

# **A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan**



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## Glossary

AGO	Attorney General's Office
AIHRC	Afghanistan Independent Human Rights Commission
ANP	Afghan National Police
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CID	Criminal Investigation Division
DoWA	Department of Women's Affairs
EUPOL	European Police Mission in Afghanistan
EVAW law	Law on the Elimination of Violence against Women
FRU	Family Response Unit of the Afghan National Police
IDLO	International Development Law Organization
JSSP	Afghanistan Justice Sector Support Program (US)
MoWA	Ministry of Women's Affairs
NAPWA	National Action Plan for the Women of Afghanistan
NGO	Non-Governmental Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
UNAMA	United Nations Assistance Mission in Afghanistan
UNFPA	United Nations Population Fund
UN Women	United Nations Entity for Gender Equality and Empowerment of Women

### **Dari, Pashto and Arabic words**

<i>Baad</i>	Giving a woman as restitution for murder or other crime
<i>Khabahat</i>	Crimes punishable by imprisonment of up to three months
<i>Jirga</i>	Gathering of elders
<i>Mahram</i>	Husband, wife or other close relative with whom marriage is prohibited
<i>Sharia</i>	Code of law derived from the Holy Koran and the teachings and example of the Prophet Mohammed
<i>Shura</i>	Local council
<i>Tahud Nama</i>	Commitment Paper
<i>Tashkil</i>	Official Government staffing table
<i>Ulema</i>	Religious scholars
<i>Zina</i>	Sexual intercourse outside of marriage

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## Mandate

This report has been prepared further to UNAMA's mandate under United Nations Security Council Resolution 1974 (2011):

“To assist in the full implementation of the fundamental freedoms and human rights provisions of the Afghan Constitution and international treaties to which Afghanistan is a State party, in particular those regarding the full enjoyment by women of their human rights.”

Resolution 1974 (paragraph 37) welcomes the Government of Afghanistan's commitment “to develop a strategy to implement the Elimination of Violence against Women (EVAW) law, including services to victims.”

UNAMA/OHCHR undertakes a range of activities aimed at promoting and protecting women's rights to live free from violence and discrimination in partnership with Government of Afghanistan, the Afghanistan Independent Human Rights Commission and civil society organizations, in particular women's civil society groups.

UNAMA Human Rights represents and is supported by the Office of the High Commissioner for Human Rights in Afghanistan and reports annually on its activities through the High Commissioner to the Human Rights Council.

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## Methodology

This report is based on research carried out by UNAMA/OHCHR human rights officers in Kabul and in eight UNAMA regional offices between March 2010 and September 2011. UNAMA/OHCHR officers gathered detailed statistical and substantive information on implementation of the EAW law by prosecutors, judges and police officers, and on the status of operations of provincial Commissions for Prevention of Violence against Women.

In addition, UNAMA/OHCHR carried out more than 261 interviews in 33 provinces, with 67 prosecutors, 52 police officers, 43 judges, 45 representatives of the Ministry of Women's Affairs and provincial Departments of Women's Affairs, and 17 interviews with representatives of the Afghanistan Independent Human Rights Commission (AIHRC) around the country.<sup>1</sup> Interviews were supplemented by monitoring of numerous individual cases of violence against women during 2010 and 2011 and a literature review of relevant documents and reports by Government officials, NGOs and UN agencies.

This report focuses on the Government's implementation of the EAW law during its full first year of implementation, the Afghan solar year of 1389 (21 March 2010-20 March 2011) with additional general research for the period April to September 2011. Afghanistan uses the solar year for all official records.

The report includes statistical data about how judicial and law enforcement authorities in the provincial centers of 31 of Afghanistan's 34 provinces were applying the law from March 2010 to March 2011.<sup>2</sup> City courts, prosecution offices and police provided the data that UNAMA/OHCHR analyzed, although not all authorities systematically recorded information or were prepared to share such information. The report does not document implementation by district courts and district prosecution offices, or by courts of appeals and the Supreme Court, except in general terms.

The report cites numbers of cases of violence against women as reported to various institutions, including the Afghan National Police, Ministry of Women's Affairs (MoWA) and the AIHRC. The report makes no assertions about whether rates of violence against women are increasing or decreasing in Afghanistan.

The MoWA began collecting data on cases of violence against women in 2006 and enhancements to its database may eventually make it possible to offer a clearer picture on the total number of cases of violence against women in Afghanistan.<sup>3</sup> UNAMA, UN Women, AIHRC, the Ministry of Interior and the Afghan Women's Network (AWN) are supporting efforts to strengthen tracking of cases of violence against women including enhancements to the MoWA database.

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<sup>1</sup> UNAMA/OHCHR could not interview authorities of Helmand province due to access constraints. However, information from Helmand was obtained with the assistance of the Provincial Reconstruction Team there.

<sup>2</sup> Each Afghan province has one urban jurisdiction and a varying number of district jurisdictions, most of which have at least one court and prosecutor. In this report, data for the provinces of Logar, Nuristan and Wardak are incomplete due to access constraints. Some data from Nuristan province comes from interviews with officials from that province based in Jalalabad. Police and courts in several provinces declined to share information with UNAMA.

<sup>3</sup> The Ministry of Women's Affairs registered 4,103 cases in the Afghan solar year 1389 (available at [www.mowa.af.gov](http://www.mowa.af.gov)). The detailed criteria for MoWA's registration of violence against women cases is under development and was not available at the time of writing of this report.

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## 1. Executive Summary

*I have not recorded a single case of violence against women. Security concerns, strong or deep rooted traditional customs and the psychological obstacles of shame and fear prevent women from bringing their cases to court.*

Provincial court official, Khost province<sup>4</sup>

The Government of Afghanistan took a big step forward in support of women's equality and protection of women's rights when it enacted the Law on the Elimination of Violence against Women (EVAW law) in August 2009. The landmark legislation criminalizes for the first time in Afghanistan child marriage, forced marriage, forced self-immolation and 19 other acts of violence against women including rape, and specifies punishments for perpetrators. This report examines implementation of the EVAW law by judicial and law enforcement officials throughout Afghanistan for the period of March 2010 to September 2011, and identifies both positive progress and large gaps.<sup>5</sup>

The report updates earlier findings on the law's implementation in OHCHR/UNAMA's December 2010 study *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*. That report documented widespread harmful practices against women and identified the EVAW law as a key tool for combating violence that is often deeply rooted in traditional practices and attitudes that deny women's equality with men and dictate concealment of abuses within the family. The report also found that the Government's implementation of the law, in particular by police and prosecutors, was limited and that much greater efforts were needed to improve enforcement.

UNAMA/OHCHR's research for this report suggests that judicial officials in many parts of the country have begun to use the law – but that its use represents a very small percentage of how the Government addresses cases of violence against women. UNAMA/OHCHR found there is a long way to go to fully protect women from violence through the EVAW law.

The report found that comprehensive official statistics on the number of complaints of violence against women in Afghanistan are not available and most incidents are unreported. The Afghanistan Independent Human Rights Commission registered 2,299 incidents of violence against women that could be defined as crimes under the EVAW law between 21 March 2010 and 21 March 2011, the first full Afghan calendar year of EVAW law implementation. Using that figure as a baseline estimate, UNAMA/OHCHR found that prosecutors in 28 of Afghanistan's 34 provinces opened cases in 26 percent (594 cases) of an estimated 2,299 incidents, filed indictments in seven percent (155 cases), with primary courts relying on the EVAW law as the basis of their judgments in four percent (101 cases) of an estimated 2,299 incidents.<sup>6</sup>

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<sup>4</sup> UNAMA/OHCHR interview with official of Khost provincial court, 18 April 2011.

<sup>5</sup> Afghanistan uses the solar year for all official records. As noted in the methodology section, this report includes detailed statistical information on EVAW law implementation by judicial and law enforcement offices in 31 provincial centers for the period 21 March 2010 to 20 March 2011 with general information for the period April-September 2011.

<sup>6</sup> AIHRC's criteria for registering cases is similar but not identical to criteria used by police and prosecution offices. The 28 provinces are Badakhshan, Badghis, Baghlan, Balkh, Bamyán, Daikundi, Farah, Faryab, Ghazni, Ghor, Helmand, Herat, Jawzjan, Kabul, Kandahar, Khost, Kunar, Kunduz, Laghman, Logar, Nangarhar, Nimroz, Paktika, Paktya, Panjsher, Parwan, Takhar and Zabul. Prosecutors in four provinces of

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While UNAMA/OHCHR sees growing implementation of the EAW law as encouraging, the low numbers of complaints and cases prosecuted make it clear that the Government has not yet applied the law to the vast majority of cases of violence against women.

Prosecutors in 17 provinces filed indictments under the law.<sup>7</sup> Herat province led the country, with 68 EAW law indictments filed and 35 tried. The Special Violence against Women Unit of the Attorney General's Office in Kabul filed approximately half of all cases in the country - 285 from Kabul, in addition to 47 received from 19 other provinces. However, its record of filing indictments with the courts was comparatively small; it filed only 21 indictments in Kabul courts from March 2010 to March 2011.

UNAMA/OHCHR recorded recent increases in the number of cases of self-immolation of girls and women in the southern and south-eastern regions of Afghanistan. Most of these incidents were not investigated by police despite Article 21 of the EAW law which criminalizes forced self-immolation.

UNAMA/OHCHR also found that some murder cases and other serious crimes criminalized under the EAW law were prosecuted under the Penal Code instead of the EAW law. This sometimes resulted in acquittal of perpetrators, reduction of charges to less serious crimes, convictions with lighter sentences and women victims themselves being accused of "moral crimes."<sup>8</sup>

In many regions, police and prosecutors continued to refer cases of violence against women to mediation and traditional dispute resolution mechanisms that often did not enforce the EAW law or the Penal Code and failed to adequately protect the rights of women. The report found that a majority of cases of violence against women reported to police and prosecution offices were processed outside the formal justice system—through mediation, pressure for withdrawal of complaints, and by elders in traditional dispute resolution mechanisms. UNAMA/OHCHR documented extensive use of mediation for domestic violence complaints—by institutions ranging from the Police Family Response Unit to the Department of Women's Affairs and the Afghanistan Independent Human Rights Commission.

Reliance on mediation reflects in part the expressed preference of many women who file complaints, especially against their husbands, but authorities often appeared to inappropriately suggest and pressure women to withdraw complaints and opt for mediation. The extensive use of mediation even for serious crimes of violence against women is inconsistent with international best practice and the spirit and the letter of the EAW law which calls for prosecuting perpetrators of violence against women, protecting victims of violence and preventing further violence.

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Kapisa, Samangan, Sari Pul and Uruzgan had not registered cases under the EAW law. Information about two provinces of Nuristan and Wardak is incomplete.

<sup>7</sup> The 17 provinces are Badakhshan, Balkh, Bamyan, Daikundi, Farah, Faryab, Ghazni, Helmand, Herat, Jawzjan, Kabul, Kunar, Laghman, Logar, Nangarhar, Paktya and Takhar.

<sup>8</sup> For a death caused by rape (EAW Article 17(1)(2)), burning or use of chemical substances (EAW Article 20(2)) or beating (EAW Article 22(2)), prosecutors should apply the EAW law. So called "moral crimes" are primarily *zina* (sexual intercourse outside of marriage), which is a crime under the Penal Code and *Sharia* law, and "running away" or "intention to commit *zina*" which are not crimes under Afghan law. Afghan authorities often accuse rape victims or girls and women who run away from home of *zina* or "intention to commit *zina*".

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Since the law's enactment, 28 provinces have established branches of the Commission for the Prevention of Violence against Women to support implementation, as mandated by the EVAW law.<sup>9</sup> UNAMA/OHCHR found that 16 commissions are currently functioning and meeting regularly, and that many of them assist victims and raise awareness about the law. Almost all commissions, however, are still struggling to fulfill their mandate and require more support from Provincial Governors, the Ministry of Women's Affairs and other Government bodies.

