period for sexual crime cases?

### **Case preparation and presentation**

Our research recognises the importance of case preparation and presentation. Although this area does not directly involve judges or magistrates, our research does stress that improvements in training of police and prosecutors, and improvements in procedures (for example, of evidence gathering) would enhance the quality of case presentation. Better, institutionalised inter-agency cooperation would also help. Feedback from our interviews, for example, showed that there are still mistakes being made in the gathering, labelling, storing and despatch of medical evidence, including DNA results. Although this is an area not directly involving judges or magistrates, anything that helps increase the quality of investigation and prosecution will help the court reach its decision better. Crucially, it may help lower the rate of DNAA and increase the rate of convictions.

### **B: Attitudinal Factors in Sexual Crime Trials**

In our research, 96 per cent of all victims were female and 97 per cent of all accused were male. Therefore there is a need to recognise the special attitudinal factors that come into play in sexual crime trials.

In assessing the merits of a sexual crime case, it is very important that those involved, including judges and magistrates, do not impose their own opinions of appropriate gender behaviour on victims of sexual crime. Although we recognise that the credibility of the sexual crime victim/complainant as a witness is critical, as is true in any other type of criminal trial, we are concerned that certain ideas and stereotypes about women's behaviour often come into play in sexual crime trials. Any such bias against the complainants would inevitably impact upon the chances of a conviction.

Studies have shown that victims can be viewed with suspicion at any juncture of the criminal justice system. When they report the crime, they may be doubted. Investigators may also be sceptical of the claims of the victim. In the courtroom, the centre of attention is again on the victim's credibility, and the defence arguments are likely to focus on reasons why this credibility should be questioned.

Our research reveals that this 'culture of scepticism' is still present in our criminal justice system. We argue that tackling these myths and stereotypes, and tackling this culture of scepticism, where the story of the woman is doubted from the beginning, are key to better conviction rates, better justice and recovery.

Table 3 presents the frequency by which certain defence arguments were put forward in our sample of sexual crime trials.

**Table 3: Number of Times a Particular Issue was Raised by the Defence in Cross-Examination**

	S354 24 cases	S375(f) 17 cases	S375 5 cases	Overall 52 cases	Mentioned by judge in acquittal cases
False report	11	5	1	19	1
Behaviour	8	15	5	32	6
Prior relationship	5	5	4	16	1
Consented to act	1	12	5	21	7
Alcohol/drugs	1	1	1	3	1
Clothing	2	0	2	6	0
Location indicates consent	4	2	1	8	1
Time indicates consent	2	1	1	4	0
Lying/inconsistency	21	12	4	42	12
(No) injuries	13	3	3	22	3
Post-offence behaviour	17	3	3	26	7
Delay in reporting	10	4	3	20	0

Source: WCC Court Research 2007

Most of these defences refer to established myths and stereotypes about female behaviour, including what is acceptable sexual norms. Our research shows that the defence often relies on these myths and stereotypes, which we know are either false or cannot be applied universally to all cases. Judges and magistrates need to take note of these myths and stereotypes when hearing sexual crime cases.

## Q How should judges and magistrates react to defence arguments which subscribe to myths and stereotypes?

Below we present some of the more frequently used defences and the myths that underlie them.

### Corroboration

Defences	Myths
<ul style="list-style-type: none"> <li>• No Corroboration</li> <li>• Victim is lying</li> <li>• Inconsistency in testimony</li> <li>• False report</li> </ul>	<ul style="list-style-type: none"> <li>• Women lie about being sexually assaulted.</li> <li>• Women report sexual assault only in order to get even; to get revenge; because they are sexually frustrated; because they feel guilty about having sex.</li> </ul>

In sexual crime trials, establishing the credibility of the victim is one hurdle to overcome in the face of myths and stereotypes about women's behaviour. A related and arguably more frustrating hurdle is the requirement of corroboration or independent evidence in addition to the victim/complainant's evidence.

The cases on corroboration clearly reveal that the justification for the corroboration requirement is rooted in prejudices against women's credibility as witnesses:

"... the necessity for corroboration, generally speaking, is not so imperative with regard to the identity of her assailant as to the fact of the offence itself. It is here that there is danger. **The temptations of a woman to exaggerate an act of sexual connection are well known and manifold.**"

*Din v Public Prosecutor* [1964] MLJ 300, 301 (FC) per Thomson LP  
(emphasis added)

"I warn myself that, on a charge of rape, it is dangerous to convict on the evidence of the complainant alone, since **experience has shown that female complainants have told false stories for various reasons.**"

*Public Prosecutor v Emran bin Nasir* [1987] 1 MLJ 166, 171 (per Roberts CJ)  
(emphasis added)

Statements like these clearly exemplify the sort of subjective ideas about women which are an obstruction to justice in sexual crime cases. Accepting such ideas means complainants of sexual crime are seriously disadvantaged because their honesty and integrity are doubted from the start.

