



Testimony Before the Pennsylvania House Democratic Policy Committee

By Women's Law Project

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On behalf of the Women's Law Project (WLP) we wish to thank the Senate Democratic Policy Committee Chair Lisa Boscola, Senator Muth, Senator Kearney for convening a hearing on eliminating the rape culture epidemic in Pennsylvania. The recently published results of a study finding that forced sexual initiation of young women by older men and the attendant harm to health is common in the United States highlights the persistence of rape culture and male sense of entitlement to sex from women and girls and the importance and timeliness of this hearing.¹

The Women's Law Project is a Pennsylvania-based legal advocacy organization dedicated to advancing the legal status of women and girls through impact litigation, public policy advocacy, and community education. Our work addresses reproductive rights and justice, sexual and domestic violence, family law reform, and discrimination in athletics, employment, education, and insurance. We have engaged in policy advocacy about and provided direct assistance and representation to victims of sexual harassment in schools, in the workplace and in the criminal justice system. We have also filed *amicus curiae* (friend of the court) briefs in numerous cases involving sexual assault, both in criminal and civil cases.²

Historical Context

In the current public discourse about sexual assault there is discussion of the prevalence of sexual assault and the perspective that sexual assault complaints are viewed with suspicion. However, there is very little analysis about why: why mostly women are frequently prey to sexual

¹ Laura Hawks, MD, Steffie Woolhandler, MD, MPH, David U. Himmelstine, MD, et al, Association Between Forced Sexual Initiation and Health Outcomes Among US Women, *JAMA Inter Med.* (Sept. 16, 2019) <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20190&cosponId=29918>.

² A short note regarding the language we use when discussing sexual violence and rape culture. We understand that sexual violence is perpetuated and experienced by people of all genders. However, we often default to binary language because laws and the criminal justice system are binary and because the dynamic of men raping women informs the history of laws—and lack of laws—addressing sexual violence.

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assault and why their conduct is examined and why their credibility is scrutinized. It doesn't matter if it is an allegation against a famous television star, an athlete, student, stepfather, or guy next door, when a woman alleges sexual assault, her credibility is severely scrutinized to unearth a possible lie. The focus is on the victim's behavior rather than the offender's conduct. Simply put, society believes male denial over a woman or girl's allegations.

To unravel why rape victims are regarded as liars, it is useful to understand the historical underpinnings of laws prohibiting rape which led to the historic bias against sex crimes and the victims of sex crimes in the criminal arena, because that is where it all started. This historical context has influenced the way sex crime laws are written by lawmakers and enforced by law enforcement and the courts, and rape culture in society generally.

Sexual assault is unique as a crime of assault in that it developed as a crime against property rather than a crime against a person. Under English common law, from which our laws developed, a woman's chastity was essential to establish patriarchal inheritance rights, and thus a daughter's chastity was viewed as the property of her father and was transferred by the father to the man who would become her husband.

Rape was the theft of this property. The bodily integrity of the woman was irrelevant. Only virgin females could be raped. Men certainly were not considered rape victim under the law. Married men were free to rape their wives because marriage was the irrevocable implied consent to sexual intercourse by a wife to her husband.

Any sexual behavior involving the marriageable daughter, consensual or rape, could jeopardize the family's economic security, so there was incentive to assure would-be suitors of the virginity of marriageable daughters, whether true or not.

A marriageable daughter who was raped would be blamed for the economic downfall of her family line. In short, rape laws were created to protect the economic interests of men. Bodily integrity of the female was irrelevant.

Victim blaming and presuming untruths about a female's virginity undoubtedly had its origins here.

The consequences of the early rape laws were that (1) unmarried women could be raped only if they were virgins; and (2) married women were presumed to have consented to all sexual activity with their husbands.³ Under these theories, men could not be raped, rape of orifices other than the vagina was not legally recognized, and rape of non-virginal women was not a crime.

³ Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 658-59 (2010).

As incorporated into American jurisprudence, the basic elements of state rape laws included: carnal knowledge (male [penile]-female [vaginal] penetration), use of force beyond the rape itself, and “against her will” (lack of consent).⁴ In order to establish that the act was against the will of the woman, it was necessary to establish that force was used, and to establish force, it was necessary to measure physical evidence of a victim’s resistance.

As the law evolved and rape became recognized as a crime against the female victim, women were still cast as liars to protect men’s interests.⁵ Rape complainants who were “unchaste” were viewed as immoral and therefore likely to lie and the woman’s lack of chastity was used to establish her lack of credibility.⁶ Women who charged rape have historically been under constant suspicion about their veracity and accused of falsely claiming rape to protect their reputation, explain a pregnancy, or to seek revenge against or blackmail a man.⁷

As a result of this false view that women commonly lie, lawmakers imposed numerous procedural and evidentiary requirements as tests of victim veracity. The legal system’s hostile treatment of rape cases and rape victims is unique and in marked contrast to its response to other assault crimes. In sex crimes, the focus is on the victim’s character, behavior, and words in order to ascertain whether the victim was being truthful, particularly with regard to whether she consented to sexual activity. Laws were written that required rape victims to prove their truthfulness by producing evidence that that they resisted their attacker, suffered serious physical injuries beyond penetration, were chaste, and promptly complained to authorities. They also had to provide corroborating witnesses or other evidence. The complainant’s word was insufficient.⁸