Although the EVAW law is beginning to be implemented as this report documents, women and girls' lack of knowledge of its protective provisions, uneven enforcement, and the prevalence of harmful practices mean that women continue to flee violence and forced marriage. Women's shelters, a relatively new development in Afghanistan play an often life-saving role by offering temporary safe refuge. Afghanistan's Council of Ministers approved the country's first-ever Regulation on Women's Protection Centers on September 5, 2011. The regulation recognizes the critical service that shelters managed by either the Government or NGOs provide and sets standards for their operation designed to safeguard residents' rights and dignity. The regulation's enforcement, along with creation of shelters in regions where they do not exist, may allow more women to obtain the protections of the EVAW law.

The ongoing challenge to implement the EVAW law is a key element of the 2008-18 National Action Plan for the Women of Afghanistan (NAPWA), which calls for the revision of Afghanistan's legislative framework and judicial system to guarantee the equality and non-discrimination of women enshrined in the Constitution and international human rights conventions. The Government reaffirmed its commitments to implement gender quality at the 2010 Kabul Conference through several national priority programs including the "Capacity Development to Accelerate NAPWA Implementation Program" which aims to develop the capacities of relevant Government entities to mainstream implementation of the NAPWA in their policy-making, planning, programming, budgeting, monitoring, reporting and evaluation process.<sup>10</sup> Afghanistan's "Law and Justice for All Program", another national priority program which has yet to be endorsed by the Joint Coordination Management Board, calls for increasing compliance and enforcement of the EVAW law by the Attorney General's Office, the Supreme Court, and the Ministry of Justice, with funding from international donors.

Harmful traditional practices and violence against women have long prevented women from participating in public life and blocked their voices from being heard in decision making forums. Progress in implementing the EVAW law can contribute to enabling women to play a meaningful part in the country's current peace and reconciliation processes.

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<sup>9</sup> The six provinces where commissions have not been established are Helmand, Kabul, Kandahar, Nuristan, Paktika and Zabul.

<sup>10</sup> National Priority Programs (NPP) are the Afghan Government's priority programs included in the framework of the Afghan National Development Strategy (ANDS) to implement commitments made at the 2010 Kabul Conference. The Joint Coordination and Monitoring Board (JCMB) endorsed the NPP on NAPWA on 19 October 2011. The Government and the international community established the JCMB in January 2006 to provide overall strategic coordination of implementation of the Afghanistan Compact and the ANDS.

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UNAMA/OHCHR asserts that this report can serve as a baseline for future assessment of implementation of the EAW law, increase understanding of factors that impede prosecution, outline the extent to which women continue to face obstacles to access justice, and assist with assessing the effectiveness of training and awareness-raising programs.

Toward these aims, UNAMA/OHCHR calls on the Government to make much greater efforts to raise awareness about the law among women and men, in rural and urban areas, and among the Government at all levels. The Supreme Court, the Ministry of Interior and the Attorney General's Office should instruct promptly their officials at all levels to apply the EAW law consistently, rapidly and efficiently. Police, prosecutors and judges in many regions also require more training on how to apply the law.

International donors should fully fund existing programs that address violence against women, increase their support to the Government on EAW law implementation and provide more resources for training, mentoring on how to implement the law and awareness-raising that can assist in strengthening implementation and better protect women from violence.

## **Key Recommendations**

### **To the Office of the Attorney General**

- Issue instructions to prosecutors clarifying which type of cases of violence against women must be criminally prosecuted and which can be referred for mediation.
- Ensure that all serious crimes of violence against women are prosecuted.
- Conduct an assessment of the Special Violence against Women Unit in Kabul to determine why few of its total registered cases have been prosecuted and how its work can be strengthened.

### **To the Ministry of Interior**

- Issue instructions to the Criminal Investigation Division, including its Family Response Unit, clarifying the type of offences involving violence against women that must be investigated and prosecuted and those that may be mediated.
- Ensure police officers properly register and document all cases of violence against women reported to them, including those cases mediated or referred for mediation, as required by article 7 of the EAW law.
- Ensure the Family Response Unit, as part of the Criminal Investigation Division, is included in all training on investigative techniques, and participates fully in investigations of crimes involving domestic violence, rape or other types of violence against women.
- Ensure that all female police officers are assigned to professional duties and given equal consideration for promotions.

### **To the Supreme Court**

- Instruct the General Criminal Division and the Inspection Department to monitor the courts' correct application of the EAW law to cases of violence against women.

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**To the Ministry of Women’s Affairs and the High Commission for the Prevention of Violence against Women**

- Develop terms of reference for the provincial Commissions on Prevention of Violence against Women, including for their members, and guidelines for their registration and follow up of cases of violence against women.
- Invite civil society including representatives of women’s rights NGOs, shelter managers, and international partners to attend High Commission meetings as observers, to report on specific issues, and to actively support the Commission’s work.

**To International Donors**

- Support implementation of plans and programs of technical coordinated assistance to Government initiatives aimed at enforcement of the ERAW law such as nation-wide awareness campaigns, assistance and training for provincial Commissions for Prevention of Violence against Women, and technical support for the High Commission for Prevention of Violence against Women.
- Fund fully and support full implementation of the National Action Plan for the Women of Afghanistan (NAPWA), and the National Priority Programs on Law and Justice for All and on Capacity Development to Accelerate NAPWA Implementation.

Detailed recommendations are presented at the end of the report.

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## 2. Context

Millions of Afghan women and girls experience violence that is often deeply rooted in traditional practices and attitudes that deny women's equality with men. Tradition has led to concealment of abuses within the family, and police and justice officials routinely ignore domestic violence and arrest and prosecute women who attempt to flee forced marriage and family abuse. UNAMA/OHCHR's *Silence is Violence: End the Abuse of Women in Afghanistan* released in July 2009, and *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan* released in December 2010, are among several reports documenting pervasive violence against women in Afghanistan.<sup>11</sup>

### 2.1 Enactment of the EAW Law

Widespread concern about violence against women led the Government of Afghanistan in August 2009 to enact the Law on the Elimination of Violence against Women (EAW law), the most important legal step taken so far by the Government to criminalize acts of violence against women and bring perpetrators to justice.

The law marked a high point after years of struggle by women's rights activists; they helped shape the law and advocated for its passage. Its enactment provided legal fulfillment of the Constitution of Afghanistan's pledge of equal rights and duties for all men and women,<sup>12</sup> and the obligations undertaken by Afghanistan when it ratified the Convention on the Elimination of Discrimination against Women (CEDAW) without reservations.<sup>13</sup>

The EAW law defines 22 different forms of violence against women: rape; forced prostitution; publicizing the identity of a victim in a damaging way; burning or use of chemical substances; forcing a woman to commit self-immolation; causing injury or disability; beating; selling and buying women for the purpose of or under pretext of marriage; *baad* (giving away a woman or girl to settle a dispute); forced marriage; prohibiting the choice of a husband; marriage before the legal age; abuse, humiliation or intimidation; harassment or persecution; forced isolation; forced drug addiction; denial of inheritance rights; denial of the right to property; denial of the right to education, work and access to health services and other rights provided by law; forced labor; marrying more than one wife without observing Article 86 of the Civil Code; and denial of relationship.

It mandates punishments for persons found guilty of committing such acts and instructs both courts and prosecutors "to give the case of violence priority and act on it expeditiously."<sup>14</sup> The EAW law reinforces the Afghan National Police's (ANP) duty to assist victims, protect individual's rights and freedoms, and detect, combat and investigate crime, by explicitly obliging them to receive and register complaints of violence against women, deal with them according to the law, and inform the Ministry of Women's Affairs (MoWA) of its actions.<sup>15</sup>

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<sup>11</sup> Both reports are available in English, Dari and Pashto at <http://unama.unmissions.org/Default.aspx?tabid=4654>.

<sup>12</sup> See in particular Article 22 of the Constitution.

<sup>13</sup> Signed 14 August 1980 and ratified 5 March 2003.

<sup>14</sup> Article 7 (4) of the EAW law.

<sup>15</sup> See Articles 5 and 26 of the Police Law, Article 29(2) of the Interim Criminal Procedure Code, and Articles 7 and 13 of the EAW law.

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The ERAW law also obliges the Government to take protective and supportive measures in favor of victims. It outlines specific obligations for seven Government ministries and establishes a national High Commission for the Prevention of Violence against Women; members include key Government ministries and departments. The High Commission instructed the governments of Afghanistan's 34 provinces to create provincial level ERAW commissions.

Various international donors have supported the implementation of the ERAW law. For example, UN Women provides multi-faceted technical assistance to the MoWA, which leads the High Commission for Prevention of Violence against Women. The International Development Law Organization (IDLO) has provided the Special Violence against Women Unit of the Attorney General's Office (AGO) with training, administrative assistance and mentoring. IDLO also trained prosecutors in Herat and judges from Helmand, Kabul, Kandahar, Kunar, Logar, Nangarhar, Uruzgan and Zabul provinces.

The US Afghanistan Justice Sector Support Program (JSSP)<sup>16</sup> has sponsored seminars on basic criminal investigation, including of ERAW law violations, for police and some prosecutors in Kabul, and a seminar on ERAW law for prosecutors. DynCorp,<sup>17</sup> a United States-based government services contractor, is training and mentoring the ANP's Family Response Unit, which can make an important contribution toward ERAW law realization. The European Police Mission in Afghanistan (EUPOL) developed and conducted basic criminal investigation training on violence against women for the Family Response Unit and the Special Violence against Women Unit.

UNAMA/OHCHR has undertaken numerous activities from in depth monitoring of violence against women throughout the country to publishing the report *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan* to awareness-raising activities and trainings in 23 provinces. UNAMA/OHCHR also provides technical support and guidance to Department of Women's Affairs (DoWA) on the formation and function of the Commissions.

## 2.2 Weaknesses in the ERAW Law

Although the ERAW law is a milestone in the battle to criminalize violence against women, discussions about possible amendments to improve it began almost as soon as it was enacted. The ERAW law does not create a separate offence for crimes perpetrated in the name of "honor" and does not clearly define some other crimes, including rape, and the element of coercion that is required to distinguish it from consensual *zina* (sexual intercourse outside of marriage).

The law does not address how authorities should treat a woman who runs away to escape any of the offences the law criminalizes. In monitoring individual cases, UNAMA/OHCHR encountered numerous instances of girls and women who fled their home to avoid forced marriage or domestic violence and who were arrested, usually charged and convicted including by the Supreme Court, with "intent to commit *zina*."<sup>18</sup> While the ERAW law penalizes the perpetrators of such offences, it offers no protection

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<sup>16</sup> Supported by the US Department of State Bureau of International Narcotics Control and Law Enforcement Affairs (INL).

<sup>17</sup> Under a contract with the U.S. Army, DynCorp provided training and mentoring services for the Afghanistan Ministry of Interior and Afghan National Police (ANP).

<sup>18</sup> See the section in this report on "Supreme Court" for more information.

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for the woman or girl who runs to escape these crimes. This situation is demonstrated by the large number of women detained in Afghan prisons for so-called “moral crimes”.<sup>19</sup>

The law also requires a victim or her relative to file a complaint in most cases - including for crimes as serious as selling or buying a woman for marriage, *baad*, underage marriage and causing injury or disability - before State institutions will take action. If no complaint is filed or the woman withdraws a complaint due to family pressure or fear of reprisal, the State is not required to investigate or prosecute. This is a major weakness in the law that requires future amendment.

### *Implementation of Specific Provisions*

#### **Article 39(2) - Withdrawal of Complaint**

UNAMA/OHCHR’s monitoring shows that the EAW law’s Article 39(2), which allows a complainant to withdraw her case at any stage of judicial proceedings, is one of its most frequently invoked articles.<sup>20</sup> Article 39 (2) is defended by some observers as necessary in view of the harsh penalties of imprisonment the law orders for some offences, and the social and economic suffering of women whose husbands are imprisoned for long periods.<sup>21</sup> The use of this article, however, often leaves women vulnerable to family and societal pressures.

#### **Article 42 – Pardons**

The Supreme Court recently annulled article 42 of the EAW law<sup>22</sup>, which barred pardons and mitigation of sentences of persons convicted under the law, finding it in conflict with the President’s Constitutional prerogative of pardon.<sup>23</sup> The intent of article 42 was apparently to provide that convicted perpetrators of violence against women were not able to benefit from early release motivated by corruption or political favoritism. In practice, some judicial officials told UNAMA/OHCHR that article 42 discouraged use of the EAW law by prosecutors. The head of the Criminal Division of Faryab Provincial Court said prosecutors prefer to charge the alleged perpetrators using the Penal Code because of the EAW law’s bar on pardons for convicted persons.<sup>24</sup>

While recognizing that revisions of the law are necessary to fully guarantee women’s rights, UNAMA/OHCHR and women’s groups take the view that the current law, if effectively implemented now, can serve as a strong tool to protect and promote women’s rights and lead to the reduction of practices that harm millions of Afghan women and girls.

