

Recommended Changes to the Sexual Assault Victims' Rights Amendment Act of 2014

Presented to the Committee on the Judiciary
of the Council of the District of Columbia

by

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I. Introduction

The introduction of the Sexual Assault Crime Victim's Rights Act of 2013 strengthened the rights of survivors of sexual assault in the District immeasurably in a number of important ways. Specifically, the law created new rights to information and advocacy for individual survivors, and created systemic accountability and transparency to ensure that victim-centered law enforcement and victim services were consistently provided moving forward. The purpose of this brief report is to strengthen those rights by addressing instances in which SAVRAA's existing language may have had unintended consequences, and to address ongoing problems and gaps that exist in the system that can be statutorily addressed to ensure that SAVRAA's specific requirements and overall intent can be fully achieved.

All of the recommendations arrived at in this report are the result of direct observation of the work of MPD's Sexual Assault Unit, interviews with survivors, advocates, policy makers, and funders, as well as directly observing the Sexual Assault Response Team (SART) meetings and its SAVRAA-mandated Case Review Subcommittee as the group actively reviewed cases beginning in November 2014. Additionally, some issues are raised that do not yet have a resolution or specific recommendation, but still warrant the Council's attention and possibly legislative solutions in the future, or the recommendations are spelled out but the language is left to those more skilled in legislative drafting.

Some of these recommended changes have also appeared in previous reports from the Independent Expert Consultant, and these will be noted. In addition, some also relate directly to the SAVRAA Task Force Report, submitted to the Council of the District of Columbia on January 31, 2016, and speak to either departure from that report, or provide additional endorsement of or context for those recommendations as they intersect with the recommendations that follow below.

II. Changes and Clarifications to the Sexual Assault Victims Rights Amendment Act of 2013 (SAVRAA)

A. Victim's Right to an Advocate During Hospital Exam and Law Enforcement Interview

Perhaps the most significant right provided by SAVRAA is the survivor's right to have an independent community-based advocate present during a hospital exam and during any interview with law enforcement for interviews related to the sexual assault. Being informed of the right to an advocate and presented with an advocate on site to sit in on interviews, as well as the medical

Recommended Statutory Changes to
Accompany SAVRAA Independent Expert Consultant Reports
January 31, 2016

and forensic exam, provides the survivor with a confidential resource who can provide information about other rights the survivor has throughout the criminal and civil justice systems, explore their options with them, and begin to work through support and resources issues that may come up such as transportation, replacement clothing, and access to counseling resources. The Network for Victim Recovery of DC (NVRDC) provides this advocacy as a partner in the DC SANE Program.

One of the major findings in the Independent Expert Consultant's evaluation of MPD's implementation of SAVRAA is that the way the statute is currently worded and thus interpreted by MPD's Office of General Counsel has significant unintended consequences once it is applied to real world investigations and situations, particularly those that originate with a report to police rather than a survivor initiating the report by first seeking care at the hospital.

The statute currently states: "Law enforcement shall ensure that a sexual assault victim advocate is present prior to the commencement of any in-person interview with the sexual assault victim."¹ This is strictly interpreted to mean that SAU detectives cannot speak with the victim prior to the arrival of an advocate at the hospital for those cases in which a survivor wishes to seek medical and forensic care through the DC SANE Program.

While the intent of the statute is clear, it does not permit sufficient practical conversation to take place between a detective and the survivor prior to an advocate being present to even ascertain whether an advocate should be dispatched. It also precludes the detective's ability to conduct the police work necessary to correctly and adequately preserve a crime scene, apprehend a suspect who may be in the immediate vicinity, or to determine whether exigent circumstances exist that should be dealt with in the interests of survivor or public safety. Most importantly, in cases that are reported to police from the crime scene prior to the survivor going to the hospital, the law forecloses the ability of the detective to interact with the survivor enough to even determine whether an offense has taken place such that a forensic exam is appropriate or something that the survivor wants.

By written policy, NVRDC advocates arrive at the hospital within one hour of being notified by MedStar's dispatch system. Recently reviewed NVRDC and MedStar data indicates that advocates respond with an average response time of 34 minutes from the time they are notified.² While this response time is admirable and not an unreasonably long time for a detective to wait to begin a substantive interview, the absolute ban on any conversation remains

¹ DC Code §23-1909(b).