These rules and requirements, imposed only in rape and sexual assault cases, severely disadvantaged and stigmatized rape complainants and made it extraordinarily difficult to successfully prosecute rape. For other assault crimes, the legal system focuses only on the actions of the accused to establish criminal activity. For example, the crime of battery (e.g., a punch) is established based solely on evidence of the perpetrator’s actions and/or intent, and the victim’s conduct is irrelevant. The victim need not resist nor express unwillingness to being punched to establish a crime; nor is a victim’s history of being punched relevant. Lack of consent is assumed. Rape, on the other hand, under the traditional view, occurred not because of the action of the

⁴ *State of New Jersey in Interest of M.T.S.*, 129 N.J. 422, 432 (1992).

⁵ *Id.* at 433 (“According to the oft-quoted Lord Hale, to be deemed a credible witness, a woman had to be of good fame, disclose the injury immediately, suffer signs of injury, and cry out for help.” 1 Matthew Hale, *History of the Pleas of the Crown* 633 (1st ed. 1847)); Susan Brownmiller, *Against Our Will*, 23-30, 228 (1975).

⁶ Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 75 (2002).

⁷ Stephen J. Schulhofer, *Unwanted Sex: the Culture of Intimidation and the Failure of Law* (1998).

⁸ Susan Brownmiller, *Against Our Will*, 30, 368-374 (1975).

assailant, but on the basis of the victim's perceived influence upon and response to the perpetrator's action.

Hundreds of years later, the vestiges of these elements remain deeply embedded in our laws and culture and are reflected in how both the criminal justice system, and society at large, including of course, educational systems, respond to allegations of sexual assault with suspicion and victim blaming.

Sweeping sex crime law reform began in the 1970s.⁹ Feminists rejected the notion that women are the property of men without independent legal status or rights, and demanded changes in the laws. As a result of this activism, most states have expanded the definitions of sex crimes to eliminate disparities based on gender and marital status. Most have also rescinded or reduced the requirements of resistance, corroboration, and prompt reporting to law enforcement,¹⁰ and prohibited introduction of a woman's past sexual history although with exceptions.¹¹ It is now well established that penetration of orifices other than the vagina is a felony. Issues of force and consent continue to change but clear trends in the evolution of the law are identifiable. The definition of force is broadening beyond overt physical force alone to include other modes of coercion. There is an increasing recognition that penetration without consent without any physical force (beyond penetration itself) is a serious sex offense.¹² These trends demonstrate a shift toward understanding that unwanted and unconsented to bodily invasion is the core wrong that sex crimes laws must address.¹³ The FBI's broadening of the Uniform Crime Report (UCR) Summary Reporting System (SRS) definition of rape to include penetration without consent and without force reflects these trends.

It is also important to recognize that rape has been used as a tool of white supremacy with the unfettered rape of enslaved black women and the lynching of guiltless black men. That legacy continues. Black women and girls face stereotypes associated with both their gender and their race

⁹ Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644 (2010).

¹⁰ Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 652-654 (2010)

¹¹ These laws are known as "rape shield" laws and prohibit the introduction of the victim's past sexual history except under certain circumstances and a balancing test between the probative value and prejudicial impact. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002).

¹² *E.g.*, PA. CONS. STAT. ANN. 18 § 3124.1; LA. REV. STAT. ANN. § 14.41; WASH. REV. CODE ANN. § 9A.44.060; WIS. Stat. Ann. § 940.225.

¹³ See, *e.g.*, *State of New Jersey in Interest of M.T.S.*, 129 N.J. 422, 433-34.

when they report sexual assault. At the same time, black men are arrested at a disproportionately higher rate than white men.¹⁴

Bias clearly continues to cloud perceptions about sexual assault. It is not necessary to say one automatically believes every allegation of sexual assault if made by a woman or girl, but what *is* necessary is for all who interact with people alleging sexual assault examine and understand the impact of cultural bias that blames victims, automatically treats reports of sexual assault with suspicion, and all too often profiles victims as liars. People working at every point of interaction with potential victims--police, courts, employers, educational institutions, and society at large—need to understand historic bias against victims in order to move forward into a society where we can more effectively prevent and properly adjudicate sexual violence.

Recent Trends

Several years prior to the current MeToo movement, young women on college campuses came forward publicly to describe not only having been sexually assaulted, but also the awful treatment they received when bringing sexual assaults complaints to campus administrators and security personnel. These young women demanded equality and sovereignty over their bodies, took bold actions, and threw down the shackles of shame historically associated with sexual assault.

