

FEASIBILITY  
TO ASSESS THE POSS  
OPPORTUNITIES  
TO STANDARDISE  
NATIONAL  
LEGISLATION  
VIOLENCE AGAINST  
VIOLENCE AGAINST  
SEXUAL ORIENTATION  
VIOLENCE



Feasibility study to assess the possibilities, opportunities and needs to  
**standardise national legislation  
on violence against women,  
violence against children and  
sexual orientation violence**



European Commission





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## List of abbreviations

<b>AFSJ</b>	Area of freedom, security and justice
<b>AFVT</b>	European Association against Violence towards Women at Work ( <i>Association européenne contre les Violences faites aux Femmes au Travail</i> )
<b>APA</b>	American Psychological Association
<b>AT</b>	Austria
<b>BE</b>	Belgium
<b>BG</b>	Bulgaria
<b>BR</b>	Better regulation
<b>CAHVIO</b>	Ad hoc Committee on preventing and combating violence against women and domestic violence
<b>CAN</b>	Child abuse/neglect
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CJS</b>	Criminal justice system
<b>CoE</b>	Council of Europe
<b>CM</b>	Committee of Ministers
<b>CPS</b>	Crown Prosecution Service (United Kingdom)
<b>CRC</b>	Convention on the Rights of the Child
<b>CSA</b>	Child sexual abuse
<b>CSE</b>	Commercial sexual exploitation
<b>CSEC</b>	Commercial sexual exploitation of children
<b>CST</b>	Child sex tourism
<b>CWASU</b>	Child and Woman Abuse Studies Unit
<b>CY</b>	Cyprus
<b>CZ</b>	Czech Republic
<b>DE</b>	Germany
<b>DGAI</b>	General Directorate of Internal Administration ( <i>Direcção Geral de Administração Interna</i> ) (Portugal)
<b>DH-LGBT</b>	Committee of Experts on discrimination on grounds of sexual orientation and gender identity
<b>DIJuF</b>	German Institute for Youth Human Services and Family Law ( <i>Deutsches Institut für Jugendhilfe und Familienrecht</i> )
<b>DK</b>	Denmark
<b>DV</b>	Domestic violence
<b>EC</b>	European Commission
<b>ECHR</b>	European Convention on Human Rights
<b>ECPAT</b>	Child pornography and the trafficking of children for sexual purposes
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>ECtHR</b>	European Court of Human Rights
<b>EE</b>	Estonia
<b>EL</b>	Greece
<b>EPO</b>	European Protection Order
<b>EPP</b>	European Public Prosecutor
<b>ES</b>	Spain
<b>ESC</b>	European Social Charter
<b>EU</b>	European Union
<b>FD</b>	Framework decision
<b>FGM</b>	Female genital mutilation
<b>FI</b>	Finland
<b>FM</b>	Forced marriage

FR	France
FRA	European Union Agency for Fundamental Rights
GA	General Assembly
GPS	Global positioning system
HALDE	High Authority for Equality and Against Discrimination and for Equality ( <i>Haute Autorité de Lutte contre les Discriminations et pour l'Égalité</i> ) (France)
HBV	Honour-based violence
HEC	Human European consultancy
HU	Hungary
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IE	Ireland
IGO	Intergovernmental organisation
ILGA	International Lesbian and Gay Association
ILGHRC	International Gay and Lesbian Human Rights Commission
Intervict	International Victimology Institute Tilburg
IPV	Intimate partner violence
IT	Italy
JHA	Justice and Home Affairs
LGBT	Lesbian, gay, bisexual, transgender
LT	Lithuania
LU	Luxembourg
LV	Latvia
MS	Member States
MT	Malta
NCEP	National Centre on Early Prevention ( <i>Nationales Zentrum Frühe Hilfen</i> ) (Germany)
NE	National expert
NGO	Non-governmental organisation
NL	The Netherlands
NPA	National plan(s) of action
NR	National report
OAS	Organisation of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OMC	Open method of coordination
OSCE	Organisation for Security and Cooperation in Europe
PL	Poland
<b>(The three) Ps</b>	Prevention, protection, prosecution
PPS	Public prosecution service
PT	Portugal
QMV	Qualified majority voting
RCC	Rape crisis centre
RO	Romania
RRS (questionnaire)	Realising Rights Study (questionnaire)
SARC	Sexual assault referral centre
SAV	Victims' Assistance Service ( <i>Service d'aide aux victimes</i> ) (Luxembourg)
SAVI (study)	Sexual abuse and violence in Ireland (name of a national study conducted in Ireland)
SCAS	Central Social Service of the Head Prosecutor's Office ( <i>Service Central d'Assistance Sociale du Parquet Général</i> ) (Luxembourg)
SE	Sweden
SH	Sexual harassment
SI	Slovenia

<b>SK</b>	Slovakia
<b>SOV</b>	Sexual orientation violence
<b>SPSS</b>	Statistical Package for Social Sciences (Computer program used for statistical analysis, named after the company that developed the program)
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>THB</b>	Trafficking in human beings
<b>TOC</b>	UN Convention on Transnational Organised Crime
<b>UK</b>	United Kingdom
<b>UKHTC</b>	United Kingdom Human Trafficking Centre
<b>UNECE</b>	United Nations Economic Commission for Europe
<b>UNGA</b>	United Nations General Assembly
<b>UNHRC</b>	United Nations Human Rights Council
<b>Unifem</b>	United Nations Development Fund for Women
<b>UniOs</b>	University of Osnabrück
<b>VAC</b>	Violence against children
<b>VAW</b>	Violence against women
<b>VinE</b>	Victims in Europe study
<b>WAVE</b>	Women Against Violence Europe
<b>WHO</b>	World Health Organisation

### The project

Over the last three decades the connections between interpersonal violence, inequalities and human rights have received increasing attention in law, research and practice in the three fields of violence that are subject of this study: violence against women (VAW), violence against children (VAC) and sexual orientation violence (SOV). Human rights thinking has expanded beyond the use of violence by states in recognising that violence targeted at individuals as members of social groups and/or experienced disproportionately by members of disadvantaged groups is a state responsibility. This places the three forms of violence squarely in the arena of fundamental rights.

The failure of states and state agencies to adequately protect the public against, and support them in the aftermath of discriminatory violence and violence resulting in harm to a child's development not only means that victims experience violations of basic human rights, but that they are also deprived of equal access to basic needs as well as to justice, employment, leisure, community and political participation, freedom of movement — the latter all core elements of European concepts of citizenship. Whether in public or private, unchecked violence places fundamental rights in jeopardy.

Definitions of violence vary widely, making the topic challenging and contested: moreover, international treaties and conventions frequently fail to provide specific definitions of the types of actions that should be prohibited or require protection. One outcome of this project is a set of proposed definitions of the forms of violence it addresses.

The central task was to provide a coherent analysis of the need for, possibilities of, and potential hurdles to standardised national legislation across

three fields of violence for EU Member States. To this end the Commission set five research tasks:

- ♦ the mapping of relevant legislation on VAW, VAC and SOV and its implementation;
- ♦ comparative analysis;
- ♦ a set of minimum standards;
- ♦ a model of factors affecting perpetration and how these are, or could be, addressed in legislation;
- ♦ a set of recommendations.

### Mapping and comparative analysis

The original empirical data collection in this study comprised: questionnaires covering legal and policy responses to 13 forms of violence (child physical abuse, child sexual abuse, neglect; sexual exploitation of children; rape; sexual harassment; intimate partner violence; stalking; honour based violence; female genital mutilation; forced marriage; trafficking; and SOV); national reports for each EU Member State; and a follow-up questionnaire completed by the national experts.

The mapping task resulted in a matrix of the presence or absence of legal measures across Member States. The comparative analysis drew on the matrix and the national reports, with thematic reports produced on the forms and fields of violence, focussing on the commonalities and divergences of legal frameworks and their implementation across the Member States as well as on emerging promising practices.

Key findings of the mapping and comparative analysis included the following points.

- ♦ Member States have taken different routes to penalisation including integrated framework laws, specific laws addressing forms of violence, and the specification of contexts as aggravating circumstances within general criminal law.
- ♦ Whilst integrated National Plans of Action (NPA) have been recommended in international

law for some time for VAW and for VAC, existing NPAs rarely fulfil these criteria and even more rarely address the intersections between woman and child abuse.

- ◆ The best interests of the child is a core principle in child protection, with preventive measures being the preferred initial intervention, but the resources and infrastructure to implement this vary considerably across Member States. Thoughtful consideration of the best interests of the child is most likely when specialised courts and institutions deal with child protection.
- ◆ Criminalisation is more common with respect to child sexual abuse (including sexual exploitation), with thresholds for this type of response being less clear and more diverse with respect to physical abuse and neglect.
- ◆ Corporal punishment in institutions is prohibited in all but three Member States; however, there is less consensus with regard to chastisement by parents.
- ◆ Protection orders are now available in most Member States but are often limited by the context of the violence (often the family), status of victims and form of violence, and sometimes, only available in the context of criminal proceedings.
- ◆ Whilst criminalisation of intimate partner violence is broadly accepted, implementation is less consistent within and between Member States.
- ◆ All Member States have laws prohibiting trafficking and sexual exploitation of children, but procedural rules and limited capacity to identify victims limits their effectiveness.
- ◆ A minority of Member States define rape in terms of consent, although many have extended force-based definitions which come closer to a consent standard. Some Member States retain narrow force-based definitions which fail to meet international standards.
- ◆ All Member States have integrated prohibition of sexual harassment into equality and/or labour laws, but this has left lacunae in terms of penalisation of perpetrators and sexual

harassment outside the employment and goods and services contexts.

- ◆ There is a clear trend towards specific laws on stalking, as generic criminal law has proved ineffective in addressing the course of conduct involved.
- ◆ Legal responses on female genital mutilation, forced marriage and honour-based violence are only found in a minority of Member States, and may be disconnected from responses to VAW and/or VAC.
- ◆ Responses to SOV are only emerging, with some Member States finding the ‘hate crime’ route ineffective and others opting for specifying an aggravating circumstance in general criminal law.

An analytic synthesis drawing out overarching themes was the next step and the following overarching issues were identified:

- ◆ A complex and layered picture of legislative responses is evident for several reasons:
  - the diverse legal systems and socio-political histories of Member States in terms of when and how fields of violence are addressed and the specific legal measures;
  - responses to the fields of violence have travelled different trajectories, resulting in different emphasises and preferred forms of intervention;
  - regulation crosses multiple domains of law — criminal, family, civil, social welfare, asylum, immigration, administrative, police, labour and equality law.
- ◆ Significant gaps in legal measures were identified in relation to corporal punishment of children, stalking, female genital mutilation, honour-based violence, forced marriage and SOV.
- ◆ For the forms of violence where prohibitions exist the primary barriers were identified as failures in implementation which included:
  - inadequacies in investigation and prosecution cases leading in general to the



- persistence of high attrition and low conviction rates of many forms of violence;
  - inadequacies in recording and tracking of reported cases, meaning that outcomes cannot be assessed nor can attrition be monitored;
  - deficiencies in knowledge and expertise among key professional groups, including the extent to which these forms of violence contravene fundamental rights;
  - absence of guidelines and protocols for investigation and prosecution;
  - lack of specialisation in police, prosecutors and courts;
  - continued ambivalence about ‘interfering’ in private life;
  - failure of law to address the course of conduct which characterises much discriminatory violence, with the exception of child protection law, stalking laws and some innovative responses to intimate partner violence;
  - absence or limited availability of support services to assist and accompany victims within legal processes, be they civil or criminal, especially marked with respect to sexual violence against adult victims and SOV.
  - ◆ Criminal law is not always the preferred route for intervention: this is most evident with respect to child protection, but has relevance to all fields of violence.
  - ◆ The threshold of harm at which child protection should intervene without the consent of parents or guardians is varied, as are regulations as to which agencies have the competence to take emergency protective measures. Requirements to notify authorities of suspected child maltreatment differ markedly as well.
  - ◆ Protection is not routinely available to all victims for all forms of violence, with a variety of inclusions and exclusions and divergences in terms of the immediacy of actions and the continuity between emergency and medium-term orders.
  - ◆ The implementation of the EU framework decision on victims’ rights in criminal proceedings is incomplete, including the status of victims in proceedings; the extent to which they are able to participate in legal processes is not consistent across Member States.
  - ◆ EU legislation, especially on sexual harassment and trafficking in human beings, produces more convergence in legislation, but require monitoring of their implementation to ensure that rights to protection are realised.
  - ◆ There is a general failure to recognise intersections of discrimination and/or multiple victimisation, with particular consequences for non-EU nationals.
  - ◆ Across the Member States there is a dearth of available high-quality research data.
- A wide range of promising practices were identified. Here we summarise their overall direction, more detailed examples are available in the report.
- ◆ Legislation which regulates and promotes integrated approaches, including inclusive access to protection orders.
  - ◆ Securing and extending the rights of victims both within the legal process and to support services regardless of whether the crime has been reported or not.
  - ◆ Understanding that access to support and assistance is not only a right for victims, but also a vital element in protection and empowerment, which can increase willingness to report and to support a prosecution.
  - ◆ Frameworks and regulations which establish prompt and effective intervention (including the police removal order for IPV, early identification systems for child maltreatment and trafficking, specialisation in investigation, prosecution and courts, and multi-agency co-ordination which places the safety of victims at its heart.
  - ◆ Using state-of-the-art technological innovations to enhance protection of victims.

- ◆ Involvement of NGOs, violence researchers and victim-survivors in the development and monitoring of policy and legal reform, including NPAs.
- ◆ Diverse interventions with actual and potential perpetrators which target different groups.
- ◆ Routine administrative and judicial data collection and tracking of cases in order to monitor implementation of law and policy.
- ◆ Enhancing an evaluation research culture which assesses the intended and unintended consequences of new legislation and approaches.
- ◆ Broad-based primary prevention interventions.

## Minimum standards

The third task in the assignment was to develop a set of minimum standards to realise the highest attainable compliance with existing human rights obligations, in order to provide protection against all forms of VAW, VAC and SOV in the EU, whilst simultaneously exploring which methods of standardisation in EU law-making or policy development would be appropriate and needed in order to implement them.

Based on the tripartite obligations to respect, protect and fulfil human rights, states parties must proactively engage in activities that safeguard the exercise of the rights. These three obligations require different types of legislative and policy actions, depending on the issue at stake, and are often labelled as the three Ps:

- ◆ the obligation to *prosecute* with due diligence;
- ◆ the obligation to *protect* and assist victims;
- ◆ the obligation to *prevent* the violence by addressing the root causes.

Sources drawn on were international and regional, general and specific human and victims' rights instruments, with emphasis placed on legislative and policy developments in Europe especially

the European Charter on Fundamental Rights, the European Social Charter and the European Convention on Human Rights and Fundamental Freedoms. Furthermore, various EU legislative and strategy documents relating specifically to women, children or sexual orientation as well as Council of Europe agreements were used.

The initial compilation of existing standards was collated for the three fields of violence and organised in six sections: legislation, including investigation and prosecution; protective measures; support services; prevention; capacity-building and training; research and statistics. To create a coherent set of standards that addresses the three fields and all forms of violence, a set of revised and additional standards were developed. Together these form the proposed minimum standards for an EU approach to VAW, VAC and SOV. In exploring the feasibility of harmonising the criteria, forms and legal basis were examined, including: the principle of conferral; subsidiarity and proportionality. The impacts of the Lisbon Treaty were explored in detail with respect to the harmonisation of: criminal procedural law; substantive criminal law; civil law; protective measures for crime victims; preventive measures. Attention was also paid to the open method of coordination which offers a more flexible potential to identify the objectives Member States wish to achieve jointly.

## Perpetration model

A rapid but broadly based evidence assessment of current research knowledge concerning the factors or conditions conducive to the perpetration of VAW, VAC and SOV was undertaken, including evaluating the strength of the findings.

The analysis of perpetration factors shares the human rights perspective of the study: a focus on the forms of interpersonal violence that have been

supported by, and tolerated because of structures of unequal power and recognition in society. The research review identified factors that lead specifically to disproportionate violence against women, against LGBT persons and against children. A further criterion was to select factors that might be influenced by policy or policy-based prevention and intervention. Based on the review, a set of higher order factors were developed within which the research findings are located<sup>(1)</sup>. These are theorised on four levels (ontogenetic, micro, meso, macro), with levels here used in a sociological understanding that facilitates addressing violence resulting from structural inequalities of gender, generation and sexual orientation.

An interactive visual model was produced encompassing the four levels and showing the interplay between factors. The model shows the weight of each factor for different forms of violence and the multiple influences of each factor across forms of violence. In addition, path models were developed showing different routes that can lead to one or the other forms of violence. The path models have interactive functions and permit visualising the possible effects of selected interventions.

Against the background of the analysis of perpetration, the national experts were invited in the follow-up questionnaire to assess possible legal measures that might reduce the likelihood of perpetration. One example will illustrate, drawing on the factors **impunity** and **failed sanctions**, how perceptions of fundamental rights are significantly changed when acts of violation, domination and coercion are no longer legally permitted by explicit exceptions in criminal law. As long as the law excludes acts of violence from its purview, this at the very least condones and certainly does not prevent perpetration. The factor ‘impunity’ refers to such traditions as legal definitions of

rape that apply only ‘out of wedlock’, provisions declaring the rape of a girl child forgiven if the rapist subsequently marries her, allowing parents the use of physical force inflicting pain on a child for the purpose of discipline, or the exclusion of assault within intimate relationships from public prosecution. The possible legal measures that could ‘interrupt’ the pathway here include removing all exceptions in criminal law that provide impunity or allow for mitigation in respect of any act or form of VAW, VAC or SOV; and/or eliminating the possibility of referring a complaint on any of these counts to private prosecution, ensuring that prosecution is understood to be in the public interest.

## Conclusions on international minimum standards and EU legal basis

The conclusions and recommendations cover the feasibility of standardisation at EU level and also offer a guide for Member States in the quest to implement basic requirements to fulfil human rights obligations and to prevent VAW, VAC and SOV.

With regard to **harmonisation of legal measures in the field of substantive criminal law** based on consensus that EU Member States do not tolerate violence, the following minimum standards are proposed<sup>(2)</sup>:

- ♦ IPV and stalking: criminalise *as course of conduct* (VAW 4).
- ♦ Rape/sexual violence: establish the absence of consent as the defining element of sexual offences, ensure that all non-consensual sexual acts are criminalised, including abuse of a position of trust or authority (VAW 4).

(2) The standards have been summarised for the purpose of this executive summary. The acronym and number behind each bullet refer to the field of violence/standard number in Annex 2 where the full text can be found.

(1) The review and model are available on a CD as a stand-alone report and interactive visual model.

- ◆ Sexual harassment: develop legal frameworks to penalise harassment, including sexual harassment, in any context (VAW 20).
- ◆ Ensure that all acts of SOV are punishable either through specific laws or definition of aggravating circumstances (SOV 1).
- ◆ Trafficking: exempt victims of trafficking from prosecution for offences committed while under control of, or attempting to escape from the trafficker (VAW 21).
- ◆ Child maltreatment (all forms of abuse/neglect): provide sufficient time to start criminal procedures (statute of limitation starting at the age of majority), the limitation period for compensation being not shorter than that for criminal prosecution (VAC 4).
- ◆ Child sexual abuse:
  - establish a strict liability offence for sexual acts with or involving children below the age of consent (VAC 2).
  - criminalise sexual acts involving children up to the age of 18 when these include misusing a position of trust and/or authority or sexual practices harmful for the child's development such as prostitution, pornography, grooming (VAC 3).

In the field of substantive criminal law, the overall conclusion is that, although the competence of the EU has been recently extended through the Lisbon Treaty, there is still a limited basis for harmonisation. The exhaustive list of crimes that fall within the EU competence to propose approximation of laws does not include most of the crimes discussed here (Article 83 TFEU). Trafficking and child sexual exploitation — crimes which often have a clear cross-border dimension — have a clear legal basis for harmonisation and have been subject of EU regulation.

In the area of **criminal procedural law** the due diligence principle has clear implications for the obligations of states to record, investigate and prosecute cases of discriminatory violence and violence

against vulnerable victims. A key standard calls for the public prosecutor to have competence to initiate prosecution, excluding referral to private prosecution, regardless of whether acts of violence occur within the family or not.

- ◆ States shall record promptly and thoroughly investigating all reports of VAW, SOV or VAC.
- ◆ Where legal systems allow the prosecutor discretion in deciding whether to prosecute, the views of the victim must be taken into account. This shall be accompanied by measures of safety and support to avoid negative consequences of expressing such views.

Furthermore, the right to information, and various procedural rights that ensure adequate participation of the victim in criminal proceedings (VAW 8-11) and the right to compensation (VAW 12) have already been accepted as standards in EU as well as in Council of Europe instruments (SOV 1). Various measures have been developed and proposed as standards to ensure the safety and dignity of the victim during investigation or when giving testimony, and which have application to violence against women (VAW 8, 9, 10, 11), LGBT persons (SOV 1) and victims of child maltreatment (VAC 23-32). These measures:

- ◆ do not require victims to confront the perpetrator, nor require victim and perpetrator to attend mediation or conciliation procedures as an alternative to prosecution, the right of the accused to question the victim directly in court shall be suspended and limited to questioning through a legal representative (VAW 11);
- ◆ ensure that criminal investigations do not degrade women or LGBT persons who have been subjected to violence (VAW 7, SOV 1) and minimise intrusion, while maintaining standards for the collection of best evidence (VAW 9);
- ◆ minimise possible harm to a child victim or witness by ensuring that interviews be carried out by professionals trained for this purpose (VAC 30);
- ◆ make examination by a female forensic officer available to every victim of physical or sexual

violence free of charge irrespective of criminal proceedings, the results not to be released without consent of the victim (VAW 7);

- ♦ establish and implement rules on admissibility of evidence to protect the dignity and privacy of victims in cases of rape or sexual violence (VAW 8);
- ♦ ensure that in cases with a vulnerable victim or witness videotaped interviews may be used as evidence in criminal court proceedings (VAC 30);
- ♦ ensure separate, fit for purpose waiting rooms so that victims and accused can enter and leave courts through different routes (VAC 30);
- ♦ ensure that a child victim is provided with a special representative, exclusive to the child and duty-bound to represent and act only in accordance with the interests of the child victim, from the outset of an investigation (VAC 26).

Proposals to improve investigation and prosecution through criminal procedural law find their legal basis in Article 82 TFEU. The rights of crime victims are explicitly listed as one of the areas where measures may be proposed. Still, at first sight, the procedural limitations in this article restrict the proposed standardisation in the list of minimum standards.

With respect to **protection**, the proposed minimum standards regarding the content of *protection orders*, invoked through either criminal or civil law, find no legal basis in EU law that would allow prescribing the *content* of a protection order across Member States. The proposed European Protection Order (January 2010) finds its legal basis in Article 82(1)(d) and is based on the principle of mutual recognition of judicial decisions taken in one of the Member States.

The minimum standards containing protective measures embedded in migration law find their basis in Article 79(1) and (2). Owing to the cross-border dimension often involved in most trafficking in human beings (THB), a directive providing

for a temporary residence permit for victims of THB who cooperate with the authorities was issued. Although the competence is based in migration, this temporary residence permit should include medical assistance and a reflection period. Extension of these rights to other forms of crime also seems legally feasible, but only in relation to third-country nationals, and should not be tied to cooperation with authorities but to the breaching of fundamental rights.

In the field of VAW several international instruments call upon states to establish a range of **support services** for victims. In light of the high risk of serious injury and of lethality, adequate emergency support services are crucial to effectively protecting the right to life and health. In the field of VAC, Member States are called upon to take all appropriate measures to promote the recovery and social integration of children who have been abused and take all necessary actions to assist and support child victims. Advice and information services (telephone, Internet) are particularly emphasised. With regard to SOV dedicated support services would be needed. The study findings make it clear that, currently, services are not sufficient in capacity, geographical distribution, and quality.

The area of support services for victims in general, regardless of whether or not they are engaged in criminal proceedings, is a primary competence of the Member States (Article 168(7) TFEU) and has no legal basis for harmonising legislation across the Member States. However, Article 13 of the EU framework decision on the standing of victims in criminal proceedings urges the Member States to promote the involvement of victim support systems both for the initial reception of victims and for support and assistance thereafter. When revising this framework decision, the relevant proposed standards should be taken into account.

It is difficult to identify a legal basis for EU-wide **prevention** actions. Prohibition of all corporal



punishment and corresponding education of the public is regarded as a key preventive measure of VAC. It could be argued that activities in education and provision of information fall within *general health education*. As such EU measures could be based on Article 168(1) TFEU, but even here there is a complementary competence between the EU and the Member States.

Combating discrimination is a basic preventive measure which relates to recognising the discriminatory roots of violence, especially VAW and SOV. Article 8 TFEU in combination with Article 19 TFEU could provide for a basis to adopt acts to eliminate inequalities and to promote equality between women and men taking into consideration, though, the prohibition of harmonisation as described in Article 19(2) TFEU.

In general there is no legal basis in EU law to harmonise legislative measures in the realm of **capacity building and training**. Article 14 of the Council framework decision on the standing of victims does provide that each Member State shall encourage initiatives enabling personnel involved in criminal proceedings or otherwise in contact with victims to receive suitable training with particular reference to the needs of the most vulnerable groups, and particularly applying to police officers and legal practitioners. Beyond this, Article 82(1)(c) TFEU might be relevant, but only to the extent that training is required in the context of judicial cooperation in criminal matters; the scope of training and capacity building that the proposed minimum standard calls for extends beyond that.

There is no legal basis in EU law to standardise efforts to develop **research or for the collection of administrative data**, although EU institutions such as Eurostat can require the Member States to collect statistics. The results of this study indicate that Member States differ widely in the quality and consistency with which they collect reliable prevalence data in the three fields of violence; this is an

obstacle to developing a comparable knowledge base. There is a growing need among Member States to exchange and compare data. Support on an EU level to develop a stronger research culture in these fields seems crucial.

## Analysis of the feasibility of harmonisation

The above analysis of the extent to which there is a basis in EU law to harmonise minimum standards in the fields of VAW, VAC and SOV, reveals a mixed picture. There is no clear-cut answer as to the feasibility of standardisation due to the diversity of the legal areas in which the range of proposed measures could be embedded. Several of the measures that are implied in the standards clearly go beyond the legal competence of the EU.

Given the scope and content of the challenges that Member States face when developing a coherent and integrated approach on a national level, let alone from a European perspective, legislation is not necessarily the first or the most appropriate strategy. Legislation inevitably brings about a certain level of fixity in definitions and procedures. In areas like VAW, VAC and SOV, where many innovations take place, and several approaches and interventions are still experimental, policy-based initiatives to support and encourage convergence could be a more productive option towards achieving further consistency across Member States. The overarching conclusions to the study offer a 'roadmap' towards more coherent and consistent responses within the EU.

## Overarching conclusions and recommendations

The challenge presented to this study was whether there is a sufficient foundation for the EU to develop a coherent policy to address VAW, VAC

and SOV. Based on a synthesis of empirical findings alongside an analysis of the principles that have been established in international law, it was concluded that such an overall policy is possible, timely, and promising. It can be framed so as to be compatible with the diversity of legal systems, institutional structures and sociocultural traditions across Europe.

The final step of the comparative study considered how far the proposed minimum standards converge across fields and forms of violence. It emerged that most of the standards can be synthesised and provide elements for an overarching policy framework. The conclusions rest on this integrated approach, and are accompanied by a series of more specific recommendations.

The main recommendations can be summarised as follows.

1. A coherent policy approach on the EU level is a promising way to ensure that overcoming discriminatory violence is a priority for national equality and human rights bodies, and that protection of children from violence is a core issue in strategies to establish children's rights. It can be a basis as well as guidance for the Member States to develop integrated National Plans of Action (NPAs).
2. Criminal laws address violence in principle, but barriers hamper effective and consistent implementation, resulting in lack of access to equal redress and protection. There are a number of possibilities for more effective implementation of existing international standards in the Member States. Where there is a legal basis for EU action, the EU can encourage inclusion and implementation of such standards. Where there is no legal basis an EU approach can be to encourage more unified action by Member States.
3. In the process of revising the framework decision on the standing of victims in criminal proceedings into a directive the EU may further elaborate Article 2.2, which notes that 'Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.' This will build a stronger framework for special measures for women, children and LGBT persons.
4. Facilitation by the EU is needed to expand the exchange of information on good practices. Member States can then benefit from each others' innovations and experience in developing coordinated interagency structures and have access to state of the art research findings. EU support programmes can encourage the wider use of such approaches for all forms of VAW, VAC and SOV, and enhance and ensure effectiveness and efficiency.
5. Member States need to provide stable funding and establish quality standards for sufficiently specialised services that can reach all victims of VAW, VAC and SOV. Fit for purpose services should include independently run shelters, helplines, outreach, counselling, therapy, advocacy, rape crisis centres and sexual assault referral centres, and both shelter and short-term fostering for children.
6. The EU can reinforce convergence across the Member States in immediate protection measures by promoting exchange of experience and good practices among Member States in this area, particularly with regard to avoiding gaps in protection.
7. When regulating the mutual recognition of both judicial and non-judicial protection orders, the EU can make specific mention of measures to prevent crimes and discriminatory violence from occurring or being repeated. Alongside measures imposed by authorities, civil protection orders issued *ex parte* have proven a critically important tool in stopping violence, to ensure the safety of a victim until it is possible to hold a full hearing.
8. There is widespread acceptance across Member States of the need for specialised child protection services. However, they are currently

uneven in their availability and ability to offer differentiated interventions. Preventing VAC can best be assured by Member States through a network of child protection agencies with the duty and power of protective intervention with sufficient and qualified staff, and with the resources to provide family assistance.

9. Recognition in the Member States of the importance of intervening with perpetrators is growing. Still, intervention programmes need to be more widely available and also integrated into criminal justice or community responses. Investment in a differentiated range of programmes has considerable potential for prevention.
10. The necessity of comparable data across the EU and at national level to benchmark and monitor progress and assess the effectiveness of interventions is widely recognised. The EU can initiate a consultation of national statistics offices to recommend minimum standards for data collection and monitoring the implementation of measures as well as NPAs. The engagement of Eurostat can support such a development.
11. Training professionals is essential to ensure implementation of legal frameworks. With regard to qualification for specialist roles, certification can be used to good effect. In view of the key decisions made in the court system, Member States can set standards and bindingly provide specific qualification for judges and for prosecutors regarding VAW, VAC and SOV and provide the necessary training to obtain these qualifications.
12. There is a growing, but uneven, European knowledge base, especially on VAW. In developing the European research area, the EU can recognise combating VAW, VAC and SOV as a key societal and economic challenge for Europe, and in consequence set a priority within its funding framework on building a policy relevant knowledge base.
13. Primary and long term prevention remains underdeveloped in Member States and in

EU approaches. It must be a strong pillar in national action plans, linked to equality and human rights programmes. Prohibiting corporal punishment, building awareness about the rights of young women, teaching respectful relationships, and support during transition to parenthood can be key elements of prevention.

14. By defining VAW, VAC and SOV as violations of universally adopted fundamental rights in all policy documents, the EU will set a basic standard, providing Member States with a common platform on which to move forward.

## Summing up

For much of the project, the three fields of violence were addressed separately, and data collection and analysis followed this pattern. As analysis of the data and information proceeded, the divergences in approaches and trajectories of responses of Member States emerged as strong themes. Once the focus shifted during the research from the particularities of the forms and fields of violence, and the actions of individual Member States and onto factors involved in perpetration and comparative analysis, higher order connections and similarities emerged.

The project started from a human rights based approach for each of the three fields of violence. The result of this project is an integrated approach encompassing the three fields of violence; this was one of the important outcomes of working across the three fields and the international standards.

Choosing such an integrated human rights based approach offers much in terms of understanding the common roots of discriminatory violence and violence based on lack of access to fundamental rights, the similar needs of victims, and what needs to be in place in order for states to be able to claim with justification that they are acting with due diligence to protect, prosecute and prevent.



# Chapter 1 — Introduction and methodological approach

## 1.1 Aims and objectives of the study — the research team

The parameters for this study on violence against women (VAW), violence against children (VAC) and sexual orientation violence (SOV) were set by the EU Commission, following a motion by the European Parliament.

The central aim was to provide a coherent analysis of the need for possibilities of and potential hurdles to standardised national legislation across three fields of violence: VAW, VAC and SOV. Within this, the research was to identify which EU instruments could be employed towards the harmonisation of the laws.

The Commission set five research tasks which were to form the empirical keystones of the study and are simultaneously the outcomes of the project. These were:

- ◆ the mapping of relevant legislation on VAW, VAC and SOV and its implementation across Member States;
- ◆ a comparative analysis of relevant legislation and implementation;
- ◆ to produce a set of minimum standards or essential elements of legislation which aim to provide full protection against VAW, VAC and SOV;
- ◆ the creation of a model encompassing all known factors affecting the perpetration of the different forms of violence and how these are, or could be, addressed in legislation;
- ◆ the development of recommendations whereby EU legislation may help to bridge gaps and resolve inconsistencies in legislation in Member States.

The output is this final report, including recommendations on possibilities, needs and potentials alongside challenges and obstacles for standardisation across the EU.

The tender requires mapping legislation in three fields: VAW, VAC and SOV. On an empirical level

the arena is far more diverse and we need to distinguish domestic violence and/or intimate partner violence (encompassing physical, sexual and psychological force or harm); stalking; rape and sexual assault; sexual harassment; trafficking for sexual exploitation; child physical abuse; child neglect; child sexual abuse; child sexual exploitation; forced marriage (FM); honour-based violence (HBV); female genital mutilation (FGM); and SOV.

The short timetable of nine months from award to completion made this an extremely challenging task. The methodology (see the next section) developed by the research team sought to maximise routes by which the accuracy of data, and their interpretation, was subjected to multiple internal and external validity checks.

A consortium headed by human european consultancy (HEC) undertook the study linking three research hubs with their teams of experts, 27 national legal experts (one in each Member State).

The three research hubs (the Child and Woman Abuse Studies Unit (CWASU), London Metropolitan University; the International Victimology Institute (Intervict), University of Tilburg; and the University of Osnabrück) were each headed by a professor, each of whom had a track record in policy-relevant research, including with the European Union (EU), the United Nations (UN) and the Council of Europe (CoE). The research hubs built teams of researchers to undertake the project, with the *Deutsches Institut für Jugendhilfe und Familienrecht (DIJuF)* (German Institute for Youth Human Services and Family Law) joining to provide additional expertise on child maltreatment.

## 1.2 Why interpersonal violence is a matter of fundamental rights

Over the last three decades the connections between interpersonal violence, inequalities and

human rights have received increasing attention in law, research and practice. Human rights thinking has expanded beyond the use of violence by states in recognising discriminatory violence by individuals when it is targeted at, or experienced disproportionately by, members of disadvantaged or vulnerable social groups. These ideas were firstly and perhaps most clearly articulated with respect to violence against women (VAW) and adopted through various UN mechanisms, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). They were subsequently applied to children through the Convention on the Rights of the Child (CRC), here with the addition of state responsibility to ensure the conditions which are conducive to children's health and development, and later work on commercial sexual exploitation of children (CSEC). Inequalities in gender and generation (often intersecting) have, therefore, been accepted as the underlying causes of victimisation which, in turn, constitute human rights violations, placing the issues squarely in the arena of fundamental rights. The issue of sexual orientation violence (SOV) is a more recent entrant into the discourse on interpersonal violence, following the recognition of sexuality and sexual orientation as axes of privilege and marginalisation in equality and labour law.

Across Europe prevalence studies show that one in two women experience at least one form of the continuum of VAW in their lifetime<sup>(3)</sup> and all European institutions concur with the statement in the EU roadmap for equality between women and men that VAW 'is a breach of the fundamental rights to life, safety, freedom, dignity and physical and emotional integrity'.

(3) Johnson, H., Ollus, N., Nevala, S., 2008, *Violence against women: an international perspective*, New York, Springer; see also WAVE, 2008, *Country report 2008: A Right for Protection and Support?* (<http://www.wave-network.org/start.asp?ID=23087&b=15>).

Whilst European prevalence research evidence on violence against children (VAC) is not as strong, the UN Secretary-General's *World report on violence against children* reveals that violence is widespread and constitutes serious violations of children's rights<sup>(4)</sup>. The evidence base on SOV, whilst weak, shows that a high proportion of lesbian, gay, bisexual and transgender (LGBT) persons suffer harassment and assault across a range of settings. Variations in methodology of prevalence studies and in the compilation of official statistics make comparison of data among Member States potentially misleading; in the case of VAW the forthcoming European prevalence study being commissioned by FRA promises improvement.

VAW, VAC and SOV all comprise continuums of violence and abuse ranging from harassment/psychological abuse through to, at the extreme end, murder. Whilst the latter is most often the focus of public debate and concern, less lethal forms of violence are far more commonplace. Other important connections include:

- ◆ each field of violence includes physical, sexual and psychological abuse;
- ◆ whilst the pattern is not the same for all forms of violence, perpetrators are often known to victims and abuse takes place in locations of familiarity — the family, intimate relations, workplaces and institutions;
- ◆ many cases are not single incidents, but courses of conduct, taking place over time;
- ◆ the experience of being unsafe can thus become a life context;
- ◆ to be a victim still carries the stigma of shame, which can act as a barrier to seeking help/reporting;
- ◆ historically, many of the forms of violence were not recognised at all and those that were, were seldom treated as serious crimes, but rather relegated to the realm of the private.

(4) Pinheiro, P., 2006, *The world Report on Violence Against Children*, Geneva, UN.

The failure of states and state agencies to adequately protect the public against, and support them in the aftermath of, discriminatory violence or violence resulting in harm to a child's development not only means that victims experience violations of basic human rights but that they are also deprived of equal access to basic needs as well as to justice, employment, leisure, community and political participation and freedom of movement — all fundamental to European concepts of citizenship. Whether in public or private, unchecked discriminatory violence places fundamental rights in jeopardy. VAW and VAC have been recognised as both cause and consequence of unequal social positions, and the same can be argued for SOV. This places specific obligations on states.

European countries have a rich and diverse history of responding to VAW<sup>(5)</sup>, and a longer but varying history of regulating VAC, with many long-standing and internationally recognised non-governmental organisations (NGOs) and experts, innovations in legal responses and provision of support services.

Responses to SOV can only be said to be emergent. However, progress has not been consistent and a range of approaches are evident. In all three fields, initiatives on the European level have moved towards a more unified approach (for more detail see Chapter 4). Implementation of the Council of Europe Recommendation (2002)<sup>5</sup> on VAW has been monitored to show an increasing policy convergence across Europe, while also revealing persisting variation in legal systems, procedural traditions and institutional cultures<sup>(6)</sup>.

(5) See for a recent overview of attitudes across the EU regarding domestic violence and its regulation: EUROBAROMETER 344/Wave 73.2 (2010). *Domestic violence against Women*, Brussels: TNS Opinion & Social. (Survey at the request of the Directorate-General for Justice, Freedom and Security of the European Commission).

(6) Most recently see Hagemann-White, C., *Protecting women against violence*. Analytical study on the third round of monitoring implementation of Recommendation (2002)<sup>5</sup> on the protection of women against violence in the Council of Europe Strasbourg, 2010.

The European Parliament stated in a resolution in 2006 (INI/2004/2220) that efforts should be increased to ensure better protection and support for women<sup>(7)</sup>.

The European Commission has proposed an active strategy to promote the rights of the child, and has made strong moves to include sexual orientation within equality measures. Similarly, the Council of Europe has developed guidelines for integrated strategies to prevent VAC, has begun reviewing national policies to identify promising practices and passed a recent Recommendation CM/Rec(2010)<sup>5</sup> on discrimination against lesbian, gay, bisexual and transgender (LGBT) people that recognises SOV.

Taking stock of what has been achieved on the national level with a view towards assessing the potential for EU-level standardisation raises a number of questions. What should the balance be between criminal law and other domains of law which offer the possibility of immediate protection and/or longer-term support to deal with the legacies of abuse? What legal frameworks or policies have the potential to reduce the prevalence/prevent the perpetration of violence? What are the benefits of specific laws on forms of violence? What are the benefits of consolidation, which brings together and updates existing law? What are the advantages of drawing on generic criminal law provisions, whilst making certain contexts — often relations of familiarity (family, partnership, professional relationships) — aggravating circumstances? Variations along all these dimensions can be found across Europe, between and within the three fields of violence.

(7) The recent developments in the Council of Europe to develop a convention on violence against women (currently the work of the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO)) is further evidence of the desire to create coherent and consistent responses which ensure that women across Europe have equivalent rights and access to legal remedies.

### 1.3 International legal standards and obligations of Member States

Any standardisation of legislation on VAW, VAC and SOV must take place against the backdrop of existing international human rights legal standards which the Member States have ratified, as well as legal standards, recommendations and policy initiatives developed through the Council of Europe. Three core obligations — often referred to as the three Ps — have been distilled from the core human rights treaties, all of which have been further elaborated on in reports by UN Special Rapporteurs<sup>(8)</sup>. They are obligations to:

- ♦ prosecute with due diligence (including criminalisation of identified forms of violence);
- ♦ protect and assist victims;
- ♦ prevent violence by addressing the underlying causes<sup>(9)</sup>.

**‘Prosecute with due diligence’** requires more than criminalising violent acts, since due diligence necessitates both adequate investigation and prosecution processes and effective protection of women by the police (see Opuz ruling<sup>(10)</sup> from the European Court of Human Rights (ECtHR) which elaborates on ‘due diligence’ obligations).

**‘Protect and assist’** requires exploring the connections between human rights and victims’ rights. Even though victims of crime have not been granted explicit victims’ rights in the leading international human rights instruments, these can be inferred through general human rights, in particular the right to privacy, the right to be heard or to complain

(8) See the *Report of the Secretary-General’s in-depth study on all forms of violence against women*, United Nations General Assembly, Sixty-first session, A/61/122/Add.1 (<http://daccessdds.un.org/doc/UNDOC/GEN/No6/419/74/PDF/No641974.pdf?OpenElement>).

(9) Sometimes, a fourth P is included: ‘provision’, meaning adequate resources in advocacy, advice, support and counselling.

(10) *Opuz v. Turkey*, Application No 33401/02, Council of Europe, European Court of Human Rights, 9 June 2009.

and the right to an effective remedy<sup>(11)</sup>, accompanied for children by the right to a (safe) family life. In this regard, regional human rights courts have underlined that impunity for serious crimes may violate human rights and that victims can be considered to have a right to effective investigations<sup>(12)</sup>.

The longer-term right to assistance beyond the legal process was recently elaborated by the UN Special Rapporteur on VAW in her report to the Human Rights Council on reparation<sup>(13)</sup> and there are strong arguments that this should encompass economic and social assistance. In addition, there are *specific victims’ rights instruments*: the first adopted in 1985 by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>(14)</sup>. Within the EU, the 2001 framework decision on the standing of victims in criminal proceedings regulates the uniform treatment of victims in the Member States. Also the CoE recommendations contain paragraphs on victims’ rights with respect to criminal proceedings as well as provisions for victim support in general.

(11) On human rights law in relation to victims, see for example Aldana-Pindell, R., ‘An emerging universality of justiciable victims’ rights in the criminal process to curtail impunity for state-sponsored crimes’, in *Human rights quarterly*, 26, No 3, 2004, pp. 605 ff. and Seibert-Fohr, A., *Prosecuting serious human rights violations*, Oxford: Oxford University Press, (2009), pp. 62–64, pp. 122–123 and pp. 138–139.

(12) e.g. Inter-American Court of Human Rights, *Blake v. Guatemala*, Judgment of 24 January 1998, paragraph 97.

(13) See, for example, the UN Special Rapporteur on VAW, Rashida Manjoo, 2010, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* A/HRC/14/22, 19 April 2010. ‘The obligation to provide adequate reparations involves ensuring the rights of women to access both criminal and civil remedies and the establishment of effective protection, support and rehabilitation services for survivors of violence. The notion of reparation may also include elements of restorative justice and the need to address the pre-existing inequalities, injustices, prejudices and biases or other societal perceptions and practices that enabled violations to occur, including discrimination against women and girls.’

(14) See UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Resolution 40/34, 1985.

Whilst a minimal reading of ‘**prevention**’ could be limited to interventions that interrupt repeat victimisation, i.e. further incidents of violence and/or having rights violated within the legal process, it is clear from both CEDAW and the CRC that this should be read in a more fundamental way: that states should address the underlying causes of discriminatory violence. In this respect our approach gives attention to those factors which are highlighted in research on perpetration (see Chapter 5).

Bearing the above in mind, and in light of the tasks set for this project (see next section), alongside the challenges of collecting comparable data across 27 Member States, an overarching framework for data collection rooted in a human rights approach was developed, which parallels the three Ps:

- ◆ legislation and policy — existence and substantive content of law and/or binding policy in the three fields of violence;
- ◆ implementation — procedural law, legal infrastructure, policy guidelines;
- ◆ protection and provision — victim support and protection provisions, either legally or policy based;
- ◆ prevention — national-level activities including awareness-raising campaigns and education.

This framework includes recognition that efforts to address VAW, VAC and SOV will have the fullest and most effective impacts when they are woven together with equality policies which seek to end discrimination in all fields of social, political, economic and personal life.

## 1.4 Conceptual and methodological approach

The diversity of approaches to legislation — both globally and within Europe — demonstrates that there is no simple linear track from treaty

obligations to legal measures. We understand legislation as both setting standards and being a tool to guide social action: in the complex field of interpersonal violence it can only be ‘fit for purpose’ if it is part of a more comprehensive strategy which engages with the specific institutional cultures of each country. In other words, progress in overcoming violence must work with diversity in Europe. It is relatively simple to formulate normative legal standards, but assessing the feasibility of specific legal instruments across Europe is a much more complex challenge and one which this project has sought to address as comprehensively as possible.

### 1.4.1 Defining violence in the three fields

International treaties and conventions frequently fail to provide specific definitions of the types of actions that should be prohibited or require protection, because their aim is to set an overarching framework of principles that can be applied in a variety of legal systems, policy frameworks and political and social circumstances. Social and research-based concepts of violence, necessary from a transnational and comparative perspective, may depart — and at times markedly — from the definitions of behaviours legally regulated by states. On the level of experience there are even more variations, with behaviours that are never, in themselves, criminal offences becoming abusive within a coercive context. For example, a look or a word can convey a threat or a warning when located within a history of ongoing abuse within which a victim has learnt to read the minutiae of a perpetrator’s moods and actions.

On the one hand, this project required working research definitions to ensure comparability of data whilst, on the other hand, it needed to investigate in an open-ended way whether and how forms of violence are the subject of legislation, what is considered an offence or a harmful act and how these are



defined in the relevant legal frameworks. In seeking working definitions we drew on current international legal sources but it became clear that not only do these only exist for certain forms of violence, but also that some which have been widely used fail to reflect the current research evidence base and/or are poorly suited to legislation or policy measures. The working research definitions used are available in Annex 4a (with explanations in Annex 4b) and, in the concluding chapter we present a proposed glossary which includes both internationally recognised definitions and our proposals, based on the study findings, for new/improved definitions for certain forms of violence.

As a research team, we have had to make decisions about which overarching concepts were to be used in the study. ‘Gender-based violence’ was developed to clarify not just the disproportionality of women’s victimisation, but also that it is rooted in gender inequality. Here, however, we encounter profound difficulties with language and meaning, since the word ‘gender’ does not have an equivalent in all European languages, making its inclusion in national legislation inherently problematic. We, like the UN, have, therefore returned to the earlier concept of violence against women (VAW), understood as: ‘*Violence directed at a woman because she is a woman or violence that affects women disproportionately*’<sup>(15)</sup>.

Similarly, ‘child abuse’ may not exist as a legal concept, or the term may be defined in criminal law only with reference to sexual abuse, while the legal obligations to ensure good care of children and keep them safe from harm may be formulated only in positive terms. Legal frameworks, for example in national social welfare law, defining the obligation of statutory agencies to intervene for child protection, may use a term such as ‘child abuse’ in a way that gives it a quasi-legal status. The UN uses

the overarching concept of ‘child maltreatment’ to avoid some of the dangers of incompatible definitions and we follow that convention. This concept does not cover every form of violence children experience, but is restricted to that which exploits the position and vulnerability of children. We do not, therefore, cover bullying/school violence or other forms of violence between peers<sup>(16)</sup>.

The issue of SOV is relatively recent in terms of recognition, and there are a series of definitional/conceptual issues at stake, both in terms of how to name this form of violence and where it ‘sits’ within legal frameworks. This determines who/which groups are to be protected and how the roots of violence are understood and therefore framed in law and policy. The distinctions, overlaps and intersections between sex, gender and sexuality are the central problematic here, with contested and incompatible usages abounding in academia, law and policy. This lack of conceptual clarity includes slippages between identity and orientation, sexuality, and confusions between transexuality and transgender, with the former sometimes included under gender provisions and the latter under sexuality.

We have made a pragmatic, although not entirely satisfactory, decision to use ‘sexual orientation violence’ (SOV), since sexual orientation is the concept which has been most frequently incorporated into law within Member States. We state unequivocally here, however, that violence towards transgender people must be recognised in law and included within understandings of SOV or, where applicable, gender-based violence.

Throughout this report the term ‘fields of violence’ is used to cover the three arenas of interpersonal violence — VAW, VAC and SOV — and ‘forms of violence’ indicates the more specific ways in which

(15) *UN Special Rapporteur Study on violence against women*, 2006, pp. 15–16.

(16) Whilst this violence may connect to other forms of inequality, such as gender, race or disability, these intersections are outside the parameters of this study.

violence is enacted, such as trafficking, child neglect or intimate partner violence (IPV).

We use the concept ‘promising’ rather than ‘good’ or ‘best’ practice, since what works well in one jurisdiction may not be feasible in others. The concept of ‘best practice’ implies that there is nothing left to learn from different approaches. One of the aims of the study is to assess which practices would be both feasible and effective across a range of different legal and institutional systems, thus ‘promising’ is the more appropriate terminology.

#### 1.4.2 The challenge of comparative analysis

Systematic comparative research on developments in EU legislation on violence is very limited<sup>(17)</sup>, whilst most academic research on the implementation of law focuses on the national situation, with the comparative element often limited to contextualising information<sup>(18)</sup>. Furthermore, assessment of implementation is crucial if we are to understand how law on the books translates into law in practice and whether it succeeds in providing *de facto* access to justice.

There are two layers of implementation at issue: whether states have incorporated international norms into ‘domestic law through legislation, judicial decision, executive decree, or other

processes’<sup>(19)</sup>, and whether the laws are actually implemented so that they deliver the intended protection — this is sometimes referred to in international legal theory as compliance. A systematic investigation of compliance goes beyond the scope of this project, although we have endeavoured to collect official statistics on the extent to which laws are used and their outcomes and findings from evaluations and on aspects of provision and prevention. As later sections note, however, considerable barriers were encountered both in access to and comparability of data.

Each of the forms of violence has specific characteristics and enabling context variables and they are not addressed through the same legal frameworks. Some are primarily seen as issues for criminal law, others may be addressed in the first instance by civil law, or specifically by family law, and others still are dealt with through social welfare or in labour law. This meant that data had to be collected on legal responses to each form of violence separately and across multiple domains of law. Chapter 2 presents the outcomes of this research task.

#### 1.4.3 Multiple and diverse causal factors

One of the tasks of this project, in line with the state’s obligation to prevent violence, requires examining the literature on perpetration: the causal factors that underpin the three fields of violence and the extent that these have been, or could be, addressed through legal measures. Between and within the three fields of violence there appear to be differences in the nature and underlying dynamics that influence its emergence: these include the intimacy (or not) of the relationship between

(17) Krizsán, A., Bustelo, M., Hadjiyanni, A. and Kamoutis, F., 2007, ‘Domestic violence: a public matter’, Verloo, M. (ed.), *Multiple meanings of gender equality. A critical frame analysis of gender policies in Europe*, pp. 141–184, Budapest/New York, Central European University Press; Kantola, J., 2006, *Feminists Theorise the State*, Basingstoke, Palgrave Macmillan.

(18) Römkens, R., Lünemann, K., 2008, ‘Getting behind closed doors. New developments in legislation to prevent domestic violence’ in *International journal of comparative and applied criminal justice*. 32, 2, pp. 173–194.

(19) Shelton, D., ‘Introduction, law, non-law and the problem of ‘soft law’’, Shelton, D. (ed.), *Commitment and compliance, the role of non-binding norms in the international legal system*, Oxford, Oxford University Press, 2000, pp. 1–18, p. 5.

perpetrator and victim; private or (semi-)public context; individual or organised perpetration.

Research on the causes and factors influencing perpetration is currently fragmented, frequently addressing only one or two types of violence or victims. Much of the research on perpetrators of VAW is based on selective, non-representative samples, without a control group (participants in treatment programmes, or convicted perpetrators). There is a large body of empirical research on the perpetration of VAW, but it is focused overwhelmingly on violence within the family. A few studies but no systematic data are available on perpetrators of SOV. For VAW, profiles of victims and some information on perpetrators can be drawn from national prevalence studies, which have been carried out in almost all EU countries in recent years. However, only a few of these (e.g., DE, IE, NL, UK) have been able to undertake multivariate statistical analysis and identify risk factors and levels of severity.

Evaluation research of perpetrator programmes<sup>(20)</sup> provides insights as well. Other forms of violence point to very different ‘conducive contexts’<sup>(21)</sup>; trafficking is influenced by the presence of a market with economic interests and perpetration may involve possibly different motives for the sellers and the buyers. Overall, there is much less research on the factors that increase (or decrease) probability of perpetrating non-family violence.

The methodology and results for this part of the study are addressed in more detail in Chapter 5.

(20) See Gondolf, E.W., 2002, *Batterer interventions systems. Issues, outcomes and recommendations*, Thousand Oaks, Sage Publications.

(21) Kelly, L., 2006, ‘A conducive context: Trafficking of persons in Central Asia’, Lee, M. (ed), *Human trafficking*, London, Willan Publishing.

## 1.5 Methodology

### 1.5.1 Organisation of the research

This section details how the study was conducted and which data were used for each research task, as well as noting limitations to the quantitative and qualitative information collected. The study was able to draw on an existing data set from a Daphne-funded project ‘Realising Rights’ for all areas except SOV; however, a number of additional research questions were essential for the current study. Table 1.1 summarises the data and information sources developed to address all the research tasks, with the questionnaire, national reports, thematic reports, comparative analysis and minimum standards which are also covered in detail in this section. The methods were constructed to be as efficient as possible, with many serving multiple purposes and feeding into more than one of the tasks.

### 1.5.2 Task 1 — Mapping: questionnaire, national reports and follow-up questionnaire

Task 1 was undertaken in six stages, in order to achieve an optimal fit between the Realising Rights data collection and this project: upgrading the Realising Rights Study (RRS) questionnaire data; analytic national reports; follow-up questionnaire; data entry into SPSS; thematic reports on forms of violence; and producing the matrix which is included in Annex 1. Whilst the matrix cannot claim to be accurate in every detail, it has been subject to triangulation across data sources and intense scrutiny through several analytic processes.

#### *Building on existing data*

The RRS project produced a detailed questionnaire covering VAW and VAC. Data collection involved



**Table 1.1: Data sources and study tasks**

Study task	Data and information sources
1. Mapping and analysis of legislation and implementation on VAW, VAC and SOV	Questionnaire on VAW and VAC SOV questionnaire National reports Questionnaire, data analysis and production of the matrix Follow-up questionnaire
2. Comparative analysis	Thematic reports on fields and forms of violence Synthesis
3. Minimum standards	Analysis of existing standards Harmonisation paper Further analytic work with thematic reports Follow-up questionnaire
4. Perpetration model	Review of research literature Set of overarching factors Follow-up questionnaire
5. Recommendations	Synthesis of 1, 2, 3 and 4

the researchers mining existing sources to compile information on legislation and or legally binding or policy-based provisions for each country. Four regional consultants were to fill identified gaps.

The secondary sources consulted included:

- ◆ the 2006 CoE compendium of legal situation responses in Member States to all forms of VAW;
- ◆ data from the regular audits of Recommendation 2002(5) and supporting information held at the University of Osnabrück (UniOs);
- ◆ the UN database of legislation and policies on violence against women, launched in March 2009;
- ◆ the 2008 and 2009 Women Against Violence Europe (WAVE) reports on support services for VAW;
- ◆ CEDAW country reports and shadow reports;
- ◆ CRC country reports and shadow reports; and
- ◆ international websites on the fields and forms of violence.

The questionnaire covered 12 forms of violence, with general sections on victims' rights, international instruments and treaties, national plans of action (NPA) and support services. As far as possible the same questions were asked about the different forms of violence, whilst bearing in mind the different structure of responses to child maltreatment. A major challenge was developing questions that were meaningful on a transnational level while taking into account the complexity of diverse European legal systems, especially when legal concepts and terminology mean different things<sup>(22)</sup>. Working research definitions accompanied the questionnaire to overcome some of these potential misunderstandings (see Annex 4). Whilst the questionnaire was an

(22) See Jowell, R., Kaase, M., Fitzgerald R. and Eva, G., 'The European Social Survey as a measurement model', Chapter 1, Jowell, R., Roberts, C., Fitzgerald, R. and Eva, G. (eds), *Measuring attitudes cross nationally: lessons from the European Social Survey*, 2007, London, Sage.

effective tool for collecting a large amount of information across 27 Member States in order to build the matrix, it was never intended to fully capture the detail and complexity of national legislation, hence the need not only for the national reports, but also for triangulating findings across sources.

As expected, some information, especially on implementation, proved difficult to obtain and the regional consultants, with limited resources, were not always able to track it down, especially for countries other than their own. Since the current study required intensive collaboration with legal experts in all Member States, it provided an opportunity to subject the RRS data set to a further test of its rigour and fill remaining gaps. The first task for the national experts, therefore, was to check and upgrade the RRS data set. The opportunity was also taken to redraft questions that had failed to provide valid data. Each national expert was provided with the questionnaire as it had been completed to date, along with detailed guidelines on how to undertake the task of upgrading it.

### *National reports*

The second task for the national experts was to write an analytic national report drawing on the material in the questionnaire and using a set of guidelines and a template developed by the research team. Here, part of the task was to include jurisprudence and to summarise findings from any evaluations of the effectiveness of legal measures, and support provisions and identify promising practices. Extensive guidelines were provided. The national reports included the following.

- ◆ An overview of the legal system.
- ◆ A brief history of how the legal framework and legal strategies in the three fields of violence have evolved.
- ◆ The most recent reforms/changes/jurisprudence. Specific procedures for dealing with the three fields of violence — such as guidelines for

how they should be investigated/prosecuted, protections in court when giving evidence.

- ◆ Any explicit attempt to comply with EU/international standards.
- ◆ Evidence that any of the legal measures are used and/or effective.
- ◆ Other provisions — through victims' rights and/or support services — which enable rights to safety and redress following violence to be realised.
- ◆ Current assessment of the effectiveness of legal measures in addressing interpersonal violence and meeting international minimal standards.

National experts were also asked to identify any promising practices according to the criteria formulated below.

#### — *International standards*

Does the measure concerned meet or go beyond the minimum international standards?

#### — *Transferability*

Does the initiative have the potential to be one that others can copy, transferable to other settings and/or Member States? What conditions would need to be fulfilled in order to ensure transferability, i.e. what factors contributed to the measure being a success in the state where it originated — for example, strong inter-agency cooperation, political leadership, involvement of NGOs?

#### — *Innovation*

Is the provision innovative in some way? What added value does it have if compared to standard practices?

#### — *Effectiveness and impact*

Is there any evidence, especially independent evaluation, that the initiative has either a short-term measurable outcome or a longer-term impact on the safety of women, children and/or LGBT people?

In addition, it would be useful to understand the context in which these measures were

implemented. In particular, please comment on the following features:

- *Review and assessment*  
Does the measure have review and assessment built into?
- *Participation of beneficiaries*  
Are beneficiaries and other stakeholders involved in the design, planning, evaluation, review, assessment and implementation? If so, has there been sufficient ownership by stakeholders for the practice to be sustainable?
- *Special project or national pilot*  
Is the measure funded as a special project in a small number of localities or was it a pilot which was then extended more widely? If the latter how wide has the roll-out been, and are the new projects as well-funded and supported as the pilots?

The national experts have provided a rich resource for the comparative analysis phase of the study, whilst simultaneously permitting cross-checking of questionnaire data and information. Unsurprisingly, when working on an in-depth report, new material emerged which provided a different interpretation of the questionnaire data, and even in some cases required creating new variables. For example, the national reports revealed that a number of Member States had legal definitions of rape which included both force and consent, which, when the questionnaire was drafted had been presumed to be mutually exclusive.

### ***Follow-up questionnaire***

The final task for the national experts was to complete a follow-up questionnaire. This was included for two reasons:

- ♦ in Task 4, the identification of factors influencing perpetration from the literature gave rise to targeted questions that were not available from the outset; and

- ♦ the questionnaire responses and national reports suggested measures that might have potential for harmonisation. In the follow-up questionnaire national experts could say whether they thought these should be standard across the EU, how feasible their introduction would be in their national context and what system or structural reasons might impede this.

The follow-up questionnaire was administered online, an efficient way to gather new data quickly, enabling daily monitoring of who has responded. Whilst considerably shorter than the first questionnaire, it did require that national experts to think and reflect on issues they may not have previously considered.

### ***Building the matrix***

The matrix offers a simple way of representing the legal measures which do and do not exist across the 27 Member States. The questionnaire data were entered into SPSS — a powerful statistical package — and in the process various anomalies and missing data were identified. Higher level coding was carried out on ‘open’ responses to produce categorical variables. The basic frequencies and cross tabulations by country were provided to the research hubs responsible for writing thematic reports on forms of violence (see the next section). Each hub had to check the data initially, identifying any potential data entry errors or inconsistencies in coding.

An interim matrix was constructed, drawing on questionnaire responses, using a binary format — shaded for ‘Yes’ and white for ‘No’. This provided a foundation for the thematic reports and was to be checked against the more qualitative material in national reports, especially to the extent that this might reduce the amount of missing data. This process revealed a series of queries, some of which highlighted the fact that national experts had understood certain questions differently.

The research hubs made the final decisions on codings within the data set, and thus the matrix, sometimes checking with national experts for clarification. In cases of inconsistency, the information in the national reports has been taken as the ‘correct’ answer, since complex information could be conveyed here more effectively. Protocols were developed across the research team to ensure all hubs followed the same procedure and to ensure consistency in analysing and interpreting the responses.

The matrix presented is a selection from the much more extensive data collected for the project. Selection took place on a number of criteria to ensure quality and relevance. These criteria required that:

- ◆ the item was a legal measure;
- ◆ the data could be converted into a binary yes/no format;
- ◆ the data had internal validity — checked across questionnaire and national reports — and national experts appear to have understood the question in the same way; and
- ◆ there was no more than 20 % (n = 6 Member States) missing data.

A draft of the final matrix was sent out to the national experts for final checking and to further minimise missing responses and additional amendments were made to the data set and matrix entries as a result. The matrix has, therefore, been subjected to four layers of internal and external validity checks.

### 1.5.3 Task 2 — Comparative analysis, using thematic reports

The comparative analysis drew on all the data and information collected in the study to address the following questions, for each form of violence.

- ◆ What are the commonalities and divergences with respect to content and structure of legal

frameworks and their implementation across the Member States?

- ◆ Where are the gaps and barriers to implementation of legislation?
- ◆ What promising practices have been identified and what are the opinions of national experts on potential harmonisation?

The comparative analysis covers all areas of law in the three fields of violence that from a social perspective are more or less related, yet reflect profound differences as the subject of regulation under different legal regimes. Working from a human rights-based perspective the aim of the comparative analysis went beyond comparison of legislative measures and includes protective and preventive legal and policy-based measures. A protocol was developed to inform the comparative analysis. It was structured across the five main areas of data collection covering the different domains of the obligations which flow from the duty of states to respect, protect and fulfil human rights for its citizens: legislation and policy; support services and protection; prevention; capacity-building/training; and statistics, data and research.

The research hubs produced concise thematic reports (15–30 pages) on the different forms of violence (child maltreatment (merging analysis of findings on physical and sexual child abuse and neglect); intimate partner violence; stalking; rape; sexual harassment; female genital mutilation; honour-based violence; forced marriage; commercial child sexual exploitation; sexual orientation violence and trafficking).

The thematic reports were built on all available data (questionnaire data, the national reports and qualitative material). They served a dual function, ensuring that all data were analysed from a comparative perspective for each form of violence, with the more qualitative material providing information on implementation and effectiveness. Using all the data, the findings were cross-checked

and triangulated, which enhanced the validity of the findings and highlighted further issues for clarification within the matrix.

Writing the thematic reports confronted us with the inherent challenges in comparative transnational research, accentuated since this study addresses three fields and 13 forms of violence, across 27 Member States, which are regulated in many different domains of law. Despite the care with which data collection and data analysis were conducted, using the comparative protocol developed for the purpose, the following caveats need to be borne in mind.

- ◆ Given the range of languages within the EU it is inevitable that some concepts and/or subtleties are lost in translation or misunderstood.
- ◆ Availability of statistics to assess the implementation of law in practice was often limited. A particular challenge is presented when forms of violence do not constitute distinct offences in the criminal code, so that different statistical markers have to be combined to arrive at useful figures. The lack of data meant that ultimately we had to refrain from including them in the comparative analysis.
- ◆ Whilst we asked national experts to provide us with information on landmark case-law, this was not possible at all for some Member States where jurisprudence is not understood in this way.

A synthesising process followed in which transversal themes were identified which cross-cut forms and fields of violence and these then informed the conclusions of the study. Chapter 2 presents the matrix and comparative analysis. Chapter 3 presents the synthesis of overarching issues as well as cross-cutting issues relevant from an EU perspective.

### 1.5.4 Task 3 — Minimum standards

While there has been a sustained international discussion on minimum standards in the area of

VAW and international bodies (including CoE, the United Nations Development Fund for Women (Unifem) and the UN) have published numerous suggestions, minimum standards on child maltreatment have been less broadly discussed, due in part to the wide variety of institutional and legal frameworks involved. SOV has ‘fallen between the cracks’ of anti-discrimination law and concern for the victimisation of women and children. Overall, the protection of children and youth from violence has given very little attention to gender.

Two internal papers were produced to determine relevant minimum standards in the three areas of violence.

- ◆ A full compilation of existing international and regional legal and quasi-legal standards across the three fields of violence. The compilation was based on two criteria: standards needed to be reflected in international and/or EU instruments and had to be specifically germane to the assignments in this project (leaving out standards on social and economic rights, for example).
- ◆ A paper on the criteria for EU competence relating to the harmonisation of legislation, other routes through which standardisation might be addressed, and the instruments that can be used.

The extensive list of legal and quasi-legal standards was then considerably reduced to a list of already existing standards (Annex 2, column 1) and a list of proposed revised or additional standards (Annex 2, column 2) based on the following criteria:

- ◆ the selection among existing standards to limit repetition and redundancy: many international standards build on or expand previous decisions/instruments;
- ◆ clarity in wording: some standards which were important in principle, but currently worded in ways that were not specific enough in light of the assignment. The research team recast



them, changing wording to make them more regionally appropriate. These constitute ‘revised standards’; and

- ♦ where significant gaps were identified, ‘additional standards’ based on principles in the international normative framework were drafted. Proposed revisions and additions have also been guided by research findings in the comparative analysis.

The proposals have been enriched through presentation to, and discussion with, the international expert group. Finally, the question of feasibility of harmonisation and standardisation is addressed, analysing whether and how harmonised legislation could be adopted, drawing on the various criteria as incorporated in the EU Lisbon Treaty relating to different areas of competence.

Chapter 4 presents the results of this research task and the relevant standards. It suggests legislative and policy-based minimum standards that are capable of broad application.

### 1.5.5 Task 4 — Review of knowledge on factors at play in perpetration of violence

Task 4 aimed to assist the European Commission in developing a more coherent and longer-term policy by way of a deeper understanding of the factors at play in the perpetration of violence. Working in parallel to the survey of legislation and policy in the Member States, in the first stage a team of 11 researchers with a wide range of specific areas of expertise reviewed current research knowledge about what conditions are conducive to the perpetration of the different forms of VAW, VAC or SOV. Particular attention was given to assessing the state of empirical research, but in-depth insights from work with perpetrators as well as advanced theoretical analyses were included.

