

# **NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia**

## **Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

Coordinated by  
**the National Council for Women's Organisations (NCWO)**  
in collaboration with the Women's Aid Organisation (WAO)

Prepared by the NGO Shadow Report Group  
2005

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## **INTRODUCTION**

The Malaysian NGO Shadow Report on the Government of Malaysia's Initial and Second Periodic Report to CEDAW is the work of a coalition of individuals and women's groups under a project initiated by the National Council of Women's Organisations (NCWO) in 2003.

### **The Process**

In January 2003, NCWO organised a meeting with women's rights activists and academics to look into the CEDAW review process and begin discussing preparation of an NGO Shadow Report. The meeting, attended by around 30 women's rights activists and academics, began with an introduction to the CEDAW Convention and the UN treaty body reporting process facilitated by IWRAW Asia Pacific and concluded with a decision on the themes/ critical areas to be covered by the shadow report as well as names of possible coordinators/ writers. 12 areas were identified based on the articles of the CEDAW Convention. These are:

- (i) Law, policy and programmatic measures to implement the convention (articles 1-3) and affirmative action (article 4)
- (ii) Customary practices and stereotyping (article 5)
- (iii) Trafficking and the exploitation of prostitution (article 6)
- (iv) Participation in political field and public policy formulation (article 7), participation in the international field (article 8)
- (v) Citizenship (article 9)
- (vi) Education (article 10)
- (vii) Employment, social security and access to credit (article 11 & 13)
- (viii) Health (article 12)
- (ix) Rural women (article 14)
- (x) Equality in the law (article 15)
- (xi) Rights in Marriage (article 16)
- (xii) Violence against Women (general recommendation 19)

At a follow up meeting in February 2003, guidelines on preparing a shadow report by IWRAW Asia Pacific were shared and discussed. Throughout 2003, the NGO Shadow Report Group met several times to further discuss critical issues to be raised in the shadow report and to also give feedback on draft reports.

The formation of the NGO Shadow Report group was very timely as in February 2003, the Ministry for Women and Family Development (as it was then known) invited comments and feedback from the women's group on the draft government report to CEDAW. A meeting was held on 25<sup>th</sup> February 2003 where members of this NGO Shadow Report group presented verbal and written feedback on the draft government report to representatives of the Ministry. In May 2004, the Ministry sent NCWO a copy of the final government report (initial and second report). The NGO Shadow Report is a critique of this final government report.

On 21<sup>st</sup> & 22<sup>nd</sup> August 2004, Women's Aid Organisation (WAO) in collaboration with NCWO organised a National Conference on the CEDAW Convention to present the draft NGO Shadow Report to a larger community of NGOs and obtain their feedback and comments on the critical issues raised in the report. Heisoo Shin, a CEDAW Committee member and two resource persons from IRAW Asia Pacific facilitated sessions on the CEDAW Convention, the treaty reporting process and the linkages between advocacy at the national and international levels. Participants provided valuable feedback on critical issues raised in the draft Shadow Report as well as suggestions for further advocacy using the CEDAW Convention. The list of participants (individuals and organisations) who attended the Conference is attached as ANNEX 1.

The Government's first and second report on the implementation of the CEDAW Convention has since been submitted to the CEDAW Committee and the Government of Malaysia is scheduled for a review during the 35<sup>th</sup> CEDAW session in May 2006. The NGO Shadow Report as a critique of the Government Report, identifies critical issues that continue to affect women in Malaysia today along with specific recommendations.

### **The NGO Shadow Report Group**

Writers and contributors from the women's groups, academia and agencies worked on different chapters of the shadow report based on their specialised area of work. To ensure the representation of a wide range of issues affecting different categories of women, writers were also identified to prepare pieces on migrant, disabled women as well as the specific issues of women from Sabah and Sarawak.

The following is the list of writers and contributors for the different chapters and areas of concern:

Article 1-4, 9, 16	<i>WAO - CEDAW Core Committee on Baseline Report on Article 16 Ivy Josiah (WAO), Wathshlah Naidu (WAO), Nik Noraini (SIS) Zarizana Abdul Aziz (WCC)</i>
Article 5	<i>Jaclyn Kee (WAO) Contributors: Dr Kiranjit Kaur (NCWO), Aishah Ali (NACIWID)</i>
Article 6	<i>Lee Shook Fong (WAO), Mah Xian Shen (WAO) Contributors: Chong Eng (DAP), Priscillia Yap (MCA), Haezreena Begum (Puteri UMNO), Catherine Arumanayagam (WAKE), Mr CH So</i>
Article 7	<i>Zaitun Kasim Contributors: Persatuan Sahabat Wanita, WCI</i>
Article 10	<i>Puan Sri Prof. Datuk Dr Hajjah Fatimah Hamid Don (NCWO)</i>
Article 11 & 13	<i>Maria Chin Abdullah (WDC), Dr Shanthi Tambiah (UM), Cecilia Ng (WDC), Jean Lim (MTUC), Norlaila Aslah (MTUC) Contributors: Dr Norma Mansor (NCWO), Dr Lee Lee Ludher</i>

Article 12	<i>Dr Hamidah Karim (NCWO)</i> <i>Contributors: Dr Rashidah Shuib (USM), Dr Ang Eng Suan (FFPAM), Usha Pillay (NCWO)</i>
Article 14	<i>Airmy Johari (NCWO);</i> <i>Contributors: Dr Rokiah Talib, Salbi Ranting, Che Aloha bt Sulaiman (LPP), Shellatay Devadason (Methodist Women Organisation), Saripah Yusof (FELDA), Dr Husna Sulaiman, Zaliha Othman (Dept of Agriculture), Hajah Maimum Yeop Kamaruddin (RISDA), Redza Baba (Dept of Agriculture), Colin Nicholas (COAC), Azizah Hashim (FELCRA), Dr Hew Cheng Sim (UNIMAS)</i>
Article 15	<i>Lynn Oh (WCC), Zarizana Abdul Aziz (WCC)</i>
Violence Against Women	<i>Wathshlah Naidu (WAO)</i> <i>Contributors: Manohari Subramaniam (AWAM)</i>

Additional information on particular geographical locations and categories of women were provided by:

