

# **Seeking More Effective Prosecution Of Sexual Crimes**

**Background Paper  
for Dialogue with Prosecutors**

P R E P A R E D B Y



Women's Centre for Change (WCC) Penang

October 2007

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P U B L I S H E D B Y

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KSK Printers, Penang

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# Background to the Research

## Introduction

The Women's Centre for Change Penang (WCC) has been involved in advocacy and service provision for women, especially women who are the victims of domestic and sexual violence, since its inception in 1985. Through this experience spanning over 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, a trauma that is exacerbated further as they meander through the criminal justice system - 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 surmised that this 'second rape' is more traumatic than the first. Through our advocacy and education programmes, WCC has tried to help prevent the first rape; through our advocacy and service programmes, we hope to stop the second. This is premised 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 pivotal to the victim's healing process.

WCC strongly believes that our advocacy and service work has to be strongly supported by concrete data and information. We have undertaken numerous research over the years, and we embarked on this project to collect and document information and statistics on sexual crime and sexual crime trials in order to publish, discuss and act concretely on the issues related to sexual crimes against women.

In focussing on how the criminal justice system is responding to sexual crime victims, especially within the court process, WCC was concerned to extend our understanding beyond the previous focus on rape, with the emphasis not only to assess whether the victims gained justice in outcome but also whether they received 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;

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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 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
- 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 sexual crime cases 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, bringing together the various components of this project.

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 persist. The incomplete recording of certain information in the court files prevented the compilation of a wholly 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 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 voluminous amount of information which makes this project a pathbreaking one.

With the information and insights gained, WCC hopes to collaborate with all associated parties, including Deputy Public Prosecutors (DPPs) and police Prosecuting Officers, to effect the necessary changes and improvements that would guarantee expeditious delivery of justice for the victims of sexual crime.

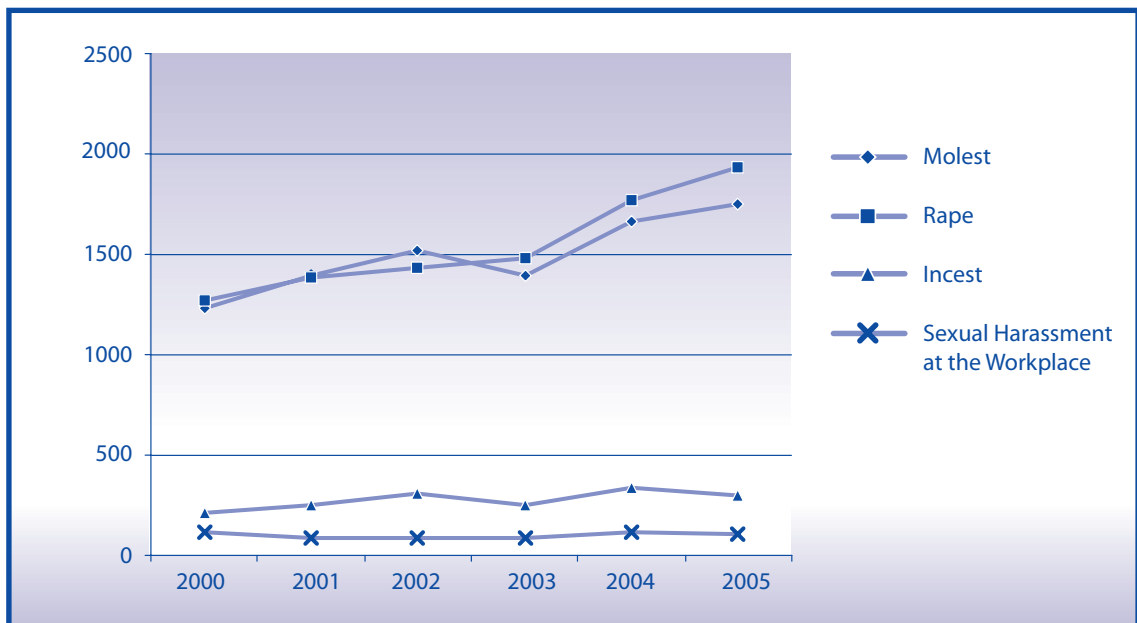
## Some Key Statistics

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 include the rising incidence of sexual crime, the high rate of discharge not amounting to acquittal (DNAA) once the case goes to trial (45 per cent in our sample), and the very low conviction rate in contested cases (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 workplace 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