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<sup>19</sup> See UNAMA/OHCHR *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*, December 2010.

<sup>20</sup> Article 39(2) of the EAW law: “The victim may withdraw her case at any stage of judicial proceedings (detection, investigation, trial or conviction) in the circumstances mentioned in paragraph (1) of this Article. In this case, the adjudication process and punishment shall be stopped”. Exception is made for the crimes of rape, forced prostitution, publicizing the identity of a victim, burning or using chemical substances, and forcing to self-immolation or suicide which must be prosecuted.

<sup>21</sup> UNAMA/OHCHR interview with Medica-Afghanistan defense lawyers, 3 August 2011.

<sup>22</sup> Article 42 on suspending, pardoning and mitigation of punishment: “The punishment of crimes by offenders of violence shall not be postponed, pardoned or mitigated.”

<sup>23</sup> Supreme Court Approval 27 July 2011. “[..] With regard to a query about article 42 of the EAW law that creates problems for the implementation of presidential decrees pardoning and reducing penalties, the High Council of the Supreme Court clarifies that pardoning and reducing the penalties of prisoners is one of the constitutional competencies of the President, who can implement this in any way. Hence this article of the EAW law contradicts Afghanistan’s Constitution. As a law cannot exceed the Constitution, therefore, it is annulled and inapplicable.”

<sup>24</sup> UNAMA/OHCHR interview with head of the Criminal Division of Faryab Provincial Court, 31 March 2011.

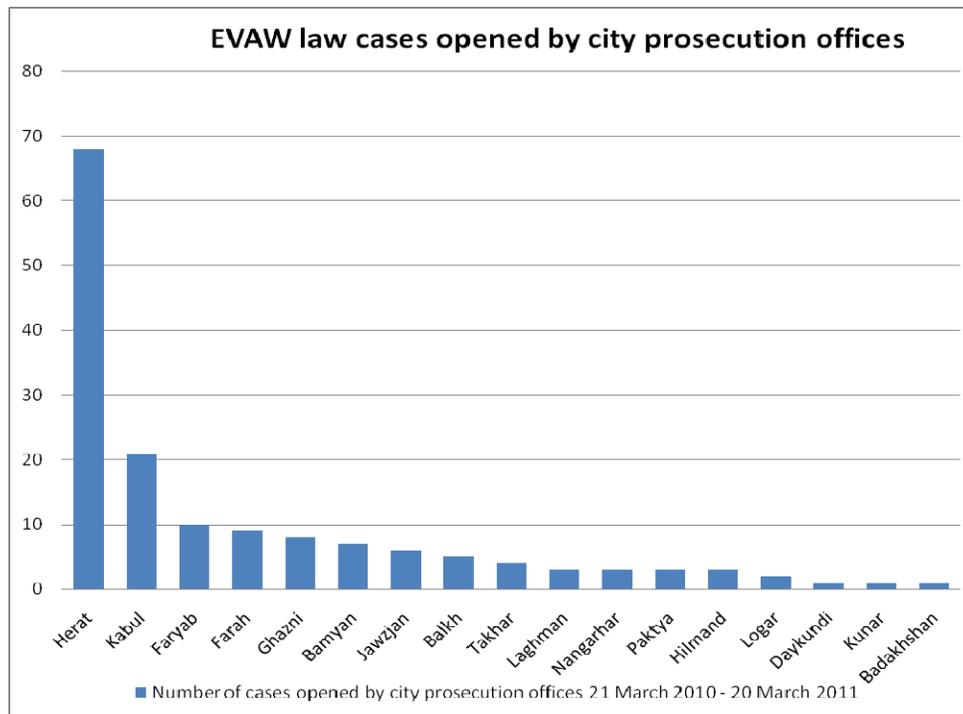
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### 3. Findings on Implementation of the EVAW Law

#### 3.1 Prosecutions of Violence against Women Cases

In the first full Afghan year of the EVAW law's existence,<sup>25</sup> prosecutors in 28 of 34 provinces across the country opened 594 cases of violations under the EVAW law.<sup>26</sup> This appears to represent a reasonably good start for new legislation that challenges deeply rooted harmful practices of violence against women. However, prosecutors filed only 155 indictments from the total 594 cases and primary courts relied on the law as the basis for their decisions in at least 101 of these cases.

Prosecutors in 17 provinces filed indictments under the law.<sup>27</sup> Herat province led the country, with 68 EVAW law indictments filed and 35 tried. The Special Violence against Women Unit of the AGO in Kabul filed approximately half of all cases in the country - 285 from Kabul, in addition to 47 received from 19 other provinces.<sup>28</sup> However, its record of filing indictments with the courts was comparatively small; it filed only 21 indictments in Kabul courts in 2010.



<sup>25</sup> 21 March 2010 - 20 March 2011 or solar year 1389. All official records are kept according to the solar year.

<sup>26</sup> The 28 provinces are Badakhshan, Badghis, Baghlan, Balkh, Bamyan, Daikundi, Farah, Faryab, Ghazni, Ghor, Helmand, Herat, Jawzjan, Kabul, Kandahar, Khost, Kunar, Kunduz, Laghman, Logar, Nangarhar, Nimroz, Paktika, Paktya, Panjsher, Parwan, Takhar and Zabul. Prosecutors in four provinces of Kapisa, Samangan, Sari Pul and Uruzgan had not registered cases under the EVAW law. Information about two provinces of Nuristan and Wardak is incomplete.

<sup>27</sup> The 17 provinces are Badakhshan, Balkh, Bamyan, Farah, Faryab, Ghazni, Helmand, Herat, Jawzjan, Kabul, Kunar, Kunduz, Laghman, Logar, Nangarhar, Paktya and Takhar.

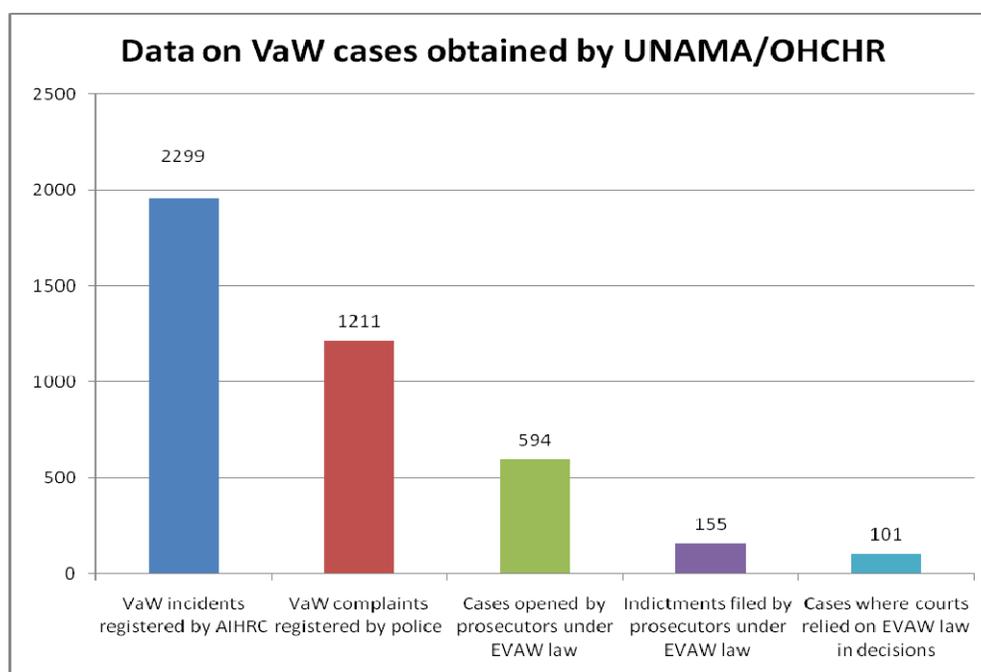
<sup>28</sup> The Special Unit filed an additional 47 cases from provinces outside Kabul, and after conducting preliminary investigations, forwarded them to prosecutors in the provinces where they occurred. Some of these 47 may also be included in the 594 total, as they should be included in the cases filed by provincial prosecution offices.

The 594 EVAW law cases opened by prosecution offices in 17 provinces show that the legislation is beginning to be applied in many parts of the country. This number however represents just over one quarter of the estimated number of 2,299 incidents of violence against women registered by the AIHRC from March 2010 to March 2011.<sup>29</sup>

Using the AIHRC figure as an estimated baseline,<sup>30</sup> UNAMA/OHCHR’s research found that prosecutors opened cases in approximately 26 percent (594 cases) of the total 2,299 incidents, filed indictments in seven percent (155 cases), with primary courts using the EVAW law as the basis of their judgments in four percent (101 cases) of the estimated 2,299 incidents.

In those provinces where UNAMA/OHCHR found the law had not been applied namely, Kapisa and Uruzgan, lack of implementation was reinforced by weak or absent Government, heightened general insecurity and widespread discriminatory traditional practices.<sup>31</sup> In these provinces, women and girls rarely left the home and few can attend school. Even if they know about the EVAW law, women were usually unable to gain access to police or prosecutors, the offices of the Department of Women’s Affairs or the AIHRC. As the head of the provincial court in Khost province told UNAMA/OHCHR;

*I have not recorded a single case of violence against women. Security concerns, strong or deep rooted traditional customs and the psychological obstacles of shame and fear prevent women from bringing their cases to court.*<sup>32</sup>



**\*AIHRC, police and prosecution offices use similar but not identical criteria for registration of cases.**<sup>33</sup>

<sup>29</sup> AIHRC registered 2,765 incidents of violence against women during Afghan year 1389, 21 March 2010-20 March 2011, of which 2,299 incidents could be defined as crimes under the EVAW law.

<sup>30</sup> AIHRC’s criteria for registering cases are similar but not identical to criteria used by police and prosecution offices. Additionally, AIHRC may have registered some complainants who reported their cases to district jurisdictions not surveyed by UNAMA/OHCHR.

<sup>31</sup> Information about two provinces of Nuristan and Wardak is incomplete.

<sup>32</sup> UNAMA/OHCHR interview with head of Khost Provincial Court, 18 April 2011. The Khost city prosecution office registered two cases, but both were withdrawn by the complainants.

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### 3.2 Implementation of the ERAW Law by Prosecution Offices

The prosecutor is a key figure in the implementation of the ERAW law. He or she investigates, issues warrants, approves police arrests,<sup>34</sup> detains and prosecutes alleged perpetrators, and even assists in the implementation of court decisions.<sup>35</sup> The quality of the prosecutor's actions and proper application of the ERAW law, including its instruction to act expeditiously in cases of violence against women generally determine whether a woman victim of violence receives justice.<sup>36</sup> Other Afghan laws reinforce the prosecutor's duty to protect the rights of all citizens, bring perpetrators to justice and ensure that laws are implemented.<sup>37</sup>

The Attorney General's Office (AGO) issued a clear instruction to prosecutors on 8 January 2011 to invoke the ERAW law when prosecuting cases of violence against women:

"The ERAW law was published in Official Gazette number 989, dated 10/01/1388 (30 March 2009), and has been in force since then, but in rape cases and violence against women cases, prosecutors and judges are still invoking Penal Code articles or article 130 of the Afghanistan Constitution. Such practices are misapplication of the laws and cause verdicts to be overruled. In this regard, prosecutions should pay serious attention."

UNAMA/OHCHR, however, documented some judicial authorities continuing to use laws other than the ERAW law for crimes included in the ERAW law when formulating indictments and sentences, especially the Penal Code and *Sharia* law. As a result, in some cases perpetrators were acquitted, charged with less serious crimes, received lighter sentences and/or victims were accused of "moral crimes".<sup>38</sup> More training of prosecutors from the district level up and continued monitoring by the AGO can help increase use of the ERAW law particularly for prosecution of serious crimes of violence against women.