Their research led them to the Office for Civil Rights of the United States Department of Education and the 2011 Guidance. Many of them filed complaints with the Office for Civil Rights, the administrative enforcement arm of the US Department of Education that handles complaints of Title IX and similar statutes barring discrimination in education on other bases. These young activists understood social media connected them from one campus to another all over the country and leveraged their skills to attract traditional mainstream media attention, resulting in a flurry of news stories about campus sexual assault in major media outlets. Many of their stories were told in the documentary *The Hunting Ground*. In turn, that documentary fueled more action.

The collective actions of these young people ultimately drew the attention of the President of the United States, which in and of itself was remarkable, and it also led to new initiatives and increased support for the enforcement of Title IX mandates.

The #MeToo movement followed, with women rising up to complain about long-standing and silently endured sexual harassment in the workplace. You have all read about these complaints, including those arising in the Pennsylvania General Assembly.

¹⁴ FBI Crime Data Explorer, Arrests in the United States for Rape, Demographic Data, <https://crime-data-explorer.fr.cloud.gov/explorer/national/united-states/arrest>; U.S. Census Bureau; .Debbie Nathan, Black Men Disproportionately Represented on Sex Offender Registries, *The Appeal* (Nov. 15, 2016), <https://theappeal.org/black-men-disproportionately-represented-on-sex-offender-registries/>

When federal and state laws were enacted in the 1960's prohibiting discrimination against women in the workplace, the term "sexual harassment" did not exist. Although inappropriate sexualized behavior undoubtedly existed, such behavior was normalized and not taken seriously as a problem. With no legal recourse, most women endured such behavior in silence.

That too changed in the 70s when activists recognized sexual coercion experienced at work was an aspect of inequality and actionable sex discrimination. The Equal Employment Opportunity Commission developed and adopted guidelines defining sexual harassment. In a series of cases in the late 1980s, the Supreme Court recognized that conditioning employment on submission to sex or creating a sexually hostile environment was sex discrimination in violation of Title VII, which prohibits sex discrimination in employment.

How schools address sexual harassment came to be addressed in guidance from the DOE and rulings by the courts. After the Supreme Court concluded schools could be sued for violating Title IX in 1992 the courts began to sort out just how that liability would be assessed for monetary compensation—meaning damages. In those early years, schools paid little attention to the law and enforcement was minimal. In the last administration, enforcement was significantly expanded and schools were reminded of their obligations to address sexual misconduct under Title IX. Now, the current administration is retreating from enforcement and seeking to limit school's liability.

WLP Current Work Related to Rape Culture

WLP has been working in a variety of venues to improve institutional response to sexual assault by eliminating rape culture bias in our criminal justice system and in our workplaces and schools.

Criminal Justice System:

A significant part of our work has been with law enforcement. We began this testimony with the deep history of bias in the criminal justice system towards rape victims. Although there have been incremental improvements in this response, our work and research tells us that that bias continues to affect investigations.

Our work advocating to improve police response to sex crimes began in 1999 when we led the reform of police practice in Philadelphia after an investigative report by the *Philadelphia Inquirer* revealed that the Special Victims Unit (SVU) of the Philadelphia Police Department (PPD) had failed to adequately investigate thousands of rapes and other sex crimes, and downgraded these cases by classifying them in a non-criminal category. Over the course of two decades, approximately 30% of all sexual assault-related complaints were buried this way. An

internal audit, initiated by then-Police Commissioner John Timoney, resulted in 681 rape cases, and 1,141 sexual assault cases, being re-opened and investigated.

How could this have happened? A number of reasons, including the influence of prosecutors on police investigation, the pressure to keep crime stats down, the secondary trauma experienced by investigators who deal with difficult cases day in and day out, and, for today's purposes, bias against sex crime victims inherited from the past that causes society to blame victims of rape and view them as liars.

Initial reforms included revamping the staffing of the SVU, increasing supervision, and revising the coding manual. In addition, the resulting crisis in public confidence led the Commissioner to invite us to review SVU files and provide feedback. This invitation led to the creation of an annual advocate case review that has just completed its 19th year. Every year, we join a team of advocates at the SVU and review hundreds of SVU files, including all unfounded rape complaints and a random sample of open cases and provide confidential feedback to the SVU leadership and supervisors. We assess the thoroughness and outcome of each investigation as well as bias.¹⁵ We have seen vast improvement in investigations. This review has become known as the Philadelphia Model and is known nationally and internationally as an effective method for eliminating bias.

Philadelphia was not alone. After leading this highly publicized reform effort in Philadelphia, the WLP was contacted by journalists from major cities throughout the US about the same or similar police responses. In cities across the country, reporters have exposed police officers who have refused to accept sexual assault complaints, misclassified and failed to investigate those accepted, and unfounded cases at high rates.

Our early case reviews and discussions with investigators led us to conclude that the then narrow UCR rape definition contributed to Philadelphia's miscoding of sex crime complaints. In 2001, we asked the FBI to update its definition of rape to reflect the modern public understanding of rape and be more consistent with state crime codes. Our effort to change the definition of rape in the UCR summary reporting system to be inclusive of all types of sexual penetration crimes regardless of gender achieved success in 2012.