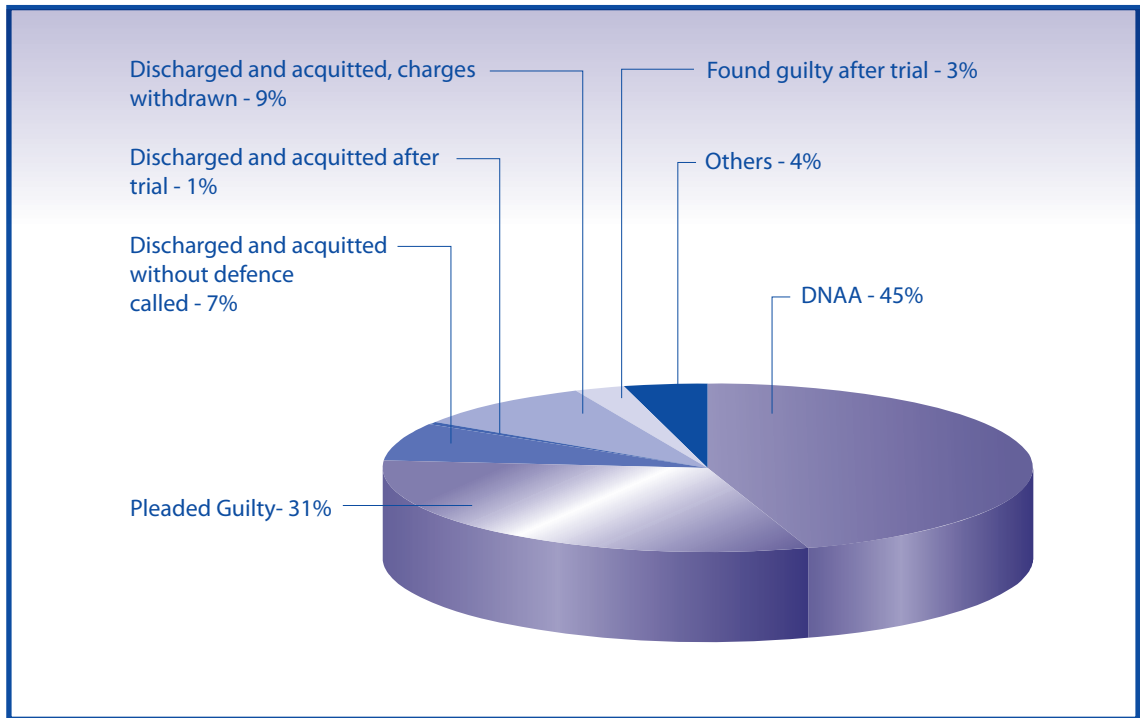


(23 per cent statutory rape, one per cent incest and nine per cent rape of an adult). There were also significant numbers of cases related to prostitution (including suppression of brothel cases) and involving ‘word or gesture intended to insult the modesty of a woman’. Overall, the majority of cases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

**Table 1: Type 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

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

Source: WCC Court Research 2007

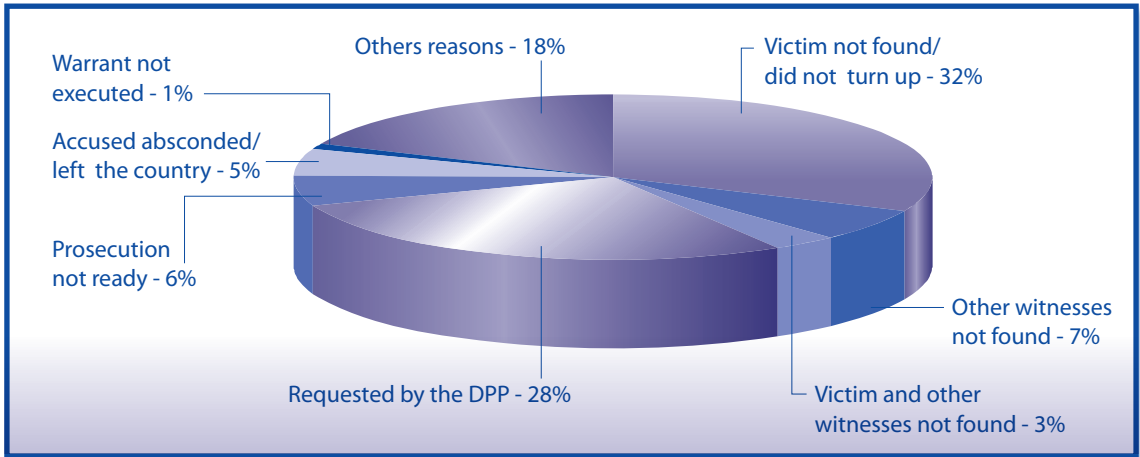
The verdict in 45 per cent of all these cases was DNAA, as shown in Figure 2. In other words, nearly half of all the cases were not heard in full.

This high rate of DNAA could be reflective of certain challenges within the criminal justice system – as the reasons for the DNAA, recorded in Figure 3, help show.

The single biggest reason for DNAA was 'victim not found or did not turn up' (32 per cent) and if added to 'other witnesses not found' (seven per cent) and 'victim and other witnesses not found' (three per cent), make up a total of 42 per cent. There may be a number of reasons why this happens, including the trauma and negative experience of the victim in the course of the investigation or trial, the failure of the court, prosecution or police to inform victims and witnesses of trial dates in time, witnesses changing addresses without informing the police and the length of time the trial takes.

From the court files, we also noted that in 28 per cent of the cases in which DNAA was granted, this was at the request of the DPP without any elaboration or reasons. In another six per cent of cases, the verdict of DNAA was returned because the prosecutor ‘was not ready’.