In a second step, building on sophisticated recent research overviews for the different forms of violence, a set of main factors that make perpetration more probable was extracted from the numerous variables in the studies. These were conceptually framed to be relevant to all three fields of violence in the study; the selection was focused on the possible influence of policy-based prevention and intervention measures; for each of the four different levels from the macro-social influences to the individual life history, five to seven main factors were defined. Using quantitative empirical overviews wherever possible, numerical values were then assigned for each form of violence, weighting the factors as a weak but measurable, moderate or strong influence on the likelihood of perpetration occurring.

In a third step, a multilevel visual interactive **model** was constructed encompassing all the factors and showing the interplay between them. It aims to capture the complexity and differential paths of influence across fields and forms of violence, as well as their cumulative impact and the possible effect of protective factors. To this end, two approaches are used: a perpetration model showing the factors at play and their relative influence for each form of violence and path models for the most prevalent forms of violence, showing the different routes that can lead to a specific form of violence. With a visual model that has interactive functions, the wide range of existing research knowledge was made more accessible to policy development. The path models can also be used to visualise the possibilities of reducing the probability of violence by specific interventions.

To construct the model, two experts in web design and programming joined the team. With their help, it was possible to include additional features, such as answers to frequent questions or viewing different pathways separately. The model and its uses are presented in Chapter 5; the interactive model itself is offered on the CD accompanying the final report.

The full results of the literature review are presented in a stand alone report. It shows that the level of research on perpetration differs considerably by form of violence and that even in the best-researched areas there are significant gaps. It has been included on the CD, where users of the model can find a fuller explanation of what is and is not known from current research.

### **1.5.6 Task 5 — Recommendations**

The conclusions and recommendations are presented in Chapter 6. Here we have sought to produce a set of overarching conclusions which apply across the three fields of violence, drawing on the empirical findings of the study. A set of practical measures which flow from the conclusions are presented as recommendations.

## Chapter 2 — Mapping legal measures and comparative analysis

### 2.1 Structure of this chapter

This chapter presents the main empirical findings of the study, drawing on the matrix, thematic and national reports. To cover three fields and 13 forms of violence necessitates presenting a data and information in summary form, thus losing much of the differentiation that the thematic reports contained. Whilst we acknowledge this, the previous chapter outlined the many checks undertaken to make the report as accurate as possible.

The matrix in Annex 1 presents key information in a binary format — Member States do or do not have the relevant provision — albeit that we have, on occasion, included qualifications or clarifications. It is presented in a format where a purple shading indicates that provision exists in the relevant Member States, green indicates that the information is missing in this instance and a white/blank that there is no such provision.

The chapter comprises five major sections, three reporting findings on violence against children, violence against women, and sexual orientation violence, and two more general sections on victims' rights and promising practices. In the sections on fields of violence, mapping and comparative analysis are combined in the text and a summary section addresses the main convergences, divergences and gaps found in the research: convergence and divergence refer respectively to tendencies for Member States to have similar or dissimilar legal and/or policy responses, whereas gaps indicate persisting lacunae within responses among Member States. These have implications for the extent to which standardisation has been broadly achieved already, may be possible, given a similar direction of travel or appears more complex due to profound differences in approach.

### 2.2 Child maltreatment

Whilst VAC is linked in multiple ways to VAW, there are important differences due to the differing citizenship and rights status of children. The United Nations Convention on the Rights of the Child (CRC) sets as a standard that all proceedings should follow the principle of the best interests on the child (Article 3(1) CRC); it gives children the right to live in their families as far as possible, and calls on all treaty states to assist parents in fulfilling their parental responsibilities. As a result, the protection of children from violence has to define the legal frameworks for state intervention into the family very carefully: it must balance supporting parents with the obligation to take 'appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has care of the child.' Responses to child maltreatment thus tend to begin with protection measures rather than criminal law.

Following the developmental approach of the CRC, child maltreatment is often defined by the resulting harm or the risk of harm to the child, requiring assessment of an overall situation. Thus, there are few internationally recognised definitions of child maltreatment, or of the forms of abuse it covers (physical, sexual, emotional/ psychological and neglect), and these are usually not defined explicitly in national law. The definitions used in data collection can be found in Annex 4 and those proposed on the basis of the study as European standards are in the glossary (Annex 3).

For full references, see the matrix (Annex 1), Table 1.



### 2.2.1 Child protection

When a child is deemed at risk of harm, intervention always either consists of, or is accompanied by, support services. In cases where the needs of the child cannot be met except through placement outside the home, protective measures may need to be taken against the wishes of parents or other carers.

The matrix shows that child protection law addresses all those aged 18 and under in almost all Member States. Only Malta sets a lower age limit (16) for the provision of protection through foster or institutional care. All Member States have legal frameworks which permit, as protective measures, removal to a place of safety, short-term and long-term placement and suspension/removal of parental rights. Eviction of the person posing a danger to the child is available in 21 Member States (except BE, CZ, LT, LV, PL, PT). The essential support services and assistance to parents are not always widely available nor sufficiently differentiated: for example, in four Member States parental education and consulting is not integral to child protection measures (CY, EE, EL, PL) and family therapy is unavailable in 11 (BG, CY, EE, EL, FI, FR, IT, LT, PL, RO, SI). All Member States require a court order for at least one of these interventions if it is undertaken without the consent of the parent or guardian; 10 require a court order for all such actions (BE, DE, EE, FR, HU, IT, MT, NL, PL, UK).

Most Member States set a priority sequencing of interventions through law (18) or binding guidelines (two) (except CY, EE, ES, LU, MT, PL, SI), with the initial preference for less intrusive/punitive measures. This, in turn, leads to a need to set a threshold for state interventions without parental consent. Here somewhat different approaches are evident, with most (AT, BG, CY, DE, DK, EL, ES, FR, HU, IE, IT, LT, LU, LV, MT, NL, PT, RO, SE, UK) requiring a double prognosis, assessing both the risks to the child and parental capacity to meet the child's needs.

The exceptions emphasise either the endangerment of the child (BE, CZ, EE, FI, PL) or parental behaviour (SI). In all countries but one (LT), the development of the child is the central criterion for protective measures. In almost all Member States a threshold for statutory intervention (court or administrative authority) in parental or other carer's rights does not presuppose criminal investigation.

As already noted, no Member State defines all forms of child maltreatment in law, although they often mention concepts such as child maltreatment, child abuse or child endangerment. Denmark and Sweden refer to harm to the physical or mental well-being of the child.

#### 2.2.1.1 *Responsible authorities for child protection*

The matrix shows that in all but two Member States, legal frameworks provide one or more administrative authorities with the competence to take at least emergency measures without parental consent for immediate protection of a child from endangerment. The fact that Belgium and Slovakia require a court order raises the question of whether this can ensure timely and effective protection in acute situations. There is considerable variation with regard to which authorities are legally entrusted with powers to protect in the short term: courts (20); youth welfare (18); police (13); prosecutors (10); and child protection social workers (8).

The powers of administrative authorities are more limited when medium- or long-term measures are required, and most require a court order (AT, BE, BG, CZ, DE, EE, EL, ES, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, UK), but even here in five (CY, DK, FI, PT, SE) specialised administrative bodies can take these decisions. Where child protection measures are undertaken without

consent of the parents or guardians, most Member States require a periodic review (except EL, LU, SI), whether by the court or by child protection/social welfare agencies.

The coordination of child protection is designated to a specific administrative body in all Member States except Greece and Poland. In smaller countries, this may be a national body: in federal and larger states, it is organised at regional and/or local levels.

About half of Member States (13) seem to have binding guidelines governing the procedures for investigating and assessing child maltreatment (BE, CY, CZ, DE, EE, EL, ES, FI, HU, IE, LV, SE, UK). There is, however, variation in what are understood as guidelines: from a single legal norm as a guiding principle in Germany to elaborate requirements and advice on how to deal with cases (IE, LV, UK). Here we encounter a tension between the need for standards and professional confidence on the one hand and the danger of bureaucratic proceduralism on the other.

### 2.2.1.2 *Multi-agency cooperation*

In recognition of the necessity of involving different professional actors, both in risk assessment and in the offer of assistance, the majority of Member States subscribe to a multi-agency approach either by law (AT, BE, CY, DE, DK, ES, FI, HU, LU, PT, RO, SE, UK) or through binding guidelines (BG, EE, IE, NL, PL). There are, however, differences in purpose and membership: the focus can be on working together to recognise and assess risks and/or they can aim at building a structure of assistance and protection. The content, goals and structures of multi-agency cooperation were rarely described in a concrete way, but membership varied across Member States (social workers (17), health workers (15), police (14), psychologists (14), education workers (13), lawyers (7)).

### 2.2.1.3 *Mandatory reporting*

Svevo-Cianci et al. (2010)<sup>(23)</sup> define the establishment of a child abuse and neglect reporting system as one of five measures of the quality of the child protection system. The findings across the EU, however, suggest that a reporting system is not necessarily related to quality of protection.

In eastern Europe, child protection has traditionally been the preserve of the police, within an understanding of averting a danger and with mandatory reporting a common feature. In western Europe, child protection has developed through a strong relationship with the social welfare system, with protection understood as beginning with help and support, including assistance to parents. This coincides with a number of Member States not adopting mandatory reporting rules — often after lengthy internal debates in which the potential benefits have been weighed against unintended negative consequences — whilst having protocols with respect to thresholds for information sharing (e.g. AT, BE, DE, IE, NL, UK). Other Member States narrow the duty to report to notification to the child protection agencies rather than the criminal justice system (CJS).

In nine Member States any citizen who becomes aware of possible child maltreatment has a duty to report to the child protection authorities (BG, CY, DK, EE, LU, LV, PL, RO, SK), but only two Member States (PL, SK) also require any citizen in this situation to report it to the criminal justice system. For all or at least some groups of professionals working with children 13 Member States (AT, CY, CZ, EL, FI, HU, IT, LT, MT, PT, SE, SI, UK) have a duty to notify presumed child maltreatment to the child protection system, with four extending this to notification of police or prosecutors (CY, EL, MT, LV).

(23) Svevo-Cianci, K. A., Hart, S. N., Rubinson, C., 2010, 'Protecting children from violence and maltreatment: A qualitative comparative analysis assessing the implementation of UNCRC Article 19'. *Child abuse and neglect* 34, 45–56.

In 11 Member States (BG, CZ, EE, ES, FR, HU, IT, LT, PT, RO, SI) reporting to the criminal justice system is mandatory for the administrative child protection system, although in France, Slovenia, Portugal and Lithuania this obligation only applies to certain criminal offences.

All in all, 18 Member States require mandatory reporting to the criminal justice system either by any citizen and/or (groups of) professionals working with children and/or the child protection system. Six Member States (BE, DE, ES, FR, IE, NL) have no mandatory requirements but focus on facilitating cooperation. Nine Member States (AT, BE, DE, DK, IE, FI, NL, SE, UK) have established a legal separation of powers between the child protection and criminal justice systems, affording discretion over reporting depending on what seems best for the child.

### 2.2.2 Criminal law: sexual abuse

Child sexual abuse (CSA) is criminalised in all Member States. However, although the CRC defines a child as any person under the age of 18, this is not the generally accepted definition of ‘child’ in sexual offences law, with variations between Member States as well as across offences.

Sexual intercourse with children who have not yet reached the age of sexual consent is consistently criminalised. However, the matrix shows that the age of consent differs substantially, with two Member States setting it at 12–13, 16 at 14–15 and nine at 16–18. This variation becomes even more complex with the fact that four Member States (AT, DE, FI, IT) have more than one ‘age of consent’, differentiating according to the different ages of the parties concerned.

In Austria consensual sexual acts other than intercourse with a minor are not criminalised if the minor is at least 12 years old, the offender is

not more than four years older and the act did not result in death or grave injury. Sexual intercourse with a minor is not criminalised if the victim is at least 13 years old, the offender is not more than three years older, the penetration was not committed with an instrument and the act did not result in death or grave injury. In Finland, sexual abuse of a person aged 16 or 17 is only criminalised if the offender is the parent of the child or parental figure/guardian. In Italy consensual sexual intercourse is not criminalised when the minor is older than 13 and the other party is not more than three years older or is a minor him/herself. In Germany engaging in sexual activity with a person aged between 14 and 17 years or inducing a young person to engage in sexual acts for payment is only penalised if the offender is over 18.

If a minor has reached the age of sexual consent, but is still younger than 18, the question arises of how sexual abuse should be defined. The conditions need to be defined in criminal law, since treating young people as adults may create protection gaps. One clear example here are ‘abuse-/breach-of-trust’ offences which have been enacted in 17 Member States (AT, CZ, DE, EE, EL, ES, FI, FR, HU, IE, IT, NL, PL, PT, RO, SI, SE), which variously cover family relationships and/or the abuse of a position of authority (as a teacher or sports instructor, for example). CSEC offences (see trafficking section) are also often up to the age of 18. These complexities also need to be reflected in how CSA is defined (Annex 3, Glossary).

The matrix shows that all penetrative acts are criminalised in all Member States in child sexual abuse offences where the child is under the age of consent. The intentional sexual touching of a child who has not yet reached the age of sexual consent is also criminalised in almost all Member States (exception: LU), although the threshold differs across Member States.

Causing and inciting a child below the age of sexual consent to engage in sexual activity is criminalised in most Member States (except FI, SI). Provisions which take account of the specific dangers heralded by the widespread use of new media, such as the Internet, have been introduced in 11 Member States (BG, DE, EE, EL, ES, LV, MT, NL, PL, SE, UK). These include ‘grooming’ offences, that is using new media to facilitate access to a child with the intent to abuse them. How these offences are delimited varies across Member States.

Intentionally engaging in a sexual act in the presence of a child for the purposes of sexual stimulation is criminalised in most Member States (except AT, BG, CZ, HU, LU, PL, SI). Intentionally causing a child to watch a sexual act for the purpose of gratification is also widely criminalised (except AT, CZ, HU, SI).

In 21 Member States aggravating circumstances apply when the sexual abuse is committed by a person in a position of trust or authority (except BG, MT, NL, PL, missing: SE). Ireland has no formal provision, but in practice higher sentences are imposed. Breach-of-trust offences have been addressed above. The majority (except LV, SI) have specific, but varying regulations that apply to sexual abuse in some kind of family relationship. Some retain the concept of incest, defined in terms of blood ties, whereas others have modernised to cover a range of family forms/relationships, thus recognising the betrayal of social relationships of trust and responsibility.

While the protection of children from sexual abuse seems to be extensive in most Member States, there are some notable gaps and gender-specific offences: in Bulgaria the offence of rape only applies if the victim is female; and in Cyprus the offence of defilement (any conduct that harms a minor’s sexual integrity not necessarily involving physical contact) can only be committed against girls, while on the other hand only males can be

convicted of incest. Even if sexual crimes are gender disproportionate — most victims are female and the vast majority of perpetrators male — compliance with the CRC means ensuring that all children are protected.

### 2.2.2.1 Statute of limitation

Most Member States (except CY, IE, LU) have a statute of limitation during which victims of sexual abuse can bring proceedings. The time limits vary across Member States and according to the gravity of the offence. The range spans from 3 to 30 years for criminal liability and from 1 to 20 years for compensation. During recent decades there has been increasing recognition that, in the case of offences against children, the statute of limitations should not start until they have reached the age of majority. Most Member States have recognised this in law (except BG, EE, HU, IT, LV, MT, SK).

### 2.2.3 Physical abuse

Child (physical) abuse is, by contrast, defined by the actual or potential significant harm caused or by the risk of significant harm<sup>(24)</sup>, with harm including not only the impact on health but also on the child’s development (see definitions in the glossary, Annex 3) As the harm caused may vary considerably with the age and developmental stage of the child, abuse is rarely defined in legal terms by penalising specific actions, rather repetition, severity and consequences are the reference points.

All Member States have provisions in criminal law to penalise the physical abuse of children and in many cases emotional abuse is included in these provisions. For the most part, however, there is

(24) Krug, E.G., Dahlberg, L.L., Lozano, R., Mery, J.A., Zwi, A.B., 2002, *World report on violence and health*, WHO, Geneva.

no clear definition. Analysing the national reports revealed three broad approaches.

- ◆ Aggravated circumstances in criminal codes with respect to assault/bodily harm offences (physical and sexual) frequently specify that the victim is a minor, that a member of the family is the perpetrator or that it takes place between individuals with a close relationship and/or where one is vulnerable. Here, offences remain as defined in the general criminal code.
- ◆ A range of specific offences exist, including ‘maltreatment of a ward’, ‘deliberate injury or beating of a child’, ‘inflicting physical or psychological mistreatment’ (on a person in one’s care) or ‘endangerment of a child’. These are only marginally more specific with regard to the prohibited acts; they are more likely to be ‘result crimes’ than ‘conduct crimes’, requiring proof of physical or other harm to the child. There is considerable overlap here with the aggravated circumstances provisions.
- ◆ The final possibility is that Member States draw solely on general criminal law but applied to the situation of children. Here, procedural law may include possibilities for considering the degree of recklessness or cruelty in the actions or the level of harm done, but these are general principles rather than child-specific ones.

Table 2.1 below summarises the various approaches to child (physical) abuse across the EU and shows that there is little convergence.

**Table 2.1: Approaches to physical abuse of children in criminal law**

Violence against a child/family member receives higher penalty	Abuse of child or close person a specific offence	General provision for aggravated case and specific offence	General criminal law only used
8	7	4	8
AT, BE, BG, DK, ES, FR, LT, SE	CY, DE, IT, LU, PL, PT, SK	CZ, HU, LV, RO	EE, EL, FI, IE, MT, NL, SI, UK

The threshold at which physical force or inflicting pain becomes abusive is seldom clearly defined: criminal prosecution is more likely when the harm is very serious or the actions reflect a course of hostile conduct over time.

The categories used in the national reports referred to legal concepts and long-standing principles of categorising offences in the respective legal system. Cutting across these differences, recent laws against family violence sometimes set criteria which are at odds with existing legal traditions as they follow international recommendations or those of foreign donors. As a consequence, the use of terms such as ‘bodily harm’, ‘physical abuse’ or ‘assault’ cannot be interpreted out of context.

A typology of the broad approaches found across Member States reveals that 14 Member States focus on prescribed acts which constitute a course of conduct (BE, BG, CY, CZ, DK, EE, HU, LV, FR, LT, LU, PL, PT, SI), 11 concentrate on harm to the child (AT, DE, EL, IE, FI, MT, NL, RO, SE, SK, UK), whilst two require a combination (ES, IT).

### 2.2.3.1 Implementation

The national reports confirm and statistics show that criminal prosecution is not the priority method for addressing physical abuse of children, both in Member States with a highly developed child protection system and a wide range of



support for families and those where such early interventions are not available.

Implementation with respect to the statute of limitations only beginning at adulthood reveals that, at least in Finland (but also in AT, BE, CZ, NL, PL, PT, SE), this applies not for physical abuse, but only to sexual offences and in Denmark and France only to sexual offences and very severe physical violence. In four Member States (DE, EL, RO, SI) the provision covers a range of child maltreatment but not physical abuse outside the family. The linked information on legal provisions for compensation is incomplete (data missing for 10 Member States).

The duty of the state to provide for compensation following child abuse seems particularly important but in most cases the limitation periods are, if not similar, shorter than for criminal prosecution, sometimes significantly so (e.g. DE, LT, UK). This runs the risk of disregarding the length of time it can take abused individuals to feel entitled to claim their rights when the offences took place in childhood. To summarise, it can be said that there is insufficient recognition of the difficulty that abused children may face in seeking outside help or redress.

#### 2.2.4 Neglect

Neglect is one of the most frequent forms of child maltreatment. While it is deemed equivalent to other forms of child maltreatment in child protection procedures, criminal law in Member States is less consistent. Four approaches can be discerned, although they are not mutually exclusive.

The most convergence can be seen in the 15 Member States which require demonstration of significant harm to the child (AT, BE, CY, CZ, DE, EL, LT, LV, MT, NL, PL, RO, SE, SK, UK), followed by 11 where danger to the child's health, life or physical, mental (or educational) development

occurs due to a breach of the legal duty to care for and meet a child's needs (BG, DE, DK, EE, FI, FR, HU, IE, LU, PT, RO). Six Member States make it a criminal offence if there is persistent failure of a parent or other responsible carer to meet a child's basic needs (BE, EL, LV, MT, PL, UK), with five making simply the breach of the legal duty of care a crime (ES, IT, LV, MT, SI).

In the Member States which criminalise 'pure' neglect — for example, leaving a child aged six or under alone — women are more likely to be convicted. If Member States have a threshold specifying danger or harm caused, criminal law is less likely to have such gendered outcomes. That said, criminal convictions for neglect are rare in most Member States.

#### 2.2.5 Rights of the child and victim protection in proceedings

The principle of the best interests of the child is implemented in the legal framework of all Member States, but in only four (DK, ES, HU, LV) is it a general overarching principle in all judicial and administrative decisions relevant to a child and proceedings involving a child. The other Member States declare this a primary consideration through guidelines in family, child protection, child and family welfare laws.

This may represent an honest assessment of how this principle is addressed. In criminal law, the primary interest of the state is to ensure that the law is upheld. Whilst a child's rights must be taken into account, these do not supersede the foundations of criminal law. Law and policy on criminal investigations and proceedings here, therefore, focus on protection measures to insulate the child from the potentially adverse effects of criminal proceedings and states approach this in a variety of ways (see section on victims' rights below).



### 2.2.5.1 *Civil/family court proceedings*

In two thirds (14) of the Member States, the courts in charge of child protection matters are specialised or adapted (except BG, CY, CZ, DK, EE, EL, FI, HU, LT, LV, SE, SI, SK). In only two Member States is it obligatory for judges to have had specific training for this role (ES, LV). Eight Member States always exclude the public in child protection cases (DE, DK, FR, IE, IT, NL, SI, UK), with a further 15 having this as a possibility at the discretion of the court (except CZ, EE, LT, LV). In most cases where the public are excluded, there are also limitations on media reporting. Separate waiting areas are guaranteed only in France, Ireland, Portugal, Spain and the United Kingdom. Estonia, Latvia and Lithuania seem to have made no adaptation of the civil court proceedings for child protection cases.

Clear shortcomings emerge in law and practice with respect to the right of a child to be heard in any judicial and administrative proceedings affecting her/him. Provisions that would ensure this, either directly, or through a representative or an appropriate body (Article 12(2) UNCRC) are often lacking. Additionally, Member States may define an age from which the child must be heard, although this ranges from 7 to 14, while others undertake a capacity test which includes the best interest of the child. Cyprus, Malta, Poland and Slovakia do not recognise a duty to hear the child in civil/family court proceedings at all.

### 2.2.5.2 *Criminal proceedings*

Repeated questioning, the obligation to testify in court and/or confront the accused may stress child victims more than adults and — in the worst case — lead to their (re)traumatisation. There is a growing conviction in Member States that children who have already been harmed by a criminal offence need special protection in criminal

proceedings. Our findings, however, show that the letter of the law is not necessarily translated into practice (for more details see sections on victims' rights).

Both the status and development of children suggest that they are likely to need legal aid and/or assistance from a support worker to uphold their rights in court. Children have the right to separate legal representation in criminal proceedings in just over half of Member States (AT, BG, DK, EE, ES, FR, HU, IT, LV, LU, PL, PT, RO, SI, SK, SE); however, in a number of instances this right is limited to specific circumstances, including the age of the child.

In 12 Member States children have a right to a support worker throughout criminal proceedings. For example, in Austria a facilitator — who does not talk with the child about the facts of the case — is appointed to explain the proceedings, to be at the child's side during the trial and to assist her/him in fulfilling the role of witness.

It has long been a principle in criminal law that the accused has the right to question their accuser. In the case of children who are believed to have been abused by the accused, this raises the question not only of intimidation, but also of the risk of further harm. Eight Member States prohibit this where there is a child victim appearing as a witness (DK, FI, IE, IT, LT, LV, LU, SE), with Slovenia limiting this to children under 15 and the United Kingdom restricting the prohibition to sexual offence cases. In Germany, the prohibition is at the discretion of the court.

## 2.2.6 **Support services and prevention**

Whilst prevention of violence against children is central to child protection policy in all Member States, some adopt a distinctly reactive approach. For support services to be an effective preventive

measure (at least of further harm) two criteria must be met: *sufficient differentiation* so they can deal with all forms of child maltreatment and the diversity of service users and *wide and timely availability*.

These two standards seem to be met in 12 Member States (AT\*, BE, DE\*, DK\*, ES, FI, FR, IE, IT, NL\*, SE, UK — \* indicates secure funding). In seven services are either not differentiated (HU, PT, RO, SI) or insufficient (EE, LU, SK) with eight Member States fulfilling neither standard (BG, CY, CZ, EL, LT, LV, MT, PL). Early prevention programmes during pregnancy exist in at least six Member States (DK, DE, FI, MT, SE, SI), with these and/or intervention programmes widely available only in some Member States (e.g. BE, DE, DK, FI, IT, NL, SI, UK). Wide availability of preventative programmes correlates with not having mandatory reporting.

Explicit legal prohibition of corporal punishment can be recognised as a preventive approach. Since all Member States have ratified the CRC, prohibiting corporal punishment is on regional and national agendas<sup>(25)</sup>. Currently 17 Member States prohibit all corporal punishment (AT, BG, CY, DE, DK, EL, ES, FI, HU, IT, LU, LV, NL, PL, PT, RO, SE). The moderate punishment allowed in Portugal appears similar to the ‘reasonable chastisement’ in the United Kingdom: however, one NE defines this as prohibition, the other as permission. That said, it is important to stress, in line with general approaches to child protection that **no** Member States criminalises corporal punishment to the extent that any act of physical disciplining of a child could be subject to a prosecution. Frequently, the prohibition is framed in varying fields of law, and is intended to set a normative standard.

The prohibition of corporal punishment in schools, educational establishments and residential care is

older, clearer and more widespread (except CZ, FR, MT), often anchored in Education Acts or other laws regulating schools. The removal of legitimate use of force made teachers or other responsible persons liable to prosecution for common assault, and schools could be held responsible for prevention or disciplinary measures against teachers who violate the regulations.

Several national reports point to developments through jurisprudence in which traditional defences of chastisement or discipline have been declared invalid as a consequence of a civil law prohibition of corporal punishment. This is not the case everywhere, however, and seems to depend on the extent to which children’s rights have more generally been recognised, including through sustained awareness-raising campaigns (e.g. AT, DE, IT, SE). Without such awareness, despite prohibition of corporal punishment, courts may continue to absolve parents of guilt for beating a child (even repeatedly) if there was an ‘educational’ or disciplinary purpose.

The one form of support provided directly to children is a confidential helpline and almost all Member States have one (except CY, PL), although these cover children’s rights lines, child protection and families and advice to children in crisis. Most helplines cover all forms of VAC, although some are more restricted and only 13 are open 24/7 (AT, BG, CZ, EL, ES, FR, HU, IT, MT, PT, RO, SE, UK).

Sex offender registers are less commonly used (AT, EE, FR, IE, SE, UK) as a secondary preventive approach compared to restrictions on convicted sex offenders (and, in some instances, those convicted of other crimes against children) working with children (AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, LV, LU, PL, RO, SK, SE, UK). The United Kingdom recently introduced Sex Offender Orders, which allow the courts to place a range of restrictions on convicted offenders (such as preventing them living near, or being in the vicinity of schools, or travelling abroad without permission).

(25) In June 2005, the European Committee for Economic and Social Rights declared Ireland in breach of its obligations under the European Social Charter for its failure to prohibit corporal punishment of children by parents.

### 2.2.7 Capacity-building and training

Child protection and the prosecution of criminal offences against children both depend for their effectiveness on knowledge and skills beyond that which is usually acquired in tertiary education and initial job training. The reality across the EU is far from conforming to these requirements, as Table 2.2 demonstrates.

Only 15 Member States have established mandatory training for professions working with children at risk, with police (BE, CY, DE, EE, ES, NL, SE, SI, UK) and child protection social workers (AT, DE, ES, FR, HU, IE, MT, RO, UK), the most likely to receive it.

It is a matter of concern that qualifications and expertise are weakest among the professional

actors with the greatest powers: in most Member States (23) decisions about intervening in parents' rights, as well as decisions about prosecution, punishment and victim protection in judicial proceedings, are in the hands of judges and prosecutors, both the least likely to receive training, and in only two Member States is it mandatory (ES, LV). These findings indicate an immense potential for national measures to improve knowledge and technical qualifications on child maltreatment for professionals working with children.

### 2.2.8 Statistics, data and research

While a variety of prevalence studies have been undertaken, they are not comparable transnationally (and almost never representative). Administrative

**Table 2.2: Specific training on child maltreatment**

	Police officers/ investigators	Prosecutors	Judges	Child protection social workers	Child psychologists	Healthcare professionals	Nursery workers and school teachers
<b>Mandatory across the country</b>	BE, CY, DE, EE, ES, NL <sup>1</sup> , SE, SI <sup>2</sup> , UK (9)	ES, LV (2)	ES, LV (2)	AT, DE, ES, FR, HU, IE, MT, RO, UK (9)	DE, ES, MT (3)	ES (1)	MT (1)
<b>Mandatory in some regions</b>	LU, SI <sup>3</sup> (2)	EE (1)	o	LU (1)	LU (1)	o	o
<b>Discretionary</b>	CZ, IT, LT, LV, MT, PL, PT, RO (8)	DE, IT, LT, PL, RO, SE, SI, UK (9)	AT, CZ, DE, IT, LT, RO, SI, UK (9)	BE, BG, CY, CZ, EL, FI, IT, LT, LV, NL, PL, PT, SE (13)	BE, CY, EL, FI, HU, IT, LT, LV, NL, PL, PT, SE, UK (13)	BE, CY, DE, EL, FI, IT, LT, LV, MT, NL, PT, RO, SE, UK (14)	CY, CZ, DE, ES, IT, LT, LV, PL, SE, SI, UK (11)
<b>Not widely available</b>	BG, EL, FI, FR, HU (5)	BE, BG, CY, CZ, EL, FI, FR, HU, MT, NL, PT (11)	BE, BG, CY, EL, FI, FR, HU, MT, NL, PT, SE (11)	o	BG, CZ, FR, RO (4)	BG, CZ, FR, HU (4)	BE, BG, EL <sup>4</sup> , FR, HU, NL, PT, RO (8)

<sup>1</sup> Child/Juvenile Vice Squad only.

<sup>2</sup> Police academy.

<sup>3</sup> Border officials.

<sup>4</sup> None at all.

statistics on all forms of VAC are unevenly available and the overall picture is sadly inadequate. As child protection is an obligation of the state, it would be reasonable to expect that Member States record and compile data on cases that come to the attention of authorities and on how these are dealt with. Yet very few statistical data were entered in the questionnaire.

There were additional barriers for national experts here, not least that in most Member States the relevant bodies use different recording systems. In some Member States there is no nationwide database or the publication of crime statistics is selective, including only some forms of violence against children, or they record charges or prosecutions but not reported cases. Child protection authorities may publish data on the number of children under protection measures, but without the number of cases of possible child endangerment dealt with, nor the reason for taking protective action. Finally, there are some Member States which seem to have a persistent heritage of state reticence in providing information to citizens.

We conclude, therefore, that we currently lack a rigorous European knowledge base.

### 2.2.9 Perspectives on promising practices and harmonisation

National experts offered recommendations for what they thought should and/or could be

harmonised across the EU. The suggestions range from concrete to general and broad.

The general consensus (seven) was on the importance of *specialisation, training and education for professionals*. Particularly emphasised was the specialisation of the courts and training for judges. Only slightly fewer (six) made recommendations about *support services* seeking full and secure funding for psychological, social and legal support, prevention programmes, national helplines and/or perpetrator programmes.

The next most common recommendations were:

- ◆ further enhancements of *the rights of child victims in criminal proceedings*;
- ◆ *improving the knowledge base*; and
- ◆ *banning of all corporal punishment*.

### 2.2.10 Comparative analysis

With the exception of sexual abuse, less punitive measures are preferred, with criminal prosecution reserved for the most serious cases. Whether Member States have the required infrastructure of trained staff and support services to deliver effective, and where necessary protective, measures is an open question. The range of approaches is, at least in part, the outcome of limited international and regional standards, which has in turn led to processes and procedures developing in accordance with national priorities and preferences. This results in a large number of divergences in approach and provision as Table 2.3 demonstrates.

**Table 2.3: Convergences, divergences and gaps in responses to child maltreatment**

Convergences	Divergences	Gaps
<b>CHILD PROTECTION</b>	<b>CHILD PROTECTION</b>	<b>CHILD PROTECTION</b>
Best interests of the child as key framing	Threshold for state interventions without parental consent	Differentiated, widely and timely available support services
Child protection approach not rooted in criminal law, but in protection	Cooperation in a multi-agency approach	Periodic review of protective measures, especially foster or institutional care
Multi-agency approach (18)	Mandatory reporting	Strong European knowledge base and data collection
Limits for offenders on working with children (20)		Training and capacity-building
<b>CHILD SEXUAL ABUSE</b>	<b>CHILD SEXUAL ABUSE</b>	<b>CHILD SEXUAL ABUSE</b>
Penetrative acts with a child under age of consent criminalised	Age of consent	Criminalisation of <ul style="list-style-type: none"> <li>— sexual abuse of boys</li> <li>— grooming</li> <li>— intentionally engaging in a sexual act in the presence of a child for the purpose of sexual stimulation</li> </ul>
Range of other criminal offences, including abuse of trust Child sex tourism	Sex offender registers	
<b>CORPORAL PUNISHMENT</b>	<b>CORPORAL PUNISHMENT</b>	<b>CORPORAL PUNISHMENT</b>
Criminalisation only under certain circumstances	Total prohibition in family	Total prohibition in institutions and/or the family
<b>PHYSICAL ABUSE/NEGLECT</b>	<b>PHYSICAL ABUSE/NEGLECT</b>	<b>PHYSICAL ABUSE/NEGLECT</b>
Criminal law a last resort in the most serious case	Threshold for criminal liability	
<b>VICTIMS' RIGHTS</b>	<b>VICTIMS' RIGHTS</b>	<b>VICTIMS' RIGHTS</b>
Statute of limitations beginning at majority (17)	Length of time limit	Limitation periods for compensation (also in comparison to criminalisation)
	Victim protection and support available for child victims appearing as witnesses	

## 2.3 Violence against women (VAW)

In this section, forms of VAW have been combined where they are linked/overlap in law, policy and/or experience.

### 2.3.1 Rape and sexual harassment

There is a potential overlap, in criminal law at least, between sexual offence laws and sexual harassment, hence both are addressed in this section.

### 2.3.2 Rape

International and European standards on sexual violence are sparse, with the exception of sexual violence in conflict, where both international standards and jurisprudence have established key reference points. Some of the basic standards on VAW and victims of crime have particular resonance for sexual offences: the special needs of victims as witnesses at all stages of legal proceedings<sup>(26)</sup>; the requirement that gender-sensitive investigative techniques be used so as not to further degrade women<sup>(27)</sup>; and the obligation for Member States to guarantee appropriate measures to protect the privacy of victims<sup>(28)</sup>.

For European standards, both the Council of Europe and rulings by the ECtHR are relevant, especially *M.C. v Bulgaria*<sup>(29)</sup> and CoE Recommendation (2002)5: the former established that a narrow, force-based definition of rape with a resistance requirement fails to protect women's right to bodily integrity, whilst the latter

set a standard that Member States should penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance, and penalise the sexual penetration of any nature whatsoever, or by any means whatsoever, of a non-consenting person.

The CEDAW committee has echoed the CoE emphasis on consent, arguing in a number of its comments that this is more compatible with human rights standards than force-based definitions.

Given the extensiveness and complexity of sexual offences law, how rape is regulated was prioritised in the questionnaire, whilst national experts were asked to report on the extent to which other forms of sexual violence were penalised. In some Member States there is an overlap with child sexual abuse, whereas in others there are separate sections of criminal/penal codes covering sexual violence against adults and children. There is also an overlap with sexual harassment and the extent to which this is covered by criminal law.

Unlike many other forms of VAW, rape has been part of penal codes for centuries, with associated jurisprudence. The limited legal definition of rape and unique evidential requirements were subjected to intense critical engagement from the 1970s and have been reformed in three waves. The first wave, in the 1970s and 1980s, extended the definition of rape to include other forms of penetration and relaxed some of the evidential rules, such as the corroboration warning and the resistance requirement; the second wave focused on criminalising marital rape and male rape; and the third wave returned to the issue of definition and evidence, with an increasing correspondence between force and consent-based definitions through various combinations of: replacing notions of force with coercion; recognising conditions in which it is unreasonable to expect resistance; defining consent in law; and including all sexual violence (to comply with the CoE standard) under a single paragraph in the penal code.

(26) Article 8, EU framework decision on the standing of victims in criminal proceedings.

(27) UNGA Res 52/86; A/52/635, paragraph 8(b).

(28) Article 8(2) EU framework decision.

(29) *M.C. v Bulgaria*, Application No 39272/98.



**Table 2.4: Acts covered in the crime of rape**

Sexual act	Number of countries	Member States where the act does NOT apply*
Penetration of vagina by penis	27	
Penetration of anus by penis	24	SK (missing DK, LT)
Penetration of vagina by object	22	LV, SK, UK (missing DK, LT)
Penetration of mouth by penis	22	LV, MT, SK (missing DK, LT)
Penetration of vagina by other body part	21	LV, SK, UK (missing DK, IE, LT)
Penetration of anus by other body part	19	EE, FI, LV, SK, UK (missing DK, IE, LT)
Penetration of anus by object	19	EE, FI, LV, SK, UK (missing DK, IE, LT)

\* Not all are criminalised in Bulgaria but precise details are missing.

For full reference see the matrix (Annex 1), Table 10.

### 2.3.2.1 Legislation and policy

The matrix shows that all Member States have a specific crime of rape and the national reports (NRs) revealed that the majority (n=23) have additional adult sexual offences (except IT, RO, information missing: BE, BG).

Rape law is now firmly gender-neutral, with all 27 Member States recognising female victimisation and 24 male victimisation (except BG, CY, SI); in all Member States the perpetrator can be male and in 25 also female (except SK, UK). The United Kingdom is unusual in retaining a gendered approach<sup>(30)</sup>, but only with respect to perpetration: rape is defined as penetration by a penis<sup>(31)</sup>, with parallel but separate offences regulating penetration by objects or other body parts where both

(30) Ireland also has gendered offences: a Section 4(a) rape can only be committed by a man against either a man or a woman; a Section 4(b) rape can be committed by a male or female against a woman.

(31) Sex Offences Act 2003, for England and Wales; Sexual Offences (Scotland) Act 2009, for Scotland.

males and females can be perpetrators. Table 2.4 shows which acts are covered in the crime of rape; in 10 jurisdictions the definition is wider still, covering either 'all sexual penetration', 'sexual intercourse and acts comparable to it', 'coercion to perform a sexual act' and in one instance 'all sexual acts'.

If the crime of rape, or an equivalent offence, should penalise all non-consensual penetration, the matrix and Table 2.4 show that a number of Member States fall short of this standard, although both Slovakia and the United Kingdom could claim that equivalent offences pertain in their legal regimes. Similarly, whilst the marital rape exemption has been formally removed in most Member States (exception: LT), more subtle procedural distinctions remain in a number of Member States. These distinctions are in tension with the ECtHR statement that, 'a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim'<sup>(32)</sup>.

From a human-rights perspective, sexual violence should be framed as a crime against sexual

(32) *S.W. v United Kingdom*, judgment of 22.11.1995, paragraph 42, and *C.R. v United Kingdom*, judgment of 22.11.1995, paragraph 40.

integrity/self-determination/autonomy and the matrix shows that 18 Member States do this explicitly: in four it is understood solely as a ‘sex crime’ (CY, NL, SE, UK), in six it is understood as a crime against sexual freedom (EL, ES, LT, LV, PL, SK), but in six (BG, DK, HU, LU, LV, MT) aspects of the anachronistic concept of ‘crime against morality’ remain. National experts noted that this framing protects a social group and its honour, rather than the sexual autonomy of individuals/women. Whilst such naming could be regarded as merely symbolic, it correlated with other anachronistic provisions, such as allowing rape and/or abduction charges to be dropped if the accused subsequently marries the victim, even if they were a minor.

One major divergence is whether the crime is defined in terms of force or consent. Narrow, force-based definitions have already been ruled insufficient by the ECtHR<sup>(33)</sup>, yet the matrix shows 11 Member States (AT, CZ, FI, FR, EL, ES, HU, MT, NL, PT, SI) retain a definition limited to use of force or threat, with implicit or explicit resistance requirements. Seven have what we term ‘expanded force’ definitions (DE, DK, IT, LV, PL, SK, SE) which include what the ICC termed ‘coercive circumstances’, especially taking advantage of a helpless state.

Only three Member States have a solely consent-based standard (BE, IE, UK), whilst six, somewhat confusingly, use both force and consent (BG, CY, EE, LT, LU, RO). It is unclear whether these were formal moves to comply with the *M.C. v Bulgaria* case, and no national reports shed light on the potentially contradictory evidential requirements. Even where the legal definition is force-based, consent enters into legal judgments and four national reports (DE, FR, NL, SE) noted that in court, non-consent is what must be proved. Implicit resistance requirements are also inherently problematic where provisions are supposed

to cover children and adults, since they presume similar capacities.

These variations and lack of clarity resulted in contradiction between Member States and, sometimes, even within them, depending on the victim or the sexual offence concerned. Some of the jurisprudence provided by national reports illustrated precisely these points.

Table 2.5 extends the data presented in the matrix to illustrate commonalities and differences in legal definitions. It confirms that a number of Member States have extended understandings to encompass incapacity/helpless state and abuse of authority and vulnerability: contexts and physical states in which the capacity to resist is impaired/unavailable. That said, jurisprudence went in different directions in interpreting these provisions, with some very narrow rulings (DK, CZ) and others expansive (EE).

The matrix also shows that 24 Member States allow for aggravating circumstances which increase the sentence, the most common being listed below:

- ◆ degree of harm to the victim (AT, BG, CZ, DE, DK, EE, ES, FI, FR, HU, IE, LV, MT, PL, RO, SE, UK);
- ◆ multiple perpetrators (BG, DE, EE, EL, ES, FI, FR, HU, IT, LT, LV, MT, PL, RO, SI, SE);
- ◆ victim a minor (BE, BG, CZ, EE, ES, FR, HU, IT, LT, LU, LV, MT, PL, RO, UK);
- ◆ sexual attack resulting in death (AT, BG, CZ, EE, EL, FR, LU, LV, NL, PL, PT, RO, SK);
- ◆ helpless state/incapacity (BE, BG, ES, FR, HU, IT, LU, LV, MT, RO);
- ◆ use of weapons (BE, CZ, DE, ES, ES, FI, FR, IT, MT, UK); and
- ◆ perpetrator a family member (BG, ES, ES, FR, HU, LU, MT, PL, PT, RO).

Less common (seven Member States or fewer) were humiliation/degradation; level of brutality; victim vulnerability; victim in care/custody;

(33) *M.C. v Bulgaria*.

**Table 2.5: Components in legal definitions of rape**

Concepts in definition	Number of countries	Countries WITH these provisions
Force	24	AT, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK
Threat	18	AT, BG, CY, CZ, DK, EL, FI, FR, IT, LT, LU, LV, NL, PL, PT, SI, SK, SE
Helpless state/abuse of incapacity	9	BG, CZ, DE, FI, IT, LU, LV, RO, SE
Consent	7	BE, BG, CY, EE, IE, LT, UK
Incapable of defending self	7	BG, CZ, DE, EE, FI, HU, RO
Vulnerability	3	LT, LU, SK
Deceit	3	IT, LU, PL

pregnancy as a result of the rape; repeat offender; repeated assaults; suicide of victim; administration of drugs to incapacitate; and taking place during armed conflict.

Given the seriousness accorded to rape offences, it is not surprising that the majority of Member States treat it as a state offence/*ex officio* prosecution (n=19). In the others, a variety of other provisions pertain, with some still requiring the victim to lay a charge, and in Italy and Lithuania, it remains a private complaint, although in Italy, once the complaint is made, it becomes a public prosecution.

The status of the complainant in rape cases is a matter of considerable variation, with at least three possibilities:

- ♦ the injured party/witness (BE, BG, CY, DK, IE, IT, NL, SI, UK);
- ♦ a civil claimant/party (EL, LU, MT);
- ♦ a full party (DE, EE, FI, FR, HU, LT, RO).

Whilst some national reports noted that few exercise the rights of being a party, these can be substantial including some combination of: having access to all evidence; the right to be heard/intervene in court; and the right to appeal decisions,

including the right not to prosecute. If one aspect of procedural justice in the aftermath of rape is to have one's agency restored, being a party to the case offers much potential, but needs to be accompanied by support and information to enable these rights to be exercised.

Sentencing ranges were also incommensurate, with significant variations in minimums for those Member States which have them (three months to six years) and maximums (nine years to life). Many national reports noted that there were limited data on sentencing and it was difficult to interpret what were available when offences had a large range of acts within them, but that it appeared that they tended to cluster around minimums.

### 2.3.2.2 Other sexual offences

The differentiation between rape and a sexual coercion offence is not consistent between Member States: sexual coercion offences variously cover non-penetrative offences where force/coercion has been used (n=4); abuse of dependency/vulnerability/helpless state (n=4); penetration of parts of the body other than the vagina (n=2);

non-sexual violence (n=1); and homosexuality for men and women (n=1). In several Member States the precise wording raises the question of where the boundary between rape and sexual coercion lies. The case of Germany is complex here, since the legal paragraph in the reformed law is titled 'sexual coercion' with rape a grave form of the more overarching concept.

Other Member States penalise additional sexual offences under the headings of 'sexual assault' 'sexual violence', 'indecent assault', 'violent indecent assault' or 'sexual abuse'. There is further lack of convergence in terms of: whether there is a single 'catch-all' offence (e.g. EE, IT)<sup>(34)</sup> or a series of more specified provisions; whether there is a force requirement; whether there are specific provisions protecting disabled people; whether sexual crimes other than rape remain private motion offences (e.g. FI); whether there are breach of trust/authority offences targeting professionals; whether there is an offence of criminal sexual harassment, including by electronic means; and whether there are anachronistic offences — for example, in Malta there is still an offence of abduction carried out with violence or intent to abuse/marry, where the charge can be expunged on marriage.

### 2.3.2.3 Investigation and prosecution

There is now substantial evidence that across the EU the majority of reported rape cases do not result in a conviction: a recent Daphne-funded study examining long-term trends concluded that a 'classic attrition' pattern was now the norm in Europe — with reporting increasing or stable, whilst conviction rates have fallen<sup>(35)</sup>. In nine countries (BG,

CZ, DK, EE, FI, HU, SK, SE, UK) police have the power to 'no crime' a report (data missing for BE, IE, MT, PL). This is a formal designation which means the report will not be included in crime statistics and is often supposed to be limited to cases deemed to be false allegations. Little evidence was found of concerted efforts to ensure that such designations are not used to remove non-stereotypical and/or complex cases from caseloads.

The need for supporting evidence beyond the word of the complainant in order for prosecutors to take the case forward makes the provision of forensic evidence in rape cases especially crucial. At the same time such examinations in the aftermath of sexual assault can be experienced as an additional intrusive act, requiring careful attention to be paid to the dignity and privacy of the victim. International recommended minimum standards from the World Health Organisation (WHO)<sup>(36)</sup> suggest that specially trained female doctors in a dedicated setting should undertake the examinations to ensure both the quality of evidence and care and support of the victim.

Only six Member States (FI, IE, LT, PT, SE, UK) can claim that some examinations are undertaken in such settings. For the majority (BG, CY, DE, DK, EL, ES, FR, HU, IT, LV, NL, PL, PT, SK, UK) examinations are undertaken by designated forensic doctors, with two still relying solely on family doctors (EE, LU). In some Member States, in certain circumstances, the victim may even have to pay for evidence to be collected (BG, DE, LT, PT, RO, with information missing for LU). In only 10 Member States (BE, BG, CY, DE, DK, LT, RO, SI, SK, UK), is it clear that the decision to release forensic findings to the CJS remains with the complainant, although information was missing for three (LU, MT, NL). Moreover, very few Member States report the right to have a forensic examination without having

(34) The rationale for this reform in 1990, which created a 'sexual violence' offence was to shift from a focus on penetration to sexual aggression.

(35) Lovett, J. and Kelly, L, 2009, *Different systems, similar outcomes: tracking attrition in reported rape cases across Europe*, London, CWASU. (<http://www.cwasu.org>).

(36) WHO, 2003, *Guidelines for medico-legal care for victims of sexual violence*, Geneva, World Health Organisation.

made a formal report to the CJS. There is a need here for quality standards to ensure similar protection of dignity and access to redress across the EU.

The number of times a complainant may be interviewed is also poorly regulated in some Member States, with national reports noting that this may take place on multiple occasions and even involve a ‘confrontation’ with the accused as part of the investigation.

Several national experts commented on how the unique evidentiary rules on rape had been retained as rules of practice, even if they were no longer in the letter of the law. The clear implication here is that those who complain of sexual victimisation are less truthful than those reporting other crimes. This in turn links to the issue of false accusations, which a number of studies have shown are believed, by police and prosecutors, to be higher in rape, creating a ‘culture of scepticism’ in which police and prosecutors work with a template of ‘genuine complaints’: by a stranger, outside, involves injuries, prompt reporting. All of these have been shown by social research<sup>(37)</sup> to apply to the minority of rapes, yet this is the standard against which complaints are judged worth investigating, as a recent Irish study notes<sup>(38)</sup>. The depth and standard of investigations is thus compromised<sup>(39)</sup>. There was consensus that stereotypes of rape were barriers to reporting, investigation and prosecution.

#### 2.3.2.4 Protection

Sexual violence has been described as a unique crime, in terms of the bodily intrusion it involves

(37) See, for example, Lovett and Kelly, 2009.

(38) *Rape and justice*, (<http://www.rcni.ie/uploads/Exec-Summary.pdf>).

(39) Stanko, B. and Williams, E., 2009 ‘Real’ rape and ‘real’ rape allegations: what are the vulnerabilities of the women who report to the police?, Horvath, M. and Brown, J. (eds), *Rape: challenging contemporary thinking*. Cullompton, Willan.

and the cultural and social meanings that being a victim carries. The offences involve particular and specifically harmful violations of the human rights to privacy and bodily integrity. This has led to arguments for the process of legal cases to be informed by ‘procedural justice’: that everything which is done should protect dignity and restore agency to the victim and control over her/his body. One recommendation here has been that rape victims be interviewed by female police officers and examined by female forensic examiners, but in only seven Member States is this currently a legal right with respect to doctors (AT, BE, EL, FR, LU, MT, SI).

In most Member States there is no specific protection for rape complainants, although in the case of Germany and Spain, the Protection Against Violence and Organic Law respectively provide the possibility of protection orders, and a ruling by the Supreme Court in the Netherlands in 1985<sup>(40)</sup> extended civil restraining orders to rape cases. Specific protection for victims of sexual offences while giving evidence in court were reported in eight Member States (DK, EL, FR, IE, IT, LV, LU, UK) with information missing for two (BE, MT). These may include: giving evidence to a closed court; restrictions on reporting of the name of the victim in the media; and being able to give evidence via a video link. Defendants are still allowed in most jurisdictions, to question the complainant in court in person and only a few report qualifying this in sexual offences (UK).

A matter of intense ongoing debate is the extent to which sexual history evidence of the victim is admissible in court, since historically this has functioned as a way of undermining women’s credibility. It is still permitted in 17 jurisdictions (BE, CY, CZ, DE, DK, EL, HU, IE, IT, LT, LV, MT, NL, PT, SI, SK, UK), with only six having legal rules on admissibility (BE, DE, IE, IT, PT, UK). One evaluation of

(40) HR 24.5.1984, NJ 1985.



such rules found that judges interpreted the law liberally and often failed to keep to the procedures outlined in the reform<sup>(41)</sup>. Similarly, medical history of the victim (often including information about contraception use, abortion and mental health) is permitted in 21 countries and since information is missing for two, only four do not allow this (BG, CZ, FR, IT) and only four (EL, IE, PT, UK) have rules on admissibility. A recent Scottish study found that restrictions on sexual history evidence had the unintended consequence of increasing requests for disclosure of all medical and social service records<sup>(42)</sup>. General character evidence with respect to credibility is permitted in 21 Member States and, given that one is missing, is only clearly prohibited in five (AT, BG, DE, FR, PL). One can make the case, therefore, that current legal rules in many Member States fail to adequately protect women's privacy and dignity in rape trials.

### 2.3.2.5 Sex offenders

Law and policy on sex offenders is often presented as a protective, and even a preventative, measure. However, developments here appeared somewhat random, with limited evaluation and innovation. A few Member States have introduced sex offender registers (AT, EE, FR, IE, SE, UK), whilst rather more have provisions banning convicted sex offenders from working with children (AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, LV, LU, PL, RO, SK, SE, UK).

The outcome data from sex offender treatment remain inconclusive, with re-conviction

(41) Kelly, L., Temkin, J. and Griffiths, S., 2006, *s41: An evaluation of new legislation limiting sexual history evidence in rape trials*, Home Office Online Report (<http://www.homeoffice.gov.uk/rds/pdfs06/rdsolr2006.pdf>). (accessed 8.3.2010).

(42) Burman, M., Jamieson, L., Nicholson, J. and Brooks, O., 2007, *Impact of the aspects of the Law of Evidence in Sexual Offence Trials: an evaluation study*, Edinburgh, Scottish Government.

emerging as a misleading measurement; a Home Office study in the United Kingdom found that using recidivism revealed higher rates of re-offending<sup>(43)</sup>.

### 2.3.2.6 Support

In general, support services are far less available than those developed for IPV, with many national reports describing hardly any specialised sexual violence services. For example, only three countries (FR, IE, UK) have a national sexual violence helpline. Other countries report severely limited provision: the German national expert, for example, notes that, whilst the '2.Opferrechtsreformgesetz' (*victims' Rights Reform Law*) of 2009 established the right to support, no provision was made to create services where these do not currently exist and there are very few sexual violence services.

There are two sexual violence-specific types of service which may be available. Sexual assault referral centres (SARCs) are usually based in hospitals and respond to recent serious sexual violence by providing forensic examination services (often without a police report having to be made), as well as short-term counselling, advice and advocacy; and Rape crisis centres (RCCs) which are invariably NGOs and offer support, counselling and advocacy, independent of the CJS and regardless of when the sexual violence took place. Six Member States have RCCs (AT, DE, IE, IT, SE, UK) and eight (CY, DK, DE, FI, IE, IT, SE, UK) report having SARCs; in both cases these could not be said to be national networks, with the possible exceptions of Ireland and the United Kingdom. Many national reports noted that a dearth of support services contributed to under-reporting and the reluctance of victims to support prosecutions.

(43) Home Office, *Sexual offenders — measuring reconviction, re-offending and recidivism*, Home Office Findings (183), London (<http://rds.homeoffice.gov.uk/rds/pdfs2/r183.pdf>) (accessed 8.3.2010).



### 2.3.2.7 Prevention

Neither the questionnaire nor the national reports revealed much evidence of primary prevention with regard to sexual violence or rape. Only France reported an ongoing campaign; Romania has had a series of campaigns; and Slovakia and the United Kingdom, a single campaign run by government.

The lack of tools to undertake such work was also evident, including an urgent need to work with young people on what consensual sex might be.

### 2.3.2.8 Capacity-building and training

Only eight countries (BE, EE, LT, LV, NL, RO, SK, UK) reported having special/additional procedures with respect to investigation, 11 (BE, DE, DK, EL, ES, FI, IT, LV, NL, SE, UK) on prosecution of rape and eight on how cases are dealt with in court (DK, EL, FR, IE, IT, LU, LV, UK). Minimal training appears to be available.

### 2.3.2.9 Statistics and data

Prevalence data were reported in 11 countries (DE, FI, HU, IT, LT, NL, PL, PT, SK, SE, UK) but the headline findings varied hugely, confirming that methodology has not developed as strongly as in the case of domestic violence. Two issues should be noted here: a tendency to use very few (sometimes just two) questions to probe for experiences, in contrast to domestic violence where lengthy lists of behaviours are included; and the influence of national legal definitions on findings — whilst not necessary for social research, many studies revert to the current national legal definition, which, if narrow, will decrease prevalence estimates). Indeed, there are very few European prevalence studies addressing sexual violence specifically, with a notable exception being the Sexual Abuse

and Violence in Ireland (SAVI) study which examined assaults in childhood and adulthood.

While in 20 countries, official statistics were reported as being available annually (except BG, DK, ES, IT, RO, missing: MT, SK)<sup>(44)</sup>, very little was entered into the questionnaires and many national experts pointed to the difficulty in accessing the information. Where the legal code has been reformed into a single, all-inclusive sexual offence, it becomes difficult to provide meaningful data, since the range of acts covered is so wide.

### 2.3.3 Sexual harassment

Sexual harassment is the only form of VAW where there is binding EU law, through Directive 2002/73/EC of the European Parliament and of the Council, which placed harassment under the prohibition of discrimination (recast in Directive 2006/54/EC). The considerable harmonisation with respect to sexual harassment in employment is undoubtedly due to this.

The European Commission established a monitoring group published a report in November 2008 and updated in October 2009. The country-by-country overview canvases implementation of EU gender equality law, including the relevant directives<sup>(45)</sup>. Sexual harassment is framed as a form of discrimination, with minimal consideration of its dimension as violence. Correspondingly, there is almost no mention of the possible use of criminal law for penalisation of harassers.

(44) Although the Belgian expert did not tick this box in the questionnaire, she did include an appendix to the national report, showing that in Belgium official statistics on rape are collected annually.

(45) European Network of Legal Experts In The Field Of Gender Equality, *Gender Equality Law in 30 European Countries*, 2009 update, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2, (<http://ec.europa.eu/social/BlobServlet?docId=4193&langId=en>).

The principle of it being the responsibility of the employer to prevent harassment, ensure an effective complaints procedure, end the harassment and impose sanctions have been established widely across the EU. The reversal of the burden of proof for claims to compensation and redress when employers fail to prevent and protect are considered important steps forward; however, the liability of harassers for what can be very intrusive and harmful violations of a victim's sexual and personal integrity is lost. In this study, we focus on sexual harassment as a form of violence and do not repeat findings on legal provisions in equality law and in labour law.

For full reference see the matrix (Annex 1), Table 9.

### 2.3.3.1 *Legislation and policy*

The matrix shows that the earlier predominance of labour law provisions has changed considerably: only three Member States (BE, LV, LU) rely solely on labour law. The great majority (22) now address sexual harassment in anti-discrimination law, but most also have provisions in another legal domain. While the trend is clearly towards anti-discrimination law, since it is required by Directive 2006/54/EC, there are several approaches to including criminal prosecution in the 'toolbox' for combating sexual harassment. Seven Member States (BG, CY, ES, LT, MT, SI, UK) have provisions in all three domains of law (although CY and MT penalise sexual harassment within anti-discrimination law and thus do not use criminal law in a strict sense). Two Member States (AT, RO) combine criminal law with anti-discrimination law and two (FR, PL) combine criminal law with labour law.

The low level of criminalisation is striking in view of the fact that Directive 2004/113/EC not only prohibits sexual harassment by 'all persons who supply goods and services', but in Article 14

explicitly calls on Member States to 'lay down the rules on penalties applicable'.

There are three main approaches to making harassers liable to sanctions.

**Unwanted behaviour of a sexual nature:** provisions here include 'sexual behaviour that offends dignity' (CY); 'vulgar actions, offers or hints' (LT); and 'act or conduct with sexual connotations that could be regarded as offensive' (MT). By placing the option of criminal prosecution within the general equality law (a codification that would not be possible in many legal systems), Cyprus and Malta draw down the definitional elements from the EU directive. Slovenia has a criminal offence of 'violation of sexual integrity by abuse of position, mobbing'. The United Kingdom has transposed some key elements of the EU definition of sexual harassment into a self-standing criminal provision that penalises 'unwanted physical, verbal or non-verbal conduct of a sexual nature, violating the woman's dignity and creating a hostile environment' and further specifies that sexual harassment is a course of conduct 'which the perpetrator knows or ought to know will amount to harassment'. The Spanish criminal code provision on sexual harassment defines the offence as 'creating a situation that is objectively and seriously intimidating, hostile or humiliating', with a higher penalty if it occurs in work, teaching or service relationships.

**Demanding or trying to extort sexual favours** is the framework in France and can also be seen in other Member States: 'who, in seeking sexual contact or satisfaction, harasses a person subordinate to him in office or otherwise' (LT); 'requesting sexual favours' (MT); 'threatening or forcing with the purpose of gaining sexual satisfaction... requesting sexual favours repeatedly' (RO). All of these emphasise the abuse of a workplace relationship and Romania further limits criminal law to the power of a superior who can decide over employment and its conditions.

**Forcibly imposed physical intimacy:** included here are ‘sexual acts on or in front of a person’ (AT); ‘copulation using employment or material dependency’ (BG); ‘imposing physical intimacy’ (MT); and ‘compelling a person to perform or submit to a sexual act while abusing a relationship of dependence or taking advantage of a critical situation’ (PL). These definitions overlap with other sexual offences (sexual assault, rape and exhibitionism), however, the provisions in Bulgaria, Malta and Poland do mention the relevance of a workplace context.

Some national experts pointed to provisions in criminal law that could be applied to serious infringements. Here, there is no specific criminalisation and the possibility seems to be rather theoretical: the victim might lodge a complaint under ‘insult to sexual dignity’ (EL) or ‘insult’ (SE), which requires private prosecution, or ‘coercion to perform a sexual act’ (FI), ‘molesting’ or ‘sexual violence’ (IT).

Several national experts suggest that stalking legislation could be applied to sexual harassment (BE, DK, LU, IT<sup>(46)</sup>). In Belgium, the *Arbeidsraad* (Labour Board) can refer a harassment complaint to criminal trial, presumably in cases that fall under general criminal provisions. There is no suggestion that such provisions are used with any frequency. In Germany and in Denmark, where stalking is penalised but sexual harassment is not a criminal offence, prosecution (and in Germany also civil protection orders) can also be pursued if the harassment fits the stalking definition; a workplace context is not necessary. The Luxembourgish legislation uses the directive definition, and sexual harassment is dealt with solely in the context of labour law, but the definition of stalking, which is criminalised, is sufficiently vague to allow for several forms of harassment to be covered outside of the workplace. This is also the case in Ireland. In

(46) Here, the offence is ‘molesting’.

two Member States (CY, SI), the connection is the other way round: legislation prohibiting harassment is suggested as a possible tool for addressing some forms of stalking.

### 2.3.4 Implementation

Little information is available on investigation, prosecution and court procedures, underlining the fact that criminal law is not the ‘front line of defence’ against sexual harassment. General provisions on investigation and prosecution of sexual violence may apply, but a minority of Member States report having these. Of the Member States with specific criminal laws, very few cases appear to be reported or prosecuted, with the exception of Austria, where the legal provisions include harassment in the street and exhibitionism: 1 111 charges were filed in 2008<sup>(47)</sup>.

Prosecution for sexual harassment in the workplace seems to be very rare. Even in France, where it has been criminalised since 1992, the provisions are not used regularly. For 350 cases followed, the European Association against Violence towards Women at Work (*Association européenne contre les Violences faites aux Femmes au Travail* — AFVT) reports about 50 convictions per year. Moreover, a significant proportion were sexual offences that were ‘downgraded’ to the status of sexual harassment (a misdemeanour) merely because they occurred in the context of a work relationship.

(47) In 70% of these the perpetrator was not known, suggesting that these were mostly incidents of harassment by strangers in public places.

The United Kingdom defines a criminal offence of harassment broadly, including sexual harassment regardless of the place and context, focusing on criteria of alarm or distress. The Protection from Harassment Act makes it unlawful to cause harassment, alarm or distress by a course of conduct and states that:

*‘A person must not pursue a course of conduct:  
(a) which amounts to harassment of another, and  
(b) which he knows or ought to know amounts to harassment of the other.’*

Overall, it seems that provisions intended to bring sexual harassment into the domain of criminal law have had little success. The definition of offences where there is criminal liability tends not to follow EU standards, so that the criminal justice system can only call perpetrators to account for something other than sexual harassment as the EU directive understands it. Across the EU, there is little protection from sexual harassment in locations other than in the workplace.

#### **2.3.4.1 Support services**

The most striking commonality is the near total lack of publicly established or funded support services for victims. In framing sexual harassment as a problem of workplace discrimination, and placing obligations on employers to ensure a safe working environment, both the EU and national governments evidently assumed that the structures and organisations that represent and protect workers’ interests would automatically ‘kick in’ to monitor implementation and support victims. This assumption failed to take account of the fact that sex discrimination and sexual harassment have a long history within trade unions, workers’ representative bodies and the occupational health and safety professions.

Support services here are an area of intersection between protection of women against violence

and gender equality institutions. It was beyond the scope of this study to examine the extent to which agencies, organisations and institutions available to support women experiencing discrimination tackle sexual harassment directly.

#### **2.3.4.2 Prevention and capacity-building and training**

Our information here is limited to sexual harassment as defined in equality legislation, with limited, if any, overlap with provisions in criminal law. That said, both prevention and training were sparse.

#### **2.3.4.3 Statistics, data and research**

Official statistics are largely missing and few cases are recorded in CJS data. In most Member States there have been national prevalence studies on violence against women, many of which included sexual harassment. Surprisingly, then, in response to our questionnaire 21 experts said there were no research-based estimates, one said information was unavailable and only five confirmed the existence of such data.

#### **2.3.4.4 Comparative analysis**

Table 2.6 highlights the main convergences, divergences and gaps in legal measures and policy responses to rape and sexual harassment.

### **2.3.5 Intimate partner violence (IPV)**

Whilst there has been a notable increase in attention to IPV across Europe, there is also much diversity in the responses, ranging from no specific legislation to a comprehensive law which makes profound changes to the legal and policy-based approach — not only to IPV but to VAW in general. Virtually all

**Table 2.6: Comparative analysis of rape and sexual harassment**

Convergences	Divergences	Gaps
<b>RAPE</b>	<b>RAPE</b>	<b>RAPE</b>
Criminal offence of rape (27)	Defined in terms of force and/or consent  Recognition of contexts of vulnerability/helpless state	Specialised support services
Removal of marital rape exemption (26)	How other sexual offences are addressed and differentiation	Prevention
Aggravating circumstances (24)	What is aggravating	Data
All forms of penetration covered (19–24)		Expertise among CJS staff, including on sexual violence and how to undertake thorough investigations
Framing as crime against sexual integrity/self-determination (18)	Provision for forensic examinations	Access to protection orders
	Protections of privacy within court proceedings, including what is admissible evidence	
<b>SEXUAL HARASSMENT</b>	<b>SEXUAL HARASSMENT</b>	<b>SEXUAL HARASSMENT</b>
Prohibition of sexual harassment in equality law	Use of criminal law	Direct (penal) sanctions for harassers
	Inclusion of non-employment contexts	

Member States (except EE, FI, LT, LV<sup>(48)</sup>) have some form of specific legislation relating to IPV and the matrix shows that 17 have some kind of dedicated framework law (AT, BG, CY, CZ, DE, EL, ES, HU, IE, IT, LU, MT, PL, PT, RO, SI, UK) which specifies acts of violence in a *domestic* context as the target, some of which cover more than IPV.

Member States differ in the concepts used in law and policy. Domestic or family violence are

(48) Latvia and Finland do have procedural rules that apply to protection orders and prosecution.

umbrella concepts which are not always explicitly defined and may overlap with wider concepts such as ‘violence against women’ or ‘gender-based violence’. Nevertheless, Member States often have a (working) definition of IPV (or the linguistic equivalent of ‘domestic violence’) in national policy documents. We use the concept of IPV to indicate our focus on the intimate relationship as a specifically and gendered site of violence and coercive control of a partner or ex-partner which affects women disproportionately. The range of physical, psychological and sexual violence that women can experience is addressed in a range of



different legal provisions, linked, at times, to violence against other household members (children or parents). In the interest of clarity we consistently use the term IPV, unless any other concept is crucial for understanding the particularities of the regulation in a Member State.

Legal definitions, in terms of the scope of legislation, vary with respect to three main characteristics: the kind of violence that is addressed (physical, psychological and/or sexual), with most focusing on physical violence; the range of persons to whom the law applies (current/ex, marital/non-marital, cohabiting/non-cohabiting, same-sex/heterosexual partners and/or other household members); and gender-specificity or gender neutrality in approach and legal concepts used, with a convergence towards gender-neutrality.

