

SEXUAL VIOLENCE AND INDIGENOUS VICTIMS

Women, Children and the Criminal Justice System

Research Brief No 1, 2010



Executive Summary

The Indigenous Law Centre (Faculty of Law, University of New South Wales) is conducting a research project funded by the Commonwealth Attorney-General's Department examining the experiences of Indigenous victims of sexual violence in the criminal justice system.

In this first phase, the project examines the way Aboriginal and Torres Strait Islander female and child victims are dealt with by the courts through an analysis of court/sentencing decisions.

The Chief Investigators are:

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This research aims to facilitate informed decision-making by government and policymakers. The research also seeks to help in improving the experiences of Indigenous women and child victims of sexual assault in the criminal justice system, and their access to justice.

Preliminary analysis of the data collected has indicated the following:

- **The majority of the cases collected involved female victims between the ages 11 and 15. This indicates that specific attention to the experiences of victims in this age group is needed. The data also signals a need to interrogate whether this is representative of higher rates of offending against children or whether other factors result in a discrepancy between offending and prosecution (eg, decisions not to prosecute offences against adults because of a difficulty in proving lack of consent beyond a reasonable doubt).**
- **The majority of assaults in the cases analysed were perpetrated by people known to the victim through family or community ties.**
- **Victims sometimes face community pressure urging them not to proceed to court with complaints.**

Introduction

Violence is a longstanding, widely recognised problem that disproportionately affects Indigenous people in comparison to non-Indigenous people. State governments across the country have conducted numerous inquiries into Indigenous violence. Cumulatively, these reports suggest that Indigenous women and children experience unusually high levels of sexual violence in comparison to their non-Indigenous counterparts.

The 2006 New South Wales report titled *Breaking the Silence* noted that, during consultations with Aboriginal participants, child sexual assault was described as 'massive', an 'epidemic', and 'a way of life'.¹ None of the participants could name a family in their community who had not been affected by child sexual assault.² In the 2007 *Little Children are Sacred* report, which focused on the Northern Territory, a senior woman in a Top-End community stated:

People are more willing to talk about sexual abuse these days. Why? Because it affects most/all families and often involves a family member but it is still difficult to get information about it, for people to talk about it – it's like "digging into hard ground".³

Despite the many inquiries and reports, understanding remains limited about Indigenous women's and children's experiences of the justice system as victims of sexual violence. Indigenous women and children already inhabit a marginalised position within the community. Sexual violence, which by its very nature renders victims powerless, severely compounds the marginalisation of those Aboriginal and Torres Strait Islander women and

children subject to such violence. It is therefore of the utmost importance that the criminal justice system takes a culturally appropriate, sensitive and respectful approach to the position of Indigenous victims of sexual violence, so as not to further victimise them. This research aims to give recognition to victims' experiences by shedding light on factors relating to the cases and case outcomes, and questioning the processes, stereotypes and knowledge foundations that inform judicial decision-making.

This research will inform policies at both federal and state levels. Through an analysis of the collected data, the project will provide evidence-based recommendations for necessary policy change, law reform and judicial training, which will in turn create an environment which better supports victims.

This project is guided by Australia's international obligations to prevent sexual violence and to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination. This commitment is underpinned by the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1979), the *United Nations Declaration on the Elimination of Violence Against Women* (1994) and the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).

- 1 NSW Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future* (2006), p49.
- 2 Ibid.
- 3 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, "Ampe Akelyernemane Meke Mekarle" – *Little Children are Sacred* (2007), p74.