**Figure 3: Reasons for DNAA**



Source: WCC Court Research 2007

## Q What are the reasons for 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, 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 in contested cases, 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 focussed on 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.

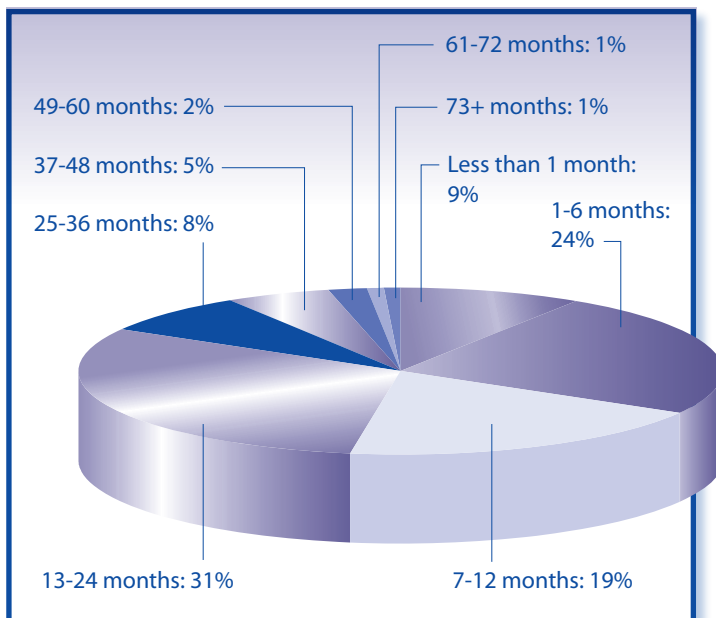
### A: Structural Factors in Prosecuting Sexual Crimes

#### 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 (good) people, which affects the workloads that these people (including DPPs) have to bear. Competency levels are also affected, due to possible time or monetary constraints on effective professional orientation, monitoring and performance enhancement, the extent of training, and the possibilities for case conferences and regular inter-agency contact. Initiatives with regard to communication with, and support

for, the victim and witnesses may also be compromised. Additional issues include transfers between states and the ability to develop areas of expertise.

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



Source: WCC Court Research 2007

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

#### Length of Time

Our research notes the many adverse effects of a long trial period. From our sample of 439 sexual crime cases, the breakdown in terms of length of time cases took to be concluded as shown in Figure 4.

This means 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. In just under half of the cases that took less than a year, the accused pleaded guilty.

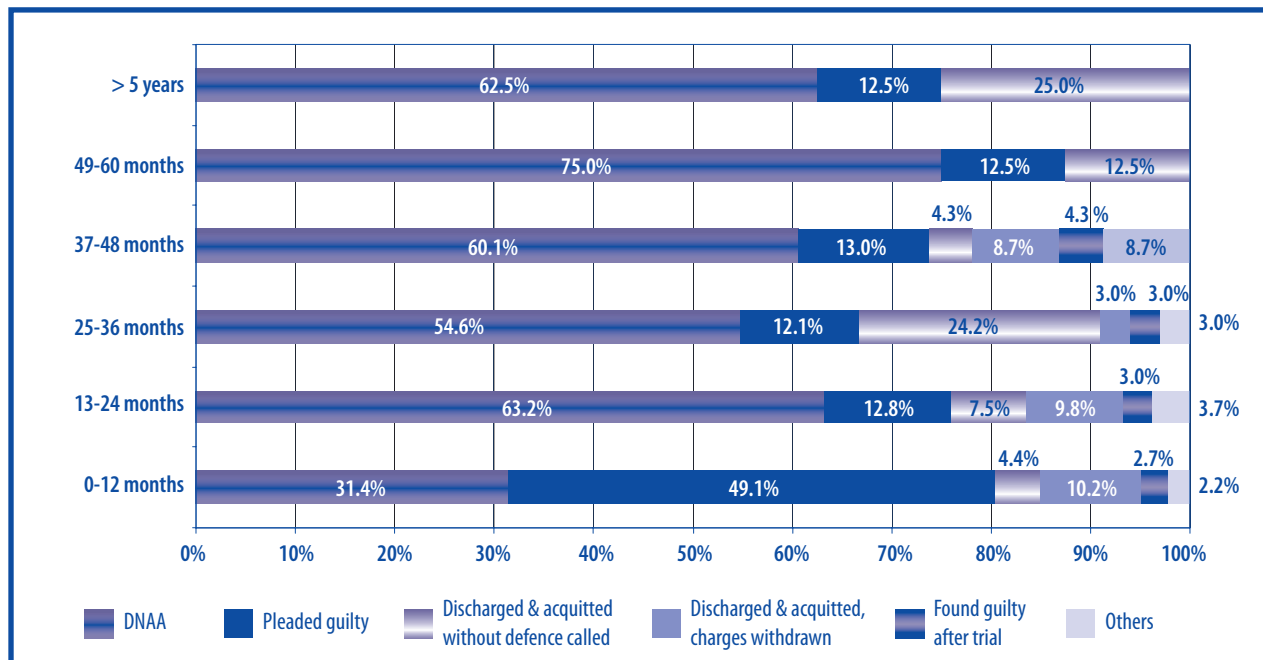
Looking more particularly at the sexual assault cases in our sample, the situation is similar, though S509 cases were despatched with relative speed (not least because 72 per cent pleaded guilty), and statutory rape (S375(f)) trials took relatively long. Two out of three of the latter lasted more than a year, although the majority of these were 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.