² Network for Victim Recovery of DC Hospital Advocate Log and corresponding MedStar Call Sheets, September – December 2015.

problematic for the aforementioned reasons. It may also give the survivor the impression that there is something untrustworthy about the detective or that the detective does not consider this issue to be urgent or important, thus setting up an awkward and even damaging dynamic. This policy also increases the time the survivor has to wait anxiously without any information or real interaction, a scenario that is not in keeping with survivor-centered, trauma-informed best practices.

To remedy the double bind that the current wording of the statute creates, NVRDC and MPD worked together to develop a revised protocol that the independent expert consultant then translated into a statutory revision that mirrors the SAVRAA Task Force's recommendation.³ These recommendations are nearly identical and leave room for the future expansion of advocacy to non-hospital cases after a one-year needs assessment is conducted.

§23-1909 (b) shall read: "Law enforcement shall ensure that a sexual assault victim advocate is offered to the sexual assault victim prior to the commencement of any in-person interview with the sexual assault victim.

(1) If a sexual assault victim chooses to assert their right to a sexual assault victim advocate, the law enforcement officer may only conduct a minimal facts interview with the sexual assault victim before the sexual assault victim consults with a sexual assault victim advocate;

(2) If a sexual assault victim declines their right to a sexual assault victim advocate, the law enforcement officer shall: (a) notify the sexual assault victim of their right to request an advocate at any point during the law enforcement process and (b) ensure that the sexual assault victim's decision regarding their right to a sexual assault victim advocate be noted in writing with the victim's signature and the law enforcement officer's signature.

This change is not at all intended to supplant the initial interview with the survivor in which the details of the case are gathered. Rather, it is intended to ensure that immediate police work can be conducted in the interest of public and victim safety, the victim can be consulted as to what next steps they would like to take, i.e. whether they want to seek medical care or speak with an advocate at that time. The new DC SANE Program protocol and MPD's General Order 306.04 on Adult Sexual Assault Investigations should reflect that a minimal facts interview in this instance is limited to the following⁴:

³ See SAVRAA Task Force Report, page 26.

⁴ Alternatively, this definition can be written into the statute itself.

Recommended Statutory Changes to
Accompany SAVRAA Independent Expert Consultant Reports
January 31, 2016

- a) Determination of exigent circumstances, including the existence of a suspect in the immediate vicinity;
- b) Information necessary to determine the location and nature of any crime scene, including the appropriate jurisdiction of the case;
- c) Whether the survivor wishes to go to the hospital or exercise their right to medical care;
- d) Determination of whether a sexual element exists and therefore the appropriate detective unit has taken over the case.

The corresponding DC SANE Protocol, revisions to the General Order on Adult Sexual Assault Investigations and the SAU's Standard Operating Procedure should also include a provision for the advocate and detective to coordination services, specifically to include the ability to allow the victim to speak with the advocate on the phone prior to arriving at the hospital and meeting in person if they so desire.

Scenario-based joint training should be spelled out in the SAU Standard Operating Procedure and conducted with the Metropolitan Police Department and the Network for Victim Recovery of DC to ensure that both parties, meaning all advocates and all detectives, fully understand the protocol and how to best work together to provide a seamless law enforcement and advocacy response to the survivor.

B. Confidentiality

Part of the benefit of a community based advocate present to support survivors in law enforcement interviews comes from their ability to keep the survivor's information and their communication with their advocate confidential. Because they are only observing the law enforcement interview and not taking part in it either by providing answers or taking notes, advocates can remain outside of a criminal case and continue to support the victim within the bounds of a confidential relationship. While this distinction is clear in SAVRAA and codified in §14-312 which details the circumstances under which communication between an advocate and a victim are confidential, including any records pursuant to that relationship, the presence of an advocate in law enforcement interviews and the possibility that this right is extended to prosecutorial interviews requires that this language be as clear and cover as many broad scenarios as possible to avoid any confusion or assertion of the application of the Jencks Act or the existence of Brady material⁵ by erroneously inferring that the advocate is a government actor.