Sexual crime complainants (the overwhelming majority of whom are women) are effectively placed in the same class of “unreliable” witnesses as accomplices and children of tender years whose evidence generally requires corroboration.

Thus, as a matter of principle, the basis of the corroboration requirement for the evidence of sexual crime complainants should be questioned.

Although the uncorroborated evidence of a sexual crime complainant will not automatically be rejected by the court (since in law, such evidence is still admissible), judges are required to warn themselves of the danger of convicting the accused on such evidence. If they fail to do so, such conviction, if any, could be set aside. Sexual crime complainants, therefore, face the prospect of convictions against the accused being set aside because this technical requirement is not met.

The mandatory warning on the requirement for corroboration has been abolished in many countries around the world, with positive effect. We see no reason why it should not be abolished here. By this, we are in no way suggesting that the burden of proof should be relaxed in sexual crime cases per se, as we are fully aware of the accused’s fundamental right to be presumed innocent until proven guilty beyond reasonable doubt. Instead, what is proposed is an approach which considers the evidence as a whole, as articulated by Justice Augustine Paul in the following extract:

“In my view, the right approach is to analyse the evidence for the prosecution and for the defence, and to decide whether the complainant’s evidence is so reliable that a conviction based solely on it is not unsafe. If it is not, it is necessary to identify which aspect of it is not so convincing and for which supporting evidence is required or desired. In assessing the supporting evidence, the question then is whether this supporting evidence makes up for the weaknesses in the complainant’s evidence. All these would, of course, have to be done in the light of all the circumstances of each case and all the evidence, including the defence evidence, as well as accumulated knowledge of human behaviour and common sense...

This way, the proper weight is given to the right evidence, and no undue weight is assigned to some evidence merely because it is called ‘corroboration’ or ‘supporting evidence’. Likewise, it ensures that insufficient weight will not be given to other evidence merely because there was an absence of ‘corroboration’ or ‘supporting evidence’ in relation to some other issue where such evidence is not even necessary....

**To recite mechanically that it is unsafe to convict without corroboration and to delve into what is or is not, technically speaking, corroboration without relating the evidence to the relevant issues would obfuscate the matter, which is essentially a factual one. It would be a true instance of not seeing the wood from the trees.”**

Augustine Paul, *Evidence: Practice and Procedure* (Third Edition),  
Malayan Law Journal Sdn Bhd, Kuala Lumpur (2003), pp 1018-1019  
(emphasis added)

## **Credibility - Lying and Inconsistencies in Testimony**

Doing away with the corroboration requirement would help free us from pre-judging the honesty of the (female) victim. However, the defence is almost always inclined to argue that the complainant is lying or that there are serious inconsistencies in the victim's testimony. In our research, this was a defence argument in 21 out of the 24 outrage of modesty (S354) cases where there is record of defence, 12 out of 17 statutory rape trials, four out of five rape cases and 42 out of the total 52 cases where we have information.

Our experience with victims of sexual crime shows that it is important for judges and magistrates to understand that there are several explanations why contradictions in a victim's testimony have nothing to do with wilful lying. These include the age and confidence of sexual assault victims, the trauma they may have suffered, the length of time a trial takes, as well as understandable lapses in memory. Trying to find a balance between understanding these factors and the need for consistency in evidence is a major challenge.

Good practice, often based on common sense is highlighted in some of our cases. This is an example from one of the judgements from the court files we researched:

"I agree in scrutinizing evidence by the SP1 (survivor), there are inconsistencies in her evidence. Minor inconsistencies by SP1 cannot be avoided... witnesses will give evidence according to their own perception.... The question here is, are the existence of differences and inconsistencies enough to damage the credibility of the witnesses. From all the evidence of prosecution's witnesses, none of their credibility was challenged or damaged. Although there are existence of differences and inconsistencies, there are minor and cannot damage the credibility of the prosecution case."

This is a good example of a judge or magistrate being aware of the situation faced by sexual crime victims and applying common sense in addressing defence arguments of lying and inconsistency.

## **False Reporting**

The accusation of false reporting is also another defence where the integrity and honesty of the victim is questioned. In 19 of 52 of our cases, it is cited as a defence. Our research also shows that misconceptions about the frequency of false reporting persist, even amongst police and prosecutors. For example, three DPPs whom we interviewed were in agreement that approximately 20 per cent of rape cases reported would be false. Yet according to Malaysian police statistics, between 1998 and 2001, the number of false reports of rape cases in Penang was just 18 out of 237 cases, or 7.6 per cent. This figure is no higher than false reporting of other crimes. There is therefore no basis for the myth that female complainants usually lie about sexual crimes against them.