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

Our findings demonstrate that the length of time of a trial has an impact on the verdict of the case. 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).

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 possible lack of attention paid to the support of the victims and witnesses may all affect court evidence on behalf of the victim, which in turn could affect chances of a conviction.

Besides posing extra challenges for victims, witnesses and accused, the length of a trial may also adversely affect its continuity. This relates to the number of judges/ magistrates, prosecutors and (to a lesser extent) defence counsels involved. Tables 2 and 3 present the situation pertaining to prosecutors.

**Table 2: Length of Time the Case Takes to Complete and Number of Prosecutors**

Length of trial	One or two prosecutors		Three or more prosecutors		Total	
	Number	Percentage	Number	Percentage	Number	Percentage
Less than a year	180	79.6%	46	20.4%	226	100.0%
13 – 24 months	41	30.8%	92	69.2%	133	100.0%
More than 2 years	26	36.1%	46	63.9%	72	100.0%
<b>Total</b>	<b>247</b>	<b>57.3%</b>	<b>184</b>	<b>42.7%</b>	<b>431</b>	<b>100.0%</b>

Source: WCC Court Research 2007

There is a clear correlation between the length of time of the trial and the number of prosecutors involved in the case.

**Table 3: Number of Prosecutors by Selected Type of Sexual Crime (%)**

Number	S354	S375(f)	S375	S509	Overall
1	52.7	8.9	5.1	68.0	34.9
2	20.7	23.8	23.1	20.0	23.2
3	16.3	28.7	41.0	8.0	20.3
4	2.2	13.9	15.4	4.0	7.3
5	3.3	16.8	5.1	–	8.7
6 or more	4.8	7.9	10.3	–	5.6
<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>

Source: WCC Court Research 2007

Table 3 shows a huge contrast depending on what type of sexual crime is being tried. Very, very few rape or statutory rape trials have just one prosecutor; whereas the majority (just) of outrage of modesty cases do, and two-thirds of cases heard under S509 do.

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

### **Inter-agency Communication**

The way the different parts of the system communicate (or not) to each other is also highlighted in our research. There is probably agreed recognition by all parties of the positive value from having inter-agency communication and there have been several steps taken by different players to institutionalise this. These include the establishment of One Stop Crisis Centres (OSCC) for sexual assault victims in hospitals, the recent discussion between the police and DPPs on how best to exchange information, and various initiatives by Jabatan Kimia and others to make known their expertise and difficulties.

But from our interviews it is clear that there are still many challenges, including the need to further institutionalise good practice (rather than relying on individuals to champion this). Good inter-agency communication helps ensure harmonisation between agencies, with systematic follow-up and sharing of appropriate information; it would help overcome any knowledge-gap in judges, magistrates, DPPs, and others in key areas; and it would help emphasise the importance of maintaining a positive relationship with the victim and with witnesses.

One area we examined was the use of forensics and medical evidence. This is a specialised area, meaning it is unlikely others in the criminal justice system will be able to attain complete knowledge of procedures and scientific bases for evidence. But there are concerns that such evidence is still not made full use of by the prosecution, and not given due weight by judges or magistrates. There should be better communication between the prosecution and the forensic experts so that such evidence can be more effectively used in trials. Investigating officers and other police personnel need to be more aware and more rigorous about how medical evidence should be collected, labelled, and despatched to forensic experts for examination.

## **Q** How can we improve inter-agency communication in order to ensure more effective prosecution?

## **Professionalism of Prosecutors**

### **Performance in Court**

Resource constraints obviously can have a major impact on prosecution. When the prosecutors' caseloads are overwhelming and when a lot of pressure falls on inexperienced prosecutors, the quality of prosecution suffers. Our research documented certain instances when technical errors and other lapses committed by prosecutors were highlighted in judgements and had a negative bearing on the outcome of these cases. These are examples taken from the court files in our court research:

"The prosecuting officer did not re-examine on many issues brought up by defence, did not call father as witness and did not reply to Defence's submission".

"If there was a Chinese neighbour who has seen the said incident, that neighbour has not been called by the prosecutors to give evidence. The failure to call the witness who has seen the incident causes the downfall to the prosecution's case. In addition, there have been some doubts if such wounds on the complainant's left-hand existed, why haven't the prosecutors submitted medical reports to the effect or referred to the hospital on the injuries sustained by SP1. This has given rise to doubts if SP1 has had such injuries or not in consequence of being beaten by the offender."