Sabah	<i>Angela Foo (SAWO) &amp; Anne Lasimbang (PACOS)</i>
Sarawak	<i>Gill Raja &amp; Margaret Bedus (SWWS)</i>
Migrant Women	<i>Maslina Abu Hassan, Bathmalashanee Muniandy, Aegile Fernandez, Dr Irene Fernandez (Tenaganita)</i>
Disabled Women	<i>Bathmavathi Krishnan (Malaysian Confederation of Disabled Persons)</i>

The following is a list of the organisations involved in the process of preparing the NGO Shadow Report:

- **National Council of Women's Organisations (NCWO)**
- All Women's Action Society (AWAM)
- Center for Orang Asli Concerns (COAC)
- Democratic Action Party (DAP)
- Department of Agriculture
- Federal Family Planning Association Malaysia (FFPAM)
- Lembaga Pertubuhan Peladang (LPP)
- Malaysian Chinese Association (MCA)
- Malaysian Confederation of Disabled Persons
- Malaysian Trade Union Congress – Women's Section (MTUC)
- Methodist Women's Organisation
- National Council of Women in Development (NACIWID)
- Partners of Community Organisations (PACOS)
- Persatuan Sahabat Wanita
- Puteri UMNO

- Rubber Industry Smallholders Development Authority (RISDA)
- Sabah Women's Action Resource Group (SAWO)
- Sarawak Women for Women (SWWS)
- Sisters in Islam (SIS)
- Tenaganita
- Universiti Malaysia Sawarak (UNIMAS)
- Universiti Sains Malaya (USM)
- University Malaya (UM)
- Women and Health Association (WAKE)
- Women's Aid Organisation (WAO)
- Women's Candidacy Initiative (WCI)
- Women's Center for Change (WCC)
- Women's Development Collective (WDC)

Acknowledgements also go to Ivy Josiah (WAO), Nik Noraini (SIS), Zarizana Abdul Aziz (WCC) and Dr Rashidah Shuib (USM) for reading through several chapters of the final draft of the shadow report. Special mention is made of Jana Rumminger (WAO) who also helped with the editing of the Shadow Report.

Acknowledgement is also made to the efforts of Dr. Hamidah Karim (NCWO) who worked on the final stages of this project to ensure the timely submission of the final draft of the shadow report to the CEDAW Committee.

This project has been a long journey for everyone involved and much appreciation goes out to each and everyone who contributed both their time and resources to ensuring the effectiveness of both the process undertaken and final outcome.

Tashia Peterson  
Project Coordinator  
November 2005

## **Articles 1 – 4: Definition of Discrimination, Law, Policy and Measures to Implement the Convention**

### **CRITICAL AREAS OF CONCERN**

#### **1. Equality provision of the Federal Constitution**

One of the major successes of law reform has been the amendment to the equality provision of the Federal Constitution. In September 2001, “gender” was inserted into Article 8(2) of the Federal Constitution as one of the prohibited grounds of discrimination.<sup>1</sup> The amendment to the Federal Constitution was hailed as a progressive move and welcomed by women’s groups as it was seen as a commitment by the government to fulfil its obligations under the CEDAW Convention.

##### **1.1 Definition of discrimination**

It is however noted that the definition of discrimination which was not made explicit in the Federal Constitution, was left by and large to the interpretation of the government and the courts.

The definition of discrimination as offered in the government report of “*treating women differently to men to the detriment of women*”<sup>2</sup> does not suffice and indicates a lack of an in-depth understanding of how to deal with the root problem of discrimination against women. The Human Rights Commission of Malaysia (SUHAKAM) recommended in its Annual Report 2000 that discrimination be defined with reference to Article 1 of the CEDAW Convention which recognises that any action which has the effect (not just the intention) of discrimination on the basis of sex constitutes an act of discrimination”.<sup>3</sup> In this way, both direct and indirect discrimination is covered and an effective working definition of discrimination is available to analyse any given situation.

##### **1.2 Contradictory/ Discriminatory Constitutional provisions**

Yet the amendment to the Federal Constitution itself limits the scope of the application of Article 8(2). Included in Chapter II under Fundamental Liberties, Article 8(2) states:-

*(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*

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<sup>1</sup> Article 8(2), Federal Constitution now reads “Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth and gender...”

<sup>2</sup> Ministry of Women, Family and Community Development, *Malaysia Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report)*, 2004, para 65.

<sup>3</sup> SUHAKAM Annual Report 2000, pg. 23.



The discrimination expressly or impliedly authorised under the Federal Constitution are many:-

- (i) Article 8(2) makes specific reference to non-discrimination in relation to “employment under a public authority” implying that employment in the private sector may be unaffected by the amendment
- (ii) Article 8(5) of the Federal Constitution also provides that the equality clauses of the Constitution do not invalidate or prohibit “any provision regulating personal law”, effectively leaving Muslim personal law unaffected by the amendment. The second exception in article 8(5) to the prohibition is similarly with respect to “any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion”.
- (iii) Article 12(1) on rights in respect of education prohibits discrimination against any citizen on the grounds only of religion, race, descent or place of birth. The article has not been amended to include prohibition against gender discrimination;
- (iv) Article 12(4) also needs to be amended to recognise the rights of both parents to decide the religion of a minor.<sup>4</sup>
- (v) Provisions on citizenship in article 14, Second Schedule s.1 (d), articles 15, 24(4) and 26(2) of the Federal Constitution continue to expressly discriminate against women’s rights to citizenship, to confer citizenship on their children and to enable their foreign husbands to receive permanent residence status.<sup>5</sup>

### **1.3 Judicial Interpretation**

The case of *Beatrice Fernandez vs. Sistem Penerbangan Malaysia & Anor* [2004] 4 CLJ 403 highlights the abovementioned concerns regarding the effectiveness of the existing gender equality provision in the Federal Constitution.

In this case, Beatrice had filed a suit in 1991 against the national airline carrier, Malaysia Airlines System seeking a declaration that various provisions in the 1988 collective agreement were invalid as they required a female stewardess to resign on becoming pregnant and allowed the company to terminate her services if she did not resign. In 1991, the airline terminated Beatrice’s services after she became pregnant and refused to resign. The High Court dismissed her application in 1996 and her appeal to the Court of Appeal was dismissed in October 2004. The Court of Appeal ruled that:

- Constitutional remedies only protect individuals from violations of their rights by the state or public authorities. Malaysia Airlines was not a public authority and the assertion that it was “a government agency” had not been

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<sup>4</sup> see *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 CLJ 416 where the court held that a converted Muslim father is entitled to convert his children to Islam without their mother’s consent and in so doing dismissed the mother’s application to nullify the conversion. Please see chapter on article 15 for a more detailed description.