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<sup>33</sup> Statistics obtained by UNAMA/OHCHR from police, prosecutors and courts in provinces are not comprehensive because these offices do not keep consistent, detailed, thorough records of violence against women (VAW) cases.

<sup>34</sup> Under the Interim Code of Criminal Procedure (ICPC), the prosecutor must approve all arrests made by police, or the suspect will be released (article 29, Role of Judicial Police, 1). Judicial police perform their duties under the direction and supervision of the prosecutor (Article 33, Ratification of the Police's Decisions, 1). The primary prosecutor immediately after having been informed about the judicial police's activities indicated in articles 30, 31 and 32 either sanctions the judicial police's activities or adopts decisions to revoke or modify them.

<sup>35</sup> ICPC article 8 Final Decision; clause 4, "The prosecutor at the Primary Court shall give execution to the final decisions. To this end, the Court of Appeals and the Supreme Court shall deliver to the prosecutor at the Primary Court that adopted the initial decision the file containing the procedural documents and the objects confiscated."

<sup>36</sup> Article 7(4) of the ERAW law, "The prosecutor's office and the court are bound to give the case of violence priority and act on it expeditiously."

<sup>37</sup> Prosecution Law, Art.12 Duties and responsibilities of prosecution offices...2- Protect political rights, right to work and other rights enshrined in the Constitution and other legislative documents...4- Monitor equal implementation and observation of law by central and local administrations, governmental, private and mixed institutions, political parties, social organizations, officials and citizens. ...13- Monitor implementation and enforcement of court's decisions.

<sup>38</sup> UNAMA/OHCHR monitoring of individual cases of violence against women across Afghanistan from March 2010 to September 2011.

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UNAMA/OHCHR also recorded that some appeals prosecutors demonstrated awareness of the law by correcting the failure of first instance prosecutors to invoke the EAW law, including in these cases:

- District police in Shahr-e-Buzurg, Badakhshan province, investigated a complaint from a 22-year-old woman that her husband and in-laws were beating her. The prosecution completed its investigation and submitted the indictment to the district court, which only fined the perpetrators 1,000 Afghanis (US \$22). The Badakhshan Appeals Prosecutor challenged the sentence based on Article 23 of the EAW law (Battery and Laceration), and on 14 October 2010, the provincial court sentenced the husband to three months imprisonment.<sup>39</sup>
- In Daikundi, the appeals prosecutor challenged a verdict by the primary court that found two minor girls who had been raped and impregnated by a 60-year-old mullah guilty of adultery, invoking EAW law articles 3 and 17, but the Court of Appeals rejected this.<sup>40</sup>

#### *Herat Province: Increasing Use of the EAW Law*

Herat prosecutors were the first in the country to use the EAW law, filing 26 indictments with the courts between the law's enactment in August 2009 and 20 March 2010 and in the following year, a further 68 indictments.<sup>41</sup> Herat courts relied on the EAW law as the basis for their decisions in 35 cases. Herat's Chief Prosecutor attributed this strong record to the very good collective efforts of key institutions, training courses for Herat's prosecutors by the International Development Law Organization (IDLO), and the performance of prosecutors.<sup>42</sup>

Among examples of application of the law by Herat prosecutors is the prosecution in a military court of police officers for raping a 15-year-old girl. Four Afghan National Police raped the girl on 31 April 2010 in Ghoryan district, Herat, as she was running away from home to Herat city to avoid a forced marriage. The prosecution charged the four according to article 17 of the EAW law. The military court convicted them and ordered sentences of 12 to 14 years (although the EAW law provides a mandatory sentence of life imprisonment for rape of an underage woman (article 17(2))). The Military Court of Appeals upheld the convictions, but reduced the sentences to six to eight years.<sup>43</sup>

In another case, prosecutors applied Article 22 of the EAW law and Article 395 of the Penal Code to pursue a double murder. Two sisters, age 15 and 17, were killed in Karukh district of Herat on 5 July 2010. Reportedly, the 17-year-old had refused to marry a man her family had chosen for her. Five people, including her would-be in-laws and two other men attacked them at their home and killed them. Police arrested the five on

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<sup>39</sup> Badakhshan Appeals Prosecution Office in an April 2011 response note to UNAMA/OHCHR.

<sup>40</sup> UNAMA/OHCHR interview with Daikundi Appeals Prosecutor, 8 August 2010. See "Implementation by the Courts" section of this report for an account of the case.

<sup>41</sup> UNAMA/OHCHR interview with Herat Chief Prosecutor, 24 May 2011. Unlike other prosecution offices UNAMA/OHCHR consulted, Herat's records indicate that all cases registered were sent for prosecution in the courts. This may indicate that cases received and later withdrawn or closed were recorded elsewhere.

<sup>42</sup> UNAMA/OHCHR interview with Herat Chief Prosecutor, 24 May 2011,

<sup>43</sup> UNAMA/OHCHR interview with head of Military Prosecution Office, Herat province, 18 April 2011.

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15 October 2010. The Court of Appeals later acquitted three of the men, but sentenced the would-be husband and father-in-law to 16 years imprisonment.<sup>44</sup>

The vast majority of cases filed and prosecuted under the EVAW law in Herat are for battery or beating. The rest includes causing injury under Article 22 (about 10 percent), humiliation, intimidation under Article 29 (about six percent) and death caused by crimes under the EVAW law (about six percent).

It is too soon to tell if Herat's robust efforts to implement the EVAW law lead to a reduction in violence against women. Reliable statistics on such cases are not available, and international experience indicates that increased awareness of rights tends to lead to increased case reporting. A closer study of trends in Herat province, however, could provide useful information, lessons learned and best practices for national efforts to address violence against women.

### *Special Violence against Women Unit of the Attorney General's Office*

The Special Violence against Women Unit of the Attorney General's Office was established in March 2010 with a mandate to investigate and prosecute cases of violence against women, and support and assist victims throughout the process. Integrated into the *Tashkil* (official Government staffing table) of the AGO in June 2010, it is staffed with 11 prosecutors and 11 other employees.

The Unit can accept cases from anywhere in the country, but most of its work comes from Kabul city and province, for which it is the primary reference.<sup>45</sup> Although the Unit registered 285 cases from Kabul province between March 2010 and March 2011, it filed indictments in only 21 of these cases with the courts. Of the original 285 Kabul cases, 76 were withdrawn by the victims under Article 39.<sup>46</sup> In many other cases, the complainant did not return to follow up, apparently abandoning her case.<sup>47</sup>

The Deputy Attorney General for Criminal Investigation advised UNAMA/OHCHR that few cases were prosecuted because more than 70 percent of cases were closed, mediated or archived although these were not felonies, only misdemeanors.<sup>48</sup> A large number of those remaining were divorces or other civil matters that were referred to Family Court. Only a small number of violence against women cases of serious crimes remained for prosecution. The Deputy Attorney General attributed the high rate of mediation and withdrawal by women of their complaints to Afghan culture and traditions.<sup>49</sup>

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<sup>44</sup> UNAMA/OHCHR interview with head of the Public Security Unit Murder and Assault Branch of Herat provincial prosecutor's office, 24 May 2011.

<sup>45</sup> Kabul police sometimes file EVAW law cases with other prosecution offices, but they generally forward them to the Special Unit. When complainants come from other provinces, the Unit conducts a preliminary investigation (interviewing the victim or complainant, sending the victim for a medical check, and preparing a case file) and then sends the file to the province or district where the incident took place.

<sup>46</sup> Information from the Special Violence against Women Unit's database, shared with UNAMA/OHCHR by IDLO, May 2011.

<sup>47</sup> UNAMA/OHCHR interview with official from the Special VAW Unit 12 June 2011.

<sup>48</sup> Felonies, misdemeanors and *khabahat* (delinquencies/obscenities) are defined by the length of sentence that follows conviction.

<sup>49</sup> UNAMA/OHCHR interview with Deputy Attorney General for Criminal Investigation, Nurhabib Jalal, 10 August 2011.

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Several NGO legal aid providers consulted by UNAMA/OHCHR said the Special Unit preferred to resolve cases through mediation. One female lawyer said, "*Protection of the family requires that not all cases be prosecuted... The Special Unit is a good leverage for bringing the husband to the table of reconciliation. Because of their fear of being prosecuted, they accept suggestions made by the Special Unit for reconciliation.*"<sup>50</sup> Other defense lawyers noted that some women complained but they did not want to separate or to see their husbands, their only breadwinner, incarcerated, so they consented to reconciliation.<sup>51</sup>

Another legal aid provider told UNAMA/OHCHR, "*When we are there [Special Unit] we see three or more complainants coming in, but most of these cases, mostly beating cases, are resolved through mediation between the wife and the husband.*"

UNAMA/OHCHR suggests that the Attorney General with international assistance if requested conduct an assessment of the Special Unit, examining its low rate of prosecution and high rate of complainants' abandonment and withdrawal, to determine if changes are needed in its handling of complaints. This is particularly important in light of the imminent establishment of special violence against women units in six provinces with assistance from the International Development Law Organization: Balkh, Kapisa, Kunduz, Nangarhar, Paktya, and Parwan.<sup>52</sup>

Special Unit prosecutors investigate and pursue cases only up to the Court of Appeals level, leaving appeals to the Supreme Court to the General Penalties Unit, whose prosecutors are less familiar with cases of violence against women than those of the Special Unit.<sup>53</sup> UNAMA/OHCHR is of the view that the AGO should consider giving the Special Unit responsibility for following up on all violence against women cases that reach the Supreme Court.

The Special Unit shared some examples of its prosecutions with UNAMA/OHCHR.<sup>54</sup>

- The Chief of Police of Meer Bachakot district, Kabul, transferred the case of a 21-year-old woman's suicide to the Special Unit. Marks on her leg and face substantiated the claim that the woman had killed herself following domestic violence. After initial investigation, police arrested the victim's brother-in-law. The Special Unit pressed charges under Article 21 of the EAW law. The alleged perpetrator was acquitted by the primary court, but the prosecutor appealed on 4 January 2011, and on 8 May 2011, the Court of Appeals found the man guilty and sentenced him to three years imprisonment.
- The Unit received a complaint on 9 April 2010 from an 18-year-old woman in Kabul who claimed her husband beat her badly, causing injuries and bodily harm.

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<sup>50</sup> UNAMA/OHCHR interview with Medica-Afghanistan, 3 August 2011.

<sup>51</sup> UNAMA/OHCHR interview with Da Qanoon Ghush-tonky legal aid organization, 3 August 2011.

<sup>52</sup> 19 September 2011 news release by the International Development Law Organization (IDLO) announcing its signing of a Memorandum of Understanding with the AGO to support with training and mentoring the six violence against women "commissions," which will become units when they are integrated into the AGO's *Tashkil* in the upcoming fiscal year. The program is supported by the United States Department of State's Bureau of International Narcotics and Law Enforcement (INL).

<sup>53</sup> In May 2011, UNAMA/OHCHR monitored two cases where the Supreme Court affirmed convictions of the Court of Appeals for adultery of victims of gang rape. Attention to the treatment of cases at this highest level by the Special Unit could help improve overall handling of violence against women cases.

<sup>54</sup> UNAMA/OHCHR interview with officials from the Special Violence against Women Unit, May 2011.

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The perpetrator admitted the crime. On 15 May 2011, the investigation team of the Special Unit filed an indictment with Kabul primary court, which subsequently sentenced the husband to two months imprisonment under Article 23 of the EAW law.

### 3.3 Implementation of the EAW Law by the Courts

UNAMA/OHCHR found that primary prosecution offices have more readily applied the EAW law than the primary courts. While 28 prosecution offices filed indictments under the EAW law, the provincial center primary court or city court in only 14 provinces relied on the EAW law as the basis for their decisions in a total of 101 of the 155 cases between 21 March 2010 and 20 March 2011.<sup>55</sup>

Victims withdrew some cases were withdrawn and some cases were still pending at the primary courts. In some instances, primary court judges amended the prosecutors' indictments during trial, rejecting the application of the EAW law and redefining the criminal charges under the Penal Code or other laws.<sup>56</sup> In the two cases noted below, women victims of violence were also convicted of "moral crimes".