"In examination, there appears to be no question asked whether she verbally resisted or that she said to the OKT the acts were happening. The re-examination did not go through points brought up in cross exam."

Furthermore, research also shows that cases are not always allocated to specialist prosecutors, and prosecutors do not always learn from unsuccessful prosecutions. We also note that incorrect charges are sometimes preferred.

### **Training**

Our research notes the importance of training for prosecutors. While we are aware that prosecutors undergo regular training, we feel there is a need for prosecutors to be sensitised to specific issues related to sexual crime. Training prosecutors, judges and magistrates to take a more assertive and pro-active approach to counter particular defence arguments is one immediate step. There is also a need to inculcate a general sensitivity in the court process which then is able to challenge misogynistic attitudes and stereotypical assumptions about male and female sexuality so that victims are not systematically traumatised in court. A wider understanding of the myths and stereotypes, and of how and why they are misleading, will go a long way to put a stop to degrading and humiliating cross-examination of victims.



## Victim Support

In our research we stress the importance of the experience of the criminal justice system to the victim's chances of recovery. Although obtaining a conviction is significant in aiding the victim to come to terms with her experience, having a generally positive experience of the criminal justice system – including the trial process, regardless of the outcome – is also critical. Our research argues that a lot more could be done through a better understanding of victim experience as well as adequate resourcing for dealing with victims of sexual crime.

In our system, the public prosecutor is prosecuting the case on behalf of the government (crimes being viewed as offences against the state and the victims of sexual crime merely as witnesses). Nevertheless, it is important to address the needs and rights of victims, by explaining to them the trial process and keeping them informed of progress, records, and decisions pertaining to their case.

**Q** What sort of additional training would help the successful prosecution of sexual crime cases?

## Data Collection and Analysis

One additional area emphasised by the findings of our research concerns the amount of data and analysis available: there is not enough of either. We need to build up a comprehensive understanding of the relevant issues to allow us to plan appropriate actions. To do that, more resources need to be devoted to data collection and to research. Figures and findings should be made available in the public domain, so that they can be more widely disseminated and discussed.

## B: Attitudinal Factors in Prosecuting Sexual Crimes

We have mentioned the special dynamic which operates in the case of sexual crime, especially sexual assault, because this crime is predominantly committed by a male against a female. 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 peculiar attitudinal factors that come into play in sexual crime trials and to avoid imposing our own subjective notions of appropriate gender behaviour on victims of sexual crime. This is especially important because in a sexual crime trial, the victim's behaviour and her credibility is put on trial and can affect the outcome of the case.

Much previous research here and elsewhere has focussed on rape, and has highlighted how the prevalence of myths and stereotypes detrimental to the female victim is not just a consistent factor that influences trial outcomes but a major impediment both to justice and recovery. The existence of these myths and stereotypes has been shown to prevail not just in the courtroom, but at all stages of the victim's journey through the criminal justice system.

Our research confirms the existence of these myths and stereotypes, again not just in the criminal justice system (in our Court Research report) but across the wider society (in our Media Report). In so doing, these findings extend our knowledge that the myths and stereotypes exist not just with regard to rape cases, but across the range of sexual crime. The table below categorises the types of defence offered in the cases we researched and illustrates the influence of myths and stereotypes on them.

**Table 4: 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

In the successful prosecution of sexual crime, the debunking and eradication of these myths in the courtroom is essential. This will involve understanding more clearly the reality of sexual crime, especially as demonstrated by the experience of sexual crime victims, and freeing ourselves of unwarranted biases and assumptions. In looking in some detail at the different sorts of defences, and what they are founded on, our research highlights the kind of myths and stereotypes to which such defences refer, and how they need to be countered.

Furthermore, in our media research, we compiled negative comments made by judges and defence counsels during sexual crime trials, that reflect myths and stereotypes or other gender biases.

**Table 5: Frequency of Reference to Various Rape Myths in Negative Remarks made in Court**

Rape Myth	Number
Lack of resistance as proof of consent/false allegation	6
Questionable credibility of victim	5
Complicity of victim in date rape	4
Rape as manifestation of lust	3
Non-divulgence and late report as proof of false allegation	3
Use of weapon as essential part of rape	3
Rape is committed by a maniac	1
<b>Total</b>	<b>25</b>

Source: WCC Media Research 2007

Note: The data above is derived from 37 instances in which negative comments were recorded in the 759 media cases compiled.

The persistence of defences raised and remarks made in court that draw on myths and stereotypes is a crucial cause for concern.

### 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>

It is important to acknowledge that the existence of the corroboration requirement, in and of itself, upholds the myth that women will lie about sexual assault. We note that corroboration is only required, whether as a statutory requirement or as a rule of practice, in very few instances: namely, for the testimony of accomplices, children of tender years and complainants in cases of sexual crime. It means that the testimony of a (female) sexual crime victim is placed in the same category as that of children who are thought to be too young to know the truth and accomplices who are thought to tend to lie to save themselves.