<sup>5</sup> See chapter on Article 9 (Nationality) for further information.

substantiated. Therefore the prohibition against discrimination under Article 8(2) is not applicable;

- Although article 8(1) and 8(2) of the Federal Constitution provide for equality before the law, it did not apply in this case because a collective agreement cannot be considered “law”.
- Article 8(2) which had been amended in 2001 to include gender as a prohibited ground of discrimination could not be applied retrospectively.
- The Court also held that Section 37 of the *Employment Act 1955* which compels employers to provide “maternity protection” to female employees was not relevant in this case.<sup>6</sup>

Leave to appeal to the Federal Court was dismissed in May 2005.<sup>7</sup> In refusing to grant leave, the Federal Court upheld the decision of the Court of Appeal and added that,

- “There was no definite special clause in the collective agreement that discriminates against the applicant for any reason which will justify judicial intervention”;
- “Our hands are tied. The equal protection in cl. (1) of art. 8 thereof extends only to persons in the same class. It recognises that all persons by nature, attainment circumstances and the varying needs of different classes of persons often require separate treatment” and
- “Unless and until the *Employment Act 1955* is amended to expressly prohibit any term and condition of employment that requires flight stewardesses to resign upon becoming pregnant, such clauses are subject to our *Contracts Act 1950* and continue to be valid and enforceable”.

This reasoning does not accord with the developments in the legal doctrine of equality nor the principles of substantive equality as entrenched in the CEDAW Convention. A law which applies uniformly to all within a class may still violate a claimant’s equality rights by discriminating against the whole class. Equality is a comparative concept and identical treatment of all within a certain category does not mean that the whole category is not being discriminated against.

Indeed it is the absence of any legislation that domesticates / adopts the CEDAW Convention as part of the law of Malaysia, under the dualist system applicable in Malaysia, that allows the courts not to take cognizance of the CEDAW Convention at all

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<sup>6</sup> Section 37(1)(a) of the *Employment Act 1955* reads “Every female employee shall be entitled to maternity leave for a period of not less than sixty consecutive days (also referred to in this Part as the eligible period) in respect of each confinement and, subject to this Part, she shall be entitled to receive from her employer a maternity allowance to be calculated or prescribed as provided in subsection (2) in respect of the eligible period.” and Section 7 reads “Subject to section 7A, any term or condition of a contract of service or of an agreement, whether such contract or agreement was entered into before or after the coming into force of this Act which provides a term or condition of service which is less favourable to an employee than a term or condition of service prescribed by this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder shall be void and of no effect to that extent and the more favourable provisions of this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder shall be substituted therefore”.

<sup>7</sup> [2005] 2 CLJ 713

and this absence should immediately be addressed by the government (see below on treaty incorporation).

It is clear that much remains to be done to ensure that the formal provision of equality provided for in the Federal Constitution is relevant to women's lives. The failure of the Federal Constitution to coherently embody the principle of equality of men and women contravenes Article 2(a) of the CEDAW Convention.

## **2. Discriminatory laws**

The Government Report provides a comprehensive list of laws which it has amended in the interest of gender equality. The government has responded favourably by amending some of the laws that discriminate against women, for example, the amendment to the *Guardianship of Infants Act in 1999* and the subsequent Cabinet administrative directive in September 2000 to recognise Malaysian women, irrespective of religion, as equal guardians. Unfortunately any amendments pertaining to personal law like guardianship does not apply to Muslim women where the father and not mother is the legal guardian of a child.

For Muslims, the government has gradually been expanding a narrow interpretation and application of the *Syariah*. In prohibiting assignments of insurance policies<sup>8</sup>, strict application is given to the concept of faraid under which a woman's share of inheritance is half that of a man. This approach of emphasizing and applying the faraid distribution only appears to disregard other concepts of property and income distribution that are also permitted under the *Syariah* system, including the concepts of trust funds (*amanah*) or endowment funds (*waqf*) for the benefit of dependants, and the possibility of utilizing such concepts for the benefit of female family members. Sisters In Islam (SIS)<sup>9</sup>, has attempted to push for the recognition and promotion of those beneficial concepts e.g. SIS letters and statements on the possibility of recognizing EPF funds as trust funds for dependants instead of as estate for inheritance under the faraid.

Further there still remain several areas of the law need to be reviewed. Critical areas that have long been advocated for by the women's groups include The *Domestic Violence Act 1994*, the laws pertaining to rape (the *Penal Code*, *Evidence Act* and *Criminal Procedure Code*), legislation on sexual harassment, Islamic Family Law and administration of justice in the *Syariah* System, Immigration regulations and the *Employment Act*. On 25<sup>th</sup> May 2004, the Joint Action Group against Violence Against Women (JAG-VAW) submitted a Memorandum on Equality for Malaysian Women to the Prime Minister YAB Dato Seri Abdullah Badawi identifying remaining laws and policies that discriminate against women. This memorandum is attached as ANNEX 2.

The *de facto* reality is that, even where there are substantive laws in place, the structures of implementation, prevailing societal attitudes and the culture of the law hinder a woman's full access to and enjoyment of her rights as was intended in the spirit of the

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<sup>8</sup> This prohibition was newly introduced under the *Insurance Act 1996*. There was no such prohibition under the *Insurance Act 1963*.

<sup>9</sup> Sisters In Islam (SIS) is a non governmental organisation formed in 1988 by a group of Muslim professional women committed to promoting the rights of women within the framework of Islam.

law. In particular are laws related to family, marriage, divorce and violence against women.<sup>10</sup>

For example, despite the 1999 amendment to the *Guardianship of Infants Act* and the subsequent administrative directive providing equal guardianship rights to all Malaysian women irrespective of religion, bureaucratic red tape still prevents mothers from exercising this right. The application forms for a passport or travel document had not been changed and continued to read “father/ legal guardian”. It was only after complaints made through the press that the Ministry of Home Affairs followed up with making sure that the Immigration Department adopted this new policy.<sup>11</sup> This continues to cause problems as officers at the ground level; both in Malaysia and at Malaysian embassies overseas are not aware of the change in the law and have insisted that fathers sign the forms for passports.