## Late Reporting

Defences	Myths
<ul style="list-style-type: none"> <li>• Late reporting</li> <li>• Delay in reporting</li> <li>• (Lack of medical evidence)</li> </ul>	<ul style="list-style-type: none"> <li>• Genuine victims would report a sexual crime immediately</li> </ul>

Another common defence argument is that of late reporting. The defence of late reporting draws on the myth that if the victims are truthful, they would report the crime immediately. If there is delay, it is implied that the victim is therefore ‘not genuine’. It was raised by the defence in 20 out of the 52 cases where there is a record of cross examination, in our sample.

Research, however, shows that there are number of reasons why a woman (or man) may not report the crime, or delay reporting it. These include:

- Fear of embarrassment or humiliation and stigma attached to being a victim of a sexual crime, where the worth of the individual becomes devalued even when she is innocent;
- Fear that they will be blamed for the crime, by families, friends, the police, the medical officers and/or anyone else to whom they make the report or have to suffer the consequences of making a report;
- The situation where victims blame themselves (previous research shows how common this is, even where they clearly have no reason whatsoever to do so);
- Uncertainty and fear as to what will happen if they make a report;
- Fear of publicity and the trial process;
- Fear of retaliation by the accused or her friends/family;
- Pressure from the family not to report to ‘safeguard’ the family’s name;
- Pressure where the victim has an existing close relationship with the accused (e.g. relative, boyfriend or date); and
- Lack of knowledge or understanding that a crime has been committed.

Being aware of the possible reasons for late reporting is crucial to acknowledging that there are rational explanations for a victim’s behaviour, despite defence efforts to cast doubt on them. We suggest that being able to call expert witnesses, including psychologists and counsellors to testify in these cases, may also help.

One adverse consequence of late reporting is that any medical evidence may be lost. There is therefore a need to explore ways in which obstacles to reporting sexual crime are effectively tackled. This would include the changing of attitudes at all levels of the criminal justice system which doubt the woman’s story and lead to the persistence of the culture of scepticism. Better victim support throughout the system needs to be seen as an essential ingredient of positive change.

## Q Would the use of expert witnesses give the courts a better understanding of the victim's behaviour?

### Consent

Defences	Myths
<ul style="list-style-type: none"> <li>• Consented to act</li> <li>• Not against her will</li> <li>• Prior relationship</li> <li>• Behaviour</li> <li>• Clothing</li> <li>• Location indicates consent</li> <li>• Time indicates consent</li> </ul>	<ul style="list-style-type: none"> <li>• Women who are sexually assaulted must have asked for it by the way they dress or act or when and where they go.</li> <li>• Women secretly want to be sexually assaulted. They enjoy it.</li> <li>• Women mean yes when they say no.</li> </ul>

The issue of consent is another subject which is central to many sexual crime trials. In our sample, it was raised as a defence not just in rape cases but in a range of sexual assault trials.

The defence of consent includes both explicit assertions of consent as well as implicit indications of consent, based on interpretations of the victim's behaviour.

In 39 of the 52 cases where there is a record of cross-examination, consent was explicitly raised as a defence and in 32 cases, the 'behaviour' of the victim implying consent was relied upon, for example, by reference to the choice of the victim being with a particular person, at a particular location, and/or at a particular time.

### Injuries

Defences	Myths
<ul style="list-style-type: none"> <li>• No injuries</li> <li>• Lack of medical evidence</li> </ul>	<ul style="list-style-type: none"> <li>• It can only be a genuine sexual assault if there are injuries.</li> <li>• A woman who does not resist cannot claim rape or assault.</li> </ul>

Related to this is our finding that in 22 of the 52 cases in our sample, the defence argued that absence of injury on the victim was an indication of consent. The implication is that the victim has to resist physically in order to establish non-consent. This is an extract from one of the court files of our sample cases:

"Furthermore, SP1 did not shout, did not push, did not bite the accused, and did not try to run away. This evidence is not consistent with the reflex actions of a sexual crime victim."

It provides a clear example of a defence argument based on a myth. Our experience tells us that women will behave and react very differently both at the time of the attack and in its aftermath. We need to be aware that the victim may be frozen by fear. She may also choose the line of least resistance in order to avoid serious injury or the risk of being killed.

It is important to acknowledge that the victim's shock, surprise, embarrassment, fear and overall sense of powerlessness are all factors which influence how the victim behaves both during and after the assault, and that these factors need to be brought consistently to the court's attention.