“... 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)

Complainants of sexual crime have often expressed frustration that, due to this scepticism, their complaints have been trivialised and doubted - from the moment of making or accepting a report, through the process of investigation and the decision to prosecute, and finally in the court.

We note that the mandatory warning on the requirement for corroboration is no longer applied in many countries, with positive effect, and we see no reason why it should not be abolished here.

"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

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

Our research also indicates that one of the most common defences in sexual crime trials is that the complainant is lying or that there are serious inconsistencies in the victim's testimony. This was found 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.

The defence may try to have the whole case dismissed on inconsistencies in the complainant's evidence on the basis that she lacks credibility as a witness. But our experience with victims of sexual crime shows that it is important to understand that there are several explanations why contradictions in a victim's testimony have nothing to do with wilful lying. These include the trauma faced by sexual assault victims, the length of time a trial takes, as well as understandable lapses in memory. Trying to find a balance between understanding the victim's trauma and the need for consistency in the 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 court files in our court research:

"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 being aware of the situation faced by sexual crime victims and applying common sense, to rebut defence protestations of lying and inconsistency. This accusation is just one of many that the victim will have to suffer in the course of the defence's attempts to discredit her.

## **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 lie about sexual crimes against them.

It may also be worth noting that in one interview we conducted with a defence lawyer, he stated that the allegation of rape is a tool, open for abuse by ingenuous women. In his words, *'any slightest claim, they claim rape'*. According to him, women are capable of *"lying, concocting and fabricating"*. He was not convinced about research which shows that women are not any more likely to lie than other witnesses. *"Men never rape; women consent."* In the man's mind, when a woman puts up a struggle, it is nothing out of the ordinary. It doesn't mean she does not want it. And if you are going with someone you know, *"all the more that person expects you to agree to sex"*.

## 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> </ul>

The issue of consent is crucial to sexual crime trials. In our sample, it was a defence for a range of sexual assault crimes. 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>

One line of defence argument regarding consent relates to injuries. 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 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.”

This provides a clear example of a defence argument based on a conformist notion of behaviour (in this case, reaction to the assault at the time of the incident), which is false. Our experience tells us that women will behave and react very differently both at the time of the attack and in its aftermath. In many cases of sexual assault, the victim may be frozen by fear. She may also choose the line of least resistance in order to avoid serious injury or being killed.

When the defence argues based on stereotypes of women’s behaviour, the prosecution must be quick to expose this. It was difficult to discover from the trial notes how far the prosecution sought to establish the oppressive sense of powerlessness experienced by so many victims in sexual assault cases: there seemed to be few questions asked to establish the victim’s shock, surprise, embarrassment or fear, all of which are almost certainly influencing factors on how the victim behaves both during and after the assault.

“The law has frequently been prepared only to see resistance to force as evidence of non-consent. There is a double error here. **First, it is mistaken to think that consent can be negated only by a use or threat of force...Second, it is a mistake to think that the only evidence of such force could be resistance to it.**”

D. Archard. *Sexual Consent*, Westview Press, 1998 (emphasis added)

## Past Sexual History

Reference to the complainant’s sexual history has also in the past been used as ‘evidence’ of consent. This has been acknowledged as an area needing intervention, and the Evidence Act has since been amended accordingly. But, although Section 146A of the Evidence Act stipulates that, except in certain circumstances, no evidence and no questions in cross-examination shall be adduced or asked concerning the sexual activity of the complainant with any other person other than the accused, our research reveals very few objections by the prosecution on the basis of S146A. 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”.

Dealing with the issue of consent has been problematic, both here and in other jurisdictions. It has been the subject of much discussion over the years in many judicial systems, for example in seeking reforms to courtroom procedures and practice in order to avoid the situation where it is assumed that a woman is consenting to sexual penetration or activity until she proves otherwise.

In some jurisdictions, these include codifying definitions of consent and shifting of the evidential burden of proof in that the accused is required to prove that he had taken positive steps to establish consent. All these need to be properly and fully debated in the knowledge that this area is crucial in sexual crime trials and would seem to be a major inhibitor of successful prosecutions.

## Late Reporting

Defences	Myths
<ul style="list-style-type: none"> <li>• Late reporting</li> <li>• Delay in reporting (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 late reporting. It was raised by the defence in 20 out of the 52 cases where there is a record of cross examination, in our sample. It draws on the myth that if the victims are truthful, they would report the crime immediately. Research however shows that there are a 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;
- Fear that they will be blamed for the crime by their 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;
- Feeling of guilt (victims blame themselves even where they clearly have no reason whatsoever to do so);
- Uncertainty 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; and
- Pressure where the victim has an existing close relationship with the accused (e.g. relative, boyfriend or date).

WCC's experience with its clients confirms too that it is not easy to deal with the consequences of being a victim of a sexual crime.

Being aware of the possible reasons for late reporting is crucial to successful prosecution rebuttal of any argument by the defence that the credibility of the victim is therefore to be doubted. The prosecution will then be able to help the victim to give a rational explanation for her behaviour which will in turn give the prosecution a better chance of securing a conviction. Being able to call expert witnesses, including psychologists and counsellors, would also help.