A reference to international law, human rights law or an equality perspective is rarely evident in national legislation, with the possible exceptions of Spain and Sweden, although on a policy level the connection between IPV and gender inequality is more often recognised.

### 2.3.5.1 *Legal measures and policy*

Many Member States deal with IPV through a combination of laws: police law plus civil law; criminal law plus civil law; administrative, civil and criminal law; or civil, criminal and family law. Some Member States also mention ‘social’ or ‘welfare laws’ which focus on providing shelter and support facilities for the victims<sup>(49)</sup>. In the event of an act falling under both a specific law in IPV law *and* general criminal law provisions, nine Member States have specifically regulated which law should be applied (BG, CZ, EL, ES, MT, PT, SI, SK, SE); in three (EL, SK, SE), the specific IPV legislation takes precedence.

(49) It is not always clear whether these laws create a specific legal obligation to provide shelters for IPV victims.

Three broad approaches to criminal law can be discerned. The matrix shows that 11 Member States (BE, BG, CY, EL, ES, FR, IT, LU, MT, NL, RO)<sup>(50)</sup> define all criminal offences as aggravated if they are committed within the family/household or against a close person or current or ex-partner. This approach allows for the use of all provisions of criminal law while imposing a higher sentence but, with the exception of Spain, no gender dimension is introduced. Ten Member States have framed a specific criminal offence (AT, CZ, DK, ES, IT, PL, PT, SE, SK, SI), of which only Austria does not specify the relationship context. The only case of overlap between the two approaches to criminalisation is Spain, suggesting that Member States tend to opt for one or other approach. Some Member States also make breach of a protection order a criminal offence.

A different, but, at times, overlapping approach is a broad and dedicated law, regulating such measures as protective interventions, court restraining orders and sometimes also penalisation. This approach, which we call ‘a framework law’, can combine provisions in different domains of law and 17 Member States have such legislation (AT, BG, CY, CZ, DE, EL, ES, HU, IE, IT, LU, MT, PL, PT, RO, SI, UK), with 13 including the criminal law provisions discussed above. Four Member States have a framework law, whilst relying for penalisation on existing criminal offences (DE, HU, IE, UK).

The framing of legal reform tends not to specify the intimate partner relationship or gender equality, but focuses on the family as a protected sphere of life. A minority of Member States have developed legal and policy provisions addressing IPV in a gender-neutral way (e.g. AT, DE, IE, UK). The

(50) It must be noted, however, that in Bulgaria, while domestic violence (DV) is an aggravated case calling for a higher penalty, procedural law also defines all DV as a private prosecution offence which the police and public prosecutors neither investigate nor pursue. De facto, therefore, there is no penalisation, since victims of IPV are not in a position to prosecute.



most advanced from the perspective of an integrated approach is without doubt the Spanish Organic Law, covering not only prosecution, including the creation of special courts, but also addressing preventive and supportive measures (welfare, child support, housing, employment), and it is unique in its specification of gender-based violence. The new IPV law in Portugal takes up a number of these elements and the United Kingdom has an integrated approach to VAW, rooted in human rights and gender equality, by way of policy.

### 2.3.5.2 Protection

The matrix shows a strong convergence across Member States in the development of a range of legal protection measures, most via specific laws on domestic violence, including those in administrative and police law that make such protection possible. Almost all Member States, if they regulate IPV at all, have some such provisions.

There are three types of protective orders relevant to cases of IPV.

*A civil interim injunction or civil restraining order* is available in all but four Member States (LT, LV, PL, RO), but conditions vary and usually it takes at least several days before the court issues an order. Such orders require a party to do, or refrain from doing, certain acts. Failure to adhere to the requirements can lead to criminal or civil penalties, but the breach must be reported and action taken for this to apply. In Malta, such orders can only be issued after initiation of formal marital separation or divorce: in France, separation or divorce must be initiated within four months or the protection order will be withdrawn.

*Criminal law protection orders* are more restrictive in that they are limited to cases when criminal proceedings have been initiated. Criminal protection orders are widespread. The period between a

violent incident and charging a perpetrator can be one of the most dangerous for a victim and lack of protection may result in victims choosing not to support a prosecution.

Finally, there are the orders that provide immediate protection. The *emergency removal order* (also called ‘go order’ or ‘barring order’) is relatively recent, but is being widely adopted. Following Austria, which introduced it in 1998, it can now be imposed in 11 Member States (AT, CZ, DE, DK, FI, HU, IE, LU, NL, SI, SK). Such an order allows the police (sometime operating under the authority of either prosecutorial or an administrative authority) to temporarily ban the offender from the home (the range of the ban varies from 3 to 20 days, with a possibility in several Member States for an extension under specified conditions). In some Member States the removal order is embedded in a multi-agency intervention programme for both perpetrator and victim/s (AT, NL). Some laws allow the police to impose a ban regardless of the wishes of the victim, if the perpetrator poses a danger. Member States which ensure that the immediate protection continues until a civil protection order can be issued (AT, DE, LU) also provide the civil protection order free of charge.

The matrix shows that there is a strong convergence in the development of protection measures — most specific laws on domestic violence (DV), and especially those in administrative and police law are aimed at making such protection possible. Almost all Member States, if they regulate IPV at all, have some such provisions.

In addition, in Belgium, Bulgaria, Spain, Italy and the United Kingdom, urgent court decisions to remove the perpetrator or ban them from the residence can be issued by a judge *ex parte* on probable cause within a day, in Italy within a few hours. These measures can also be considered immediate protection, especially when accompanied by the police power to arrest or detain. During the

police or temporary ban, the victim can apply for additional protective follow-up measures if necessary. In several Member States there is no provision to ensure that a civil protection order can be obtained before the emergency protection order runs out, thus leaving a significant safety gap; this was noted by experts from four Member States (BG, HU, SI, SK) and may extend further.

### 2.3.5.3 *Implementation: investigation and prosecution*

From a criminal legal perspective there has been a convergence across Member States in that violence in the family or against a partner is considered a public offence (although not always in the case of rape in marriage). When the police are called to a situation of possible IPV, in most Member States (23), they are legally permitted to enter the home without a warrant in order to assess whether anyone is in danger of harm (except CY, PT, SI; missing: BG). They have the powers to arrest the suspect to protect victims/prevent future assault in 12 countries (BE, CZ, DE, ES, FI, FR, MT, PL, RO, SI, SK, UK). Exceptions to the trend to considering IPV a public offence are the Member States which still require a victim complaint or private prosecution (CZ, DE, IT, HU, LV, but there may be more Member States where this is applicable). In some Member States the victim must investigate and initiate a private prosecution (BG, HU, LT, LV), depending on the offence. Referral to private prosecution must be seen as a failure of the state to exercise due diligence in preventing and prosecuting VAW.

There have been important reforms in criminal procedural law in some Member States which facilitate the investigation and prosecution of cases. The most significant are:

- ♦ policy measures to improve prosecution by designating IPV as a priority for the police and the public prosecution service (BE, NL, UK)

and special guidelines for the criminal justice actors (AT, BE, BG, CY, CZ, DE, FR, EL, IT, LV, LU, PL, SI, HU, IE, DK, NL, UK, EE, LT, MT, SK, ES, UK);

- ♦ additional or special procedures for investigating (BE, CY, DK, EL, ES, HU, IE, MT, NL, PT, SE, UK) and/or prosecution of IPV ((BE, CY, DK, ES, FR, IE, NL, PL, SE, UK); or additional/special procedures in court for IPV cases (CY, DK, EL, ES, IE, IT, LU, UK); and
- ♦ in two Member States national networks of special domestic violence (UK) or gender-based violence (ES) courts have been created<sup>(51)</sup>.

In addition to the measures described above, protection has been enhanced through the following measures:

- ♦ preventive protection programmes which address repeat victimisation and/or increase protection and support such that women feel it is safe to pursue criminal cases (e.g. electronic monitoring devices or GPS-based track systems to identify the location of high risk victims);
- ♦ when the victim of IPV is a non-EU national without an independent residence permit, 17 Member States allow the victim to apply for a residence permit after they no longer share residence with a violent partner (AT, BE, BG, DE, DK, EL, ES, FI, FR, IT, LU, LV, NL, PL, PT, SE, SK); and
- ♦ legal provisions to offer perpetrator programmes exist in 15 Member States (AT, BE, BG, CY, DK, EL, ES, FR, IE, LU, NL, PL, RO, SE, UK), although capacity is generally limited. In most Member States it is a sentencing option, while a few try to insert the programmes into the procedure at an earlier stage. Only four Member States (DK, ES, NL, SE) have such programmes available in every region of the country.

(51) In England and Wales, there are 141 special IPV courts and in Spain there are 92 exclusive courts to address gender-based violence and 366 shared courts.

Despite the move to more positive (active) prosecution policies, which aim to be more mindful about victims' needs, a number of national experts commented that, in practice, the police often continue to treat IPV as a family or private matter (AT, CZ, EL, LT, MT, PL) or that they minimise the violence (IT). Several national experts point to lack of sufficient expertise in CJS actors, including judges, as the main barrier to implementation of laws (BG, CY, MT, PT, RO, SI). Reference was also made to 'well-established routines of non-intervention' (RO), non-response to calls (EL), reluctance to intervene (PL), reluctance to prosecute (BG, LT) or a reluctance to impose appropriate sentences/sanctions (CY, LV).

Further barriers to prosecution noted in national reports included: prejudice and victim-blaming attitudes; stereotyping and under-enforcement in minority communities; and a lack of speedy process. Alongside this some national experts referred to the reluctance of victims to cooperate with investigations or testify in court (BE, CY, DE, EE, IT, RO, SE), which may seriously hamper the prosecution of IPV cases.

A number of additional concerns or ongoing debates were raised by national experts.

*Protection:* Despite new legal protection measures, difficulties in practice included time-consuming procedures leading to lack of immediate protection (BG, CY, LI, LT, MT, PL, RO, HU, SI, SK) and/or protection orders require too much evidence (SI, SK, DE); eligibility criteria (BE, IE, LU, MT); legal and procedural inconsistencies and lack of clarity (IE, HU, RO, LT); limited response to violation of a protection order (FI, NL, UK); and the financial costs of obtaining a protection orders for anyone not on social assistance (NL, SK, UK).

*Use of mediation:* The appropriateness of victim-offender mediation in cases of IPV was questioned by national experts, since it is ill-suited to

recognising the power relations involved and mediators are rarely professionally trained and certainly do not have expertise in IPV (AT, EL, HU, RO).

*Children living with IPV:* Several national experts highlight the fact that insufficient attention is paid in legislation to children who have to witness IPV (BG, CZ, DE, IT, LU, RO).

*Lack of gender perspective:* Some national experts pointed to the limited acknowledgment of the gendered nature of IPV (CY, LT, NL, SK, UK) and/or the absence of a coherent national approach or plan of action to address IPV from a gender perspective (NL).

#### 2.3.5.4 Support services

A majority of Member States (except DE, EL, MT and LT<sup>(52)</sup>) have a national VAW telephone helpline to provide support and information to victims, run by NGOs either fully or partially funded by the state.

Virtually all Member States provide some form of shelter facilities, with the majority dedicated for IPV victims (AT, BE, BG, CY, CZ, DE, DK, EL, FI, HU, IT, IE, LT, LU, MT, NL, PL, PT, RO, SI, SK, UK) however, sustainable funding remains a problem in most, and is not legally based. The situation is especially acute in the newer Member States, where much provision is dependent on international donors. Capacity problems — not having enough space to meet need — were noted in many Member States, including those with more extensive and long-standing shelter networks.

Several national experts emphasise the importance of having multi-agency intervention programmes available in which criminal justice and

(52) Germany has a number of regional lines.

other professionals collaborate in a systematic way (inter alia LU, UK, NL, DE, IT). Some national experts mention that these multi-agency programmes have been legally based in a national domestic violence law (MT, CY, PL).

### 2.3.5.5 *Prevention*

In a majority of Member States (except EE, HU, LV) awareness-raising campaigns on IPV have been launched (or are ongoing), including information that IPV is a crime which can and will be prosecuted. A number of campaigns also focused on the right to protection. Far less information was provided on primary prevention and many of these interventions appear to be localised and not mainstreamed into the school curricula or youth work.

### 2.3.5.6 *Capacity-building and training*

Many national experts (BG, CY, CZ, EE, EL, ES, FR, IT, NL, PT, RO, SI) commented on the lack of expertise and knowledge among professionals, due to limited or no training of the relevant actors in civil and criminal legal systems. Although training provisions are reported by a vast majority of Member States (AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LT, LU, NL, PL, PT, SE, SI, SK, UK), in only a minority (AT, CZ, DE, EL, ES, HU, IE, NL, SI) is training for police mandatory<sup>(53)</sup>. For prosecutors and judges the numbers are considerably lower.

### 2.3.5.7 *Statistics, data and research*

Over two thirds of Member States have undertaken prevalence studies (BG, DE, DK, EE, EL, ES, FI, FR, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK,

(53) Government reports to the Council of Europe monitoring suggest that mandatory training of the police may be more widespread, see Hagemann-White, C. (2010).

UK), although the results vary substantially, reflecting differences in methodology. Official statistics, as another source of data, are limited as well. The majority of Member States (AT, BE, CY, CZ, DE, DK, ES, FI, IE, LT, LU, NL, PL, PT, RO, SI, SK, UK) report that one or more institutions collect data on reported, prosecuted and convicted cases and the number of protection orders issued. One of the barriers in the case of IPV, in the absence of a specific law, is that criminal cases may be found within a wide range of offences. This requires a consistent way of ‘flagging’ cases if they are to be tracked through legal processes. Several national experts also noted that they even lacked a registration system or there was a system but it was flawed (DK, EE, IT, PL). In the Netherlands, as well as in the United Kingdom, efforts have been undertaken to improve the accuracy of police registrations of IPV, but even here problems remain: not least that the police, prosecutors and courts use different categories and identification markers.

Whilst evaluation of new legal measures and interventions is more common for IPV than other forms of VAW, it remains sparse, although foundational studies have been undertaken in some Member States (AT, DE, ES, NL, UK).

## 2.3.6 *Stalking*

### 2.3.6.1 *Legal measures and policy*

For full reference see the matrix (Annex 1), Table 7.

The most common form of stalking is that of post-separation IPV, so whilst the two are not totally coterminous they are very strongly correlated.

Laws on stalking are new in the EU, with the first passed in 1997 (IE, UK) and most specific criminal laws are even newer (BE, 1998; NL, 2000; MT, 2005; AT, 2006; DE, 2007; HU, 2008; CZ, IT, LU,

2009). In three Member States (PL, SE and RO) a proposal for reform is currently before parliament<sup>(54)</sup>. Both Germany and the United Kingdom have enacted specific civil law provisions in addition to the criminal prohibition. Member States with no specific law deal with the behaviours under generic offences, such as intimidation, damage to property or assault, or in the case of post-separation violence under IPV provisions.

In Germany, stalking was first legally defined in the Protection Against Violence Act. Whilst the rationale was the recognition that stalking is frequently a continuation of IPV, the law does not presuppose any specific relationship. Hungary, on the other hand, has made ex-partner stalking an aggravating circumstance, and in Malta, the punishment for harassment is increased ‘by one degree where it is committed on members of the same household, relatives including ascendants and descendants, spouses and partners’. Similar provisions can be found in Italy, Luxembourg and the Netherlands.

Where Member States have criminalised stalking, there are generally no references to international law as a relevant framework, nor has a human rights-based approach or gender equality played out as a relevant consideration.

### 2.3.6.2 Criminal law

The matrix shows that 12 Member States have specific criminal laws on stalking (AT, BE, CZ, DE, DK, HU, IE, IT, LU, MT, NL, UK). Three elements are characteristic in most of the criminal law definitions of stalking: that it is a ‘course of conduct’ or ‘repetitive behaviour’; intention on the part of the perpetrator; and open terminology or broad

concepts. With the exception of Belgium<sup>(55)</sup>, all define stalking as a repeat offence.

Another commonality is that perpetrators must have intentionally aimed at a certain outcome or at least known or should have known that certain negative consequences for the victim could ensue. In Belgium and Luxembourg, for example, ‘he knew or should have known that due to this behaviour he would severely disturb this person’s peace’. In Hungary, the stalker has to have the ‘intention to intimidate another person or to disturb the privacy of the everyday life of another person’. Similar requirements can be found in the laws of Ireland, Malta and the Netherlands. In Denmark, criminal liability requires that the police warn the stalker before a charge is laid, failure to comply thus demonstrates they knew that a continuation would ‘violate the peace’ of the victim.

Most legal definitions use broad terminology, such as ‘harassment’ or ‘pursuit’ in an attempt not to delimit the variety of stalking tactics by restricting the law to certain behaviour. These definitions may require further interpretation by the courts. Many Member States have therefore included non-exhaustive lists of possible stalking tactics (AT, CZ, DE, HU), but others have not.

Despite these attempts at clarifying the concept, some experts still report that broad concepts evoke uncertainty of meaning and may lead to strict interpretations through case-law. On the other hand, statutory elements, such as ‘pestering on a regular or persistent basis’ or ‘with the intention to intimidate’, may not be inclusive enough. The Czech national expert expressed concern that terms such as ‘long-term pursuit’ and ‘justified concern for life or health’ set the threshold for prosecution too high.

(54) In Sweden, the report of the Government Inquiry proposes to introduce the new offence of ‘unlawful stalking’. It has not led to statutory amendments yet, but this may occur in 2010.

(55) According to Belgian law, one incident can suffice, but the Belgian Supreme Court has ruled that the behaviour needs to be repetitive in order to qualify as stalking, making the difference only theoretical.



There are three points on which Member States with stalking laws diverge or at least hold different positions:

- ♦ the need to prove the negative impact on victims;
- ♦ the range of sanctions; and
- ♦ whether prosecution is only possible on the complaint of the victim.

In Malta, for instance, it needs to be proven that the behaviour has ‘caused alarm or distress in the victim’. Similar requirements can be found in four other Member States (CZ, DE, IE, IT). As far as the range of sanctions is concerned, for Member States with minimum sentences these range from 15 days’ to 12 months’ imprisonment. The statutory maximum, on the other hand, ranges from three months’ to seven years’ imprisonment.

Many Member States which have yet to adopt specific legislation report problems in addressing the issue through the law and national experts were more or less unanimous on the need for specific criminalisation. They cited the following impediments with general criminal law measures: they are ineffective (EE, LT, BG, SE, LV); they only address certain elements or do not cover all victims (LT, PL, ES, EL, SK, SI); and the absence of provision results in the police letting the situation escalate before intervening (LT, PL).

One of the greatest barriers to reform, according to some NGOs, is an absence of public awareness and a lack of advocacy groups (BG, CY, EE, LI, RO, SI) and, not unrelated, the fact that there are no concrete initiatives for such reform. Nevertheless, in several Member States there are signs of an increased interest in the issue. Often (public) attention is spurred by a high-profile incident, unfortunately often involving the death of the victim (LT, PL).

### 2.3.6.3 Investigation and prosecution

Few Member States have created special investigation or prosecution procedures for stalking. Only Italy has a special procedure which gives the police the possibility of cautioning a perpetrator prior to formal complaint. Only three Member States (BE, DK, SE) report that national guidelines on identifying and handling cases of stalking for police and prosecutors, although IPV provisions may pertain in other Member States.

Despite its criminalisation, stalking is still not unequivocally recognised as a straightforward public offence. In six Member States, prosecution is only possible upon the complaint of the victim (BE, DE, HU, IT, LU, NL)<sup>(56)</sup>. Some national experts questioned this requirement, as when stalking takes place in the context of post-separation IPV, there may be duress involved in the victim’s decision-making. In Germany the private prosecution rule only applies to simple cases and even then *ex officio* prosecution can be undertaken if the public prosecutor considers that public interest obtains (e.g. when the victim cannot be expected to file a complaint in a case of post-separation violence). In Denmark the victim has to request the police to warn the stalker first, before they can file a report upon violation of the warning.

Although actual numbers are difficult to compare due to recording differences, all available crime statistics unequivocally indicate that the numbers of prosecuted and convicted cases of stalking have increased in all Member States since stalking was criminalised (sometimes doubling or even tripling in a couple of years). This illustrates the added value of a specific criminal statute on stalking over a generic approach using existing criminal legal provisions.

(56) In the Netherlands, the rationale behind the complaint requirement was to allow for the victim to have the final say, since the prosecution of stalking potentially violates his or her privacy.



#### 2.3.6.4 Protection

Protection of stalking victims tends to be within the wider provisions with respect to IPV, although two Member States (LU, PL) state that there are no available avenues and a further eight national experts indicate that there are no provisions in civil law available to protect victims of stalking (BG, ES, FR, IE, LT, LV, PL, PT). In the other Member States, victims of stalking can apply for restraining orders on the basis of general civil law (such as general tort law) or the police/prosecutors/courts can impose restrictions on convicted perpetrators using general criminal procedural law (EE, EL, FI, HU, IE, MT, NL, SK).

The extent to which these provisions are used in practice is, however, unclear. The most extensive provisions appear to be the Protection from Harassment Act in the United Kingdom and the Protection from Violence Act in Germany. In some instances, whilst the legislation does not limit the use of legal remedies, practice does: for example, in the Czech Republic, the provisions are only used in situations of IPV as a follow-up to an eviction order. The Polish national expert noted the lapse in time between an application and the issuing of a restraining order, leaving the victim unprotected and vulnerable to reprisal. As of June 2010, restraining orders will be available as a preventive measure in the form of police supervision, but as long as stalking is not criminalised in Poland, these will not be available to stalking victims. Thus, restricted eligibility criteria for protective measures, with many limited to IPV/post-separation stalking, is a challenge in some Member States.

One Member State (Italy) has created specific protection for victims of stalking — in the form of a preventive cautionary procedure. If the stalker does not desist after this warning, the offence can then not only be prosecuted *ex officio*, but is also considered an aggravated offence.

#### 2.3.6.5 Support

There are very few support measures specific to stalking: the United Kingdom has a dedicated helpline, but in most Member States it is only the VAW/IPV provisions which are available and these may exclude victims of stalking where the perpetrator is not a current/ex partner. Few Member States integrate prosecution with measures designed to prevent repeated victimisation. In two Member States (ES, NL), innovative measures have been developed (using GPS-based alarm systems in cases of post-separation IPV which allow the police to identify the location of the victim) and are in the process of being implemented nationally.

#### 2.3.6.6 Prevention

As far as national awareness-raising campaigns or activities have been concerned, the situation is rather gloomy: only four Member States have made stalking the topic of a national awareness-raising campaign (BE, CZ, DK, IT). All four stressed the fact that stalking is a crime which can be prosecuted and/or that women have legal rights to protection. Particularly in Member States without a specific anti-stalking law, the national experts commented on the limited general awareness in society of the extent and severity of the problem of stalking.

#### 2.3.6.7 Capacity-building and training

As regards specific training for police officers and investigators, many Member States (20) have training courses, but, in two thirds, these are neither widely available nor mandatory. Only Italy and the Netherlands have made stalking training mandatory within IPV training. For public prosecutors, the situation is more or less the same. Other professions are even less well equipped.

### 2.3.6.8 *Statistics, data and research*

Only four Member States have research-based national estimates on the extent of stalking (NL, PL, SE, UK).

Only six Member States have compiled official statistics on reported/identified cases, although it is not always clear how reliable they are (AT, BE, CZ, DE, HU, NL). Whilst it is difficult to compare numbers, the data indicate that the number of reports made and recorded and the number of convictions delivered increase (sometimes by a factor of two or three) where there is a specific law.

Minimal research has been done on the effectiveness of anti-stalking legislation or protective measures, with some national experts noting it is too early to assess the impact. In the Netherlands there has been a study of the CJS effectiveness in handling stalking and these results were relatively positive.

### 2.3.6.9 *Comparative analysis*

In both IPV and stalking there have been clear moves towards criminalising the behaviour and providing protection for victims, since both crimes tend to be repeated courses of conduct. Whilst this is clearly the case with IPV, with close to half of Member States having criminalised stalking and another three Member States having legislation pending, there can be said to be a tendency in Europe towards criminalisation here too.

The unanimity of national experts from Member States without specific laws that the general provisions are not ‘fit for purpose’ with respect to this form of VAW adds power to an argument for greater standardisation. That said, the extent to which reported cases are dealt with seriously and promptly leaves much to be desired, even when

dedicated laws are available, and there are gaps in protection, especially with respect to stalking.

Table 2.7 summarises of the convergences, divergences and gaps in the two forms of violence across the EU.

### 2.3.7 **Female genital mutilation, forced marriage and honour-based violence**

These three forms of VAW have been combined, in part to reflect the overlap and commonalities among them and in part to signal the paucity of measures to address them across much of the EU.

Despite being named explicitly in the core international documents, in many Member States they receive little or no recognition, in others national experts report an emerging awareness and a minority report having specific legal provisions, strategies and measures in place, sometimes in recognition of changing patterns of migration, but also, to a lesser extent, in fulfilment of international obligations.

It should also be noted that no Member State considers any of these forms of VAW to exist among majority populations: rather they are associated with ethnic minorities, members of which may or may not be citizens and/or recent arrivals from outside of the EU.

Member States may grant international protection status to women and girls seeking entry to EU territory on grounds of the risk of these forms of violence, but the information collected by the national experts suggests that, in practice, few Member States do so.

Where women have gained entry on grounds of family reunification, they retain a dependent residence status. Where those relationships break

**Table 2.7: Comparative analysis of IPV and stalking**

Convergences	Divergences	Gaps
IPV	IPV	IPV
Provisions on criminalisation and protection	Minimal/piecemeal versus elaborated and coherent reform and policy	Protection gap between emergency and extended protection orders
Policy which specifies that prosecution of IPV is in the public interest	Specific offences versus aggravated circumstances	Protection gap where emergency removal orders not available
Emergency protection orders (16)	National protocols/guidelines for police and prosecutors	
	Laws framing IPV in terms of family or partner relations	Recognition of children living with IPV as victims
	Connections to gender equality and/or fundamental rights	
	Integrated law covering all domains of law	
	Recognition of IPV as a course of conduct offence	
Gender-neutral approaches in legal measures	Mandatory reporting	
Perpetrator programmes (15)		Availability of perpetrator programmes across all region
<b>STALKING</b>	<b>STALKING</b>	<b>STALKING</b>
Course of conduct offences		Lack of protection orders in some Member States
		Gap in protection in Member States without criminal law on stalking
Increasing criminalisation	Necessity to prove the negative consequences for the victim	Protection orders not covering non-IPV victims of stalking
	Private motion	

down because a woman suffers one of these forms of violence, therefore, and/or a woman has to flee on grounds of violence, her residence status is immediately in jeopardy and usually at the discretion of the authorities in the Member State in question.

Similarly, access to vital protections and support services is usually less available to non-citizens. This is the wider context in which these forms of VAW need to be considered, alongside overlaps with child maltreatment and IPV.

For full reference see the matrix (Annex 1), Table 8.

### **2.3.7.1 Female genital mutilation**

#### *2.3.7.1.1 Legislation and policy*

According to the World Health Organisation, FGM comprises all procedures that involve partial or total removal of the external female genitalia or

other injury to the female genital organs for non-medical reasons (see the glossary, Annex 3). It is typically carried out on young girls between infancy and the onset of puberty and may have serious implications for the health of girls and, later in life, for adult women.

The matrix shows that eight Member States have a specific legal provision (AT, BE, CY, DK, ES, IT, SE, UK), while 13 also, or separately, recognise it within child protection procedures and/or policy (AT, BE, DE, DK, ES, FI, FR, IE, IT, NL, PT, SE, UK). Taking these provisions altogether, half of Member States (14) address FGM in some way and none acknowledge ‘culture’ by way of a defence or as a plea in mitigation.

In the eight jurisdictions where there is a specific law, it is an offence to remove a child from the jurisdiction for the purposes of FGM or to aid or assist a third party in mutilating a child, irrespective of whether it is done, or to be done, by a medical or non-medical practitioner. Similarly, all eight have general or specific extraterritoriality provisions; albeit in most cases this is qualified by the requirements that the act also constitutes a criminal offence in the jurisdiction where it was performed (double criminalisation) or by requirements that the perpetrator (or victim) be a citizen or permanent resident of the state in question.

The United Kingdom law created new offences, which entered into force in March 2004, of ‘taking a female abroad for the purpose of FGM or of assisting a non-UK national to mutilate a female overseas’. The wording of definitions is variously vague, simply referring to FGM or similar wording and detailing only ‘genital organs’, with three (CY, SE, UK) being more specific. Most definitions are gender-specific, referring to *female* genitals (except AT, ES). In at least two Member States criminal law has been understood less in terms of ensuring prosecutions and more to set clear normative standards (DK, SE).

Of those Member States with no specific criminal provisions, current criminal law provisions, for example, of assault, aggravated assault and bodily harm or, as in France, criminal law provisions on violence against women, can be applied to FGM. However, these remain theoretical options since only the Netherlands reports prosecuting a case of FGM under them. Of the remaining Member States, many report little or no awareness of FGM (BG, CZ, EE, EL, HU, LT, LV, MT, PL, RO, SI, SK). National experts attribute this primarily to the absence of significant migrant groups, obviating any requirement for specific legislation.

The changing patterns of migration referred to above suggest that it is an issue likely to warrant more attention. Seven Member States have both criminal and child protection provisions (AT, BE, DK, ES, IT, SE, UK), enabling wide-ranging interventions, from informal oversight to the removal of a child to a place of safety or court orders banning travel out of the jurisdiction.

Sweden has introduced additional, arguably more controversial measures allowing, in certain instances, for the compulsory medical examination of children. This practice has, however, been criticised as discriminatory and undermining of trust between parents and health practitioners, more so as no evidence of FGM has ever been found. It is noteworthy, however, that in Catalonia — one of the autonomous regions of Spain — criticism is not reported of what appear to be similar practices. There, the Catalan Institute of Health also uses ‘letters of commitment’ in which parents pledge not to undertake FGM on their daughters, echoing the emergence of pledging as an effective preventative strategy in various African countries<sup>(57)</sup>.

Several of the Member States which address FGM only through policy and/or child protection law

(57) <http://www.tostan.org>

(DE, FI, IE, NL, PT) focus on victim support and prevention and developing protocols for professionals (NL). In at least one (IE), lack of specific legislation is thought to hinder the deepening of policy and interventions.

It is unknown how widespread the practice of FGM is within the EU, but it appears that much tends to be committed outside the territorial jurisdiction. Extraterritorial applicability thus becomes important, but as noted above may be delimited by specific requirements, the example of new offences in the United Kingdom is one attempt to overcome these. Belgium has a different provision permitting the extra-territorial application of the criminal offence of FGM to anybody who commits this crime (regardless of nationality), as long as the offender is found on Belgian territory. Even if the foreign-national offender is only passing through Belgian territory, s/he can be arrested prosecuted and convicted in a Belgian court. In addition, Denmark, Sweden and the United Kingdom have excluded the standard requirement of double criminalisation in cases of FGM in order to enable prosecution within their national territory if the offence was committed abroad. However, the law protects only potential victims who are nationals or permanent residents.

#### 2.3.7.1.2 Support

In a number of Member States NGO networks provide vital points of contact and support, including in Germany and the United Kingdom; the latter also has 15 specialist health clinics offering healthcare to adult women, as well as ‘reversal’ of the procedure. That said, all of these are in England and 10 are located in the London area. In some Member States (for example, the Netherlands) the issue is fully integrated into the national youth healthcare system, following training of all professionals. However, in most cases of

suspected FGM, state obligations are triggered by harm — or the risk of harm — to children and statutory child protection duties mandate interventions of the types discussed above. Authorities are confronted with particular challenges of identification of, and access to, children at risk. Simultaneously, there is concern that interventions should not be designed or implemented in a discriminatory fashion, risking further alienation of minority populations.

#### 2.3.7.1.3 Prevention

Few Member States undertake sustained prevention work, which is unsurprising, given the number in which FGM receives marginal or no recognition. Three Member States have set up national centres or functions to coordinate prevention and other activities. The Netherlands launched a Focal Point on FGM, which cooperates closely with key individuals from the target groups themselves. Similarly, the United Kingdom appointed a National Coordinator on FGM, with cross-ministerial support, and has a number of NGOs actively involved in promoting awareness and discussion in schools and communities and a current nationwide initiative involving educational programmes in schools.

#### 2.3.7.1.4 Capacity-building and training

Few Member States engage in the regular training of professionals or sustained capacity-building within or across state and non-state sectors. Legislation in Italy provides for the training of professionals, and educational programmes for parents and communities as well as international cooperation. However, training and capacity-building appears to lack focus and priority status and there is little emphasis on basic, let alone continued, training nationally, for healthcare, youth and other front-line service providers.



### 2.3.7.1.5 *Research and statistics*

Reliable prevalence data on FGM are not available from any Member States, although research-based estimates have been produced in two (NL, UK). There is little evidence that these are routinely updated or that they inform legal or other initiatives, even within those Member States pursuing more active measures. In the United Kingdom official data are also collected.

### 2.3.7.2 *Honour-based violence*

HBV refers to all forms of violence and/or threats which are specifically motivated by the perpetrator's wish to protect, defend or revenge the so-called honour of either the victim or of the victim's family. Women's sexual reputation is considered to be the basis of their own and their family's 'honour'. Female (family) honour is dependent on the perceived chastity and adherence to 'accept femininity', often linked to prescribing the sexual behaviour of women to heterosexual marriage. Male sexual behaviour is usually only considered a violation of (family) honour when it is homosexual. HBV includes, but is not limited to: violent abuse or assault; restrictions on free movement; kidnapping; imprisonment; and, in the extreme, murder. In a number of Member States it is only the latter which has been the focus of debate. We note here that HBV is a contested concept which can lead to 'ethnicising' forms of violence which may have parallels in majority communities. More research and conceptual clarity is needed here.

For full reference see the matrix (Annex 1), Table 5.

### 2.3.7.2.1 *Legislation and policy*

All Member States have criminal laws against violence; the issue, therefore, is whether criminal law directly, or through policy, recognises HBV, and

whether it is regarded as an aggravating factor in the prosecution or sentencing of an offender. A similar picture emerges as with FGM, with considerable attention in a few Member States, but very little in most. The matrix shows that five Member States acknowledge HBV in law (DE, DK, NL, SE, UK); these and two more in policy (BE, DE, DK, FI, NL, SE, UK) and four as an aggravating factor (DE, NL, SE, UK). Several national experts noted that recognition has been limited to 'honour killings', thus neglecting the probably more frequent, if less lethal, forms of violence. Whilst the Netherlands rejected either a specific offence or specifying HBV as an aggravating factor, the courts have, in fact, taken it into account to increase the severity of sentences<sup>(58)</sup>. In 2010, in contrast to this, a set of prosecutorial guidelines was issued which suggest mediation, thus under-playing the risks involved. In Sweden HBV has been dealt with using the existing offence of 'gross violation of personal integrity': both here and in the United Kingdom it is evident that offences other than homicide are included in HBV<sup>(59)</sup>.

The matrix shows that 19 Member States do not have legal or policy-based provisions to identify and address HBV. As with FGM, general legal provisions criminalising physical and sexual violence are plainly capable of being used in such cases and it is certainly possible that offences involving HBV have, in fact, been prosecuted. Where the concept is not recognised, however, in law or policy, the existence or likely prevalence of this form of violence against women cannot be known and the extent to which Member States are meeting international obligations cannot be assessed. Two Member States (EL, HU) conflate it with the problematic concept of 'crimes of passion'.

(58) Leading case *Rb's-Hertogenbosch*, 13 February 2001, *LJN*, AA9954 (*NJ* 2001, 130).

(59) Magill, C., Lee, V., Watson, J., 2008, *CPS pilot on forced marriage and so-called 'honour' crime — findings*, London, Crown Prosecution Service.



### 2.3.7.2.2 Support

Given the limited recognition, few specialised support services exist. In Germany domestic violence shelters offer the best protection, although if the victim is a young person, public youth welfare agencies are obliged to invoke general procedural measures of protection. Indeed, this is the case throughout the EU in those Member States with statutory child protection duties. Denmark has a range of specialist services, including teams to assist municipalities with difficult cases, and a new shelter has also recently been opened there for young couples fleeing HBV. Civil injunction orders are also available to women in the Netherlands, where a pilot is additionally underway with two specialist shelters for young women at risk and other shelters for young men at risk of HBV. Protection orders tend to be available, given the family context of the violence and its threat, but may not always extend to the range of potential threats to safety.

### 2.3.7.2.3 Prevention

There is some evidence of consistent and sustained prevention efforts in a few Member States, with the most evidence from four (DE, NL, SE, UK). The Swedish Government commissioned the county administrative boards in 2005 to develop regional prevention projects. In the United Kingdom, by contrast, most initiatives come from the NGO sector, often with very limited government funding.

### 2.3.7.2.4 Capacity-building and training

Again, most initiatives can be found among the same Member States referred to above, although there is little specialist training provided for any law enforcement and criminal justice system personnel or to front-line healthcare and social welfare providers.

### 2.3.7.2.5 Research and statistics

One Member State (UK) has devised methods enabling the police to record, identify and monitor cases and to estimate the extent of the problem. However, the true scale of HBV is unknown anywhere in the EU and much research and data collection is still too new to provide an accurate picture of prevalence, let alone the complexities of many of these crimes.

## 2.3.7.3 Forced marriage

According to relevant international legal instruments, marriage requires the free and full consent of both parties, expressed in person before a competent authority in the presence of witnesses. However, this in itself cannot always guarantee freedom of choice. A marriage can be forced due to duress, family pressure and/or a range of threats. The overlap with early/child marriage is less well documented and attended to.

For full reference see the matrix (Annex 1), Table 4.

### 2.3.7.3.1 Legislation and policy

All Member States have laws regulating marriage, which include provisions pertaining to consent, as well as the circumstances in which marriages can be annulled or otherwise terminated in law. Similarly, all Member States regulate the age at which intended parties can marry. Relatively few Member States, however, have specific provisions in relation to forced marriage (FM) which distinguishes between forced and arranged marriages.

The matrix shows that six Member States have specific criminal provisions (AT, BE, BG, CY, DE, DK) with two (BE, DE) also having civil law provisions, as do Sweden and the United Kingdom.

A larger number address FM through policy measures (AT, BE, BG, DE, DK, FR, LU, NL, PT, SE, UK), with five distinguishing forced from arranged marriages (BE, BG, DE, DK, UK). Bulgaria criminalises both FM and arranged marriage: the former is characterised in terms of ‘compelling by violent means’, while the latter refers to circumstances where a ‘parent or relative receives a ransom’<sup>(60)</sup> (in other parts of the world this would be referred to as a form of ‘bride price’). In Austria and Germany the offence is characterised as a form of ‘aggravated coercion’. Two national experts (CY, DE) noted that, while distinctions are made between FM and arranged marriage, in practice the distinction can be difficult to maintain.

Both Belgium and Germany also have substantive provisions in civil law relating to FM. In Belgium these pertain to requirements in countries of origin if the intended parties are foreign nationals. In Germany registrars are obliged to withhold cooperation in the performance of the marriage ceremony if it is obvious that it would be void (e.g. due to coercion). However, it is not clear how registrars are to make this assessment. The United Kingdom has enacted a number of civil law provisions specific to FM, of which the Forced Marriage (Civil Protection) Act 2007 is the most recent. It placed a range of codes of practice and guidance on a statutory footing. Furthermore, it provided a victim-oriented definition of forced marriage as lacking at least one party’s free and full consent and involving elements of force. The Act takes a wide view of force and also makes provision for specific protections (see the next section).

That forced/early marriage appears to be an issue for specific minority communities, including Roma and those from south Asia, raises issues of ‘cultural sensitivity’, both in terms of the debates about the

appropriate response (does passing a specific law further marginalise disadvantaged groups/rural communities?) and as a barrier to implementation (noted by the national experts for BG, EL and RO). Early marriages, in particular, may be common either amongst minority groups or in certain regions.

### 2.3.7.3.2 Support

Few Member States report good provision of specialist support services and protection for victims of FM. Where significant Roma populations exist, a number of NGOs actively work with, or directly within, affected communities. However, labelling otherwise illegal activities as ‘cultural’ may impede effective government-level action. In Member States with robust child protection laws, statutory obligations require the intervention of social, youth and welfare services where young people are deemed at risk or are victims of FM.

In the Netherlands, victims of FM can, at times, be accommodated in ‘honour-based violence shelters’. In the United Kingdom, a network of NGOs offer specialised advice and assistance to potential or actual victims of forced marriage, but these tend to be located in major urban areas and struggle with precarious funding arrangements. A state-funded organisation, the Forced Marriage Unit, was established in 2005 and provided advice and support to nearly 1 700 individuals between then and 2009.

However, the most innovative measure is the United Kingdom Forced Marriage Protection Order. Application need not be made by the victim but can be made by a relative or a third party who is a ‘relevant person’. The court is empowered to issue a Protection Order not only in relation to past conduct, but also in relation to anticipated conduct. There has been no evaluation as yet but it is reported that a total of 86 such orders were issued during the first year.

(60) This is seen in terms of practices which are/were common within Roma communities, although prosecutions are rare due to ‘cultural sensitivities’. The provisions are also considered relevant to the fight against people trafficking.

### 2.3.7.3.3 *Prevention*

Six national experts report prevention measures in their respective Member States (AT, DE, DK, NL, SE, UK), with efforts in Spain limited to the autonomous region of Catalonia. Most focus on the tried but largely unevaluated awareness-raising campaigns, targeting wider or specific communities. Other initiatives are more specifically geared towards young people in schools or involve inter-community educational activities. One strategy adopted by some Member States (DK, NL) has been to raise the age of marriage where one of the parties is a foreign national. These measures have not been evaluated and raise fundamental rights issues.

### 2.3.7.3.4 *Capacity-building and training*

Whilst education and training among frontline service providers — police, immigration personnel, social and youth welfare workers and health-care staff — might be deemed essential elements in efforts to combat FM, there is no evidence that provision is widespread. In the field of child protection, inter-agency work is encouraged or mandated in a number of Member States, but few have specialist protocols to assist in formulating response plans for young people at risk of FM. Generic child protection procedures are likely to be inadequate, especially where workers lack specialist expertise.

### 2.3.7.3.5 *Research and statistics*

No Member State reports having reliable and up-to-date research-based estimates on the prevalence of FM; however, some have made efforts to gauge the scale of the problem (SE, UK). Germany, for example, has conducted surveys in some cities or regions and a few agencies (such as the Forced Marriage Unit in the United

Kingdom) compile annual statistics. Also, in Sweden and the United Kingdom, regular official statistics are published.

### 2.3.7.4 ***Comparative analysis of FGM, HBV and FM***

The three forms of violence show substantial commonalities in the extent to which they are dealt with or, more accurately, not addressed, within responses to VAW. As a minimum, therefore, they should be integrated into VAW NPAs and within child protection procedures.

This mainstreaming might go some way to countering the unhelpful framing which suggests only minorities have cultures and/or traditions which legitimise VAW or VAC. Whether specific laws are needed is a moot point with respect to FM and HBV, since, in theory, existing provisions should be sufficient. In the case of FGM, this is less certain. The argument for new law would, therefore, be more appropriately framed as a way to raise awareness and set common norms. There is certainly an argument for ensuring that protection orders can be obtained in these circumstances.

We do not present a table summarising the convergences, divergences and gaps. The only convergence — understood as legal measures or policy approaches evident in more than 50% of Member States — would be the absence of provision; hardly a candidate for standardisation, given state responsibilities to ensure all forms of VAW are criminalised, and the violation of fundamental rights involved. Clearly there is a need for more attention to be paid to these forms of VAW/VAC, including capacity-building and awareness-raising. There is much to be learnt from the Member States where actions have been taken.

### 2.3.8 Trafficking for commercial sexual exploitation and the commercial exploitation of children

Trafficking in human beings for the purposes of sexual exploitation and the commercial sexual exploitation of children (CSEC) have been combined in this section due to the considerable overlaps in law and/or policy. CSEC is distinguished from child sexual abuse (CSA) due to it involving a commercial transaction of some kind: an exchange in which one or more persons gains a financial or other benefit from the exploitation for sexual purposes of someone under the age of 18 years.

Unlike many forms of violence covered by this study, both trafficking and CSEC are the subjects of international and regional conventions. In the field of trafficking in human beings, the most relevant international instrument is the Palermo Optional Protocol to the United Nations Convention Against Transnational Organised Crime<sup>(61)</sup> which requires state parties to adopt national laws to criminalise trafficking and to implement victim support measures.

The CoE Convention on Action Against Trafficking in Human Beings extended obligations with respect to the rights of and protection for victims. With respect to CSEC, the CRC was supplemented in 2000 by an optional protocol on the sale of children, child prostitution and child pornography, requiring state parties to criminalise these forms of sexual exploitation. The relevant legal instrument is the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25 October 2007)<sup>(62)</sup>.

(61) Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, signed in Palermo, December 2000.

(62) <http://conventions.coe.int/Treaty/EN/Treaties/Word/201.doc>

As a consequence of the international and regional instruments, it comes as no surprise that many Member States have developed efforts to co-ordinate policy and legislative measures through national plans of action (NPA). No less than 20 Member States have, or have had, an NPA on trafficking (AT, BG, CY, CZ, DK, EE, EL, ES, FI, HU, IE, LV, NL, PL, PT, RO, SI, SK, SE, UK), and a majority of 18 still have a NPA in effect (AT, BG, CY, CZ, DK, EE, EL, ES, FI, HU, IE, LV, PT, RO, SI, SK, SE, UK; missing: PL). The majority of Member States have prevention as a main aim of their trafficking NPAs (18 Member States). However, of the 20 Member States with an NPA, only 10 Member States identify trafficking as a human rights violation (AT, BG, CY, CZ, DK, EE, ES, FI, HU, UK), nine of which use the UN definition of trafficking (AT, BG, CY, CZ, EE, ES, FI, HU, UK). Only eight Member States have made the link between trafficking and gender inequality explicit in their NPAs (AT, CZ, DK, EE, ES, FI, HU, UK), six of which used the UN definition. 14 Member States have included monitoring mechanisms (AT, DK, EE, ES, FI, HU, IE, LV, PL, PT, RO, SI, SE, UK). Eleven Member States have taken on the UN definition of trafficking (AT, BG, CY, CZ, EE, ES, FI, HU, PT, SE, UK).

Almost half of the Member States (13) have had an NPA on child sexual exploitation since 2002 (BE, BG, CY, CZ, DE, DK, ES, IT, LT, LV, RO, SE, UK), but in only seven was it still in effect (CY, DE, LT, LV, RO, SE, UK; missing: BE, ES, IT). All Member States have prioritised prevention of child sexual exploitation (only DK missing). In several cases, the trafficking NPA covers CSEC as well, hence the absence of a separate NPA.

As with the more general NPAs on VAC, not all Member States have been consistent in the human rights-based approach. About half of the Member States with an NPA on CSEC actually used the UN definition of childhood (any person below the age of 18) (BE, BG, CY, CZ, ES, IT, UK). An

acknowledgement of the gender-based nature of CSEC, i.e. that it disproportionately affects girls and/or is related to issues of gender inequality, is only present in three Member States (CZ, SE and UK). Finally, monitoring mechanisms were in place in about two thirds of NPAs (eight: BE, CY, DE, ES, IT, LV, RO, UK; missing: DK, SE).

Trafficking and CSEC partially in its wake, seems to be the one area where NPAs have indeed been developed in a majority of Member States. Whether this translates into actual coherence is addressed in the rest of the section.

For full reference see the matrix (Annex 1), Tables 3 and 2.

### **2.3.8.1 Legal measures and policy**

The approach to, and historical development of, national anti-trafficking law in many Member States has been informed by international law and standards, specifically the Palermo Protocol, which provides the internationally agreed definition of trafficking in Article 3 (Glossary, Annex 3). Some Member States (DE, DK, FI, HU, IT) amended their penal laws preparatory to ratification. For others, crucial levers for change were: EU candidacy (LT); international obligations (EL, LT, LU); or NGO lobbying (PL).

However, several national experts (DK, LT, NL), point to problems arising from their nature and characteristics, including the complexity of proving all the elements of the offence as defined in the Palermo Protocol: recruitment, transportation and exploitation. It should be noted, however, that in a number of Member States proof of all elements is not a prerequisite and, indeed, in the majority, a single element is sufficient (AT, BG, CY, CZ, DE, EL, ES, FI, FR, HU, IE, IT, LV, LU, MT, NL, PL, PT, RO, SI, SE).

The matrix shows that all Member States, with the exception of Estonia and Spain, have laws which specifically criminalise trafficking in persons, and all make it a criminal offence for any individual to arrange or facilitate the exploitation of another individual for the purposes of prostitution. The vast majority also criminalise transportation and recruitment (exception: SI). Of those Member States with specific laws, Hungary and Poland report that their respective laws fail to achieve even broad compliance with the Palermo Protocol. Other national experts (BG, CZ, FR, LT, MT) are also cautious as to whether their respective laws can be said to be fully Palermo-compliant.

Considerable convergence is evident with respect to the means specified as constituent elements of the offence or as aggravating factors. Twenty-six Member States include the deception of the victim and threats and/or force against the victim (missing BE throughout). Only Greece fails to specify exchanging financial or other benefits with a person controlling the victim as an element of the offence and all except Estonia and Malta include taking advantage of the vulnerability of the victim. All Member States criminalise both cross-border and internal trafficking.

### **2.3.8.2 CSEC**

The internationally accepted definitions of child prostitution and child pornography are to be found in the United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Glossary, Annex 3). Child sex tourism (CST), however, is not defined in international law and we draw on ‘End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes’ (ECPAT) here: ‘The commercial exploitation of children by men or women who travel from one place to another, usually from



a richer country to one that is less developed, and there engage in sexual acts with children, defined as anyone aged under 18’.

The matrix shows that all Member States criminalise the offering of a child for the purposes of prostitution in exchange for money or other benefits. Similarly, all make it a criminal offence to procure a child for the purposes of prostitution or to control a prostituted child; likewise, to produce, distribute, possess, sell, import or export child pornography. Here, at the level of basic criminalisation, harmonisation is already evident. As far as sex tourism is concerned, 24 Member States make sexual offences committed by a citizen against a child in another country punishable under national law (except FI, LT, MT) and 17 have an offence of intentionally arranging or facilitating the travel of another person within the jurisdiction for the purposes of child sex tourism (except BG, FI, NL, SE, missing: BE, CZ, HU, LT, LU, SK).

The matrix shows the majority of Member States use the UN definition of a child (under 18) in framing their laws, but issues pertaining to age are complex, since virtually all Member States specify an age of sexual consent below this, which can create tensions and contradictions in CSEC offences, either in the letter or implementation of the law.

Similarly, the variation in prostitution regimes<sup>(63)</sup> across Europe — with forms of legalisation, decriminalisation and prohibition operating — creates different contexts in which trafficking for sexual exploitation is undertaken. Swedish law, for example, criminalises the purchase of sex, the United Kingdom recently introduced a provision to criminalise, as a strict liability offence, the purchase of sex from an exploited woman, which clearly includes victims of trafficking, and a third of Member States (BE, BG, EL, FI, IE, LT, PT, SE,

(63) Kelly, L. and Coy, M., 2010, *Shifting sands: a comparative analysis of prostitution regimes in nine countries* (<http://www.uknswp.org/resources%5Chomeoffshiftingsandscoyetalog.pdf>).

UK) criminalise buying sex from a victim of trafficking. Where selling sex is not legal trafficked women can themselves be criminalised under prostitution laws.

As with other forms of violence, the range of penalties varies considerably, with maximum terms of imprisonment spanning five years to life imprisonment and, in some instances, specifying aggravating circumstances as involving children or organised crime. However, this must be viewed against a backdrop of low prosecution and conviction rates.

### 2.3.8.3 Investigation and prosecution

Just over half of the Member States (CY, CZ, EE, EL, ES, FR, IE, IT, LU, NL, PL, PT, RO, UK; missing: MT) have additional or special investigative procedures for trafficking, including specially trained police officers, specific guidelines or national and international coordination procedures. Similarly, nine (CY, DE, EE, EL, IT, NL, PL, RO, UK; missing: LT, MT, PT) have additional or special prosecutorial arrangements, including guidelines and specially trained prosecutors. Eleven Member States (CY, DE, ES, FR, IT, LT, LU, MT, PT, RO, UK; missing: BE) have tailored court procedures such as vulnerable witness provisions, anonymity for the victim or pre-recorded victim testimony.

All Member States confirm witness protection measures are available to victims of trafficking, although a number of national experts noted that additional qualification criteria often apply and/or lack of resources limits access.

Whilst most Member States report that a variety of protective measures are available to all child victims, little information on any special or additional arrangements for the investigation and prosecution of CSEC was provided. Few Member



States have explicit provisions governing the non-prosecution of women and girls who commit offences whilst under the control of traffickers or attempting to escape conditions of exploitation. Only five Member States (AT, DK, EL, ES, IT) have ratified the CoE Convention on the Protection of Children against Sexual Exploitation. However, the majority (except CZ, DE, EE, EL, FI, HU, LT, NL, SE) have ratified the CoE Convention on Action Against Trafficking in Human Beings which provides that, in case of doubt, a presumption be made that a suspected victim is a minor.

Since most countries report identification of victims of trafficking and CSEC to be a significant problem, it is likely that many children are falling through otherwise protective nets and being deported or even prosecuted for prostitution, immigration or other offences.

In this context, it is worth noting which Member States fulfil the requirement to have a designated national competent authority/national coordinator for trafficking (AT, BG, CY, DK, ES, FI, FR, HU, IT, LT, LU, NL, PL, PT, RO, SI, SK, SE, UK). Fifteen Member States have guidelines for the police, border and other relevant authorities (BE, CY, DK, EE, ES, FI, LT, LV, NL, PL, PT, SI, SK, SE, UK), with the guidelines agreed and adopted by all (except LT, SE). The fact that only 10 have agreed multi-agency guidelines may explain the concerns raised by national experts about identification.

#### **2.3.8.4 Support and protection**

Provisions for support and protection vary across Member States: the majority report that victims are protected against summary deportation and that they are entitled to a reflection period of at least four weeks. However, given the problems of identification referred to above, summary deportation must be considered a particular risk, especially for victims from outside the EU.

Two national experts (FR and SE) reported that a reflection period is not available as of right, but is dependent upon victims' cooperation with the authorities, and considerably more note that this is what happens in practice with respect to most of the fundamental rights supposedly accorded to trafficking victims (CZ, EE, EL, HU, IE, LT, LU, LV, MT, NL, PL, SK). Some also commented that even once an investigation is underway, rights and access to support and protection are restricted or limited because of lack of availability of support services.

The repatriation of foreign victims also lacks a coherent strategy and practice: 10 Member States (AT, BG, EL, ES, FR, HU, LT, LU, RO, SK) have formal bilateral agreements with other countries and a third (BE, DK, ES, FI, FR, PL, SE, SK, UK) specify that they have judicial, policy or other written guidelines governing the return of foreign nationals to source countries, although these are not always binding. Few undertake any assessment of the risk of re-trafficking (BG, EL, ES, LV, PL, SK, SE), with the number not that much higher when the return involves a minor (BG, CY, DK, EL, ES, FI, IE, LV, PL, RO, SK, SE, UK). Fewer still (AT, DK, ES, FI, PL, SK, SE) confirm the monitoring and follow-up of the returnees.

Whilst these data need to be read with caution, as the information was missing for close to a third of Member States, it remains an important area to address for harmonisation in the light of the risks of re-trafficking, particularly in the context of children whose circumstances in their homes and communities may have rendered them especially vulnerable to trafficking and sexual exploitation in the first instance. Nearly two thirds of Member States (CY, CZ, DE, EE, FI, FR, IT, LT, LV, LU, MT, PL, PT, RO, SI, SE) report having no special or additional arrangements for the protection of victims of CSEC. While most will use existing child protection infrastructures, as the child maltreatment section shows, these are by no means uniform.

Of the seven Member States which report having special or additional procedures, Denmark refers to a national plan of action of 2003, with funds allocated, for example, to the provision of counselling and other services. In the United Kingdom, identified victims of CSEC fall within general statutory child protection procedures, as well as those specific to trafficked and sexually exploited children. Hence, for example, a child at risk or already being exploited may be removed to a place of safety, such as local authority or foster care. However, the United Kingdom national expert points to a number of reports which have highlighted that many such children go missing from care, indicating again serious failings in support and protection procedures, leaving children vulnerable to CSEC and trafficking, both internally and internationally.

Whilst firm conclusions as to non-compliance cannot be drawn, the above suggests that, even in those Member States which have well developed and robust child protection systems specifically for trafficked and sexually exploited children, children nevertheless fall through the net. In those countries with no such targeted provisions, the risks must be even greater.

### **2.3.8.5 Prevention**

Most Member States report having a designated national competent authority, with 11 confirming that promoting awareness of trafficking among relevant professionals is one of its functions. Twenty Member States have NPAs on trafficking (except BE, DE, FR, IT, LT, LU, MT). Only seven Member States (CY, DE, LT, LV, RO, SE, UK) report current NPAs on CSEC.

A number of NPAs target demand reduction (as required under the Palermo Protocol) or provide for awareness-raising through campaigns. In particular, the United Kingdom Human Trafficking

Centre (UKHTC), in cooperation with NGOs, developed a national, and now, international campaign, the Blue Blindfold — Don't Close Your Eyes to Trafficking campaign, which a number of other states have taken up, including Ireland. As far as demand reduction is concerned, given that different prostitution regimes operate within the EU, efforts to coordinate and harmonise strategies and measures are likely to be challenging. Moreover, the lack of evaluation of specific measures will hamper the development and implementation of targeted measures.

### **2.3.8.6 Capacity-building and training**

Just over a third of Member States (AT, CY, CZ, EL, ES, IE, NL, PT, SE, SI) report that specific training on trafficking is mandatory across the country for police officers and investigators: a further two (DE, LU) report that training is mandatory in some regions, whilst in eight (DK, EE, FI, IT, LT, LV, PL, UK) it is discretionary. However, only six indicate that training is in fact widely available. With respect to border and immigration officials, again few (AT, CY, ES, PT, UK) report training to be mandatory across the country and even fewer (EL, ES, NL, SE) state that training is mandatory for prosecutors or for judges (EL, ES). Training is extremely sparse for child protection social workers or health professionals. Ironically, even where mandatory, training is often reported as not widely available. The picture is very similar for CSEC. One might expect that training for child protection workers would be more widely available, but only one Member States reports this as mandatory across the country.

### **2.3.8.7 Statistics and research**

There are well-documented difficulties in estimating the extent of trafficking. The majority of Member States (AT, BE, BG, CY, CZ, DE, DK, EL,

FI, EL, HU, IE, IT, LT, NL, PL, PT, RO, SI, SK, UK) compile official statistics annually on reported/identified cases of trafficking. Germany has an exemplary system in which police document every trafficking case in a national ‘situation report’, which combines statistics with analysis, including information about perpetrators. Similar collection, collation and analysis of data is undertaken in the Netherlands and by UKHTC. Twenty-two Member States (AT, CY, CZ, DE, DK, EE, EL, ES, FI, FR, IE, IT, LU, LV, MT, NL, PL, PT, RO, SI, SE) report that there are no national research-based estimates on the extent of CSEC and only the United Kingdom reported research-based estimates: eight (CZ, DK, EE, HU, PT, SI, SK, UK) report that annual official statistics are compiled.

### 2.3.8.8 Comparative analysis

To the extent that there is commonality, the influence of international and regional law and standards is evident. However, legislation is only effective if it is implemented and where there are adequate provisions in place for the protection and support of victims<sup>(64)</sup>, and here significant weaknesses emerge. Many national experts have pointed to the difficulties in identifying victims, the gateway to accessing services in all Member States. It is this which triggers the entitlement to a reflection period and access at least to some protection and support services, albeit that a right in law often does not translate into a right in practice, even in respect of the reflection period. Discretionary elements introduce further barriers to victims’ access to justice, more so when they themselves may be prosecuted for offences committed while under the control of, or attempting to escape, their exploiters.

(64) See also Rijken, C. and Römkens, R., 2010, ‘Trafficking for sexual purposes as a globalised shadow economy: Human security as the tool to facilitate a human rights based approach’, Van Dijk, J. and Letschert, R. (eds.), *Globalisation, human security and victims*, New York, Springer (forthcoming).

It has already been noted that, with a few exceptions, most Member States have enacted broadly Palermo-Protocol-compliant national laws and that there is a high degree of convergence with respect to criminalising CSEC. The challenge, therefore, is with regard to standardisation of protection and support measures, prevention and data collection and analysis. As far as prevention is concerned, a number of Member States are very proactive, whilst others lack strategies or fail to implement measures. Table 2.8 summarises the key convergences, divergences and gaps for trafficking and CSEC.

## 2.4 Sexual orientation violence (SOV)

The foundation for addressing discriminatory violence towards LGBT people whilst relatively weak is developing in both EU and international law. The framework of fundamental rights has resulted in the inclusion of sexual orientation in equality/anti-discrimination laws<sup>(65)</sup>; hate crime provisions tend to include sexual orientation and there are emerging principles with respect to addressing violence more specifically.

The most extensive outline of potential minimum standards is CoE Recommendation CM/Rec (2010)5 of the Committee of Ministers, which calls on Member States to combat discrimination on the grounds of sexual orientation or gender identity, with specific attention to violence.

More specifically, the following are commended: effective and prompt investigations; encouragements to report, including anonymous or online mechanisms; specialised investigative units which also maintain contact with LGBT communities; training for professionals; ensuring freedom

(65) A study on these provisions is available online ([http://fra.europa.eu/fraWebsite/research/publications/publications\\_per\\_year/2008/pub\\_cr\\_homophobia\\_o6o8\\_en.htm](http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2008/pub_cr_homophobia_o6o8_en.htm)).

**Table 2.8: Comparative analysis for trafficking and CSEC**

Convergences	Divergences	Gaps
<b>TRAFFICKING</b>	<b>TRAFFICKING</b>	<b>TRAFFICKING</b>
Criminalisation of cross-border and internal trafficking	Range of penalties	Coherent knowledge base
Constituent elements of offence — recruitment, transportation and exploitation	Protection during investigation and court proceedings	Support services
National designated body	Multi-agency agreed protocols	Effective identification procedures that accord victim status
	Training	Regulation of repatriation
<b>CSEC</b>	<b>CSEC</b>	<b>CSEC</b>
Criminalisation of involvement in prostitution and pornography for under 18s	Extent to which CSEC is integrated in child protection law and procedures	Specific protection in legal process
		Data
Range of offences on producing, distributing and owning child pornography	Training	Support services

of association principles are applied to sexual orientation and in particular Gay Pride marches; recognition that persecution on the basis of sexual orientation/gender identity may be a valid ground for asylum; decriminalisation of consensual sexual acts between same-sex adults; and awareness-raising on rights of, and respect for, sexual minorities, including in schools.

Recent decisions of the ECtHR point to a responsibility of states (in this instance, with reference to racism) not just to investigate crimes of violence effectively, but also to ‘unmask’ biased motives, since, in these contexts, violence is ‘particularly destructive of fundamental rights’, and furthermore that this should be ‘considered an aggravating circumstance in the prosecution and sentencing of the accused’<sup>(66)</sup>. To date this has mainly been achieved through ‘hate crime’ provisions.

A number of Member States have only legalised consensual sex between same-sex partners in the

last decade and the rights of sexual minorities to equal citizenship and recognition remains a contested issue in many Member States. In over half of Member States SOV has not been a matter of public debate and there is low awareness and recognition of this form of discriminatory violence. It is on one level obvious that if there is limited recognition or respect for LGBT communities and the discriminations they face then violence will not be acknowledged either.

#### 2.4.1 SOV and fundamental rights

We have already noted in Chapter 1 our decision to use ‘sexual orientation violence (SOV)’, since sexual orientation has been most frequently incorporated into law within Member States. No definition of SOV is found in the EU, but from a fundamental rights perspective all sexual minorities should have equal rights under the law, including protection from violence.

The most common legal approach has been through the concept of ‘hate crime’, but this is the subject

(66) ECtHR, *Secić v Croatia*, 31 May 2007, Reports 2007-VI, No 40116/02.

of intense academic<sup>(67)</sup> and political debates. One commentary notes that, whilst the ideas ‘have thus acquired powerful rhetorical focus for mobilisation of victim and identity politics’<sup>(68)</sup>, the precise contours of these crimes is less well understood and documented. Whilst hate crime legislation does criminalise, it should be noted that the targeted actions are motivated not just by hate, but by bias and prejudice with respect to a set of protected social statuses. Proving a hate crime requires proof not just of the crime itself but *also* a subjective intent standard.

Additional limitations have been a tendency to exclude VAW and recently in the United Kingdom, the Home Office explicitly excluded age from the groups covered on the reasoning that violence towards children and elderly people is rarely motivated by hatred. This raises the question of how useful the ‘hate’ designation is across other protected groups: it presumes motivations of animosity towards the victim based on separation from, and stereotypes of, the other group.

Yet the most likely perpetrators of violence against women, children, the elderly and adults with disabilities are those they live in close proximity to — partners, relatives, friends, carers — all of whom are positioned in relationships of intimacy, trust and/or care. In these contexts violent and abusive practices are frequently normalised, taken for granted as forms of social interaction based on perceptions of others as ‘worth less’ and/or undeserving of the same entitlements or rights as the perpetrators. ‘Hate crime’ fails to capture these processes and has a tendency to reduce structural inequalities to individual psychology, thus bypassing the complex intersections between violence, equalities and human rights violations. A number

(67) Jacobs, J. and Potter, K., 1998, *Hate Crimes: Criminal Law And Identity Politics*. Oxford and New York, Oxford University Press.

(68) Ray, L. and Smith, D., 2001, ‘Racist offenders and the politics of “hate crime”’, *Law and Critique*, 12:3, p. 203.

of national experts noted explicitly that this was the case with respect to ‘hate crimes’, which tended to be disconnected from inequalities.

In this sense, discussing violence against LGBT people in the context of VAW and VAC has merits, since the concepts of gender and generation have been used to refer to long-standing social inequalities, discrimination and power relations, within which patterns of violence are located. These theoretical framings also permit the exploration of the overlaps and intersections with child maltreatment: for example, forced marriage and honour-based violence can be rooted in sexuality as well as gender and/or generation. As with VAW and VAC, SOV is a continuum, ranging from everyday harassment in the neighbourhoods where people live and public spaces, through to threats and actual violence, with the most extreme form being murder. Much of this violence would not be recognised under narrow concepts of hate crime, another reason to adopt the more accurate and inclusive concept of discriminatory violence.

For full reference see the matrix (Annex 1), Table 11.

#### 2.4.2 Legislation and policy

Only a minority of Member States (eight) explicitly recognise SOV in law (BE, DK, FR, PT, RO, SE, UK) or in policy (IE). There are two ways this is done: seven use specific provisions within ‘hate crime’ legislation; in the remainder it is via general criminal law.

The majority of Member States (24, exceptions: CY, HU, NL) have provisions prohibiting harassment in employment and provision of goods and services within labour law and/or anti-discrimination law, but even here some fail to specify sexual orientation. Each of these approaches is examined in more detail below.



The majority of Member States (23), report that SOV is addressed through general criminal law, albeit in 14 (BE, CZ, DK, ES, FI, FR, HU, IE, LT, LU, PT, RO, SE, UK) this includes a ‘hate crime’ provision as an aggravating factor within violent offences. These data suggest that there is a number of EU countries where SOV is under-regulated. Indeed, some national reports noted efforts to address SOV being thwarted by parliament (IT, LT, RO).

### *Hate speech and hate crime*

Fourteen Member States report having hate speech provisions and 11 consider LGBT people to be protected by them (CY, DK, EE, ES, FI, FR, IE, LT, LU, RO, SI); three note that LGBT people are excluded from the provisions (EL, IT, MT). Considerably more commented that in practice the focus was on ethnicity/race/religion/political conviction.

The protections provided by hate speech laws were considered extremely limited by some national experts, with four noting extreme and prejudicial public homophobic comments by politicians and in the media where either no action was taken or courts decided it came within freedom of expression. In many instances the legal formulation is limited to incitement to use violence and in some formulations (e.g. EE) it is further restricted to danger to the life, health and property of a person (Articles 151 and 152).

Narrow interpretations of law can place even more restrictions on already limited protections. Sixteen Member States report having hate crime provisions in the criminal code (BE, BG, CZ, DK, EL, EE, FI, FR, HU, LT, PL, PT, ES, SE, SI, UK), with a further law soon to be implemented (RO). LGBT people are excluded in three (BG, EL, PL<sup>(69)</sup>) and not explicitly mentioned as one of the groups protected

in a further three (CZ, DK, HU). Germany includes SOV in a statistical category for ‘politically motivated crime’, and the Netherlands, whilst having no penal code provision, has a mandatory guidance to prosecutors on ‘discriminatory crime’ where bias or hostility is to be considered aggravating.