Although there have been substantive changes on the face of the law, the challenge lies in interpretation and implementation; and changing the prevailing societal attitudes that continue to present obstacles for the effective exercise by women of their rights.

### **3. National Policies on Women**

There are several policies on women in place: The National Policy on Women (1989), The National Action Plan (1996) which followed several years after the National Policy was formulated, a chapter on women and development in the Sixth Malaysia Plan (1991-1995), Seventh Malaysia Plan (1996-2000), Eighth Malaysia Plan (2001-2005) and references to women in the Third Outline Perspective Plan (2001 – 2010) (OPP3), which is the operational aspect of the 2<sup>nd</sup> phase of the overall developmental plan called Vision 2020 for Malaysia to become a fully developed country.

The OPP3 has a paragraph reference to Enhancing the Role of Women in Development which reads, “*A resilient and competitive economy cannot be created unless the full potential of all its members is utilized. Towards this end, opportunities in employment business and social activities will be made available without gender bias. Greater access to training and retraining will promote employment opportunities and greater occupational mobility. Information pertaining to the labour market and opportunities for advancement in education and business will be made more accessible through the use of ICT. At the same time, the participation of women, particularly those with family commitments will be enhanced by more extensive use of flexible working hours, the provision of crèches at workplaces as well as enabling them to work from home*”.<sup>12</sup>

The crucial step is to streamline these policies and action plans. On the face of it, they appear as separate pieces that do not mainstream gender into all sectors and at all crucial levels of the government’s overall socio-economic plan for Malaysia. It is important that

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<sup>10</sup> See chapters on Articles 15 (Equal Rights in Law) and 16 (Rights in Marriage and Family) for further information.

<sup>11</sup> C. Celstine, “Mums not able to sign papers due to red tape”, The Star, September 21, 2000.

<sup>12</sup> The Third Outline Perspective Plan 2001- 2010, Economic Planning Unit, Prime Minister’s Department, 3 April 2001, pg 27

women's concerns are reflected at every level of policy planning and across all sectors. The current practice of dedicating a separate chapter to women and development in the government's five-year plans does not allow for the effective consideration and action on women's concerns in the policies and programmes in other related sectors. There is no conscious utilization of the CEDAW framework in the government's development plans to include the interests of women.

The State has an obligation under Article 3 of CEDAW to ensure that the "full development and advancement of women" is incorporated into "all fields, in particular in the political, social, economic and cultural fields". However sex-disaggregated data is not collected to establish de facto status of women in all fields. Nor is there information on impediments to improving the status of women. Such data and information is also not gathered according to other relevant socio economic indicators such as rural, plantation sectors, urban poor, women in East Malaysia and indigenous women. There also does not appear to be any mechanism to assess the efficacy of these policies in truly changing the status and position of women in the country.

#### **4. National Machinery for Women**

The creation of the Ministry of Women and Family Development in January 2001 received a mixed response. There was some reservation to this sudden development, as the Women's Division under the Prime Minister's Department (the former MWFD), sited as it was in the Prime Minister's Department which housed the Economic Planning Unit which is responsible for the national development of the country, was perceived as having more political clout in respect of policy revision and gender mainstreaming.

Reservations aside, the creation of a separate Ministry for Women and Family has raised the ante. As a full fledged ministry there has been an increase in staff capacity and over the years a steadily increasing budget allocation.<sup>13</sup> The Ministry is charged with the task of implementing the national policy on women and as a new ministry it has struggled and experimented with creating an effective role and strategy to mainstream gender. In March 2004, the mandate of the Ministry was extended further to cover that of the recently dissolved Ministry of National Unity and Social Development. The Ministry is now known as the Ministry for Women, Family and Community Development (for ease of reference hereinafter called "the Women's Ministry") and has four agencies under its administration:

- Women's Affairs Department (Jabatan Pembangunan Wanita - JPW)
- Malaysian Community Welfare Department (Jabatan Kebajikan Masyarakat Malaysia – JKMM)
- National Population and Family Planning Board (Lembaga Penduduk dan Pembangunan Keluarga Negara - LPPKN)
- Malaysian Social Institute (Institut Sosial Malaysia - ISM)

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<sup>13</sup> The budget allocation for the Ministry has increased from about RM15 million in 2001 to RM60 million in 2002, RM99 million in 2003 and RM128 million in 2004. Kua Abun, Ministry of Women and Family Development, "Regional Meeting of National Machineries for Gender Equality in the Asian and Pacific Region: Towards a Forward Looking Agenda, Country Paper: Malaysia", 2003.

The ministry is strong on public education campaigns; it has, by engaging the services of the private sector which includes public relations experts, advertising agencies and event organizers, organised a series of campaigns and conferences which created greater visibility on women's issues. The minister herself has oftentimes released statements on issues related to women.

Over the years there have been several positive initiatives which could potentially be effective mechanisms in ensuring that gender concerns and women's rights are mainstreamed into crucial sectors of government policy and planning. These initiatives include:

- A Cabinet Committee on Gender Equality and Non Discrimination which was formed in 2004. However the composition, terms of reference, priorities and plans of the Committee are not publicly known.
- The appointment of Gender Focal Points in all government ministries and departments. Without proper training and an effective inter-ministerial mechanism, the roles and functions of these focal points cannot not be fully realised. It is still unclear how much the focal points are contributing towards mainstreaming gender concerns into the various ministries
- In 2003, the Ministry of Education, Ministry of Higher Education, Ministry of Health, Ministry of Human Resources and Ministry of Rural and Regional Development participated in a pilot project looking at incorporating gender-sensitive budgets into the national budgeting system. This has yet to be implemented or enforced as a policy by the government.

#### **4.1 Working with the Women's Ministry**

The ministry has attempted to act as a facilitator in bringing NGOs' concerns to the government. Examples include facilitating a meeting between the Ministry of Human Resources and women NGOs to discuss the Sexual Harassment Bill proposed by the NGOs, hosting a meeting with the Islamic Department to voice NGO demands for reform in the *Syariah* laws and system, and initiating a meeting with the Ministry of Law to discuss rape law reforms. Women NGOs have found the Ministry to be open and welcoming of input into their various plans and programmes, although much of the input was not followed through and has not been fully realised.