⁵ The Jencks Act 18 U.S.C. §3500, and *Brady v. Maryland*, 373 U.S. 83 (1963).

§14-312(b) should be amended to include:

(4) The confidential nature of the communication is not waived by: the presence of a third person who is required for the response at the time of the communication; group counseling; or disclosure to a third person with the consent of the victim when reasonably necessary to accomplish the purpose for which the advocate is consulted.

(5) Except as provided in this Act, no sexual assault victim advocate shall be examined as a witness in any civil or criminal proceeding as to any confidential communication without the written consent of the victim or the representative of the victim as provided in subparagraph(B).

(6) The presence of a sexual assault victim's advocate or sexual assault counselor does not operate to defeat any privilege otherwise guaranteed by law.

By amending the confidentiality provisions in this way, law enforcement, prosecutors, advocates and survivors may proceed with the confidence that the presence of an advocate in interviews does not invalidate the survivor's confidentiality, and clarifies that the advocate is not interfering with any other confidential relationship established by being present in these interviews, or in prosecutorial interviews pursuant to the SAVRAA Task Force recommendations.⁶

The SAVRAA Task Force has recommended that the right to an advocate's presence extend to interviews with prosecutors. In light of the confusion, frustration and concerns with the prosecutorial process revealed by survivors in interviews for this evaluation and project, this right is badly needed.

C. Definition of Law Enforcement and Interview

While a basic operational definition of law enforcement is of course being used in daily application of SAVRAA, the statute does not distinguish between detectives or investigators and patrol officers in its requirements except in the definition of "Interview" under §23-1907(a)(5) which states:

"'Interview' means any interview by the Metropolitan Police Department (MPD) or other law enforcement agency with a sexual assault victim that occurs in conjunction with a sexual assault victim receiving any medical treatment or forensic evidence collection related to sexual assault at the hospital and any subsequent in-person interview with law enforcement related to the sexual assault."

⁶ See SAVRAA Task Force Report, pg. 24- 28.

This definition of an interview does imply, if by function alone, that the requirements listed only apply to detectives and investigators and that the intention is to attach the right to an advocate to interviews defined as such, i.e. those that occur with a medical and forensic exam at a hospital. For the sake of absolute clarity, this definition should be amended to state that it envisions or applies only to detectives and investigators investigating sexual assault and not the patrol officer who arrives on the scene after a 911 call has been made.

Similarly, this definition will require revision to accommodate the non-hospital cases based on the recommendations of the one-year needs assessment recommended by the SAVRAA Task Force. The SAVRAA Task Force has recommended that a one-year needs assessment be conducted to determine the volume and reporting patterns of survivors who report to law enforcement but do not want or need medical and forensic care, and thus the capacity requirements for NVRDC or another program seeking to provide advocacy for that population. While historically the focus of most sexual assault responses nationwide takes place within a medical context, this is not a foregone conclusion and is also not representative of the majority of sexual assaults taking place in the District.⁷ One could make the argument that these represent the most acute cases and are those that involve the most violence, thereby warranting the most heavily coordinated and resourced response. However, there are multiple scenarios that do not fit within the 96-hour time limit for SANE exam eligibility that are nonetheless extremely violent and/or traumatizing to the survivor. Those cases may only be distinguished by a choice to forego a particular type of care, or by a delay in the decision or ability to seek help beyond the 96-hour window of eligibility for a SANE exam. All of the benefits of a confidential, community-based advocate should be available to as many survivors of sexual assault as possible regardless of the resources they choose to avail themselves of beyond law enforcement. This need was pointed out by survivors interviewed for this project as well as detectives who reported that the restriction of advocacy to the hospital setting seemed arbitrary given the level of trauma and need they see in survivors of some non-hospital involved cases.

D. Definition of the DC SANE Program

The definition of the DC SANE Program under Title II, Sec. 201 requires amendment to accurately reflect the appropriate title and positioning of the DC Forensic Nurse Examiners as an independent non-profit organization in equal partnership with the Network for Victim

⁷ Metropolitan Police Department case records for 2014 indicate that 1102 sexual assault cases were reported. The DC SANE Program's 2014 Annual Report shows that the program conducted 405 exams that year.