Of course one consequence of late reporting is that any medical evidence may be lost. There is therefore a need to explore ways in which disincentives to report sexual crime are effectively



tackled. One necessity is to change attitudes at all levels of the criminal justice system that lead to the persistence of the culture of scepticism.

**Q How would prosecutors counter defence arguments which subscribe to such myths and stereotypes? Would the use of expert witnesses to testify about psychological effects on victims help?**

## **Other Findings**

Besides looking at issues of corroboration, consent, and victims' behaviour, our research also covered a number of other issues. Some of these also involve myths and stereotypes surrounding victims, perpetrators and locations of sexual crimes. We briefly summarise them here.

### **Relationship Between Victim and Perpetrator**

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 were known to the victim. 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. The recent amendment fails to recognise that rape can be perpetrated without visible signs of force and arguably endorses the myth about injuries. Further, the fact that marital rape is not recognised as a crime not only fails to adequately protect women who are wives, but also challenges another popular misconception: that women cannot be sexually assaulted by husbands or boyfriends.

### **Location of Crime**

Further, our research shows that 72 per cent of sexual crimes take place in a building, and in 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 do not take place in public places but in homes or buildings.

## Recommendations

Recommendations arising from our research are as follows:

### Changes in the Criminal Justice System

- Ensure that there are enough prosecutors to allow each case to proceed with minimal delay.
- Review the processes of trials to identify and tackle any issue that causes unnecessary delay.
- Support the development of specialised Sexual Crime Units which should include members of the medical profession so as to have the necessary expertise and professionalism needed in the investigation, case preparation and prosecution of sexual crimes.
- Ensure that there is a systematic training programme for prosecutors and police, such training to cover:
  - Gender sensitivity issues related to sexual crime and victims;
  - Understanding trauma as it affects victims;
  - Understanding the importance of victim support;
  - Better understanding of collection and presentation 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 if she is underage.
- Make appropriate changes in procedures and facilities:
  - To counter defence arguments based on myths and stereotypes;
  - 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.
- Improve inter-agency communication and cooperation.
- Set targets, to help focus efforts to lower attrition rates at each stage of the criminal justice process, and/or attain higher conviction rates in contested cases.
- Expand the use of additional/alternative charges, so that the accused is charged both with the sexual crime(s) and any other criminal offence which might have been committed, to capture the totality of the victim's experience and ensure that the seriousness of the crime is fully and incontrovertibly recognised.
- Review the definition of "solved" cases (the police definition of 'solved' has at the moment nothing to do with conviction rates or even the number of cases proceeding to trial).

- Widen the definition of ‘indexed crime’ to include other sexual crimes besides rape; and
- Make statistics available on the whole range of sexual crimes.

## **Victim Support**

To create a victim support system via the following:

- Implement a Witness Support service, to help victims and witnesses become familiar with courtroom procedures and appearances.
- Ensure consistent and effective communication between Investigating Officers, DPPs and victims and prosecution witnesses to ensure speedy communication of decisions and progress.
- Ensure there is a separate, private waiting area for 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 counselling to sexual crime victims.
- Address the issue of victim compensation with a view to making the process better utilised for victims of sexual crime.
- Explore possibilities of restorative justice.
- 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**

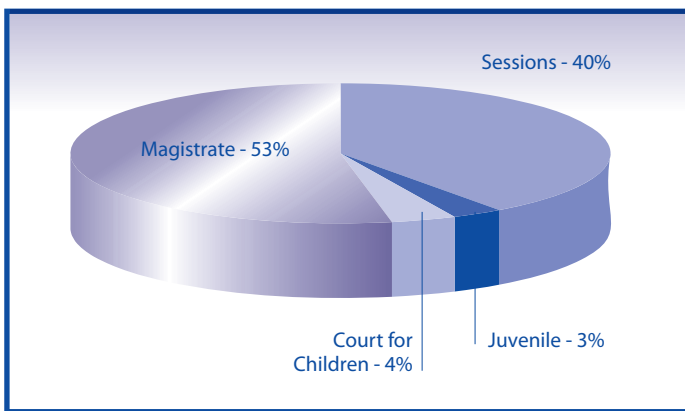
- Take a proactive stand in making recommendations for gender sensitive legislation bearing in mind, amongst others, the following documents prepared by the Women's Centre for Change (WCC) Penang and/or the Joint Action Group for Gender Equality (JAG).
  - Memorandum On Proposed Amendments To The Penal Code And The Criminal Procedure Code, 2006.
  - Memorandum on Laws Related to Rape, 9 September 2003.
  - Memorandum on Proposed Sexual Harassment Bill, May 2002.
  - Memorandum on the Government's Proposal to Amend Existing Labour Laws and Penal Code to Combat Sexual Harassment, 25 April 2005.
- 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