Methods

- The project involves the identification of sexual assault cases with Aboriginal and Torres Strait Islander victims and the location of the transcripts of these cases.
- Once cases have been identified using internet databases, relevant details are entered into a quick reference table (cases in this table are referred to as 'located cases'). Relevant court registries are then contacted and where sentencing transcripts can be found they are ordered. The subsequent transcripts are analysed and information from them is entered into a thematic summary (these cases are referred to as 'analysed cases').
- In this first phase of the research, statistics are being gathered to lay a foundation for the analysis to come. Before looking at the court process in any depth it is important to understand the circumstances of the offences, victims and offenders, and how the cases have proceeded to the point of prosecution, as these factors will shape the experiences of victims. The details of the offences, victims and offenders, and the courts' reasoning and comments in trial and on appeal, are recorded and analysed.
- The information available is restricted in a number of ways. Sentencing transcripts are not publicly available where the offender is a child. Moreover, there are difficulties in obtaining case information and transcripts where alleged offenders are found not guilty. Because of these limitations on information, such cases have not so far been included in this research. Cases where there is no mention of the victim's Aboriginal and Torres Strait Islander (ATSI) status and no other indications of a victim's Aboriginality (eg, location, familial connections, mention of Aboriginal law) are also missed. This means that the research is at present skewed more towards crimes committed in remote and rural areas rather than in cities, and towards crimes committed by adult Indigenous offenders.

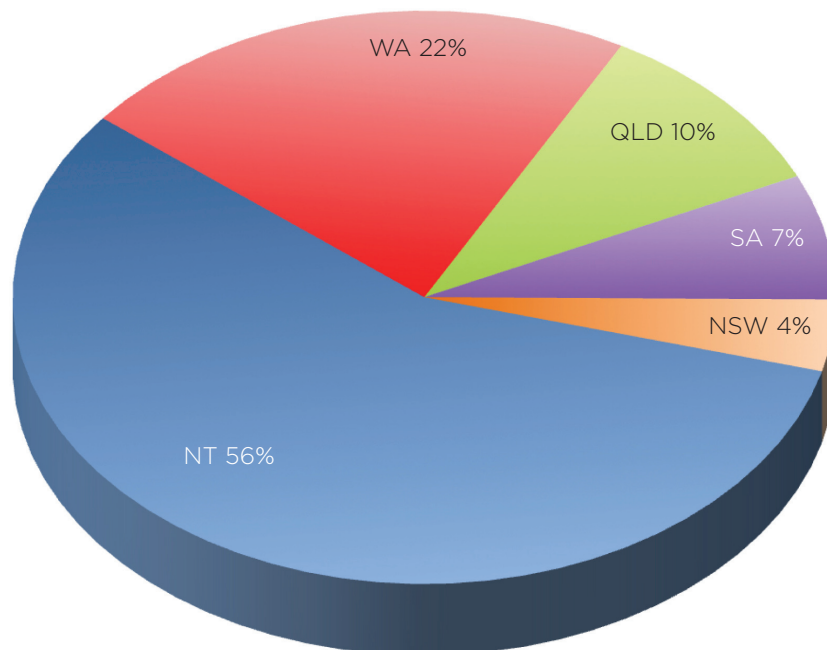
Initial Findings

All percentages rounded to nearest whole number.