Recovery of DC. Both programs together currently make up the DC SANE Program. This definition should read as follows:

- (1) The DC SANE Program means the program that provides comprehensive care to adult victims of sexual assault, and other sex crimes through a collaboration with the DC Forensic Nurse Examiners (DCFNE) (or its successor entity), the Network for Victim Recovery of DC (NVRDC) (or its successor entity), MedStar Washington Hospital Center (or its successor entity) where medical exams are conducted.”

The Office of Victim Services (OVS) previously operated the DC SANE Program in its infancy, and currently provides support for the program by compiling and issuing its quarterly and annual report, which is robust and highly informative. However, that office no longer directly operates the DC SANE Program in the way that it once did and the primary partnership is between NVRDC, DCFNE and MedStar.

E. Clarifications about the Sexual Assault Response Team (SART) and SART Case Review Subcommittee

i. Office of the Chief Medical Examiner Added to SART Case Review Subcommittee

Because of the critical role played by OCME in testing toxicology specimens obtained during SANE exams, they should also be required members of the SART Case Review Subcommittee. Therefore, Title II, Sec. 214 should be amended to include:

- (7) The Chief Medical Examiner of the District of Columbia, or his or her designee, so long as that designee is the Chief Toxicologist in the Office of the Chief Medical Examiner.

It should be noted that the Chief Toxicologist has already been invited to participate in the subcommittee’s work and has attended one meeting thus far.

ii. SART Reporting Requirements

The SART should be required to report to the City Council on its case review subcommittee activities, as well as aggregate statistics about member organizations and agencies work with sexual assault survivors, as well as outreach and other activities, on an annual basis. This report should also incorporate in full or in relevant part the annually produced DC SANE Program report. The SART annual report’s purpose is to ensure that the District has as full and accurate a picture as possible of the needs of sexual assault survivors as well as the statutory compliance of the SART and the Case Review Subcommittee.

F. MPD Reporting Requirements

The Metropolitan Police Department is required under SAVRAA to provide extensive information to the Council for the District of Columbia annually. To provide greater transparency and ensure that the specific rights for survivors of sexual assault provided in SAVRAA are being fully observed, that report from MPD should also include the number of:

- Survivors who requested information about their Toxicology results;
- Cases in which that request was honored, and if it was not honored, the reason why should be provided as aggregate categories based on the recommendations provided to MPD in the SAVRAA mandated evaluation;
- Survivors informed of MPD's intent to contact the defendant in the case. This metric can also include attempts to inform the survivor of said contact given the difficulty with guaranteed contact with a survivor in some cases;
- Interviews that took place without an advocate present and the reasons why including the survivor rights waiver forms signed as described on page 3 of this report.

These metrics are consistent with the changes to MPD's records management system and case files recommended to MPD by the Independent Expert Consultant.

Section 209 of SAVRAA should also be amended to include a section 209 (a)(6) that reads, "The degree to which the victims request for toxicology results, notification of contact with the suspect and the presence of an advocate in law enforcement interviews was adhered to by law enforcement." This could be considered to be encompassed in 209 (a)(3)(B) within the phrase "and other law enforcement actions taken as a result of investigations into sexual assault reports;" but making these metrics explicit will help maintain transparency as to SAVRAA's implementation moving forward. This change should not be interpreted as an indication that a problem has been found to date.

III. Expanding SAVRAA to Include Prosecution

The United States Attorney's Office, the primary prosecutor for the District of Columbia in adult sexual assault cases, was originally left out of SAVRAA. The District's unique bifurcated criminal justice system, i.e. one divided between a locally controlled law enforcement agency and a federally designated prosecution and court system⁸, creates specific challenges when

⁸ The Attorney General for the District of Columbia also prosecutes cases involving defendants who are minors among other case categories, but for purposes of this discussion we're distinguishing the federal status of the US Attorney's Office for the District of Columbia which handles the bulk of the adult sexual assault cases.