In 2001, eight Technical Working Groups (TWG) were formed, chaired or co-chaired by NGOs. The inclusion of NGOs into the various committees was important, however, the committees did not work effectively. The terms of reference for the chairperson and the sub-committees were not clearly outlined. The roles and scope of each sub-committee were also not clear and because the sub-committees were headed by NGOs, they did not have the necessary secretariat support, not to mention the "authority" to call for meetings with government agencies. These shortcomings seriously undermined the effectiveness of the TWGs and the women's groups subsequently withdrew in 2003.

Aside from input from NGOs, the Women's Ministry receives advice from the National Advisory Council on the Integration of Women in Development (NACIWID). However its composition (its members are not all experts on gender), role and limited resources have prevented NACWID from operating effectively.

### **5. Discrimination by and within public authorities and institutions**

Complaints about insensitive police officers, Immigration officers, magistrates and judges remain anecdotal. To date, Women's Aid Organisation (WAO) has documented 25 complaints regarding police attitude and four complaints about Immigration officers refusing to process passport applications from mothers notwithstanding that the law recognizes equal guardianship. Furthermore, there is a public record of at least two judges making disparaging remarks about women.

While there is general acceptance that public officials are usually unprofessional, such incidents are viewed by the state as isolated occurrences and not part of a systemic problem. Training for the police and judiciary, therefore, tends to focus on the substantive aspects of law and not the culture of law or the application of gender perspective in the implementation of law. Police training is held at least once a year for a period of 2 – 14 days and NGOs are usually given a half to one day session to train the police. Very little is known about training of the judiciary or immigration officials.

One of the main reasons for the ineffectiveness to monitor discrimination is the absence of an effective mechanism to report, investigate and address discrimination against women. It is only when such mechanism is in place followed by proper implementation will the women be empowered to act against discrimination.

### **6. Reservations**

The Government Report mentions the withdrawal of some of the reservations to CEDAW. The remaining reservations, on articles 5(a), 7(b), 9(2) and 16(a), (c), (f), (g) and (2), are justified on the ground that they are “in conflict with the provisions of the Islamic Sharia’ law and the Federal Constitution of Malaysia”.<sup>14</sup> On 6<sup>th</sup> February 1998, the Government of Malaysia notified the Secretary General that it had decided to modify some of its reservations made upon accession as follows:

“With respect to article 5(a) of the Convention, the Government of Malaysia declares that the provision is subject to the Syariah law on the division of inherited property.

With respect to article 7 (b) of the Convention, the Government of Malaysia declares that the application of said article 7 (b) shall not affect the appointment to certain public offices like the Mufti Syariah Court Judges, and the Imam which is in accordance with the provisions of the Islamic Syariah law.

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<sup>14</sup> Ministry of Women, Family and Community Development, *Malaysia Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report)*, 2004, para 69.

With respect to article 9, paragraph 2 of the Convention, the Government of Malaysia declares that its reservation will be reviewed if the Government amends the relevant law.

With respect to article 16.1 (a) and paragraph 2, the Government of Malaysia declares that under the Syariah law and the laws of Malaysia the age limit for marriage for women is sixteen and men is eighteen.”

Clearly there remains a resistance by the government to fully submit to the spirit of the CEDAW Convention. In light of the recent Constitutional amendment affirming the government’s commitment towards gender equality there is a need to revisit and review the rationale for maintaining these reservations.

### **7. Treaty incorporation**

The doctrine of incorporation which provides for the automatic incorporation of international law into domestic law is not provided for in the Federal Constitution. Instead, the government of Malaysia needs to enact specific legislation to facilitate this incorporation into domestic law. To date, there does not appear to be any move to incorporate the CEDAW Convention into domestic legislation to enable the provisions of the treaty to be invoked and given effect to by courts, tribunals and administrative authorities. There is almost no history in the Malaysian courts of utilising international treaties or even international norms effectively.<sup>15</sup> This results in the CEDAW Convention being given effect in a piecemeal fashion by incorporating its principles in some form of specific domestic legislation.<sup>16</sup>

### **8. Optional Protocol to the CEDAW Convention**

The Government of Malaysia has not ratified the Optional Protocol to the CEDAW Convention. The Optional Protocol to the CEDAW Convention will provide women in Malaysia with an additional mechanism to ensure that their rights are protected and fulfilled should domestic laws and processes fail to do so.

### **9. Temporary Special Measures**

Temporary special measures are an important tool that the government should use to level the playing field in sectors and areas where women, due to past or indirect discrimination, find themselves at a disadvantage.

The CEDAW Committee, in clarifying the concept of temporary special measures explains that a distinction needs to be drawn between temporary special measures which are used to accelerate the achievement of gender equality and other general social

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<sup>15</sup> In *Jakob Renner v Scott King, Charimand of Board of Directors of the International School of Kuala Lumpur* [2000] 3 CLJ 569, the Court, in granting an injunction to restrain the school from excluding a moderately spastic dispelgia child from attending school, held that the question whether the Convention on the Rights of the Child, 1989 was applicable in Malaysia was a serious question to be tried.

<sup>16</sup> Honey Tan Lay Ean, “Measuring up to CEDAW: How far short are Malaysian Laws and Policies?” Presented at the SUHAKAM Roundtable Discussion: Rights and Obligations under CEDAW, 2003.



policies that are needed to support women's rights.<sup>17</sup> The measures identified in the Government Report, however, reveal that there is some confusion regarding the nature and purpose of temporary special measures. Campaigns promoting equitable sharing of parental roles and household responsibilities should not be part of a "major affirmative action" initiative, but rather needs to be integrated into national policy in an effort to create a culture of shared responsibility.<sup>18</sup> While the government has announced a 30% allocation of decision making positions for women in the public sector as a policy, there have not been any specific guidelines or laws as to how this is to be implemented.<sup>19</sup>

## **RECOMMENDATIONS TO THE GOVERNMENT**

### **1. Equality provision of the Federal Constitution**

- 1.1 Discrimination as provided under Article 1 of the CEDAW Convention must be defined either in the body of the Federal Constitution or legislation.
- 1.2 The remaining discriminatory provisions within the Federal Constitution should be thoroughly reviewed and amended to ensure harmonisation with article 8(2) of the Federal Constitution.