### **Other 'Indications' of Consent**

Other indications of consent used by defence counsels also include the 'fact' that the victim had agreed to meet the accused, with the time and/or the location also indicating that the victim therefore consented to the act. Our media research reports one case where the defence argued that a hairdresser had consented to having sex with her accused, and

"this was supported by the evidence of witnesses who testified that the victim knew the accused. One of the witnesses said he saw the victim and accused having dinner at a roadside stall...on the night of the incident."

Reported in New Straits Times, 4 May 2002

The inference that a woman agrees to sex just because she may know the accused and/or has had a meal in his company must be rejected. A woman should not be blamed for a wrong committed by the accused.

This is even clearer in the issue of past sexual history, also often used to attempt to establish consent. The inference is that once a woman has engaged in sexual activity, she automatically is a willing partner at any time in the future. Again, it is an inference we need to reject.

Incidentally, our research reveals very few objections by the prosecution on the basis of Section 146A of the Evidence Act. This is the section which stipulates that, except in certain circumstances, no evidence and no questions in cross-examination shall be asked concerning the sexual activity of the complainant with any other person other than the accused. In the UK, the Home Office recently reported that (in relation to the rules of evidence regarding past sexual history) there was "*overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose*". It may be useful to consider whether this is an area which we need to revisit in Malaysia.

Other jurisdictions have taken initiatives which include codifying definitions of consent and shifting of the evidential burden of proof so that, for example, the accused is required to prove that he had taken positive steps to establish consent. These and other possibilities need to be

properly and fully debated in the knowledge that this area of consent is crucial in sexual crime trials and would seem to be a major obstacle to successful prosecution.

## **Rape as Manifestation of Lust**

Another common myth subscribed to is that rape is a manifestation of lust. For example, in one of the media reports we compiled, a perpetrator was described as:

“a 46-year-old man who could not control his sexual urges and raped his 11-year-old daughter...”

Reported in New Straits Times, 15 May 2004

Another example of such a view is reflected in the remark that :

“the accused should have satisfied his sexual urges with his wife who is the victim's mother, but instead he chose his daughter who is his own flesh and blood.”

Reported in New Straits Times, 21 March 2003

This idea that sexual assault is basically about sex is another myth that needs to be rejected. Research around the world, much of it based on the direct experience of victims and perpetrators, shows that rape and other sexual assault are first and foremost crimes of violence, in which power and control are key facets. The sex is used as a weapon to assert domination over women, and is not something done purely for sexual gratification.

If we continue to believe that rape and other sexual assault are primarily sexual acts, it is then easy to continue to (at least partially) blame the victim. For example, the woman will be blamed for ‘arousing’ the male, by her behaviour or her appearance. Such perceptions may again impact upon the court's perception of the victim, which in turn could affect the outcome of the case.

## **Relationship Between Victim and Accused**

Another myth is the idea that an allegation of sexual assault is only credible if the assault is committed by a stranger. Our figures indicate that in the large majority of cases (77 per cent), the victim knew the accused. Strangers are involved only in a minority of cases, accounting for 23 per cent. Police statistics also show that 82 per cent of the victims knew their attacker in reported rape cases nationwide between 2000 and May 2004. AWAM's research on rape found a very similar figure: 84 per cent of victims knew their attacker, meaning that stranger rape accounted for just 16 per cent. Recent research in Kelantan (a study based on 439 cases from the USM Hospital Kubang Kerian) also showed that in 88 per cent of the cases, the accused

was known to the victim. So the myth that most rapes are committed by strangers needs to be demolished, especially given that many reported sexual crimes are committed by partners or friends or dates.

This is particularly relevant if we take account of the fact that marital rape is still not recognised as a crime in Malaysia. If it were, the figures would be even lower for stranger assault. Further, the fact that marital rape is not recognised as a crime not only fails to adequately protect women who are wives, but also reinforces another popular misconception that women cannot be sexually assaulted by husbands or boyfriends.

On the other hand, by not subscribing to stereotypes, a judge could display an exemplary mindset in dealing with the sexual crimes as the example below shows:

“the gravity of the offence is increased because you committed the offence in the police station while on duty. Even though the two women were said to be prostitutes, they still had their rights, and if there was no consent, it would constitute rape.”

Reported in the Star, 8 August 2003

In this case, the judge emphasised that the relationship between the victim and the accused does not automatically render sexual relations consensual, and that rape under custody is particularly serious.

## **Location of Crime**

Further, our research shows that 72 per cent of sexual crimes take place in a building, and 22 per cent were committed in the homes of either the accused or the victim. Police statistics show that 68 per cent of reported rapes nationwide between 2000 and May 2004 took place in a residential house or building. AWAM’s study also reports that 67 per cent of rapes took place in a home or building. The research in Kelantan shows that nearly all rapes occurred at or in the neighbourhood of the victim’s home or the offender’s home. These statistics clearly point to the fact that the majority of sexual crimes take place in homes or buildings, contrary to the perception that most sexual assaults take place in an unfamiliar outdoor location.