Hate crime is occasionally legislated as a specific offence, but more commonly it is a designation via motive with attached policies across a range of existing offences. A number of national experts noted the complex evidential issues in proving ‘hate crime’ — as opposed to ‘hate speech’ where there is usually documentary evidence. This raises the question of whether an aggravation designation may be a preferred approach, since it allows cases to be proved on the facts, with motivation an additional element: prosecutions would not fall on the basis of lack of evidence on motivation.

The picture is even more sparse with respect to guidelines for police and prosecutors, with only five countries (BE, DK, NL, SE, UK) reporting having one or both. Some guidance was also minimal in content, merely stating that complaints must be taken seriously and investigated promptly. The majority of Member States currently have no means of tracking the number of cases reported or their outcomes.

Little jurisprudence on hate crime and sexual orientation was reported, with some leading cases finding bias and others not, even within the same country. The number of successful hate crime prosecutions remains low across the EU and for sexuality-based offences, even more so. Limited progress in cases which most closely fit the hate crime template is not lost on LGBT communities and must act as a disincentive to reporting more everyday violence. On a more positive note, in countries where police and prosecutors have developed policies, including outreach to and liaison with LGBT communities alongside professional training, reporting has increased.

(69) A draft law to include LGBT people was recently rejected in Poland.



### *Anti-discrimination/equality laws*

Whilst equality legislation has limited reach in addressing violence, the adoption of Directive 2000/78/EC has provided some protection from harassment, but tends to be limited to employment and services and, in a number of EU countries, excludes transgender people.

The matrix shows that only Cyprus, Hungary and the Netherlands fail to prohibit discrimination on the grounds of sexual orientation in labour law and only Estonia, France, Latvia, Luxembourg, Malta, Poland, and Portugal in equality laws. That said, however, sexual harassment provisions are sometimes restricted to gender, thus precluding harassment where sexuality is the key issue. Moreover, many equality laws do not allow for intersectional harassment — for example, a lesbian may be harassed in ways that combine gender and sexuality. Five national experts noted that sexual minorities were specifically protected by their constitution, i.e. stated grounds (BE, NL, PL, PT, SI).

#### **2.4.3 Protection**

Only that protection provided to all victims of crime is available, with many national reports noting that these remain at the discretion of the prosecutor/court. Provisions with respect to confidentiality (an important protective measure where the victim is not ‘out’), whilst potentially available in 20 countries, require some combination of a request by the victim and the prosecutor/court deciding that the individual should qualify for such measures.

In terms of protection against violence, civil protection orders are said to be available to victims of SOV in 16 countries (AT, BE, DE, DK, EE, EL, ES, FI, FR, IE, IT, LV, NL, SK, SE, UK), but in some cases these are limited to attacks by a partner and in others are only possible as part of a criminal

prosecution. Only two provisions appear to offer wide-ranging protection.

- ♦ The Protection from Harassment Act 2007 in England and Wales offered extensive protection across many contexts provided that what was being complained about constituted a ‘course of conduct’ (i.e. two or more incidents). Protection orders with an attached power of arrest can be accessed here regardless of whether a report has been made to the police, although evidence of the harassing behaviour is required by the court.
- ♦ LGBT people have the same right to civil protection orders in Germany, under the Protection Against Violence Act, which applies when a person known to them injures their body, health or liberty, or as protection against stalking.

It should be noted, however, that each has limits in terms of the violence covered, requiring either repetition or relational contexts in which the violence takes place.

Member States do recognise sexual orientation as ground for asylum in law (although not always explicitly) and reportedly also mostly in practise. Assessment of the practise is however beyond the scope of this study.

#### **2.4.4 Support**

That so few NGOs have prioritised SOV has direct implications for the provision of support, which in the case of both VAW and VAC originated and is still strongly rooted in the NGO sector. It was rare for there to be more than one organisation (and in many cases not even one) in any Member State providing specialised support to victims of SOV and most of those who did provided only a helpline. Many national experts noted that generic victim support services frequently lacked understanding of LGBT discrimination and thus were

not equipped to provide appropriate support and advice.

#### 2.4.5 Prevention

To the extent that inequality constitutes the bedrock on which violence can be justified and perpetrated with virtual impunity, ensuring equal citizenship rights for sexual minorities may challenge mindsets which legitimise discrimination and violence. Whilst all 27 Member States<sup>(70)</sup> have equalised the age of consent for heterosexual and homosexual sex, to date only four countries permit same-sex partners to marry, although another 14 have systems of civil partnership. In 11 there is no formal recognition possible of same-sex partnerships.

The only references to more specific prevention activities were that police in Stockholm and in the regions of the Netherlands (here as part of pilot projects) go into schools to educate on hate crime.

#### 2.4.6 Capacity-building and training

The late emergence of SOV on to public agendas and the lack of policy compared to VAW and VAC meant that there was very little to report under this heading. Only the Netherlands and the United Kingdom could claim to have policies which built capacity to identify and respond more effectively to SOV among police and prosecutors. Whilst Germany has introduced a new coding system, which reflects the shift to ‘politically motivated crime’ rather than extremism, it is unclear which parts of SOV would qualify under this heading. However, detailed instructions were issued and training on them across the *Länder* took place in 2002. Furthermore, increased cooperation was

(70) Article 347 of the Greek Criminal Code stipulates 17 as the age of consent if the partner is 18 or over. There is a ‘close in age exception’ which sets the age of consent at 15 for consensual sexual activity between those aged 15–17 years.

initiated with NGOs who operate helplines on homophobic violence.

#### 2.4.7 Statistics and research

There were no examples of Member States undertaking national surveys on SOV and very few LGBT NGOs have done this either. It must be noted here, however, that there are considerable methodological challenges. What is a ‘nationally representative sample’ of a minority and frequently invisible/hidden community? It simply may not be possible to research this issue in parallel ways to studies on VAW and VAC. Smaller surveys with convenience or voluntary samples have been undertaken in some countries and questions included on sexual identity in general victim/victimisation surveys. There are similar limitations in official data for the vast majority of Member States, either because there is no legal provision or because there is no code to identify LGBT within hate crime or general assault cases. Even where codes do exist, many are so recent that often no data have been published<sup>(71)</sup>.

In public discourse the focus has been limited to assaults which ‘fit’ the hate crime profile, especially assaults on gay men when frequenting spaces associated with homosexuality and assaults in the context of Gay Pride marches. The everyday harassments and threats in neighbourhoods, workplaces, schools and colleges and the familial violence documented from parents and relatives who reject young people when they ‘come out’ is thus lost.

The knowledge base on SOV is, therefore, characterised by gaps and omissions and limitations in methodology. This lack of rigorous research is itself a barrier to further action as research has

(71) Nevertheless, six Member States claim that they have official statistics on SOV which are compiled annually (BG, DE, EL, NL, SI, UK).

proved an important lever for change with respect to both VAW and VAC, especially in establishing the scale and dimensions of the problem.

### 2.4.8 Comparative analysis

The relatively recent recognition of SOV means that legal policy and other responses are not as developed as for the other two fields of violence and there remains a tendency to focus on the most public and obvious settings and incidents. Law must be crafted to include all the violence which is directed at someone because of their actual or perceived sexual orientation: violence that deems people who are different as deserving of abuse. ‘Discriminatory violence’ captures the abuse of fundamental rights more accurately and opens up new avenues for legal responses, such as ensuring LGBT people are among protected groups within constitutions and/or principles underpinning criminal law. Responses to SOV are emergent and thus Table 2.9 indicates directions of travel.

## 2.5 Victims’ rights

### 2.5.1 The EU framework

This project addresses the rights of women, children and LGBT people to lives free of discriminatory violence and within this their status as victims of crimes is significant. The attention in research, policy and law to victims of crime in general has grown considerably since the 1970s<sup>(72)</sup>.

(72) Groenhuijsen, M.S. and Letschert, R. M., 2008, ‘Reflections on the development and legal status of victims’ rights instruments’, Groenhuijsen, M.S. and Letschert, R. M. (eds.), *Compilation of international victims’ rights instruments*, Nijmegen, Wolf Legal Publishers, second edition.

**Table 2.9: Comparative analysis of responses to SOV within the EU**

Convergences	Divergences	Gaps
Inclusion of LGBT in equality/labour laws re harassment in employment contexts	Recognition of SOV in criminal law	Definition of SOV in law
Recognition of SOV as grounds for granting asylum	Hate crime or aggravated circumstances	Research on the dimensions of SOV
		Access to protection orders
		Support services
		Expertise and capacity-building

Within the EU the 2001 framework decision (FD) on victims’ rights in criminal proceedings<sup>(73)</sup> was a milestone which codified at the supranational level, the legal position of victims which is binding for Member States. However, for many of the norms, it is not only legal transposition that matters, but implementation in practice. These considerations have been the starting point in the recently conducted Victims in Europe study (hereafter: VinE Study), which evaluated the implementation of the FD<sup>(74)</sup>. In this section, we draw on both our own findings and those of the VinE

(73) Framework decision on the standing of victims in criminal proceedings of 15 March 2001 (2001/220/JHA).

(74) See: van der Aa, S. et al., 2009, *Victims in Europe: implementation of the EU framework decision on victims in the criminal proceedings in the Member States of the European Union*, APAVI Intervict.

Study<sup>(75)</sup>, since they provide a unique opportunity to broaden and contextualise our results.

In the following sections we address the basic rights as defined in the EU FD: the right to respect and recognition at all stages of the criminal proceedings (Article 2); the right to receive information about the progress of the case (Article 4); the right to protection, of both victims' privacy and their physical safety (Article 8); the right to compensation, from the offender and the state (Article 9); and the duty of governments to promote mediation in criminal cases for offences for which it considers it appropriate (Article 10). The right to receive victim support (Article 13) has been addressed in connection with the provision of support services for each field of violence.

## 2.5.2 Codification of victims' rights

Overall, the vast majority of Member States (23) codified in law (AT, BE, BG, CZ, DE, EE, ES, EL, FI, FR, HU, IT, LU, LV, MT, NL, PT, RO, SE, SI, SK, UK) or a charter (IE, PL) one or more legal administrative provisions which set out the entitlement of victims in the criminal justice system (information missing for DK). These rights can be found in specific acts, included in the criminal procedure law or in the acts dealing with the specific fields of violence. The range of provisions and the scope of application vary significantly between Member States as well as across the fields of violence. Some national experts explicitly noted that there are very few or restricted provisions in their country (CZ, EL, MT).

(75) While preparing the initial RRS study, we conferred with the already ongoing VinE Study on operationalisation and conceptualisation of the questions on victims' rights. The methodology of the two studies is different so findings are not always directly comparable. That said, the fact that general findings on the level of implementation in both studies had a high level of congruence indicates that together they provide a reasonably accurate picture of the current situation.

Many national experts from Member States who joined the EU after 2004 mentioned that a specific victim law had been adopted as one of the accession criteria to comply with the *acquis communautaire*. However, implementation has, to date, been limited, due to lack of funding, a finding corroborated by the VinE Study. Although some of the western European Member States make a substantial contribution to the funding of national victim support organisations as one way to enhance the implementation of victims' rights, funding remains a weak spot in the majority of Member States.

Table 2.10 presents overall findings on the extent to which the rights in the FD have been incorporated into national law: the right-hand column indicates states where this does not apply or information was missing.

## 2.5.3 Respect and dignity

Respectful treatment which recognises the specific circumstances of the victim's ordeal is a cornerstone of victims' rights, with particular significance when they participate in a trial as a witness. Particularly vulnerable victims should benefit from 'specific treatment best suited to their circumstances' (FD Article 2.2). Definitions of vulnerable victims invariably include child victims and increasingly (female) victims of sexual and domestic violence. We recommend that this be extended to all forms of VAW and SOV.

Several national experts reported that adult victims of sexual offences, IPV and SOV are regularly confronted with discriminatory remarks and disrespectful forms of interviewing and forensic examination. There is a strong correlation between the lack of acknowledgement of the right to respect and dignity and the failure of some Member States to establish protocols for police and prosecutors on how to investigate discriminatory violence cases. There is also

**Table 2.10: Aspects of victims' rights**

Right to	Number of Member States with the provision	Member States where right does NOT apply
<b>Be treated with respect and dignity</b> (as an explicit legal or quasi-legal provision)	16	BG, CY, CZ, FI, FR, LT, LV, MT, RO, UK (missing DK)
<b>Receive information</b>	22	EL, IE, MT (missing DK, SI)
<b>Be involved as an affected party</b> (i.e. to be heard)	25	CY (missing DK)
<b>Protection in proceedings</b> (both of the physical safety and their privacy)	27*	
<b>Legal aid and other forms of assistance</b>	—	Provision and availability differs between the fields of violence
<b>Compensation</b>	—	Not possible to generalise as provisions so varied

\* The content and extent of measures differs considerably between Member States and for different crimes and groups of victims.

increasing research evidence that victims who are treated with care and respect not only give 'best evidence' but are also more likely to continue to support prosecutions.

#### 2.5.4 Receiving information

Nearly all Member States have a general provision on the right to receive information. The VinE Study revealed that this is most often fulfilled in the early stages of the criminal procedure.

However, information at later stages, in particular on the release of the offender, is often not made available. Our findings concur: only 13 national experts report that their state notifies victims of the release of the offender (AT, BE, BG, CY, CZ, DE, LT, NL, PL, PT, SE, SK, UK). This oversight may be particularly problematic for victims of VAW, notably IPV, rape, HBV and stalking, who run a high risk of repeat offences.

The VinE Study concluded that 'the systems for information dissemination may be there on paper,

but according to most respondents they do not provide victims sufficient access to information in practice'.

#### 2.5.5 Involvement as affected party

For victims of crimes which breach their bodily integrity and dignity and thus have profound impacts, as is the case across all three fields of violence, it is crucial to be involved in criminal proceedings, including having the rights, for example, to ask questions, to be heard, to make applications or to appeal decisions made by police/prosecutors/the court.

One of the most important rights in criminal (or other court and administrative) proceedings is the right to be heard. For children, a right to participate in, and be heard on, all decisions in legal or quasi-legal criminal proceedings affecting her or him, either directly or through a parent, guardian, lawyer or support worker, is one of the fundamental rights of children in the CRC and is established nationally in all but five Member



States (CZ, DE, IT, PT, UK). In Belgium the child has a right to participate in person and this can only be denied through a formal assessment that the child does not possess the power of discernment necessary to take part in the process. In Bulgaria a child has the right to be heard in all administrative and judicial criminal proceedings which affect his/her rights or interests if s/he is 10 or older, unless it would not be in his/her interests to do so. If the child is younger than 10, s/he may be heard depending on the level of individual development. In comparison, adult victims have a better legal position, as in the fields of VAW and SOV, only two Member States do not make this provision (CY, IE); both, ironically, provide children with the right to be heard (information missing from DK, FI).

Victims of criminal offences are usually heard as witnesses in court. If the victim is a minor, the question arises if and when s/he may be considered a reliable and competent witness. The Member States handle this problem in different ways: in 12 Member States (CZ, DE, EE, EL, IT, LT, LV, MT, PL, PT, SK and UK) all children are generally presumed to be competent to testify in criminal proceedings, while in the others competency is age-dependent (AT, DK: five years; BG: 10 years; SE: 12 years; HU, IE, RO: 14 years; FI: 15 years).

### 2.5.6 Protection in proceedings

Recognition of the potential for further harm to victims in legal proceedings (sometimes termed 'secondary victimisation') has prompted measures to prevent this. Overall, Member States appear to be aware of the necessity to protect victims in proceedings, including reducing the extent, length and repetitiveness of questioning. However, the VinE Study observed that most of the respondents were not satisfied with progress in their jurisdiction. A majority reported that questioning continues to be unnecessarily intrusive and extensive,

which had a negative impact on the continued participation of victims in the criminal justice system. At least in the field of VAC, 17 Member States have an explicit legal or quasi-legal provision to limit the number of interviews (AT, BE, CZ, DK, ES, FI, FR, HU, IE, LT, LV, NL, PL, PT, SE, SK, UK). In Germany, this is covered by non-binding guidelines.

A number of additional measures, all designed to enable victims to give best evidence have been implemented in some Member States: the availability differs according to whether a woman/adult or a child is the victim, as Table 2.11 demonstrates.

Provision of special waiting areas for victims in court premises, to prevent confrontation with the accused, is only assured in a third of Member States (VAW: AT, BE, ES, FI, IE, LV, NL, PL, SE, UK; VAC: AT, DK, ES, FI, FR, LT; PT, SE, UK). This is a particularly crucial provision to ensure the safety of victims of violence, especially where there is a high risk of retaliation by the perpetrator, which is arguably most likely where they are known to each other. For victims of SOV provisions regarding confidentiality and anonymity are a potentially critical protective measure where the victim is not 'out'.

A further serious limitation is that, whilst these provisions appear to be rights in law, many national experts noted that in practice they often remain at the discretion of the prosecutor and/or court and the technology was not always available in all courts/regions. Despite increased attention in law and policy, therefore, the FD is still to be fully implemented.

### 2.5.7 Mediation in cases of interpersonal violence

Victim-offender mediation has received increased attention within the EU over the last decade.

Table 2.11: Protective measures for interviews and the testimony of victims

Protective measures	Number of Member States with the provision	Member States where provision is discretionary	Member States where does NOT apply
<b>Give evidence behind a screen</b>			
— VAW, SOV	10		AT, BE, CZ, DE, EE, EL, FR, HU, IE, LU, LV, MT, PL, PT, RO, SK (missing DK)
— VAC	12	IT, MT	AT, BG, DE, EL, HU, IE, LT, LU, LV, NL, PT, RO, SK (missing CZ, DK)
<b>Give evidence by live television/ video link or pre-recorded evidence</b>			
— VAW, SOV	25		EE (missing DK)
— VAC	24	CY, DE, DK, IE, IT, MT	BG, NL (missing CZ)
<b>Testimony in closed session</b>			
— VAW	21		BE, CZ, EE, PT, SK (missing DK)
— VAC	24	DK, MT	DE, PT, SK
<b>Anonymity</b> (whilst giving evidence)			
— VAW	16	EE	CY, ES, FI, FR, IT, LU, MT, PT, RO, SE (missing DK)
— VAC	19		DK, EE, EL, ES, FI, IT, LU, SK
<b>Confidentiality</b> (outside the courtroom)			
— VAW	22	EE	CZ, IT (missing DK, LU, UK)
— VAC	21		DK, EE, EL, IT, SK (missing CZ)
<b>Separate waiting areas</b>			
— VAW	10		BG, CY, DE, EE, EL, FR, HU, IT, LT, LU, MT, PT, RO, SI (missing CZ, DK, SK)
— VAC	9		BE, BG, CZ, DE, EL, HU, IE, LU, LV, MT, NL, PL, RO, SK, SI (missing CZ, EE, IT)

According to the VinE Study, mediation is most commonly used in less severe cases, especially with juvenile offenders. In our study, however, we found that several Member States still permit more severe cases — even IPV — to be referred to victim–offender mediation. This approach ignores the now extensive knowledge base on the inappropriateness of this response where the safety of the victim needs to be the first consideration. It is not appropriate in cases of IPV or sexual violence, if not explicitly requested by the victim<sup>(76)</sup> and even here care needs to be taken to ensure that the victim's rights to bodily integrity are not compromised in the process<sup>(77)</sup>.

### 2.5.8 Legal aid and other forms of assistance

A majority of Member States comply with the obligation to provide legal aid to victims of crime (AT, BE, BG, DE, EE, EL, ES, FI, FR, HU, IT, LT, LU, LV, NL, PL, PT, RO, SE) and in a slightly smaller number a child victim has the right to separate legal representation in criminal proceedings (AT, BG, DK, ES, FR, HU, IT, LU, LV, PL, PT, RO, SE, SI, SK). This right can, however, be qualified in terms of means (e.g. EE, IT, PT), the offence in question and may only be available to those who cooperate with criminal proceedings. The VinE Study also revealed that eligible victims may not have access to aid and assistance due to unnecessarily cumbersome application procedures.

Additional forms of assistance during and for a reasonable period of time after criminal

proceedings vary between the Member States. In the field of VAC, some Member States (BG, EE, IT) provide that the hearing or testifying of a child has to take place in the presence of a psychologist or social worker. Austria guarantees victims of deliberate violence and those whose sexual integrity has been violated both psychosocial and legal support during the police investigation and the trial. Separate specialised support services are provided for adult women and for children. In Germany, victims of rape or sexual coercion have the right to be accompanied by a trusted person during investigation and court proceedings and the United Kingdom has introduced independent sexual violence advocates to accompany victims through the process.

### 2.5.9 Compensation

Victims of violence are eligible for compensation either from the state or from the perpetrator in all 27 Member States. In addition, all Member States but one (IT; information missing from CY, DK, NL, SI) have implemented some form of compensation by the state. In Cyprus and Luxembourg the state only compensates in cases where the offender cannot pay; in Malta, either the state or the offender pays. These positive results, however, conceal a more troubling and disparate reality. The VinE Study revealed that in many Member States only a minute proportion of victims access compensation and it is questionable whether the amounts awarded are sufficient to acknowledge the harm done to victims<sup>(78)</sup>.

The structural inequalities which impact on the right to compensation for victims of gender-based violence are receiving increasing attention. The UN Special Rapporteur on VAW recently addressed this

(76) And even this is controversial, see Pemberton, A., Kuijpers, K.F., Baldry, A.C. and Winkel, F.W., 2009, 'A nuanced position. Intimate partner violence and restorative justice', Winkel, F.W. et al. (eds.), *Proceedings of the Symposium of the World Society of Victimology*, Nijmegen, Wolf Legal Publishers.

(77) UN *Handbook for legislation on violence against women*, 2008, refer Council of Europe Convention which is currently in preparation, mediation in cases of IPV is discouraged.

(78) See Miers, D., 2007, 'Looking beyond Great Britain: the development of criminal injuries compensation', Walklate, S., 2007, *Handbook of victims and victimology*, Cullumpton, Devon, UK, Willan Publishing.

extensively in her first report to the UN Human Rights Council, highlighting state obligations under international law to provide the right to remedy and access to effective remedies for the harm that victims of VAW have suffered. She concluded:

*Reparations should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systematic marginalisation and structural inequalities that may be at the root cause of the violence.*<sup>(79)</sup>

### 2.5.10 Comparative analysis

Results indicate that the EU FD, albeit a hard-law instrument, has resulted in adaptation of (soft) victims' laws in most Member States and is yet to be translated into substantial improvements in the actual implementation of rights. There are shortcomings in all Member States, and national experts from central and eastern Europe tended to report that the situation is even worse: whilst law is on the books since it was an accession requirement, in practice little has changed and there has been minimal investment in the infrastructure and training that would be needed to make these rights real for victims of violent crime.

## 2.6 National plans of action (NPA)

National plans of action are directly relevant for the development of integrated legislative and policy-based measures responses that encompass a punitive, protective and preventive approach towards VAW, VAC and SOV.

(79) Manjoo, R., 2010, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*. Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/14/22, 19 April 2010, paragraph 85.

Based on recommendations on the development of NPAs in the framework of the Council of Europe as well as CEDAW Reporting Guidelines and CRC<sup>(80)</sup>, NPAs can be characterised as a policy document that specifies both concrete goals and the steps or actions by which they will be achieved. It names agencies that have the responsibility and the competence to take these steps and indicates the respective roles of state and non-government organisations and their cooperation. It includes a timetable and monitoring mechanisms.

No Member States has a NPA on SOV, the overview below relates to VAW and VAC only.

Of all 27 Member States over two thirds (22) have (or once had) a VAW NPA. As of 2010, only one in three Member States (9) have a working NPA on VAW (DE, EL, FR, IE, LT, LU, SK, SE, UK). Just over half of all Member States have or had (14) a *broad* NPA on *violence against women* which commonly addresses IPV and other forms of violence that are related to the domestic domain and the gender specific risks, like honour-based violence, forced marriage and female genital mutilation (DE, DK, EE, EL, ES, FI, FR, HU, IE, LT, LU, SK, SE, UK). In just over half of the Member States with a NPA (13) there is or was a monitoring mechanism in place but no information was available on the monitoring process as such.

Of all the Member States just over half (16) which have (or have had at some point in time since 2002) a NPA on *child maltreatment*, only 10 have ongoing NPAs (CZ, DE, DK, EE, LT, NL, RO, SI, SK, UK); in five Member States, the NPAs have expired (AT, BE, IT, LV, SE; missing ES). In the majority of NPAs, prevention is prioritised (12 out of 16 Member States; AT, BE, DE, ES, IT, LT, LV, RO, SI, SK, SE, UK; three Member States missing).

(80) CoE Committee of Ministers (Recommendation Rec (2002)5), CRC Article 44; CEDAW Reporting Guidelines (<http://www.un.org/womenwatch/daw/cedaw/reporting.htm#guidelines>).

Three quarter of the 16 Member States which have or had an NPA referred to the Convention on the Rights of the Child, but only nine actually used the UN definition of childhood in the NPAs ('any person below the age of 18') (AT, BE, DE, DK, IT, LT, SI, SE, UK; missing: ES, SI) and/or explicitly consider child maltreatment as a children's rights violation (AT, BE, CZ, DE, LT, RO, SE, UK). Only Denmark indicated that there was no referral to the CRC in their NPA<sup>(81)</sup>. A limited proportion of Member States (8) indicated they had a monitoring mechanism (BE, DK, ES, IT, LV, NL, RO, UK).

Of the 13 Member States that have had a NPA on *child sexual exploitation* since 2002 (BE, BG, CY, CZ, DE, DK, ES, IT, LT, LV, RO, SE, UK), 11 also had a NPA on child maltreatment in place. In three Member States, the NPA on child sexual exploitation had expired (BG, CZ, DK); in seven it was still ongoing (CY, DE, LT, LV, RO, SE, UK); and for three Member States the answers were missing (BE, ES, IT).

Here, again, the human rights-based approach is inconsistent across the Member States. About half of the Member States with a NPA on CSEC actually used the UN definition of childhood in their NPA ('any person below the age of 18') (BE, BG, CY, CZ, ES, IT, UK) and seven Member States have referred to the right to be heard and participate (BE, BG, ES, LT, RO, SE, UK). Acknowledging the gender-based nature of CSEC, i.e. that it disproportionately affects girls and/or is related to issues of gender inequality, is only reported by three Member States (CZ, SE, UK). But all Member States have prioritised the prevention of child sexual exploitation (only DK missing). Monitoring mechanisms, finally, were in place in eight Member States (BE, CY, DE, ES, IT, LV, RO, UK), were not in place in

three Member States (BG, CZ, LT) and answers were missing from two Member States (DK, SE).

The area of violence where most NPAs have been launched is the trafficking in human beings. Obviously influenced by EU binding law, no less than 20 Member States have, or have had, a NPA on trafficking (AT, BG, CY, CZ, DK, EE, EL, ES, FI, HU, IE, LV, NL, PL, PT, RO, SI, SK, SE, UK). Of the Member States that have a NPA on trafficking, a majority (17) is ongoing NPAs (AT, BG, CY, CZ, DK, EE, EL, ES, FI, HU, IE, LV, PT, RO, SI, SK, SE) and in three Member States it is unclear whether the NPA is ongoing or not (NL, PL, UK). Member States are almost unequivocal when it comes to the main aim of their trafficking NPAs: prevention is the priority in 18 Member States (missing NL and FI).

## 2.7 Promising practices

In the guidelines for national experts criteria for identifying promising practices were provided (see Chapter 1) in the expectation that some, if not all, would be fulfilled in each case. Given the scope of the overall task of the national reports, the description of promising practices were rarely elaborate and reference could seldom be made to solid monitoring or evaluation data. Furthermore, what is innovative in one Member State may be long-standing in another and promise may turn to disillusion or partial success spur the search for further adaptation. Across forms of violence we found promising practices clustered in the following areas:

- ◆ overarching legislation with structures and methods for integrated approaches;
- ◆ legislation directed at criminalising violence and imposing sanctions;
- ◆ measures to secure victims' rights;
- ◆ legal frameworks, regulations and guidelines establishing procedures for quick and effective intervention;

(81) Member States that take the children's rights perspective generally go beyond mere protective and punitive measures, and often also address the child's rights to be heard and (to a certain extent) the right to participate in proceedings.



- ♦ cooperation among agencies and between agencies and NGOs;
- ♦ protection and empowerment of victims through support and assistance;
- ♦ interventions with perpetrators;
- ♦ monitoring and evaluation; and
- ♦ prevention.

Selected examples, which appear to offer considerable promise, are presented in this section.

### 2.7.1 Overarching legislation with structures and methods for integrated approaches

The **Spanish** Organic Law 1/2004 on comprehensive protection measures against gender-based violence is widely considered a promising practice. Worth noting is the comprehensive character of this law, as it spans all legal domains (criminal, civil, administrative, labour, family) and addresses most of the forms of violence under discussion in this chapter. Not only are a wide range of offences penalised at a higher level than in general criminal law, but all court cases are referred to specialised courts as soon as it becomes evident that some element of gender violence is involved. The law targets ‘violence against women which, as a manifestation of discrimination, inequality and the power that men exercise over women, is perpetrated against them by their present or former husbands or by anyone else with whom they maintain or maintained similar emotional ties, even without living together’ and the concept of gender-based violence comprises ‘all forms of physical, psychological or sexual abuse, including threats, coercion or unlawful detention.’ Its limitations include exclusion of other forms of violence against women, such as rape, sexual assault and forced marriage, as well as SOV.

By contrast, the **German** Protection against Violence Act is gender-neutral and does not limit its application either to forms of violence or to the

relationships involved, although stalking is explicitly mentioned and, thus, introduced for the first time as a legal concept. As a result, its application is comprehensive, although its scope is limited to such regulation measures as are in the remit of the federal government and it is limited to civil law. Protection orders can be obtained against any person who has used violence or threatened to do so, provided the victim knows the identity of the perpetrator. Court evictions (police removal from the residence is regulated by the police laws of the 16 federal *Länder*) can be issued against anyone living in the home, including for example housemates or relatives. Thus, the measure can be used against stalking, sexual violence when the victim is in fear of further attacks, intimate partner violence or forced marriage (if the victim is over 18 — child protection is regulated separately).

**Austria**, as a state with more competencies at the federal level to address IPV, has framed police removal, court protection orders and proactive advice and support in one comprehensive law across the legal domains of civil, administrative and police law. It creates structures ensuring that the police protective measure lasts until a longer-term court measure can be issued and permits the police to inform the psychosocial intervention centres immediately (via fax, 24/7) in order that they proactively contact each victim after the police have taken action and offer free of charge counselling and support, including legal advice.

The law is gender-neutral and the range of application — originally restricted to cohabiting close relationships — now includes anyone who causes danger, as in the German law, and no-contact injunctions are also available without police intervention and against someone who does not live in the same house. The law is limited in primarily addressing violence within the home and in having no link to criminal law. There are no indications that protection orders are being used with regard to rape or sexual assault.

Not all forms of violence are primarily dealt with through criminal law, but there is consensus that the legacy of downplaying, excusing, ignoring and forgiving acts of discriminatory violence has to end and promising practices may consist in removing the gaps in criminalisation.

With sexual offences and violence in close relationships, promising practices include defining rape and sexual assault as crimes against sexual self-determination and using a human rights approach for child sexual abuse as well. The **United Kingdom** has a consent-based definition of rape, rather than one requiring proof of physical force or resistance, and recently reformed sexual offences law on principles of equity, sexual autonomy and protecting the vulnerable. This removed all specific homosexual offences and discriminatory sentencing. With regard to children, strict liability offences were established in respect of age and consent: it is absolute for children under 13 years (including sexual touching) but, while a defence of error concerning age is possible above 13, but consent is still irrelevant where a child is under the age of consent (16). Commission by family members uses a wide definition of ‘family’ and prosecutors are instructed to prefer familial sexual offence charges rather than child sex offences. Offences of grooming and abuse of children through prostitution and pornography are also criminalised.

Several national experts regard the introduction of a wide and explicit legal definition of domestic violence as a promising practice. This is the case in the family violence laws of **Bulgaria** and **Cyprus**, for example, but these laws do not address IPV distinctly, referencing the family in general.

**Belgium** differentiates between the offence of domestic violence as ‘any form of physical, sexual, psychological or economic violence between members of the same family, regardless of their age’ and intimate partner violence as an aggravating circumstance for ‘any form of physical,

sexual, psychological or economic violence between spouses or persons who live together or have lived together and where a stable emotional and sexual relationship exists or existed’.

**Portugal** criminalises the crime of domestic violence involving ‘physical and psychological mistreatments, including physical punishments, deprivation of freedom and sexual offences against someone of the opposite or same sex’, with whom the aggressor ‘maintains or has maintained a relationship akin to that of spouses, even if not in the same household’. Also covered are threats, coercion, slander, insult, illegal taking of minors, failure to pay maintenance, rape, sexual abuse and homicide and attempted homicide. If mistreatment/domestic violence is committed against or in the presence of a minor, in a common or in the victim’s dwelling, this constitutes an aggravated circumstance for sentencing.

The law on ‘gross violation of integrity’ in **Sweden** takes a dual approach, designed in accordance with the general principle of retaining the gender-neutral language of the Penal Code. It thus criminalises ‘gross violation of personal integrity’ in general and, in a second paragraph, gross violation of a woman’s integrity by a man. The offence comprises repeated transgressions within a present or former intimate relationship. Thanks to the dual construction, offences committed in same-sex relationships are also covered, as well as cases where children are victims of ongoing abuse. It is a rare example of a course of conduct offence which can take account of this common element in interpersonal violence.

**France** adopted a legal reform through which the penalties incurred for any crime or misdemeanour are aggravated when the offence is motivated by the sexual orientation of the victim, including sexual harassment. Specific criminalisation of stalking is also mentioned as a positive development and in **Italy** noted under promising practices. **Germany**

and the **Netherlands** report a growing number of cases under their stalking laws.

In concluding, a case where 10 men attacked an individual at a gay-friendly café during Gay Pride week, the **Slovenian** Court of First Instance found the three accused guilty of public incitement to hatred, violence and intolerance, the Appeal Court decided that ‘public incitement to hatred, violence or intolerance’ included violent conduct, interpreting the crime of public incitement as covering not only hate speech but hate crime as well.

### 2.7.2 Securing victims’ rights

Thanks, no doubt, to the 2001 EU framework directive, there has been considerable activity in this area. Although implementation is not yet satisfactory, there are also significant efforts to define and secure rights with attention to the specific needs and vulnerability of victims of VAW, VAC and SOV.

A good example is **Austria**, where the 2006 law implementing the FD guarantees victims of deliberate violence and those whose sexual integrity has been violated both psychosocial and legal support during the police investigation and the trial. Support is provided by specific victim support organisations such as intervention centres, child protection centres or counselling centres, which are contract partners of the Ministry of Justice and financed by it. They offer psychosocial support, accompany victims to their hearings by the police and at court, inform them of court proceedings etc.

Legal support — which means advice and representation at court — is given by lawyers who are appointed by the victims’ rights organisations and who cooperate with them. Children and juvenile victims of sexual and/or physical violence and

women as victims of violent men are specifically eligible and the support organisations are NGOs with specialised knowledge and the ability to adapt to the specific needs of victims. For children, two professionals in the psychosocial field are involved in each case, one for the child, the other for the mother. This provides a specific facilitator who does not talk with the child about the case but is on her/his side as long as the criminal proceedings last, to explain the proceedings and to assist the child in handling the role of witness. Evaluation research confirms successful implementation of this model overall.

Trafficking is another important area where victims’ rights are critical. While many Member States seem to handle the Palermo Protocol rules very restrictively, **Austria** and **Italy** are exceptions. In Vienna, a specialised intervention centre for victims of human trafficking offers psychosocial and legal support for victims. Even if a woman does not cooperate with police and prosecution, she usually gets a residence permit on humanitarian grounds. The centre can house them temporarily in apartments and also provides someone to accompany the women to the police and to court. So far, victims being supported by the intervention centre have not been sent back to their home countries against their will.

**Italian** law grants a special residence permit to foreign nationals, whatever their age, who are presumed to have been victims of violence and severe exploitation and still in danger of their lives as a result of their wish to escape from the control of criminal organisations or to cooperate with the police and prosecutors. This is based on the principle of the protection of human rights and foresees granting a permit even when the victim does not participate in judicial proceedings. In fact, there are two paths through which a permit may be obtained: one is the so-called judicial procedure and the other the social procedure. The latter merely requires the submission of a ‘statement’

by an accredited Article 18 agency or by the public social services of a city council on behalf of the victim. The six-month permit may be renewed for an additional year, it does not oblige the person to go back home once the programme is over and it may be transformed into a residence permit for education or work.

In 19 Member States victims have the right to be a full party to the criminal case, represented by a lawyer who has the same rights as the lawyer for the defendant. In **Finland**, this is the case for all victims of crime and the court may appoint an attorney for the injured party during police investigation and, if applicable, during court trial. The fees may be claimed against the state. In **Germany** victims of the major forms of interpersonal violence — bodily harm, offences against sexual self-determination, offences against personal liberty and attempted killing — may thus gain some control over the proceedings. In addition, victims of rape or sexual coercion have the right to be accompanied by a trusted person during investigation and court proceedings and when there is a good local specialised advisory and support centre this support is appreciated.

In **Denmark** the special needs of victims of rape or sexual assault have led to a wide array of provisions to facilitate best evidence as well as diminishing the risk of reprisals. These include closed sessions, a ban on notes, a ban on disclosing the name of the victim and, in some exceptional circumstances, a ban on the presence of the suspect in the court room during the trial. In addition, the courts have the competence to decide that personal data shall not be disclosed to the suspect and the counsel for the defence when the safety of the victim is at stake. In sex offence cases, the name and personal details of the victim are removed from the case files before granting access to other parties. Danish procedural law also strictly limits evidence regarding the victim's previous sexual history, only allowing it if it is of considerable

relevance to the case. The victim of a sexual or a violent crime also has the right to have a lawyer appointed free of charge. Besides support to the victim during interrogation and assistance in claims for compensation, they should also assist with special support measures, provide personal support and guidance and attend to other practical support issues.

It is a promising practice to allow the victim the opportunity to receive advice and support before deciding whether to release the results of a forensic examination and go through with the trial. Specialised services such as those in **Denmark** and the **United Kingdom** (see below) ensure good evidence collection, while respecting the right of a victim to reflect before deciding if she wishes to report the crime. At present, very few Member States, if any, are able to ensure that the victim of rape will be treated with respect and dignity during criminal proceedings.

Promising practice in **Poland** has emerged related to children in criminal proceedings. In a Coalition for Child-Friendly Interrogation, professionals who have contact with child victim-witnesses cooperate with child support organisations to prepare standards for the location and equipment of special interrogation rooms and rules for their certification. In 2009, the Charter of the Rights of a Child Victim/Witness of an Offence was developed (a non-binding Act, under the patronage of the Minister of Justice) and the booklet *Child under the umbrella of the law* was published. The Nobody's Children Foundation prepared a hand-out especially for children, *Jesteś świadkiem, masz prawa*, (You are a witness, know your rights), which is included with notification when children are called as witnesses.

A child must be interviewed in the presence of a psychologist or social worker in **Bulgaria** and **Estonia**. In **Italy**, the court may ask an expert in child psychology to assist.

### 2.7.3 Legal frameworks, regulations and guidelines establishing procedures for quick and effective intervention

Intervention takes up more space both in promising practices and in critiques of inadequate practice than does substantive legislation. This overlaps with the need for training. Indeed, weak laws can be strengthened through good implementation procedures and strong laws can be ineffective without flanking measures of a procedural nature. It is thus encouraging to see a number of Member States introducing measures on the procedural level that are considered promising by the national experts.

Promising practices addressing SOV were most likely to be procedural. This includes, in some Member States, having an agreed national method for coding all crimes of discriminatory violence, and specifically those concerning LGBT communities and SOV in particular, data on which are published nationally and locally. In **France** the *Haute Autorité de Lutte contre les Discriminations et pour l'Égalité* (High Authority Against Discrimination and for Equality (HALDE) has been given powers to act *sua ponte* and to suggest a fine and/or settlement, in some cases combined with publicity. The public prosecutor must approve the proposed settlement, but if it is refused the HALDE can launch public proceedings using a direct summons. In 2008, 240 cases of discrimination based on sexual orientation were reported to the HALDE.

In **Belgium**, Ministerial Circulars prescribe that the public prosecutors and the police must register every criminal IPV case immediately and they have to act fast. The police must arrest the suspect (preventive custody) if there is a reasonable suspicion of guilt. The police have to register all relevant information in an official report with standardised elements. The public prosecutor has to follow clear

instructions and treat every case of IPV seriously. Specialised magistrates, who have received training on IPV, manage the records on a daily basis.

**Germany** reports that the regulation of police powers to intervene without delay in a situation of IPV before any decision on the possibility of criminal prosecution has led to a sustained process of police training for the perpetrator-oriented approach and evaluation studies confirm that the quality of intervention has improved significantly from the viewpoint of the victims as well.

In **Estonia**, domestic violence information sheets were first launched as a pilot, evaluated and then made available to all police prefectures. The system of registration by police of 'domestic conflicts' was developed with the direct involvement of academics who were active in the women's movement. Thus, a regional pilot project was successfully transferred to the national level.

**Sweden** has a manual for patrol officers and detectives on how to prevent, detect and investigate men's violence against women, as well as guidelines for prosecutors to improve preliminary investigations and also to ensure professional and efficient support to victims from the first point of contact with law enforcement and throughout the entire legal proceedings. These guidelines include special information about dealing with honour-based crimes.

An important field of activity are measures to improve the early identification and assessment of cases of child abuse and neglect. **France** has established a National Monitoring Centre for Children in Danger and developed a system of transmitting information between agencies that can improve detection and intervention. **Belgium** has employed 31 criminologists at the Office of the Public Prosecutor of the Juvenile Court to assist magistrates with the management of judicial files concerning child abuse and juvenile delinquency.



A central registration system and an electronic file are also being developed. This gives organisations the possibility of managing files of child abuse electronically.

In **Germany** the 2005 reform of child protection law required professionals in the child and youth welfare system to consult an expert adviser in all cases of suspected child maltreatment. Implementation of this binding requirement, which helps both to identify victims and to choose appropriate protective measure, has set off a wave of advanced training and improved the quality of intervention overall. At present introducing the same regulation for healthcare professionals is under discussion.

#### 2.7.4 Specialisation

A number of Member States now entrust intervention to specialised units in the police and/or prosecution service. This practice is probably more widespread than the national reports indicate, since our questions focused on the national level and such procedures are often regulated regionally, especially in larger countries such as **France, Germany, and Spain** where there are different levels of government involved.

In the **Netherlands** many police forces have specialised trafficking investigation teams, although this is far less widespread among prosecutors: each public prosecutor service (PPS) region in the Netherlands has a prosecutor who is allowed to spend 50 per cent of their time on human trafficking.

In **England and Wales** a qualified prosecutor must supervise all SOV cases and all such cases must be notified to prosecutors by the police. All cases are recorded on an internal case management system, which ensures tracking and monitoring. Police also have LGBT liaison officers and the Crown

Prosecution Service (CPS) Homophobic Crime Coordinators. Aspects of this model are also in place in **Denmark and Ireland**. In the **Netherlands**, police forces have to include an anti-discrimination plan in their annual reports and employ a specialist with responsibility for policy implementation. Outreach pilots and specialist squads in cities with large LGBT communities, designed to increase reporting, have been successfully implemented in parts of **Germany, Sweden, the Netherlands and the United Kingdom**.

Specialised courts to handle cases of domestic violence or gender-based violence have been established throughout the **United Kingdom and Spain** and represent a major effort to ensure effective intervention. **Germany** has taken its cue from the success of these courts to move responsibility for protection orders to the family courts, thus addressing the intersection between child protection and protection of women from partner violence.

#### 2.7.5 Cooperation

Prescribing and empowering multi-agency cooperation is another important field of promising practice. It plays a key role in effective child protection approaches and in recent years has become a mainstay of addressing IPV in some Member States, such as **Germany, the Netherlands and the United Kingdom**.

In the **Netherlands**, *Veiligheidshuizen* ('Safe Houses') create a structure that facilitates multi-agency cooperation (police, prosecutors, municipality, support workers and child protection). The idea is that much violent crime, including IPV or child abuse, is complex and multifaceted, needing to be combated in a multidisciplinary fashion. All the actors meet, sometimes on a daily basis, and discuss cases that have been reported during the past 24 hours, each party bringing in his/her own

expertise. During these meetings they try to come up with a bespoke approach for each case.

Enhancement of networking and exchange of information is a major trend in **Italy**. The very active Artemisia Association of Florence, together with Tuscany regional and local governments and financed by the Italian Government, has built a network aiming to link VAW and VAC problems, aiming to increase the capacity to identify violence situations, with a particular focus on the consequences of VAW on the psychology of children who are compelled to live with and watch such violence. The project has a strong multidisciplinary and inter-institutional component.

In **Romania** since 2008 local teams of representatives of different authorities (social assistance, education, health, police, work inspectorate), NGOs and other representatives of civil society, who previously dealt with preventing exploitation in a work context, have extended their mandate to any form of neglect, abuse, exploitation and child trafficking. Their role is to identify children at risk and child victims; notify the social protection services; monitor vulnerable communities at county level; help establish focal points in these communities; raise awareness among the general public and decision-makers; propose solutions at local level; and draft annual reports of activity. However, no data are available on the actual extent of these activities and financial restrictions may undercut these efforts.

The founding of the *Nationales Zentrum Frühe Hilfen* (National Centre on Early Prevention) in **Germany** helped to build a stronger link between the two systems of child welfare and healthcare as well as between science and practice in the field of child protection. The programmes developed under the umbrella of the NCEP improved the pre-emptive approach to families with children and has showed initial promising results in preventing

child maltreatment. All projects have agreed on common indicators and methods of evaluation. This programme promises to establish innovative and low-threshold methods of prevention and to collect and assess their impact and effectiveness.

What **Sweden** can provide in terms of promising practices during the investigation phase is the *barnahus* concept (borrowed from Iceland). These are children's crisis centres where police, prosecutors, social workers, psychologists, psychiatrists, children's physicians and others cooperate under the same roof to investigate and rehabilitate a child who is suspected to be a victim of abuse. During the trial phase, the Scandinavian tradition to view the victim as a party to the process has led to the reform of the victim's counsel (and an appointed lawyer for a child abused by his/her parents), but this approach can, and should, also be used in procedural systems where the victim is treated only as a witness. More recently a number of other countries in Europe (e.g. Austria) have introduced this as routine practice. Legal support is as important to victims of VAW, VAC and SOV as social and psychological support. According to evaluation studies, the children's advocacy centres have led to an improvement and more efficient cooperation between public authorities, as well as a better understanding and exchange of knowledge between professions.

A protocol against forced marriage, created by the *Département* of Seine-Saint-Denis, is unique in **France** and permits social workers to help any woman wherever she seeks refuge. This allows social workers from other cities who do not know the family of the victim to ensure that her interests are protected. The protocol provides psychological, financial support and legal accompaniment of victims of forced marriages and helps them to find accommodation. All social actors participate in this effort to eradicate forced marriages.

### 2.7.6 Cooperation on the policy level

The **Bulgarian** expert can identify only one promising practice that is the drafting of legislation on domestic violence and its current implementation: NGOs initiated the process, worked together with the institutions and brought the law to parliament. In **Germany** as well, methods and procedures for involving NGOs in policy development continue to be very significant. The involvement of NGOs on a structural level and the establishment of structures for a comprehensive national policy is assessed as a promising practice for larger Member States where many of the powers and duties addressing violence are not centralised.

In **Cyprus**, the Advisory Committee for the Prevention of Domestic Violence set up under the law, encompassing expertise from both the public sector and the NGO sector, has significantly contributed to raising the level of debate and of standards as regards knowledge, awareness-raising and the handling of domestic violence incidents by the various actors involved. It has also meant that documents which would have otherwise been drafted by public servants, such as the national plan of action and the manual for interdepartmental coordination, can now benefit from the expertise and attention of people with considerable experience and publications in the field.

In **Malta**, the subcommittee on service development seeks to bring together representatives from different stakeholders working in the field of domestic violence and aims to monitor and safeguard standards of practice and provide for further networking.

### 2.7.7 Protecting and empowering victims through support and assistance

Walk-in sexual assault referral centres (SARCs) — in some jurisdictions called rape crisis centres or trauma centres — and trained female forensic examiners are cited as promising practices in **Germany** and the **United Kingdom**. In **Denmark**, eight centres for rape victims have been established across the country. The centre in Copenhagen is open day and night for both women and men who have been raped or been exposed to an attempted rape. The centre will do a forensic examination. It is not a requirement that the person has reported the crime or wishes to report the crime in order to receive the examination. The treatment is free of charge and discretion is guaranteed. The victim can decide not to report the crime and any evidence that might have been found at the forensic examination will be kept for three months if the victim changes her/his mind. Similar practices are found in the 32 SARCs in the **United Kingdom**.

Following the Austrian model, **Luxembourg** has an initial ten-day expulsion order imposed by the police when there are signs that an individual is preparing to commit, or commit again, an offence against the life or physical integrity of a person close to them or a person with whom they live. Prior to the expiry of the expulsion order, the victim can petition the district court to extend the measure and also request additional protection orders. These can prohibit the perpetrator from entering a certain area, or attempting any contact (including telecommunications) with the victim; such injunctions can also prohibit the individual from having his/her children to stay or from seeing them outside a specialised institution. The victim files a simple paper request with the court clerk and the matter is adjudicated urgently, with hearings even being held on holidays. The order is effective immediately and the parties are sent notice of the order

with a copy to the police. There is no fee for protection orders.

This approach has been very influential. A number of Member States have introduced new protection and eviction orders or procedures and, if well-constructed, these are often considered a key promising practice. The national experts from the **Czech Republic, Denmark, Germany, the Netherlands and Spain** cited this as an important step forward. To date, a total of 12 Member States had implemented some variation of the police banning order adapted to the national situation/legislation. In **Malta** and **Romania**, there are now proposals to introduce it.

**Spain** and the **Netherlands** have introduced GPS-based alarm systems to protect victims in cases of IPV/stalking. Victims of IPV with a protection order receive an electronic monitoring device which allows them to identify when perpetrator is approaching, enabling them to call the police in time for protection. It is innovative in the sense that, in contrast to general tendencies, it aims to keep the offenders outside the criminal justice system, while ensuring protection of victims. There are positive reports of its effectiveness.

In **Italy** rapid court procedures have been instituted instead. Protection orders can be issued in a few hours, without any hearing. The victim is entitled to access the judge and ask for a protection order. When a request is filed, it is immediately (within hours and, certainly, the same day) assigned to a judge. The judge available for emergencies in the court usually examines the request the same day and, in the event of emergency and as a matter of course when there are grounds to believe that the victim is in serious and imminent danger, the judge may issue the order immediately, without any hearing and without asking for any other information than that contained in the victim's request. In any case, a protection order is usually issued within two to three days at most.

When issuing an emergency protection order the judge must schedule a hearing within 15 days when longer-term measures can be taken.

In **Denmark**, an abused woman with children is eligible when she leaves a shelter to have a family advisor (a case manager) to support her in connection with the social welfare, health and other authorities and to assist her in obtaining new accommodation, childcare or school for her children. The **Netherlands** has a policy whereby sexual or other violence within a relationship constitutes separate grounds for granting residence status for victims of foreign origin who have dependent residence permits.

**France, Spain** and **Ireland** have established an ombudsperson for children and report that large numbers of contacts are made, although there are no data on how many of these concern violence.

Providing effective protection to victims of trafficking on a human rights basis is a challenge not often adequately met. The so-called Article 13 programme in **Italy**, in operation since 2006, provides accommodation, social assistance and healthcare services for trafficked persons. Once the programme is complete, assisted persons may continue to be supported under the Social inclusion and integration programme. The latter is provided for by Article 18 of the Immigration Law and has been in place since 2000. It applies to foreign citizens (both EU and non-EU nationals) in situations of abuse or severe exploitation, where their safety is seen to be endangered as a consequence of attempting to escape from the conditions enforced by a criminal organisation or as a result of pursuing criminal action against the traffickers. The assisted persons are granted a series of protection and assistance measures (through the Article 18 projects) regardless of their willingness to cooperate with the authorities. They are also afforded access to social services and educational institutions and enrolment with the state employment

bureau and are provided with access to employment. The programme lasts for at least six months and is renewable.

In **Luxembourg**, the *Service Central d'Assistance Sociale du Parquet Général* (Central Social Service of the Head Prosecutor's Office (SCAS)) has operated the *Service d'aide aux victimes* (Victims' Assistance Service (SAV)) for several years. The SAV's primary function is to provide post-traumatic stress counselling and treatment to crime victims and those close to them, as well as social services and legal assistance. The SAV provides such services as accompanying victims to file complaints with the police, to hearings and to meetings with the Justice Ministry's Crime Victim Commission, and appears to provide a limited amount of financial assistance.

To provide support services and assistance available to all victims throughout the country, the secure funding of the services by the state, as is guaranteed in **Austria**, **Denmark**, the **Netherlands** and (for children) **Germany**, should be considered a promising practice.

### 2.7.8 Interventions with perpetrators

With regard to IPV, there is a growing focus on providing programmes for perpetrators of domestic and other forms of interpersonal violence which make the perpetrators take responsibility for their actions and sensitise them to alternative forms of behaviour. The **Spanish** Organic Law requires that any man convicted of gender violence must, along with the (usually suspended) sentence, be mandated to attend a perpetrator programme. In **Luxembourg**, a centre that offers psychological counselling and treatment for perpetrators of violence gives priority to domestic violence. The *Riicht Eraus* Centre provides psychological counselling and treatment for perpetrators of violence, gives priority to domestic violence perpetrators

and has a Luxembourg Violence Perpetrator Group. Perpetrators may come voluntarily but are most often mandated by a court. A network of voluntary entry programmes, with required associated women's support workers, has been established in the **United Kingdom** under the name Respect. They are also developing promising practice through closer links with child protection agencies and in working with men from minority communities.

### 2.7.9 Data collection, monitoring and evaluation

The establishment in **Portugal** in 2009 of an Observatory on Human Trafficking is a positive development, but it is too early to evaluate its effectiveness. The **Luxembourg** Police Annual Report contains a section on domestic violence which provides statistics on domestic violence interventions and expulsions, broken down by offences against property, offences against people and other offences, giving the totals of attempted and committed domestic violence crimes. Generally, the police interventions are increasing (572 in 2009, as compared to 565 in 2008). Figures are given for each of the crimes as percentages of all domestic violence crimes and the numbers regarding domestic violence perpetrators and victims are broken down by sex and age. To some extent there are also statistics on the relationship between perpetrators and victims.

In the **Netherlands** the police and the PPS have improved the system of recording crimes with a discriminatory aspect. The new system has an option to specify the grounds of discrimination involved. In **Portugal**, since 2008, the *Direcção Geral da Administração Interna* (General Directorate of Internal Administration) has published a report every semester with detailed statistics of domestic violence occurrences recorded by Security Forces, based on the 'Domestic Violence Database'.



In the **United Kingdom**, the public prosecutor (CPS) issues an annual report on violence against women, which monitors the implementation of its internal violence against women strategy, drawing on its own data.

### 2.7.10 Prevention

Member States have been active, some for decades, with awareness-raising activities. The 2007–08 Council of Europe campaign to combat violence against women stimulated a new and wider range of activities in many Member States. This report cannot hope to capture and assess all of these, but it can note some specific methods of prevention.

In the **Netherlands** (and in Germany) the police have developed networks with NGOs which represent the interests of LGBT people. The Dutch police have a special telephone number for victims of homophobic offences. The Minister of Education has ‘gay emancipation’ as a special portfolio and the budget for this has increased considerably over the years. There are numerous prevention projects which revolve around teaching in order to make homosexuality the subject of discussion in secondary education. One example is the Gay Straight Alliances in schools.

The **Cyprus** national expert refers to the launch, with the support of the European Commission, in May 2009, of a children’s helpline relating to Internet safety. At the same time, it is noted that, despite ratification of the Convention on Cybercrime, there are no laws requiring Internet providers to report instances of Internet child pornography.

**Finland** considers the introduction of a law criminalising the buying of sex from a trafficked woman to be a promising practice and the Finnish national expert has expressed the view that, together with the prohibition on the purchase and sale of sex in public places, the effect has been a reduction in the sex trade, at least in public locations. The effect of similar legislation recently introduced in the **United Kingdom**, which criminalises the purchase of sex from a woman exploited in prostitution, remains to be seen. The expert from **Sweden** considers the prohibition on purchasing sex as one of the most important to end the objectification of women and children and bring about long-term changes in attitudes and behavioural patterns. For the same reasons (positive attitudinal changes and protection of personal integrity), prohibiting corporal punishment of children is equally important.

## Chapter 3 — Comparative synthesis and cross-cutting issues

### 3.1 Introduction

This chapter presents overarching issues that emerge from findings presented in Chapter 2.

A comparative synthesis (Section 3.2) presents an overview of cross-cutting issues which arise from the comparative analysis. After a brief overview of the historical development of legal responses, main issues in legislation as well as in other domains of state obligations that are crucial from a human rights perspective are discussed, including support services and protection, prevention, capacity building and research.

In Section 3.3, we contextualise the position of Member States with respect to international human rights instruments pertinent to the fields of VAW, VAC and SOV.

The chapter closes with some conclusions regarding a human rights based approach towards reform at EU level.

### 3.2 Comparative synthesis

#### 3.2.1 Historical development of legal responses in the fields of VAW, VAC and SOV

Unsurprisingly the history of responses to the three fields of violence reveals considerable disparities, influenced by the social and political landscapes within the Member States. The picture should also be considered ‘history in the making’: significant legal reforms took place during this project. It is impossible to sketch a generalised picture, since there is no linear process across Member States, and a number of directions stem from the specifics of legal systems and cultures of Member States. Overall, legal developments across the three fields of violence were informed by different perspectives

and conceptual frameworks; these independent trajectories mean that the intersections between them have often been neglected.

In the majority of the pre-2004 Member States activist social movements played a pivotal role as engines of awareness-raising, social and legal reforms with respect to VAW, and women’s NGOs developed the first specialised services, and victims were also key movers. With respect to children’s rights NGOs were also active, but child protection measures and policies have a stronger root in innovations within state agencies, especially social work. Gay and lesbian activism also began in the 1970s, and whilst being strong and vocal focused more on achieving equal citizenship rights than addressing SOV. In all three fields, recognition of violence was embedded in a long-term process of change in social attitudes and values.

In the newly acceded Member States, social movements were much slower to emerge and had much more restricted opportunities for influencing law and policy. After 1989, new women’s rights NGOs began awareness-raising and lobbying on both VAW and also VAC, often drawing additional impetus from the 1995 Beijing Platform. Legal reforms were often given the decisive push by the accession process, but several NEs referred to the key role of persistent pressure from civil society in this process (e.g. BG, CZ, HU). At the same time, in many eastern and southern European Member States the NEs report that conservative social and cultural attitudes persist towards the family, gender relations and sexuality, delaying social support for substantive reforms.

Where legal reforms are not shaped by the state’s recognition of the key role of civil society, it appears more likely that the changes are formalistic, fulfilling external obligations and expectations, and face substantial implementation challenges. The continued engagement of active and competent women’s NGOs — often with the support of

international human rights organisations — who critically monitor implementation and assess ongoing and proposed legal changes has made a difference in some new Member States. In all Member States, however, the continued scrutiny of civil society remains the motor for both further legal reform and exposure of gaps in implementation.

Within the (mostly pre-2004) Member States with a strong social activist tradition in the field of VAW, a rights perspective linked to gender inequality and discrimination has predominated, somewhat undercut by more recent fragmenting through a focus on specific forms of VAW, often IPV, within a gender neutral perspective. With respect to child abuse, a rights perspective is more recent, reflected in the CRC. Until the 1970s, unmarried mothers were frequently deemed unable to bring up their child; the removal of children, often to authoritarian institutions, was commonplace. Reforms in child protection during the 1970s and later sought to replace this punitive approach and to move towards social rights and legal provision for support services to empower parents and assist children. In eastern Europe, the concept of social rights for parents and their children was intensified during the membership negotiations, with the consequence that a number of new Member States enacted sophisticated, modern social welfare laws (e.g. HU, RO, SI). Several NE indicate that implementation still has quite a distance to go, whilst other Member States lag behind in legislation

One intersection with VAW that deserves mentioning was the emergence of knowledge on the extent of child sexual abuse in the family in the 1980s; here a pattern of responses more similar to VAW can be discerned, echoed in subsequent recognition of various forms of commercial child sexual exploitation and sexual abuse of children in educational and religious institutions. The intersection of gender and generational power deserves more systematic attention in policy and legal developments within the EU, and, with the

emergence of SOV connections with sexuality and sexual orientation, must be added to the picture.

When looking at the commonalities and divergences in legislative response in Member States to all forms of violence, a complex and layered picture emerges. The historical legacy of predominantly separate developments in the different fields can be traced in the current legal situation.

There are important differences between the three fields in how the three entities in the legal relationship — victim, perpetrator and the state — are positioned with regard to each other. In the fields of VAW and SOV, the violence is positioned as a public concern, with the adult victim, the perpetrator and the state as legal subjects with rights and obligations vis-à-vis each other. In the field of VAC, the legal positions are more complex, notably when one or both of the parents is the perpetrator and both children's rights and parental rights and/or obligations can be the subject of regulation.

Overall the three fields of violence reflect diverse characteristics with respect to legislation. These include the extent to which, if at all, the various forms of violence have been the subject of legislation and, where they have, in which area of law this has taken place; whether legislation is part of a broader coherent legal framework or is a more incidental form; which legal definitions are used; and whether and how legislative measures are connected to policy measures.

Some of the differences cannot be isolated from political and historical roots that are specific to the legal system and culture of a particular Member State. There are more general differences in law and legal cultures between the Member States that inevitably affect any legislation<sup>(82)</sup>. These include

(82) Zweigert, K., Kötz, H., 1998, *An introduction to comparative law*, Oxford: Clarendon Press. For criminal law, see Fijnaut, C., Dupont, L. (Eds), 2005, *International Encyclopaedia of Criminal law*, The Hague, Kluwer Law International (24 Vols).

differences between a statutory and/or a common law or codified system, or a mix of both, often associated with an accusatorial versus inquisitorial system<sup>(83)</sup>. The majority of Member States have a unitary national legal system whereas others have a federal system that in varying ways and degrees encompasses (semi-)autonomous regional legal systems (e.g. BE, DE, ES, UK). There are, for example, differences in prosecutorial systems, most notably between Member States with a legality principle, where the prosecutor has the legal duty to prosecute *ex officio*, and Member States with a more discretionary system where the decision to prosecute depends primarily on whether it is in the ‘public interest’ (provided there is sufficient evidence).

Furthermore, and despite binding EU regulations, Member States still differ in the regulation of the legal position of the victim (whether or not the victim can be a full party to the criminal case (beyond the position of the victim as a civil party for the purposes of compensation) and whether a Member State provides options to instigate a private prosecution under certain conditions)<sup>(84)</sup>.

It was beyond the scope of this study to fully address the differences in legal systems between the Member States and their impact on the legal regulation of VAW, VAC and SOV. It is important to bear these differences in mind, however, as the wider context influences the convergences and divergences in these specific fields.

(83) Although both systems can no longer be considered as an unequivocal oppositional binary given the increasing importance of case-law in the traditionally statutory legal systems and that of Parliamentary based legislation in common law systems.

(84) Groenhuijsen, M., 2005, ‘International protocols on victims’ rights and some reflections on significant recent developments in victimology’, Snyman, R. and Davis, L. (eds.), *Victimology in South Africa*, Pretoria, Van Schaik Publishers, pp. 333–351.

### 3.2.2 Legislation on VAW, VAC and SOV

Only a few of the forms of violence in this study have historically been subject of criminal law (for example rape and incest) and even with these, the definition of the offence in older laws was not necessarily nor always based on the violation of the rights of the victim (but sometimes the right of the husband or father, in cases of the rape of a married woman or daughter). As the understanding of women, children and LGBT people, as rights holders widens, both the framing of the offences has shifted and other forms of violence have gained attention as a topic of public relevance, i.e. state concern.

Whilst there are provisions in criminal law that can be applied to most acts of VAW, VAC and SOV, there is much variation in the use of specific provisions, notably in criminal law, as described in Chapter 2. Many NE identified significant gaps, pointing to forms of abuse and violence that they consider not effectively criminalised either via special laws or via existing generic provisions, for example, stalking, HBV, FGM, FM, SH and SOV. Some of these gaps are attributed to a lack of recognition of the seriousness of the issue. At the same time, depending on the form of violence, Member States have taken different routes with regard to their deployment of law and policy, and a punitive response through criminal law is not always the preferred option, focusing instead on preventive policy based measures (for example FGM).

A combination of **multiple legal regimes** is used frequently across Member States, including criminal law, family law, civil law, social welfare law, asylum law, immigration law, administrative law and labour law (for sexual harassment and for the prohibition on working with children). Since any of the forms of violence which involve a violation of the physical integrity of the individual can qualify as a form of assault or bodily harm, all Member States can apply generic criminal law, but there may be specific evidentiary challenges.

Some Member States then implement other legal measures to prohibit and prevent continuation of the violent behaviour adequately.

In the field of VAC the focus is more directly on protection and prevention through social welfare law, family law and child protection law, less on criminalisation (except for sexual forms of abuse).

The combination of different legal regimes, important and necessary as this is in order to achieve the complexity of goals in a coherent and encompassing way, is obviously a complicating feature from the perspective of harmonisation. The different legal domains are subject to different rules in the EU when it comes to standardisation.

In general the **legal definitions** vary strongly across the areas of law within the fields and per form of violence. Most notably with respect to physical violence, divergence predominates in legislation. A tendency towards convergence in definitions can be observed in fields of violence that have been the subject of European binding law, or that have a strong history of international legal or policy discourse, notably in the domains of sexual forms of violence such as (child) trafficking, sexual harassment, main forms of commercial sexual exploitation of children, sexual abuse of children and rape. However, even in those domains points of divergence coexist, sometimes indicating gaps in criminalisation and/or civil law prohibitions of violence (e.g. marital rape exemption, various forms of forced non-penile penetration).

Another dimension of variation is to be found in the choice of **dedicated or generic legislation**. Dedicated legislation refers to a legal provision that *explicitly* addresses that particular form of violence as the subject of a specific legal provision and goes beyond a mere administrative regulation.

Such a legal provision itself can vary in the level of detail and/or comprehensiveness: it can range from

a specific and dedicated act regarding that form of violence (e.g. an act on domestic violence), to a law covering both punishment and protection through an integrated set of different legislative and policy measures (e.g. the Spanish Act on gender-based violence), to a specific statute or other provision dedicated to a particular form of violence in the context of an existing broader framework of legislation (e.g. a statute on stalking in the penal code or the explicit listing of abuse of a spouse or family member as an aggravating circumstance). These different approaches coexist within most Member States.

**Dedicated criminal laws** exist in all 27 Member States in the fields of VAW and VAC with regard to rape and sexual assault, child sexual abuse, trafficking, and commercial sexual exploitation of children. Thus, sexual offences are most widely addressed specifically by criminal law; however, as noted in Chapter 2, there are often barriers to implementation. Only a minority of countries have specific criminal provisions for sexual harassment. Sexual orientation based violence is in no Member States the subject of any dedicated legal regulation

For *Intimate Partner Violence*, the majority of Member States rely on existing criminal statutes, sometimes with aggravating clauses, with a minority creating specific criminal offences. In light of the difficulty of reconciling evidentiary issues when prosecuting IPV as a course of conduct involving a range of repeated abusive acts, with the tradition of criminal law focusing on single incidents, some key innovative models for criminalisation (especially Sweden and Spain) have stimulated debate on defining IPV as a specific crime. Currently, stalking is the form of violence that is increasingly criminalised via specific legislation and as a form of violence that implies the repetition of behaviours (almost half of the Member States, with a few more considering going that route).

Although, with respect to IPV, a majority of Member States has some form of dedicated



criminal and/or civil legal provisions, the numbers per se are deceptive since the level of dedication and the scope of legislation vary profoundly. There is a growing convergence among Member States towards a multi-legal approach using various legal domains in parallel (criminal, civil law, family law, administrative law). Furthermore, specific laws frequently include or prioritise measures for protection and prevention (notably with regard to FGM, HBV and FM), and in some cases do not address criminal law at all.