### **2. Discriminatory laws**

- 2.1 There should be a thorough review of all laws in the country and legislation that continues to discriminate against women should be amended.
- 2.2 The review and amendments of laws identified in the JAG-VAW<sup>20</sup> Memorandum on Gender Equality submitted on 25<sup>th</sup> May 2004 (attached as ANNEX 2) should be made a priority.
- 2.3 Enact a gender equality law that would address the problems in the constitution with regard to the guarantee for equality as described on page 6 .

### **3. National Policy on Women**

Women's interests should be mainstreamed into all sectors and policies in the five year development plan of the government and on the basis of equality between women and men as required by the CEDAW Convention. Data disaggregated by sex and other socio economic status must be gathered to facilitate planning and implementation of initiatives aimed at integrating women's interests into national development plans.

### **4. National Machinery for Women**

- 4.1 The Ministry of Women, Family and Community Development has to adopt a more proactive role as an advocator (and not only as a facilitator) to detect,

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<sup>17</sup> CEDAW Committee General Recommendation no. 25 on Temporary Special Measures

<sup>18</sup> Ministry of Women, Family and Community Development, *Malaysia Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report)*, 2004, para 86.

<sup>19</sup> Announcement made in August 2004

<sup>20</sup> The Joint Action Group against Violence Against Women (JAG-VAW) submitted a Memorandum on Equality for Malaysian Women identifying remaining laws and policies that discriminate against women. This memorandum is attached as ANNEX 2.

- monitor and eliminate discrimination against women within the government and private sector. It should be given the inter-ministerial power and responsibility to oversee matters pertaining to gender equity and equality and the power to act in cases where discrimination exists.
- 4.2 The Cabinet Committee on Gender Equality and Non-discrimination which was formed in 2004; should involve the NGOs in identifying its mandate, composition and priorities; which should be made public. The Cabinet Committee should also receive regular reports from the Gender Focal Points of the various ministries on the progress or obstacles faced by them in implementing gender mainstreaming.
  - 4.3 The Gender Focal Points of each of the ministries should have their roles and functions clearly defined with proper guidelines on strategies and actions to be taken to ensure that gender mainstreaming is effectively implemented within each ministry. The names and mandates of the focal points should also be made public.
  - 4.4 Systematic and institutionalised gender sensitisation training programmes should be introduced for civil servants at all levels, in particular decision makers and gender focal points.
  - 4.5 Gender budgeting should be implemented to ensure appropriate allocation of the budget and resources within each sector for programmes that promote women's rights and equality.
  - 4.6 The Technical Committees under the ministry should have a clear idea of the area of work, including time lines. In addition, it must be chaired by the Ministry of Women and Family and Community Development officials so that the Ministry will be in a better position to initiate meetings, implement and "own the issues". Technical committees must identify weak mechanisms in implementing laws and policies that continue to discriminate women.
  - 4.7 The role and composition of NACIWID should be reviewed. NACIWID should establish a secretariat independent of the MWFCDC to strengthen its role as a coordinating, consultative and advisory body.
  - 4.8 A Gender Anti-Discrimination Commission vested with full power to advise the government, hear complaints and deliver decision and guidelines on gender equality should be established.
- 5. Discrimination by the within public authorities**  
To conduct ongoing training for all public officials in a systematic programme. To get input from NGOs/ gender experts into the training materials for public officials. To utilise the MWFCDC women centres as a means of collating complaints and problems at the implemental level with the view for developing policy reform.
- 6. Temporary special measures**  
To identify areas for application of temporary special measures with specific guidelines for its implementation and monitoring to ensure its effectiveness.
- 7. Reservations**  
To address "problem" areas identified and remove the remaining reservations to the CEDAW Convention on Articles 5 (a), 7 (b), 9.2 and 16.1 (a, c, f, g) and 16.2.

**8. Treaty incorporation**

The CEDAW Convention should be incorporated into domestic legislation so that the treaty provisions can be invoked and given effect to by the courts, tribunals and administrative authorities.

**9. Optional Protocol to the CEDAW Convention**

To ratify the Optional Protocol to the CEDAW Convention.

## ARTICLE 5

### SEX ROLES AND STEREOTYPING

The government's report to CEDAW acknowledges in its section on article 5 the existence of "widespread stereotyping of women as followers and supporters rather than leaders or equal partners in Malaysian society" and "various cultural and institutional factors which are predicated on restrictive notions of a woman's role in society" and which "often intersect to form barriers to the advancement of women's career and upward mobility in an organization".<sup>21</sup> It is however important that the nature and location of this stereotyping be identified so as to enable concrete and targeted responses to be formulated to eliminate these practices. The Eighth Malaysia Plan (2001-2005) explicitly demands the strategies and programmes implemented for the women's advancement to be consistent with Malaysian values, religious beliefs and cultural norms.<sup>22</sup> It is a great concern that these values, as currently controlled by men, act as an impediment to persisting gender inequality.

#### CRITICAL AREAS OF CONCERN

##### 1. Positions of Leadership in Institutions.

When positions of authority are dominated by men, it becomes a material barrier to reexamine gender discriminatory values and beliefs interpreted within the religion and culture. These values then continue to enable the status quo of unequal representation and power distribution.

##### 1.1 Political Parties.

The leading political parties in Malaysia have been structured such that men and women are segregated into male and female wings within each political party. This creates an environment which encourages division on gender amongst the party members. There are women's wings in all three parties. UMNO incorporated *Kumpulan Kaum Ibu* (Mothers' Group) as their women's wing in 1949 and renamed it to *Wanita UMNO* (UMNO Women) in 1971. MCA and MIC formed its women's section only in 1975. Although the recognition afforded by these auxiliary sections to women's political involvement and decision making within the governing institution is laudable, their contribution is often limited to a primarily socio-welfare approach.<sup>23</sup>

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<sup>21</sup> Ministry of Women, Family and Community Development, *Malaysia Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report)*, 2004, para 89 & 90

<sup>22</sup> Para 20.27, *Supra*, n. 10

<sup>23</sup> However, it is noteworthy that MCA Wanita has played an active role in bringing to the political front a diverse range of issues, including being one of the first vocal groups to debate about the Hudud enactment in Kelantan.