Recommended Statutory Changes to
Accompany SAVRAA Independent Expert Consultant Reports
January 31, 2016

attempting to implement a law such as SAVRAA, which would ideally hold the prosecution, whether in the Office of the Attorney General of the District of Columbia or the United States Attorneys Office for the District of Columbia, to the same standards and reporting requirements as the rest of the system. Recognizing those unique caveats, transparency within the entire system of care and a meaningful implementation of SAVRAA requires that we directly address this gap. This is particularly needed given that the primary frustration expressed by survivors and the point at which they felt they were not believed or served well post-SAVRAA is within the prosecutorial context rather than law enforcement.

To that end, the following information from prosecutors' offices, including the US Attorneys Office for the District of Columbia, should be required by SAVRAA to the DC City Council annually regarding how many:

- Warrants were presented to them by law enforcement, and the number approved and declined;
- Cases were presented to a grand jury and indictments returned;
- Cases in which charges were filed;
- Cases dismissed after charges being filed and the reasons for those dismissals construed in aggregate categories;
- Cases in which a plea bargain was accepted;
- Cases that went to trial and the result at trial.

Because actual conviction rates are not a valid measure of prosecutorial success both from a survivor's perspective and also from an offender accountability perspective, any legislation or formal request drafted should be heavily weighted towards process measures rather than conviction outcomes. Those outcomes should be solely focused on a willingness to pursue where possible each and every case in which the legal threshold for viable prosecution is met, and to pursue the case in as victim-centered a manner as possible.

It should also be prominently noted that the USAO has cooperatively and thoroughly provided data on a case by case basis to the Independent Expert Consultant and that they participate actively in the SART. However, the lack of cohesive and consistent tracking across the lifespan of a case as it transitions from law enforcement to prosecution in the form of warrant approval or grand jury to DC Superior Court means that this aggregate information, even gathered on a case by case basis by someone else, is too difficult to gather on a system-wide basis over time without significant changes. By including this requirement, those changes are more likely to become a reality.

Recommended Statutory Changes to
Accompany SAVRAA Independent Expert Consultant Reports
January 31, 2016

Survivors interviewed for the MPD evaluation echoed almost verbatim a desire for best practices for prosecution of sexual assault cases, i.e., success is not in the conviction itself but in the attempt and the process surrounding that attempt. Survivors clearly indicated that they understood that conviction may not be possible. However, if their case was legally sufficient, they wanted it taken as far as it could possibly go in order to have their voice heard in a public forum, i.e., a courtroom or a public court process. To be clear, this desire for aggressive prosecution is not a universal phenomenon and some survivors refuse to cooperate with prosecutors or will even request that a case be terminated for a host of reasons. When this is the case, the USAO should also indicate as much to make it clear that they are in fact observing survivor's wishes in this manner as well.

To that end, the SAVRAA Task Force has also recommended that SAVRAA be amended to include a requirement that prosecutors meet with any survivor who requests an explanation of why their warrant was declined or why a prosecution is no longer being pursued. That language is as follows, and should be incorporated into SAVRAA as well:

§23-1909 (d) shall read: "In any case in which the prosecutor declines the request of a warrant for arrest or declines to prosecute a case presented to them by a law enforcement authority, the prosecutor or agent thereof shall (1) provide notice to the victim or survivor of the reason that the warrant for arrest or the prosecution was declined, within the boundaries of the law; and (2) at the request of the victim or the victim's representative, participate in a meeting with the victim to explain the reasons for declining the warrant or continuing with a prosecution of a known offender."⁹

By codifying this right to a meeting and an explanation about the ultimate fate of their case, a crucial gap in the District's response to sexual assault will be closed and the question of when the rights pursuant to the federal Crime Victim's Bill of Rights (CVRA) attach, i.e., at the warrant or grand jury phase when most survivors seek an explanation, or only after charges have been filed as has been asserted by the USAO in letters to survivors and their attorneys.¹⁰ This accessibility and the transparency it provides prevents survivors from inferring that lack of prosecution means lack of belief in their story or that their efforts at holding the offender accountable were ignored.