In this regard, in legislation on *Child Maltreatment*, preventive and protective support services are also a priority. The overall approach differs, depending on whether the child maltreatment occurs within the family or beyond the family, e.g. in an educational setting (teacher) or perpetrated by a stranger. When any form of abuse or neglect is suspected within the family, the first response tends to be preventive, supportive and/or protective. While for sexual forms of violence against children the criminal law provisions are much more unequivocal, these too differ substantially across Member States.

However, profound divergences between Member States emerge most notably with respect to the type of infrastructure in each Member State, which varies in terms of the level of regulation and coordination. This then leads to differences in relation to which statutory agencies are responsible and/or carry the (legal) obligation to identify children who are victims of maltreatment and which ones must subsequently provide an effective and adequate protective response towards the child and/or prohibitive or punitive response towards the parent.

### 3.2.3 Applying aggravating clauses to VAC, VAW and SOV

In the absence of dedicated criminal legal provisions with respect to many forms of violence,

notably in the fields of VAW and SOV, most Member States consider general criminal provisions on abuse, assault, bodily harm, and injury applicable, sometimes enhanced by general or dedicated provisions on aggravating motives (e.g. hate crime, or hate speech) or aggravating circumstances (e.g. the intimate or family relationship between perpetrator and victim).

The extent to which VAW, VAC and SOV are indeed addressed as an aggravated form of violence varies across Member States. Many Member States still lack any explicit acknowledgment that the intimate relationship (IPV), or any specific motive relating to social constructs and norms regarding ‘honour’ or ‘female sexuality’ (HBV, FGM, FM), or a motive based on discrimination against sexual minorities (SOV), or the abuse of the dependency and inherent vulnerability of the child victim (VAC) can aggravate the generic offence of abuse, assault, etc.

The fact that some Member States do not have dedicated laws criminalising or prohibiting all of the forms of violence, nor structurally recognise the violence as related to an aggravating motive or circumstance, reflects a gap in legislation and legal protection with respect to that form of violence. On a symbolic-legal level, it reflects an absence of the most elementary recognition of the violence per se as a violation of fundamental rights, and of its severity that even aggravates the generic violent act.

### 3.2.4 Protective provisions

#### 3.2.4.1 General

Although criminalisation is historically the predominant legal response to most forms of violence, there is an increasing tendency to develop integrated legal frameworks which allow for a response that at the very least includes and sometimes prioritises support and protection for the

victim from further victimisation and harm. This is especially the case when the victim is vulnerable by being known to the perpetrator, or having been in a close relationship. Priority of protection is historically widely established with respect to child maltreatment, and in relation to IPV, this tendency is increasing, with a substantial majority of Member States having one or more forms of protective orders in place.

In several of the new Member States it is striking that that newly implemented laws on IPV provide for predominantly protective measures and virtually ignore criminal legal interventions. This seems to reflect an ambivalence towards legally recognising IPV as a public offence where criminal law is one of the legal instruments to be used.

### 3.2.4.2 Family-based — gender-based approach

There is a widespread tendency among Member States to take the protection of *family life* as the defining perspective and frame provisions on that basis rather than placing women's or children's human rights at the heart of legislation and policy, making little or no reference to gender-based discrimination. This illustrates the persisting tendency to dichotomise the traditional and highly ideologically charged public/private divide, also in international law, which *de facto* locates victimisation of women and children as 'private concerns', where it is argued that state responsibility is not necessarily imperative from an international legal perspective<sup>(85)</sup>. As a consequence, forms of violence that do not fit into the 'family' framing tend to be marginalised.

This move towards centralising the family-basis of VAW and VAC, notably with respect to IPV,

(85) Chinkin, C., 1999, 'A critique of the public/private dimensions' in *European journal of international law*, Vol. 10, No 2, pp. 387–395.

has been noted with growing concern<sup>(86)</sup> by the CEDAW Commission among others, since it ignores the discriminatory basis of violence against women<sup>(87)</sup>. It runs counter to recent jurisprudence from the ECtHR acknowledging that domestic violence against women is a form of discrimination against women which requires states to respond with due diligence<sup>(88)</sup>.

Some Member States, however, still lack sufficiently adequate protective measures, or only make them available under limited conditions, either exclusively for IPV or only in cases where criminal proceedings have been initiated and/or if the victim of IPV has filed for divorce or the couple has separated. In several Member States (emergency) protection orders are provided exclusively for victims of IPV (sometimes narrowly defined), which means they are not necessarily available for victims of rape, stalking or SOV.

### 3.2.4.3 Vulnerabilities to be considered when devising protective measures

The fact that many victims are confronted with *simultaneous* and *intersecting* forms of victimisation is often insufficiently recognised when devising

(86) Reed, E., Raj, A., Miller, E., Silverman, J.G., 2010, 'Losing the 'gender' in gender-based violence: the missteps of research on dating and intimate partner violence' in *Violence against women*, 16, pp. 348–354. In a similar vein: Hearn, J. and McKie, L., 2008, 'Gendered policy and policy on gender: the case of domestic violence', *Policy and politics*, 36(1), pp. 75–91 and Römken, R., 2008, *Rightly concerned?* Inaugural address, Tilburg University Law School (<http://www.tilburguniversity.nl/intervict/events/academicssessions/>).

(87) For example, CEDAW's response to the Dutch country report with respect to domestic violence/IPV in 2007: The Committee is also concerned that the policy on violence against women is couched in gender-neutral language, which undermines the notion that such violence is a form of discrimination against women. CEDAW, 2007, Concluding comments of the Committee on the Elimination of Discrimination against Women, Netherlands, CEDAW/C/NLD/CO/4, 15 January–2 February 2007.

(88) ECtHR, *Opuz v. Turkey*. Application No 33401/02, 9 June 2009.

protective provisions that focus on the classic, single-issue form of victimisation. Many victims of VAW, VAC and SOV are confronted with a concurrence of violent victimisation, abuse and/or neglect. If perpetrators and victims live in a relationship of close proximity, or one that is often characterised by past or current intimacy and/or ongoing dependencies, the personal context enhances the risk of multiple victimisation. As a direct consequence, women and children often experience a continuum of violent, abusive and controlling behaviour. In this respect, IPV and various instances of child maltreatment are essentially different from most violent personal crime committed outside the family, which usually consists of one or more discrete incidents within a limited time span. Protective measures against IPV and VAC need to address the reality that the violations reflect an ongoing *course of conduct*<sup>(89)</sup>.

Another limitation in protective measures emerged as a consequence of a limited recognition of intersecting forms of discrimination and inequality affecting non-EU- nationals across the board. In many Member States there are limited options for victims of IPV, HBV or FGM, as well as FM, to secure their legal status solely on the basis of being victim of these forms of violence.

Victims of trafficking face limitations in accessing protective measures, since many Member States only provide such facilities to victims if they collaborate with the criminal justice authorities. Very few Member States have legal provisions governing non-liability of victims who commit crimes whilst under the control of traffickers. In many Member States victims run the risk of summary deportation before an assessment is made of the probability of re-trafficking after they are repatriated. Similarly, victimisation through sexual orientation violence reflects intersecting forms of discrimination related to both gender inequality and sexual orientation. It

(89) Johnson, M., 2008 *A typology of domestic violence. Intimate terrorism, violent resistance and situational couple violence*, Boston, Northeastern University Press.

is essential to acknowledge these conglomerates of victimisation when approaching the issue of harmonisation, since legislation often tends to gravitate towards single-issue regulations.

#### 3.2.4.4 *Immediacy of protective provisions*

Across the fields of violence a growing convergence is visible with regard to implementing protective provisions in emergency situations. The emergency removal order which is available (under various legal regimes) in almost half of the Member States, is considered a promising practice. It is most often intended for cohabiting victims of IPV, although in some Member States emergency removal can also be applied in cases of child abuse where the abusive parent can be removed from the home for a set period of time, and in other Member States removal can be applied to any person living in the same residence.

This measure exemplifies the strengthening of a protective approach which positions protection generally and the interests of the victims as more central to the intervention than prosecution.

### 3.2.5 Investigation and prosecution

#### 3.2.5.1 *Attrition*

The common concern, across the three fields of violence, which stands out when addressing investigation and prosecution, is the persistence of *high attrition and low conviction rates*. This confirms earlier research findings across 11 Member States in the area of rape<sup>(90)</sup>. National experts highlight a gap between the law on the books and the law in practice. Various factors seem to contribute to this outcome.

(90) Lovett, J. and Kelly, L., 2009, *Different systems, similar outcomes: tracking attrition in reported rape cases across Europe*, London, CWASU, (<http://www.cwasu.org>).

Across all fields of violence, the *limited or inadequate expertise* of professionals, especially in the criminal justice system (police, prosecutors and judges/magistrates) and the judicial system dealing with protection, is highlighted by the national experts as one of the crucial factors hampering equal access to justice for victims and consistent implementation of the law. Persistence of stereotyping based on gender, ethnicity and/or sexual orientation, and more specifically the minimising of the severity of the reported violence, or the positioning of the violence as a private problem is a barrier which is regularly reported.

Very few Member States have imposed binding *guidelines* or protocols on handling the investigation and prosecution cases of VAW, VAC and SOV or on implementing legislation more generally. Although guidelines and protocols are only effective to the extent when they rely on an adequate understanding of the aim of the law, they can be helpful in steering the process towards more effective and consistent implementation of the law. However, they lose their positive effects, if there is a drift towards standardisation and bureaucratisation that does not leave enough room for individual handling of particular cases. Although some Member States have made progress, notably with respect to implementing protocols for the police (and to a lesser extent for prosecutors) in handling IPV, sexual violence and child sexual abuse, structural lacunae still exist.

In Member States where *specialised courts* for VAW have been established, initial experiences confirm the crucial importance of sufficient specific expertise to handle cases. Although in many Member States family courts have existed for much longer, the same issue of expertise on gender, violence and child development arises. In addition, several Member States reported that NPAs in the field of VAC do not address the particular gender-based risks to the girl child. A more

widely realised measure, and one requiring fewer structural adjustments in the legal system, is the establishment of *specialised police units or officers and specialised prosecutors*. This seems to be quite prevalent in relation to trafficking, but has also been successful for sexual violence, IPV and, more recently, in the field of HBV. Specialised police units for dealing with child victims are legally established in some Member States. SOV has barely been addressed as a legal concern, with the exception of a few Member States which are experimenting to identify what an adequate police response should be.

The ambivalence in the recognition of VAW, VAC and SOV as a violation of fundamental *rights* (going beyond concerns based on ethics and/or care) and therefore a *public* concern is another barrier identified by national experts which feeds into the high attrition rate. In practice this translates into the ‘no-criming’ of cases and/or to non-prosecution. The clearest manifestation of this ambivalence is reflected in Member States which allow for prosecution of less severe cases of IPV or of (marital) rape only via private prosecution. This reflects the fact that some Member States still do not consider physical or sexual violence against women categorically as a public offence.

### **3.2.5.2 Monitoring and registration**

The absence or limited validity of systematic administrative data both within and across Member States impedes the monitoring of the handling of cases of VAC, VAW and SOV in the criminal justice system. Across all fields of violence, the registration of reported cases by the police, prosecuting authorities, courts or child protection agencies varies between and within the Member States in terms of content (definition of the violence) as well as in the rigour with which it is implemented, affecting quality and

reliability<sup>(91)</sup>. A small minority of Member States have reliable registration data on some forms of violence. The absence of a sufficiently gender and age disaggregated breakdown of statistical data is consistently reported as lacking across Member States, which is an obstacle to adequate monitoring on a national level. It is argued that it feeds into an attitude of minimising the severity of reported cases.

Related to registration problems is the issue of mandatory reporting by professionals (inter alia in social work, healthcare, education), in particular of VAC, but increasingly also VAW. Current approaches diverge widely, most notably with respect to VAC. For VAW and SOV, the focus is more on ensuring that authorities register reports, although a few Member States place an obligation on citizens or on groups of professionals to report IPV. For VAC, the majority require that either professionals or, sometimes, any citizen should notify child protection authorities if they suspect abuse or neglect. Reporting to the criminal justice system is dependent on the approach to VAC in the individual Member States. The preventive potential of notification or reporting depends on the widely differing capacity and infrastructure of preventive support services, if available.

### 3.2.6 Victims' rights

Across all fields of violence, many Member States fail to fully implement basic victims' rights, such as the right to be treated with dignity, the right to redress and compensation or the right to safety when reporting and testifying. Several national experts remark that victims will refuse to testify if

(91) See also Hagemann-White, C., Bohne, S., 2007, *Protecting women against violence. Analytical study on the effective implementation of Recommendation Rec(2002)5 on the protection of women against violence in Council of Europe Member States*, Strasbourg, Council of Europe ([http://www.coe.int/t/dghl/standardsetting/equality/o3themes/violence-against-women/CDEG\(2007\)3en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/o3themes/violence-against-women/CDEG(2007)3en.pdf)).

the atmosphere in society does not support them, let alone if the criminal justice system treats them disrespectfully. More importantly, the nature of the victimisation means that many of the victims know their assailant and need conditions in which they can be confident of their safety from reprisals and of being treated in a way that avoids secondary victimisation. This is particularly problematic for children, given their inherently dependent and vulnerable position in a court setting. The results point to an urgent need for gender and generation-sensitive implementation of the rights of victims of VAW, VAC and SOV.

### 3.2.7 Support services

#### 3.2.7.1 Shortage of support services

Given the severity of the violence and the risks to their safety run by many victims of VAW and VAC, particularly in the context of separation violence, due diligence call for provision of support services that offer safety to victims<sup>(92)</sup>. VAW, VAC and SOV represent a state concern from both a public health and a safety point of view. Across all Member States, but especially in the new Member States, the shortage, if not lack, of specialised and state-funded support services is the most common element in the overall picture of the availability of support for victims. While most of the older Member States now provide support and shelter facilities for victims of IPV, trafficking and child maltreatment. However, timely availability and the level of differentiation often remains insufficient.

Several Member States, notably the newly acceded ones, rely primarily on NGOs for the provision of dedicated support services. The accessibility

(92) Ertürk, Y., 2010, 'The due diligence standard: what does it entail for women's rights?', C. Benninger-Budel (ed.), *Due diligence, state responsibility to combat violence against women*, Leiden, Martinus Nijhoff Publishers (forthcoming).



of existing generic victims' services differs across Member States, depending on a varying level of availability. It is striking that provision of support services for sexual violence and rape of adult women is under-developed compared to provisions for IPV.

Both IPV, especially when it is related to a couple's separation and HBV, regularly carry a risk of severe, life-threatening danger. A few Member States are beginning to give this fact greater attention, by launching specialised support services for this category of victims. Similarly, FGM has been dealt with more vigorously in recent years, although many Member States still lack a coherent approach.

### 3.2.7.2 *Multi-agency interventions and the role of law and policy-based measures*

The move towards multi-agency collaboration is developing in the fields of both VAC and VAW, although in both cases the actual cooperation in a multi-agency approach and the division of responsibilities diverges substantially. In relation to VAC different legacies within the Member States play an important role (welfare-based or criminal-justice-linked protective measures). There is a gradual increase in attention for the intersection of IPV and child maltreatment. Research indicates that it remains a complex challenge to address both groups of victims simultaneously (mothers and children). The dynamics of domestic violence are often misunderstood and inappropriately responded to and differences in history and culture between these two domains complicate collaborative interventions<sup>(93)</sup>.

(93) See Douglas, H., Walsh, T., 2010, 'Mothers, domestic violence and child protection' in *Violence against women*, 16, pp. 489–508; Humphreys, C., 2010, 'Crossing the great divide: response to Douglas and Walsh', *Violence against women*, 16, pp. 509–515; and Hester, M., 2010 'Commentary on mothers, domestic violence, and child protection' by Heather Douglas and Tamara Walsh', *Violence against women*, 16, pp. 516–523.

Within the field of VAW, the developments towards multi-agency approaches are found mostly in relation to IPV and, to a lesser extent, stalking, HBV, FM and FGM. The emergency removal order which is available (under various legal regimes) in almost half of the Member States also illustrates a development towards an integrated, multi-agency approach. In practice, the criminal justice system and various agencies of social work, healthcare, youth care, and education collaborate to fully realise protection, support and prevention measures (notably secondary prevention) for victims. Note that policy measures which may be part and parcel of these multidisciplinary interventions are often the discretionary domain of local and regional authorities and are not always, or not necessarily, regulated or mandated at a national level. In this study, we could only collect data on nationally established policy measures. In reality, more policy-based interventions are undoubtedly provided for in the three fields of our study.

In some Member States, specific protective and support measures are connected to policy-based interventions to prevent (further) violence (e.g. for FGM via prohibitions on travelling abroad, for example). Particularly when sociocultural traditions feed into the upholding or revival of violent practices against women and girls, which often affect both the victim and her family and the social community, an integrated multi-agency approach is preferred. In these latter areas, policy development<sup>(94)</sup> is often prioritised over legal regulation, with criminal law functioning as the *ultimum remedium*. The integrative approach, mostly applied to IPV (and, interestingly, only rarely to rape or sexual assault), is multi-agency

(94) 'Policy' was used as a broad concept when asking the national experts to indicate whether their governments had adopted any legislation or policies with respect to the different forms of violence. This implies that a range of more or less coherent or structural policies can fall into this category. It was beyond the scope of the project, with its emphasis on legislation, to collect detailed data on the content or coherence of policy frameworks.

and multi-purpose: providing immediate safety and support for women and children alongside the prosecution and punishment aspects. In doing this it goes beyond a strictly legislative approach in combining legal and policy-based measures.

Within the three fields of violence, a diverse picture emerges of whether and how legislative measures are actually connected to policy measures and programmes. Although we have only been able to collect limited information, an increasing number of Member States are slowly but steadily starting to expand their responses and developing a coordinated and integrated approach to the various forms of violence, in particular with respect to domestic violence and cross-border forms of violence which are characterised by links to international organised crime (i.e. trafficking and the various forms of commercial sexual exploitation of children)<sup>(95)</sup>.

### 3.2.8 Training and capacity-building

It is consistently reported in virtually all Member States that there is limited expertise in relation to VAW, VAC and SOV among front-line professionals. This is a direct outcome of the lack of specialised training provided. Several national experts express concern that legal decisions, which may be decisive for the future of families and safety of children (and women), are regularly taken by professionals who have very little specific knowledge about the dynamics and nature of violent abuse and child maltreatment.

While a growing number of Member States currently provide training facilities to the police, including in-service training, for police, only a

minority ensure mandatory basic training for police, and, to an even lesser extent, for prosecutors, with respect to some forms of violence (notably IPV; trafficking and some forms of child maltreatment, more recently FGM and HBV are increasingly receiving attention). In the field of VAC only social workers seem to be sufficiently focused in at least the majority of Member States. Continued training for prosecutors while in service is virtually absent, and so is training for judges.

### 3.2.9 Prevention

Prevention measures in the field of VAW are generally very sparse with respect to the most common forms, such as sexual violence, rape or stalking. IPV is the exception, with awareness campaigns increasingly launched, often initiated and run by NGOs, sometimes with the support of state funding. It is striking that, with respect to the generally far less prevalent (but severe) forms of violence directly related to increasing migration flows and globalisation, such as HBV, FGM, FM and, most notably, trafficking, several Member States are making in-depth investments in developing preventive measures (targeting at-risk groups).

Although prevention of VAC is central to child protection policy in various Member States, the focus is mostly on protective intervention when a child is already considered to be at risk. Early prevention programmes, aiming at primary prevention, such as programmes offered during pregnancy, are much less prevalent and exist only in about one third of Member States. National experts report very few systematic efforts to address child maltreatment or VAW in early education in primary or secondary schools (notably physical and sexual dating violence among teenagers). The majority of Member States (17) prohibit all corporal punishment as a normative standard, and all but three prohibit it in schools; educating the public about children's rights in this regard is a major prevention strategy.

(95) However, it should be noted that there is anecdotal evidence (police-based) that informal networks (often family-based) seem to be involved in the growing market for the sexual exploitation of women and children, in particular child pornography, the sale of children and trafficking of women.

Prevention programmes in the field of SOV which target a wider audience are virtually non-existent across the Member States, with the exception of police programmes in two cities in two Member States. It should be noted that some Member States still have discriminatory legislation on the books regarding homosexuality or trans-sexuality. This reflects a state position which condones discrimination and effectively hinders the prevention of violence which is closely linked to discrimination against LGTB people.

### 3.2.10 Research and statistics

The collection of reliable national data in the fields of violence is a prerequisite for evidence-based development of policy and legal measures and to monitor any progress. From a human rights-based understanding of VAW, VAC and SOV, collecting data on the forms of violence can be considered a state responsibility. At the level of the Council of Europe, the UN and the EU the need for reliable data collection has been repeatedly underlined. Internationally, numerous efforts are being undertaken to enhance the knowledge base, notably in the field of VAW where systematic databases are in the process of being established <sup>(96)</sup>.

#### *National victimisation studies*

Population-based or national household surveys, where respondents are asked about their experiences of one or more forms of violence, are considered the most reliable method to obtain information on the extent of violence. The availability of this type of national prevalence estimates differs widely among Member States for each form of

(96) Under the EU Presidency of Spain (2010) preparations began in order to develop an EU Observatory on VAW; the UN Secretary's General database on Violence Against Women aims to provide an overview per UN MS of available knowledge on legislation on VAW, policies, good practices and impact (<http://webappso1.un.org/vawdatabase/home.action>).

violence. Obviously, some forms of violence, such as trafficking, HBV, FGM and FM cannot be studied through national samples, since it is virtually impossible to approach a sufficiently large enough sample of the target population, when the violence is concentrated in social and cultural subpopulations. The hidden nature of the crime and the fact that it is embedded in deeply rooted traditions, creates profound barriers to collecting valid and reliable quantitative data (language, non-response, establishing report to collect data).

Overall, IPV/DV is the only form of violence which has received some systematic attention in prevalence research in over two thirds of the Member States (n=20). For all other forms of violence, only a minority of Member States can provide any national prevalence estimates. The contrast between prevalence studies on IPV and rape is stark, with prevalence studies on rape in just over one third of the Member States. It reflects the way in which, in recent decades, the issue of IPV has pushed rape and sexual violence more generally into the background. In the field of child maltreatment, prevalence studies on physical abuse and sexual abuse have been undertaken through

**Table 3.1: Availability of national prevalence estimates across Member States**

	Number of national prevalence estimates
IPV/DV	20
Rape/sexual violence	11
Stalking	4
Sexual harassment	5
Child maltreatment	
— <i>physical abuse</i>	7
— <i>neglect</i>	2
— <i>sexual abuse</i>	7
SOV	0

national surveys in only a minority of one in four Member States (seven). The lack of prevalence data on SOV, although methodologically a challenge to collect, reflects the dearth of research in this field more generally.

The focus here is on whether any national data have been collected in Member States. Comparison of the results of prevalence research is beyond the scope of this study (see Chapter 1). Research has indicated that transnational comparison of prevalence data is a challenge due to methodological differences<sup>(97)</sup>. It is, therefore, important that international research is conducted where a similar method can be developed and applied which is sensitive to the different samples across Member States<sup>(98)</sup>.

*Official statistics: crime statistic and administrative data*

Across Member States the data situation regarding availability of crime statistics, based either on police registration or court statistics, reveals a complex picture. A vast majority of national experts indicate that crime statistics exist but that the statistics themselves are not always publicly accessible. Several national experts point out that the reliability of criminal justice system's registration systems is, for various reasons, limited. Some point to internal inconsistency in definitions. More importantly, not all forms of violence in our study are registered as such in crime statistics,

since they do not always translate into a distinct and dedicated criminal law. Furthermore, when a gender breakdown is absent, the relationship between victim and suspect is not recorded or no recording of aggravating circumstances or aggravating motives (hate crime) takes place and cases of IPV, HBV, FGM and SOV cannot be identified as such in crime statistics (e.g. FGM might be registered as bodily mutilation, or IPV or SOV under the generic category of assault).

Only on trafficking, rape and child sexual abuse do a majority of around 20 Member States have official and more or less reliable crime statistics available, which reflects their one-to-one correspondence with a criminal statute. For trafficking, a subject of international scrutiny since the Palermo Protocol, there is also a clear obligation for all Member States to have solid recording systems in place to monitor trafficking.

In relation to most other forms of violence, in particular child maltreatment, FGM, FM, HBV and SOV, we have to rely on administrative data from agencies (i.e. youth healthcare institutions, child protection agencies, social work organisations, women's or DV shelters and social welfare registration data, etc.). Only a minority of Member States can provide some kind of administrative registration data, with child maltreatment most extensively covered (in almost half of Member States). There is almost no systematic recording of sexual harassment, despite it being prohibited in labour law in most Member States. Regarding SOV, only a minority of Member States have any registration of violent incidents motivated by sexual orientation (usually police registrations or NGO data) at all. If Member States collect any data related to sexual orientation, they usually focus on incidents of discrimination.

A caveat must be stated here regarding the quality of administrative data. Many national experts point to fragmentation, variation and a lack of

(97) See UNODC-UNECE *Manual on victimisation surveys, 2010*, Geneva, and for a comparative reanalysis of survey data: Schröttle, M., et al., 2006, *Comparative reanalysis of prevalence of violence against women and health impact data in Europe — obstacles and possible solutions. Testing a comparative approach on selected studies* (Project No 506348), CAHRV, (<http://www.cahr.uni-osnabrueck.de/reddot/190.htm>).

(98) At time of writing, FRA was about to commission a pilot study to develop a methodology suitable for conducting survey research on VAW across Member States. ([http://www.fra.europa.eu/fraWebsite/news\\_and\\_events/cft-dse1010\\_en.htm](http://www.fra.europa.eu/fraWebsite/news_and_events/cft-dse1010_en.htm)) (last accessed 19.9.2010).

clarity in definitions used by different institutions within their country, with the result that the data are of limited use beyond internal monitoring purposes for the institution that collects them. This obviously impedes international comparison as well. Spain reports having a nationally coordinated registration system, organised around so-called ‘observatories’ which structurally collect administrative data on VAW (and certain forms of VAC) in a standardised form. This seems to be a promising practice to enhance the quality and usefulness of registration data<sup>(99)</sup>.

The lack of adequate registration systems for many forms of violence seems to reflect the limited social and political concern, except when NGOs are successful in lobbying to collect data or when the violence becomes the subject of international regulation (trafficking) and/or becomes the subject of political concern and debate (e.g. HBV or FGM), which often translates into a growing call for ‘hard numbers’. EU coordination seems crucial in this respect<sup>(100)</sup>.

### *Overall picture of national research*

There is profound variation across the Member States as regards the institutions which carry out (prevalence) research, as well as with respect to the (channelling of) funding of research. The collection of prevalence data may be carried out by the national office of statistics or by nationally established/state-funded organisations or by universities or independent NGOs. There is an increasing body of research on evaluation of the

(99) Several national experts acknowledge that registration of ethnicity is far from straightforward or simple. It is complex for methodological reasons (for example, defining which generation still counts as belonging to a minority) and it is politically sensitive information in a context of rising xenophobia and/or anti-immigrant sentiments across Member States.

(100) Ruuskanen, E., Aromaa, K., 2008, *Administrative data collection on domestic violence in Council of Europe Member States*, EG-VAW-DC(2008)Study, Directorate General of Human Rights and Legal Affairs, Council of Europe, Strasbourg.

effectiveness of newly implemented approaches against violence is developing in Member States with a strong research culture.

The majority of the national experts are rather sceptical about the quality of the available knowledge base and the future of research in their Member State. This is especially true of the newer Member States. The lack of funding for independent research (again, especially in the newer Member States) is viewed as a barrier. Some national experts point to a new dependency on foreign funders which is developing<sup>(101)</sup>.

Overall Member States differ widely in the quality and consistency with which they collect reliable prevalence data in the three fields of violence. Only a small group of Member States have succeeded in developing a strong and relatively independent research culture, but no Member State succeeds in doing so for all forms of VAW, VAC and SOV. VAW is relatively better researched than VAC, which, in turn, is better researched than SOV. Support at an EU level to develop a stronger independent research culture in these fields seems crucial.

## **3.3 Member States and international human rights instruments**

### **3.3.1 Ratification of relevant human rights instruments and national approach**

When sketching overarching issues across the Member States in their approach to VAW, VAC and SOV, it is important, certainly from a human

(101) An original approach to generating a research budget has been developed in Sweden. Every perpetrator who is sentenced to imprisonment must pay approximately EUR 50 into a fund dedicated to crime victim research.



rights perspective, to contextualise the position of the Member States vis-à-vis the relevant core international human rights instruments.

The key binding instruments are the European Convention on Human Rights (ECHR) and the European Social Charter (ESC, at the level of the Council of Europe) and both have been ratified by all Member States<sup>(102)</sup>. Although the ESC does not contain any specific provision on VAW, VAC and SOV, it does include a broad anti-discrimination clause in which sex and age are mentioned (Part V, Article E).

From a substantive perspective, two UN conventions which directly bear on VAW and VAC are most relevant: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). All 27 Member States have ratified these two core instruments. It should be noted that a vast majority of Member States have also ratified several of the optional protocols which go with the instruments<sup>(103)</sup>: to CEDAW (24), to CRC with respect to CSEC (21) and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) (23) (see Table 3.2). Regarding SOV, there is no dedicated international instrument. From a human rights perspective, we can conclude that all Member States have firmly committed themselves to complying

with obligations which flow from the ratification of these instruments<sup>(104)</sup>.

### 3.3.2 VAW, VAC and SOV as a human rights and/or gender equality issue

This widely shared commitment among Member States to address VAW and VAC as a human rights concern raises the question of how does this translates at a national level? In the data collection for this study, the focus was on two related aspects: (i) to what extent Member States address any of the forms of VAW, VAC and SOV as human rights violations or, in the case of VAW, as gender equality issues (VAW); and (ii) whether Member States have actually developed a coherent and integrated overall response to VAW, VAC or SOV in a national plan of action (NPA).

Overall, very few Member States actually make an explicit reference in legislation to gender inequality as a basis of VAW or position VAC as a human/children's rights issue. Although international human rights law has increasingly become part of an international political discourse, it is rare that Member States directly use it as a framework in national law-making. The exception here is trafficking where virtually all Member States refer to the CoE Convention. It

<sup>(104)</sup>Compliance with regional instruments is relatively lower as can be seen in Table 3.2. Only 18 Member States have ratified the 2005 Council of Europe Convention on Action against Trafficking in Human Beings and only six Member States have ratified the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. This reflects, inter alia, the fact that these instruments, which are more detailed than CEDAW or CRC, contain potentially more areas of debate and contestation. Furthermore, they are relatively recent. It is probably a matter of time and political will before more Member States ratify. In relation to compensation for victims of crime, 17 Member States have to date ratified the 1983 European Convention on the Compensation of Victims of Violent Crimes. The lower number of ratifications seems directly related to the reluctance of many Member States to accept the direct economic implications of this Convention.

<sup>(102)</sup>*The European Union Charter of Fundamental Rights*, 2000, articulates, for the first time in the history of the EU, as founding principles to be upheld and respected by all Member States, a whole range of fundamental civil, political, economic and social rights for European citizens and all people who are resident in the EU. However, the Charter is binding for Member States only with regard to EU law.

<sup>(103)</sup>From the perspective of providing direct access to international legal provisions for individual citizens, the optional protocols are a crucial instrument.

**Table 3.2: Member States ratification of international human rights and victims' rights instruments**

Conventions ratified	Total
CEDAW	<b>All</b>
CEDAW Optional protocol	<b>24</b> AT, BE, BG, CY, CZ, DE, DK, EL, ES, FI, FR, HU, IE, IT, LT, LU, NL, PL, PT, RO, SI, SK, SE, UK
CRC Optional protocol on CSEC	<b>21</b> AT, BE, BG, CY, DE, DK, EE, EL, ES, FR, HU, IT, LT, LV, NL, PL, PT, RO, SI, SK, UK
TOC Trafficking protocol	<b>23</b> AT, BE, BG, CY, DE, DK, EE, ES, FI, FR, HU, IT, LT, LV, LU, MT, NL, PL, PT, RO, SI, SK, UK
ECHR	<b>All</b>
CRC	<b>All</b>
CoE Convention on Action against Trafficking in Human Beings	<b>18</b> AT, BE, BG, CY, DK, ES, FR, IE, IT, LV, LU, MT, PL, PT, RO, SI, SK, UK
CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	<b>6</b> AT, DK, EL, ES, IT, MT
CoE European Convention on the Compensation of Victims of Violent Crimes	<b>17</b> AT, BE, CY, CZ, DE, DK, EE, ES, FI, FR, LU, NL, PT, RO, SK, SE, UK

is more common for a reference to be made to gender-based violence in policy frameworks or NPAs (e.g. DE, NL).

However, several national experts observed that often just lip service is paid to the gender-based nature of VAW, with very little practical or substantive meaning. Even with respect to rape and sexual harassment, forms of VAW which have historically been positioned as manifestations of gender inequality, are only legally recognised as such by half (concerning rape) or two thirds (concerning sexual harassment) of the Member States.

At time of writing, only Spain explicitly addresses VAW as a concept related to gender inequality or the discrimination against women. It is explicitly conceptualised as a human rights issue in the implementation of the 2004 comprehensive law on gender-based violence which addresses punitive, protective and supportive provisions <sup>(105)</sup>. Portugal is currently preparing a similar law.

Sweden makes explicit reference to IPV as a form of gender-based violence. In the majority of all

<sup>(105)</sup> However, it should be noted that the Spanish law on gender-based violence, although broad in semantic scope, mostly concerns domestic violence/IPV.

other Member States, reference *in law* to VAW as gender-based violence is absent. Several national experts point out that, although international law has a directly binding effect in their country, and, therefore, has priority over national law, human rights have not been at the forefront as an explicit conceptual legal framework for legislative reforms, in any of the fields of violence, with the exception of trafficking (human rights issue) and sexual harassment (gender inequality issue). In both the latter cases, this directly flows from existing CoE or EU regulation.

Overall, the *legal* recognition of gender inequality as one of the root causes of VAW which simultaneously implies a human rights violation is met with ambivalence among Member States. In addition, there is a paradoxical tendency across Member States towards gender-neutralising the legislative approach to VAW which goes beyond the mere gender-neutral formulation of laws.

The defining perspective seems to rest upon concerns about (morally based) family values which are violated through violence against women or children. No reference is made to gender inequality as a (gendered) basis for violence against women. This tendency is particularly prominent in recently adopted or proposed laws in several of the newer Member States (e.g. LV, HU, PL, RO, SI). The new Polish law on domestic violence is entirely gender neutral and its approach barely reflects any recognition of the disproportionately gender-based risks to women compared to men, according to the national expert.

A similar analysis is presented by the Slovenian national expert where the Family Violence Act positions the violence as an act ‘against marriage, family and children’. A similar ambivalence regarding the recognition of the impact of gender inequality is visible in the approach towards trafficking. The Member States which have a legal or policy-based intervention usually consider trafficking primarily

as a human rights violation and its specific gendered aspects are marginalised, if not erased.

## 3.4 Preliminary conclusions

### 3.4.1 Human rights-based approach: violence as coming from inequality and discrimination

From a human-rights-based perspective it is crucial to acknowledge VAW, VAC and SOV as forms of violence which are related to structures of gender or generation-based inequality and discrimination.

An understanding of the underlying structures of discrimination and inequality affecting VAW, VAC and SOV is directly relevant for the development of a coherent and transformative approach which encompasses the different levels of intervention which need to be addressed in order to be effective. As recently argued by Ertürk (2010), the transformative impact of recognising violence against women as a human rights issue has been particularly significant in three respects<sup>(106)</sup>:

- ◆ in transforming the conventional understanding of human rights beyond violations perpetuated mainly by state actors in the public sphere;
- ◆ in the transformation of the doctrine of state responsibility to include the actions of private individuals, deconstructing the public/private dichotomy; and
- ◆ in the transformation of the criminal justice systems with the recognition of new forms of crimes, such as domestic violence, marital rape and stalking.

(106) Ertürk, Y., 2010, ‘The due diligence standard: what does it entail for women’s rights?’, Benninger-Budel, C. (ed.), *Due diligence: state responsibility to combat violence against women*, Leiden, Martinus Nijhoff Publishers.

This analysis applies *mutatis mutandis* to VAC as well as to SOV. A fourth transformative dimension of an integrated human rights-based approach which can be added flows from the recognition of the intersectional nature of various elements of inequality and discrimination which are often simultaneously at stake.

Although Member States vary with respect to the extent to which they consistently succeed in explicitly acknowledging VAW, VAC and SOV as a violation of fundamental human rights, there is a growing shared commitment to protecting the rights of victims from a fundamental human rights perspective. Often legislative and policy measures are fragmented and/or limited, despite efforts to implement national plans of action in the field of VAW (and sometimes VAC), and they suffer from persisting ambivalence, both within state agencies and in wider society, towards categorically recognising VAW, VAC and SOV as protection matters and as public offences which it is the state's responsibility to address. It therefore seems timely to coordinate and stimulate concerted efforts at an EU level.

### 3.4.2 Human rights-based approach: comprehensive and integrated law and policy frameworks

A human rights-based approach requires states to prosecute and punish with due diligence, to protect and support victims and to prevent violence (the three Ps). Applied to gender and generation-based violence, this also translates into the call for an integrated approach, where both policy and legal measures are developed to reach beyond a merely punitive response, in order to address protection and prevention issues effectively.

The comparative analysis reveals that legislative measures alone cannot effectively fulfil the complex set of obligations which are placed upon states. The effectiveness of legislation, in terms of

actually delivering justice to victims, is hampered as a consequence of the disconnection between the several domains that affect the law in practice. Without adequate capacity-building and specialised expertise among the police, prosecutors and judges, the implementation of the law is severely impeded. Without effective support services, victims are not safe and often do not even come forward to report to the police or participate in prosecution.

The most innovative legislative and policy-based measures in the various fields and forms of violence increasingly focus on designing *integrated* responses, where law and policy developments are interwoven to address protection, prevention and support for victims. This seems a clear manifestation of the impact of the human rights perspective over the past two decades on the response of states to these forms of violence, each of which reflect a fundamental human rights violation.

The ongoing and newly initiated but fragmented development efforts of the Member States suggest that the time has indeed come for the EU to develop an overall, coherent policy towards all forms of violence which is based on discrimination or unequal recognition and participation rights. However, this policy will need to be differentiated into targeted measures in order to address each of the different forms of violence in the most effective and appropriate way. We will address this in more detail in the next chapter.

It is nevertheless important to emphasise that, against the backdrop of a human rights approach, the identification of gaps in legislation across the Member States does not necessarily imply a call for more or different legislation. Whether different legislation in practice would be able to provide adequate protection or options for redress depends on its institutional context and its implementation. The criminal legal system is often limited in its potential to realise a less gendered and more transformative

interpretation which fully integrates protective and prosecutorial interests<sup>(107)</sup>. In many cases where Member States fail to apply generic (criminal) law provisions, for example, this might be changed through detailed guidelines or better training. The results more generally clearly point to an urgent need for improved implementation of laws in practice, with (legal) professionals paying adequate attention to the generational and gender-specific aspects of violence, as well as to other grounds of discrimination, such as sexual orientation.

The value of additional dedicated legislation for specific forms of violence is not always indisputable. A dedicated law on one form of violence can add to recognition of the problem as a fundamental rights issue, in this case disproportionately affecting women, children or individuals from a sexual minority. A good example is the criminalisation of stalking. Explicit recognition of that form of violence in law has had an important cultural and normative impact which cannot be underestimated. Similarly, several national experts said that without the EU directive on sexual harassment, no public discussion of sexual harassment would have been possible at all. Law is a powerful discursive engine in society at large, in addition to providing a legal tool to counteract the prevailing tendency to either position the violence in the private domain or minimise its severity.

Dedicated legislation underscores the fact that violence is a subject of the state concern and, as such, it is drawn into the realm of public regulation. However, the other side of this is that legislation can ‘freeze’ the current understanding of violence into a narrow frame. Practitioners may then have to struggle with definitions which, for example, exclude some categories of women, LGBT people or

children from gaining recognition of the violence they suffer. Examples are protective provisions which define domestic violence by legal or blood ties only, definitions of ‘family’ which exclude caregivers who do not fit the standard, legislative ideal and, of course, definitions of sexual assault and rape which require proof of physical resistance or which restrict their applications to specific concepts of what is or is not ‘sexual’.

In seeking to articulate the standards which are relevant when striving towards harmonisation in the EU (Chapter 4), it is important to bear in mind that the wide divergences in many fields of violence in current legal regulations across the Member States obviously complicate the process of achieving unanimity in strict legal reforms from an empirical perspective. Ultimately, the question is: does legislation, in principle, address all forms of violence adequately in such a way that, in practice, it offers tools for protection and redress to victims? Criminalisation or any other form of legislation, in and of itself, is not necessarily a sufficient nor adequate response. The implementation of the law in practice defines the extent of its transformative value.

This important outcome of the comparative analysis and synthesis should be built on when taking the next step towards identifying which standards can be articulated as guiding principles and when exploring the options for harmonisation and the development of coherent and integrated policy measures within the limited powers of the EU. The comparative analysis (Chapter 2) and synthesis (this chapter) clearly point towards the need for the development of an integrated approach. From a human rights based perspective two outcomes will define the success of any development towards harmonisation in the EU: the ending of impunity for any form of violence as rooted in discrimination and gender inequality, and the empowerment of victims through the provision of an integrated set of measures of support, protection and prevention.

(107) Burman, M., 2010, ‘The ability of criminal law to produce gender equality: judicial discourses in the Swedish legal system’, *Violence against women*, 16 (2), pp. 173–188. Also, Römkens, R., 2006, ‘Protecting prosecution. The powers of criminal law to protect victims of stalking’, *Violence against women*, 12 (2), pp. 160–187.



## Chapter 4 — Identifying minimum standards

### 4.1 Introduction

In this chapter we address the following questions:

- (i) Which minimum standards can be identified that should be taken as a starting point when devising an effective EU approach towards VAW, VAC and SOV?
- (ii) What are the legal parameters in EU-law that are required when harmonising legislation in the domain of VAW, VAC and SOV?

In line with the human rights-based perspective of the study, and taking into account the regulatory framework of the EU, we analysed different sources and elements which inform the articulation of minimum standards.

Firstly, we looked at international human rights-based standards which set the stage regarding the content of the standards. Including a normative description of the existing international legal and quasi-legal framework provides a comprehensive picture of both the legal obligations as well as the softer norms that exist in our fields of study and by which most of the Member States are also bound.

After elaborating on the considerations we took as starting points for the selection of sources for legal and quasi-legal standards (4.2), we explain how we have worked to make a selection of existing standards and propose additional standards (4.3). Section 4.4 addresses the requirements which need to be taken into account when considering law and policymaking in the European Union. Specifically, we looked at EU harmonisation law which defines the parameters under which standardisation can be taken forward and in which ways. The ultimate qualification of standards as feasible minimum standards depends on a complex set of arguments which can be drawn from these different perspectives.

### 4.2 State obligations in the fields of VAW, VAC and SOV: the duty to respect, protect, fulfil

International human rights standards put different types of obligations on states parties, the primary bearers of duties with regard to upholding human rights. In order to better understand what the obligations of the state entail, concepts such as the tripartite typology have been developed, i.e. that states should *respect, protect* and *fulfil* human rights<sup>(108)</sup>.

Applied to gender-based violence and child abuse and maltreatment these three obligations require different types of legislative and policy actions, depending on the issue at stake<sup>(109)</sup> and are often also referred to as the three P obligations:

- ♦ the obligation to prosecute with due diligence (including criminalisation of identified violent acts);
- ♦ the obligation to protect and assist victims; and
- ♦ the obligation to prevent the violent act by addressing the root causes.

It seems widely accepted nowadays that state parties must take appropriate measures to eliminate violence against women, and act with due diligence to prevent, investigate, punish and redress acts of violence against them by private actors<sup>(110)</sup>.

(108) There is now broad consensus that human rights impose these three types or levels of obligations on states parties, see Committee on Economic, Social and Cultural Rights: General Comment No 12 (May 1999), paragraph 15.

(109) See also ICSESCR, General Comments, General Comment No 16, 2005, Article 3: The equal right of men and women to the enjoyment of all economic, social and cultural rights, paragraph 27: 'Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality'.

(110) Thomas, D.Q., and Beasley, M.E., 1993, 'Domestic violence as a human rights issue in *Human Rights Quarterly*, Vol. 15, No 1, pp. 36–62, p. 49.

The ECtHR has repeatedly held states responsible for breaching the due diligence principle. In *M.C. v Bulgaria* (2003), the importance of states' monitoring of the implementation of law is highlighted. The case found that, although Bulgaria's rape statute did not legally require any sign of physical resistance by the victim, it appeared to be required in legal practice to pursue a charge of rape<sup>(111)</sup>. The recent (June 2009) ECtHR ruling in the case *Opuz v Turkey* has elaborated on the meaning of the concept of 'due diligence' and explicitly sets out that states have a positive obligation to take preventive measures to protect an individual from the criminal acts of another person where they 'knew or ought to have known' of a 'real and immediate risk to the life of an identified individual(s) from the criminal acts of a third party and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'<sup>(112)</sup>.

## 4.3 Selecting relevant standards: method

### 4.3.1 Step 1: Identifying standards

As briefly indicated in Chapter 1, the sources from which to derive minimum standards can be found in international and regional, general and specific human and victims' rights instruments and documents, both legal and quasi-legal. The reasoning why to include both legal and quasi-legal sources in our analysis is as follows. In international law, reference is often made to the divide between hard and soft law instruments. In academic discussions on the character

of international legal standards, however, it is often made clear that this divide is at the very least problematic. Soft law instruments may have a clear normative value despite their non-binding, non-treaty form. To some extent, they might reflect state practice or express some intention to create law and progressive development. Hence, establishing whether an agreement is binding or not requires the analysis of both substance and intent. Moreover, an agreement involving a state and another entity may be binding, even if it is not a treaty. Furthermore, once soft law begins to interact with binding instruments, its non-binding character may be lost or altered. In light of this, it is generally accepted that the divide between hard and soft law instruments is problematic and no longer very helpful.

The value of purely political commitments to implement the norms should also not be underestimated. Adoption at the highest political level increases the status of the norms. Conversely, a legal obligation towards implementation does not automatically imply action, as shown by the limited implementation of the 2001 legally binding European framework decision on the standing of victims in criminal proceedings<sup>(113)</sup>.

Even though we have also drawn upon relevant existing international instruments, the normative developments in the European Union, both in the legislative and policy sphere, were taken as the point of departure.

On a European human rights level, the rights in the European Charter of Fundamental Rights provide useful guidance on basic requirements to fulfil human rights obligations and prevent

(111) *M.C. v. Bulgaria* (App.39272/98), judgment of 4 December 2003.

(112) *Opuz v. Turkey*, (Application N 33401/02) judgment of 9 July 2009.

(113) Report from the Commission, pursuant to Article 18 of the Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), (SEC(2009) 476). Brussels, 20.4.2009, COM(2009) 166 final. (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0166:FIN:EN:PDF>).

violence against women and children and sexual identity-based violence<sup>(114)</sup>. The European Social Charter is of importance, in particular its provisions on the rights of children to be protected from negligence, violence and exploitation<sup>(115)</sup>. Also, the European Convention on Human Rights contains a number of directly relevant provisions<sup>(116)</sup>.

As to other international human rights instruments, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) contain several provisions which are relevant in terms of the prevention, protection and punishment of violence and recognise the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights. General Comment 28 proposed a gendered interpretation of the ICCPR, according the principle of equality of the sexes.

Furthermore, we have looked at various EU and other international and regional sources relating to the protection of victims of crime in general. *The Compilation of international victims' rights*

(114) For instance (Article 1); the right to respect for physical or mental integrity. In the fields of medicine this includes respect for free and informed consent of the person concerned (Article 3); the right to protection of personal data (Article 8); any discrimination based on any ground shall be prohibited, including sex, race, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

(115) Principle 7 notes that, 'Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.' Principle 17 stresses that 'Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.' See further Article 7 on the rights of children and young persons to protection.

(116) A large number of the cases dealt with under the European Convention on Human Rights concern family matters (e.g. children born out of wedlock, parentage, adoption, custody and access, children in institutions, legal aid in family matters, etc.).

*instruments* was the main source<sup>(117)</sup>. It goes beyond the scope of this chapter to provide a thorough analysis of different general victims' rights. It suffices here to refer to the most relevant EU instruments; the EU Council framework decision on the standing of victims in criminal proceedings (2001), and the EU directive relating to compensation to crime victims (2004).

The following subsections contain an overview of the various normative developments and sources relating to the three forms of violence.

#### 4.3.1.1 Sources — violence against women

##### *EU developments*

The EU has taken various initiatives to address violence against women. Sexual harassment and harassment based on sex have been dealt with in the context of equal treatment initiatives, by Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and later by Directives 2002/73/EC and 2006/54/EC. In relation to trafficking in human beings, Framework Decision 2002/629/JHA should be mentioned and also Directive 2004/81/EC regarding the issuing of residence permits for victims of trafficking. In 2009 the Commission submitted a proposal for a Council directive on preventing and combating trafficking in human beings and protecting victims, replacing Framework Decision 2002/629/JHA (2009).

As to policy measures, an important document which indicates the approach to the subject is the November 2008 *Guidelines on violence against*

(117) Groenhuijsen, M.S. and Letschert, R.M., 2008, *Compilation of international victims' rights instruments*, second (revised) edition, Nijmegen, Wolf Legal Publishers. Letschert, R.M. and Groenhuijsen, M.S., 'Global governance and global crimes. Do victims fall in between?', Letschert, R. and Van Dijk, J., 2010 *The new faces of victimhood; globalisation, transnational crimes and victim rights*, Springer Publications.

women and girls adopted by the EU Council, which are applicable to EU's external action. Through this, the EU Council aims to take effective action against violence against women which it describes as 'one of the major human rights violations.' Although it is hard to claim any *acquis communautaire* in a legal sense (in the absence of binding legal documents in this area), it is crucial that the EU Council takes an unequivocal international human rights position here and presents the guidelines as 'based on a solid *multilateral acquis*' (our emphasis), referring explicitly to 'the most recent milestones' of the UN Secretary-General's in-depth study on all forms of violence against women (2006), the Special Rapporteur's work on indicators of violence and various UN resolutions in this area. The EU Guidelines are in line with efforts of the UN Secretary-General's campaign, UNiTE to End Violence against Women, which aims to achieve by 2015 'adoption and enforcement of national laws to address and punish all forms of violence against women and girls, in line with international human rights standards'<sup>(118)</sup>.

Gender inequality has been tackled through a number of programmes, notably in the Roadmap for equality between women and men (2006–10) and the Strategy for equality between women and men (2010–15). In the most recent strategy, ending gender-based violence is positioned as one of the priorities that have been identified for action in the EU in 2010–15<sup>(119)</sup>. The strategy spells out actions under five priority areas defined in the Women's Charter, which was adopted by the European Commission on the occasion of the 2010 International Women's Day, aiming to build a gender perspective into all policies for the next

five years<sup>(120)</sup>. The Charter refers in Section 4 to gender-based violence:

*Europe does not tolerate gender-based violence. We will step up efforts to eradicate all forms of violence and to provide support for those affected. We will put in place a comprehensive and effective policy framework to combat gender-based violence. We will strengthen our action to eradicate female genital mutilation and other acts of violence, including by means of criminal law, within the limits of our powers.*

#### *International developments*

Besides these existing EU initiatives, we have taken other instruments, regional and international, into account, most notably the Council of Europe's Recommendation Rec(2002)5 of the Committee of Ministers, the CEDAW and the General Recommendation 19 on violence against women, and the 1993 UN Declaration on the Elimination of Violence Against Women. Relating to specific forms of violence against women, reference is made to the 2000 UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the Convention against Transnational Organised Crime and the 2005 Council of Europe Convention on Action Against Trafficking in Human Beings.

Additional documents have provided a further source for recommending certain standards in this field. One such document is the in-depth study on violence against women by the UN Secretary-General (2006). In addition, reports from the UN Special Rapporteur on Violence Against Women as well as Council of Europe studies in the field of

(118) Information on the UNiTE campaign is available online (<http://endviolence.un.org/>).

(119) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0491:FIN:EN:PDF>

(120) [http://ec.europa.eu/commission\\_2010-2014/president/news/documents/pdf/20100305\\_1\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/news/documents/pdf/20100305_1_en.pdf)



VAW<sup>(121)</sup> have been taken into consideration from the perspective of recommended standards.

Lastly, the Council of Europe is considering turning its Recommendation 2002/5 relating to the protection of women against violence into a legally binding Convention. The Ad hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO), which began its work in April 2009, has just completed the second reading of the draft CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence. The background documents containing the discussions relating to the various provisions to be included in the Convention show the CoE Member States' opinions on issues relating to our study<sup>(122)</sup>.

#### 4.3.1.2 Sources — violence against children

##### *EU developments*

The EU has undertaken various initiatives with regard to the promotion of the rights and needs of the child<sup>(123)</sup>. Promoting and protecting children's rights form part of the human rights that the EU and the Member States are bound to respect

under international and European treaties<sup>(124)</sup>. Under the former Treaties, the EU did not have a general competence in the area of fundamental rights, including children's rights. Therefore, EU measures in the field of criminal law relating to child *physical abuse and neglect* are practically non-existent. This is due to the lack of a legal basis (see further Section 4.4). Some forms of sexual exploitation have a cross-border dimension, which is most evident in the sexual exploitation of children. However, it also appears in the need to ensure that children in all Member States should be protected from offenders from all Member States, who can travel easily<sup>(125)</sup>.

Notwithstanding the lack of a general competence at that time, various particular competences under the treaties did allow specific positive action to be taken to safeguard and promote children's rights, although not concerning violence against children. As quoted in the Commission communication, 'A number of different instruments and methods can be envisaged, including legislative action, soft law, financial assistance or political dialogue'<sup>(126)</sup>. In addition, as was noted in a report of the EU Fundamental Rights Agency, 'The absence of any explicit reference to children in the Treaties has meant that "hard" EU law relating to children has evolved either indirectly (embedded in more generic legislation relating, for example, to the free movement rights of family members or

(121) Kelly, L., 2008, *Combating violence against women: minimum standards for support services*, Strasbourg, Council of Europe, DG Human Rights/Equality Division. Also, Hagemann-White, C., 2006. *Combating violence against women: Stocktaking study on the measures and actions taken in Council of Europe Member States*, Strasbourg, Council of Europe, Directorate-General of Human Rights, Equality Division.

(122) More information is available on the website of the Committee ([http://www.coe.int/t/dghl/standardsetting/violence/meetings\\_en.asp](http://www.coe.int/t/dghl/standardsetting/violence/meetings_en.asp)).

(123) Activities of the EU with regard to ensuring the promotion and protection of children's rights in the EU's external policy framework (for instance relating to children in armed conflicts) fall outside the scope of our study.

(124) For a critique of how little the EU incorporates the principles enshrined in the UN CRC in its case-law and policy measures, see Stalford, H. and Drywood, E., 2009, 'Coming of Age? Children's rights in the European Union', in *Common Market law review*, Vol. 46 (1), pp. 160–163, notably on p. 162: '[...] both the Commission and the Court have failed so far to do any more than lip service to the UN CRC, creating the disingenuous impression that mere passing reference to the instrument provides sufficient endorsement of the principles it embodies.'

(125) See also the explanatory memorandum to the 2009 proposal for a new directive on child sexual exploitation.

(126) Communication from the Commission, *Towards an EU strategy on the Rights of the Child*, Brussels, COM(2006) 367 final of 4 July 2006, p. 3.



migrant groups) or through EU health and safety legislation with its strong elements of child protection (toy safety, television advertising, etc.)<sup>(127)</sup>. Furthermore, a range of measures have been introduced through less formal avenues: soft law measures (in the field of education); coordinated action plans (in the fields of health, poverty and family policy); and intergovernmental initiatives (in the field of child protection)<sup>(128)</sup>.

The Lisbon Treaty incorporates for the first time the protection of the rights of the child within the stated objectives of the EU (Article 3.3 of the Treaty on European Union (TEU)). This commitment is reinforced by a new Article 3.5 TEU, which singles out protection of the rights of the child as an important aspect of the EU's external relations policy, and by Articles 79.2 and 83.1 TFEU, which allow the European Parliament and the Council to adopt measures specifically aimed at combating the sexual exploitation of and trafficking in children. A number of other, more general Treaty provisions relating to citizenship (Article 20 TFEU) and non-discrimination (Article 19 TFEU) also support the development of more inclusive, child-sensitive EU laws and policies<sup>(129)</sup>.

As noted by Stalford and Drywood, 'Even more significant are the changes that the Lisbon Treaty [...] would make to the constitutional framework of the EU. Article 6(1) TEU affords Treaty level status to the provisions of the Charter of Fundamental Rights, while Article 6(2) declares that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'<sup>(130)</sup>. The Charter contains rather extensive provisions relating to children's rights and

(127) Stalford and Drywood (2009).

(128) Report, 'Developing indicators for the protection, respect and promotion of the rights of the child in the European Union', EU Fundamental Rights Agency, March 2009, p. 9.

(129) Stalford and Drywood (2009), p. 144.

(130) Stalford and Drywood (2009), p. 145.

welfare (Articles 14.2, 21, 24, 32)<sup>(131)</sup>. The jurisprudence of the European Court of Human Rights shows the broad interpretation of the provisions with a view to protecting children's rights<sup>(132)</sup>.

Furthermore, the European Council has adopted some important measures in the area of family law. Most of these measures are based on international treaties which were established by the Hague Conference for Private International Law, such as the Hague Convention on Child Abduction and the Hague Convention on the Protection of Children<sup>(133)</sup>. Where a decision on access (contact), custody and/or maintenance has been reached in one Member State, it will be automatically enforceable in any other Member State to which any of the parties move, in order to create certainty and security for children. The Council authorised the Member States to ratify the Hague Convention on the Protection of Children in 2008<sup>(134)</sup>.

Regulation (EC) No 2201/2003 of 27 November 2003 (Brussels II bis) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility also directly refers to the Hague Conventions on Child Abduction. Brussels II bis declares, for example, that judgments concerning custody or visitation are recognised in other

(131) See further McGlynn, C.M.S., 2002, 'Rights for children? The potential impact of the European Union Charter of Fundamental Rights', *European public law*, Vol. 8 (3), pp. 387-400.

(132) See Opromolla, A., 2001, 'Children's rights under Articles 3 and 8 of the European Convention: recent case-law' in *European Law Review*, Vol. 3, pp. 42-57.

(133) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, respectively. Other conventions that are relevant for the research: [http://www.hcch.net/index\\_en.php?act=text.display&tid=1](http://www.hcch.net/index_en.php?act=text.display&tid=1).

(134) Council Decision of 25 June 2008 (2008/431/EC), OJ L 151, 11.6.2008, p. 36.

Member States without any special procedures (Article 21). It includes a legal obligation to provide specialist representation for children in family processes and/or provision for independent consultation with the child and to consult directly with children in custody, access and abduction cases in accordance with their age and capacity; and makes cross-border cooperation mandatory in all cases specific to parental responsibility or when a placement of a child in care is to take place in another Member State.

Although initiatives of the EC initially met with some hesitation, scholars agree that, for instance, the Brussels II and the Brussels II bis Regulations have largely contributed to the enhanced implementation and application of the Convention on Child Abduction<sup>(135)</sup>.

With regard to the Hague Convention on the Protection of Children of 1996, this application should be strengthened in the EU, achieved by adopting a new EU regulation to enhance implementation of this convention. The recognition by operation of law of any measures, including all administrative measures, with regard to the protection of a child should be achieved throughout the EU. The proposed European Protection Order also aims to tackle this issue (see Section 4.4 below).

Partially following the objective of ensuring a high level of security, EU legal measures in the field of child protection have concentrated on child labour and sexual exploitation and were particularly geared towards coordinating police and judicial efforts in identifying and apprehending criminal perpetrators. Council Framework Decision 2004/68/JHA introduces a minimum of approximation of Member States' legislation to criminalise the most serious forms of child sexual abuse and exploitation, to extend domestic jurisdiction

(135) Remien O., 2001, 'European private international law, the European Community and its emerging Area of Freedom, Security and Justice', *Common Market Law Review*, Vol. 38 (1), p. 73.

and to provide for a minimum of assistance to victims. Although the requirements have generally been put into implementation, the framework decision has a number of shortcomings. It harmonises legislation only on a limited number of offences, does not address new forms of abuse and exploitation using information technology, does not remove obstacles to prosecuting offences outside national territory, does not meet all the specific needs of child victims and does not contain adequate measures to prevent offences. Other EU initiatives partially address some problems which also affect child sexual offences<sup>(136)</sup>.

In 2010 the Commission submitted a proposal for a directive on combating the sexual abuse, sexual exploitation of children and child pornography, which would repeal Framework Decision 2004/68/JHA<sup>(137)</sup>. The aim of the proposal is to develop a more comprehensive approach, including stronger measures to ensure that children have easier access to justice and do not suffer additional trauma in legal proceedings; additional measures

(136) According to Stalford and Drywood (2009), the previous framework decision of 2004 on this topic was '...formulated in response to some high profile cases involving sex offenders who had succeeded in gaining employment in other Member States in spite of a history of child sexual abuse', p. 154. These initiatives include Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, Decision No 854/2005/EC of the European Parliament and of the Council of 11 May 2005 establishing a multiannual Community programme on promoting safer use of the Internet and new online technologies, Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States.

(137) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0094:FIN:EN:PDF>

for the protection of and assistance to victims, and the non-application of sanctions to victims<sup>(138)</sup>.

The recent 2010 proposal for a Council directive on preventing and combating trafficking in human beings has also provided us with certain standards<sup>(139)</sup>. The proposal pays particular attention to child trafficking and the treatment of child victims. In particular, when there is an indication that a person might have been trafficked, this person will receive assistance and support. Specific provisions concerning the protection of children in criminal proceedings have also been included in the proposal.

In 2006, the Commission adopted the Communication Towards an EU Strategy on the Rights of the Child (COM(2006)367). Also in the 2009 Stockholm programme (Multiannual programme for an area of freedom, security and justice serving and protecting the citizen), provisions relevant to children's rights are included. Paragraph 2.3.2 calls for an EU policy regarding the rights of the child. It underlines, 'The principle of the best interest of the child being the child's right to life, survival and development, non-discrimination and respect for the children's right to express their opinion and be genuinely heard in all matters concerning them according to their age and level of development.'

The open method of coordination (OMC) (see also Section 4.4.3) has facilitated progress relating to children's issues, as reflected in the Commission's Communication on the EU Strategy for Youth (2009)<sup>(140)</sup>. However, these strategies avoid proposing action that might be construed as intervening in the policies or practices of Member States and do not address VAC.

(138) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0135:FIN:EN:PDF>

(139) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0095:FIN:EN:PDF>

(140) EU Strategy for Youth, 2009, 'Investing and empowering. A renewed open method of coordination to address youth challenges and opportunities'.

### *International developments*

Among the hard law instruments, we derived norms from the UN Convention on the Rights of the Child and its two Optional Protocols (CRC, 1989)<sup>(141)</sup>, the European Convention on the Exercise of Children's Rights (1996)<sup>(142)</sup>, the 2005 Convention on Action Against Trafficking in Human Beings; and the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse<sup>(143)</sup>. Next to these documents, the proposed framework of standards also considers the (CRC) Committee recommendations to the state parties and its general comments<sup>(144)</sup> on thematic issues<sup>(145)</sup>. Also, the UN Secretary-General's Study on Violence against Children calls for urgent and more effective prevention and protection measures<sup>(146)</sup>.

The CoE Committee of Ministers and Parliamentary Assembly have adopted several resolutions and recommendations relating to the protection of children. Although difficulties arise in harmonising the many areas of family law, owing to the varied legal systems and traditions, the CoE has been working for many years to harmonise

(141) As with CEDAW, all Member States ratified or acceded to the CRC.

(142) <http://conventions.coe.int/Treaty/en/Treaties/Word/160.doc>  
The convention lists measures to promote children's rights in family proceedings before a court.

(143) <http://conventions.coe.int/Treaty/EN/Treaties/Word/201.doc>  
This convention constitutes the highest international standard for protecting children against sexual abuse and exploitation to date.

(144) General Comment 8 (2006) is most relevant for our study. It concerns the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment. We will refer to relevant provisions in the minimum standards section below.

(145) <http://www.ohchr.org/Documents/Publications/FactSheet10Rev.1en.pdf>

(146) Pinheiro, P. S. (2006) *World report on violence against children*, Geneva: UN.

policies and adopt common standards and practices in Member States in the field of family law. In 2009 the CoE adopted policy guidelines for integrated strategies against violence in its programme Building a Europe for and with Children<sup>(147)</sup>.

The guidelines pose a clear and comprehensive set of standards and policy measures, often supported by other international legal or quasi-legal instruments and provisions which provide an excellent basis from which to derive our standards. Note that the Committee of Ministers has formally adopted the guidelines in a recommendation, thereby increasing the soft law status of these guidelines (CM/Rec(2009)10).

#### 4.3.1.3 Sources — sexual orientation violence

Unlike in the fields of VAW and VAC, the legal underpinning for measures on SOV is less developed. Part of the reason for this could be that violence against LGBT people is often underreported and reliable research data on the prevalence and the background of violent crimes against LGBT people are limited and usually focus on intimate partner violence within same-sex relationships<sup>(148)</sup>. Research on public violence is still in its infancy<sup>(149)</sup>. Because of this scarcity in data, as well as the relative lack of advocacy, policymakers

(147) Available online (<http://www.coe.int/children>).

(148) Walby, S., Allen, J., 2004, *Domestic violence, sexual assault and stalking. Findings from the British Crime Survey*, London, Home Office Research Study, p. 276.

(149) See online (<http://www.iglhrc.org/cgi-bin/iowa/theme/9.html>) for various studies conducted by the International Gay and Lesbian Human Rights Commission on violence and abuse of LGBT people. In response to a series of public 'gay bashing' incidents, an explorative study was conducted in the city of Amsterdam. See: Buijs, L., Hekma, G. and Duyvendak, J.W., 2009, *Als ze maar van me afblijven: een onderzoek naar anti-homoseksueel geweld in Amsterdam* (As long as they stay away from me; a research project on antigay violence in Amsterdam), Amsterdam University Press.

and legislators often do not feel any urgent need to address it. In addition, at an international level, initiatives in drafting standards are often met with resistance in several Member States. The qualitative studies and reports available show that the increasing sexual liberalism over the past decades evokes ambiguous responses, reflected in a global diminishing of discrimination and homophobia on the one hand and in outbursts of hate crimes against openly LGBT people on the other<sup>(150)</sup>.

#### EU developments

At the European level the issue of sexual orientation as a basis of discrimination is slowly but steadily receiving increasing attention<sup>(151)</sup>. Article 3 TEU commits the EU to promote its values, combat social exclusion and discrimination, promote equality between women and men and uphold and promote these values in its relations with the wider world. Likewise, the EU Treaties — following the entry into force of the Treaty of Lisbon — considerably expand the EU's binding obligation on human rights both by stating, in Article 6 TEU, that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, including the prohibition of discrimination on the grounds of sexual orientation (Article 21 of the Charter), and by providing for the accession of the EU to the European Convention on Human Rights. In defining and implementing its policies and activities, the EU aims to combat discrimination based on,

(150) Swiebel, J. and van der Veur, D. (2009) Hate crimes against lesbian, gay, bisexual and transgender persons and the policy responses of international governmental organisations. *Netherlands Quarterly of Human Rights*, Vol. 27/4, 485–524.

(151) See, for a detailed overview, International Commission of Jurists, 2007, *Sexual orientation and gender identity in human rights law, jurisprudential, legislative and doctrinal references from the Council of Europe and the European Union*.



inter alia, sexual orientation (see Articles 10 and 19 TFEU)<sup>(152)</sup>.

Nevertheless, there are no specific EU standards in the Lisbon Treaty relating to sexual orientation violence other than the non-discrimination provision in Article 19 TFEU and the EU non-discrimination directives previously mentioned in relation to harassment: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (racial equality directive), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (employment equality directive), and Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Lastly, the framework decision, adopted after many years of discussion in November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law is of relevance here<sup>(153)</sup>. The framework decision establishes that the Member States ensure that the following intentional conduct will be punishable by imprisonment: *publicly inciting to violence or hatred on the basis of race (in a broad sense), also by public dissemination of tracts, pictures and the like, as well as publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes*<sup>(154)</sup>. Although the framework decision does not explicitly address homophobic and transpho-

bic violence, nor incitement to hatred based on sexual orientation or gender identity, it does reflect a growing political concern within the EU with respect to violent so-called hate crimes<sup>(155)</sup>.