We are still doing this work. Now that the FBI is switching to another system, NIBRS, we are advocating for them to use the same definition they had previously adopted and getting rid of archaic biased language: carnal knowledge, sodomy, and fondling. Our own crime code could

¹⁵ See WLP Policy Brief, Advocacy to Improve Police Response to Sex Crimes, available at https://www.womenslawproject.org/wp-content/uploads/2017/02/Policy_Brief_Improving_Police_Response_to_Sexual_Assault.pdf

benefit from elimination of its own archaic and biased terms, such as “deviate sexual intercourse” to describe any form of sexual penetration that is not a penile-vaginal.

We, along with other national allies, also persuaded the Department of Justice to issue guidelines to law enforcement on identifying gender bias in police investigations of sexual and domestic violence. These guidelines are available for police to apply to their own work.

We also have worked with the Police Executive Research Forum with funding from the Office of Violence Against women grants that included examining sex crime files and policies in other jurisdictions. We also are participating in a project of the American Law Institute that is revising the sex crime provisions of the Model Penal Code.

We follow the research on how the criminal justice system addresses rape. Since 2012, more and more evidence-based research is documenting the extremely high attrition rate of sex crimes in the criminal justice system. This research found that, starting with the very low number of reported sex crimes very few filed rape complaints result in arrest and far fewer result in conviction.¹⁶ The most recent research has confirmed this high level of attrition based on data from six different jurisdictions. For every 100 rapes reported to law enforcement: 19 lead to arrest, 5 end in guilty pleas, only 1 ends in guilty verdict through trial. Only 6% of complaints end in conviction or guilty plea.¹⁷

According to the findings of this research, police officers scrutinize rape victims who don’t fit the “ideal” victim profile. This scrutiny is rooted in myths about rape. Police interrogate rape victims whose reports they believe are false.¹⁸ Police don’t treat victims of other assaultive crimes this way. Most cases don’t fit the stereotypical scenario of a stranger jumping out of a bush in the dark of night and viciously attacking. Most victims know their attacker. Most attackers don’t have weapons and don’t physically injure the victim. Only a fraction of sexual assault complaints are

¹⁶ M.C. Claire Harwell, J.D. and David Lisak, Ph.D., *Why Rapists Run Free*, 5 *Fam. & Int. Partner Viol. Qtly.* 175, 177-79 (2012) (discussing filtering of rapes out of criminal justice system, with few making it to trial when they do not meet stereotypical perceptions of real rape, and a disproportionate number resulting in acquittal due to juror bias); Cassia Spohn Ph.D. & Katharine Tellis, M.S.W., *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff’s Department, and the Los Angeles County District Attorney’s Office* (2012) (finding substantial attrition in sexual assault cases reported to the LAPD and the LASD in cases that are not considered “slam dunks,” including cases involving non-strangers) available at www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf.

¹⁷ Morabito, M. S., Williams, L. M., & Pattavina, A. (2019). Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf>

¹⁸ Rachel Venema, Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports, 31 *J. of Interpersonal Violence* 872-899 (2016) <https://doi.org/10.1177/0886260514556765>

false (between 2% and 10%).¹⁹ Victims are sometimes charged with making a false complaint, but such charges usually turn out to be wrongly brought.²⁰

Research tells us that extra-legal – irrelevant – factors contribute to police decisions not to arrest. We saw this in Philadelphia when the scandal broke. Cases are rejected and not investigated because of false perceptions about victim behavior including risk-taking behavior (drinking, walking alone, accepting a ride from a stranger), mental health issues, inability to recall assault details, actual or perceived lack of cooperation, or delayed reporting.²¹ These scenarios are not uncommon. Women shouldn't be judged at fault for becoming intoxicated. Intoxication is irrelevant to whether she was raped. And yes, people with mental illnesses and prostitutes can be raped. Traumatized victims will have difficulty remembering details and providing a systematic and sequential narrative. And many reasons exist for delayed or no reporting of sex crimes: fear of retaliation, embarrassment, ignorance of the law, distrust of the law enforcement system and others.

Police data informs us of how sexual assault is treated by the police. Pennsylvania, like federal law, includes a system for collecting police crime data. Pennsylvania data, like data in other jurisdictions, shows that sex crime complaints are often unfounded – determined to be false or simply not a crime – or cleared by exception, a category which means an arrest could have been made, but wasn't because of reasons outside of law enforcement. Those reasons can include prosecutorial declination – a decision that may be influenced by bias, or noncooperation, a perspective that may reflect police misperception or mistreatment that causes a victim to disengage with law enforcement. All of these categories are ways to dispose of cases without pursuing an arrest. In Pennsylvania, data for 2017 shows that of 4311 rape complaints statewide, 461 were unfounded, 979 were cleared by exceptional means, and only 1010 resulted in arrest. 30% were removed from the system, and 56% of the cases that came in during 2017 were not solved. Arrest does not automatically mean that a prosecution will occur.