Because of the focus on and contentions about the USAO's lack of transparency about their rationale in sexual assault cases or even the results thereof, it is also recommended that

⁹ SAVRAA Task Force Report, pg. 28.

¹⁰ Letters provided to the Independent Expert Consultant in two cases asserting that the Crime Victim's Bill of Rights did not attach until such time as charges were filed and a case opened by the USAO.

SAVRAA be amended to include an evaluation of the prosecution process similar to that undertaken for MPD via an independent expert consultant's report. Within the statutory amendment to SAVRAA, the process for this evaluation should be spelled out as specifically as possible with requirements for access to information and remedies for the independent expert consultant if those requirements are not met. The evaluation can also assist with implementation of the annual reporting requirements discussed above, as well as the SAVRAA Task Force recommended right to the presence of a community-based advocate in prosecutorial interviews. Much as it has with MPD, implementation of that new right, should it become District law, may require a process of revision, protocol development and training to ensure that it functions smoothly for all parties, most especially the survivors exercising that right.

IV. Department of Forensic Sciences (DFS) SAVRAA Compliance and Permission to Consume DNA Samples

SAVRAA requires the Department of Forensic Sciences (DFS) to process physical evidence recovery kits (PERKs) within 90 days of receipt from MPD or other law enforcement agencies. Although the PERK Audit conducted by the Independent Expert Consultant showed significant problems with kit processing until DFS was reorganized beginning in May 2015, these problems and the corresponding backlog of kits have been entirely resolved as of this writing.

However, one significant problem has come to light that interferes with both the intent and letter of SAVRAA: the asserted requirement by the USAO that DFS receive permission from the USAO to begin testing based on the possibility that the testing process may consume the entire sample, thus interfering with the defendant's right to confront witnesses against them. DFS is currently outsourcing kit testing, and prior to submitting any kit to an outside lab, a "Permission to Consume" form must be filled out indicating that the prosecutor and the defense attorney, or alternatively the court, is permitting the lab to potentially consume the entire sample possibly precluding the defense from being able to conduct their own testing, or to observe the testing that occurs.¹¹ This is primarily relevant when an arrest has been made and an attorney assigned.

While the judicial process is relatively inflexible, the extent to which this requirement and its

¹¹The need to obtain permission to consume the entire DNA sample and the appropriate related process is described in Standard 16-3.4 of the *ABA Standards for Criminal Justice: DNA Evidence, 3d ed. 2007*, pg. 75.

interpretation by the USAO interferes with the intent and letter of SAVRAA, the ability of DFS to adhere to the law while still meeting its evidentiary obligations, and most importantly the promises and representations the system made to the survivor at the time they were deciding whether or not to undergo such an often invasive exam have to be discussed in a transparent manner and reconciled. Multiple instances have been reported of kits being delayed to the point where more expensive testing contracts have had to be entered into in order to still meet the statutory 90-day requirement incumbent upon DFS. There have also been instances reported in which the USAO has requested that testing not occur at all because a plea bargain has been accepted by the defendant, or in which the USAO has obtained the kit from the lab it was sent to by DFS for testing and sent it elsewhere on their own account outside of DFS' control. These scenarios raise questions about the District's ability to hold DFS accountable for testing each and every kit within 90 days of receipt and the city's ability to promise survivors a high degree of procedural transparency.

Therefore, the Independent Expert Consultant will be obtaining data from DFS regarding the prevalence of this issue, how it impacts their case flow as well as the budget implications for kits that are outsourced. In addition, the USAO will be consulted regarding their perspective on SAVRAA's mandate that all kits be tested as a matter of course, rather than as a matter of prosecutorial discretion or permission. While PERKs are indeed evidence in a case, they are also part of what was promised to a survivor when they reported the crime and District law currently requires that they be tested within a certain time frame with rare exception.

The Independent Expert Consultant will report her findings to the Council with a recommended solution to this issue by February 25, 2016. If need be and where possible, an amendment to the PERK Audit will also be submitted clarifying which delays in testing previously reported were impacted by issues related to permission required by prosecutors or law enforcement.