One of the main obstacles is the perceived traditional role of women constrained within the domestic ambit of their homes. This perception is so entrenched that the national machinery for women's development is amalgamated with the family and subsequently, the community and in March 2004 was renamed the Ministry of Women, Family and Community Development. The Minister of Women and Family Development stated that the reinforcement of women's basic and traditional functions like cooking and caring for the household were among the three grey areas that she will look into when the Ministry was newly formed in January 2001.<sup>24</sup> The Eighth Malaysian Plan (2001-2005) also explicitly states the expected dual responsibility of women between their family and career<sup>25</sup>, intrinsically including women's duties to their family in their public roles; restricting women's mobility, freedom of choice, public participation and/or career advancement. No equivalent burden is placed on men. This belief is also reflected by the mass media in their reports and representation of women economic and political leaders. These views translate women's role in political participation as a replication of their perceived role in the family.

Despite being half of the political party membership and voting mass,<sup>26</sup> women are underrepresented in all areas of decision making in the ruling coalition the structure of the parties.

Some Members of Parliament (MP) also display paternalistic and sexist attitudes towards their female colleagues, making condescending remarks such as "I would like to advice my younger sister"<sup>27</sup> and "go home and suck on a pacifier"<sup>28</sup> to female MP, Fong Poh Kuan during Parliamentary proceedings.

## **1.2 Institutions of Culture and Religion**

The authority vested under formal and informal institutions of culture and religion are primarily led by men. Women are greatly underrepresented in all the bodies and departments who have the authority over the interpretation and construction of religion and religious laws. This restricts the inclusion of women's experiences and concerns into the interpretation and subsequently enforcement of the values within religion and culture. For example, the explicit prohibition for women to hold leadership roles as Imam in the Islamic structure (who leads prayers and gives *khutbah*, or sermon, in the mosques), and interpretations of the Islamic notion that men are leaders and women are followers exist as real obstacles in recognition of women's leadership capacity. Through practice and convention, the environment is

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<sup>24</sup> 19 January 2001, [www.malaysiakini.com](http://www.malaysiakini.com)

<sup>25</sup> Para 20.28, Eighth Malaysian Plan (2001-2005)

<sup>26</sup> *Women's Political Movement in Malaysia: Progress, Problems & Prospects*, Maimunah Ismail, *Women's Political Empowerment* (2000, Center for Asia-Pacific Women in Politics)

<sup>27</sup> Dewan Rakyat (11 December 2001), quoted in Women's Agenda for Change (WAC), "The Suspension of MP Fong Poh Kuan and Gender Discrimination in the Parliament" (25 January 2002), <http://www.wao.org.my/news/20020302wacgenderdiscrim.htm>

<sup>28</sup> Dewan Rakyat (29 March 2000), quoted in Women's Agenda for Change, "The Suspension of MP Fong Poh Kuan and Gender Discrimination in the Parliament".

hostile towards any women holding formal positions as judges, *muftis* (State chief authority on Hukum Syarak), or *ulamaks* (Islamic intellectual scholars),<sup>29</sup> all of which are positions with interpretive powers within the Islamic legislative system. There are no women *Syariah* judges or *muftis*,<sup>30</sup> and no woman who is currently holding a senior/director position in JAKIM (the Department for Islamic Development in Malaysia, a coordinating body in charge of Islam at the Federal level).<sup>31</sup>

Such perception and subsequent segregation of roles in terms of leadership on the basis of gender is reflected in almost all primary religious institutions as practised in Malaysia. For example, in Buddhism, only men can be monks, while women as nuns typically play a subservient role to the monks by doing the chores of cleaning and cooking.<sup>32</sup> In some Christian denominations,<sup>33</sup> women are not allowed to be priests. Women are only allowed to be priests under Hinduism after they have reached menopause.

In Sarawak where cultural practices continue to dominate community life, the position of Headman within the indigenous communities in Sarawak, reached by consensus between the members of the village, is usually passed from father to son.<sup>34</sup> This position of Headman is the first step towards holding a position within the Native Courts, which governs interpretation and enforcement of customary practices. Since the inception of the Council of Customary Practices in 1974 in Sarawak, there has only been one female *Temenggong* (Officer of the Chief's Superior Court, which is the third level of appeal within the Native Courts system).<sup>35</sup> In Sabah, as the Native laws are not codified, the customs are left to the interpretation and enforcement by the predominantly male native chiefs or District Officers who hear appeals from the Native Courts.

The top management positions at the Ministry of Culture, Arts & Tourism are also currently dominated by men, with women making up about a quarter of decision-making positions.<sup>36</sup> The National Culture Policy, implemented in the same year as the New Economic Policy (NEP), i.e. 1971, emphasises cultural programmes that enhance and promote national unity and integration, sets the Malay culture as the base for national culture, and allows the practice of individual cultures by different ethnic groups. However, in its strategies and outlines, it remains conspicuously silent

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<sup>29</sup> Although arguably there are female *ulamaks* who are not officially recognised; interview with Zainah Anwar, Executive Director of Sisters in Islam, 13 August 2003

<sup>30</sup> There exists no central database of actual numbers of men and women holding decision-making positions in the *Syariah* system. These figures are based on an interview with Zainah Anwar, Executive Director of Sisters in Islam, on 13 August 2003.

<sup>31</sup> Interview with Shamrifa, staff member of the Research Department, JAKIM, on 13 August 2003.

<sup>32</sup> Notably the Thai Teravada version of Buddhism, which is gaining popularity in Malaysia.

<sup>33</sup> Notably Catholicism, which represents a large number of Christians in Malaysia.

<sup>34</sup> Interview with Jayl Langub and Nicholas Bawin of the *Majlis Adat Istiadat* (Council of Customary Practices), Kuching, Sarawak, on 7<sup>th</sup> March 2003

<sup>35</sup> *ibid.*

<sup>36</sup> There are currently four women holding senior positions out of the 14 top management positions as profiled by the Ministry in their website [http://www.motour.gov.my/laman\\_web/index.php?page=carta](http://www.motour.gov.my/laman_web/index.php?page=carta)

on addressing the issue of gender and discrimination against women through culture and tradition.<sup>37</sup> It is also a concern that the promotion of “medical tourism” in the state of Penang, which includes supporting tourism, packaged with cosmetic surgery, effectively sanctions and reinforces the superficial valuing of women for economic gains.<sup>38</sup>

## 2. Marriage and family life

The perceived traditional role of women within the domestic ambit of the home continues to permeate both at the policy and personal levels.