## Recommendation

In order to improve access to justice for victims of sexual crime, holistic and comprehensive action must be taken. The following are recommendations arising from our research which cover a wide range of concerns and are addressed to judges and magistrates, prosecutors, the police, other agencies, and society at large.

### Changes in the Criminal Justice System

- Ensure that there is a systematic training programme for all involved in sexual crime cases, including judges and magistrates, such training to cover:
  - Myths and stereotypes related to female victims of sexual crime;
  - Understanding trauma as it affects victims;
  - Understanding the importance of victim support;
  - Better understanding of forensic evidence and procedures;
  - Better awareness of the law, the legal issues and alternatives for change; and
  - Awareness of the dynamics of a trial and how it may impact on the victim, including any special considerations such as age or disability.
- Review the processes of trials to identify and tackle any issue that causes unnecessary delay, including reducing the number of cases scheduled each day, ensuring the effective serving of subpoenas, and modernising the system of court recording and dissemination of the notes of proceedings.
- Make appropriate changes in procedures and facilities:
  - To allow more effective use of expert witnesses, counsellors and NGO assistance; and
  - To widen options for victims in the giving of evidence, including use of video.
- Ensure that there are enough personnel (including judges and magistrates, as well as support staff and additional personnel such as interpreters) to allow cases to proceed with minimal delay.
- Improve inter-agency communication and cooperation.

## Victim Support

To create a victim support system via the following:

- Explore models of victim support practised in other jurisdictions and consider what is most appropriate for Malaysia.
- Ensure consistent and effective communication between Investigating Officers, DPPs/ Prosecuting Officers and victims and prosecution witnesses to ensure speedy communication of decisions and progress.
- Ensure there is a separate, private waiting area of victims in court buildings, removing any possibility of intimidation, harassment or trauma by the accused and/or the accused's family or supporters.
- Address issues outside the courtroom including:
  - The procedures/attitude of police and other agencies receiving and processing reports;
  - The way identification parades are conducted;
  - Effective communication between investigators and/or prosecutors;
  - Ensuring other agencies are appropriately supportive and sensitive; and
  - Ensuring that there are adequate centres throughout the country offering professional advice, information, care and counseling to sexual crime victims.
- Address the issue of victim compensation with a view to making the process better utilised for victims of sexual crime.
- Generally, give greater emphasis and respect to the voices of victims, in planning and implementing the responses to sexual violence. Listening to the experiences of victims has significantly helped to guide changes in other jurisdictions.

## Information Gathering

- Acknowledge the importance of information and analysis as crucial tools in developing our understanding of sexual crime and therefore in the developing of appropriate policies and responses. This needs to be done by:
  - Involving all agencies in the introduction of more comprehensive data recording systems, and in the collection, collating and publishing of data on sexual crimes;
  - Encouraging and ensuring the government and other agencies invest in more and appropriate research programmes, whose results are made public; and
  - Modernising the system of court recording to relieve judges and magistrates of the responsibility of recording the trial by taking handwritten notes.

## Changes in the Law

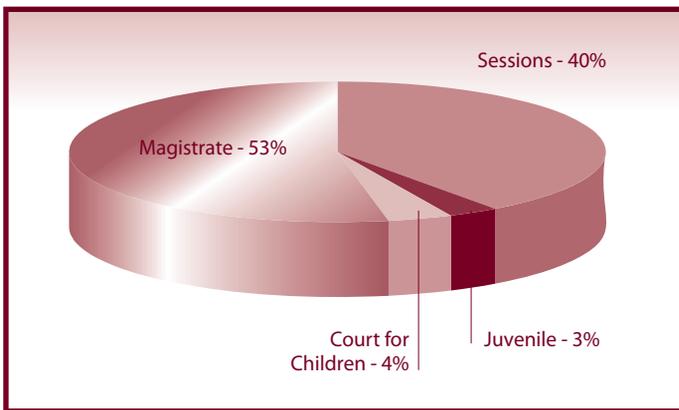
- Take a proactive stand in making recommendations for gender sensitive legislation bearing in mind, amongst others, the following documents prepared by the Women's Centre for Change (WCC) Penang and/or the Joint Action Group for Gender Equality (JAG):
  - Memorandum On Proposed Amendments to the Penal Code and the Criminal Procedure Code, 2006
  - Memorandum on the Government's Proposal to Amend Existing Labour Laws and Penal Code to Combat Sexual Harassment, 25 April 2005
  - Memorandum on Laws Related to Rape, 9 September 2003
  - Memorandum on Proposed Sexual Harassment Bill, May 2002
  
- In particular, to abolish the marital rape exception, to abolish the need for the corroboration warning in certain sexual crime trials, and to introduce legislation with regard to sexual harassment.