V. Amendments to the Misdemeanor Sexual Abuse Statute D.C. Code § 22-3006
a. Adding the crime of removing a person's clothing without consent

The prevalence of drug facilitated sexual assault (DFSA) is high with 35% of the 450 cases reported to the DC SANE Program in 2015 classified as suspected DFSA.¹² The ways in which this crime takes place can vary from someone becoming intoxicated themselves while out with friends beyond the point where they can consent to sexual activity to instances of deliberate drugging of the victim by the perpetrator for purposes of rendering that victim unable

¹² DC SANE Program Annual Report FY2015, pg. 7.

to consent up to and past the point of unconsciousness. Both scenarios constitute a crime under District law. Survivor's conversations with prosecutors and as well as court cases leading to one appellate court case filed by the DV Legal Empowerment and Appeals Project (DVLEAP), have shown a gap in the application of the Misdemeanor Sexual Abuse statute that often centers around a very narrow technicality that may allow a perpetrator to exploit the drugged or intoxicated state of a victim and leave that victim with no legal recourse in spite of a clear violation of what we would commonly understand as sexual assault or the interim steps to committing such an assault: removing someone's clothing without their consent.

Specifically, most victims in drug facilitated sexual assaults, regain consciousness and realize that they are in a state of undress can at the very least attest to not having been in that state before they blacked out. However, under the current D.C. Code, it is not illegal in and of itself to remove someone's clothing without their consent unless, as DV LEAP describes in the attached White Paper discussing their appeal, "the government could prove beyond a reasonable doubt that the perpetrator touched the victim's genitalia, anus, groin, breast, inner thigh, or buttocks, in order to humiliate, abuse, etc., or gratify his own sexual desire. See D.C. Code § 22-3006; D.C. Code § 22-3001(9)." This is a standard that victim witness who has blacked out and awoke to find themselves undressed is almost always unable to confirm and provides a huge loophole for perpetrators of sexual assault to exploit exactly as they may have intended when they preyed upon someone who was so compromised.

Therefore, based on the attached White Paper for DVLEAP, which states the case for statutory reform on this issue far more proficiently than can be provided here, it is strongly recommended that the Misdemeanor Sexual Abuse statute be revised to include the language from Minnesota or Oregon as suggested by DVLEAP to provide the maximum degree of judicial discretion to encompass the wide range of scenarios in which drug facilitated and other forms of sexual assault occur.

b. Felony Enhancement for Multiple Misdemeanor Counts

Misdemeanor sexual assault can be the safe haven of repeat offenders who are often extremely savvy not only about ways to commit the crime, but also about the minimum and sometimes minimal punishment they will receive. In reviewing MPD's cases and discussing these cases with SAU detectives, a clear pattern emerged in which misdemeanor sexual abuse was being committed repeatedly by the same perpetrator, often in cases involving grabbing women on the street, or compulsively obtaining access to victims to grab or otherwise physically violate them, often over the top of their clothing and without force or violence.

Recommended Statutory Changes to
Accompany SAVRAA Independent Expert Consultant Reports
January 31, 2016

During the review of 217 MPD cases for this evaluation, this kind of case was prevalent among the misdemeanor cases. Detectives were also able to present files related to these cases which clearly indicated three disturbing things. First, the degree of recidivism for crimes of this nature is exceedingly high, with some perpetrators grabbing or assaulting a woman every few days or weeks and counting on those victims not to report this to police and to be unable to identify them as the contact is so swift, often taking place in public. Second, the degree of premeditation involved in both planning the method of the crime is shocking. In three cases reviewed in depth, the perpetrators were explicit with detectives about coming to the District to commit these crimes as opposed to other jurisdictions where they have more extensive records or were registered sex offenders, planning the isolation of their victims, in one case very elaborately, as well as their ability to swiftly get away after the crime. Third, the penalty for these crimes as discrete incidents is not a sufficient deterrent, and the perpetrators are actively calculating and weighing that factor in their choice of criminal behavior. One suspect indicated while being interviewed that while he would prefer to be more violent and has been in the past, he is currently satisfied with grabbing women on the street as he rarely receives more than a month in jail for each arrest. Meanwhile, this type of assault can be incredibly traumatizing for the victim.