The Treaty of Lisbon mentions the prevention and combating of racism and xenophobia as an explicit goal of the Area of Freedom, Security and Justice (AFSJ), but does not broaden this to a wider goal of combating hate crimes on various grounds. This situation made the FRA conclude in their study on *Homophobia and discrimination on grounds of sexual orientation and gender identity in the Member States* that, 'Following the model of [...] framework decision on racism and xenophobia [...], the European Commission should consider proposing similar EU legislation to cover homophobia. This EU legislation needs to cover all forms of harassment and violence based on sexual orientation and approximate criminal legislation in the Member States applicable to these phenomena'<sup>(156)</sup>. This position is receiving increasing support from within the EU Parliament and different European regional organisations<sup>(157)</sup>.

#### *International developments*

The international lobby for the recognition of the rights of LGBT people followed the path chosen by

(152) Working Party on Human Rights, *Toolkit to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual and transgender (LGBT) people*.

(153) Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

(154) The legal basis of this framework decision was former Article 29 TEU (now only mentioned in Article 67.3 Lisbon Treaty) on cooperation in criminal matters and not in the equality provisions.

(155) For the underlying reasons, see Swiebel, J. and Van der Veur, D. (2009), p. 502.

(156) FRA report on *Homophobia and discrimination on grounds of sexual orientation and gender identity in the Member States*, Part I, p. 156; according to Swiebel, J. and Van der Veur, D., this should include hate crimes based on gender identity.

(157) See online ([www.osce.org/documents/pa/1995/07/171\\_en.pdf](http://www.osce.org/documents/pa/1995/07/171_en.pdf)), paragraph 29. See European Parliament Resolution on homophobia in Europe, 18.01.2006, the Ottawa Declaration of the OSCE Parliamentary Assembly of 8 July 1995, which '[c]alls on the participating states to ensure that all persons belonging to different segments of their populations be accorded equal respect and consideration in their constitutions, legislation and administration and that there be no subordination, explicit or implied, on the basis of ethnicity, race, colour, language, religion, sex, *sexual orientation*, national or social origin or belonging to a minority' (emphasis added).



the women's rights NGOs in addressing pertaining issues from a human rights perspective<sup>(158)</sup>. The first official recognition of sexual orientation-based discrimination as a human rights violation dates back to 1981, when the ECtHR stated that prohibition of sexual relations between consenting adult males — as at that time still in force in Northern Ireland — was a breach of the right to privacy as contained in Article 8 of the ECHR<sup>(159)</sup>. This judgment was supported in 1994 by a similar decision of the UN Human Rights Committee in the *Toonen v Australia* case<sup>(160)</sup>. However, it has proved more difficult compared to the women's rights lobby to have LGBT issues accepted as an important human rights concern<sup>(161)</sup>.

When addressing violence against LGBT people, we can conclude that, similar to the problem of violence against women, recent legal and policy developments frame it as inherently related to discrimination.

The ICCPR is the central reference document of international law for standards relating to hate crime, notably Article 2 which forbids discrimination on any ground. Furthermore, Article 20(2) provides that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

(158) Swiebel, J. and van der Veur, D. (2009), p. 489. Others: Heinze, E. (1995) *Sexual orientation: a human right*, Dordrecht: Martinus Nijhoff; Wintemute, R. (1995) *Sexual orientation and human rights*, London: Clarendon Press; Stychin, C. and Herman, D. (eds) (2000) *Sexuality in the legal arena*, London: Athlone Press; and Bamforth, N. (ed.) (2005) *Sex rights: the Oxford Amnesty Lectures 2002*, Oxford: Oxford University Press.

(159) ECtHR, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A, No 45.

(160) UN Human Rights Committee, *Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992, 4 April 1994; the Committee found that Tasmanian laws criminalising all sexual relations between men were in breach of the International Covenant on Civil and Political Rights (ICCPR), whose non-discrimination provisions were interpreted as including 'sexual orientation', Section 8.7.

(161) Swiebel, J. and van der Veur, D. (2009), p. 490.

Apart from criminal law provisions, protection may be sought under the civil law in order to combat homophobic speech. Article 17 of the ICCPR provides that, 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' The Human Rights Committee considers that it follows from this provision that states must protect honour and reputation through the law and that, 'Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible'<sup>(162)</sup>.

Since the *Toonen* case, other treaty-monitoring bodies of the UN have helped consolidate the principle that sexual orientation-based discrimination and violence is prohibited in international human rights law. The United Nations Human Rights Council (UNHRC) has emphasised the harmful consequences of these laws for the enjoyment of other civil and political rights, particularly health issues and human rights where they result in the death penalty and other cruel, inhuman and degrading punishments. The concerns of the treaty bodies have, furthermore, extended far beyond the criminalisation of homosexual sex. 'Social cleansing' killings of sexual minorities and the impunity surrounding them have been addressed by the Human Rights Committee. The CRC underlined the harmful effects of sexual orientation discrimination on adolescent health, calling on states to ensure that young gay and transsexual people 'have access to the appropriate information, support and necessary protection to enable them to live their sexual orientation' and recommended that attention be given to sexual orientation discrimination as one of many factors that can expose children to a higher risk of violence and victimisation at school.

(162) Human Rights Committee, General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17) (8 April 1988), paragraph 11.

Further mention should be made of the 2007 Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity, while not adopted as an international standard, the principles are already cited by UN bodies, national courts and many governments have made them a guiding tool for defining their policies in the matter. The CoE Commissioner for Human Rights has endorsed the Yogyakarta Principles and considers them to be an important tool for identifying the obligations of states to respect, protect and fulfil the human rights of all persons, regardless of their gender identity<sup>(163)</sup>.

The European Court of Human Rights has recognised that Article 14 ECHR covers sexual orientation<sup>(164)</sup> and the explanatory report to Protocol No 12 indicates that this instrument would provide protection against discrimination based on sexual orientation. While this was not expressly stated with regard to gender identity, it may reasonably be expected that this would also be covered by both Article 14 and Protocol No 12. The jurisprudence of the Court has promoted the human rights of LGBT people in general, but not specifically addressed SOV<sup>(165)</sup>. The European

(163) Section II, Commissioner for Human Rights, 'Human Rights and Gender Identity'; Issue paper, Strasbourg, July 2009.

(164) *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 2001, and *Karner v. Austria*, judgment of 24 July 2003.

(165) In several landmark cases the Court held that, for instance, same-sex sexual acts between consenting adults should not be criminalised; that there should be no difference in the age of consent between homosexuals and heterosexuals; that homosexuals should not be banned from the armed forces; that LGBT people and organisations enjoy the same freedom of assembly as anyone else; and that same-sex partners should have the same right of succession of tenancy as heterosexual couples. The Court also set minimum standards regarding the recognition of a transgender person's sex change in identity documents and said that exclusion of individuals from the application process for adoption of children simply because of their sexual orientation is discriminatory. For reference to the court cases see Swiebel and Van der Veur, pp. 506–507 and for an extensive overview the report by the International Commission on Jurists, 2007.

Court of Human Rights has set some minimum standards relating to SOV. Note that the Court did not use the term 'hate crime' as such<sup>(166)</sup>.

The CoE also has a Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT)<sup>(167)</sup>. This Committee has been tasked to draft a recommendation for adoption by the Committee of Ministers on measures to combat discrimination based on sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay and transgender people and to promote tolerance towards them, which was adopted as CM/Rec(2010)5 on 31 March 2010<sup>(168)</sup>.

To conclude, all potentially relevant sources for legal standards relating to SOV are framed in soft law. However, ECtHR case-law and the opinions and views of treaty bodies have now resulted in important jurisprudence on sexual orientation-based discrimination and in some instances also acts of violence. The latest CoE recommendation is an important step forward, since it dem-

(166) See ECtHR, *Angelova and Iliev v. Bulgaria*, judgment of 27 July 2007, *Reports 2007-IX*, No 55523/00, and ECtHR, *Secic v. Croatia*, judgment of 31 May 2007, *Reports 2007-VI*, No 40116/02, where the Court interestingly noted that, 'When investigating violent incidents, state authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events (...) [and that] treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.'

(167) [http://www.coe.int/t/e/human\\_rights/cddh/3.\\_Committees/07.%20Other%20committees%20and%20working%20groups/05.%20Discrimination%20against%20LGBT%20\(DH-LGBT\)/default\\_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/cddh/3._Committees/07.%20Other%20committees%20and%20working%20groups/05.%20Discrimination%20against%20LGBT%20(DH-LGBT)/default_en.asp#TopOfPage)

(168) See also the explanatory memorandum for background to this recommendation. Also in 2010 (autumn), the CoE Commissioner on Human Rights will publish a 'Comparative study in which hate crimes will feature as one of the main topics.'

onstrates the political will to put this issue more prominently on the agenda.

### 4.3.2 Step 2: Selection of relevant standards and propositions for additional or revised standards

The first selection of existing standards which are included in the legal and quasi-legal European and international sources on VAW, VAC and SOV, as outlined above, were in an internal working document. Following from the obligations to respect, protect and fulfil, we used a parallel structure, as developed to conduct the comparative analysis of findings across the Member States to compile the existing normative standards in the following domains:

- ♦ measures relating to the criminal justice system, including investigation, prosecution and punishment;
- ♦ protective measures for victims (concerning protective measures both within the criminal justice system and in other areas of law);
- ♦ measures relating to support services;
- ♦ preventive measures;
- ♦ measures aimed at capacity-building and training; and
- ♦ measures aimed at research and statistics.

The first and full compilation provided an overview as to the range of existing international and European standards and the differences across the three fields of violence. It inevitably contained repetitions. For instance, measures relating to the prevention of forms of violence or the improvement in police responses or in support services have been articulated with respect to all three fields of violence and general overarching victims' rights relating to the criminal procedure are applicable to all crime victims. Furthermore, international standards tend at times to build on and refer to each other, creating repetitiveness. The selection of relevant standards used two criteria:

topics which are essential to the remits of this study and avoiding redundancy. This resulted in a condensed compilation, included in Annex 2 column 1. References to original sources have been maintained so that the binding (or not) character of a certain standard is transparent.

The next step was to analyse possible additional or revised standards (see Annex 2, column 2), guided by the empirical research findings of the current study, as presented in Chapters 2 and 3. On this basis, standards which either required further clarification or more precision in wording were identified. The empirical data also revealed gaps in certain areas, where the implications of more general human rights law have not yet been spelled out by international agreements. This led to the suggestion of additional proposed standards<sup>(169)</sup> (see Annex 2, column 2).

For a full compilation of the standards we refer to Annex 2. In Chapter 6, when addressing the question of whether there is legal basis in EU law for the existing and proposed standards, a brief summary of the essential elements of the standards is provided.

## 4.4 EU perspectives on harmonisation

### 4.4.1 Approach

Given that most of the violations which will be addressed constitute violent crimes, criminal law is one of the major areas of standardisation to be addressed in the project. In this respect we will contextualise this section within the wider debate on harmonisation of, and approximation in, criminal law.

<sup>(169)</sup>Proposals for revised or new standards are in Annex 2, in the second column, but in italics; anything in italics which does not correspond to an existing standard can be said to be a 'proposed standard'.

Nevertheless, in other areas of law, such as civil law (mainly family law) and migration law, measures are introduced to address issues pertaining to VAW, VAC and SOV. This section will therefore, also present an exploration of the possibilities of adopting measures other than those relating to the harmonisation of criminal law.

Section 4.4.2 deals with the main issues which need to be taken into consideration from an EU law perspective when reflecting on the question as to which areas might qualify for standardisation in law, describing the criteria which need to be taken into account when assessing feasibility. In Section 4.4.3, we then describe the possibilities for further standardisation by non-binding measures, such as soft law or policy measures.

#### 4.4.2 Harmonisation of law

##### 4.4.2.1 *Criteria, forms and legal areas of harmonisation*

We only address the legal basis for the approximation of criminal or civil law under the Treaty of Lisbon and only when relevant do we reflect upon the situation as it existed under the three-pillar structure. A new title has been incorporated, namely the ‘area of Freedom, Security and Justice,’ including police and judicial cooperation in criminal matters (besides police and judicial cooperation in civil matters and migration). Consequently, the ‘community method’ is now also applicable to this area. The ‘community method’ means that directives, regulations and decisions can be taken in this area by adopting the ordinary decision-making procedure, which means by qualified majority voting (QMV) in the co-decision procedure between the European Parliament and the Council. Consequently, legal acts in European criminal law cannot be obstructed by a single Member State and Member

States can be bound to a legal act against their will. This is a revolutionary change in the field of European Criminal Law<sup>(170)</sup>. Using this method must be considered a significant improvement to the decision-making process, as decision-making under the old third pillar, by unanimity, limited the effectiveness of EU action as well as limiting the role of the European Parliament.

Differences in criminal law and criminal procedural law among Member States must not be underestimated as a complicating factor for harmonisation. As an illustration, consider the case of murder: although it has been criminalised in all Member States, differences as to interpretation do exist. In some countries, it includes abortion and, in most Member States, it includes euthanasia. Nevertheless, these constraints have not prevented Member States through the Council of the EU from adopting legal acts which harmonise national laws<sup>(171)</sup>.

In the next subsection, we describe the competence of the EU in the Area of Freedom, Security and Justice, as well as some important principles and criteria within EU law which must be taken into account when adopting legal (harmonising) acts at EU level.

##### *The principle of conferral*

In Article 4 TEU, which must be read in conjunction with Article 5, the principle of competence attribution or conferral is reflected. Paragraph 1 states that, ‘In accordance with Article 5, competences not conferred upon the EU in the Treaties remain with the Member States.’ Article 5, Paragraph 2, is relevant in

(170) There are some exceptions to the QMV procedure, namely in Articles 82(3), 83(1), (3), 86(1), (4) on the European Public Prosecutor (EPP), 87(3) on operational police cooperation and 89 on operational competences on the territory of another Member States.

(171) For an overview of the legal measures adopted in the Area of Freedom, Security and Justice is available online (<http://www.statewatch.org/semdoc/437.html>).



that it states that, ‘Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaty remain with the Member States.’ This puts at least two limitations on the competence of the EU: firstly, competences need to be attributed to the EU in the Treaties (especially the TFEU) and, secondly, for the exact competence of the EU in a particular area, we need to look at the specific provision in the TFEU or TEU to find out *which objectives* are formulated in that area. This is because the EU is only competent to take action with the aim of fulfilling the particular objectives in that area.

To establish whether the EU is competent in the fields of VAW, VAC and SOV, the question of whether these areas fall within the competences attributed to the EU and under what conditions must be answered. Title I of the TFEU (Articles 2–6) prescribes the attribution of competences to the EU. This section focuses on the competence within the AFSJ. The following section provides considerations with respect to other areas of competence outside the AFSJ which might be relevant for this study.

Article 4 lists the areas where the EU has shared competence with the Member States which include, among others, the AFSJ under subheading (j). This means that the Member States have shared competence with the EU in this area and that the ‘community method’ applies. To determine the further division of competences in the shared competence AFSJ, we have to look into the specific provisions in the Title on the AFSJ. This is reflected in Article 2(2) and (6) TFEU.

### *Subsidiarity*

As stated above, the EU is only competent in areas that are conferred to the EU (Article 4 TEU and Title I TFEU). In addition, the test of Article 5 TEU should be applied. The principle of subsidiarity

determines *the limitations of the use of EU competences*. Under the principle of subsidiarity, in areas not belonging to the exclusive competence of the EU, ‘The Union shall act *only if and insofar* as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’. This means that for all proposed acts an assessment must be made whether and why the particular issue can be better dealt with at EU level. Thus, after determining the proper legal basis, the test of subsidiarity must be met.

The proposal for a directive on preventing and combating trafficking in human beings and protecting victims, repealing Framework Decision 2002/629/JHA (FD on combating trafficking in human beings (THB)), is illustrative of a broad interpretation of the principle of subsidiarity, since it does not merely relate to the criminalisation of this offence. This proposal provides a good example when considering the possibilities for legal actions in the areas of this study. What appears from the title is that the proposed directive, contrary to the framework decision on combating THB, is not limited to the criminal law field, namely only combating THB, but also includes the prevention of THB and protection of victims. The proposal, furthermore, adheres to a human rights-based approach to THB, by stating that the response to trafficking must be robust and aimed at prevention and prosecution of the crime and protecting its victims<sup>(172)</sup>.

(172) See, for instance, Article 10, subparagraph 4: ‘Victims shall be granted the necessary assistance and support by Member States in the framework of criminal proceedings, to enable them to recover and escape from the influence of the perpetrators, including by providing them *with secure accommodation and material assistance*, necessary medical treatment including psychological assistance, counselling and information, assistance to enable their rights and interests to be presented and considered in criminal proceedings, and translation and interpretation services where appropriate. Member States shall attend to the special needs of the most vulnerable’ (emphasis added).



The legal basis for this proposal is limited to Article 82(2) and Article 83(1) TFEU and no additional legal basis was considered to include the various aspects of a human-rights-based approach to THB. The proposal still needs to be adopted and it is expected that the legal basis will be one of the controversial issues in the negotiations. On the other hand, political agreement was already reached on the proposal for a framework decision in November 2009, just two days before the entering into force of the Treaty of Lisbon. The proposed framework decision also founded its legal basis in the third pillar and not in the former first or second pillars (namely Articles 29, 31(1)e and 34(2)b TEU).

#### *Proportionality*

Proportionality is another principle which needs to be upheld when the EU is acting in the areas where it is competent. This principle means that the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties.

#### **4.4.2.2 Harmonisation of legislation under the Lisbon Treaty — criminal procedural law**

The specific provisions relevant for the approximation of laws in the AFSJ are Article 82, especially sub 2 (on procedural criminal law), and Article 83 (on substantive criminal law). Article 82(1) indicates that measures may be taken in the field of judicial cooperation in the areas specified under (a)–(d): ensuring recognition of judgments and judicial decisions, conflicts of jurisdiction, training of the judiciary and facilitating cooperation between judicial or equivalent authorities. This paragraph applies as long as the relevant proceedings take place in a judicial context. In Article 82(2) an important expansion of the competence for approximation can be found, namely,

in criminal procedural law. Such a competence did not exist before the Lisbon Treaty was adopted. According to this provision, minimum rules can be established to facilitate mutual recognition of judgments, and judicial decisions, and police and judicial cooperation in criminal matters. The European Parliament and the Council adopt legal measures in accordance with the ordinary legislative procedure, which means QMV and not by unanimity, as was the case under the third pillar.

Article 82 (2) also includes some important limitations to the competence question, as well as for our study's final assessment of the feasibility of EU legislation. First are the *substantive* limitations stating that the legal measures shall *only* concern the following aspects: *mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure and the rights of victims of crime*. The Council can extend this list to other aspects of criminal procedure by taking such a decision unanimously and after the consent of Parliament.

Furthermore, the provision includes some *procedural* limitations. First, EU action must be *necessary* to facilitate mutual recognition and police and criminal law cooperation. Secondly, it must have a cross-border dimension. Thirdly, *the differences* between the legal traditions and systems of the Member States must be taken into account. And fourthly, *only minimum rules* can be adopted. The addition of the cross-border dimension in particular appears, at first sight, to seriously limit the thematic scope of competences of the EU.

When the Council decides to extend the list to other aspects of criminal procedure, it must act unanimously after having obtained the consent of the European Parliament. The emergency brake described in paragraph 3 is applicable to paragraph 2, which means that one Member State can stop the negotiations on such a directive, by requesting that the proposal shall be referred to the European Council. A Member State can only do

this if it thinks the proposal would affect fundamental aspects of its criminal justice system. On the other hand, paragraph 3 also foresees the possibility for enhanced cooperation in the event of a group of at least nine Member States deciding to proceed with the proposed directive.

Although it is to be welcomed that in post-Lisbon the EU has a broader competence in European criminal procedure, it is still limited. As follows from the recent debate on the proposed EPO, it is clear that serious conflicts may arise in determining the scope of this article. In January 2010, 12 Member States submitted a proposal for a directive on the EPO. According to Article 1 of the proposal, an EPO means, ‘A judicial decision relating to a protection measure issued by a Member State and aiming at facilitating the taking by another Member State, where appropriate, of a protection measure under its own national law with a view to the safeguard of the life, physical and psychological integrity, freedom or sexual integrity of a person’. In Paragraph 2, it is stated that a ‘protection measure’ means a decision adopted by a competent authority of a Member State imposing on a person causing danger, one or more of the obligations or prohibitions referred to in Article 2(2), provided that the infringement of such obligations or prohibitions constitutes a criminal offence under the law of the Member State concerned or may otherwise be punishable by a deprivation of liberty in that Member State<sup>(173)</sup>.

(173) Article 2 further explains for what kind of situations an EPO can be issued. Paragraph 2 of this article states: ‘2. The European protection order shall only be issued when a protection measure has been previously adopted in the issuing state, imposing on the person causing danger one or more of the following obligations or prohibitions: (a) an obligation not to enter certain localities, places or defined areas where the protected person resides or that he visits; (b) an obligation to remain in a specified place, where applicable during specified times; (c) an obligation containing limitations on leaving the territory of the issuing state; (d) an obligation to avoid contact with the protected person; or (e) a prohibition on approaching the protected person closer than a prescribed distance.’

In the consultations prior to the issuing of the proposal, several Member States reported that they have victim protection measures of some kind and that they vary in type and classification. The systems under which these measures are adopted are similarly varied; some are adopted in civil or criminal proceedings and some by administrative decision (see Chapter 2). They also pointed to the existence of a legal vacuum with regard to the protection of victims moving to another Member State. The fact that the measures taken can also follow from civil proceedings or even be an administrative decision might be problematic, since the legal basis for the proposal is Article 82 1(d) TFEU relating to the field of judicial cooperation in *criminal matters*. The first sentence of Paragraph 1 of this article refers to ‘mutual recognition of judgments and judicial decisions’. An administrative decision does not necessarily fall within this description.

The proposal was discussed during the Justice and Home Affairs (JHA) Council of 23 April 2010 which led to serious debates. Some Member States argued that the legal basis is invalid: this view is strongly supported by the Commission. The Commission stated that, based on the fact that the measures in some Member States originate from private law, family law or administrative law, and are taken by non-judicial authorities, the proposal cannot solely be based on criminal law. Furthermore, the Member States, pursuant to Article 76 TFEU, are only competent to take a legislative initiative in the fields of judicial cooperation in criminal matters and police cooperation and for the measures referred to in Article 74 (administrative cooperation). Therefore, the Commission also disputes the competence of the Member States to initiate the proposed directive.

#### 4.4.2.3 *Harmonisation of substantive criminal law*

Article 83 concerns the approximation of substantive criminal law. The first part of Paragraph 1

seems to include a general provision. Here, again, additional requirements are inserted: it concerns a particularly serious crime and has a cross-border dimension following from the nature or impact or the need to combat such offences on a common basis. The second part of this paragraph further clarifies that this description only refers to terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money-laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Contrary to the provision of 31(1)e former TEU, this list must be considered exhaustive. If we look at the forms of violence covered in this study, it is clear that most of the offences do not fall within this list. Consequently, if an offence is not in this list, there is no competence for the EU to adopt a legal Act with the intention of approximation of the definitions of the particular offence.

However, there is a possibility created in the third part of Paragraph 1 to extend the list of crimes. It states that the list can be extended by a decision of the Council taken by unanimity and after having obtained the consent of the European Parliament. Thus, for each of the offences of this feasibility study, it should be determined whether it falls within the list of this article. If not, a legal Act with the aim to adopt a common definition cannot be adopted. In that case, the Council may take a decision to extend the list of offences in this article. This, however, would be a time-consuming procedure.

A more general competence for approximation can be found in Paragraph 2 of Article 83, namely in those areas where some approximation has already taken place. Here another additional condition is put in place, namely that the approximation is essential to ensure effective implementation of EU policy (not law). A second condition is that the area has already been subject to harmonisation measures. Furthermore, the directive may provide minimum rules on the definition as well as on sanctions.

The fact that differences exist between the conditions for approximation of procedural criminal law (especially Article 82(2)) and substantive criminal law (Article 83) might be problematic if both areas are to be included in one and the same instrument. As follows from the above, different assessments as to competences need to be made for the various provisions. This aspect, as well as the different limitations referred to in the articles above, needs to be taken into account and must be complied with when proposing legal acts for the acts of violence included in our study. Any harmonising legislation with regard to the fields or forms of violence in this study will contain both procedural and substantive criminal law. Procedural law relates to the prosecution, cooperation between judicial authorities, rights of individuals in criminal procedure and rights of victims. Substantive law is required when proposing common definitions of the offences.

#### 4.4.2.4 *Harmonisation of civil law*

Judicial cooperation in civil matters is part of the AFSJ and therefore falls within the competence of the EU. Article 81 TFEU forms the main basis of this. As can be read in Paragraph 3, for family law with cross-border implications measures must be adopted by the Council by unanimity. Some of the measures required for the combating of VAW, VAC and SOV will find their basis in family law and therefore have to follow this procedure, unless the matter has been identified by the Council as a matter on which decisions can be taken by the ordinary procedure.

The predecessor of this article (pre-Lisbon, Article 65 EC) has been widely debated and its scope was not clear<sup>(174)</sup>. Most of the criticism of

(174)Remien, O., 2001, 'European private international law, the European Community and its emerging Area of Freedom, Security and Justice', in *Common Market law review*, 38, pp. 53–86, 2001.

Article 65 also applies to the new Article 81 TFEU, since Article 65 is adopted almost in its entirety in Article 81. However, some changes were made. In particular, the phrase ‘**insofar** as necessary for the proper functioning of the internal market’ in Article 65 EC was often disputed. The new Article 81 contains a less strict condition for adopting measures, namely, ‘**particularly** when necessary for the proper functioning of the internal market’<sup>(175)</sup>. This seems to be an important enlargement of the EU’s mandate. Furthermore, an extension of the competence of the EU has been made for the issues under sub-paragraphs (g) and (h) of paragraph 2 (the development of alternative methods of dispute settlement and support for training of the judiciary and judicial staff, respectively).

Despite the fact that family law was and is excluded from the QMV procedure, the European Council has adopted some important measures in this area of law which relate to the subjects of our research. Most of these measures were based on international treaties which were established by the Hague Conference for Private International Law. Two important treaties adopted by the Hague Conference in relation to children are the Hague Convention on Child Abduction and the Hague Convention on the Protection of Children (see also Section 4.2 under sources VAC).

#### **4.4.2.5 Harmonisation of legislation relating to protective measures for crime victims**

The requirement for attention to the needs of crime victims in general within the EU became more apparent with the establishment of the AFSJ. As stated, ‘With the entry into force of the Treaty of Amsterdam the EU faces the challenge of ensuring that the right to move freely throughout the

<sup>(175)</sup> Remien O., 2001, ‘European private international law, the European Community and its emerging Area of Freedom, Security and Justice’, *Common Market law review*, p. 74.

EU can be enjoyed in conditions of security and justice accessible to all.

This challenge involves establishing a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own and where better compatibility and more convergence between the legal systems of the Member States is achieved. The need to meet this challenge is evident from the ever-increasing number of persons using their right to free movement within the EU, for example, as workers, students or as tourists. The establishment of an area of freedom, security and justice must also take due account of the needs of crime victims in the European Union<sup>(176)</sup>. In this common area of free movement, justice and security, recognition of crime victims’ needs and comparable legal regulation are required.

However, the European landscape of victim policies exhibited great variation in terms of both procedural rights in criminal justice and entitlements to services, influenced by differences in legal systems and general services. The EU addressed this by adopting the EU framework decision on the standing of victims in criminal proceedings and a directive relating to compensation to crime victims. Before that the issue was addressed in various Green Papers and in declarations issued by the European Council and the European Parliament<sup>(177)</sup>.

The rationale for developing standards for victims (of any crime) thus lies in preventing possible problems and inequalities that may occur because of the fact that a person becomes victimised in another Member State other than their own. The link to developing specific provisions for victims of crime was made by arguing that residents of

<sup>(176)</sup> Green Paper Compensation to Crime Victims, Brussels, COM(2001) 536 final of 28 September 2001, p. 6.

<sup>(177)</sup> See, for instance, the Green Paper on Compensation to Crime Victims, Brussels, COM(2001), 536 final of 28 September 2001.



any Member State of the EU who choose to reside temporarily or permanently in another Member State should receive the same level of protection as they would in their home country. The framework decision was thus clearly inspired by victims being victimised in a country other than their home country. In addition, it was argued that those actually victimised by crime were likely to be in need of special protection (mainly because ‘foreign’ victims — such as workers, students or tourists — have no knowledge of the judicial system of the country where they are victimised and/or may not speak the language etc.)<sup>(178)</sup>.

As mentioned before, with the adoption of the Lisbon Treaty, framework decisions will have to be updated and transformed into directives. This transformation is likely to enhance the legal status of the EU standards for victims’ rights. The European Council, in the 2009 Stockholm programme, called for an integrated and coordinated approach to victims. The Council acknowledged the unsatisfactory implementation of the framework decision and the directive. It called upon Member States and the Commission to take a variety of measures, from strengthening legislation and policy to increasing research. The European Council called on the Commission and the Member State, among other things, to:

- ♦ *‘examine how to improve legislation and practical support measures for protection of victims and to improve implementation of existing instruments;*
- ♦ *offer better support to victims otherwise, possibly through existing European networks which provide practical help and put forward proposals to that end; and*
- ♦ *examine the opportunity of making one comprehensive legal instrument on the protection of victims, by joining together the directive relating*

(178) For more information on the background to the adoption of the framework decision, see Rock, P. (2004). *Constructing victims’ rights: the Home Office, New Labour and victims*, Oxford: Oxford University Press.

*to compensation to victims and the framework decision on victims, on the basis of an evaluation of the two instruments’*<sup>(179)</sup>.

In early 2010, work to that end was initiated by the European Commission in consultation with Victim Support Europe and individual experts. Under consideration is an omnibus directive incorporating updated versions of both the framework decision and the directive on compensation. It, therefore, appears that the European Union is currently putting the crime victims issue more prominently on the agenda<sup>(180)</sup>.

#### **4.4.2.6 Harmonisation of legislation relating to preventive measures**

Preventive measures relating to VAW, VAC and SOV should be understood as encompassing two areas: the prevention of repeat victimisation *and* prevention before violence occurs, addressing the root causes of the violent acts. It would be impossible to provide a general picture on the actions that must be considered for the prevention of the offences included in our study. Furthermore, a general legal basis for the harmonisation of these actions cannot be drawn, considering the variety in type of measures. Therefore, this section will provide some general considerations on the competence of the EU relating to preventive measures.

One of the aims of the newly proposed directive on trafficking in human beings is prevention. The legal basis for this directive is sought

(179) See the Stockholm programme — An open and secure Europe serving and protecting the citizen, European Council, Brussels, 2 December 2009.

(180) See also Council Conclusions on a strategy to ensure fulfilment of the rights of and improve support to persons who fall victim to crime in the European Union, 2969th Justice and Home Affairs Council Meeting, Luxembourg, 23 October 2009.



in Articles 82(2) and 83(1). The provision in the proposed directive includes the adoption of measures to discourage demand, to raise awareness and to reduce the risk of people becoming victims of THB, and to consider the criminalisation of consumers of services of victims of THB. This provision, however, leaves to the Member States a great margin of appreciation concerning its implementation and is not aiming at harmonisation.

Looking again at Title I of the TFEU, it can be seen that Article 4(4) relates to areas of development cooperation and humanitarian aid. In relation to prevention this might be an important area through which to reduce the differences in economic situation between the rich and poor countries and in that way reduce the risk of individuals becoming victims of THB. The EU has competence to carry out activities and conduct a common policy and cannot adopt legal acts *per se* in this area. However, as is the case with the proposed directive on THB, legislative measures concerning prevention can be adopted if agreed upon by the Member States and considered a necessary tool in an comprehensive approach.

With regard to combating discrimination against women, Article 8 TFEU provides for a general basis to adopt acts to eliminate inequalities and to promote equality between women and men. This means that the EU is mainstreaming equality, so that discriminating effects on men and women of any of the acts adopted in the EU are prohibited.

Another area of importance is the external dimension, foreign and security policy (the former second pillar). However, it would go beyond the scope of our study to elaborate further on this. On the EU's external action, there is no common provision for harmonisation of legislation; but this field is still very much left to the Member States. If acts are adopted, it will be done by unanimity, but it leaves the competence of the Member States largely untouched.

#### 4.4.2.7 Other relevant areas of EU competence

Article 6 TFEU indicates the areas where the EU is only competent to supplement, support or coordinate the actions of the Member States. The protection and improvement of human health mentioned under subparagraph (a) is an area that directly impacts VAW, VAC and/or SOV. Furthermore, especially with regard to VAC, subparagraph (e), in which reference is made to youth, could be relevant. However, it is explicitly stated in Article 2(5), second paragraph, that the legally binding acts adopted in these areas shall *not* entail harmonisation of Member States' laws or regulations. Therefore, the specific provisions in the TFEU on these areas (Article 168 subparagraph (5) for human health and Article 165 sub 4 for youth) will not provide a proper legal basis to harmonise legislation in the fields of VAW, VAC and SOV.

##### *Specific provisions on 'youth'*

Title XII (Articles 165 and 166) relates to 'Education, vocational training, youth and sport' and could provide a basis for measures which aim to contribute to the protection and agency of children and the combating of VAC. This area is identified in Article 6 TFEU as an area in which the EU, 'Shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States'. The measures adopted in this field relate primarily to sport and include the European dimension in education and sport.

##### *Social policy*

Social policy is adopted in Article 4(2)b TFEU as an area where the EU has a shared competence with the Member States and is further dealt with in Title X (Articles 151–161 TFEU). The mandate of the EU is limited in several ways. For instance, in relation to labour, labour conditions and social

policy (Article 153), measures adopted at EU level can only have the intention to encourage Member States to cooperate — harmonising measures are excluded. Furthermore, the special legislative procedure is prescribed for some aspects. Although no specific reference is made to children in any of these articles, measures relating to the protection of children, including the prevention and prohibition of child labour and conditions under which children (under the age of 18) are allowed to work, may find their legal basis in this title of the Treaty. With regard to VAW, Article 153(1)(i), states that, ‘...the Union shall support and complement the activities of the Member States... in the field of equality between men and women with regard to labour market opportunities and treatment at work’. Equality between men and women, also in relation to equal pay, is the subject of Article 157 as well.

#### *‘Rest’ category*

There is a section in the TFEU containing provisions providing general competence for approximation of laws. These are Articles 114 and 115. These articles can be used as an independent legal basis for adopting legal measures which have as their object the establishment and functioning of the internal market. Although this is a broad competence and might also be used for *potential* obstacles for the functioning of the internal market, it is not a general competence to regulate the internal market<sup>(181)</sup>. These provisions may not, of course, be used to circumvent a prohibition on the approximation of laws. The approximation of law in the areas of our research most likely does not have a direct connection with the functioning of the internal market but only an indirect one, through the facilitation of police and judicial cooperation or immigration policy. In that case, Articles 114 and 115 probably cannot be used, since the Treaty provides for more specific provisions, namely in the title on the AFSJ.

<sup>(181)</sup> ECJ, 5 October 2000, Case C-376/98, *Jur.* 2000, p. I-8419.

Lastly, we refer to Article 352 TFEU. The 2004 directive relating to compensation to crime victims is based on this Article. Reference is made to the Cowan case, which held that, ‘When Community law guarantees to a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. Measures to facilitate compensation to victims of crimes should form part of the realisation of this objective.’

#### *Legal instruments*

Under the former third pillar, the Council could adopt common positions, decisions, framework decisions and conventions in accordance with Article 34(2). With the entering into force of the Lisbon Treaty, the legal Acts of the old Article 249 TEC (regulations, directives and decisions being the binding instruments) are the *only legal* acts that can be adopted in the AFSJ. The instrument of a framework decision is, thus, no longer part of the legal framework<sup>(182)</sup>.

### **4.4.3 Possible alternatives to legal measures**

Another possibility to take action is not by legally binding measures but by non-binding measures such as soft law or policy measures. In relation to soft law we often come across the concepts of co-regulation and self-regulation. Soft law refers

<sup>(182)</sup> This raises the question of what the status is of the legal acts that were adopted under the old third pillar, such as FDs pursuant to Article 34(2). In accordance with Article 10 of Protocol 36 to the Lisbon Treaty, amending acts must be taken for all the acts which were adopted under the third pillar before they can have effect under the regime of the Lisbon Treaty. More concretely, this means, for instance, that framework decisions will have to be updated and transformed into directives. Until these acts have been adopted, the legal system in force on 1 December 2009 remains in place.

to the non-legally binding acts which can be adopted at EU level, such as communications and guidelines. Provisions of co-regulation and self-regulation can be adopted in such acts. However, this does not mean that there are no rules on the use of these forms of regulation<sup>(183)</sup>.

Some general conditions for the use of both forms need to be met. For instance, their use has to be consistent with EU law; they must have an added-value for the general interest and they may not affect the principles of competition or unity of the market; and their use must meet the criterion of transparency, implying the publication of agreements, and the representativeness of the parties involved.

Two other important conditions identified are the prohibition of the use of self-regulation and co-regulation in two situations: where fundamental rights or important political options are at stake and where the rules must be applied in a uniform fashion in all Member States. Self-regulation refers to the process where other actors adopt amongst themselves and for themselves, common guidelines at European level. An EU legislative act is not required. Co-regulation relates to an EU legislative act (not necessarily an act of secondary legislation but this can also be a provision of primary law)<sup>(184)</sup>, in which parties which are recognised in the field (e.g. social partners, non-governmental organisations, private actors etc.) and are entrusted with the attainment of the objectives defined

by the legislative authority, generally in the legislative act. This means that actors other than the legislative have a role in the implementation of the legal act. Co-regulation is regarded rather as an implementing mechanism and consequently, presupposes the involvement of a public actor. Co-regulation is more a complement to legislation and not an alternative to it.

#### *Open method of coordination*

As discussed briefly in Section 4.2, international law-making is changing from a traditional state-based focus to the involvement of other actors in the process of law-making. A similar development can be seen within the context of the EU. The increasing use of the OMC is an example of this development. It was first adopted in the conclusions of the Lisbon Summit in March 2000<sup>(185)</sup>.

The main procedures of this method are common guidelines to be translated into national policy, combined with periodic monitoring, evaluation and peer review organised as mutual learning processes and accompanied by indicators and benchmarks as means of comparing best practice. The OMC provides a framework for cooperation between the Member States whose national policies can thus be directed towards certain common objectives. Under this intergovernmental method, the Member States are evaluated by one another (peer pressure), with the Commission's role being limited to surveillance (the Commission may also initiate an OMC). Note that the OMC takes place in areas which fall within the competence of the Member States, such as employment, social protection, social inclusion, education, youth and training. It is based principally on:

- ♦ jointly identifying and defining objectives to be achieved (adopted by the Council);

(183) Inter-institutional Agreement on better lawmaking, (OJ C 321, 23.12.2003, p. 1), Senden, L., 2005, *Soft law, self-regulation and co-regulation in European law: where do they meet?*, *Electronic journal of comparative law*, Vol. 9.1.

(184) 'Secondary legislation' is the third major source of EU law after the treaties (primary legislation) and international agreements. Secondary legislation comprises the binding legal instruments (regulations, directives and decisions) and non-binding instruments (resolutions, opinions, recommendations) provided for in the TFEU, together with a whole series of other instruments, such as the institutions' internal regulations and EU Community action programmes.

(185) Lisbon European Council (2000): 'Lisbon Extraordinary European Council. 23 and 24 March 2000, Presidency Conclusions', *Bulletin of the European Union*, No 3.

- ♦ jointly established measuring instruments (statistics, indicators, guidelines); and
- ♦ benchmarking, i.e. comparison of the Member States' performance and exchange of best practices (monitored by the Commission).

Furthermore, the proportionality principle in the revised Article 5 of the EU-Treaty also applies to the OMC and specifies that both contents and form of Union action should not go beyond what is necessary to realise the Treaty objectives'<sup>(186)</sup>.

Generally, the OMC works in various stages. Firstly, the Council of Ministers agrees on (often broadly formulated) policy goals. Secondly, Member States then transpose guidelines into national and regional policies. Thirdly, specific benchmarks and indicators to measure best practices are agreed upon. Finally, results are monitored and evaluated. However, the OMC differs across the various policy areas to which it has been applied. There are variations in length of reporting periods, guidelines may be set at EU or Member State level, and enforcement mechanisms may be harder or softer. Depending on the areas concerned, the OMC involves so-called 'soft law' measures which are binding on the Member States in varying degrees but which never take the form of directives, regulations or decisions<sup>(187)</sup>. An advantage of the OMC is that

it facilitates ways to establish a feasible balance between diversity and unity among the Member States.

It is unclear who can initiate an OMC, especially when it comes to the position of the Commission and the European Parliament<sup>(188)</sup>.

Senden argues that the use of soft law, and of the OMC in connection with the same, does require some accounting for in terms of competence and that its use may be limited in certain cases, as a result of the Treaty itself or as a result of general principles of law<sup>(189)</sup>. She provides an example falling within the ambit of our study:

'Article 67, paragraph 3, TFEU stipulates that "The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws." This provision imposes some obligation on the EU to act, but leaves a lot of leeway for deciding how to do that and in what (legal) form. Such a provision obviously allows also for a certain "regulatory mix" or hybridity, combining possibly a legislative approach under the Union Community Method with a soft convergence approach under the OMC'<sup>(190)</sup>.

(186) These principles are operationalised within the context of the Union's Better Regulation (BR) Strategy which it has been developing over the past decade, building on documents such as the Commission's White Paper on European Governance (2001), COM(2001) 428 final, the Commission's Communication on general principles and minimum standards for consultation of interested parties (2002), COM(2002) 704 final, the Inter-institutional Agreement on Better Lawmaking (2003), (OJ C 321, 23.12.2003, p. 1), the Commission's Strategy for Growth and Jobs (2005), COM(2005) 330 final, and its Impact Assessment Guidelines (revised in 2009), ([http://ec.europa.eu/governance/impact/commission\\_guidelines/commission\\_guidelines\\_en.htm](http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm)), see Senden, L., *The OMC and its patch in the European regulatory and constitutional landscape*, forthcoming 2010, p. 4, on file with the authors of the report.

(187) See EU Glossary.

(188) Senden, Linda (2010) *The OMC and its Patch in the European Regulatory and Constitutional Landscape* EUI Working Papers RSCAS 2010/61 Robert Schuman Centre for Advanced Studies <http://cadmus.eui.eu/handle/1814/14436> p. 17, also for some critique on the use of the OMC.

(189) Senden, L. (2010), p. 18; von Bogdandy, A. and Bast, J., 2002, 'The European Union's vertical order of competences: the current law and proposals for its reform', *Common Market Law Review*, Vol. 39, p. 233.

(190) Senden, L. (2010), p. 20.

#### 4.4.4 Summing up

In this chapter, two core questions have been addressed: (i) Which minimum standards can be identified that should be taken as a starting point when devising an effective EU approach towards VAW, VAC and SOV? (ii) What are the legal parameters in EU law which are required when harmonising legislation in the domain of VAW, VAC and SOV? This lays the groundwork for the assessment of the feasibility of harmonisation of the minimum standards, which follows in Chapter 6.

To answer question (i), relevant sources of standards have been identified in international and EU hard and soft law instruments. The resulting list of existing and proposed standards providing the answer to the first question is presented in Annex 2.

In Chapter 6 a summary of the main standards is presented.

Question (ii) concerns the EU competence to standardise Member States' national legislation and/or policy in order to achieve a comprehensive approach to addressing the three forms of violence. The overall conclusion is that there is still a limited legal basis for harmonisation for many of the legislative measures we propose. It is therefore important to carefully consider the range of legislative and policy-based instruments which the EU can deploy to enhance the ultimate goals of harmonisation.

A more detailed assessment of the extent to which the minimum standards, as identified in this chapter, could find a legal basis in EU law to standardise legal measures, is presented in Chapter 6.



# Chapter 5 — Factors at play in the perpetration of violence

## 5.1 Introduction

To assist the European Commission in developing a more coherent and longer-term policy, a review of current knowledge about factors related to the perpetration of violence was requested. This should allow a deeper understanding of the phenomena, so that consideration can be given to enhancing legislation against VAW, VAC and SOV, in full cognisance of the complexity of the problem.

The task consists of three components.

- ♦ A scientifically founded, concise **overview** of current research knowledge about what factors or conditions are conducive to the perpetration of violence against women, violence based on sexual orientation and/or violence against children. The review includes critical assessment of where the research is inadequate to meet the needs of policy and practice, is methodologically weak or is missing.
- ♦ A **model** encompassing all these factors and showing the interplay between them. In order to capture the complexity and differential paths of influence across types of violence, as well as their cumulative impact and the possible impact of protective factors, we have developed a visual model. It aims to make the wide range of research knowledge more accessible to policy development.
- ♦ A **mapping** of how the elements covered in the research analysis are treated in national and EU legislation. Since legislation rarely addresses causes or triggers of perpetration directly, expertise was used to derive possible ways of taking account of relevant factors. The national reports and a follow-up questionnaire for the 27 national experts contributes to mapping presence of such elements.

The task as a whole pursues two main aims:

- ♦ to suggest which legally framed interventions might have an impact on reducing the occurrence or the severity of violence;

- ♦ to stimulate the thinking of policymakers about what might be done to prevent violence being perpetrated in the first place.

The analysis of perpetration factors shares the human rights perspective of the study, focusing on the specific kinds of interpersonal violence which have been supported by, and tolerated because of, structures of unequal power and recognition in society. Thus, the task at hand is not general crime prevention or improving the level of mental health in the population, rather, we seek to identify the factors that lead specifically to disproportionate violence against women, children and LGBT people.

Furthermore, the focus is on factors which might reasonably be influenced by policy or policy-based prevention and intervention measures. Thus, while the genetic make-up or severe psychopathology of some individuals makes them generally aggressive, the majority of perpetrators of VAW and VAC show no psychopathology and genetic or medical intervention is not a policy option. The goal of identifying factors which make perpetration more probable also guided the decision not to include victim vulnerability factors, since vulnerability can equally stimulate protective responses, it does not cause the violence.

## 5.2 Methodology

### 5.2.1 Review process

The broad scope and limited timeframe of the literature review called for techniques of rapid research review for policy relevance. In order to assess the current evidence base for the factors at play in perpetration and their interaction, the following methods were combined:

- ♦ inclusion in the team of five senior researchers with many years of international research experience in the research areas in question;

- ♦ two teams carried out systematic thematic searches (on VAW, VAC and SOV) in databases of journal articles and within key journals, with special attention paid to locating comprehensive research reviews, meta-analyses<sup>(191)</sup> and longitudinal studies, but also large-scale, cross-sectional studies where these are the best evidence available;
- ♦ identification of reviews of the research evidence in recent book publications by internationally recognised authors or sources (such as American Psychological Association (APA) handbooks);
- ♦ assessment of the results of evaluation studies from work with perpetrators and of well-designed relevant qualitative research; and
- ♦ mining clinical and theoretical analyses of the dynamics and interplay of factors to construct path models of the confluence of factors.

Initially, 20 publications presenting the most important evidence were summarised as abstracts in a template constructed specifically for this study, thus permitting comparison of the evidence base across the fields of research. In the further in-depth exploration of the knowledge base for different forms of violence, information on the empirical data was extracted from a total of about 120 further articles and research overviews and summarised in interim reports for each form of violence. With this methodology, it was possible to capture state-of-the-art quantitative evidence for factors at play in the major fields of research on perpetration: intimate partner violence, sexual assault and rape and child maltreatment.

Considerably less empirical evidence is available on the motives and factors influencing SOV, commercially profitable forms, such as trafficking and

(191) Meta-analysis is a sophisticated statistical technique for reviewing and summarising a large number of research studies and combining their results by way of a common measure of effect size to arrive at a weighted average value.

child sexual exploitation, and practices rooted in traditions or customs from the country of origin of immigrant communities. Stalking and sexual harassment are also under-researched with regard to the factors involved in perpetration. Victimisation studies in all of these areas throw some light on perpetration, but reliable assessments of factors and their effect sizes would require a developed body of research with perpetrators. Such research is lacking, and in some areas there are considerable barriers to identifying perpetrators. Only a few studies of sexual orientation violence in North America are to be found.

In-depth qualitative studies, interview data from victims or reflective reports based on clinical or practical intervention experience throw light on relevant factors, but there are no systematic reviews, longitudinal studies or statistical analyses across studies, making general conclusions difficult. We have located no empirical research at all with perpetrators of trafficking or child sexual exploitation, nor with those who perpetrate HBV, FM or FGM.

## 5.2.2 Defining research-based factors and levels for a policy-oriented model

### 5.2.2.1 Levels

There are widely varying uses of the concept of ‘levels’ across disciplines and theoretical schools. For a policy-relevant model we use a sociological understanding of ‘levels’ which facilitates addressing violence resulting from structural inequalities of gender, generation and sexual orientation. This analytical concept of levels differs from the conventions established in psychological research and also takes a different approach again from that found in research primarily aimed at qualifying casework and family intervention, or

at psychiatric intervention in the case of sexual violence. Nonetheless, evidence from all of these fields is integrated into the model.

The **ontogenetic** level can also be called the ‘life history approach’. It includes those factors in the biographies of individuals which contribute to a disposition to resort to violence or even to find satisfaction in violence. Much of this research identifies correlations but cannot provide explanations. Longitudinal studies are useful for developing grounded hypotheses about causal links.

The **micro** level refers to dynamics and formations of the face-to-face group: peer groups, close relationships in the immediate family or household, the classroom or workplace as a site of day-to-day interaction. These can reinforce or mitigate the effects of ontogenetic factors. It is on this level that general social norms are translated into expected or socially approved practices. Thus, while gender stereotypes have historical and cultural roots, their impact on the perpetration of violence is most clearly recognisable when they shape perceptions of what is ‘normal’ in the way men and women think and behave.

The **meso** level refers to the larger institutions or organisations which regulate social life and within which individuals and families negotiate their lives. Norms and values about subordinate or compliant behaviour for women or children were placed on the meso level when they tend to be specific to a community or milieu. This level also includes presence or absence of a consistent policy, as well as the rules, procedures and (lack of) resources for agencies which could or should supervise, intervene, offer help or enforce sanctions. Excessive caseloads, for example, or lack of even minimal training, can set parameters within which violence remains unchecked.

The **macro** level refers to overall cultural, historical and economic structures of a society. Persistent and tolerated gender inequality and failure to

recognise and establish children’s and LGBT rights belong here, as do deeply rooted attitudes devaluing women and/or children and imposing normative regimes for gender and sexuality. Development and influence of the media permeate society on all levels. The law is a macro factor which defines some acts of violence as more serious, while treating others as not deserving of sanction and establishes the responsibilities of agencies and the rights and claims of victims to redress and support.

Empirical research on violence against women and violence against children typically measures and compares characteristics and acts of individuals in their life history and personal environment. Thus, the empirical evidence base is strongest on the ontogenetic level and on some micro-level aspects. At the same time, the patterns that emerge from this research only make sense, as research reviews regularly emphasise, when meso and macro-level factors, such as the gender hierarchy in society, are taken into account. While there are some studies comparing levels of violence in organisations or whole societies (cross-culturally or historically), they are few and at best suggestive for theorising. Thus, different kinds of research are needed if the fundamental rights issues are to be included in the factors at play in perpetration.

We have assessed the influence of main factors relative to other factors within each area of violence and on each level of effect. Respecting the differences in quality and quantity of research, we have not drawn comparisons between arenas in which the research is not comparably developed. Thus, the explanatory power of a factor is always to be seen relative to that field of research and not in comparison to other forms of violence.

### 5.2.2.2 *Factors*

There is a consensus across research and theory that interpersonal violence is multifactorial and

arises through the confluence of interacting influences at different levels. Empirical evidence accumulates over a multitude of studies, each defining the variables in specific ways, and each field of study has its own discourse and preferred concepts. A major aim of this research review was to integrate the vast amount of available information, not only across studies, as has been done in systematic published research reviews for specific topics, but also across the fields of violence, in order to pull out more general factors which could contribute to developing a coherent overall policy. The aim was to capture the complexity of the problem, while structuring research knowledge for policy use, thus focusing on those factors which seem amenable to influence by legislation which is targeted to reducing violence.

To this end, we simplified and clustered the numerous variables to be found in the research into composite ‘main factors’. Theoretical discussions of how research variables relate to perpetration of violence provided the key to integrating multiple dimensions into a larger-scale factor, of which they can be considered aspects. For example, in relation to physical violence, heavy drinking has been identified as a relevant variable; with child neglect, drug use becomes more significant as well; with regard to sexual violence the use of (violent) pornography or of child pornography has been studied. For the model, all of these were grouped together under a concept of ‘stimulus abuse’, meaning the excessive or habitual use of means of self-stimulation which correlate with use of violence. The differences reappear in our path models, which show how combinations and cumulative effects may lead to one form of violence rather than another. For factors on the level of the society as a whole, and to some extent for those on the meso level, the review drew on analytical and theoretical work by researchers with a broad empirical background or wide clinical experience. The focus is on ‘theories of the middle range’, since the purpose of the review is to capture connections on which a policy can reasonably be expected

to have an effect. The relevant authors argue from the breadth of their cumulative understanding and refer to indicators, rather than empirical measurement. As we seek to identify the factors at play in perpetration, we select explanatory models which help us to understand why some individuals or groups within society ‘choose’ violence and others do not. They should be compatible with the state of our empirical knowledge on the levels that permit measurement or clinical confirmation. Theories of the middle range should further have the potential to discriminate among pathways which lead towards or away from violence.

Five main macro-level factors have been drawn from the literature in the course of this review. Each of them represents a cluster of influences which are interrelated and have effects on culture and society in the wider sense, on the various relevant institutions and environments within a society (meso level), but also directly on the smaller social networks, such as families, and on the life history of individuals. Three of these factors describe the socio-cultural and socio-economic relations of gender and of generations: we have chosen to look at the status of women, the status of men and the status of children separately. A further macro-level factor, central to policy, is the law as a structure linking the way a society is organised, with the rights and duties of the members of the society. Finally, in today’s world the media must be understood as a powerful societal influence.

Each of the five factors can be modelled theoretically as a socialisation theory, connecting general norms, beliefs and access to social positions and resources through institutions and interactions to individuals. The socialisation perspective has the potential for a process-based understanding of how individuals in their social environments come to develop an affirmation or a rejection of violence which can also change over time. Through a complex approach which goes beyond linear notions of causality, social analysis can thus

be linked to the empirical results found on the other levels of the model. This also illustrates the fact that the factors, while situated in the model on one of the four levels, actually radiate out into the other levels. In particularly significant cases this is represented in the structure of the model, but it must also be understood as a general interactive principle within the entire construct.

### 5.2.3 Assigning numerical values to factors

In the areas of violence perpetration which have been extensively researched, and where research reviews provided a quantitative assessment of the best-studied variables, the selection criteria for risk factors<sup>(192)</sup> were: replication in a least two longitudinal studies and/or a computed composite effect size  $\geq .10$  based on all available studies, including cross-sectional studies. The full report on the literature review presents the available evidence in more detail. The centrality given to longitudinal studies and meta-analytic results was intended to focus on the best available evidence. Replication and at least small effect size are necessary criteria for using empirical results in a policy-relevant research synthesis. In addition, temporal order is a recognised criterion for interpreting correlations to develop hypotheses about causal connections. Nevertheless, it must be mentioned that, as some variables ordinarily co-vary, it is difficult to exclude third-variable effects<sup>(193)</sup>.

Even within overviews, the variables are often very fine-grained, taking account of differences in measurement techniques, for example, and

(192) The term 'risk factors' refers to statistical probability of measured variables being linked to certain outcomes, in this case violence. As such, it applies only to the ontogenetic and (in part) micro levels of our model.

(193) Rutter, M., Pickles, A., Murray, R. and Eaves, L., 2001, Testing hypotheses on specific environmental causal effects on behavior, *Psychological Bulletin*, 127, pp. 291–324.

thus too numerous and detailed for the purpose of modelling. For each form of violence, the effect sizes of all significant variables from meta-analyses and major studies were placed on a uniform scale. This could only be done as an approximation, since there are several different measures which are widely used. The results for empirically significant variables were then combined for each composite factor to produce an average value. Whilst the result is an estimate rather than an exactly calculated statistical value, it permitted a weighting as a weak but measurable, moderate or strong influence on the form of violence in question.

This process could be carried out rigorously for each of the main forms of child maltreatment. In the areas of IPV and rape/sexual assault, the research is much more varied. Meta-analyses and longitudinal studies are fewer and tend to focus on specific aspects only, such as anger and hostility, or alcohol abuse or include only specific populations, such as imprisoned offenders. Where available, the same criteria for effect sizes were used as with child maltreatment, but a combination of different kinds of studies made the construction of a unified scale for variable effect sizes impractical. For these forms of violence, the procedure was to build on the strength of influence found in important empirical studies, categorised for that study as weak, moderate or strong, and move directly to their combination (without the aid of statistical analysis) to estimate the approximate value for the composite factor in question.

In all other areas, the state of empirical research on perpetration is unsatisfactory and effect sizes could only be assessed from an overall reading of existing studies and by drawing on the good judgment of research experts in the team with accumulated knowledge, experience and familiarity with international discourse in the field. Stalking was grouped with IPV, since the research, where present, tends to be linked. Three under-researched fields of violence — FM, FGM



and HBV — were combined for modelling, since the limited available data point to the similarities among them. The picture is incomplete and more research on perpetrators would certainly identify differentiating aspects.

Where empirical research has produced no consistent evidence of the influence of a factor on a specific form of violence, the value of zero was assigned. Empirical research can never prove that something does not exist. Analytically, there is a difference between the absence of evidence, when the possibility of a link has not been empirically studied (or not studied adequately), and evidence of absence, when the research finds that there is no significant connection after controlling for other variables. For example, there has been no research on the life history or social milieus which might lead men (or women) to become traffickers<sup>(194)</sup> or which might cause some families to subject a daughter (or son) to a forced marriage, while others do not. In these areas the value of all ontogenetic factors had to be recorded as zero because nothing is known.

By contrast, there is some (not much) research on personal variables of sexual harassers, but it is largely inconclusive, and the present state of knowledge is that all sorts of men may harass women if the environment (e.g. the organisation in which they work) is permissive and discriminatory. Zero value means here that research has not succeeded in discovering which men choose to harass and which do not (although the comparison with ‘non-perpetrators’ is generally problematic, since they are often recruited without reliable criteria)<sup>(195)</sup>. Finally,

(194) There is some evidence that women who themselves were trafficked were offered recruitment as an alternative to continued sexual exploitation.

(195) ‘Dark field’ studies in the population regularly find that there are many men who have never been reported to any agency as perpetrators, but who, by their own report, have used violence against a partner or sexual coercion; these men may be included in ‘control groups’ thus confounding findings.

there are areas which have been researched extensively, such as the connections between drinking alcohol and rape, for which — in the most current authoritative reviews of the literature — a causal link cannot be confirmed at this time.

#### 5.2.4 Limitations of the methodology

There are methodological problems in identifying factors with a causal influence on perpetration. Even in fields where research is more extensive, the great majority of findings are limited to correlations, which may or may not justify causal inferences. Correlations also reveal little if anything about non-linear influences and/or statistical interaction effects. Some frameworks specifying criteria which can be used to approximate causal inferences have been proposed<sup>(196)</sup>, but literature reviews seldom consider this systematically. As an example: when domestic violence is found to correlate strongly with high levels of family conflict, we do not know whether the family conflict leads to violence, or (plausibly) violence generates a situation of family conflict, or whether (most probably) some third set of factors causes both. Longitudinal studies are a promising method for identifying causality, but temporal sequence alone is also insufficient. Thus, while the factors at play can be read as if they cause perpetration, the evidence for causality is generally weak.

To take these limitations into account, path models have been created alongside the presentation of the factors and their relevance to forms of violence. These are analytical confluence models: that is, they illustrate how factors interact cumulatively or conditionally to raise or lower the probability of perpetration. The path models include all factors which are empirically supported with at least

(196) Murray, J., Farrington, D.F. and Eisner, M. (2009) Drawing conclusions about causes from systematic reviews of risk factors: The Cambridge Quality Checklists. *J Exp Criminol*, 5, 1-21.

moderate weight. The decision to exclude weaker factors depended on whether they serve as a mediator or a condition for the effect of the factors with greater effect sizes. Note that the estimate of effect sizes for factors on the meso and macro levels is not based on statistical data analysis.

The meta-analyses of variables empirically linked to perpetration of violence, while very useful for identifying the most relevant factors, cannot carry out the kind of complex statistical analysis which would yield a picture of cumulative effects or developmental sequences<sup>(197)</sup>. For this we must turn to in-depth studies. As is so often the case in research, there is a trade-off between width of scope and depth of understanding. In the development of path models, both longitudinal study results and broadly-based qualitative or clinical research which can trace the development towards perpetration retrospectively were needed. In this way it was possible to represent different pathways leading to perpetration of the most frequent forms of violence. These pathways have not been statistically derived from datasets, and thus do not have direct empirical confirmation as yet; they do represent a synthesis of the best evidence currently available.

The decision to prioritise the best empirical evidence means that the knowledge of practitioners is not equally represented (although it does enter in to the path models to some extent) or falls out of the picture completely. Where this is the case, the model serves to identify research gaps and should be used as such. It also means that weaknesses in the overall body of research could not be compensated in this review. Three examples illustrate the problem. Research on all forms of child

<sup>(197)</sup>Methodological tools are now available to derive path models statistically, and this has been done to describe trajectories of aggressive behaviour in childhood, but no studies have followed the paths leading to adult violence. This requires large data sets, as well as sustained research interest in understanding the sources of perpetration.

maltreatment, including sexual abuse, is closely linked to social work and to the conceptual approaches in that field. Studies have overwhelmingly been done by interviewing mothers<sup>(198)</sup>, so that gender analysis of perpetration is not possible. A large part of the research on perpetrators of rape and sexual assault, on the other hand, has been anchored in psychiatry and works with the conceptual framing of psychopathology. Again, a large proportion of the studies of IPV are anchored in the criminal justice system and use its definitions of the violent incident as criminal law captures it, thus often missing the context of coercion and control. Such biases and specialised traditions of research or schools of thought have an impact on what factors have been sufficiently studied with quantitative methods to make an assessment of the effect size or power of influence possible. These limitations must be kept in mind when using the present study.

### 5.3 Factors conducive to violence against women, violence against children and sexual orientation violence

In the following sections, the factors are summarised and briefly explained, with reference to key publications that summarise the state of research knowledge. To enable visual presentation, each factor is characterised by a short keyword; when using the model, a brief explanation will pop up.

#### 5.3.1 Macro level

1. 'DEVALUING WOMEN' represents the material and cultural subordination of women, gender inequality of power and patriarchal ideas of

<sup>(198)</sup>Recent studies are beginning to ask about parents or step-parents and differentiate perpetration, but there are not enough of such studies to be reviewed separately.

femininity and of sexuality, underpinned by normative beliefs about the proper spheres of women and men, the societal value of these spheres and the legitimate relative power balance between women and men in each sphere. They include values for sexual and for family relationships which idealise women's compliance with men's wishes and needs and thus give the appearance of legitimacy to men imposing their will on women<sup>(199)</sup>.

2. 'MASCULINITY' serves on the macro level as a keyword for the hierarchical power and recognition of normative heterosexual masculinity, generating pressure to conform to masculine standards. It includes social recognition of claims and rights for men, but at the same time defines norms that men must fulfil. Features of such masculinity are variously described, including concepts such as heroism, the ability to face up to and overcome fear or pain and sexual conformity, meaning heterosexuality and successful sexual performance<sup>(200)</sup>.

3. 'CHILDREN'S STATUS' refers to persisting traditions in which children are not recognised as the holders of fundamental rights and are expected to submit to expectations and demands of adults. In this, children retain some elements of a legal and cultural status as property of the parents or families and as subordinates to those responsible for their education or care. Children are also perceived as naturally weak and vulnerable and as not

(199) See Kelly, L., 1988, *Surviving Sexual Violence*, Minneapolis, Weissberg, D.K., ed., 1996, *Applications of Feminist Legal Theory to Women's Lives*. Philadelphia: Harway, M. and O'Neil, J.M., (eds.), 1999, *What Causes Men's Violence Against Women?*, Thousand Oaks, Stark, E., 2007, *Coercive Control: How Men Entrap Women in Personal Life*, Oxford.

(200) See Connell, R.W., 1995, 'Masculinities'; Berkeley, C.A., Hearn, J., 1998, 'The Violences of Men. How Men Talk about and How Agencies Respond to Men's Violence to Women', London; Kimmel, M., 2008, *Guyland. 'The Perilous World Where Boys Become Men. Understanding the Critical Years between 16 and 26'*, New York.

having a real capacity to know what they want or need or what is good for them<sup>(201)</sup>.

4. 'MEDIA VIOLENCE' characterises the availability and socially accepted use of media which present violent actions as rewarding and successful, while sexualising violence and portraying women and/or children as available and vulnerable sexual objects. The impact of the media, and more recently the Internet and interactive video games, on interpersonal violence is controversial<sup>(202)</sup>, but the media are clearly a powerful influence on the culture, through the constant representation of acts of violence and their linkage to sexuality and to images of gender. Research links sexualised violence in the media to increases in violence towards women, rape myth acceptance and anti-women attitudes.

5. 'IMPUNITY' is the failure of the law to prohibit or sanction violence or to ensure protection, legal systems that confer (e.g. by exception) rights to the use of coercion, control or violence<sup>(203)</sup>. The concept of impunity is used in international discourse on violence against women more broadly to characterise state inaction, both in not holding perpetrators accountable and in permitting power relations and structural conditions of discrimination to remain in place. In the model developed here, to sharpen the focus on policy measures, we wished to mark the difference between legislation

(201) Deegener, G. and Körner W., (Hg.), 2005, 'Kindesmiss-handlung und Vernachlässigung. Göttingen'; Miller-Perrin, C.L. and Perrin, R.D., 2007, 'Child Maltreatment. An Introduction', Thousand Oaks.

(202) Oddone Paolucci, E., Genuis, M. and Violato, C., 2000, 'A meta-analysis of the published research on the effects of pornography', Oddone Paolucci et al. (eds.), 'The Changing Family and Child Development', Ashgate; Anderson, C.A. et al., 2010, 'Violent video game effects on aggression, empathy, and prosocial behavior in eastern and western countries: A meta-analytic review', *Psychological Bulletin*, 136, 2, pp. 151–73.

(203) Weissberg (1996); Kimmel (2008).

and its effective implementation, so that this factor represents the absence of legal provisions.

### 5.3.2 Meso level

6. 'FAILED SANCTIONS' refers to the failure of agencies to set limits or implement sanctions despite the existence of legal norms and agency duties. Research studies on rape, sexual harassment and IPV provide evidence that men see themselves as more likely to engage in VAW, and actually do re-offend more often, when they perceive or experience that it has no negative consequences for them<sup>(204)</sup>. This factor should be understood broadly to include all actions by responsible agencies that set limits to violence, such as insisting that parents accept help in order to raise a child without abuse.

7. 'HONOUR CODES' refer to the community or collective enforcement of honour, shame and subordination based on gender, xenophobia, fundamentalism or tradition. The term 'harmful traditional practices' established in UN documents on VAW can be questioned, since practices harmful to women such as wife abuse and rape have been embedded in the dominant cultures of Europe for many centuries. Honour codes create an expectation of approval of certain acts by families or within communities whose members immigrated from outside the EU at some time. They permit justification with reference to traditions or legal frameworks in countries of origin, based on control of women for the perceived good of the collective (family). Traditions and cultural values may of course be invoked as excuses for personally motivated acts of violence or used to cover material motives such as securing an immigration or residence permit<sup>(205)</sup>. Subgroups

within the majority population can also employ a concept of honour to enforce a rigid gender regime.

8. 'HATE GROUPS' are organised social groups promoting intolerance or hate as well as aggressive action. Although such groups can arise locally on the micro-social level, they do the greatest harm when they connect to larger organised networks, such as right-wing extremist political parties or movements and their organisations, ideological networks that propagate notions of a mission to cleanse society of danger or evil attributed to homosexuals, ethnic minorities and/or other outgroups. In this context, gender and sexual norms are not ideals so much as imperatives to be defended and enforced and there are often links to racism. Those who do not fit or conform to the norm are also, however, seen as legitimate and easy prey for aggressive impulses.