## Appendix

Our analysis of the 439 cases includes a detailed profile of various aspects of the cases and the participants in the trials. Our questionnaire covered details of types of crime; the courts in which the cases were heard; the sex, age and number of judges, magistrates, prosecutors, defence counsel and watching briefs (if any); the charges and pleas; the verdict and any noted reasons for particular verdicts; the number, sex, age, nationality, race, employment and education of the victims and of the accused; any relationship between the two; the location of the crime; remand and bail issues; representation of the accused; the length of time the trial took; defences offered and any interventions by judges (Evidence Act), prosecutors and/or watching briefs; and details of sentencing. We present a number of tables from this profile below.

### Case Profile

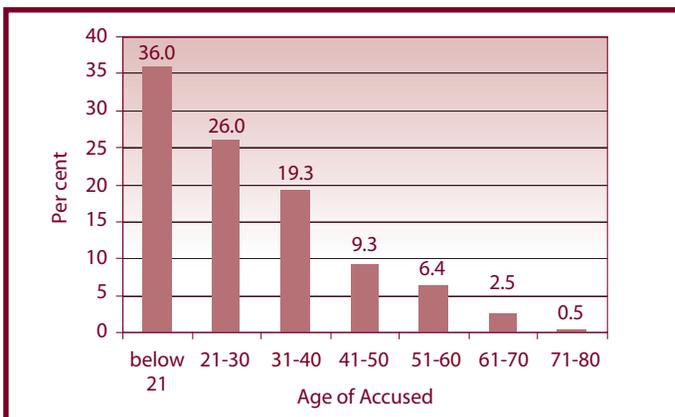
**Figure A: Breakdown of Cases by Court (%)**



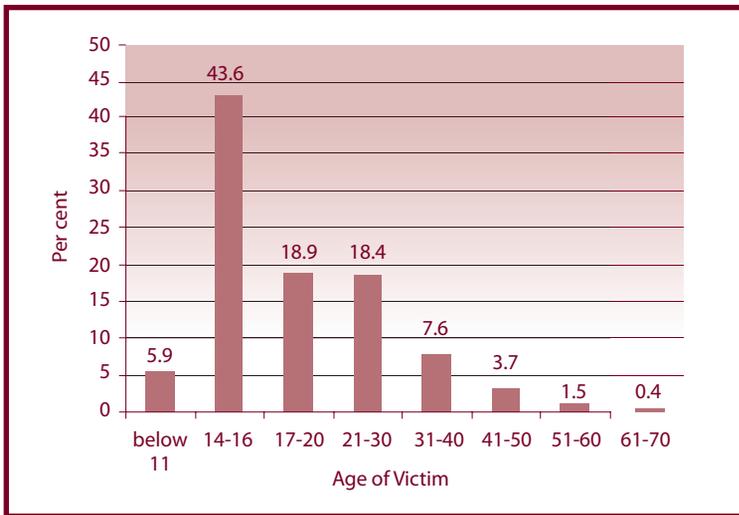
Source: WCC Court Research 2007

### Age profile

**Figure B: Age Profile of Accused (%)**



Source: WCC Court Research 2007

**Figure C: Age Profile of Victims (%)**

Source: WCC Court Research 2007

**Table A: Age of Accused Against Age of Victim by Selected Types of Sexual Crime (%)**

Age	S354		S375(f)		S375		S509		Overall	
	Accused	Victim	Accused	Victim	Accused	Victim	Accused	Victim	Accused	Victim
14-21	30.6	60.9	59.8	100.0	48.0	50.0	8.0	55.2	36.0	68.4
22-30	30.0	23.7	22.8	–	30.2	41.2	44.0	29.0	26.0	18.4
31-40	21.2	8.9	7.1	–	16.3	5.9	36.0	12.9	19.3	7.6
41-50	11.9	6.5	3.9	–	4.6	2.9	4.0	–	9.3	3.7
51-60	3.6	–	4.7	–	–	–	8.0	9.7	6.4	1.5
61-70	1.6	–	1.5	–	–	–	–	3.2	2.5	0.4
71-80	(1 case)	–	–	–	–	–	–	–	0.4	–
<b>Total</b>										
<b>actual numbers</b>	<b>193</b>	<b>169</b>	<b>127</b>	<b>101</b>	<b>44</b>	<b>34</b>	<b>25</b>	<b>31</b>	<b>483</b>	<b>408</b>