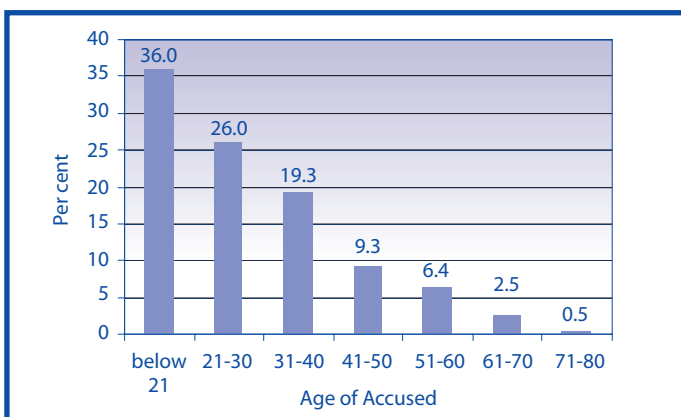
**Figure A: Breakdown of Cases by Court (%)**



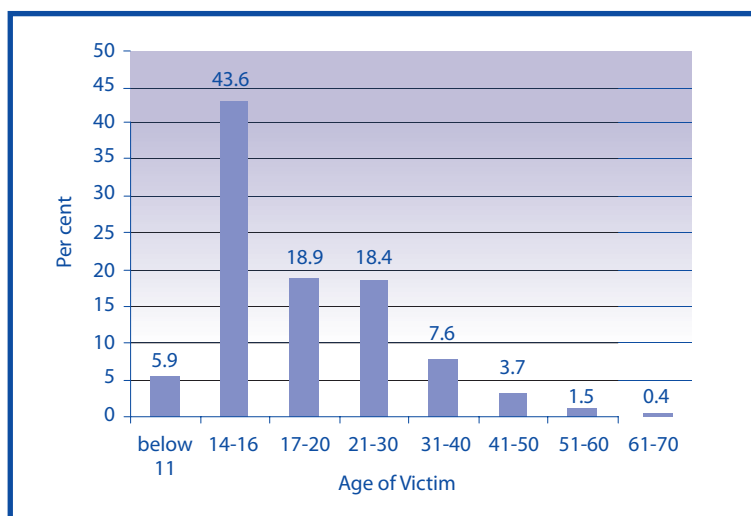
Source: WCC Court Research 2007

### 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 (%)**

	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>

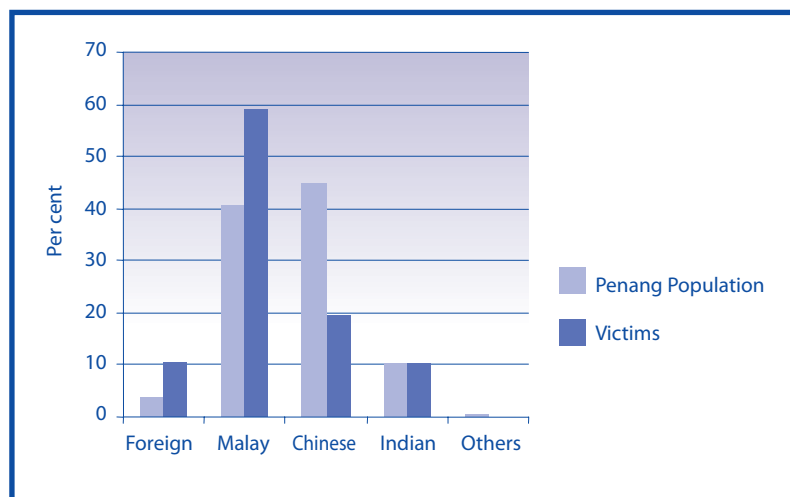
Source: WCC Court Research 2007

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>

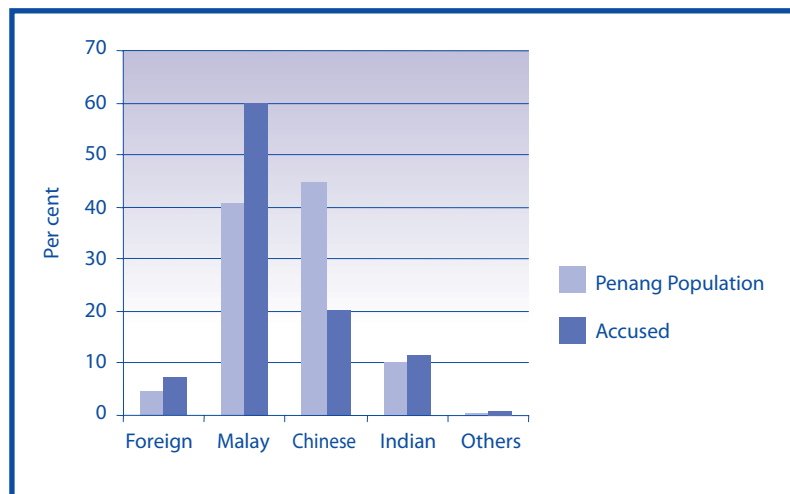
Source: WCC Court Research 2007

**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. One-third were Malay.
- 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**

	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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