¹⁹ Kimberly Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform* 18 *Violence Against Women* 145-168 (2012); False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases. *Violence Against Women*, 16(12), 1318–1334. <https://doi.org/10.1177/1077801210387747>

²⁰ See Jan Jordan, *The Word of a Woman? Police, Rape, and Belief*, (2004); Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary 111th Cong. 6-7 (Sept. 14, 2010) (statement of Carol E. Tracy, Executive Director, Women's Law Project) <http://www.judiciary.senate.gov/imo/media/doc/09-14-10%20Tracy%20Testimony.pdf>

²¹ *Id.*

Research demonstrates that prosecutors are subject to the same biases that influence police.²² Unfortunately, there is no public reporting system for prosecutorial decisions and actions in sex crimes. The public would learn a lot from knowing how many cases are referred for prosecution, how many result in charging a crime, plea deals, verdicts and prison time.

Even harder to reach are the judges and juries who are also affected by society's bias against rape victims.²³ Jurors come to the courtroom with preexisting attitudes that inform their decision-making and assess credibility of the victim based on biases regarding a number of factors, including the victim's lack of sobriety, her presentation in court, how long it took her to get help, and the existence of a past relationship with the accused.²⁴ Schuller & Klippenstine summarize research demonstrating that evidence that a victim had prior sexual contact with the defendant prejudices jurors against the victim. Studies also suggest that judicial instructions are not effective in limiting the prejudicial effect of this information, concluding "the research presented in this article clearly testifies to the falsity of any suggestion that jurors in rape cases can be entrusted to leave their personal prejudices and stereotypical preconceptions behind them when they enter the courtroom."²⁵

Recommendations:

The Women's Law Project will continue to perform annual case reviews in Philadelphia and assist any other jurisdiction that wants to learn how to implement a case review.

We are also interested in seeing a number of reforms enacted in Pennsylvania:

- Require our state UCR program to publish data on exceptional clearances due to noncooperation and prosecutorial declination;
- Develop a transparent data collection system for prosecutors;

²² Morabito et al, supra at note 15; Megan A. Alderman & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Case*, 18 *Violence Against Women* 525 (2012) (finding that decisions are made based on extralegal factors, including undue scrutiny based on a common misunderstanding that victims lie about being sexual assault).

²³ Michelle Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 *Geo. Wash. L. Rev.* 51,106-108 (2002).

²⁴ M.C. Claire Harwell, J.D. and David Lisak, Ph.D., *Why Rapists Run Free*, 5 *Fam. & Int. Partner Viol. Qtly.* 175, 178-9 (2012), citing Ellison & Munro, *Reacting To Rape: Exploring Mock Jurors Assessments of Complainant Credibility*, 49 *Brit. J. Criminol.* 202-219 (2009) and Schuller & Klippenstine, *The Impact of Complainant Sexual History Evidence on Jurors' Decisions: Considerations From A Psychological Perspective*, *Psychology, 10 Public Policy, and Law* 321-341 (2004).

²⁵ Schuller & Klippenstine at 214.

- Require training for police and particularly for investigators and detectives on victim-focused, trauma-informed investigations through Pennsylvania’s Municipal Police Officers' Education & Training Commission (MPOETC);
- Similar training for prosecutors and judges;
- Adoption of a certification for sex crime training;
- Amend Pennsylvania sex crime statutes to eliminate “deviate sexual intercourse” and distinctions in crime definitions based on the sexes of the accused and victim;
- Amend the crime of Institutional Sexual Assault to extend to police officers and any person’s in the officer’s custody (HB 1807);
- Conduct more research on perpetrators so we can learn how to reduce perpetration;
- Mandate age-appropriate evidence-based sex education to help young people understand healthy and respectful relationships and consent. HB 1586 is a good start;
- Encourage the adoption of advocate-led case reviews of police sex crime investigations.

Sexual Harassment at Work

Sexual harassment encompasses a broad range of verbal and non-verbal conduct that includes unwelcome sexual advances, requests for sexual favors, and other behavior of a sexual nature. It also includes non-sexual harassment that is based on the sex of the victim, similar to harassment based on race, ethnicity, and other protected classes. The harassment may involve felonious sexual assault, but also includes offensive and humiliating words and gestures which have no place in a respectful environment. The sense of entitlement to sexually harass coworkers and subordinates derives from the same historic origin of rape culture.

Sexual harassment is pervasive. A recent poll reported that 81% of women say they have experienced sexual harassment in their lifetime, with 38% reporting harassment at work.²⁶ In FY2018, sexual harassment claims comprised 28% of federal harassment complaints.²⁷ Black women file harassment complaints at a higher rate and harassment complaints often include additional bases of discrimination such as race, national origin, and retaliation.²⁸

²⁶ Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment>

²⁷ EEOC, *Enforcement and Litigation Statistics, All Charges Alleging Harassment (Charges filed with EEOC)*, FY2010-2018, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm; EEOC, *Enforcement and Litigation Statistics, All Charges Alleging Sexual Harassment (Charges filed with EEOC) FY2010-2018*, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm

²⁸ Nat'l Women's Law Center, *Out of the Shadows: An analysis of Sexual Harassment Charges Filed by Working Women 4* (2018) <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>