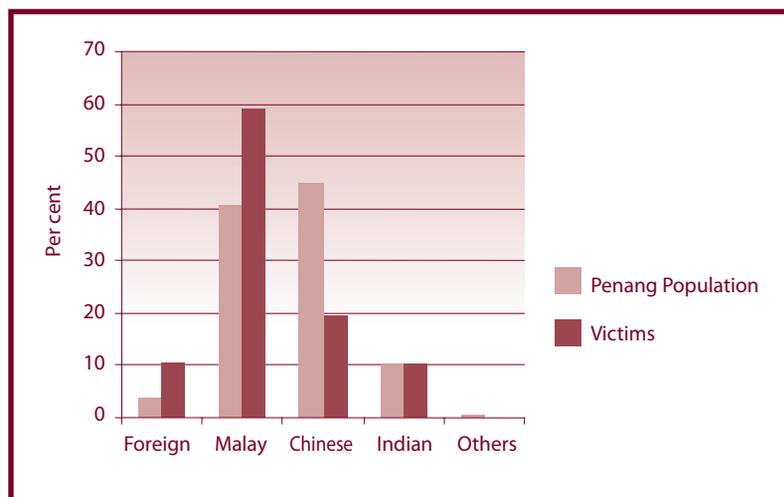
Source: WCC Court Research 2007

*Note: The overall figures refer to those cases where we have information. There are also significant numbers of very young victims (5.9% aged 10 or under), and it is noted in our full report that the younger age groups are not an exact match because the grouping for victims used in the survey was 0-20 and 21-30.*

The figures show a high proportion of both accused and victims are young. While there has been debate about how to protect young females from sexual crimes, there has been little focus on the young (male) sexual offenders.

## Ethnic profile

**Figure D: Nationality/Ethnicity of the Victims, Compared to Overall Penang Population Profile (%)**



Source: WCC Court Research 2007

The sample is of Penang cases, hence the choice of comparison. There is a disproportionate number of Malays and of foreigners (migrant workers?) as victims of sexual crime. This is true for accused as well (see figure below), though less significantly for foreigners.

**Table B: Nationality of the Victim by Selected Types of Sexual Crime (%)**

	S354	S375f	S375	S509	Of all 456 victims
Malaysian	87.0%	100%	73.8%	91.4%	89.3%
Foreign	13.0%	-	26.2%	9.6%	10.7%
<b>Total number of victims</b>	<b>184</b>	<b>101</b>	<b>42</b>	<b>35</b>	<b>100.0%</b>

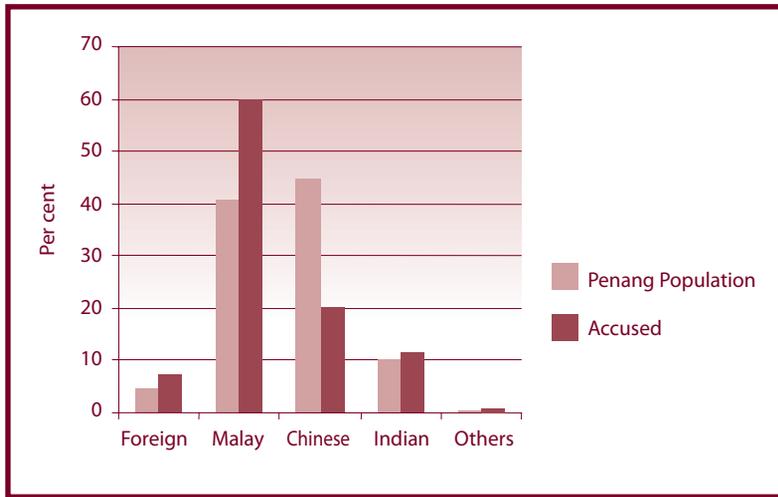
Source: WCC Court Research 2007

**Table C: Nationality of the Accused by Selected Types of Sexual Crime (%)**

	S354	S375(f)	S375	S509	Overall
Malaysian	87.0%	96.1%	97.7%	96.0%	93.2%
Foreign	13.0%	3.9%	2.3%	4.0%	6.8%
<b>Total number of accused</b>	<b>193</b>	<b>127</b>	<b>44</b>	<b>25</b>	<b>484</b>

Source: WCC Court Research 2007

**Figure E: Nationality/Ethnicity of the Accused Compared with Overall Penang Population (%)**



Source: WCC Court Research 2007

**Table D: Ethnicity/Nationality of the Victim Matched Against Ethnicity/Nationality of the Accused**

	Nationality/Ethnicity of the Accused									
	Foreign		Malay		Chinese		Indian		Total	
<b>Victim</b>	Number	%	Number	%	Number	%	Number	%	Number	%
Malay	15	5.7	220	83.7	7	2.7	19	17.2	<b>248</b>	<b>100</b>
Chinese	6	8.7	15	21.7	40	58.0	8	11.5	<b>69</b>	<b>100</b>
Indian	7	17.1	1	2.4	4	9.8	28	68.3	<b>41</b>	<b>100</b>
Foreign	4	12.1	13	39.4	14	42.4	2	6.1	<b>33</b>	<b>100</b>