- In Bamyan, for example, the prosecutor charged three defendants with gang rape under Article 17 of the EAW law. The city court judge, however, redefined the charges into adultery and added the victim to the list of accused. The Court of Appeals and finally, the Supreme Court upheld the convictions on adultery for the three rape defendants and the victim, sentencing the 16-year-old girl to one year in a juvenile facility and the three men to three-year terms.<sup>57</sup>
- Similarly, despite some effort by the prosecutor's office, courts in Daikundi province have yet to apply the EAW law. In one case, a 60-year-old mullah was accused of raping two girls aged 14 and 15 whose parents had sent them to a mosque to study with him. When the case was first reported, on 1 March 2010, the victims were seven and eight months pregnant. The girls said the mullah had drugged and tricked them. Later, the alleged facts became confused; one of the girls stated that she had secretly married the mullah - the mullah concurred but could offer no proof. Authorities arrested the mullah and charged him, not with rape under the EAW law's Article 17 but with adultery and violating the sanctity and dignity of a holy place. The prosecution also ordered the arrest of both girls on adultery charges and sent them to the women's prison in Nili. Both girls gave birth while being detained in the prison. The city court convicted the mullah of adultery under the Penal Code, sentencing him to 12 years imprisonment, and the girls of adultery, sentencing them respectively to six and four years. The appeals prosecutor, however, challenged that verdict, saying that the EAW law should be applied, invoking articles 3 and 17. But the Court of Appeals rejected this. It convicted the mullah only of adultery and reduced his sentence to eight years, sentenced the girl he allegedly married to time served and reduced the sentence of the other to four years of home confinement. On 18 January 2011,

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<sup>55</sup> The provinces are Balkh, Bamyan, Farah, Faryab, Helmand, Herat, Jawzjan, Kabul, Kunar, Logar, Nangarhar, Paktya, Panjsher and Takhar.

<sup>56</sup> According to Article 57 of the Interim Criminal Procedure Code, the prosecutor files a case invoking relevant provisions of laws allegedly violated, seeking a certain punishment based on the cited articles. The court, however, may disagree and apply another article or even another law based on proof, evidence and the arguments of the parties.

<sup>57</sup> UNAMA/OHCHR case monitoring, October 2010 to May 2011.

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the Supreme Court upheld the decision of the Court of Appeals. If the mullah had originally been charged under the EAW law, the two girls would not have been arrested and detained. Both ended up in underage marriages, one of them to a man in a position of authority who had raped her.<sup>58</sup>

In some provinces, UNAMA/OHCHR found that judges used the law appropriately.

- The city court in Takhar convicted a woman of compelling the October 2010 suicide of her husband's second wife through physical and mental harassment. In April 2011 it sentenced her under Article 21 of the EAW law to 10 years imprisonment. The Court of Appeals, still applying Article 21, found attenuating circumstances and reduced the sentence to five years and six months.<sup>59</sup>
- In Jawzjan province, on 29 March 2011, a district court found a former ANA soldier guilty of forcing his wife into prostitution (Article 18). Injured and unable to work, the former soldier told his wife to have sex with their landlord in exchange for rent. The wife refused and reported the case. The husband confessed and was sentenced to three years imprisonment; the Court of Appeals increased the sentence to seven years.<sup>60</sup>
- City court in Paktya province applied the law in two cases, including the conviction under Article 21 of a man whose wife had died of self-immolation. On 28 March 2010, she had set herself on fire, after her husband forbade her from attending her brother's wedding party. The husband brought her to the hospital in Kabul, where she later died. The provincial court upheld the conviction and the man received a sentence of seven years imprisonment.<sup>61</sup>

### Supreme Court

The Supreme Court has not issued specific instructions to courts about the EAW law's application, although it has supported and participated in trainings for judges on the law. In a meeting with UNAMA/OHCHR, the Chief Justice acknowledged that violence against women is widespread in Afghanistan and that the EAW law is not well known or understood.<sup>62</sup>

In August 2010, the High Council of the Supreme Court, in "approval number 572"<sup>63</sup> instructed prosecutors on how to handle "run away" cases. According to the instruction, courts should assess whether a runaway is single or married, the cause and motive for running away, and the place to which the woman has run (a relative's or stranger's house). If a woman runs to escape harassment and disturbance by family members, and goes to a relative's house, to the house of a legitimate *mahram*, or to a justice institution, then the incident shall not be regarded as a crime from the *Sharia* perspective. However,

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<sup>58</sup> UNAMA/OHCHR case monitoring March 2010 to January 2011.

<sup>59</sup> Chief of Criminal Prosecution Division, Takhar, response note to UNAMA/OHCHR May 2011.

<sup>60</sup> Head of criminal division, Jawzjan Court of Appeals, response note to UNAMA/OHCHR, March 2011.

<sup>61</sup> UNAMA/OHCHR interview with Gardez city court judge, 24 April 2011.

<sup>62</sup> UNAMA/OHCHR interview with Chief Judge of the Supreme Court, 4 April 2011.

<sup>63</sup> Approval no. 572, a directive or instruction, was articulated in a letter dated 27 August 2010, from the High Council of the Supreme Court, sent in response to a communication from the International Development Law Organization requesting clarification on the legal basis of arrest and prosecution for the crime of "running away". The Supreme Court's response was shared with UNAMA/OHCHR. The Supreme Court directive was also published in *Islah Daily newspaper* 25 August 2010.

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if the woman goes to a stranger's house, although the reason for running away may be to escape abusive treatment, the instruction states that she exposes herself to crimes such as "adultery (*zina*) and other associated offences" that, according to the High Council, are illegitimate under *Sharia* and thus prohibited and punishable.

The instruction could appear to represent a positive step against the common practice of arresting girls who run away. UNAMA/OHCHR, however, suggests that the Court is using Article 130 of the Constitution (which allows for courts to apply *Hanafi* jurisprudence of *Sharia* law in circumstances where there is no clear provision under criminal laws) to legitimize a traditional practice that restricts women's movement and has no basis under *Sharia* law.

On 5 September 2011, the Supreme Court wrote to UNAMA/OHCHR Human Rights questioning UNAMA/OHCHR's treatment and perspective on the Supreme Court's instruction on the issue of runaway women and girls as outlined in UNAMA/OHCHR's 2010 report on *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*. In its letter, the Court stated "punishment to prevent the possibility of inflicting damage has a religious and legal basis... prevention of non-*mahram* intercourse and moral corruption and infliction of damage to chastity in this crime has been the main priority. The matter of gender equality and non-discrimination is not an absolute subject [with]... well-known and normal exceptions in the legal systems of all countries... for example the prohibition on women doing underground or heavy jobs or nighttime work has been accepted globally and is not considered as damaging the principles of equality of man and woman before the law." The Court underscored Article 3 of the Constitution, that "the basis of Afghanistan's legal system is *Sharia* and no principle or statutory law against Islamic principles can be enacted or implemented."<sup>64</sup>

While UNAMA/OHCHR welcomes the Court's discussion of these important issues, it suggests that further consideration, dialogue and study of this issue is required to ensure women's rights are fully protected.

The Court's most significant action in relation to the EAW law is its 27 July 2011 decision to annul Article 42, which barred pardons and mitigation of sentences of persons convicted under the law. It found the article in conflict with the President's Constitutional prerogative of pardon, saying, "[...] with regard to a query about Article 42 of the EAW law that creates problems for the implementation of presidential decrees pardoning and reducing penalties, the High Council of the Supreme Court clarifies that pardoning and reducing the penalties of prisoners is one of the constitutional competencies of the President, who can implement this in any way. Hence this article of

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<sup>64</sup> On 5 September 2011, UNAMA/OHCHR received a letter from the Supreme Court, which praised UNAMA/OHCHR's report *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*: "Considering that harmful traditional practices are an ancient heritage that have blighted the Afghan people, who cannot be rid of them easily or in the short term, the content OHCHR Human Rights' report can have an important role in enlightening the minds of people of both sexes, and paving the ground for gradual positive changes." In the same letter, the Court questioned the report's treatment of the issue of runaways and UNAMA/OHCHR's view on the Court's August 2010 instruction on run away cases, which said, among other things, that if a woman runs, even fleeing "harassment and pain," to a location that is not the house of a relative, a *mahram*, or a justice institution, her action "is prohibited and punishable" because it "can result in crimes such as *zina* and other associated offences."

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the EVAW law contradicts Afghanistan's Constitution. As a law cannot exceed the Constitution it is annulled and inapplicable."<sup>65</sup>

### 3.4 Implementation of the EVAW law by the Afghan National Police

Police are required to ensure the safety of victims of violence and provide them with information on their rights and available services. As the first State actor most women victims meet, police take victims' statements and write crucial preliminary reports on the circumstances of the crime. How they respond, with sensitivity and sympathy, or ignorance and discrimination, helps set the course for the outcome of the case.

Enforcement of the EVAW law by the Afghan National Police (ANP) is more difficult to assess than by the prosecution and courts. Registration of cases of violence against women by police is not consistent, and usually does not correspond precisely to crimes defined in the EVAW law; cases are recorded as "domestic violence," or "family dispute," for instance and many cases are not recorded at all.

As noted earlier in this report, UNAMA/OHCHR recorded 1,211 complaints of violence against women registered with police from 21 March 2010-20 March 2011.<sup>66</sup>

#### *Family Response Units*

UNAMA/OHCHR found that police in provinces where Family Response Units (FRUs) have been established and whose members are mainly female, generally receive more complaints and are more likely to act upon them. The further development of the FRU, a largely although not entirely female corps, could contribute to improving police handling of female victims of violence. The FRU has an authorized strength of 355 investigators operating in 148 offices throughout Afghanistan. Most FRU staff in the provinces are not fully literate and generally, they have had no special training to deal with cases of violence against women.<sup>67</sup>

The FRU is part of the Criminal Investigation Division (CID) and as such in theory, its members can contribute to investigations into cases of violence against women. However, only a few commanders encourage this.<sup>68</sup> FRUs mainly handle domestic disputes and domestic violence, and are rarely involved in investigating cases of rape, self-immolation or forced marriage.<sup>69</sup> At many police stations, women cannot reach the FRU without first going through the duty officer and explaining their issue.

UNAMA/OHCHR found that in the absence of Family Response Units or visible women police officers, women victims almost never approach police stations willingly, fearing they will be arrested, their reputations stained or worse. Police in these areas referred cases of violence against women to traditional dispute resolution mechanisms or to the

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<sup>65</sup> The Supreme Court's decision can be read in Dari, at <http://supremecourt.gov.af/fa/news/2538>.

<sup>66</sup> This number included data from 26 provinces, ranging from highs of 293 in Herat, 237 in Kunduz, and 234 in Kabul, to zero in Paktika and Ghazni. UNAMA/OHCHR was unable to obtain data from police in eight provinces.

<sup>67</sup> UNAMA/OHCHR interview with Lieut. Colonel Zakia Esmtulla, head of the ANP's Family Response Unit, Kabul, 25 July 2011.

<sup>68</sup> UNAMA/OHCHR interview with Elizabeth Cameron, International Police Adviser and FRU Coordinator with DynCorp, Kabul, 25 June 2011.

<sup>69</sup> Consensus of participants at a 21 July 2011 meeting in Kabul of organizations working with ANP including DynCorp, EUPOL, US Embassy, UNFPA, UN Women, UNAMA/OHCHR.

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Department of Women's Affairs. Police officers continued to arrest and detain women who run away from home, often failing to investigate the reasons for their flight.