Sexual harassment occurs in all types of workplaces. We have heard about harassment from individuals in the entertainment industry and in the auto factories. Low-income workers are particularly vulnerable. The livelihood of restaurant workers depends on the tipped minimum wage, which makes them highly vulnerable to sexual harassment on the job.²⁹ Workers who clean homes and take care of children are extremely vulnerable. Sexual harassment is more pervasive in jobs where men are in charge or predominate. Construction workers are an example. A report by the Chicago Women in Trades found that 88 percent of female construction workers experience sexual harassment at work.³⁰

The fear of retaliation and disbelief in response to reporting sexual harassment is real. As many as 75% of those who report workplace mistreatment experience retaliation.³¹ And women who report sexual misconduct are regularly disbelieved. Attorneys for both employees and employers who testified before the House Labor and Industry Committee on April 24, 2018 testified that, based on their experience, false complaints in the civil system are rare.

Why would women lie about being sexually harassed? While celebrities are now congratulated for reporting harassment, average women who are not famous face challenges and risks if they report and seek a legal remedy. Not only do they often have to continue to go to work with their harassers and suffer ongoing harassment treatment, once they report, they are often treated as outcasts on the job and persecuted. Meanwhile their complaints to management frequently do not stop the harassment. They may be forced to leave their job and suffer economically. And taking further action, like bringing a lawsuit under anti-discrimination laws takes years, costs money, and can provoke retaliation and loss of employment. There is no incentive to lie.

Laws exist to address to sexual harassment in the workplace. Title VII of the Civil Rights Act of 1964 is the federal anti-discrimination law. The Pennsylvania Human Relations Act (PHRA) outlaws discrimination at the state level, and many local governmental units have their own anti-discrimination ordinances. These laws place the responsibility on the employer to stop the harassment. They prohibit *quid pro quo* sexual harassment — where sexual activity is explicitly or implicitly made a term or condition of employment or the submission or rejection of such conduct is used as a basis for employment decisions. They also prohibit conduct that unreasonably

²⁹ Women in Pennsylvania Need One Fair Minimum Wage, <http://www.womenslawproject.org/wp-content/uploads/2018/04/Women-in-PA-Need-One-Fair-Minimum-Wage-February-2018-v.2.pdf>

³⁰ Chicago Women in Trades, Breaking New Ground: Worksite 2000 (1992), <http://chicagowomenintradess2.org/wp-content/uploads/2015/02/Breaking-New-Ground2.pdf>

³¹ EEOC, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria Lipnic, (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm

alters the terms and conditions of employment so as to create a hostile or abusive work environment. A hostile work environment can be created by one or more acts of harassment, depending on the circumstances.

These laws are enforced through administrative bodies that are authorized to investigate complaints of discrimination. If a victim does not get an appropriate response from the employer, the next step is to file a complaint with one of these agencies. They include the Equal Employment Opportunity Commission (EEOC) at the federal level and the Pennsylvania Human Relations Commission (PHRC) at the state level.

The laws, however, differ in terms of who is eligible to seek their protection and how the law is enforced. This means, there are gaps in protection that need to be filled. The Women's Law Project supports legislation that will expand protection from and remedies for sexual harassment by amending the Pennsylvania Human Relations Act (PHRA) to expand protection and adopting new laws. Some of the reforms are already the subject of proposed legislation. Others must be drafted and introduced.

Covering all employees. The federal, state and local anti-discrimination laws have different thresholds for the size of employers to which they apply. Title VII applies to employers with 15 or more employees. The PHRA applies to only employers with four or more employees. Local agency thresholds vary from 1 to 5. As a consequence, there are people who have no statutory remedy for harassment because of geography and/or size of their employer. Senate Bill 490 and House Bills 1025 and 1027 will remove the PHRA's 4-employee minimum.

Adding coverage for all independent contractors. The PHRA only covers independent contractors who are licensed by the Pennsylvania Department of State.³² The PHRA thus protects independent contractors such as architects, crane operators, or other occupations licensed by the Pennsylvania Department of State³³ but leaves out others who are equally vulnerable to sexual harassment as they interact with managers, other employees, and third parties like customers.³⁴ It is estimated that 10-20% of the U.S. labor force work as independent contractors.³⁵ Whether groped by a manager while working as a contract singer and dancer for a band³⁶ or by an attendee

³² 34 P.S. §954(x).

³³ Pa. Dept. of State, Bureau of Prof'l and Occup'l Affairs, Review of State Professional and Occupational Licensure Board Requirements and Processes (June 11, 2018).

³⁴ Yuki Noguchi, NPR, *Unequal Rights: Contract Workers Have Few Workplace Protections* (Mar. 26, 2018), <https://www.npr.org/2018/03/26/593102978/unequal-rights-contract-workers-have-few-workplace-protections>

³⁵ Yuki Noguchi, NPR, *1 in 10 Workers Is an Independent Contractor, Labor Department Says*. (June 7, 2018). <https://www.npr.org/2018/06/07/617863204/one-in-10-workers-are-independent-contractors-labor-department-says>

³⁶ See *supra* note 34.

at a work-related event while working as a photographer, independent contractors deserve protection from sexual harassment.³⁷ Senate Bills 53 and 503 and House Bill 1027 extend PHRA coverage to all independent contractors and provides necessary protection to the growing number of workers who are classified — correctly and incorrectly — as independent contractors and lack protection from workplace harassment. These include freelancers and individuals in the gig economy.