Arresting the same person repeatedly for the same type of crime only to see them commit the crime again a short time later is not only a huge waste of detective time and resources that the SAU does not currently have, but it is a failed strategy with this particular group of perpetrators who are preying on District residents in order to gratify their own sexual desires.¹³ The deliberate nature of these crimes, rational decision making evidenced by law enforcement interviews with the perpetrators, and their predictable patterns of behavior indicate that a different charging strategy may have a greater deterrent effect. Specifically, in cases such as those in which a defendant is charged with the same misdemeanor for the same behavior in a relatively short period of time, where a pattern of calculated similar acts can be established, beyond a certain number of misdemeanor counts the prosecutor should have the discretion to charge the case as a felony rather than as multiple misdemeanors. By raising the stakes for repeat arrests and offenses, deliberate and calculating repeat offenders may think through the consequences of their actions differently than they do now.

¹³ D.C. Code § 22-3006; D.C. Code § 22-3001(9).

VI. Conclusion and Outstanding Issues

The statutory changes to SAVRAA and other portions of the DC Code discussed in this report are by no means exhaustive, but paired with the SAVRAA Task Force Report, they serve to repair unintended consequences created by SAVRAA and make the SAVRAA's application practical and meaningful. Some changes will necessarily evolve over time as the SAVRAA Task Force recommendations become a reality over next 18 months. However, the changes outlined here are necessary for SAVRAA to function as intended in the immediate term as well.

The SAVRAA Task Force Report itself is the result of careful consideration by service providers, policy makers, advocates, government agencies and law enforcement. The Independent Expert Consultant fully supports the SAVRAA Task Force Report and its recommendations with rare, very small exceptions and will offer written testimony about individual provisions of it as they become relevant. Because the report was created by majority vote and not necessarily unanimous, individual Task Force members reserved the right to comment individually once the report was being publicly considered. That said, the Task Force went above and beyond its mandate in terms of dedication, research, consideration and outreach to the community, particularly with regard to the legislative question about providing community-based advocates for juvenile survivors of sexual assault.

There are several important issue not fully addressed in this report that will be addressed in subsequent reports and/or addenda to this report. Those topics are as follows:

- So called "Jane Doe kits" and their efficacy in creating another way for survivors to report a sexual assault are being researched by three SART members. They will be presenting their findings to the full SART for discussion and consideration at the next full SART meeting in March. Some communities use anonymous reports to law enforcement to facilitate preservation of evidence, tracking of serial offenders, and the initiation of a report as concurrent in time with the assault as possible, regardless of the victim's readiness to come forward. Relatedly, the SART will be discussing the length of time kits are stored when a non-report case is made, i.e. a forensic exam is conducted and evidence gathered but no police report is filed.
- The possibility of expanding the District's statute of limitations for sexual assault cases, particularly in cases where DNA evidence exists but no report was made or the kit was never tested will also be researched and a recommendation forthcoming. Many states provide an exception to a statute of limitations under these circumstances, and there are also other models to choose from to ensure that the District is providing survivors with every

Recommended Statutory Changes to
Accompany SAVRAA Independent Expert Consultant Reports
January 31, 2016

opportunity to report sexual assault and so that where at all possible, law enforcement can attempt to hold an offender accountable.

- Funding or a legislative solution is needed to provide HIV prophylaxis provided by the DC SANE Program for survivors who either do not have insurance or who are dependent on someone else's insurance and cannot use that coverage for privacy or safety reasons. While the DC SANE Program and MedStar are able to creatively cover as many individuals as possible, additional doses beyond the first three are difficult to cover if at all under certain circumstances. A separate memo will be submitted by February 20, 2016 describing a legislative solution to bridge this gap and several others related to medical expenses stemming from a sexual assault.
- The impact of the requirement of permission to consume a DNA sample and therefore permission to test a kit from the USAO will be explored as a priority. This issue was brought to light last week, and data is currently being gathered from DFS. The USAO will also be contacted and other legal resources consulted to create a solution in keeping with SAVRAA's mandate that all kits are tested as promised to the survivor. A memo will be provided to the Committee on February 20, 2016 detailing this recommendation.