Women's complaints of violence generally have a better chance of being acted upon by police in Kabul than most other areas.<sup>70</sup> Police stations in the city and in rural districts have Family Response Units and Human Rights Focal Points (HRFP) and women victims often approach them directly, although neighbors or relatives of a victim occasionally report a woman's mistreatment. District police investigate, forward complaints linked to the EAW law to the FRUs or the provincial Human Rights Focal Point, or in some cases provide mediation. Depending on the type of offense, the Focal Point further investigates and forwards the case file to the prosecutor's office or addresses it through mediation. The Kabul HRFP recorded 234 cases related to violence against women during 2010.<sup>71</sup>

Police in Herat, which also has Family Response Units, has a strong record of follow up on complaints. It registered 293 complaints of violence against women during the reporting period. Out of this, 67 came from the Family Response Unit's permanent unit at the Herat Burns Hospital; officials processed these cases, originating in several different provinces, in various ways. For the 226 other cases, the FRU sent 73 cases directly to the prosecution, referred 31 to CID, 19 to different authorities in the districts, 13 to Family Court, one to AIHRC, and mediated 54 themselves. Thirty-five cases were withdrawn.<sup>72</sup>

In the northern largely rural province of Samangan, the Police Family Response Unit also consistently followed up on complaints. Out of 17 complaints it registered in 2010, the FRU referred 10 cases (beating, forced prostitution, domestic violence and adultery) to the prosecution and addressed seven through mediation and consultations (family disputes, verbal assault, disturbing girl school students).<sup>73</sup>

In north-eastern Takhar province police registered 85 cases but only a small number went to prosecution. One of these concerned a *baad* marriage—where a girl was given to another family to compensate for a crime. The case was in Warsaj district where police arrested several people in connection with a 2010 *baad* marriage. A man had raped a 16-year-old girl; when she became pregnant, the family arranged for her to marry the man who had raped her. At the same time, they demanded that the rapist's family give them a girl, and they received his nine-year-old sister. Based on an arrest warrant issued by the prosecutor, police arrested the father and uncle for facilitating and arranging the *baad* marriage, charging them under Article 25 of the EAW law. The prosecution office also issued an arrest warrant for the mullah who celebrated the *baad* marriage, two witnesses and two mediators.<sup>74</sup>

### ***Failure to Register/Investigate Cases of Violence against Women***

Examples of provinces where the EAW law was largely ignored by police include Kandahar, where police recorded victim and witness statements but rarely provided any follow up.

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<sup>70</sup> Ibid.

<sup>71</sup> UNAMA/OHCHR interview with Kabul Province Police Human Rights focal point, 23 June 2011.

<sup>72</sup> UNAMA/OHCHR interview with Herat ANP Family Response Unit, 9 June 2011.

<sup>73</sup> UNAMA/OHCHR interview with Samangan ANP Family Response Unit, 13 July 2011.

<sup>74</sup> Takhar deputy chief prosecutor response note to UNAMA/OHCHR July 2011.

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On 13 March 2011, a woman reported her daughter's forced suicide to the Family Response Unit. Her family had given away the daughter in marriage at the age of 25 in exchange for 300,000 Afghanis (US\$6,600). Her in-laws constantly berated her, the mother said.<sup>75</sup> *"Your parents took so much money from us, you must now pay it back by working in people's homes."* Eventually, in February 2011, after ten years of marriage, they told her that she would have sex with three male guests visiting the family. A month later, the woman set fire to herself in her room. *"She was always saying that she would burn herself one day. I would tell her, please tolerate, this is life as it comes and one day you will have a bright future,"* the mother said. Police recorded the mother's complaint but made no attempt to investigate. Forced self-immolation is one of several crimes that the EVAW law instructs should be pursued by police and prosecutors even in the absence of a complainant.<sup>76</sup>

In the south-east, police in Ghazni and Paktika provinces whom UNAMA/OHCHR interviewed were unaware of the EVAW law.<sup>77</sup> Paktika police said they had not registered or investigated a single case during the reporting period. *"Violence against women cases in general are not reported either for fear of anti-Government elements or cultural constraints,"* said the ANP Human Rights Focal Point.<sup>78</sup>

In the southern and south-eastern regions, UNAMA/OHCHR observed a recent increase in the number of incidents of self-immolation of desperate girls and women, most of which have not been investigated by police despite Article 21 of the EVAW law which criminalizes forced self-immolation.<sup>79</sup>

Police Human Rights focal points in Logar, Panjsher, Parwan and Wardak provinces told UNAMA/OHCHR that women in their provinces almost never file complaints. The small number of cases received were from the DoWA and female members of the Provincial Council. Parwan police said that following investigation, most cases were resolved through mediation in cooperation with DoWA, although six were referred to the prosecutor.<sup>80</sup>

### **Low Numbers of Female Police Officers**

Low numbers of female police officers contributes to discouraging women victims from coming forward. Although the *Tashkil* (Government staffing table) allocates 2,700 ANP positions to women, the force has only 1,195 female members, including 195 officers

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<sup>75</sup> As recounted to police, UNAMA/OHCHR interview with Kandahar police Criminal Investigation Division, 17 March 2011.

<sup>76</sup> The crimes of rape, forced prostitution, publicizing the identity of a victim, burning or using chemical substances, forced self-immolation or suicide do not require a complainant, according to Article 39 (1) and must be prosecuted.

<sup>77</sup> Through mid-2011, ANP basic training incorporated only a few hours on human rights, gender and violence against women. A new curriculum will include 96 hours on human rights, including 18 hours on how to handle violence against women cases. A training manual by UNFPA, called "Police Acting on Violence against Women in Afghanistan," has been approved for use by the Ministry of Interior.

<sup>78</sup> UNAMA/OHCHR interview with Paktika ANP Human Rights Focal Point, 13 April 2011.

<sup>79</sup> In the south-eastern region, UNAMA/OHCHR recorded at least six self-immolation incidents and three suicide incidents of women from May to September 2011. In the southern region, an increasing number of self-immolation in Nimroz province was raised at the Law and Justice Sector Group meeting on 4 May 2011, and the participants discussed the responsibilities of the relevant authorities to investigate and prosecute such cases and prevent self-immolation of women.

<sup>80</sup> UNAMA/OHCHR telephone interview with Parwan Police Human Rights Focal Point 15 June 2011.

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and 444 non commissioned officers. This is 0.78 percent of the entire authorized force for 1390 of 151,281.<sup>81</sup>

The Ministry of Interior's strategy calls for a corps of 5,000 women police officers by 2014, but there remain a number of challenges to reaching this goal. Obstacles to recruiting and retaining women police, according to Brigadier General Shafiq, head of the ANP's Human Rights and Gender Unit, include traditions and customs that do not support entry of women in the police force; low literacy, a heritage of the Taliban's prohibition of girls' school attendance; lack of security, lack of childcare, threats and fear of retaliation by anti-Government elements.<sup>82</sup>

In addition, a regional police commander has denounced what she says is "widespread sexual harassment" within the police, saying that authorities in the Ministry of Interior have taken no action on several cases reported to them. She warned that some 210 female police officers in the northern region would resign if the problem were not addressed.<sup>83</sup>

International mentors have noticed that many female police officers are not performing professional duties, but instead serving as cooks, cleaners or tea makers. General Sharifa Rasouli, head of the ANP's Training and Education Unit, argued the main challenge to the recruitment of female police force is traditional culture's uneasiness with women in law enforcement.<sup>84</sup>

### 3.5 Use of Mediation and Traditional Dispute Resolution Mechanisms for Cases of Violence against Women

#### *Findings*

UNAMA/OHCHR's monitoring shows that the majority of cases of violence against women reported to police and prosecution offices were processed outside the formal justice system—through mediation, withdrawal of complaints, and by elders in traditional dispute resolution mechanisms. Even the Special Violence against Women Unit of the Attorney General's Office only prosecuted a small minority of the cases it opened.

UNAMA/OHCHR also documented extensive use of mediation for domestic violence complaints by institutions such as DoWA and AIHRC. The EAW law permits mediation of cases for 17 out of the 22 crimes that the law defines if the victim does not want to pursue the matter in the criminal justice system.<sup>85</sup>

For example, of 36 cases of EAW law complaints registered with police headquarters of Nangarhar province<sup>86</sup>, 12 were mediated, 12 withdrawn by the complainant, two referred to prosecution, one to the Criminal Investigative Department for further

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<sup>81</sup> UNAMA/OHCHR meeting with General Sharifa Rasouli, head of training at the Ministry of Interior, 25 July 2011.

<sup>82</sup> Speech at Police Perception Survey Conference, Serena Hotel, 3 February 2011, cited in report "Afghan National Police Family Response Units and Women's Police Corps" by Bureau of International Narcotics and Law Enforcement, June 6, 2011.

<sup>83</sup> UNAMA/OHCHR interview with Gender and Human Rights Focal Point for northern region police, Mazar, 13 September 2011.

<sup>84</sup> General Sharifa Rasouli, head of training at the MoI, at a 25 July 2011 meeting.

<sup>85</sup> See footnote 20 above.

<sup>86</sup> Police registered a total of 60 cases of violence against women, of which 36 were crimes under the EAW law.

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investigation, one to the Ministry of Justice for handling as a civil matter,<sup>87</sup> two to DoWA, four to authorities in other regions, and in two cases, the follow up was unclear. Of the two cases of rape registered, one was sent to prosecution and one to mediation despite the prohibition in the EAW law against mediation for the crime of rape. Of 17 cases of alleged beating, seven were referred to mediation, five withdrawn, two referred to other districts, one to DoWA, and two were unclear.<sup>88</sup>

In Kunar province, the ANP Criminal Investigation Division (CID) recorded nine complaints of violence against women, sent three to DoWA for mediation, five to tribal elders and only one to the prosecution.<sup>89</sup>

Throughout Afghanistan, the ANP's Family Response Unit mediated most cases it receives. Violence against women that occurs outside the family is handled by Criminal Investigation Division, occasionally with the FRU's involvement.

The FRU in Herat is unusual for the large number of cases that it did not mediate. It registered 226 cases in 2010, mediated 103, referred 73 to the prosecution, 31 to the provincial CID, and 19 to authorities in other districts. In Khost, the FRU received 12 cases and mediated 10. The Bamyan FRU registered 12 cases of domestic violence, and sent 10 to elders for resolution and two to the prosecution.

The FRU in Kabul also sometimes accepted mediation by elders, its chief explained to UNAMA/OHCHR. After a victim submits a complaint, elders sometimes approach the FRU and ask for permission to opt for the mediation. In such cases, the elders put their decision on paper, sign or stamp it and share it with the FRU. If the decision violates the law, the FRU can overturn it and continue investigating.<sup>90</sup>

UNAMA/OHCHR found that prosecution offices, which receive complaints directly and from the police, also referred many cases to various types of mediation or encourage complainants to withdraw and reconcile. This was confirmed in interviews with the Deputy Attorney General for Criminal Investigation and the Head of the AGO's Special Violence against Women Unit.<sup>91</sup> UNAMA/OHCHR's findings that only 155 of the 594 cases filed by city prosecution offices were prosecuted, likely reflects the diversion of many cases to mediation, as well as withdrawal of cases by complainants:

Some 70 percent of the cases received by the Attorney General's Special Violence against Women Unit were closed following withdrawal, lack of evidence, or disappearance of complainants. Its chief told UNAMA/OHCHR that when prosecutors review the alleged crimes,

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<sup>87</sup> UNAMA/OHCHR monitoring in the north-eastern region from March-September 2011, found that cases involving property and inheritance rights of women were often treated as civil law cases and resolved primarily through mediation or civil court cases, even though denial of inheritance rights and prohibition to access personal property constitute a crime under the EAW law.

<sup>88</sup> UNAMA/OHCHR monitoring and analysis of violence against women cases in Nangarhar province, March 2010-September 2011.

<sup>89</sup> UNAMA/OHCHR monitoring and analysis of violence against women cases in Kunar province, March 2010-September 2011.

<sup>90</sup> UNAMA/OHCHR interview with Lieut. Colonel Zakia Esmtulla, head of the ANP's Family Response Unit, 25 July 2011. UNAMA/OHCHR could not find data about ANP oversight of traditional dispute resolution mechanisms in Afghanistan.

<sup>91</sup> UNAMA/OHCHR interview with the Deputy Attorney General for Criminal Investigation Nurhabib Jalal, and the head of AGO's Special Violence against Women Unit, Qudzia Niazi, 10 August 2011.

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*If they see that they are not serious but rather simple offences or if the complaint is made under pressure of emotion, and if it is possible for the complainant to integrate the family or live peacefully with her husband, they encourage them to reconcile and to withdraw their cases. This is done to protect and preserve families.*<sup>92</sup>

### **Afghan Law and the Possibility of Mediation for Serious Crimes**

Several studies have shown that it is common in Afghanistan to use institutions outside the formal justice system for decisions on both criminal and civil matters.<sup>93</sup> Preference for resolution outside the judicial system continues to be strong. While mediation is an acceptable resolution for certain types of disputes, it is not an acceptable process for serious crimes of violence and inconsistent with international law and policy.