Figure 1

Located Cases by Jurisdiction as at 27 April 2009

NB: ACT 0%, TAS 0%



- The project has to date located 121 cases: 67 cases from the Northern Territory, 27 cases from Western Australia, 12 cases from Queensland, nine cases from South Australia, five cases from New South Wales, one case from Victoria and no cases from Tasmania or the Australian Capital Territory. Of those cases, 103 cases have been analysed so far.
- In the 121 located cases there were 149 offenders and 138 victims. All of the offenders were male.
- In the 103 analysed cases there were 119 offenders and 111 victims. Of those victims, 101 were female and 10 were male. All of the offenders were male.
- Of the 119 offenders 67 had no criminal histories mentioned by the court, while 36 offenders had a criminal record mentioned. (Information about the criminal histories of 16 offenders was unclear or unavailable.) Of the offenders with prior convictions, 20 had previously committed non-sexual offences while 16 offenders had prior convictions for sexual offending. Half of these 16 sexual offenders had previously been charged with multiple sexual offences while eight of them had only one prior sexual offence.
- According to the data, an unexpected proportion of sexual offences were committed against children. Of the located cases, 62 per cent of offences relate to children under the age of 16.
- Victim Impact Statements (VIS), which are used in sentencing as an indication of the harm suffered by the victim and the effect the offending has had, were referenced in over 75 per cent of sentencing transcripts. While the transcripts recorded the judge's acknowledgement of the VIS, the effect of VISs on sentencing outcomes (if any) was generally unclear from the transcripts.
- In the analysed cases, 81 per cent of offenders were known to the victim, 15 per cent of offenders were strangers to the victim, and 4 per cent of the relationships were unclear. In the vast majority of located cases the offenders were Indigenous men. These high proportions of offenders known to the victim and offenders who were Indigenous may not necessarily be representative of all cases involving Indigenous women and child victims of sexual assault. This is because, in this study, identification of the victim as Indigenous relies in most cases on finding connections with the offender, whose ATSI status is much more frequently mentioned in the sentencing remarks.
- Of the offenders that were known to the victim, 41 per cent were known through the community, 35 per cent were known through family and kinship relations, 11 per cent were the current partner (or promised husband) of the victim, 7 per cent of the offenders were the former partner of the victim, and 5 per cent of the offenders were in a relationship with the victim's mother.
- In 5 per cent of cases, the victim had faced community pressure and intimidation as a result of their decision to report the assault. This pressure came in the form of assaults, ostracism or a perceived fear for the safety of the victim.
- There were five instances where the victim and/or their family had feared for their safety because of the community reaction to the reporting of the offences. In four of these cases the victims and/or their families had to relocate after reporting the offences, and in one of these four cases the offender's family assaulted the victim in response to the guilty verdict. In the fifth case it was noted that though the offenders were welcome to return to the community, it was not the view of all community members that it would be safe for the victim to return.

- Of the 121 cases located, 60 were subject to appeals against conviction or sentence or both. Twenty-eight cases were either too recent to have gone to appeal at the time of publication or there was no information available to establish whether appeals had been made. Of the cases that went to appeal, 28 were dismissed,

11 resulted in a decreased sentence, nine resulted in an increased sentence, four resulted in a new trial, three resulted in acquittal, three resulted in convictions being overturned, and two resulted in sentence being set aside.

Conclusions

- Given the special vulnerability of Indigenous females between 11 and 15 years of age, special attention must be paid to the kind of support that is provided to this category of victim. Both judicial and medical support services need to be tailored to specifically address their needs.
- As there is a high proportion of child victims, measures should be taken to ensure that families know how to identify behaviours associated with children experiencing sexual violence. Health workers, teachers, family and community members should receive special education on how to identify the signs of children who have been or are being abused.
- Appropriate victim support is needed to deal with potential pressure placed on the victim to not proceed to trial. Care must be taken to ensure the victim's safety at all points of the process, from the initial reporting through to giving evidence and dealing with the aftermath of prosecutions.

Future Directions

- The study will continue to locate new cases, with a particular focus on the jurisdictions where few cases have been found (Tasmania, the Australian Capital Territory, Victoria and New South Wales).
- Case studies will be undertaken in relation to cases where victims appear to have been treated especially poorly. This will involve the analysis of trial transcripts and other file material from DPP offices.
- The study will explore in further detail the experiences of 11–15 year-old Indigenous victims, recognising that little is publicly known of their experiences. Based on the data collected, the study will consider any law and policy reform required in this area.
- The study will also analyse the use of VISs in court. After obtaining copies of relevant VISs, the study will look at how much they are referenced in proceedings, any details from VISs that are not mentioned, what reliance judges place on VISs in sentencing, and how successfully the voice of the victim is represented in proceedings by judges' references to VISs.
- The process of reporting offences, as revealed through the transcripts, will also be examined. The study will examine how victims decide to report, how long it takes for them to report, who it is victims decide to report to first and how this proceeds to a police investigation.
- The study will further analyse those cases where there have been particular challenges faced by the victim in terms of pressure not to report or not to give evidence. The study will seek to identify where additional support for victims is needed.

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