Source: WCC Court Research 2007

*Note: The Malay victim total of 248 includes 2 'others' (0.8%) and the Indian total of 41 includes 1 'other' (2.4%). The 'other' (ethnicity) column has been left out here.*

In other words,

- Where the victim is a Malay, 83.7% of the accused were Malay.
- Where the victim is Chinese, 58.0% of the accused were Chinese.
- Where the victim is Indian, 68.3% of the accused were also Indian.
- Where the victim is foreign, only 12.1% of the accused were also foreign. The rest were Malaysians.

## Relationship Profile

**Table E: Relationship Between Victim and Accused,  
for Selected Types of Sexual Crime**

	S354	S375 f	S375	S509	Overall	Overall %
Neighbour	17	5	1	4	32	14.3
Acquaintance/friend	22	22	6	2	62	27.8
Colleague	8	–	–	1	15	6.8
Boyfriend/fiancee	4	7	–	0	13	5.8
Stranger	25	2	4	7	51	22.9
Family member	7	8	1	3	29	13.1
Teacher	1	–	–	–	1	0.4
Bomoh	1	–	–	–	1	0.4
Employer	–	–	–	–	12	5.4
Others	–	–	–	–	7	3.1
<b>Total (with information)</b>	<b>85</b>	<b>44</b>	<b>12</b>	<b>17</b>	<b>223</b>	<b>100.0</b>
No information recorded	99	57	27	8	216	

Note: These figures are for 'first victims'.

Source: WCC Court Research 2007

## Plea Profile

**Table F: Guilty and Not Guilty Pleas: Original and by Time of Verdict**

	Original Plea		Number who pleaded guilty by time of verdict	Total
	Not guilty	Guilty		
S354	139 (75.5%)	34 (18.5%)	59	184
S375	35 (89.7%)	4 (10.3%)	5	39
S375(f)	92 (91.1%)	7 (6.9%)	17	101
S377A, B, C and E	22 (84.6%)	4 (15.4%)	5	26
S509	12 (50.0%)	12 (50.0%)	18	25
S21	18 (50.0%)	18 (50.0%)	26	36
S372A, S 16(1), S 19(1)	14 (82.4%)	3 (17.6%)	1	17
<b>TOTAL</b>	<b>342 (80.7%)</b>	<b>82 (19.3%)</b>	<b>137</b>	<b>439</b>

Source: WCC Court Research 2007

Note: Higher proportion of guilty pleas for cases where punishment is lighter. The total percentage refers to 424 cases where original verdicts were recorded. The 137 who pleaded guilty by the time of the verdict represents 31.2% of all verdicts.

## Representation Profile

**Table G: Representation of Accused**

	Frequency	Percent
Represented	170	38.7
No/self represented	154	35.1
Eventually represented	100	22.8
Not rep, rep, not rep	10	2.3
Represented, not rep	4	0.9
Rep, not rep, rep	1	0.2
<b>Total</b>	<b>439</b>	<b>100.0</b>

Source: WCC Court Research 2007

**Table H: Verdict in Cases of Self-Representation**

	Frequency	Percent	(Overall % for 439 cases)
DNAA	38	24.7	45.1
Pleaded guilty	90	58.4	31.2
Discrg & acqt chrgs w/drawn	16	10.4	8.9
Found guilty aft trial	2	1.3	2.7
Others	8	5.2	3.1
<b>Total</b>	<b>154</b>	<b>100.0</b>	<b>100.0</b>

Source: WCC Court Research 2007

We note the high number of accused who are not represented and also that the types of verdict do not differ significantly between those represented and those not represented.

## Length of Time

**Table I: Length of Trial by Selected Types of Sexual Crime**

Length of Trial	S354		S375(f)		S375		S509	
	Number	%	Number	%	Number	%	Number	%
Less than a year	99	54.4%	35	34.7%	21	53.8%	22	88.0%
13 – 24 months	45	24.7%	51	50.5%	16	41.0%	2	8.0%
More than 2 years	38	20.9%	15	14.8%	2	5.2%	1	4.0%
<b>Total</b>	<b>182</b>	<b>100%</b>	<b>101</b>	<b>100%</b>	<b>39</b>	<b>100%</b>	<b>25</b>	<b>100%</b>

Source: WCC Court Research 2007

*Note: For the S354 cases, there is no clear data for two of the total 184 cases.*

Of the S509 cases, ten out of 22 took less than one month because of the high ‘plead guilty’ rate for this crime.



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