While Afghanistan's Civil Code recognizes a role for mediation, its criminal laws make no mention of it. They do, however, leave room for such processes through laws that allow the complainant to withdraw crimes for prosecution. The prosecutor, however, according to the Interim Code of Criminal Procedure, must "introduce penal action for all crimes known directly by him or reported to him...unless otherwise expressly provided by law."<sup>94</sup>

Seventeen of the 22 crimes defined by the EAW law may only be prosecuted on the basis of a complaint by the victim or her lawyer, and their prosecution and punishment must be stopped if the victim withdraws her complaint. For all these crimes, where the victim consents, mediation may replace prosecution.

Many of these 17 crimes are serious. Two, "selling or buying a woman for the purpose or under the pretext of marriage" (Article 24) and "*baad* [giving a woman or girl as restitution for murder or other crime]" (Article 25) are felonies, as is "causing injury or disability" (Article 22) depending on its severity. The other crimes whose judicial pursuit depends on the victim's complaint are forced marriage; prevention of right to marry; underage marriage; forced isolation; forced drug addiction; prevention from inheritance; prevention from acquiring property; preventing education, work and access to healthcare; forced labor; polygamy in specific circumstances; and denial of relationship; battery and laceration; verbal abuse, humiliation and intimidation; and harassment and persecution.

Only the crimes of rape, forcing into prostitution, publicizing the identity of a victim, burning or use of chemical substance, and forced self-immolation or suicide, must in all cases be pursued by the prosecutor.<sup>95</sup> As noted earlier in this report, UNAMA/OHCHR found that prosecutors did not prosecute all such cases.

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<sup>92</sup> UNAMA/OHCHR interview with the head of AGO's Special Violence against Women Unit, Qudzia Niazi, 20 September 2011.

<sup>93</sup> Including "Formal and Informal Justice in Paktia and Nangarhar: A TLO Working Paper," February 2011; "Community-Based Dispute Resolution Processes in Kabul City," Rebecca Gang, Afghanistan Research and Evaluation Unit, March 2011; "Informal Dispute Resolution in Afghanistan," United States Institute of Peace, August 2010.

<sup>94</sup> Interim Code of Criminal Procedure Article 22.

<sup>95</sup> According to Article 39 of the EAW law.

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### **Mediation of VAW Cases by Police**

Mediation by police and other institutions usually concludes with the signing of a Commitment Paper (*Tahud Nama*) by the couple or the perpetrator of violence, witnessed by two well-known persons from the family's area. Although there is no standard form, generally the perpetrator agrees to refrain from further violence and acknowledges that the full force of law will be applied the next time. According to the head of the AGO's Special Violence against Women Unit, when it resolves a case without prosecution, it has the perpetrator of the violence draft and sign a Commitment Paper, which is then countersigned by two witnesses.

The office of the chief of the ANP's Family Response Unit told UNAMA/OHCHR that her unit's mediation is successful about 60 percent of the time.<sup>96</sup> In the other cases, if the violence reoccurs and the case comes back to them, they forward the case to the CID or the Prosecution. The Family Response Unit chief acknowledged that not all women experiencing continued violence return to the FRU due to family and other pressures.<sup>97</sup> She informed UNAMA/OHCHR that her office tries to undertake follow up, visiting the victim, calling her, or seeking information from neighbors to see if she is re-victimized following the mediation.

### **Mediation of Violence against Women Cases by Department of Women's Affairs**

Mediation of family and marital disputes, including some involving domestic violence, is carried out widely by provincial Departments of Women's Affairs. One north-eastern region DoWA (Kunduz), for example, mediated 150 cases out of the 176 it received, and sent 26 to judicial authorities or police. A Western DoWA (Ghor) received 33 cases, mediated 11 and sent seven to local elders.

Mediation as practiced by the DoWA, AIHRC, and police Family Response Units offers women a role in seeking a solution, in contrast to many *jirgas* and *shuras* from which women's participation is almost always excluded.<sup>98</sup>

According to the AIHRC's women's commissioner, women are often reluctant to complain about their husbands to authorities. They express a preference for mediation, hoping for a resolution that preserves the unity of the family, fearful of the costs and public scrutiny they may incur at judicial institutions, and knowing they have few other good options.<sup>99</sup> High costs and corruption in the judicial system also discourage prosecution.

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<sup>96</sup> The ANP Human Rights Focal Point for Kabul province said that mediation succeeds in 80 percent of cases, and that police have begun collaborating with NGOs who will follow up on mediated cases to ensure that violence is not reoccurring, 15 September 2011.

<sup>97</sup> UNAMA/OHCHR interview with Lieut. Colonel Zakia Esmtulla, head of the ANP's Family Response Unit, 25 July 2011.

<sup>98</sup> See "The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan," United States Institute of Peace, 2006.

<sup>99</sup> UNAMA/OHCHR interview with Dr. Soraya Subhrang, AIHRC Commissioner on Women's Affairs, 20 June 2011.

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### *Concerns with Reliance on Mediation to Resolve Violence against Women Cases*

The extent to which Afghan authorities rely upon mediation, even occasionally for serious violent crimes, is inconsistent with the spirit and the letter of the EAW law, which requires protection for victims of violence, prevention of further violence, and prosecution of perpetrators of violence against women.<sup>100</sup>

Internationally, most experts on family violence caution against over reliance on mediation. “Mediation is a powerful tool for resolving family law disputes but in family violence cases, it is often inappropriate, in light of the safety issues and the extreme power imbalance, and should be avoided.”<sup>101</sup> Another expert noted, “Mediation is predicated on relatively equal power positions and on both parties genuinely desiring to settle their differences and on a willingness to listen in good faith. Abusive spouses may have little or no interest in listening or reaching an agreement. Inequalities in bargaining power may be difficult or impossible to overcome, even with a mediator.”<sup>102</sup>

Reliance on mediation for cases of domestic violence, some experts argue, violates international standards of non-discrimination. Domestic violence, according to best practice, should be treated as legally equivalent to other assaults. The 1993 Declaration on the Elimination of Violence against Women called on states to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”<sup>103</sup>

The 2008 UN Expert Group meeting, “Good practices in legislation on violence against women,” recommended a prohibition on mediation of violence against women cases. Its report commented, “Mediation is promoted or offered as an alternative to criminal justice and family law processes in several countries’ laws on violence against women. However, it removes cases from judicial scrutiny, presumes that both parties have equal bargaining power, reflects an assumption that both parties are equally at fault for violence, and reduces offender accountability. An increasing number of countries are prohibiting mediation in cases of violence against women.”<sup>104</sup>

Some countries have enacted legislation at national, state or local levels to reduce police discretion in responding to domestic violence emergencies. These include civil protection orders (also called restraining orders or orders of protection, when a party refuses to comply with an order, he or she faces criminal or civil penalties and may have to pay damages or accept sanctions), mandatory arrest policies, and mandatory prosecution policies. Mandatory arrest laws oblige police officers to make an arrest when someone has engaged in a domestic violence crime or has violated a civil protection order.

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<sup>100</sup> See Article 2 of the EAW law.

<sup>101</sup> S. Grace Kerr & Peter G. Jaffe, “The Need for Differentiated Clinical Approaches for Child Custody Disputes with Findings of Family Violence and Legal Aspects of Family Violence and Custody/Access Issues”, cited in Best Practices for Representing Clients in Family Violence Cases, Department of Justice, Canada, <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/viol2b.html>

<sup>102</sup> Best Practices for Representing Clients in Family Violence Cases, Department of Justice, Canada, <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/viol2b.html>

<sup>103</sup> Article 4 (c) Declaration on the Elimination of Violence against Women, 1993.

<sup>104</sup> Cited in “Domestic Violence Legislation and its Implementation,” 1st edition 2009, UNIFEM, Revised 2nd edition 2011, UN Women, available at [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/vaw\\_legislation\\_2008.htm](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/vaw_legislation_2008.htm).

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Mandatory prosecution policies make possible prosecutions even when a victim drops her complaint.<sup>105</sup>

It is imperative that Afghan authorities fulfill their obligations to arrest, prosecute and bring to court serious cases of violence against women. At the same time, discussions should be initiated to develop a guideline on the application of mediation that could be used by the special violence against women units of the AGO as well as the *Huqooq* (Ministry of Justice civil cases office) to fully protect victims of violence.<sup>106</sup>

### **Traditional Dispute Resolution Mechanisms**

Traditional mechanisms coexist with State institutions and handle various types of cases throughout Afghanistan. Composed of influential male elders, they generally seek to preserve families and prevent escalation of tribal and other conflicts rather than protect individual rights and enforce law.<sup>107</sup>

A recent study of dispute resolution processes in Kabul cited “the pervasiveness of corruption” as influencing the choice between official and traditional processes. “Disputants’ access to sufficient resources to pay for bribes and connections to influential middlemen in district offices” contributes to opting out of the formal system. Application to the formal justice system, it found, is affected by “proximity to and awareness of various state services; higher levels of acculturation to the state’s responsibility for dispute resolution; the heterogeneous demographic of the population; and patterns of social change arising from displacement and urbanization, especially concerning the rights of women.”<sup>108</sup>

The head of DoWA in Takhar explained to UNAMA/OHCHR that she prefers referring cases of domestic violence and family disputes to local *jirgas*, as solutions found through mediation were more acceptable for the local population than court rulings. She also noted, “*If I refer cases to law enforcement authorities, it will take years before the problem is solved.*”

One case UNAMA/OHCHR documented highlights concerns with the use of traditional dispute resolution for serious cases of violence against women. The case in Daikundi province involved authorities referring a matter to elders for resolution.<sup>109</sup> The case involved a man who stabbed his sister-in-law multiple times on 21 November 2010. She survived, was hospitalized, and police arrested the alleged perpetrator. However, a few days later, authorities told UNAMA/OHCHR that the case had been resolved through the informal justice system with the assistance of community elders. Their resolution was a pledge from the man that he would leave his sister-in-law alone with no prosecution. The prosecutor denied responsibility, blaming the police for referring the case to the elders.<sup>110</sup>

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<sup>105</sup> For further information, see “Domestic Violence Legislation...” Ibid, and UN Framework for Model Legislation on Domestic Violence (E/CN.4/1996/53/Add.2).

<sup>106</sup> The view was shared with UNAMA/OHCHR by the International Development Law Organization, 28 October 2011.

<sup>107</sup> See “Formal and Informal Justice in Paktia and Nangarhar: A TLO Working Paper,” February 2011 and “Informal Dispute Resolution in Afghanistan,” United States Institute of Peace, August 2010, among other studies.

<sup>108</sup> “Community-Based Dispute Resolution Processes in Kabul City,” Rebecca Gang, Afghanistan Research and Evaluation Unit, March 2011.

<sup>109</sup> Daikundi province prosecution office opened 17 cases of violence against women, of which it filed only one indictment under the EVAW law. City court in Daikundi has not applied the EVAW law.

<sup>110</sup> UNAMA/OHCHR interviews with prosecutor and chief of police of Sangtakht Bandar District, 23 November 2010.

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## 4. Commissions for Prevention of Violence against Women

### 4.1 High Commission for Prevention of Violence against Women

To lead the country's efforts to end violence against women, the EAW law created the High Commission for Prevention of Violence against Women. Chaired by the Ministry of Women's Affairs, it should coordinate among "government, non-governmental institutions and related organizations" to "effectively combat violence." Its members are the Deputy Attorney General; the Deputy Ministers of Interior; Justice; Public Health; Information and Culture; Education; Higher Education; Labor Social Affairs Martyrs and the Disabled; and Hajj and Religious Affairs; a member of the Afghanistan Independent Human Rights Commission; the Head of the Special Family Court, and the Head of the Afghanistan Independent Bar Association.<sup>111</sup>

UNAMA/OHCHR welcomed the Commission's establishment and its June 2010 decision to call for the creation of offices in every province. The Commission offers a promising mechanism for promotion of all aspects of the EAW law, both its criminal, and protective and supportive measures. However, the Commission needs additional support to enable it to more effectively carry out its challenging mandate.<sup>112</sup>

The High Commission meets regularly, chaired by the Minister of Women's Affairs. Most members are usually present, but no civil society organizations other than the Bar Association participate. The active members make reports, and State television often broadcasts short clips of the Commission's meetings. The Commission reportedly makes few recommendations for follow up on cases and does not effectively hold to account various members who are failing to carry out their mandates under the EAW law.<sup>113</sup>

### 4.2 Provincial Commissions

The provincial Commissions present a diverse picture. UNAMA/OHCHR found that Commissions had been established in 28 of Afghanistan's 34 provinces,<sup>114</sup> though only 16 were meeting regularly. Only some of these are recognized by MoWA as functioning officially in line with the most recent instructions calling for Provincial Governors to lead and the DoWA to serve as Secretariat. The others are led by DoWA, as per the original instructions.