Covering volunteers, and interns: Unpaid interns and volunteers work alongside employees but have looser ties to the workplace and may not know how to respond or may feel uncomfortable doing so. They are no less vulnerable than any other person who provides services to the employer and may be even more vulnerable. Senate Bill 452

Eliminating exemptions for agricultural workers and domestic workers: Exclusions long written into the law for agricultural and domestic workers leave these employees unprotected and should be removed.^{38,39,40} These exclusions are rooted in explicit racial discrimination. There is no logical basis to deny protection from harassment to individuals who work on farms or in their employer's home. They are equally if not more vulnerable to harassment. Senate Bills 53 and 503 and House Bills 1027 and 1040 totally eliminate the agricultural exemption but only partially eliminate the domestic worker exemption. They all in some way retain the exemption for workers who reside in the personal residence of the employer or are “casual” employees such as babysitters and employees who provide companionship services to individuals who are unable to care for themselves.” Casual employees and caretakers, including those who live in the employer's home, are equally deserving of protection from sexual harassment. The legislature should totally eliminate the domestic worker exemption.

Expanding Filing deadlines. The PHRA's short 180-day deadline to file a complaint with the Commission is a barrier to protection for some people. Sometimes, a victim wants to try to work the problem out without making trouble for herself before resorting to an external, adversarial

³⁷ Honeybook, *Sexual Harassment is Pervasive Among Self-Employed Creatives* (Jan. 25, 2018), <https://www.honeybook.com/risingtide/sexual-harassment-report/>

³⁸ PHRA 43 P.S. §4(c)(2).

³⁹ Ai-Jen Poo & Monica Ramirez, *Female Domestic and Agricultural Workers Confront an Epidemic of Sexual Harassment*, (May 4, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/female-domestic-and-agricultural-workers-confront>; Ariel Ramchandani, *The Atlantic*, *There's a Sexual-Harassment Epidemic on America's Farms* (Jan. 29, 2018), <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/>.

⁴⁰ Alexia Fernandez Campbell, *Vox.com*, *Housekeepers and nannies have no protection from sexual harassment under federal law*, (Apr. 25, 2018), <https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws>

system for a solution. Some victims are unable to take prompt action due to trauma. Deciding to complain about harassment is a complicated one in which an employee must weigh the risk of retaliation, loss of employment, and the means of supporting a family against the ongoing trauma of harassment. A longer time period to file a complaint under the PHRA will provide the needed time to make this difficult decision. Senate Bill 490 and House Bill 1620 will expand the time for filing with the PHRA to 300 days. We recommend an extension from 180 days to two years to file with the PHRC and extension from one year to 3 years to file a lawsuit in court if the complaint is not resolved at the PHRC.⁴¹

Adopting A Broad Definition of Supervisor: Courts have determined that employers are vicariously liable for harassment by supervisors only when their authority extends to “tangible” employment actions, such as hiring, firing, demoting, etc. This limitation makes it harder to prove discrimination by low-level supervisors who only have authority to direct the employee’s daily work activities. Since this authority still creates power over subordinates, the PHRA should be amended to hold responsible for harassment supervisors who have authority to direct an employee’s daily activities.

Providing for Jury Trials. The choice to take your case to a jury of your peers is an essential part of the legal system. Jury trials have been available in discrimination cases brought under Title VII since 1991. The PHRA allows them for housing discrimination but not for employment discrimination. Because of Title VII’s higher employee threshold, many people do not have the option of filing under Title VII. Amending the PHRA to provide for jury trials for employment discrimination will provide equal access to jury trials. While people may disagree about the pros and cons of a jury trial, many believe that a jury will better relate to the circumstances of a fellow citizen and better appreciate the harm a victim of discrimination experiences in the workplace. The choice should be available to the prospective plaintiff in an employment discrimination claim under the PHRA as it is under federal law and for housing discrimination cases under the PHRA. Senate Bill 490, and House Bill 1620 will allow for jury trials under the PHRA. Senate Bill 638 amends the Whistleblower Law to provide for a jury trial to expand protection for individuals who come forward in the #MeToo movement with their experiences to educate the public.

Allowing Punitive Damages: Although available under federal law, the PHRA does not authorize the award of punitive damages to victims of discrimination in employment. Punitive damages are intended to punish malicious and reckless conduct and deter discrimination. Reintroduction of last session’s House Bill 1620 will allow punitive damages under the PHRA. Such remedies will incentivize employers to prevent sexual harassment and provide greater relief to a complainant. Senate Bill 490 accomplishes this objective.