9. 'ENTITLEMENT' refers to norms generating assumptions, for example, of men's rights over women, supported by social beliefs in male entitlement to sex and services from women. Societal patterns of gender inequality, dominant masculinity and devaluing women converge in an expectation of men's right to have their needs met by women<sup>(206)</sup>. Entitlement can also be perceived as the right to do as one likes with one's own children. Different forms of violence are linked to different substantive concepts of entitlement. Subjectively, the perpetrator's experience is often one of not being respected or of being powerless, but the underlying premise is that an intimate partner/husband/father/mother/authority figure (teacher, religious leader) has the right to unquestioned acceptance of his/her needs or demands.

10. 'DISCRIMINATION', gender-based discrimination is embedded in social organisations such as workplaces or educational institutions, including

(204) Gondolf, E.W., 2002, 'Batterer Intervention Systems. Issues, Outcomes and Recommendations', Thousand Oaks.

(205) Welchman, L. and Hossain, S. (eds.), 2005, 'Honour'. *Crimes, Paradigms and Violence against Women*, London.

(206) Gilligan, J., 2000, *Violence. Reflections on our Deadliest Epidemic*, London.

the definition of relatively privileged territories reserved for (heterosexual) men. Depending on the area of violence being examined, it can primarily be discrimination against women or discrimination against anyone who does not fit the heterosexual mould and can be suspected of a 'deviant' sexual identity or orientation (LGBT). Toleration of discrimination in organisations of all kinds creates a permissive environment for harassment<sup>(207)</sup>.

11. 'POVERTY POCKETS' are high concentrations of poverty where social exclusion creates environments of depleted resources and often high rates of crime, in which violence (for example, on the streets or in schools) becomes an everyday experience. Research indicates that being poor or having a low educational level do not in themselves lead to violence. Living in a neighbourhood or region in which material resources, access to education and to regular employment or to cultural resources are very low, and in which social exclusion via racism or structural discrimination prevail, contributes to violence in everyday life and in families<sup>(208)</sup>.

### 5.3.3 Micro level

12. 'STEREOTYPES' refer to the gender-unequal values and norms in family or immediate social networks, including personally endorsed gender-stereotyped perceptions of what men and women, girls and boys, good mothers and their children 'naturally' are or should be like. In modern societies, there is a considerable range of variation in permissible gender-related values and norms, but the face-to-face context of interaction specifies

(207) Pina, A., Gannon, T.A. and Saunders, B., 2009, *An overview of the literature on sexual harassment: perpetrator, theory and treatment issues*. *Aggression and Violent Behavior*, Vol. 14, No 2, pp. 126–138.

(208) Lee, B.J. and Goerge, R.M., 1999, *Poverty, early child-bearing and child maltreatment: A multinomial analysis*, *Children and Youth Services Review*, 21, pp. 755–780.

what is accepted, admired, considered abnormal or actively sanctioned<sup>(209)</sup>. Peer groups and families as well as certain social environments can maintain or revitalise stereotypical thinking about gender and sexuality and form pockets of resistance to modernity.

13. 'OBEDIENCE CODE', this factor characterises established and recognised methods of coercive discipline and strict normative expectations of obedience from children, and these are traditionally different for daughters and sons. Traditionally, the obedience code also applied to wives, but while traces can still be seen, it is no longer widely accepted as an explicit code in much of the EU, although here, too, there are pockets of resistance to modernisation.

14. 'FAMILY STRESS', multiple sources of stress for and in families are clustered together in this factor: social isolation; depleted resources; high levels of family conflict and low levels of family cohesion; and intrafamilial or relationship dynamics leading to escalation of conflict processes. Indicators of family stress appear regularly as significant variables in the research on child maltreatment<sup>(210)</sup>, but some part of intimate partner violence, especially in the form of situational couple conflict<sup>(211)</sup> is related to an accumulation of stress factors.

15. 'REWARDS', a wide variety of sources of satisfaction and perceived rewards for violence are included in this factor: the meaning thus differs somewhat depending on the form of violence in focus. Rewards can be social recognition and admiration (e.g. for having proven oneself a man); simple profit or material gain; the satisfaction of having silenced an irritating family member

(209) Harway, O'Neil (1999).

(210) Stith, S.M., et al., 2009, *Risk-factors in child maltreatment: A meta-analytic review of the literature*, *Aggression and Violent Behavior*, 14, pp. 13–29.

(211) Johnson, M.P. (2008) Stark (2007).



and got one's way; and sexual or other kinds of pleasure. 'Conducive contexts' offer rewards for practising dominance or control. Rewards are one clear motive behind economically profitable forms of violence such as trafficking or child sexual exploitation. But for some perpetrators, the acts of violence are themselves rewarding. Men who commit sexual assault have not fewer, but more sexual partners than their peers and may develop a preference for what they experience as rewards of sexual aggression — feeling powerful, in control<sup>(212)</sup>.

16. 'OPPORTUNITY' covers context conditions which facilitate the use of violence towards selected target persons, including ease of access to potential/vulnerable victims. In his classic explanatory model for child sexual abuse, Finkelhor<sup>(213)</sup> counted opportunity as a key factor. Rewards and opportunity are often flip sides of the same coin, but this is also an independent factor: knowing that an act will have no consequences, or that there will be no resistance, can in itself lead to using the means that are easily at hand. A number of experimental studies on sexual coercion have found that many young men, when offered an imaginary scenario in which rape or sexual harassment would have no consequences for them, said that they would take advantage of the situation<sup>(214)</sup>. Opportunity can also consist of doing what peers or colleagues also do and expect<sup>(215)</sup>.

17. 'PEER APPROVAL', peer groups (especially in adolescence) supporting antisocial behaviour or violence and reinforcing hostile masculinity and aggression constitute a factor at this level. While

(212) see Harrell, M.C., Castaneda, L.W., 2009, *A Compendium of Sexual Assault Research. Technical Report*, RAND, National Defense Research Institute.

(213) Finkelhor, D., 1984, *Child Sexual Abuse: New Theory and Research*, New York.

(214) see Lalumière M.L. et al., 2005, *The Causes of Rape. Understanding Individual Difference in Male Propensity for Sexual Aggression*, Washington D.C.

(215) Kimmel (2008).

childhood experiences predispose boys in particular to aggression, peer-groups in adolescence which practise and reinforce antisocial behaviour have been found to mediate the development into sexual aggression as well as violence within the family (both IPV and child abuse)<sup>(216)</sup>. Several studies have found that men's likelihood of perpetrating sexual assault co-varies with the level of rape-supportive attitudes among their peers<sup>(217)</sup>.

#### 5.3.4 Ontogenetic level

18. 'POOR PARENTING', childhood exposure to unskilled parenting, growing up in families which are unable to offer basic care and secure attachment, summarises a range of deficits, including those resulting from a parent's own history of maltreatment or abuse. Longitudinal studies suggest that neither having witnessed violence in the home as a 'model' for imitation, nor suffering direct violence from a parent is a robust predictor of later own use of violence<sup>(218)</sup>. Unskilled parenting may inhibit or damage the basic emotional security and the images of relationships that a child acquires, as well as reducing the capacity for empathy.

19. 'EARLY TRAUMA' refers to the early exposure to violence in the home, to an abusive father-figure, or to other (sexual or non-sexual) abuses of trust, as well as other traumatic childhood experiences, fall into this category<sup>(219)</sup>. Additional conditions

(216) Capaldi, D.M. and Clark, S., 1998, *Prospective family predictors of aggression towards female partners for at-risk young men*, *Developmental Psychology*, Vol. 34, No 6, pp. 1175–1188.

(217) Harrell, Castaneda (2009).

(218) Capaldi, Clark (1998).

(219) Black, D., Heyman, R. and Slep, A., 2001, *Risk factors for child sexual abuse*, *Aggression and Violent Behavior*, 6, pp. 203–229; Stith et al. (2009); Whitaker, D. et al., (2008), *Risk factors for the perpetration of child sexual abuse: A review and meta-analysis*. *Child Abuse & Neglect*, 32, pp. 529–548.

must be added for childhood exposure to violence to translate into a propensity to use violence actively. Violence in the family of origin, often both witnessing abuse of the mother and experiencing maltreatment, raises the probability of antisocial behaviour patterns, especially among boys<sup>(220)</sup>. Girls are more likely to grow up believing that no one can, or will, protect them, and some of them may later be unable to protect their own daughters.

20. ‘EMOTIONS’, negative childhood experiences damage the basic capacity for attachment, but emotional disturbances can also arise from other sources. There is considerable research evidence showing correlations between the use of violence and personality dysfunctions, including emotional dysregulation, empathy deficits, inability to handle aggression and depressive-avoidant tendencies<sup>(221)</sup>. Severe psychopathology is not included in this model, as it has a much more general impact on antisocial behaviour and is not specific to the forms of violence linked to inequalities of gender, sexuality or age.

21. ‘COGNITIONS’, poor or hostile social information processing, cognitive distortions, strongly inadequate perceptions of children, women, LGBT people or those different from oneself (see references above). Men abusive to their partners have been described as living in a ‘bubble’ in which the perspective of a partner never enters into the perpetrator’s perception of reality. Cognitive and affective processes of misunderstanding a child’s behaviour often trigger maltreatment. Hostile attribution patterns — a disposition to assume that

(220)Capaldi, Clark (1998); Lalumière et al. (2005).

(221) Brown, J. et al., 1998, *A longitudinal analysis of risk factors for child maltreatment: Findings of a 17-year prospective study of officially recorded and self-reported child abuse and neglect*. *Child Abuse & Neglect*, 22, pp. 1056–1078; Harway, O’Neil (1999); Harrell, Castaneda (2009); O’Leary, K.D., and Woodin, E.M., eds., 2009, *Psychological and Physical Aggression in Couples. Causes and Interventions*, Washington, D.C.; Miller-Perrin, Perrin (2007).

what others do or say is intended to provoke or show disrespect — can be already present or can follow from the inability to understand child behaviour or development. Cognitive distortions acquired during adolescent sexual socialisation support notions that conflate coerced sex with consensual sex and establish contempt for homosexuality as the norm.

22. ‘MASCULINE SELF’ refers to the hostile and defensive masculine self-concept, including approval of VAW, general hostility towards women, need to prove oneself as a ‘real man.’ This factor includes the research variable ‘hostile masculinity’, a significant predictor of violence against women and sexual orientation violence; it is often measured by scales of acceptance of the use of force and violence for men, rape-myth acceptance and adversarial beliefs about the relations between women and men<sup>(222)</sup>. Masculinity of self promotes self-absorption<sup>(223)</sup> and has a very negative impact on emotional development, suppressing empathy and encouraging externalised aggression.

23. ‘DEPERSONALISED SEX’, this factor characterises antisocial sexual scripts and intimacy deficits, ensuing patterns of arousal by domination, predatory sex without regard for the needs of the other<sup>(224)</sup>. Childhood experiences of sexual abuse, interpreted through the lens of constructing a masculine self, may contribute to a depersonalised sexual socialisation oriented to conquest and control.

24. ‘STIMULUS ABUSE’ refers to alcohol or drug abuse, habitual or excessive use of pornography or other encouraging or disinhibiting means of self-stimulation can all contribute to one or another

(222)Lalumière et al. (2005); Gondolf (2002).

(223) Bancroft, L. and Silverman, J.G., 2002, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*. Thousand Oaks.

(224)Kimmel (2008).

form of violence. The mechanism may be to stimulate mood change or heighten (sexual) fantasies. Social psychological research has established that the effects of consuming alcohol (chemically a depressant) depend very much on the consumers' expectations of what the effect will be. Alcohol abuse is linked to physical abuse, but (contrary to widespread opinion) not to rape<sup>(225)</sup>, while pornography is linked to sexual violence<sup>(226)</sup>. More specific connections are shown in the path models.

#### 5.4 Model of factors at play in perpetration

The three-dimensional interactive model developed in the project was constructed to show the different levels of influence and the interactions between factors. With a visual representation, it becomes easier to grasp the complexity of the problem and, at the same time, to look at research knowledge from the point of view of its relevance for practical strategies for change. A large reservoir of information is thus organised in a way that can be called upon for the needs of policy and practice. In addition to the original task of showing the interplay between factors, we have furthermore designed path models which permit the visualisation of how factors flow into each other to increase the likelihood that someone will develop into a perpetrator.

(225) The connection often seen between drinking and rape is frequently drawn out of studies which confirm the prevalence (especially in North American college campus populations) of persuading the target victim to drink so as to lower her ability to resist; United Kingdom studies highlight as well the practice of targeting a woman who is drinking. By contrast, there is evidence that physical abuse of a partner is more likely to follow after heavy drinking by the perpetrator.

(226) For alcohol, see Lalumière et al. (2005); Harrell, Castaneda (2009). For pornography, see Vega, V. and Malamuth, N.M., 2007, *Predicting sexual aggression: The role of pornography in the context of general and specific risk factors*, *Aggressive Behaviour*, Vol. 33, pp. 104–117.

Perpetrators are not born as such, nor does a single factor or life event 'cause' them to use violence. Not all perpetrators fit into the same mould; a path model shows that there are different routes that can lead to violence. The model has been supplied with interactive functions which illustrate how protective factors can reduce the likelihood of perpetration, as can interventions which might be set in train, or be underpinned, by legislation.

The following illustration of the model presents two dimensional screenshots from a three-dimensional interactive representation of the 24 factors outlined in the previous section and their effect sizes in relation to forms of violence. The model can be accessed first from the point of departure at forms of violence, offering a visual overview of the relevant factors and the level on which they have their main effect. Up to three forms of violence can be turned on simultaneously, permitting an exploration of similarities and possible co-occurrence. In this case, the values for the factors are also visible.

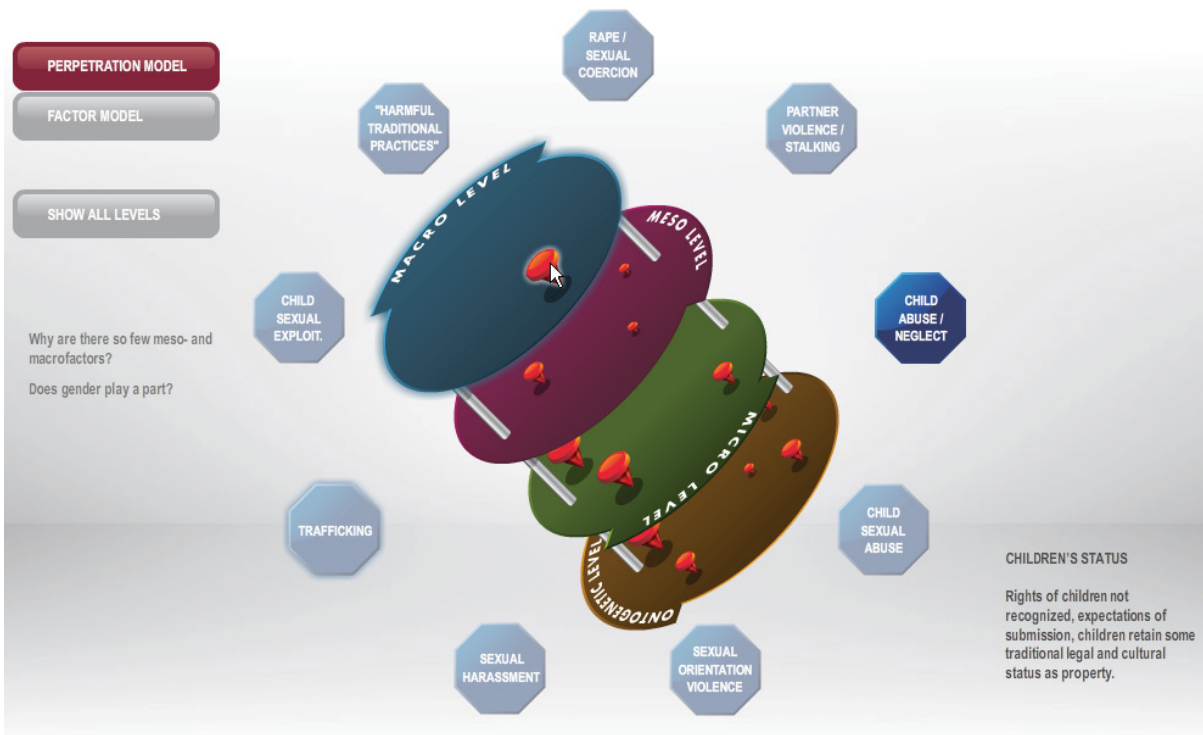
When more than one form of violence is called up in the perpetration model, the effect of the size of factors which have an impact on each other add up to become a stronger influence. In reality there may not be such an increase in effect size, since the two or three forms of violence may not have the same perpetrator. Having the factors cumulate in the model does, however, show the importance of such a factor for the user-defined field of concern and its salience as a point of intervention.

With this view of influences relevant to any chosen form of violence, it is possible to identify factors which need the most urgent attention when aiming to address perpetration with respect to a specific form of violence. More detail becomes visible if the user moves to a specific level of influence, which may be the arena of possible legislation or policy. In the following screenshots, the overview of the whole for child abuse and neglect is shown first.

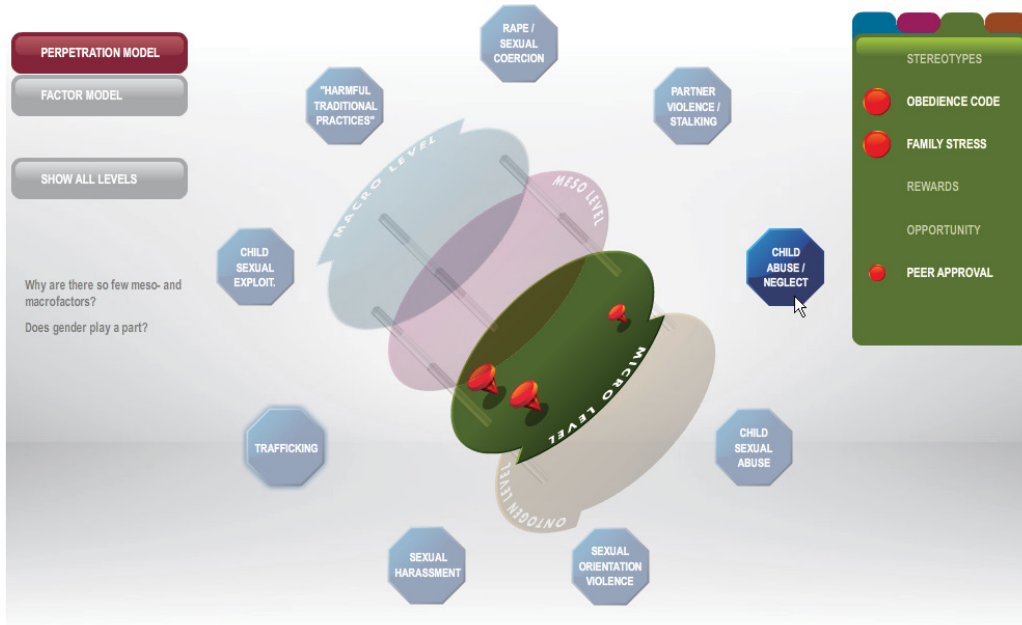
Some pop-up questions appear in the left-hand corner, which can be opened by a mouse click. Their purpose is to explain briefly a few aspects of

the picture shown which the user might find surprising or puzzling. More detailed information will be available in the full-length literature review.

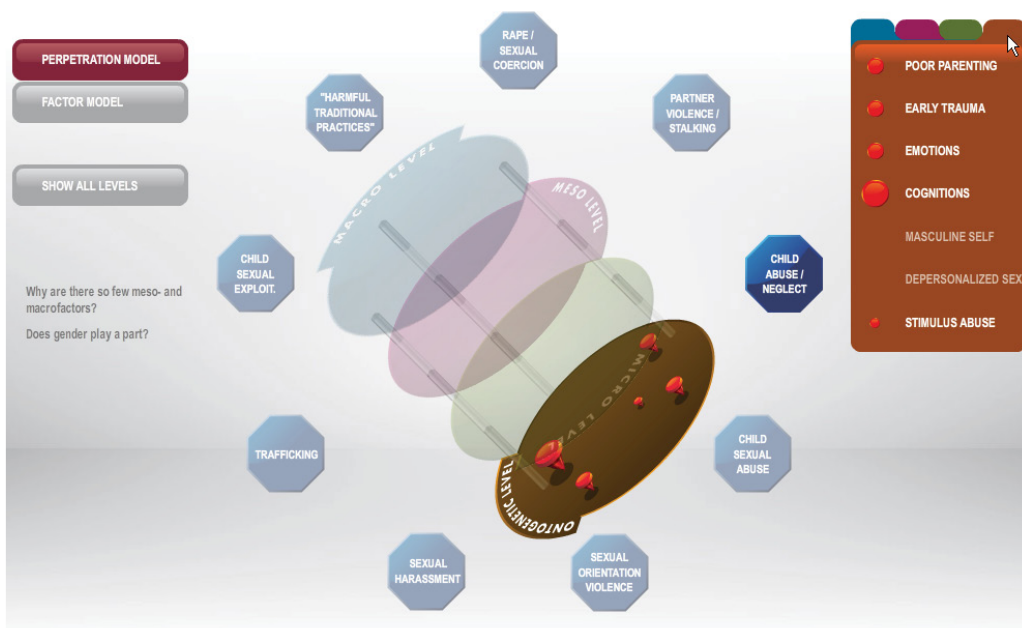
### Screenshot of perpetration model for child abuse and neglect (Diagram 5.1)



Screenshot of close-up of the micro level for child abuse and neglect (Diagram 5.2)



Screenshot of close-up of the ontogenetic level for child abuse and neglect (Diagram 5.3)

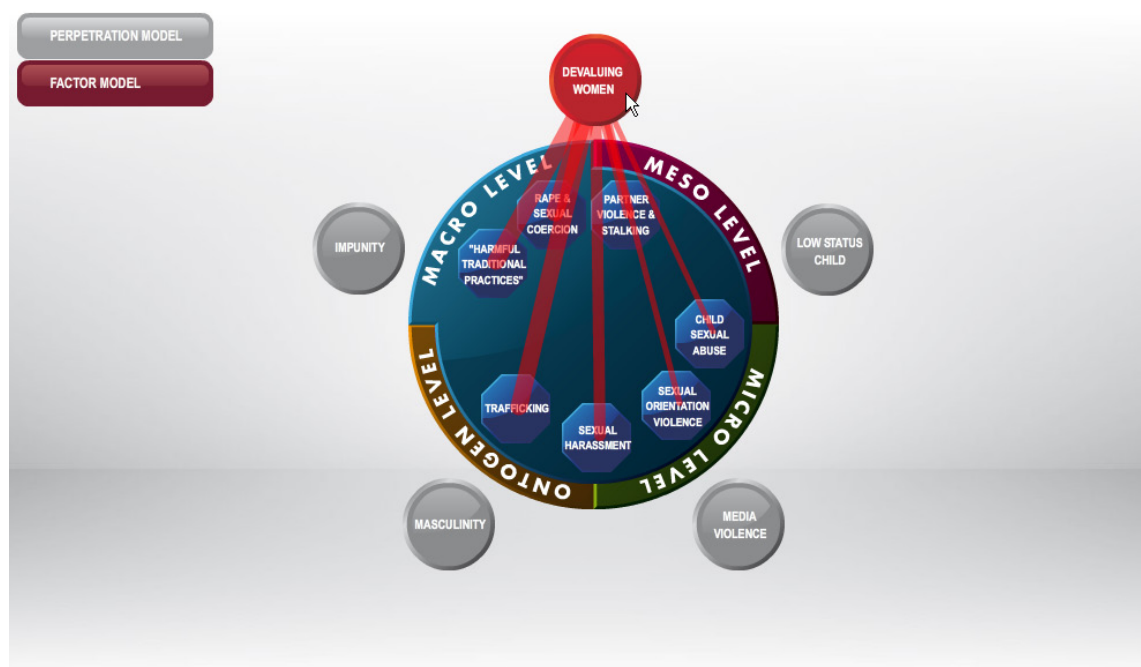




The second access route into the multi-level visual model of factors at play offers a different perspective on the presentation of research knowledge. This second viewing option flips the viewpoint to place the forms of violence in the centre and offer a choice of factors. This approach can be useful for

strategic considerations: when designing methods or provisions that could serve to reduce violence, the factor model will suggest where a positive impact towards violence reduction can be expected, it can also be used to show when strategies to address one factor need to include specific others.

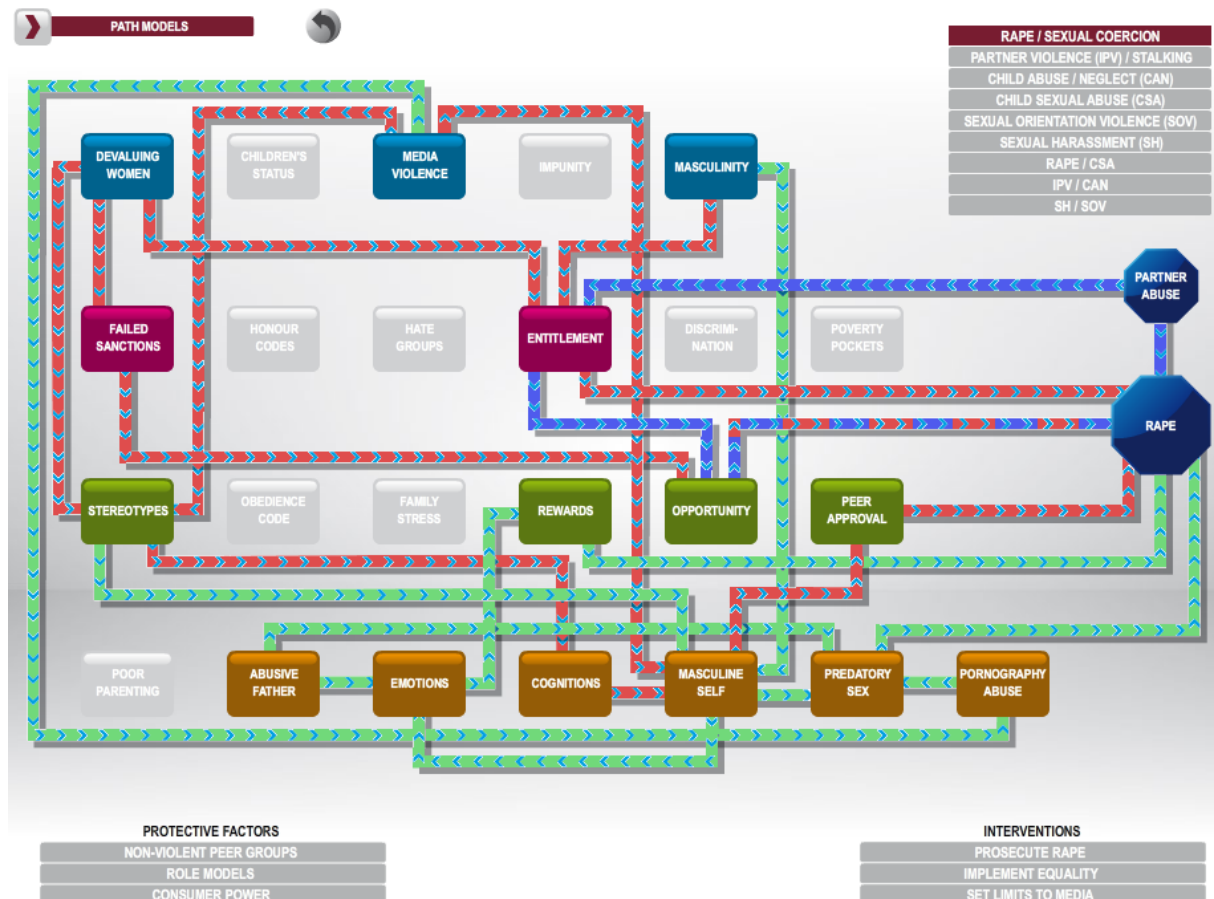
### Illustrative example: Screenshot of factor model for ‘devaluing women’ (Diagram 5.4)



The model shown thus far is static. A dynamic approach to modelling draws on the potential of path models to show the confluence of factors across all four levels which underpin likely perpetration. Path models are valuable not only for understanding how factors may interact to strengthen a negative effect, but also to explore the potential of protective factors found in the natural social environment, as well as possible interventions. The interactive model then shows how the path leading to violence can become weaker.

In most cases, research knowledge suggests that there is more than one pathway leading to the form of violence in question. This can be illustrated by the path model for rape presented below. Certain patterns of interacting factors emerge as typical, although they are by no means separate or independent of each other; the presentation of different developments leading up to a propensity to rape is heuristic in nature. Three pathways are distinguished in the following model (for the screenshot, they have been coloured differently; in the model, this is an interactive function).

Screenshot of path model rape/sexual coercion (Diagram 5.5)



Path 1 (red in Diagram 5.5) originates in societal values and peer group attitudes, supported by a construct of the masculine self that seems to depend on power and being in control, and the negative influences may cumulate in a sense of entitlement. Men’s likelihood of perpetrating sexual assault is also raised by a high level of rape-supportive attitudes among their peers. Lack of sanctions creates opportunities; the confluence of opportunity and entitlement contribute to a higher probability of perpetrating rape.

Path 2 (green in Diagram 5.5) has a stronger foundation in life history and personality deficits. Negative childhood experiences, especially of

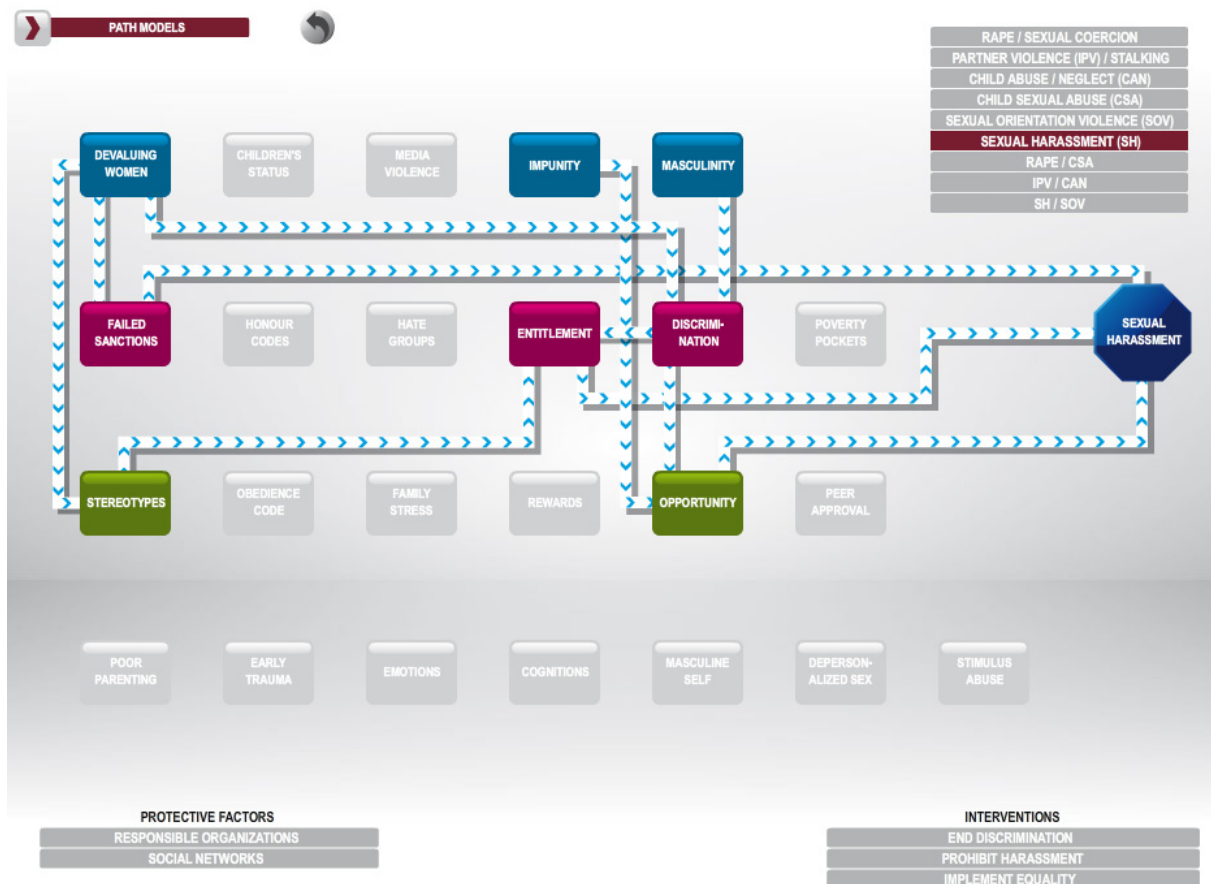
physical abuse, damage the capacity for empathy, underpinned by constructs of a masculine self they contribute to a depersonalised sexual socialisation oriented to conquest and control. High use of coercive pornography strengthens this emerging aggressive sexual disposition and coerced sex becomes perceived as both rewarding and as a confirmation of self.

Path 3 (coloured blue in Diagram 5.5) presents a routing that is implicated in the rape of wives or intimate partners. Once a pattern of coercive control and the use of violence for domination is established in a relationship — and there are different pathways leading to this, as the IPV path

model will show — men’s notions of entitlement to sex and their indifference to women’s feelings take root; successful domination makes the intimate relationship a permanent opportunity for non-consensual sex and rape becomes a likely component of the abuse, even when there is no childhood history or specific attitudes and peer group confirmation.

By contrast, our path model for sexual harassment does not show different routes, since these are not underpinned by the current state of research. There is little information available on the ontogenetic and micro-level background of the ‘disposition to harass’ and research points most clearly to factors on the macro and meso levels, interacting with peer approval.

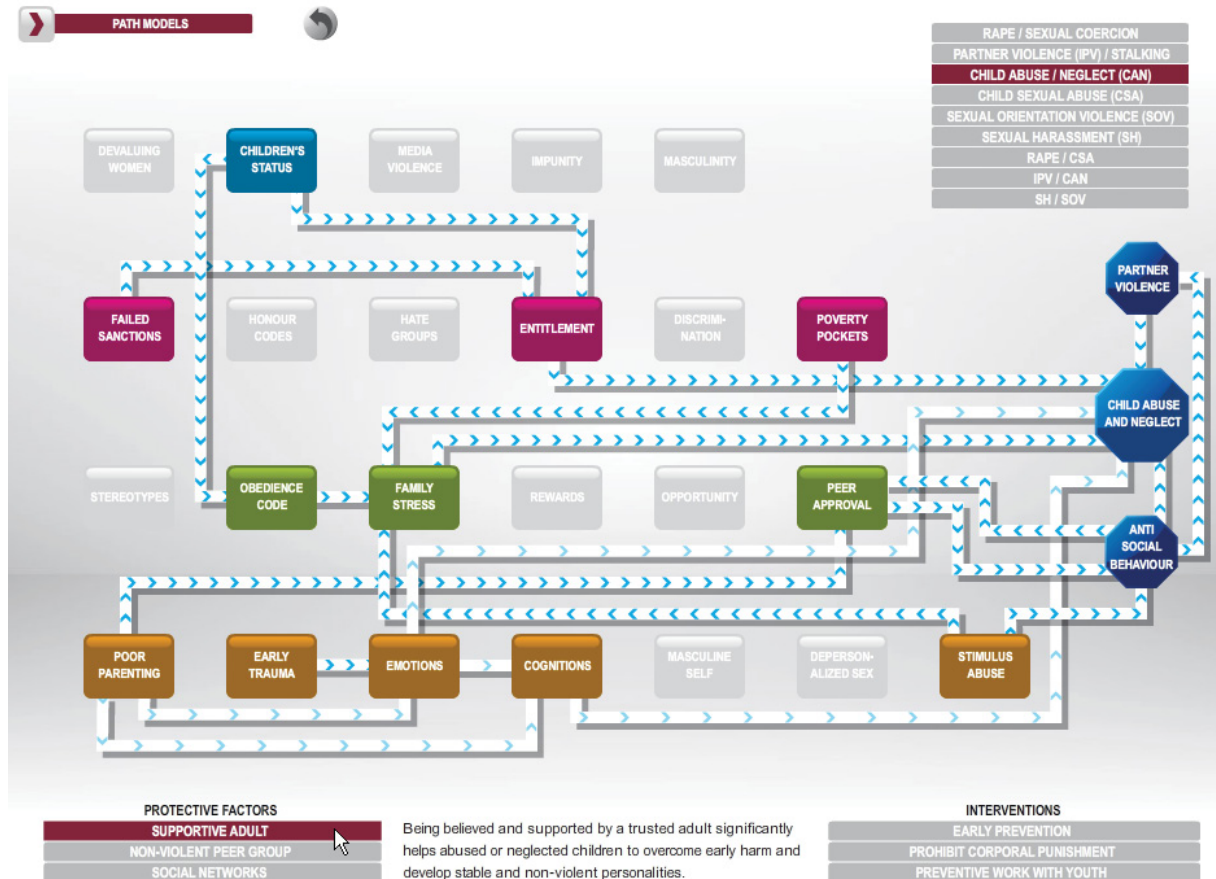
Screenshot of path model sexual harassment (Diagram 5.6)



Because the path models show the increased probability of certain forms of violence when factors come together, they can also show the effects of protective factors, derived from research on resiliency — on those individuals who successfully overcome adverse childhood experiences and environments — and on social environments which

embrace values of respect and equality. Prevention can take its cues from what is known about protective factors, thus going beyond the focus on violence. In the following path model one of the most often confirmed protective factors for children who experience violence has been activated: having a supportive adult who believes in them.

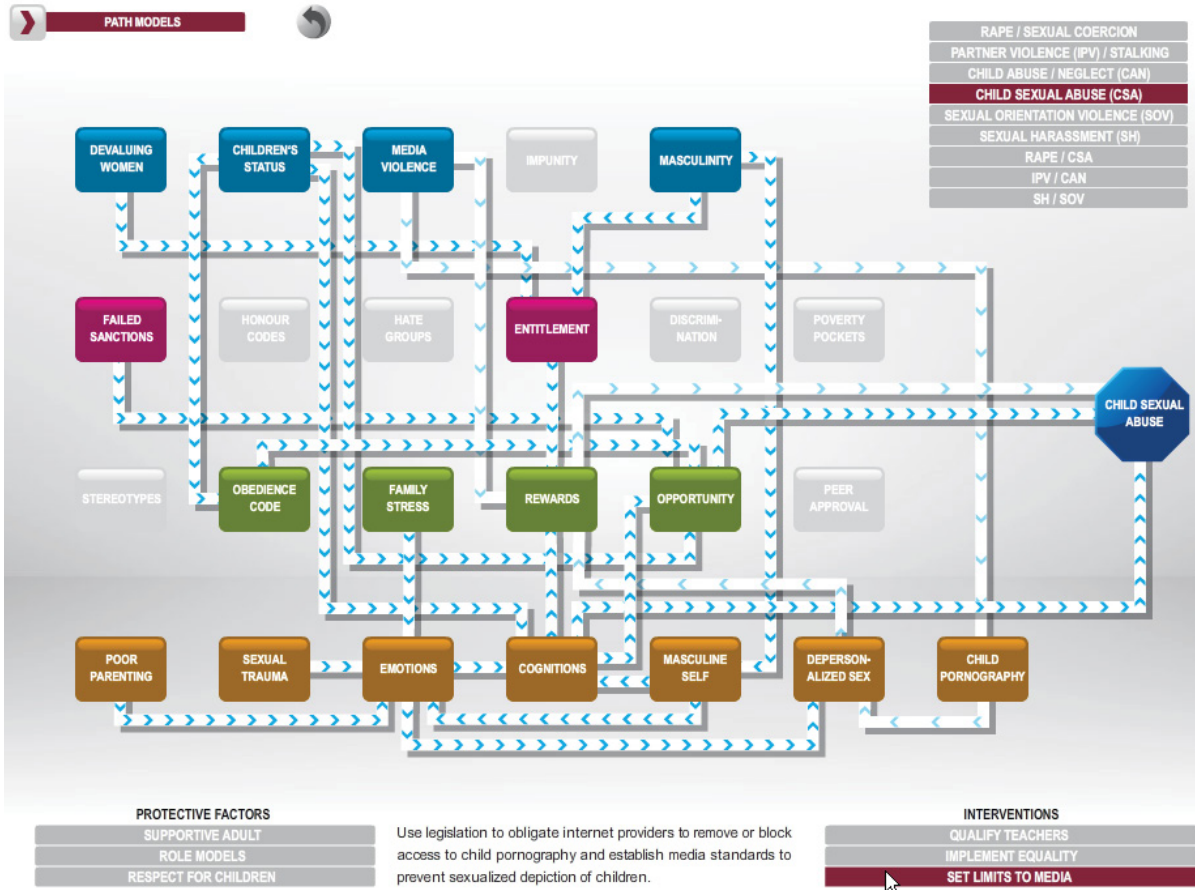
Screenshot of path model child abuse and neglect (Diagram 5.7)



When primary caregivers fail, a trusted adult can give the support needed for the emotional damage to heal and perceptions of a hostile world to be mitigated: this reduces the probability of becoming an abusive parent later. Note that the protective factors and interventions do not close off the negative route towards violence completely, they only take away some of its potency.

Prevention of child sexual abuse calls for an active strategy of interventions, since — unlike physical abuse and neglect — rewards and the satisfaction of desires play a reinforcing role which it is not easy to stop. In the following diagram the protective potential of reducing the presence of violence, coercion and sexualisation of children in the media is activated.

Screenshot of path model child sexual abuse (Diagram 5.8)



The final two diagrams on IPV (including stalking to the extent that it is post-separation harassment) show the most complex set of interacting factors. This reflects the fact that there are different patterns and types of abuse, and that the notion of men's entitlements in marriage and in the privacy of the home has deep roots. One pathway towards later abusive relationships with women can be linked to child abuse and neglect (in the interactive CD there are models combining these two forms of violence to show their similarities and differences). Early harm to emotional and cognitive ways of relating to the world promotes aggressiveness. Seeking approval in antisocial adolescent peer groups considerably raises the likelihood of later partner violence as well as later child abuse.

Note that the social relations of dominant masculinity and the related development of a masculine self with an overweening need for power and control play a key role. Another route towards IPV takes its origins from the societal values and is shaped by the 'micro-level' processes of social expectations and norms. Environments of poverty and depleted resources on the meso level contribute to family stress and violence in a very simple sense rewarding: the one who can strike out gets his/her way. This routing can include the pattern called 'common couple violence' <sup>(227)</sup> <sup>(228)</sup>.

<sup>(227)</sup>Johnson, M. P. (2008).

<sup>(228)</sup>Stark, E. (2007).

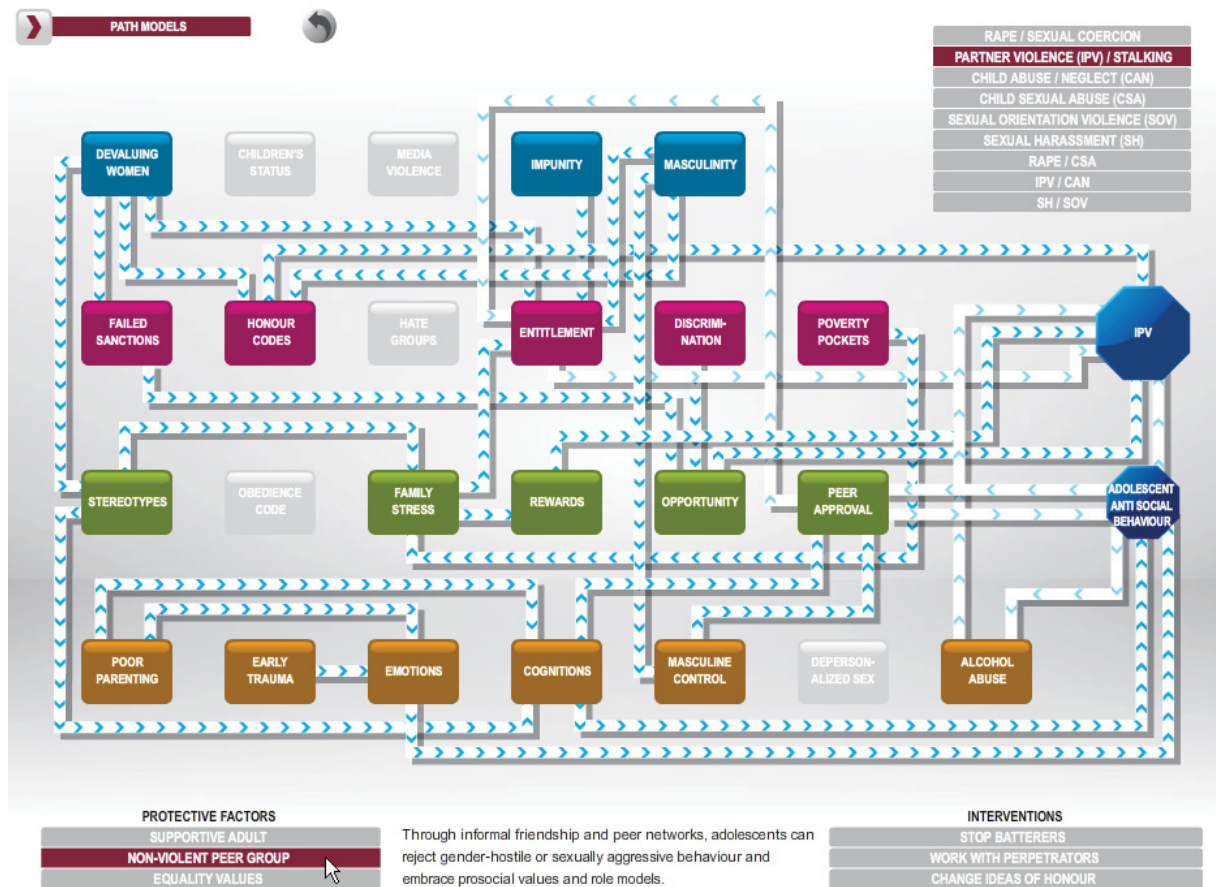


There are, however, two other pathways which are more strongly influenced by society and the social worlds of communities and organisations. Impunity and failed sanctions have been shown to increase the risk that the abusive partner will continue to use violence. Patriarchal thinking — dominance-oriented masculinity and devaluing women — not only contributes to stereotypes and

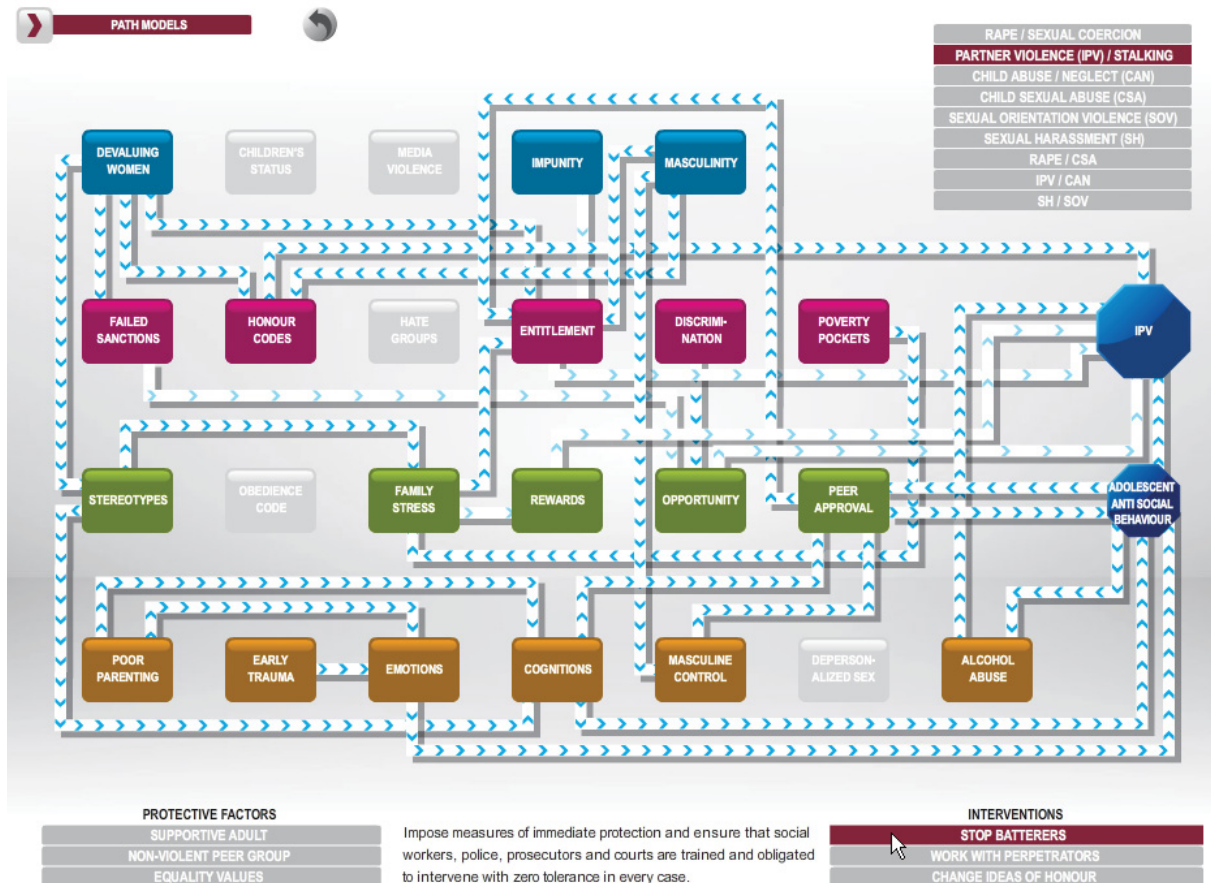
to the notion of entitlement, these factors also play into honour codes which legitimate ‘disciplinary’ violence against women.

In the following diagrams of IPV (5.9 and 5.10) the first shows the impact of non-violent peer groups as a protective factor in adolescence, the second has activated an intervention (‘stop batterers’).

Screenshot of path model intimate partner violence with protective factor intervention (Diagram 5.9)



Screenshot of path model intimate partner violence with intervention (Diagram 5.10)



## 5.5 Implications for policy and legislation

### 5.5.1 Interventions

Part of the assignment for the study of perpetration was to identify how the knowledge summarised in the research review could be addressed in various domains of law. In this section, we will discuss only such measures which can be plausibly linked to factors at play in perpetration.

The interventions below have been used in the path models. Many of them are to be found in different Member States as model projects, as sectoral

policies or as NGO initiatives. If the goal of reducing violence is to be pursued seriously, a legal framework is needed, for example ensuring sustainable funding and referral by statutory agencies or setting priorities and entrusting an appropriate body to issue guidelines and standards for intervention. Since inclusion in the visual interactive model has space limitations, only brief keywords are used to characterise each intervention.

#### *Child abuse and neglect*

**EARLY PREVENTION:** by legislation (duty of funding and provision) ensure wide availability of qualified preventive education and support, especially for parents at risk, and develop methods to include fathers.

**PROHIBIT CORPORAL PUNISHMENT:** prohibit all corporal punishment, by parents or care-givers as well as in institutions.

**PREVENTIVE WORK WITH YOUTH:** develop psychosocial interventions for youth on an antisocial developmental path and ensure state funding and evaluation of school and NGO-based preventive work.

*Child sexual abuse*

**QUALIFY TEACHERS:** provide all professions working with children with knowledge and skills to recognise signs of abuse and to strengthen children's self-confidence and personal safety.

**IMPLEMENT EQUALITY:** establish stronger legislation on gender equality and children's rights, spelling out standards, responsible actors and methods and accountability.

**SET LIMITS TO MEDIA:** use legislation to oblige Internet providers to remove or block access to child pornography and establish media standards to prevent sexualised depiction of children.

**RISK ASSESSMENT:** establish standards through legislation to ensure evidence-based assessment and therapy of child sexual abusers, drawing on all levels of the perpetration model.

*Intimate partner violence*

**STOP BATTERERS:** impose measures of immediate protection and ensure that social workers, police, prosecutors and courts are trained and obliged to intervene with zero tolerance in every case.

**WORK WITH PERPETRATORS:** require identified batterers to attend gender-based cognitive-behavioural counselling programmes after screening.

**CHANGE IDEAS OF HONOUR:** in cooperation with NGOs and communities, develop processes to reduce social approval of extremist or fundamentalist beliefs and attitudes.

**EARLY PREVENTION:** by legislation ensure the availability of preventive education for parenting, including engaging boys and young men.

*Rape and sexual assault*

**PROSECUTE RAPE:** ensure recording of all reports of rape, thorough investigation and, where evidence permits, prosecution.

**IMPLEMENT EQUALITY:** establish stronger equality legislation with standards, responsible actors, methods and accountability.

**SET LIMITS TO MEDIA:** establish human-rights-based standards and bodies to limit media depiction of violence, sexual coercion and degrading portrayal of women and of children, with state-funded media watch.

*Sexual harassment*

**END DISCRIMINATION:** inspection and penalties with a strong legal foundation to ensure workplace measures for gender equality and respect and ensure effective procedures for protection and redress.

**PROHIBIT HARASSMENT:** prohibit sexual harassment as a course of conduct causing fear or distress in any context and make protection measures available.

**IMPLEMENT EQUALITY:** make anti-discrimination laws effective by providing for remedies and sanctions.

*Sexual orientation violence*

**ESTABLISH LGBT RIGHTS:** remove all exceptions in criminal law excusing violence and all provisions discriminating against LGBT people.

**PREVENTIVE YOUTH WORK:** develop methods of youth work and education on non-violence and sexual ethics and guarantee state funding for school and NGO-based preventive work.

**END LGBT PREJUDICE:** develop and establish awareness-raising and educational approaches with multiple methods to eliminate prejudice and discrimination against LGBT people.

This list of interventions is by no means complete. The purpose of a model is to illustrate possibilities, and other interventions might be substituted, or these modified, if they do not fit well into the

overall context of a particular country. Thus, it was a separate step in the work to inquire about the compatibility of possible recommendations with legal and policy frameworks in different Member States.

In our follow-up questionnaire, we asked the national experts to assess selected measures which might address perpetration and to say whether they thought such measures would be feasible and whether an EU attempt to promote them would be desirable. In the final section of this chapter, the thinking behind the propositions, their connection to the main factors in the perpetration model and the results are presented <sup>(229)</sup>.

### 5.5.2 Selected measures addressing perpetration

#### (a) Factors ‘impunity’ and ‘failed sanctions’

It is beyond the scope of this study to resolve the generations-old debate on the role of criminal law in deterring crime. In the common experience of modern democracies, perceptions of fundamental rights are significantly changed when acts of violation, domination and coercion are no longer legally permitted by explicit exceptions in criminal law. As long as the law excludes acts of violence from its purview, this at the very least condones and certainly not does not prevent perpetration. The factor ‘impunity’ refers to such traditions as legal definitions of rape which apply only ‘out of wedlock’; provisions declaring the rape of a girl child forgiven if the rapist subsequently marries her; allowing parents the use of physical force inflicting pain on a child for the purpose of discipline; or the exclusion of assault within intimate relationships from public prosecution. A similar effect can be expected when those institutions legally charged

<sup>(229)</sup>Measures concerning media violence and stimulus abuse received mixed responses and therefore were not included in this section.

with imposing sanctions or setting limits to permissible behaviour fail to do so.

#### *Possible legal measures to counter this influence*

- ◆ Remove all exceptions in criminal law, whether special or general laws, which provide impunity or allow for mitigation in respect of any act or form of VAW, VAC or SOV. This would include penalising all sexual violence including rape in marriage.
- ◆ Eliminate the possibility of referring a complaint on any of these counts to private prosecution and clarify that prosecution is in the public interest.

For both of these measures, 19 of the national experts thought they should be minimum standards and that the measures were either already compatible with their legal systems or could be made compatible. A few expressed doubts, pointing out that sentencing must generally be able to consider mitigating factors and that prosecution might not always be in the interest of the victim. There seems to be a high potential for consensus on eliminating impunity and, even more strongly expressed in many national reports, on ensuring that the criminal law is implemented effectively.

#### (b) Factors ‘devaluing women’, ‘masculinity’ and ‘gender stereotypes’

Research on VAW points to a strong influence of **gender inequality**—power relations, related values and norms, social belief in male entitlement to sex and services from women, stereotyped notions of masculinity and femininity — which create a conducive context for violence, abuse and harassment. Similar inequalities and related values, norms regarding heterosexuality and social beliefs create conducive contexts for SOV. Here, the factor of hierarchies within masculinity are particularly conducive to violence, but so are ‘heteronormative’ beliefs which cannot tolerate any deviation from heterosexual standard. Gender differences in the victimisation of girls and boys also suggest



that the perception of children as vulnerable and available for abuse to satisfy perpetrators' wishes are influenced by the pervasive and persistent impact of gender and generation-based hierarchies.

*Possible legal measures to counter this influence*

- ◆ Stronger equality legislation could be required to establish standards, responsible actors and methods of addressing VAW and SOV and could furthermore place a legal duty on public agencies to both promote sexual and gender equality and reduce acceptance of gender-based violence.

The assessment of the current state of equality legislation by national experts yields a mixed picture. Standards, responsible actors and methods for promoting equality and addressing VAW are not well established across the EU and it is even less the case that there is a legal duty on public agencies to promote sexual and gender equality and reduce acceptance of VAW and SOV (only seven clear 'Yes' answers to VAW and five for SOV). Furthermore, the implementation of the standards, responsible actors and public duties is often weak or not monitored, as noted in the national reports.

The national experts were generally in favour of harmonising equality law across the EU in these respects, although some agree whilst being unsure whether this is feasible. Almost all, however, attach either a medium or a high priority to such standardisation.

**(c) Factors 'sense of entitlement' and 'distorted cognitions'**

Research on perpetrators of IPV/domestic violence supports explanatory models of **learned behaviour** which emphasise the role of normative beliefs about its social acceptability, men's perception that there will be low/no negative consequences, family history of antisocial behaviour

and constructs of masculinity. It also points to co-occurrence of physical and psychological violence and a pattern of coercive control in close relationships.

*Possible legal measures to counter this influence*

- ◆ Providing police with the power to remove/bar perpetrators for a limited time period can be a means of providing immediate, short-term protection to the victim while conveying a strong zero tolerance message to the perpetrator.

While many of the Member States have these or similar measures, and 25 national experts set the priority for an EU standard as high (21) or medium, there were also a number of comments suggesting that there would be resistance or scepticism towards such regulations, and not all were convinced that it would be feasible.

- ◆ Detaining or removing the perpetrator can further be linked to offers of proactive victim support and cognitive-behavioural perpetrator programmes. This intervention model requires legislation in several domains of law: creating a police power of preventive intervention; administrative regulation of data sharing; civil law injunctions/protection orders; advocacy and support for victims; and programmes for perpetrators.

Laws or policies which link victim safety and support with accountability for perpetrators received strong support from national experts, only one considering that setting an EU standard might not be feasible. However, only 12 experts said that their Member States had standards concerning the placement of perpetrators of domestic violence/IPV in (specialised) programmes by law, policy or both.

**(d) Factors 'children's status' and 'entitlement'**

Violence against an adult partner predicts **child abuse** and neglect (high level of co-occurrence)



and there is also strong evidence that witnessing IPV has the same harmful effects on a child as being directly abused. It is a contributing factor, although not a determinant, to later abusive parenting. In view of these findings and in light of the UN CRC, the duty of the state and in particular of the courts to uphold child welfare extends to knowledge-based consideration of the effects of child contact (access) with a parent known to use violence.

*Possible legal measure to counter this influence*

- ♦ By implication, prior to any decisions being made by a court affecting a child, such as those concerning separation, divorce, custody and visiting rights, endangerment to the well-being of the child through continued contact with a parent who has been violent to a current or former spouse, partner or other member of the household must be considered. Family law should require a formal assessment as to whether contact with a perpetrator of IPV will harm the child or endanger the life and safety of the mother.

Only six national experts confirmed that such an assessment was currently a firm requirement, in a further 11 Member States it is discretionary and in 10 it is not ensured at all. The further responses indicated that there might be many objections to standardisation in this area. Most often, experts predicted resistance against the EU intervening in the sphere of family life.

**(e) Factors ‘discrimination’ and ‘failed sanctions’**

The literature review concluded that a permissive environment is a conducive context for **sexual harassment**. While there is little research on individual characteristics of harassers, organisational factors are emphasised here, as well as cultural norms and customs defining vocations, workplaces or public arenas as masculine territory.

*Possible legal measures to counter this influence*

In order to address sexual harassment more comprehensively and effectively, legislation could penalise sexual harassment as a specific offence, both at work and elsewhere (possibly including stalking).

While our study found that this is rarely the case, 20 national experts thought it should be an EU standard, seven being uncertain whether the concept is sufficiently well understood as well as expressing concerns about the burden of proof and implementation. All but three thought standardisation would be possible or feasible.

**(f) Factors ‘poor parenting’ and ‘hostile masculine self’**

Children who witness inter-parental violence or suffer direct violence from a parent do not necessarily go on to become violent. However, longitudinal studies suggest that childhood experience of **‘unskilled parenting’** in the family of origin contributes directly to poor and abusive parental care of one’s own child. It is an important causal factor in adolescent antisocial behaviour (especially in boys) and a strong predictor of the use of IPV as an adult.

*Possible legal measures to counter this influence*

Programmes and measures to ensure minimum skills in parental care could be strategically important for violence prevention. While one cannot legislate for good parenting, legal frameworks for prevention can ensure that low-threshold voluntary programmes to support and to consult on parenting skills are available and free of charge during pregnancy and early childhood. It would be especially important here to find ways of engaging reluctant fathers.

According to the national experts, 13 Member States do not legally provide for any educational

programmes for parenting with the aim of prevention of violence in the family; in only five are they widely available and in only three do parents have a right to such assistance. Availability for parents at risk of possible abuse or neglect is not significantly better. At the same time, standardisation in the EU is regarded with scepticism.

In summary, there appear to be a number of points of entry for improving interventions which

address factors which are associated with perpetration and prevention more widely across the EU. There were, however, differences in the assessment of feasibility of harmonisation among the national experts. Chapter 4 of this report outlines a range of routes which can be taken within the EU towards developing and implementing minimum standards.

## Chapter 6 — Conclusions and recommendations

### 6.1 Introduction

The central task for this study was to provide a coherent analysis of the need for, possibilities of, and potential hurdles to standardise national legislation across three fields of violence VAW, VAC and SOV, for the EU Member States.

In Chapter 4 an overview and analysis were given of which minimum standards should be taken as a starting point when devising an effective EU approach towards VAW, VAC and SOV and which possibilities there are in EU law to harmonise legislation in the domain of VAW, VAC and SOV.

Taking the findings in Chapter 4 as point of departure, Section 6.2 addresses the question of the feasibility of harmonisation of the identified standards<sup>(230)</sup>. It gives an overview of relevant international minimum standards, the revisions or additions proposed to these standards and to what extent there is a legal basis to include such standards in EU law.

The fields of violence are connected to various areas of law: private law, criminal law, family law, migration law, health law, labour law, including social welfare law, and cooperation in criminal matters, but also to different policy areas (justice, health, social work, victim support and education).

Based on the observations made in Section 6.2, Section 6.3 draws conclusions and makes recommendations for directions for a coherent, overall EU-level policy to reinforce the protection of women, children and LGBT people.

### 6.2 International minimum standards

#### 6.2.1 VAW, VAC and SOV as human rights violations

##### *International standards*

All EU Member States have ratified the international treaties that oblige them to combat VAW, VAC and SOV as human rights violations. This implies an obligation for Member States to end impunity and prohibit all violence, to provide adequate protection and to ensure redress. The empirical results of the comparative analysis show, however, that the implementation of the various general and specific legislative measures referred to in the international human rights framework is frequently insufficient.

The foundations of all three fields of violence are rooted in societal structures of inequality, discrimination and/or lack of access to fundamental rights. Strategies to reduce violence require complex and coordinated approaches across different domains of law, as well as effective linkages between law and social support. Throughout this study, the necessity and benefits of integrated approaches and their potential for real change have become evident. Especially in the field of VAW and VAC, a *comprehensive* approach is needed comprising of measures in different areas of law as well as for different administrative, social and educational measures. This is reflected in UN approaches and has been articulated in a *proposed revised standard* for the EU and its Member States (Annex 2, Table of standards — VAW 4, VAC 1).

##### *EU legal basis*

The planned accession of the EU to the CoE European Convention on Human Rights and the entry into force of the EU Charter of Fundamental

<sup>(230)</sup>These standards are included in column 1 of Annex 2.

Rights are important steps in fostering a more comprehensively oriented fundamental rights culture in the EU.

However, the application of the Charter of Fundamental Rights is limited because of Article 51 of the same Charter, which provides that the Member States are only bound by it when they are implementing EU Law and that the Charter will not establish new powers or tasks for the EU or modify powers or tasks. The Charter does not provide for a general legal basis for adopting legislative measures relating to general human rights obligations.

In order to develop a comprehensive legislative approach, the following subsections identify the minimum standards that need to be included in such a comprehensive approach, as well as their possible legal basis.

### 6.2.2 Substantive criminal law

#### *International standards*

A general standard is that no act of VAW, VAC or SOV should be excused or legally declared permissible. EU Member States have taken different ways to implement this principle: specific definitions in criminal law, either as a dedicated law, a specific offence, or a provision for aggravated circumstances, have all been used to good effect. It is also possible to ensure, through guidelines for police or prosecutors or guidelines relating to sentencing, that existing general provisions of criminal law are understood to make no exceptions. The preference for one or the other method of criminalisation depends both on traditions of legal systems and on characteristics of the form of violence in question.

Some forms of violence require specific measures. This is particularly true of all forms of

violence involving a course of conduct which undermines the integrity of the victim over time. Stalking, for example, has proved difficult to prosecute under general provisions, leading some Member States to create a specific offence. IPV frequently escapes the grip of criminal law provisions because these focus on single incidents and physical attacks, some of which may not cross the threshold for criminal justice action. Innovative approaches in recent years have thus tried to capture the oppressive pattern of coercive control which entraps victims and deprives them of fundamental freedoms. Examples here are the legal concepts of ‘gross violation of a woman’s integrity’ (Sweden) or ‘gender violence’ encompassing ‘all acts of physical and psychological violence including offences against sexual liberty, threats and coercion’ (Spain).

Child protection law on the other hand is generally better able to deal with offences which consist of a course of conduct and since the threshold of state intervention is usually an assessment of endangerment or (anticipated) harm to the development of the child. In criminal law the emphasis is on punishment of certain acts of physical or sexual abuse and violence although the harm to the child may be equally serious when there is prolonged psychological abuse or neglect.

The international consensus and basic principle is that the law cannot tolerate violence. The findings of the study have led to the articulation of proposed revisions of and additions to existing relevant minimum standards which need to underpin (development of) legislation in all EU Member States.

- ◆ IPV: criminalise *intimate partner violence as a course of conduct* instead of single incidents (VAW 4).
- ◆ Stalking: establish a criminal offence of repeated violence including undermining the integrity of the victim and restriction of liberty (VAW 4).

- ◆ Rape/sexual violence:
  - establish the absence of consent as the defining element of sexual offences against and rape of adults (see VAC 2);
  - enable prosecution also when rape takes place in marriage (VAW 4);
  - penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance (VAW 4).
- ◆ Sexual harassment: penalise harassment, including sexual harassment, in any context (VAW 20).
- ◆ Ensure that all acts of SOV are punishable either through specific laws or definition of aggravating circumstances (SOV 1).
- ◆ Trafficking: exempt victims of trafficking from prosecution for offences committed while under control of, or attempting to escape from, the trafficker (VAW 21).
- ◆ Criminalise extraterritorial acts of violence when there is a cross-border dimension (VAW 4).
- ◆ Child sexual abuse:
  - criminalise all forms of sexual abuse regardless of the gender of the victim or perpetrator (VAC 2);
  - establish a strict liability offence for sexual acts with or involving children below the age of consent (VAC 2); and
  - criminalise sexual acts involving children up to the age of 18 misusing a position of trust and/or authority and harmful sexual practices (VAC 3).
- ◆ VAC generally: provide sufficient time to start criminal procedures (statute of limitation) after reaching the age of majority (VAC 4).