The provincial Commissions vary widely in their operations. Some have held just one meeting, while others are still debating their Terms of Reference. With no independent budget or staffing, they depend on members' contributions to carry out activities. Government members often are not fully familiar with the EAW law—and some oppose elements of it. Some Provincial Governors are inactive and DoWA inexperienced or lacking capacity. The directive transferring leadership from the DoWA to the Provincial Governors led to confusion in some provinces. In Balkh, for instance, meetings ceased as members awaited clarification from the High Commission. In Faryab, on the other

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<sup>111</sup> Article 15 of the EAW law.

<sup>112</sup> The EAW law's Article 16 describes the Commission's duties as including researching the causes of violence and undertaking preventive measures; designing anti-violence publicity and public awareness programs; coordinating Government and non-government activities to combat violence; collecting statistics and information on cases of violence, including from the police, prosecutor and courts; and proposing regulations and adopting procedures for better implementation of the EAW law.

<sup>113</sup> UNAMA/OHCHR interview with Dr. Soraya Subhrang, AIHRC Commissioner on Women's Affairs, 20 June 2011.

<sup>114</sup> The six provinces where commissions have not been established are Helmand, Kabul, Kandahar, Nuristan, Paktika and Zabul.

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hand, the DoWA welcomed the handover of leadership to the Provincial Governor as likely to enhance the status and effectiveness of its Commission.

At the most vigorous commissions, members address individual cases of violence against women, help victims to find protection, advocate for judicial action against perpetrators or arrange for mediation. They also assist their members to carry out awareness-raising activities and in some cases have sent recommendations to the High Commission for modifications of the EVAW law. Key elements are usually a pro-active DoWA director and participation or support by experienced civil society organizations. These elements can enable a commission to make a difference even under very difficult circumstances.

Below is a sample of activities conducted by several commissions that represent good practice and may be useful to other commissions and anti-violence against women advocates.

- **Nimroz, Southern region**

Created on 1 November 2009, the Nimroz Commission meets regularly. Chaired by DoWA, with support from the Provincial Governor, in addition to the 12 mandated members, it informally invites participation by UN agencies and several national and international NGOs. The Commission emerged out of an existing Women's Protection Action Network that had a record of casework. It functions as a network of departments and organizations working for women rights and protection. Despite the strong Commission, traditional stigmas deter referral of women's cases to court. The prosecution and courts have not yet used the EVAW law.

- When a member of the Commission receives a case of violence against women, he or she refers it to the Commission and a subcommittee follows up with police, prosecution and the court, and sometimes with the families of the victim and perpetrator.

- **Badakhshan, North-eastern region**

Created on 8 May 2010, the Provincial Governor now chairs the Badakhshan Commission, which meets monthly. DoWA plays a central role in mobilizing and organizing activities. The Commission has conducted studies and assessments of violence against women, gathered information on individual cases from police and prosecutors, held public awareness programs for prevention of violence, collected statistics on violence against women cases, and suggested amendments to the EVAW law to the High Commission.

- Coordinates with international and national organizations working to end violence against women, although they do not attend meetings.
- Advises government departments on the implementation of the EVAW law.

- **Bamyan, Central Highlands region**

The Bamyan Commission, established on 26 July 2010 and actively led during its first few months by AIHRC, has been renewed in 2011 under the leadership of Afghanistan's only woman Provincial Governor. The Commission set up a committee to review the EVAW law and drafted a letter to the High Commission with recommendations on articles 33 and 39. It has undertaken several capacity-building seminars for government departments and civil society with the

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Provincial Governor's financial support. Some 150 *Ulema* members, intellectuals and community elders attended the first session, on 26 October 2010, about women's rights from the perspective of Islam.

- Sent high-level delegation (including the Chief Prosecutor, Police and representatives of the Provincial Council) to investigate an alleged honor killing in a district. Regularly invites participation by the Provincial Council, Bamyān University, the civil society and human rights network, the women's shelter manager and international partners.
- **Faryab, Northern region**

Created in June 2010, Faryab's Commission held nine meetings during 1389 (March 2010-March 2011). It addressed some 35 individual cases during the year, resolving most through mediation and referring others to the judiciary.

  - Organized and supported awareness-raising activities by members including the Department of Pilgrimage and Religious Affairs, which tasked mosques to deliver Friday sermons on men and women's rights under religion, and the Department of Education, which issued instructions on early marriage and girls' right to education.

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## 5. Conclusion

UNAMA/OHCHR welcomes the Government's commitment to eliminating violence against women, as evidenced by its adoption of the EVAW law, encouragement of its implementation, and establishment of Commissions for the Prevention of Violence against Women.

UNAMA/OHCHR's findings suggest that women's access to justice is improving, as judicial officials in many parts of the country begin to use the EVAW law - although as yet only a small percentage of the cases of violence against women have been prosecuted or charged under the EVAW law. Nevertheless, growing awareness of the law's existence, and the support that ANP Family Response Units, Departments of Women's Affairs, AIHRC and women's shelters can provide, has encouraged women to come forward and seek assistance.

The need for shelters in all regions of Afghanistan remains acute. Increasing successful prosecutions of perpetrators of violence under the EVAW law depends in part on women victims' ability to secure safe temporary housing along with social and legal support. Some regions currently offer no such safe havens. Enforcement of Afghanistan's first-ever Regulation on Women's Protection Centers, approved by the Council of Ministers on 5 September 2011, should encourage creation of new shelters in areas where they are needed and the strengthening of existing ones through improved government oversight.

Provincial Commissions for the Prevention of Violence against Women in a number of provinces are beginning to carry out their mandate to coordinate among government and non-governmental institutions to prevent violence, although they need much greater support and guidance. Commissions in other provinces are dormant or have yet to be established.

UNAMA/OHCHR hopes that this report will be of assistance to the Government of Afghanistan as it builds on progress made toward eliminating violence against women. It offers the following recommendations to the Government, international donors and Afghans in advancing further the implementation of the EVAW law and protecting women from violence.

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## 6. Recommendations

### **To the Ministry of Women's Affairs and the High Commission for the Prevention of Violence against Women**

- Develop guidelines and terms of reference for the provincial Commissions on Prevention of Violence against Women, including for their constituent members, and codify the procedures by which they register and follow up on cases of violence against women.
- Assist the provincial Commissions to develop work plans and acquire the skills needed to fulfill their responsibilities.
- Invite civil society including representatives of women's rights NGOs, shelter managers, and international partners to attend High Commission meetings as observers, to report on specific issues, and to actively support the Commission's work.
- Ensure the High Commission has a well-functioning secretariat to enable it to more effectively follow up on decisions and action points.
- Consider creation of a subcommittee of the High Commission dedicated to assuring victims are supported with services, protection and legal assistance, as per the EAW law's article 16.
- Initiate discussions to develop a guideline on the application of mediation that could be used by the special violence against women units of the Attorney General's Office and the *Huqooq* (Ministry of Justice civil cases office) to fully protect victims of violence.

### **To the Government of Afghanistan**

- Issue instructions to Provincial Governors reminding them of their responsibility to take leadership of provincial Commissions for the Prevention of Violence against Women further to directions from the High Council for Prevention of Violence against Women.
- Ensure that Government authorities including police and prosecutors, who refer cases to traditional dispute resolution mechanisms, review the decisions of these bodies for compliance with Afghanistan's laws and human rights obligations.

### **To the Ministry of Justice**

- With the High Commission on the Prevention of Violence against Women and the National Legal Training Centre, provide training for judicial officials on the EAW law. Consider involving judges and prosecutors who are successfully applying the law to train others.
- Ensure that any law defining the relationship between the formal justice system and traditional mechanisms for dispute resolution (*jirgas* and *shuras*) improves their compliance with all national laws including the EAW law, and prohibits them from resolving serious crimes.

### **To the Supreme Court**

- Issue clarifications and instructions to the courts on the provisions of the EAW law, including their mandatory application in conjunction with other Afghan laws.
- Instruct the General Criminal Division and the Inspection Department to monitor the courts' proper application of the EAW law to cases of violence against women.

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- Consider establishing divisions within Family and City Courts throughout the country devoted to crimes of violence against women. These judges would develop expertise and help relieve the overcrowded dockets of the General Penal division.<sup>115</sup>

#### **To the Office of the Attorney General**

- Issue instructions for all prosecutors clarifying which type of cases must be criminally prosecuted and which may be referred for mediation. Ensure prosecution of all serious crimes of violence against women.
- Consider tasking the Special Violence against Women Unit in Kabul with responsibility to monitor and follow up on all cases of violence against women that reach the Supreme Court. This could be specified in the Tashkil for 1391.
- Conduct an assessment of the Special Violence against Women Unit in Kabul to determine why few of its total registered cases have been prosecuted and how its work can be strengthened.
- Ensure that the General Penal Department (Saranwali Jazai Omomi) and other appropriate divisions of the AGO monitor how prosecution offices are applying the EVAW law.
- Continue to create and support commissions or units in provincial prosecution offices dedicated to prosecuting cases of violence against women.

#### **To the Ministry of Interior**

- Include as part of basic police training an introduction to the EVAW law and its application.
- Provide guidelines for the police Criminal Investigation Division (CID), including the Family Response Unit (FRU), clarifying the type of offences that must be investigated and forwarded to the prosecution and those that may be mediated by police, and ensuring that all cases mediated or referred for mediation by Police are properly registered and officially documented.
- Provide special training on the EVAW law for all police working with the FRU.
- Ensure that women approaching police stations can consult immediately with the FRU.
- Ensure that the FRU remains part of CID, that its officers benefit from training on investigative techniques, and are able to fully participate in investigations of crimes involving domestic violence, rape or other types of violence against women.
- Ensure that female police officers are assigned to professional duties and given equal consideration for promotions.
- Create a standard Commitment Paper (Tahud Nama) for use in all violence against women cases that are mediated. It should mention the offense committed, be signed by the perpetrator and the victim (mentioning their addresses and phone numbers) as well as witnesses and a representative of the State.

#### **To the Ministry of Finance**

- Provide adequate resources and support to the ministries of Women's Affairs, Hajj and Religious Affairs, Justice, Public Health, Information and Culture, Education

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<sup>115</sup> See article 61 (2) of the Law on the Structure and Jurisdiction of Judiciary of the Islamic Republic of Afghanistan. "If required, the Supreme Court may, after the approval by the President, establish other tribunals within the provincial center primary court. If needed, the head of provincial center primary court may temporarily assign a member of one tribunal to another."

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and Higher Education to enable them to fulfill their responsibilities as required under the EVAW law.

- Ensure that activities of the High Commission for Prevention of Violence against Women and its provincial Commissions mandated by the EVAW law are adequately funded.

**To International Donors**

- Develop a program of technical assistance for the High Commission for Prevention of Violence against Women.
- Increase support to Government initiatives aimed at enforcement of the EVAW law, including nation-wide awareness campaigns, assistance and training for provincial Commissions for Prevention of Violence against Women.
- Support the Government in implementing the 2008-18 National Action Plan for the Women of Afghanistan (NAPWA); in particular in developing and putting in place a national strategy to implement the EVAW law, and by providing support for the National Priority Programs “Law and Justice for All” and “Capacity Development to Accelerate NAPWA Implementation”.
- Expand programs that provide technical assistance and support for provincial prosecution offices and courts, particularly aimed at implementation of the EVAW law.
- Increase support for women’s protection centers/shelters that offer refuge to female victims of violence. Increase support to special units or commissions of the Attorney General’s Office prosecuting violence against women.