⁴¹ Maryland extended the statute of limitations for filing with its Commission from 6 months to two years and from one year to three years to file in court, H.B. 679, 2019 Reg. Ses. (Md. 2019); New York extended the time to file with its Division of Human Rights from one to three years. A. 8421, § 13 2019-2020 Reg. Sess. (N.Y. 2019)

Allowing Attorney Fees and Costs: Harassment and discrimination are civil rights issues for which, under federal law, attorneys' fees and costs are awarded to prevailing parties. The statutory right to attorneys' fees and costs from the defendant in a successful sex discrimination case makes it possible for those with few resources to be able to retain lawyers and pursue litigation against their employer. The PHRA, however, only permits courts to award fees and costs; it does not mandate it.⁴² Senate Bill 490 and House Bill 1620 will entitle a prevailing plaintiff to reasonable attorney fees and costs.

Requiring Policies, Procedures, Notices, and Training. Employers are the first person to whom a person who was subjected to sexual harassment may report. They need to understand their obligations to their employees and they must make sure their employees are aware of procedures they can pursue and remedies available to them. Too often employers do not have policies or procedures to address sexual harassment, and provide no education or training. Too often managers lack knowledge of their obligations and the procedures for addressing sexual harassment. When a complaint is made, they may not respond at all, in a timely fashion, or in a satisfactory manner. Senate Bill 498 and House Bills 1040 and 1027 require public and private employers to have fair and transparent procedures and/or fair practice notices, and/or appropriate, interactive, and repeated training for supervisory and non-supervisory employees.

Addressing Non-Disclosure Agreements (NDAs). Workers may face two kinds of mandatory non-disclosure agreements. One is imposed on employees at the time of hire as a condition of employment or continued employment, which prevents workers from talking about unlawful acts at work and could bar the filing of a complaint of sexual harassment. These NDAs should be banned entirely. The second type of NDA arises in a settlement of a legal claim. Such NDAs should be banned only so far as the individual knowingly and voluntarily agrees to the provision and only to the extent of desired non-disclosure. Senate Bill 461 and House Bill 849 (printer's number 2008) accomplish these objectives. Similar provisions could be incorporated into the PHRA process through amendment.

Transparency of Commonwealth Settlements. Misconduct, including sexual misconduct, by Commonwealth employees is important public information. House Bill 1803 makes public access easier by requiring publication of non-confidential information about Commonwealth agency settlements of claims brought against them on PennWATCH.

Strengthening the Whistleblower Law: Individuals who come forward with their experiences to educate the public in the #MeToo movement may need whistleblower protection. Senate Bill 638 and House Bill 379 amend the Whistleblower Law to provide for punitive damages, a jury trial, and an extended time to file a civil action up to two years from 180 days.

⁴² 43 P.S. § 962(c.2).

Pennsylvania General Assembly. The General Assembly has had its share of sexual harassment complaints, including a number of complaints found credible. As an overwhelmingly male environment, this body is among those arenas that are more vulnerable to sexual harassment. Staffers and volunteers and lobbyists are affected. While rules exist, operating rules for each house, ethical conduct rules for each house and four sets of caucus rules and procedures – handbooks – exist – one for each house, each party – they lack detail and clarity, and some are inaccessible to the public,⁴³ even though this is a public body answerable to its constituents. Most importantly, process for complainants is sparse and decisions about complaints are all left to the complete discretion of leadership. Senate Bill 480 and House Bill 1000, on the other hand, provides a single transparent set of procedures for investigations and hearings by an independent office and trained professionals that is transparent, and fair and applies to the General Assembly overall. Legal representation is supported, and hearings are guaranteed if the complaint states a violation, and provide the opportunity for witnesses and pre-hearing discovery, a decision based on the preponderance of the evidence standard, along with judicial review. If a complaint is dismissed, it will only be dismissed after an investigation. The rules provide for counseling, protection against involuntary nondisclosure agreements, confidentiality, workplace adjustments if a complainant requests them, as well as legislative statistical reporting every two years, prevention training, and transparent policies and procedures.

Sexual Misconduct in Schools

Sexual assault in our schools and universities are pervasive. Pennsylvania has adopted some legislation to improve training and reporting of sexual misconduct in schools. We have two primary recommendations:

Sex Education: Young people need to gain an understanding about health and respectful relationships that will guide them throughout their lives and eliminate rape culture. A statewide sex education program, such as the one set forth in House Bill 1586, that is comprehensive and age-appropriate is essential in Pennsylvania.

Policies and procedures for addressing sexual misconduct in schools: With the federal government retreating on enforcement of protections by the federal law Title IX, Pennsylvania needs to do more. We need to adopt rules and procedures for schools to follow when they know or should have known of sexual misconduct by a student or staff person. We need to make sure victims of sexual misconduct can complete their education and that repeat offenders are stopped from reoffending.

⁴³ Shea Rhodes, Pennsylvania General Assembly Sexual Misconduct Policy Recommendations (July 2019), available at <https://cseinstitute.org/wp-content/uploads/2019/08/CSE-Institute-PA-GA-recs.pdf>.

Conclusion

Thank you for the opportunity to present our work and recommendations to you. Our recommendations are concrete fixes that will help reduce rape culture and improve protection for individuals subjected to sexual harassment and assault.