#### *EU legal basis — substantive criminal law*

The exhaustive list of crimes in Article 83 TFEU does not include most of the crimes discussed here. Furthermore, the limitations listed in Article 83 TFEU pose difficulties regarding most forms of crime under study here, mainly relating

to the requirement of a cross-border dimension. Only for the crimes of trafficking and child sexual exploitation — crimes which often have a clear cross-border dimension — is the legal basis for harmonisation clear. Considering the requirements of Article 83, the legal basis for harmonisation for most minimum standards could not be identified *prima facie* or at least requires further legal action or interpretation.

In the field of VAW, a clear tendency towards convergence exists across Member States as regards criminalising rape within marriage and there is a trend towards criminalising stalking as a separate offence. With respect to introducing a criminalisation of IPV based on course of conduct and the establishment of explicitly consent-based definitions of rape and other forms of sexual violence, empirical findings reveal that Member States still diverge in this respect, even though a development towards consensus is visible.

A legal basis for approximation of national law for these two forms of VAW can be achieved by enlarging the area of crimes with a special procedure through the use of Article 83.1 TFEU. However, it is for the Council to decide whether it wants to use this newly introduced competence. Ultimately it requires unanimity across Member States.

For EU measures in the field of criminal law relating to child *physical abuse and neglect* no legal basis could be identified, except for child trafficking or CSEC. However, it could be argued that grooming via the Internet is essentially not limited by any geographical boundaries and therefore in this respect shares a cross-border dimension. Offences of FGM, FM and HBV may also be committed by crossing borders, most frequently involving countries outside the EU.

Only a minority of Member States recognises SOV explicitly in law. As recommended by the EU Fundamental Rights Agency the model of



the framework decision on racism and xenophobia might be followed: '[...], the European Commission should consider proposing similar EU legislation to cover homophobia and approximate criminal legislation in the Member States'<sup>(231)</sup>. As indicated in Chapter 4, no legal basis for such an initiative could be identified.

### 6.2.3 Criminal procedural law: investigation, prosecution, victims' rights

#### *International standards*

The principle of *due diligence* is a minimum standard which unequivocally underlines the obligation of states to provide effective and timely protection where the risk to the victim is known or could have been known and the obligation to conduct prompt and thorough investigations of cases without undue delay (VAW 7). The due diligence principle has clear implications for the obligations of states to record, investigate and prosecute cases of discriminatory violence and violence against vulnerable victims.

The minimum standards articulated in the framework of this study can be summarised as follows (VAW 7, VAC 23–32, SOV 1):

- ◆ Member States shall demonstrate due diligence through the recording and prompt and thorough investigation of all reports of VAW, VAC or SOV.
  - Referral to private prosecution shall be excluded for all offences in the fields of VAW, VAC and SOV, regardless of whether they occur in the family or not.

- Initiating public prosecution shall be possible for all acts of VAW, VAC and SOV when there is an evidentiary basis.
- Where the prosecutor has the discretionary power to decide to prosecute, the views of the victim must be taken into account.

There is considerable variation in how reports and investigations are handled across Member States and between fields and forms of violence, implementation issues being the most obvious. Several existing minimum standards concern rights of victims in criminal proceedings and call for concrete measures which are crucial to realise those rights. Most notably, existing standards express the need to deploy sensitive investigative techniques informed by an understanding of gender inequality, discrimination and/or child development to avoid further harm (so-called secondary victimisation). The right to information and various procedural rights which ensure adequate participation of the victim in criminal proceedings (VAW 8–11) and the right to compensation (VAW 12) have already been accepted as standards in EU as well as in Council of Europe instruments (SOV 1).

Various measures have been articulated as proposed standards which aim to ensure the safety and dignity of the victim during investigation or when giving testimony. These are applicable to violence against women (VAW 8, 9, 10, 11), LGBT people (SOV 1) and victims of child maltreatment (VAC 23–32):

- ◆ Victims shall not be required to confront the perpetrator, nor shall victim and perpetrator be required to attend mediation or conciliation procedures as an alternative to prosecution (VAW 11).
- ◆ Necessary measures are to be taken to ensure that criminal investigations:
  - do not degrade women or LGBT people who have been subjected to violence (VAW 9);
  - are informed by a gender analysis of VAW and SOV and minimise intrusion, while

(231) EU Fundamental Rights Agency Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis ([http://fra.europa.eu/fra/Website/research/publications/publications\\_per\\_year/2008/pub\\_cr\\_homophobia\\_o6o8\\_en.htm](http://fra.europa.eu/fra/Website/research/publications/publications_per_year/2008/pub_cr_homophobia_o6o8_en.htm)).

maintaining standards for the collection of best evidence (VAW 9);

- minimise possible harm to a child victim or witness by ensuring that interviews be carried out by or through professionals specially trained for this purpose and take place, where necessary, in premises designed or adapted for this purpose (VAC 30).

A further standard is based on recognition of the frequently traumatic effect of rape and the urgency of securing evidence while respecting privacy rights:

- ◆ Make forensic examinations free of charge available to every victim of physical or sexual violence irrespective of criminal proceedings, the results not to be released without consent of the victim; establish the right to a female forensic examiner (VAW 7).

The level of successful prosecution can furthermore be enhanced by a number of measures, such as to:

- ◆ establish and implement rules on admissibility of evidence to protect the dignity and privacy of victims in cases of rape or sexual violence (VAW 8);
- ◆ ensure that in criminal investigations all interviews with a vulnerable victim or witness may be videotaped and that these videotaped interviews may be used as evidence in criminal court proceedings (VAC 30);
- ◆ suspend the right of the accused to question the victim directly in court in cases of VAW, VAC and SOC and limit this to questioning through a lawyer, the judge or similar representative (VAW 11, VAC 30);
- ◆ ensure separate, fit-for-purpose, waiting rooms so that victims and accused can enter and leave courts through different routes (VAC 30; VAW 11).

The CRC requires state parties to upholding a series of detailed child victims' rights during

proceedings (inter alia the rights to be heard, to representation, to free legal advice, to information and to compensation), to ensure the full realisation of general victims' rights (VAC 23, 26, 27, 30, 32). A more specific standard has been articulated to support the child when the parents' and the child's interests are in conflict:

- ◆ Ensure that a child victim is provided with a special representative, exclusive to the child and duty-bound to represent and act only in accordance with the interests of the child victim, from the outset of an investigation (VAC 26).

#### *EU legal basis*

Article 82 TFEU lists the rights of crime victims explicitly as one of the areas where measures may be proposed. At first sight the procedural limitations in this article appear to seriously restrict standardisation at EU level. The provision must be *necessary* to facilitate mutual recognition and police and criminal law cooperation, it must relate to criminal matters having a *cross-border* dimension, *the differences* between the legal traditions and systems of the Member States must be taken into account, and *only minimum rules* can be adopted. Notwithstanding these limitations, there is an established level of legislation in the EU Member States relating to victims' rights in criminal proceedings, following the implementation of the 2001 EU framework decision on the standing of victims in criminal proceedings.

The current revision of the framework decision into a directive, possibly also including the EU directive relating to compensation to crime victims in one legislative instrument, may lead to proposals for additional measures or further clarification of existing standards in these two instruments. It provides an opportunity to further elaborate Article 2.2 of the framework decision on the standing of victims in criminal proceedings (see the proposed standards relating to special

measures for women, children and LGBT, for instance, VAW 9, VAC 23–32).

The EU is currently also developing new directives on trafficking and child sexual exploitation, which elaborate proposals not only or specifically relating to criminal proceedings, but also for measures in particular in the protective sphere (mostly based on Article 82 TFEU). As also noted by the EU Fundamental Rights Agency when providing its opinion on the Stockholm programme ‘there is scope within the programme to develop a ‘joined up’ response to victims. Herein, a consistent and strengthened response to the needs and rights of seemingly diverse victim groups should be promoted in the [Stockholm] programme; a response that encompasses all victims of crime alongside the current focus to address the specific vulnerabilities of trafficking victims and child victims of sexual exploitation, which are often framed within responses to organised crime’<sup>(232)</sup>.

#### 6.2.4 Other protective measures

##### *International standards*

International standards require states to provide appropriate protective legal and other measures to ensure victims’ safety, notably in situations of immediate danger (VAW 13–16; VAC 6–22, SOV 2).

Alongside criminal legal provisions and protection orders, the standards in the field of VAW particularly emphasise civil protection orders. Access to emergency civil protection orders is crucial from a safety perspective as the legal instruments which can effectively protect the fundamental human right to life and health, as demonstrated by the findings in this study. This has led to the proposed standard for implementing the removal

order across Member States (VAW 13) as well as longer term protection orders and criminalising the breach of civil protection orders (VAW 14).

In addition, standards relating to the prevention of and protection against FGM, HBV and FM have received extensive attention in international instruments, although mostly in soft law instruments. In the majority of the EU Member States, however, they have in fact received little legislative attention. A standard is proposed that victims of these forms of violence whose resident status depends on their marital status have a right to apply for an independent residence permit irrespective of the duration of the marriage (VAW 15). A separate standard for granting asylum to recognise these forms of violence is not proposed. Rather, Member States must ensure that all relevant aspects of asylum claims are thoroughly assessed in order to grant, where necessary, international protection to victims of these forms of violence, in line with the Qualification Directive<sup>(233)</sup>.

With respect to children, a majority of the existing standards in international legal instruments belong in the domain of family law (or social welfare law or youth healthcare law and policy). Standards clearly point to the general obligation of states to protect children from all forms of violence (VAC 6–21), while respecting the rights of children (VAC 7) and taking gender differences into account (VAC 20). Child protection law usually describes as threshold of state intervention an assessment of the endangerment or (anticipated) harm to the development of the child (VAC 13).

States are called upon to provide support programmes for the family to assist in child-rearing responsibilities (VAC 9), as well as for children

<sup>(232)</sup><http://www.fra.europa.eu/fraWebsite/attachments/FRA-comments-on-Stockholm-Programme.pdf>

<sup>(233)</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Article 10d.

themselves (VAC 10). The researchers formulated additional standards on the need for widely available, timely and sufficiently differentiated protective and support facilities (VAC 10, 11).

In the field of SOV the elimination of any discriminatory legislation towards LGBT people, including in the field of family law, is a minimum standard which is clearly called for by both international standards (SOV 1). This standard is already included in EU law (SOV 2).

#### *EU legal basis*

The proposed minimum standards regarding the content of protection orders, invoked through either criminal or civil law, find no legal basis in EU law to allow the prescription of the *content* of a protection order across Member States. The proposed European Protection Order (January 2010, see paragraph 4.4) finds its legal basis in Article 82(1)(d) TFEU and is founded on the principle of mutual recognition of judicial decisions taken in one of the Member States. The Member States are competent to decide on the content of the protection order and the other Member States must recognise this decision.

The minimum standards containing protective measures embedded in migration law find their basis in Articles 79(1) and (2) TFEU. Because of the cross-border dimension often involved in trafficking in human beings, a directive providing for a temporary residence permit for victims of THB who cooperate with the authorities was issued. Although the competence is based in migration, this temporary residence permit should include medical assistance and a reflection period<sup>(234)</sup>. Extension of these rights for other forms of crime seems legally feasible, although only in relation to third-country nationals.

Family law and international and European private law are of particular importance, especially in relation to VAC. European law comes into play when family members move from one Member State to another, thus when they use the right of free movement within the EU. What kind of measure (law, soft law or policy) is needed to abolish obstacles to the free movement of persons largely depends on the specific situation.

With regard to the Hague Convention on the Protection of Children of 1996, its application needs to be strengthened. This could be achieved by adopting a new EU regulation to enhance the implementation of this convention. The recognition of any measures with regard to protecting a child by a state authority, including all administrative measures, should be recognised by operation of law throughout the EU. In addition, the flow of information and cooperation, outlined in Article 53 ff. Brussels II bis, could and should become more binding and be framed directly to include child protection.

The proposed European Protection Order aims to tackle almost the same issue. However, this proposal also relates to judicial decisions on protection measures which can be adopted by a competent authority, while the proposal finds its legal basis in the criminal law field. Whether there is a legal basis for such a regulation in Article 81 TFEU is another important point of discussion. The fact that the decision is not taken by a judicial authority seems to be no impediment for the adoption of measures under Article 81, since it refers to the mutual recognition of judgments and decisions in extrajudicial cases. However, the unanimity rule in relation to family law fully applies.

<sup>(234)</sup>Directive 2004/81/EC.

### 6.2.5 Support

#### *International standards*

International standards call upon states to establish a range of support services for victims in the field of VAW to alleviate the negative effects of violence and to provide safety. Emergency services should be securely funded and special attention is needed for immigrant women (VAW 17).

In the field of VAC, states are asked to take all appropriate measures to promote the recovery and social integration of children who have been abused and take all necessary actions to assist and support child victims (VAC 33). The setting up of advice and information services (telephone, Internet) is one part of it (VAC 37) (see also prevention).

In the field of SOV a standard is proposed to provide dedicated support services.

The researchers articulated proposed revision of standards in the area of support services based on empirical findings in the comparative analysis. Regularly across Member States national experts reported failures to provide services which are sufficient in capacity, geographical distribution and quality. Therefore revisions of standards are proposed that call upon Member States to provide a more specified delivery of support services, to ensure that all victims of VAW, VAC and SOV, including immigrant women, have access to them (VAW 17; SOV 3, VAC 33, 34, 35).

#### *EU legal basis*

The area of support services for victims in general, regardless of whether they are engaged in criminal proceedings, is a primary competence of the Member States (Article 168(7) TFEU) and has no legal basis for harmonising legislation across the Member States.

For victims in criminal proceedings, Article 13 of the EU framework decision on the standing of victims in criminal proceedings does address the issue of specialist services and victim support organisations. The article urges Member States to promote the involvement of victim support systems responsible for organising the initial reception of victims and for victim support and assistance thereafter, whether through the provision of specifically trained personnel within its public services or through recognition and funding of victim support organisations. Again, the process of revising the framework decision provides the opportunity to include several of the standards included in the annex.

### 6.2.6 Prevention

#### *International standards*

In the field of VAW, several international instruments call upon states to develop comprehensive, multi-sectoral and sustainable measures broadly aimed at preventing violence against women (education, public information programmes, information campaigns and public conferences) (VAW 18). The media are encouraged to report with respect for privacy and in a non-gender stereotypical way, but there is no monitoring mechanism, hence the proposal to set up specific mechanisms to that end (VAW 26). Concerning forms of violence which predominantly affect ethnic minority groups, several international instruments have called for awareness-raising campaigns on FGM and HBV and FM (VAW 22, 23, 24).

In the field of VAC, it is widely agreed that Member States should focus on preventive measures to facilitate a safe family life (VAC 34), prevention of re-offending (VAC 21, 35), development of school curricula (VAC 38) and engagement of the private sector in developing preventive measures (VAC



39). Regarding SOV, Member States have been called upon to undertake awareness-raising campaigns (SOV 4).

#### *EU legal basis*

It is difficult to identify a legal basis for the harmonisation of EU-wide prevention measures. It could be argued that prevention activities in the educational and information-distributing realm fall within *general health education*. As such EU measures could be based on Article 168(1) TFEU, but even in this case there is a complementary competence between the EU and Member States. This precludes finding a basis for harmonisation per se.

Several of the proposed minimum standards lend themselves more to translation into policy than into legislative acts relating to awareness-raising campaigns or public information programmes, for instance. It is noteworthy that one of the aims of the newly proposed directive on THB is the prevention of THB. The legal basis for this directive is sought in Articles 82(2) and 83(1) TFEU. Neither of these provisions refers to the prevention of crimes. Nevertheless, the provisions in the proposed directive include the adoption of measures to discourage demand, raise awareness and reduce the risk of people becoming victims of THB, and to consider the criminalisation of purchasers of services from victims of THB. This provision, however, leaves a great margin of appreciation to the Member States and is not aimed at harmonisation.

### **6.2.7 Capacity-building and training**

#### *International standards*

In particular with regard to VAW, quite detailed standards can be identified in international instruments. In the area of trafficking the Council of Europe Convention on Action against Trafficking

in Human Beings has articulated the criterion that persons working in the domain of trafficking need to be trained and qualified (VAW 21). Beyond this specific standard, states are called upon to develop a national plan of action, and, in consultation with NGOs and academic and other institutions, to set up an institution in charge of the implementation as well as of regular monitoring and evaluation of any legal reform or new form of intervention in the field of VAW (VAW 25).

The existing VAW standard specifically calls for training of judicial officials as well as vocational training programmes beyond the judicial domain. Based on findings in this study, indicating structural obstacles in the implementation of law due to limited expertise and knowledge among judicial and other professionals, additional standards have been proposed which articulate additional requirements for training activities (VAW 25, VAC 40, SOV 5).

#### *EU legal basis*

In general, there is no legal basis in EU law to harmonise legislative measures in the realm of capacity-building and training across the EU. Article 14 of the framework decision on the standing of victims in criminal proceedings relates to training for personnel involved in criminal proceedings or otherwise in contact with victims. It notes that, through its public services or by funding victim support organisations, each Member State shall encourage initiatives enabling personnel involved in proceedings or otherwise in contact with victims to receive suitable training, with particular reference to the needs of the most vulnerable groups, and particularly applying to police officers and legal practitioners.

Beyond this framework decision, Article 82(1)(c) TFEU might be relevant, but only to the extent that training is required in the context of judicial cooperation in criminal matters. Obviously the

scope of training and capacity-building called for by the standard extends beyond this. In light of the findings in this study, indicating that sufficient and adequate mandatory training is a *conditio sine qua non* for the effective implementation of any laws across the fields of VAW, VAC and SOV, this is an area that deserves attention other than through legislative measures.

### 6.2.8 Research

#### *International standards*

Again, most existing standards in international instruments directly call for strengthening the knowledge base on forms of violence against women (VAW 27). The collection and publication of administrative statistics are considered fundamental to assessing and monitoring measures and institutions. While in the area of VAC the emphasis is on evaluative research (VAC 41), in relation to international standards regarding VAW the call is broader and so is the goal: to inform policy and strategy development.

#### *EU legal basis*

There is no legal basis in EU law to harmonise the laws and regulations of the Member States concerning research or collection of administrative data, although EU institutions such as Eurostat can request the Member States to collect statistics. The results of this study indicate that Member States differ widely in the quality and consistency with which they collect reliable prevalence data for the three fields of violence. This is an obstacle to developing a research database and well-founded knowledge as a basis for the development of evidence-based legislative and policy-based measures. There is a growing need among Member States to exchange and compare data. Support at an EU level to develop a stronger research culture in these fields across the EU Member States seems crucial. The

Commission's communication COM(2006) 437 'Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: An EU Action Plan 2006-2010' demonstrates that the Commission is committed to support Member States towards harmonised indicators and data collection and already works with Eurostat on this.

### 6.2.9 Interim conclusion on legal basis for legislative acts

The above analysis of the extent to which there is a basis in EU law for the harmonisation of minimum standards in an EU legislative act in the fields of VAW, VAC and SOV reveals a mixed picture.

The findings as presented in Chapters 2 and 3 regarding the current state of affairs with respect to legislative measures across Member States revealed many divergences. Even within Member States, coordination of policy efforts across VAW, VAC and SOV is regularly absent. Given the scope and content of the challenges that Member States face when developing a coherent and integrated approach on a national level, let alone from a European perspective, legislation is not necessarily the first or the most appropriate strategy. Legislation inevitably brings about a certain level of fixity in definitions and procedures. In areas like VAW, VAC and SOV, where many innovations take place, and several approaches and interventions are still experimental, policy-based initiatives to support and encourage convergence could be a more productive option towards achieving more consistency across Member States. This will be the focus of the next section.

### 6.2.10 Convergence through other measures

In Section 4.4.3 a range of possibilities for the EU has been addressed to encourage the development

of convergence through policy measures. Various examples are presented in the three fields of violence, notably the development of multi-agency interventions and the provision of basic protective services (shelters, rape crisis centres). In general, it has been concluded that there is a strong commitment from the European Council and Commission to put the issues of victims' rights, both in general as well as more particularly in relation to VAW and VAC, and the issue of SOV higher on its agenda. Various programmes, strategies, or Council conclusions demonstrate the EU's strong commitment towards achieving progress in combating violence across the three fields of violence<sup>(235)</sup>.

#### *Open Method of Coordination (OMC)*

As the determination of a proper legal basis for several of the proposed minimum standards will be difficult, the open method of coordination could be a key to action in areas where a treaty base is lacking but a common concern is perceived. The open method of coordination provides a way to encourage Member States to jointly identify the objectives they wish to achieve. There are no strict rules on the requirements of an OMC, leaving substantial flexibility in its practical application. Member States, '...can choose whether and to what degree they take European guidelines into account. The goals agreed to at the European level are not binding, and there are no sanctions other than naming and shaming if a national government decides not to act on them'<sup>(236)</sup>.

(235) The current Belgium Presidency of the EU (July-December 2010) also notes that combating VAW will receive full attention ([http://www.eutrio.be/files/bveu/media/source1854/documents/27782\\_PL\\_SPF\\_UK.pdf](http://www.eutrio.be/files/bveu/media/source1854/documents/27782_PL_SPF_UK.pdf), p. 33).

(236) Schaefer, A., 2006, 'A new form of governance? Comparing the open method of coordination to multilateral surveillance by the IMF and the OECD', *Journal of European public policy*, Vol. 13(1), pp. 70–88.

The advantages of the OMC in the area of VAW, VAC and SOV are manifold: it can help to improve existing EU legislation and its implementation; measures can be adopted quickly, because OMC-type EU-level decision-making is not subject to a prolonged legislative process; it provides opportunity for broad, multi-level participation of civil society, regional and local actors<sup>(237)</sup>. Given the historically strong involvement of civil society and NGOs in the field of VAW, VAC and SOV, this is a characteristic of the OMC that provides an excellent framework to further develop and strengthen civil participation. Several criteria have been identified for applying the OMC<sup>(238)</sup>:

- ◆ There should be a need to address structurally rooted national differences. In such cases, it is either undesirable or politically unrealistic to achieve harmonisation. If harmonisation is undesirable, the OMC may be particularly suitable because it promises to improve the viability of continuing diversity through processes of adaptation and enhancement of national/sectoral practices. If harmonisation is politically unrealistic, the OMC may offer a politically more feasible 'second best' option.
- ◆ Because the OMC is based on legally non-binding instruments, relevant actors must be under sufficient political pressure (e.g. by influential domestic groups or significant parts of the broader public) or have sufficient positive incentives to commit to learning and change.

(237) von Homeyer, I., Klasing, A., Kraemer, R.A., *Exploring the EU Open Method of Coordination*, paper for the workshop 'The Open Method of Coordination — Risks and Chances for European Environmental Policy', 22 March 2004, Brussels. Commissioned by the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management (revised version, 8 July 2004), p. 7.

(238) von Homeyer, I., Klasing, A., Kraemer, R. A. *Exploring the EU Open Method of Coordination*, paper for the workshop 'The Open Method of Coordination — Risks and Chances for European Environmental Policy', 22 March 2004, Brussels. Commissioned by the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management (revised version, 8 July 2004), p. 10.

- ♦ The OMC does not deliver quick results because it is based on an iterative learning process. Consequently, the method is not suitable to address problems for which the premium on immediate results is particularly high.
- ♦ Although the OMC is unlikely to yield quick results, decision-making under the OMC is quicker than under the Community Method. The OMC may therefore be used to exploit political opportunities to initiate political action.
- ♦ The problem to be addressed by an OMC must have a significant multi-level dimension (comprising at least the national and the EU level), otherwise purely national or EU-level measures would be more appropriate than using the OMC.

Several of the minimum standards as identified in the Annex 2 could provide the larger framework and guiding principles in the process that an OMC would open up between Member States. It would provide the opportunity to further assess the feasibility of the implementation of certain standards across the Member States. Whether all EU Member States would support them is another matter. The data from the empirical study demonstrate the areas where legislative or policy measures reflect a tendency towards convergence (e.g. the link between protection and the criminal justice system in the fields of VAW and VAC or the establishment of a consent-based definition of rape or parts of child sexual abuse). Given the variety in Member States' approaches relating to certain areas and the question as to how legislation and policy measures relate to each other when trying to achieve implementation of certain standards, the OMC seems to be an appropriate 'intermediate' instrument to explore whether and how Member States could achieve common ground.

### 6.2.11 Feasibility of harmonisation

It is beyond the scope of this study, which covers a wide and complex set of domains of legislative and

policy measures, to address the question of feasibility of harmonisation for each standard as laid out in the annex.

The findings in this study indicated that it is precisely a coherent human rights-based perspective which is necessary in order to develop a comprehensive and integrated approach, to effectively address VAW, VAC and SOV and achieve a balance between providing protection, prevention and punishment. The findings also revealed that, on the level of Member States, both between and within them, there is still a profound lack in most Member States of such a coherent and integrated approach. From the perspective of subsidiarity, therefore, in the current situation it is appropriate and timely for the EU to deploy the instrument of the OMC to enhance the development across the EU Member States towards more convergence, based on a fundamental rights perspective.

In the next section, the overarching conclusions of and recommendations from the study are presented: they can be said to offer a roadmap for policy-based measures which would ensure a more coherent and integrated approach to VAW, VAC and SOV within the EU. In this section 'policy' is understood in the broad sense of an overall strategy with which the EU might develop a variety of measures over time, thus providing a framework for legislation as well as other methods of achieving greater unity and effectiveness.

## 6.3 Overarching conclusions and recommendations

### 6.3.1 Introduction

The challenge presented to this study was to answer the question whether there is a sufficient foundation on which the EU can develop a coherent policy to address VAW, VAC and SOV.

Previous chapters presented a synthesis of empirical findings alongside an analysis of the principles that have been established and elaborated in international law. On the basis of both, we conclude that such an overall policy is possible, timely, and promising. It can be framed so as to be compatible with the diversity of legal systems, institutional structures and sociocultural traditions across Europe. This final section sketches what such a policy might comprise.

Although overall approaches and concrete measures vary, Member States increasingly recognise the need for legislation to address and significantly reduce forms of violence that are rooted in discrimination and inequality or in lack of full access to fundamental rights. To be effective, such legislation needs an overarching policy framework that can link the different arenas of state actions and tie them to this goal. This is even more the case on the EU level, as the legal basis for harmonisation is limited.

In all three field of violence under study, international law and human rights-based policies have articulated principles and spelled out — to varying degrees of specificity — appropriate measures. This has mainly taken place through a focus on specific problems or with regard to only one of the three fields of violence. The final step of our comparative approach was to analyse how far the proposed standards converge across fields and forms of violence<sup>(239)</sup>. It emerged that most can, indeed, be synthesised and provide elements for an overarching policy framework.

The key international standards for this study (Annex 2) require that states recognise that violence against women and sexual orientation violence are forms of discrimination as well as human rights violations. Violence against children is

(239) Where standards are repeated in this text we do not, for reasons of space, repeat the referencing which appears in full in Chapter 4.

facilitated by their lack of access to fundamental rights, adapted to their developmental capacity and needs, but some forms are also founded on discrimination based on age.

Thus, **discrimination** and **access to fundamental rights** are the core points of reference for EU policy combating violence, not all measures will refer directly to these criteria; indeed, prevention should be aimed at arresting the process in which violence emerges at the earliest stage possible.

**The concept of ‘discriminatory violence’ offers potential to locate violence against women and sexual orientation violence clearly within fundamental rights, making it clear that the violations affect the status and well-being of social groups and not just individual victims. In conjunction with an understanding of violence based on the lack of full access to fundamental rights, a conceptual framing emerges that includes both the commonality across all fields of violence and the specific elements of violence against children within an integrated approach.**

On this basis, the following section comprises, on the one hand, *conclusions* from the research stating what is needed to combat violence effectively in all three fields of the study; the conclusions are framed into the context of obligations in international law, and envision a coherent integrated EU policy. On the other hand, *recommendations* for more concrete measures are set forth based on promising practices in Member States and their experience with implementing the general principles. They reflect varying degrees of convergence, from which steps towards approximation or coordination towards more consistent approach throughout the EU might be derived. In this sense the proposals aim at feasibility in the sense of a realistic medium-term potential for implementation in the 27 Member States.



### 6.3.2 An integrated human rights-based approach

With regard to all forms of violence under this study, both convergence and divergence could be traced. In many cases, however, the divergent approaches have the potential for reaching similar goals by different paths; there are different ways of meeting international human rights standards. For a coherent overall policy, the EU will thus need to draw on the full range of available instruments and methods for bringing diverse national legal and social institutions under the umbrella of equal and secure fundamental rights and freedoms for all. The policy will need to set both overarching and differentiated standards according to the form of violence being addressed. To this end a set of agreed definitions is an important first step (see the glossary).

National plans of action (NPAs) are widely recognised as the instrument of choice for combining general and specific goals, methods, indicators and timelines for making progress, and have been a required response to VAW, children's rights, trafficking and CSEC by international and regional instruments. Comprehensive NPAs on VAW are nonetheless rare in the EU, although this is the CEDAW standard. The UN Special Rapporteur has more recently called for specific NPAs to end violence against children. In all Member States, however, the NPAs in different fields or arenas of violence are seldom integrated or even connected through coordination processes:

- ◆ many NPAs addressing VAW are in fact focused entirely, or primarily on domestic violence;
- ◆ even comprehensive VAW plans of action rarely address violence against LGBT people, and while some include girls, they tend not to give extensive attention to children;
- ◆ plans of action on children's rights tend not to address protection from violence systematically, nor to address domestic violence;

- ◆ reports on the progress of children's rights under Article 44 CRC rarely include a gender dimension.

At present, no clear perspective has emerged on the best strategy for overall policy development. No Member State has produced a holistic NPA for the entire area of discriminatory violence, and given the wide range of stakeholders, sources of expert knowledge and NGO engagement in each of these fields, differentiation may, indeed, be advisable. In our consultations with international experts, doubts were expressed about the wisdom of integration at this level; the main concern seems to be that one field might dominate and overshadow the specific needs and issues of the others. In our view, these doubts could be overcome by a balance between general and specific provisions. Alternatively, where separate NPAs are preferred a coordinating body should attend to their intersections both in planning and implementation.

The national reports describe how policies on VAW, VAC and SOV evolved and show that tensions between engagement with different fields and forms of violence have played a part in most Member States. But they also document the added value for each field when their commonalities, intersections and mutual influences are considered, rather than having interest groups and agencies competing for public sympathy and resources. The challenge is to find methods of cooperation that do not overextend the capacity of the various actors. Here, the EU might play a constructive role in proposing or disseminating models for coordinating NPAs and national policies, as well as for improving the implementation of national policies from a human rights perspective.

***Conclusion 1: Member States' policies converge in recognising the value of integrated national strategies for the protection of women, LGBT persons and children from violence, but they often struggle with barriers to coordination and imbalances***

*of attention across the fields and forms of violence. Integrated strategies are a necessary foundation for making progress at the national level, resting on the three pillars of (1) strengthening fundamental rights*

*and effective intervention to prevent violence, (2) social protection and assistance to empower victims to overcome the legacies of abuse, and (3) legal protection and sanctions to provide safety and justice.*

## Recommendation 1 — EU and Member States

### EU

A coherent policy approach at the EU level is a promising way to ensure that overcoming discriminatory violence is a priority for national equality and human rights bodies, and that the protection of children from violence is a core issue in strategies to establish children's rights. It can be a basis as well as guidance for the Member States to develop national plans of action (NPA).

Through cooperation between EU institutions and agencies, Member States' governments and NGOs, national level policies can be developed that have both an explicit gender analysis and a human rights framing. Singly or together, NPAs can be built to cover all forms of VAW, VAC and SOV and address protection, prevention, prosecution and provision of support and compensation.

### Member States

Taking an integrated approach to the different fields and forms of violence can promote coherence and consistency of penalisation and protections across VAW, VAC and SOV, adapted as needed to the specific requirements of each form of violence.

Strategies to combat violence can be strengthened when both a gender analysis and a child rights perspective are incorporated at all levels of the budgetary process and national policymaking.

National Human Rights Institutions (NHRI) can be, and in some Member States already are important centres coordinating efforts to address all forms of VAW, VAC and SOV in a common fundamental rights framework, especially if they are independent and can also monitor government policy and its implementation.

### 6.3.3 Coordinated legislation

The requirement to eliminate exceptions providing impunity in criminal and in criminal procedural law is discussed above (6.1.2). A prime example of how sanctions and victims' rights can be undercut or effectively made void by the failure of coordination *between* legal domains can be found in the arena of intimate partner violence, where family law may rule in favour of parental

rights regardless of evidence that the father has been violent towards the mother; this can not only result in harm to the child, but also expose the mother to pressure not to testify, so that prosecution of partner assault also fails.

Another example is the *de facto* practice in applying immigration law in some Member States, when the recognition of a woman as a victim of trafficking depends on her immediate willingness

to cooperate with police and prosecution, and her rights are terminated when police or prosecution concludes that her testimony will no longer be useful in criminal proceedings.

Legal sanctions for coercing someone into marriage, as well as sanctions for the sexual abuse of a child under 18, are undercut or their application obstructed when the provisions of family law only allow for annulment of the marriage within a specified time frame, legitimise marriage to a minor as soon as she is pregnant, or require regular divorce proceedings for forced marriages. All of these conditions make it highly unlikely that the victim will testify to the coercion.

**Conclusion 2:** *Although most acts of physical and sexual violence are addressed by criminal law in all Member States, numerous explicit or implicit exceptions are found in practice. Victims' rights have not been satisfactorily implemented across the EU even after prosecution has begun. Sanctions and/or protection often fail due to lack of coordination between different legal domains. There are also still strong traditions of framing victims' rights dependent on their usefulness for obtaining convictions. Children are not yet fully recognised as rights holders in many Member States.*

## Recommendation 2 — EU and Member States

There are a number of possibilities for more effective implementation of international standards in the Member States. In areas where there is a legal basis for EU action, the EU can encourage that such standards are included in law and are implemented.

In areas where there is no or no clear legal basis for EU action, a coherent EU approach could encourage more unified measures such as, to:

- ◆ set the minimum age for all marriages at 18;
- ◆ permit marriage at 16 only in exceptional cases under supervision of a court or designated administrative authority;
- ◆ ensure either by general or specific law that coercion to marry is punishable, including the principle of extraterritoriality for this offence;
- ◆ ensure that a person who is forced or deceived into marriage has the right to annulment without requirement of divorce procedures and eliminate exceptions from this right based on pregnancy of a minor;
- ◆ provide foreign national victims of IPV, forced or deceptive marriage whose resident status depends on marital status with the right to apply for an independent residence permit irrespective of the duration of the marriage;
- ◆ include in regulations for police procedure a duty to inform all women in prostitution who might be trafficking victims (especially foreign nationals) of their rights and offer them contact at an appropriate independent agency or NGO;
- ◆ entrust the initial assessment of trafficking victims to an independent qualified agency for the purpose of granting them a reflection period, preventing summary deportation, and ensuring full consideration to applications for humanitarian residence permits;

- ◆ grant self-identified or suspected victims of trafficking access not only to medical assistance, but also to safe housing, social welfare and support, at least until the identification process has been completed;
- ◆ offer victims social programmes for recovery and reintegration regardless of their participation in judicial proceedings, in recognition of the responsibility of the destination state for the conditions that make trafficking profitable.

### 6.3.4 Implementation

Overall, our research findings suggest that in the great majority of Member States, gaps in criminal law are not the main problem; it is the failure to implement the law and impose sanctions that constitutes *de facto* impunity, implying that violence is taken less seriously when the victim is a woman, a child or an LGBT person. This is underlined when procedures do not integrate state-of-the-art knowledge about gender, sexuality or child development, and as a consequence the victim reporting or disclosing violence risks being intimidated, humiliated, or placed in real danger of further harm. Across all relevant domains of the law, procedural measures should always follow the principles of respect and empowerment for victims of human rights violations.

Perpetration research also points to impunity and failed sanctions as significant factors at play in facilitating discriminatory violence. At the same time, there are well-founded differences in when and how the criminal justice system is called upon to address different forms of violence. Investigation of reported violence may be the task of different bodies depending on both the form and the severity of violence. Where a prosecutable offence is confirmed, it is essential that the investigation is guided by an understanding of the specific vulnerability of victims of VAW, VAC and SOV.

The due diligence principle has clear implications for the obligations of states to, *inter alia*, record,

investigate and prosecute. Some Member States are still reluctant to prosecute violent offences that occur within the family. Yet this is the context in which victims are least likely to take action via private prosecution if legally possible and may even be justifiably afraid to testify. A key standard thus calls for the public prosecutor to have competence to initiate prosecution; human rights violations cannot be legally treated as a private offence.

However, not every case of VAW, VAC or SOV will go to court. There is no doubt that criminal prosecution is necessary in cases of severe violence, but in cases of child maltreatment, protection of the child from further harm and assistance to caregivers are often the priority (Art. 3.1 CRC). With regard to sexual harassment at work, the responsibility of the employer to prevent and protect against harassment is a prime concern. Concerning violence in close relationships some degree of choice or influence of the adult victim, providing they are not acting under duress, on the involvement of the criminal justice system may be justified, depending on the type and severity of the violence.

Recent legal reforms in a number of Member States aim to improve the response of the relevant authorities to reports of VAW, VAC and (in a growing number of Member States) SOV. These include mechanisms for better recording and ensuring that information does not get ‘lost’ between agency actors; guidelines and protocols for handling cases; redefining violence within the family as an *ex officio* crime; eliminating private prosecution from the procedural code entirely; or training police

and social workers for cooperation. Although the means and methods differ by legal system, institutional infrastructure and form of violence, one can speak of a convergence among many Member States in seeking to respond more reliably while respecting the rights and safety needs of victims.

Research on victims' experiences has found that court proceedings can be extremely stressful and frightening, even traumatic, and this may be accentuated in VAW, VAC or SOV. Member States have increasingly recognised this, especially with regard to children and to victims of sexual violence, but there needs to be consistency across all three fields of violence, since in many cases they take place within the close social environment and all involve the violation of personal integrity. Courts that regularly handle such cases, as well as courts with integrated competencies allowing them to deal with all the legal issues that arise, are more likely to develop a deeper understanding of vulnerability and potential risk for secondary victimisation. Since many provisions to protect victims in court necessarily depend on the judge's discretion, knowledge and informed assessment are crucial. Effective handling is further assured when training is a prerequisite especially for judges, but also for all other professionals involved in the court system.

***Conclusion 3: At present, no Member State can claim that reported cases of VAW, VAC and SOV are fully recorded and promptly and thoroughly investigated, and that follow-up is reliable. There is convergence among Member States in recognising the obligation of the state to ensure that safety and support for victims minimise the potential negative consequences of disclosing violence, and to initiate public prosecution when there is an evidentiary basis. Member States are also increasingly taking measures to ensure that criminal proceedings do not cause additional harm, while also enabling victims to give best evidence throughout the legal process. Whilst there is a variety of promising practices aiming to improve responses by police, prosecutors, courts, family and youth welfare agencies, child protection or emergency services, there is substantial room for improvement, especially by ensuring that all authorities handling cases of VAC, VAW and SOV have the necessary knowledge, resources and infrastructure to do so effectively and with due consideration of the vulnerability of victims and the rights of children to be heard in any judicial or administrative procedure affecting their lives. Finally, whilst the right of the victim to compensation is generally recognised, the conditions and the maximum amount concerned seem to make claims unrealistic in some Member States.***



### Recommendation 3 — EU and Member States

In the process of revising the framework decision on the standing of victims in criminal proceedings into a directive the EU may further elaborate Article 2.2, which notes that ‘Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances’. The measures proposed in Annex 2 relating to special measures for women, children and LGBT persons in criminal proceedings are recommended to be included in this future directive, and the EU is further recommended to urge and support Member States to achieve the following:

Member States can take steps to ensure that cases are dealt with more effectively, taking account of victims’ needs, by:

- ◆ installing special units in the police and in the prosecution services to handle reports of VAW, VAC and SOV;
- ◆ enabling professionals in contact with children or parents to consult with specifically qualified experts when they suspect that children and families may be at risk;
- ◆ appointing special liaison officers to affected communities for sensitive forms of violence such as SOV, HBV or FGM to foster a relationship of trust and increase reporting as well as successful prosecution;
- ◆ establishing specialised courts, adapted to the national legal system, for which judges or magistrates can be expected to receive specific training, for example family courts to decide on measures of child protection when the parents or guardians are not willing or not able to protect a child from harm, or specialised courts for IPV or gender-based violence that can integrate criminal and civil proceedings where necessary, ensuring that sanctions and protective measures are coordinated and effective.

Explicit regulation contributes to establishing in practice the right of the child to be heard and their views taken into account in all proceedings in family law, child welfare and criminal law; this could be reinforced by inclusion in a victims’ rights directive, and providing for qualified experts to interview children.

Consistent responses are needed to avoid measures in different domains contravening each other, timely communication and appropriate coordination of all legal measures within the justice system is essential, especially those concerning intimate partner violence or stalking, either by concentrating the competencies for decisions or by regulating a duty to share information on all police or court measures affecting the case, or both.

Recognising the special difficulties for victims of VAW, VAC and SOV when violence occurs within close relationships, Member States can establish a fund from which the state pays compensation, recovering it from the perpetrator where necessary or possible.

In particular, to ensure that abuse during childhood is compensated, the statute of limitations can be regulated so that it does not begin to run until the child has reached the age of majority, and in no case be shorter than that for prosecution.

Member States can already take the measures referred to above, pending the revision of the framework decision into a directive.

### 6.3.5 Multidisciplinary intervention

Integrated approaches to addressing violence, bringing together a variety of actors and agencies responsible for implementing sanctions, prevention, protection, and victim support as well as addressing perpetrators, have a long tradition in the protection of children from abuse, and, in recent decades have been developed as the potentially the most effective approach to IPV.

Legislation providing for a coordinated, multi-agency response is more recent, and in the national reports, the experts were most likely to cite either the Austrian Protection Against Violence Law with its police removal order and simultaneous involvement of interventions centres for victim support, or the Spanish Organic Law with its comprehensive approach centred around specialised domestic violence courts, as models for possible adoption.

Repeated violence with cumulative harm, intimidation, fear of reprisals or other forms of entrapment can be mixed with emotional ties and reluctance to bring a family member or a former partner to court. Multi-agency approaches can, when implemented effectively with regard to the dignity and privacy rights of victims, build a relationship of trust between the victim and different agencies, and thus can both increase the likelihood of protective interventions and of criminal justice sanctions as well as providing safety and freedom from fear or harm in situations that, for whatever reason, do not in fact enter into criminal proceedings.

Related to this multi-agency approach are policy developments regarding forms of violence that disproportionately affect minority communities that also suffer from discrimination or social exclusion. In these cases, agency and NGO cooperation also include representatives of the community; such approaches have emerged to address SOV, or harmful practices such as FGM.

Whilst many strong and positive examples of coordinated and integrated multi-agency responses could be found in comparative analysis of the national reports for violence against children, the majority of those for violence against women focused on intimate partner violence or on trafficking. Interagency approaches to sexual violence against adult women are a clear gap, and remain underdeveloped in Europe. Similarly, there was only emerging evidence of linkages between the three different fields of violence, but where these were made they had the potential to address prevention in a more coherent way, including early intervention with children and youth.

Specific challenges to intervention are present when different forms of violence overlap and intersect. A particularly difficult area is the intersection of intimate partner violence with child protection, where different agencies may have different knowledge about the same case. Violence against an adult partner is often linked to child abuse and neglect, and there is strong evidence that witnessing IPV has in itself serious harmful effects on a child. It is a contributing factor, although not a determinant, to later abusive parenting. In view of these findings and in light of the CRC, some Member States have developed regulatory frameworks. These may provide, for example, that prior to any court decisions concerning separation, divorce, custody and visiting rights, a formal assessment must be made of endangerment to the well-being of the child if the ruling would involve continued contact with a parent who has been violent to a current or former partner or member of the household. Well-established multi-agency networks are more likely to provide the necessary information on such cases.

***Conclusion 4: Multidisciplinary intervention structures have the greatest potential for combating violence in all three fields effectively and can best implement an integrated approach in practice. That means including all agencies or NGOs that can be***

*the first point of contact for victims, and developing procedures of referral, cooperation and follow-up, as well as regulating information-sharing while respecting privacy rights.*

#### **Recommendation 4 — EU and Member States**

Facilitation by the EU is needed to expand the exchange of information on good practices so that Member States benefit from each others' innovations and experience in developing these structures and have access to state of the art research findings. EU support programmes can enhance and ensure effectiveness and efficiency.

With such support Member States can more easily develop guidelines and, where needed, legal regulations to ensure effective cooperation between all agencies involved in criminal justice, social provision and healthcare, in the statutory, private and voluntary sectors.

Efforts and models of practice are needed to ensure that all forms of discriminatory violence, including sexual violence against adult women, are addressed by multi-agency frameworks.

When children have been witnesses to IPV, multi-professional assessment can be required before permitting unsupervised child contact by the parent who has been violent.

Legal regulations will need to clarify when confidential information can, should or must be reported to/shared between statutory agencies, within a framework of recognition of the privacy and informational rights of adult victims and the rights of children to be heard. Where a decision is made between agencies without the participation of the victim, they must be informed of the decision and how the information will be used.

Specialised NGOs experienced in supporting victims have important advice to offer. It is therefore advisable that these be represented in policy development and in strategic advisory bodies, including both development of NPAs and bodies that monitor implementation. Cooperation of statutory agencies with NGOs is more sustainable when anchored in NPA.

Valuable input is to be gained from forums of and for victims at local and regional levels; they can identify unmet needs and act as advisory groups to multi-agency bodies and policy makers. Integrating their views can serve to improve the monitoring of national or regional action plans, legal reforms and innovative practice.

Multidisciplinary cooperation structures can create centres of competence for responding to less common forms of violence and for recognising and meeting the needs of minority groups.

### 6.3.6 Protection

In international law, several victims' rights instruments affirm the principle that the prosecution of offenders must be linked to protection and support for victims of crime. This link has also proven indispensable for most, if not all, of the forms of violence addressed in our study. Crucially, however, support and protection must be in place before any decision is made on prosecution or even on whether the acts are to be investigated as a crime. If making a complaint leaves a victim unprotected and vulnerable, the initiation of prosecution is significantly complicated. Vice versa ending violence is facilitated and often only then possible when protection and support for victims is the primary consideration. This is a consequence firstly, of the state's duty to secure human rights for all, and secondly, of the fact that all forms of violence under discussion are linked to discrimination or lack of access to fundamental rights. Because of this context, victims often feel justifiable apprehension and reluctance to see the case taken to court unless they can be assured of their safety.

Cross-national research has confirmed the need both for **support services** that enable victims to find safety, help, information, and advice, as well as for services that restore their health and ability to take back control over their lives. These are needed for all areas of violence and must be differentiated according to the forms of violence and the specific needs of women, LGBT persons and children.

While provision of specialised protective services is a challenge for Member States during periods of economic difficulty, there is now solid research knowledge that permitting discriminatory violence to continue and failing to ensure fundamental rights to children, exposing them to violence, are even more costly. Recognising this, some of the Member States that have faced serious economic crisis have, for example, nonetheless maintained their budgets for combating violence against women. For a transitional period, designating resources and organisations that had previously served other groups as places of safety for victims of violence may be of some help, especially if the work of NGOs who support victims is given recognition. However, a sustainable infrastructure ensuring the right to protection and preventing any further violence requires specialised competencies and arrangements.

***Conclusion 5: Overall Member States now recognise in principle the need for sufficient capacity and geographical spread of specialised support services, available to victims of VAW, VAC and SOV at the point of need. These should be provided free of charge, to assist them in establishing safety, accessing information and overcoming the legacies of the violence. Experience across different institutional and national traditions confirms that independent services are able to reach a wider scope of victims and work more effectively with them than state agencies.***

## Recommendation 5 — Member States and EU

For sustainability of services and safety of victims, Member States need to provide stable funding and establish quality standards for services that can reach all victims of VAW, VAC and SOV. Fit for purpose services should include independently run shelters, helplines, outreach, counselling, therapy, advocacy, rape crisis centres and sexual assault referral centres, and both shelter and short-term fostering for children.

A solid foundation of victim protection can be built by conducting and publishing a needs analysis for support services, providing the basis for planning on national and regional levels with targets and timelines to reach the minimum standard across the country, so that services have sufficient staff and capacity to meet the need.

Dissemination methods adapted to conditions in the Member States could be employed to bring information on support services proactively to women, LGBT persons and children in remote areas, and to those who are migrants, belong to minorities and/or who have disabilities, with multilingual information and services available as needed.

**Protection** is a duty of statutory agencies, and must follow the principles of (i) timeliness, both to position of the state clearly in regard to its determination to stop violence and to protect every victim from further harm, (ii) safety, offering protective measures when there are grounds (including fears of the victim) to anticipate further violence, and (iii) continuity. Due diligence obliges the states to provide protection when the risk to the victim is known or could have been known (as with course of conduct-crimes like IPV, stalking), and more specifically requires that there should be no gap in protection between immediate measures and ensuing provisions. From these requirements it follows that protection measures cut across several domains of law, including administrative law, civil law and criminal law, for some forms of violence family law and social law as well. Coordination of the measures in different domains of law and of the actions of different agencies is thus essential. Within the different institutional structures and traditions of the Member States, different methods of attaining such coordinated protection are being tested. The information gathered in the present study suggests that increased efforts and

more exchange of experience might be needed to identify barriers to effective protection.

To be effective, protection measures must furthermore be differentially available depending on the different forms of violence and the circumstances in which the violence occurs. The appropriate measures and special provisions must consider not only age, gender and the life situation of the victim, but also whether the violence is located inside or outside the family/household, within the social environment such as a neighbourhood or workplace or by a stranger, under conditions of exploitation for profit, or in the context of enforcing a gender regime in which further actors beyond the immediate perpetrator may pose a threat. In this respect, general standards need to be unpacked to spell out more concrete standards for addressing specific forms of violence.

**Conclusion 6: Legislation and policies in the Member States are converging in establishing immediate protection measures, especially when there is violence by intimate partners or in the family, delivered by the police, administrative authorities**



*such as child protection agencies, and/or courts. Challenges appear in ensuring that all victims have access to protection as the primary consideration, and that the duration of immediate protection extends until longer-term measures can be issued, if necessary.*

### **Recommendation 6 — Member States and EU**

Immediate protection in situations of IPV is most often implemented by giving the police power to remove the person posing a danger from the home (emergency removal orders), or to arrest and detain the perpetrator until a magistrate, investigative judge or administrative authority can issue a temporary restraining or removal order. In most jurisdictions, such measures need a duration of one or two weeks in order to ensure safety up until a hearing can be held.

Protection measures may include the removal of an endangered child from the home, as well as measures to impose requirements and/or prohibitions on the parents or other carers. They also may be necessary when no parent or carer is present who can avert the danger of serious harm. A variety of institutional regulations are to be found, but in all cases, the power to bring an endangered child to safety needs to be given to an authority that is on call at any hour.

The EU could reinforce these developments by promoting exchange of experience with immediate protection measures among Member States.

Whilst immediate protection to avert acute danger may be imposed by an authority without requiring the (possibly injured or intimidated) victim to make a decision, longer-term arrangements need to take account of the victim's views, and, in the case of children, of the ability and willingness of the parents or carers to accept and profit from support in averting danger. Furthermore, protection from the threat of (further) violence must, by its nature, be available before (further) criminal harm has occurred. Especially with women facing violence by

partners or family members, research has shown that the victim is the most reliable predictor of the degree of danger. Thus, civil and family law measures need to be available on request. They may also be needed to remove a violent parent and protect a child from further harm.

***Conclusion 7: Civil or administrative protection orders have proven to be a critically important tool in stopping violence and/or preventing its reoccurrence. They should be available, free of charge, whenever repetition is a potential danger.***

## Recommendation 7 — EU and Member States

When regulating the mutual recognition of both judicial and non-judicial protection orders, the EU could make specific mention of measures to prevent crimes and discriminatory violence from occurring or being repeated. Alongside measures imposed by authorities, in many Member States adult victims have access to civil protection orders issued *ex parte*, to ensure their safety until it is possible to hold a full hearing.

Such protection orders are most effective when they can be requested for all forms of physical, sexual or psychological violence and are available against any person who poses a threat, whether or not a resident in the household, and irrespective of the nature of the relationship.

Effective protection can best be provided by making court protection orders available both on the request of the victim (civil orders), independent of any criminal justice process, free of charge with a simple and speedy process, and also during criminal proceedings from the beginning of the investigation (on the request of the police or prosecutor). This allows measures to be adapted to the variety of situations in which violence can escalate or be repeated.

It is highly advisable to ensure that courts routinely inform the police and where applicable child protection authorities when protection orders are imposed. Enforcement of go-orders as well as of civil protection orders and sanctions against their breach are extremely important if they are to be effective; to ensure the safety of the victim, such a breach is best considered an offence against the state/court.

In view of the known risk of lethal violence after separation, Member States can ensure that the victim, if necessary, cannot be located and their residence is not revealed without their consent. In all cases protection should include psychological support. High-risk victims can be provided with protective (electronic) alarm devices to call for immediate police protection.

Specialised protection orders can be very useful for specific forms of endangerment, and may need adaptation to be fit for purpose where victims are resident foreign nationals.

### 6.3.7 Prevention linked to protection

A number of the standards and recommendations that have emerged from the present study could be considered 'preventive protection', addressing the duty of the state to safeguard the fundamental rights of women, LGBT persons and children so that they will not be exposed to, or endure any escalation of violence. All of the protection measures in the previous subsection are also preventive when they can be implemented without evidence of criminal acts, for example when interventions are possible based on reasonable fears due

to threats or past actions. Services offering advice and information are also a resource for potential victims and for women, children or LGBT persons who experience situations that are frightening, distressing or threatening, and they can, in particular, encourage and empower those seeking advice to understand their rights.

Additional measures are needed to meet the needs of specific groups. For example, specialised contact points and shelters in some Member States reach women seeking to leave prostitution; Internet contact and advice sites offer support to

adolescents in dealing with a wide range of kinds of violence in the home. The present study could not explore all of these possibilities. Here, two kinds of specialised protective-preventive services are highlighted: child protection and perpetrators.

In view of the special dependency of children on adults to ensure their fundamental rights, measures require specialised (statutory and/or voluntary) agencies and institutional competencies if they are to identify signs of maltreatment and avert harm to the child. In particular, programmes to involve the perpetrators of child maltreatment

in learning to avoid the use of violence are lacking in many Member States.

**Conclusion 8: Member States converge to a high degree in recognising the need for qualified specific child protection agencies, although their level of differentiation and availability diverges, and agree in taking the healthy development of the child as the central criterion for protective measures; the threshold and conditions for state intervention differ. Whilst in principle there is agreement that support for families is a priority, family assistance services are less well developed in a number of Member States.**

### Recommendation 8 — Member States and EU

The protection of children against violence can best be assured through a network of statutory and voluntary child protection agencies with the duty and power of protective intervention, and with sufficient and qualified staff to ensure that every case of suspected endangerment can be carefully assessed and acted upon.

Child protection and family assistance services should be securely funded, provision a duty and access a right for children and carers.

Offering programmes to perpetrators of violence, and under suitable circumstances mandating their participation is another measure that can be both preventive and protective in nature.

**Conclusion 9: There is a growing awareness of the importance to intervene in the actions of perpetrators of discriminatory violence, but intervention programmes are not yet widely available in the Member**

**States, and very few have established a legal basis for the criminal justice system to mandate participation of IPV perpetrators in appropriate programmes, which need legal frameworks for screening.**

### Recommendation 9 — Member States and EU

Investment in developing a differentiated range of perpetrator programmes — provided in the community by NGOs as well as within prison/probation — can enable boys and men to learn and practice alternatives to violence, offer the potential to protect and prevent. Effectiveness requires that programmes target different groups appropriately, including primary prevention (role models and group activities for non-sexist and non-violent masculinities), secondary prevention (addressing, for example, batterers and ‘low-level’ sexual aggressors), and tertiary prevention (treatment for chronic and dangerous offenders). In all cases a gender analysis and human rights framework should underpin the programmes.

### 6.3.8 Monitoring implementation

States have a responsibility to monitor whether the legal frameworks for sanctions, safety and justice are being properly implemented. For this reason, creating the required knowledge base must be placed high on the list of priority measures.

Solid and consistent administrative data are an integral component of fulfilling the due diligence requirement, as it is not possible to ensure that human rights violations are in fact being prosecuted and protection is assured if no systematic monitoring and tracking of cases is in place.

There is a serious lack of administrative statistics across all Member States. The statistical data should be disaggregated by age, gender and relationship context, using consistent categories across institutions, and include the numbers of:

- ♦ cases of VAW, VAC or SOV that come to the attention of those responsible for investigating them;

- ♦ interventions (such as removal of perpetrator, protection orders, child protection measures, referrals);
- ♦ cases prosecuted;
- ♦ convictions;
- ♦ sentences;
- ♦ other relevant outcomes.

This is an area which does not only concern the Member States, but points to a need for comparable data across the EU, at least in the future.

***Conclusion 10: While there is an increasing awareness in the Member States of the need for comparable administrative data collection across the EU, the present study found that such data are difficult even for experts to access in their own country. Such data would be a key tool for benchmarking as well as enabling Member States to assess the effectiveness of efforts to combat VAW, VAC and SOV as well as progress in implementation. In support of a more unified approach and to enable Member States to learn from success or failure of measures elsewhere, it would be valuable to make the resulting knowledge and data bases publicly available.***

### Recommendation 10 — Member States and EU

Only reliable data can permit attrition in the criminal justice system to be systematically addressed, identifying the points of attrition and implementing measures to ensure that cases are not dropped for lack of diligent investigation and/or prosecution. To this end, systems must identify cases that fall under general as well as specific laws and ensure that the same categories and markers are used in different institutions.

Similar measures in the child protection system can help to prevent increased harm through failure of agency follow-up; to be useful data must be collected on outcomes as well as on cases and interventions.

Development of a suite of indicators on offer to Member States will assist in monitoring implementation of NPAs by providing guidance and consistency in collecting administrative data that are comparable across Member States.

Eurostat might be entrusted with the task of drafting a template for (bi-)annual reporting from all agencies with duties in the protection of women, children or LGBT persons from violence, including the criminal justice system, on VAW, VAC and SOV.

The EU can initiate a consultation of national statistics offices, such as are already being organised by the UNECE on VAW, to recommend minimum standards for data collection. On this basis, Member States could more readily establish a legal duty for police, prosecutors and courts, as well as statutory child protection agencies, to use compatible statistical categories for recording cases, and record all data needed to identify cases, interventions and outcomes. If comparable across the EU, the data would contribute significantly to the knowledge base for EU policy development.

To further and support an EU-wide strategy of combating violence it would be valuable to conduct regular methodologically appropriate population based surveys into forms of violence within VAW, VAC and SOV and to collect and analyse relevant data at EU level.

#### 6.3.9 Capacity-building and training

All of the measures under discussion will only be effective if the relevant professionals have the knowledge, understanding and skills required to act appropriately. In particular, they need to be informed about the gender dimension in all forms of violence in this study and the links to other kinds of discrimination, about recognising child maltreatment, about the fundamental rights of victims and the basic developmental needs of children, about the multidimensional nature of these forms of violence, the atmosphere of shame, fear and secrecy with which they are frequently surrounded,

their impact on the victims, and the imperative to avoid doing additional harm. They need to be fully aware of the fundamental rights that are violated when statutory agencies fail to intervene properly.

General awareness-raising is not enough; the various professions need to learn their specific roles in the process of punishment, protection and prevention and acquire the skills and knowledge needed to carry out that role. A foundation of interdisciplinary knowledge about human rights, gender and children's rights should be part of every professional's education, but beyond that, in-service training and further education is needed, and



certification should be required for those have a decisive part to play in decision-making and shaping responses to violence.

**Conclusion 11:** *Whilst the need for training for all relevant professionals, including judges, on VAW, VAC and SOV, and on victim rights in general,*

*are recognised in most Member States, the results of this study suggest that this is not installed on a regular basis nor ensured for all who need it, but tends to be sporadic or offered on a voluntary basis. Mandatory training for the police and the child protection social workers seems to be the most widespread.*

### Recommendation 11 — Member States and EU

Adapted to the different educational and training structures of the professions in different Member States, training on VAW, VAC and SOV, founded on an equality and human rights framework, could be developed and established as a core component of qualifying professional training. Groups that could profit from basic training modules include the police, prosecutors, judges, teachers, social workers, doctors, nurses, journalists.

All professionals undertaking specialist roles should be required to have appropriate further qualifications; certification can be used to good effect. In particular, they should be trained on the specific issues of child development and endangerment before dealing with cases of child protection or with child victim.

Modules for future professionals are most effective when they also include social science knowledge about the prevalence of violence, its meanings and impact alongside the roles and responsibilities of the professions. Modules for teachers also can show how to integrate equality and human rights across the curriculum.

In view of the key decisions made in the court system, Member States could set standards and bindingly provide specific qualification for judges and for prosecutors regarding VAW, VAC and SOV, requiring certification before placement in family court, specialised court or unit responsible for such cases.

#### 6.3.10 Expanding the knowledge base through research

Independent research on VAW, VAC and SOV remains haphazard and the effectiveness of legal reforms and promising practices uncharted unless a knowledge base is built. Research knowledge — including evaluation studies — is the prerequisite for any effective legal or other measure that ultimately aims at preventing (re-)victimisation and improving support of victims.

Administrative data only capture the cases that are brought to the attention of front-line institutions

such as the police and child protection agencies. They reflect the proverbial tip of the iceberg and do not reflect the extent of the problem, particularly if the figures are low because reports are discouraged or not well recorded. Regular, high-quality victimisation surveys and in-depth studies of the context, history and impact of different forms of violence are thus needed in order to understand whether the measures intended to prevent and protect against violence are fit for purpose, accessible to those who need them and effective in how they work. Research on perpetrators is also needed to develop more effective interventions. Beyond this, a commitment on the national level

to providing for independent research to evaluate implementation of legislation and policy is an indicator of intent to invest in effective measures.

**Conclusion 12:** *Member States diverge in the extent to which research on VAW, VAC or SOV is encouraged, facilitated or funded, yet supporting a research culture*

*at national and regional levels is a critical component of progress. There are some examples of research structures allocating specific funding streams to research on violence against women, although usually only for a limited time period only. Further impulses and sustained efforts are needed to strengthen the development of an EU knowledge base.*

### Recommendation 12 — EU and Member States

In developing the European research area, the EU could recognise combating VAW, VAC and SOV as a key societal and economic challenge for Europe, and, in consequence, set a priority within its funding framework on building a policy relevant knowledge base. Both national research funding organisations and the EU-level programmes could ensure that regular prevalence research on VAW, VAC and SOV is implemented and comparable data on trends and developments across the EU will become available.

Governments can commission evaluation research of new legislation and of models of practice with respect to their effectiveness in safeguarding human rights, as well as providing for systematic supervisory review of the practice of agencies with key responsibilities to address VAW, SOV, VAC. It would be particularly useful to fund empirical research on the outcome of protection measures.

#### 6.3.11 Primary and long-term prevention

The obligation of states to develop and implement prevention has received far too little attention, as the national reports make clear. The review of research on the factors at play in perpetration in Chapter 5 and the path models developed from that research knowledge suggest that there are many more possibilities beyond awareness-raising campaigns. The latter remain nonetheless necessary and important steps in the struggle to combat VAW, VAC and SOV, especially when they speak to weak points and prejudices in public awareness. The 2006–08 Council of Europe campaign against violence against women, engaging actors at different levels of governance as well as NGOs, had significant impact, albeit some of the activities were limited to addressing domestic violence. The potential for an European overarching awareness-raising campaign centred on fundamental rights has yet to be explored.

Strengthening the full and equal rights of women, LGBT people and children is a long-term approach to reducing violence. In some Member States, anti-discrimination law, equality law and laws on children's rights do not have strong coordinating bodies responsible for implementation, or these are not furnished with the competencies, mechanisms, resources, and power to impose sanctions that would be needed for a serious impact, nor are they accountable to the public for their activities. A more serious barrier to effective prevention strategies is the lack of integration between promoting rights and participation on the one hand, and addressing violence on the other.

Prevention strategies also need to consider more seriously the conducive contexts for perpetration and how the influence of relevant factors could be undercut. This could mean, for example, integrating violence prevention into the educational

system, supporting management strategies towards organisational cultures of respect and equality, or establishing programmes that challenge (potential) perpetrators to learn alternatives to violence. Since prevention is a multi-factorial and long-term project, national plans of action and policies are better suited to developing methods adapted to the conditions in each Member State. Nonetheless, such strategies can only profit by a systematic exchange on methods and experience, especially if implementation is monitored and independent evaluation secured.

Research strongly suggests that the failure of parents to give reliable and competent care (often, but not always, including violence) is one main factor setting boys (and some girls) on an anti-social

development path that can lead to violence (including SOV) in adolescent peer groups, and later to intimate partner violence as well as to child abuse and neglect. Evaluation studies indicate that programmes to prepare teenagers for parenthood in schools are less effective than offers of educational guidance and support during the transition to parenthood. In contrast, educational work with young people on gender, sexuality and relationship issues is ‘close to home’ for this age group and can be effective.

***Conclusion 13: Information campaigns to raise awareness on violence against women have been implemented in a majority of EU countries in recent years, some linked to education and public information programmes to help eliminate prejudices that***

### Recommendation 13 — Member States and EU

Member States can take a major step towards preventing violence against children by prohibiting all corporal punishment, defined as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.

Building awareness about the rights of young women, including the right to choose who they marry, sexual self-determination, and of the value of mutual respect between women and men, can reduce their vulnerability to violence both within their families and in later relationships.

Coherent and comprehensive national plans of action could be built on a core commitment to medium- and long-term primary prevention, including the development of educational modules on equality that challenge stereotypes of masculinity and femininity, establish principles of sexual self-determination and bodily integrity and further respectful relationships, as well as modules that teach basic principles of children’s rights.

Knowledge-based early intervention and prevention can be built up in cooperation between the public health and social service sectors. Effective prevention is greatest when such programmes are made widely available with sustainable funding, and when there is a legal duty to provide them, employing trained professionals, and if they last for a significant period of time. Outreach to families at risk is needed, and methods for engaging fathers need to be developed.

The influence of images of violence and of sexual exploitation can be restricted when a strong body serving as a media watch addresses issues concerning VAW and sexism as well as stereotyped portrayal of women and girls.

*hinder the realisation of equal rights for women and for LGBT people<sup>(240)</sup>. Awareness campaigns have also focussed on the right of children to a life free from violence<sup>(241)</sup>. Other prevention strategies and methods have been developed within national frameworks, and cooperation has been supported significantly within the Daphne programme.*

### 6.3.12 Perspectives and challenges

While there is a significant degree of convergence towards a human rights approach to combating all forms of violence based on discrimination or on the lack of full access to fundamental rights, barriers are still visible, notably for individuals with an insecure residence status. This particularly positions immigrant victims of VAC, VAW, and SOV in a vulnerable situation if their legal status is dependent on the abuser they want to flee from.

*Conclusion 14: Full rights to protection, provision and redress with regard to all forms of VAW, VAC and SOV are not legally guaranteed to all residents on an equal basis in most Member States. While there are some promising beginnings, immigration status or citizenship can present significant barriers to the full protection of human rights.*

#### Recommendation 14 — EU and Member States

By defining VAW, VAC and SOV as violations of universally adopted fundamental rights in all policy documents, the EU will set a basic standard, providing Member States with a common platform on which to move forward.

### 6.3.13 Summing up

This project was unusual from the outset, setting a task of examining responses to three fields of violence, which are rarely, if ever, studied together. For much of the project, the three fields of violence were addressed separately, and data collection and analysis followed this pattern.

As analysis of the data and information proceeded the divergences in approaches and trajectories of responses of Member States emerged as strong themes (see Chapter 2). Once the focus shifted from the particularities of forms and fields of violence and the actions of individual Member States and onto factors involved in perpetration and comparative analysis, higher order connections and similarities emerged. Whilst it was not the original intention of this project to create an integrated approach across the three fields of violence, this was one of the outcomes of working across the three fields and the international standards. For practical and dispositional reasons, Member States, NGOs or researchers may not choose to follow this path so directly, yet it offers much in terms of understanding the common roots of discriminatory violence and violence based on lack of access to fundamental rights, the similar needs of victims, and what needs to be in place in order for states to be able to claim with justification that they are acting with due diligence to protect, prosecute and prevent.

(240) See CEDAW General Recommendation 19.

(241) Pinheiro, P.S., (2006) p. 19.

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