### 2.1 Premarital Courses

Premarital courses are compulsory for Muslims. The courses, the modules of which are approved by JAKIM and are taught to the prospective couples by both female and male religious teachers, reinforce the value of gender-based submission and domination. Some of the modules include the method to beat one’s wife in an “Islamic” way, how to be polygamous and a husband’s role as the leader in the family with commiserating obedience from his wife.<sup>39</sup> Although there is no comprehensive research on the uniformity of these modules and courses throughout the country, the monitoring done in Kuala Lumpur<sup>40</sup> show cause for concern. Most Christian denominations also require premarital courses for couples wishing to marry. There is also no research data available on the substance of these courses, especially since there is no one central body that accredits the modules within the course. Currently, the religious institutions of Hinduism are also conducting similar courses.

### 2.2 Polygamy & Divorce

The cultural practice of polygamy by men is codified under the *Syariah* laws,<sup>41</sup> the primary justification being its explicit mention in the *Qur’an*. The legislating and interpretive bodies, composed mainly by men, as well as the general public, interpret it as a matter of right for men; whereas women’s groups have been campaigning for its interpretation as a matter of limitation. The difference in standpoint is significant, as the conditions set for limiting its practice have been steadily eroding in various States. This sets a wife’s rights in consultation and interjection of the husband’s application for polygamy under jeopardy. This further places the position of husband and wife on unequal footing in terms of bargaining powers within a marriage. The prevalent acceptance of men’s right to practice polygamy reflects a popular culture that is male dominated, and the value placed on women as property of their husband.

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<sup>37</sup> Shahar Banun Jaafar, “Cultural Information within the Context of the Malaysian National Information Policy”, presented in the First Regional Meeting of Culturelink Network, <http://www.culturelink.or.kr/archives.html> (last accessed 30th June 2004)

<sup>38</sup> “Malaysia targets breast surgery tourists”, 29 November, 2002, BBC News

<sup>39</sup> Interview with Zainah Anwar (Executive Director) and Shariza Kamarudin (Programme Officer), Sisters in Islam, from Sisters in Islam case studies.

<sup>40</sup> Monitoring of *Kursus Perkahwinan* (Marriage Courses) in Kuala Lumpur, Sisters in Islam, by Shariza Kamarudin and Nora Murat, 2002 – current.

<sup>41</sup> Polygamy under the Civil law for non-Muslims was abolished in 1982 when the *Law Reform (Marriage and Divorce) Act* was reformed in 1976

Although JAKIM recently stated<sup>42</sup> that polygamy is not a matter of right for Muslim men, this has not translated into change in terms of attitude in implementation of the law, or the laws itself.

Although polygamy has been abolished for non-Muslims,<sup>43</sup> there have been efforts to reinstate this right by The People's Progressive Party (PPP). The Party's Youth Chief had suggested that non-Muslim men be allowed to practice polygamy to correct social ills and to protect the rights of second wives and illegitimate children, reinforcing men's privilege of "ownership" over women.<sup>44</sup> His view was echoed by the PPP Wanita (Women) Chief who said she would allow her husband to take a second wife as polygamy is a common "fact of life which people have to accept".<sup>45</sup> Although this view has been criticised by other government officials, it is gravely problematic when – albeit minority – political leaders defend this practice that clearly discriminates against women over reasons that reinforces the message of gender inequality.

The disregard for women's rights within the marriage has been reified with a *Syariah* Court's judgment that divorce by a man of his wife through mobile phone texting i.e. using SMS (short message service) was valid.<sup>46</sup> Under *Syariah* laws, a man can divorce his wife if he declares his intention clearly by stating, "I divorce you" three times.<sup>47</sup> Despite discomfort with the ruling, political leaders did not problematise or challenge Muslim men's right to divorce their wives through such pronouncement.<sup>48</sup>

### 2.3 Division of Property

The division of property under *Hukum Faraid* in the *Syariah* laws favour men. As a result of this, the Malaysian government placed a reservation under Article 5 of the CEDAW Convention declaring that the provision is subject to the *Syariah* law on the division of inherited property. However, in its report to the CEDAW Committee, the government has not provided any further explanation as to the government's plans in dealing with this problem and for the eventual removal of the reservation. The principles in the division of property clearly discriminate against women and affect women's ability to have access to property and subsequent economic empowerment. As such, clear demonstration of justification and accountability is needed from the government on the continued enforcement of this law.

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<sup>42</sup> 26 March 2003, *Wanita Hari Ini* (daytime women's talk show), TV3

<sup>43</sup> *Supra*, n. 23

<sup>44</sup> 29 December 2001, *The Star*

<sup>45</sup> 29 December 2001, *The Star*

<sup>46</sup> 26 July 2003, *The News Straits Times*

<sup>47</sup> Refer to Article 16 (Equality in Marriage and Family) of the NGO Shadow Report for further information about rights of Muslim women in marriages.

<sup>48</sup> 27 July 2003, *The Star*, Minister of Women and Family Development stated that "using SMS was not the best way to divorce a wife even though it was valid"; 30 July 2003, ABC News Online (<http://www.abc.net.au/news/newsitems/s913265.htm>), Prime Minister Datuk Seri Dr Mahathir Mohamad stated that "I am not so keen on that but they say it is perfectly legal, perfectly Islamic... We hope of course that instead of sending messages, you should look at the beautiful wife that you're going to divorce ... maybe she would cry a bit and you would change your mind",



In Sabah, under the Native laws among the *Nabai Muruts* community, the inheritance system also favours men over women. The wife has no exercisable right of survivorship and cannot claim any of the property acquired during marriage by either party. No study has been done on the effects of such a custom on the lives of the widows in the community.<sup>49</sup>

### **3. Education system**

#### **3.1 Textbooks**

Although efforts have been made by the government to address gender stereotyped images in school textbooks, there still exists a gap in the portrayal of the diverse contribution made by women in Malaysian society. The government's report states that the Ministry for Women and Family Development has requested the Ministry of Education to eliminate stereotypical images and representations of women in textbooks. The deadline in the National Plan of Action for revision of textbooks and curriculum to remove gender biases and promote positive images of girls and women was set for 2000<sup>50</sup> for secondary education and 2003<sup>51</sup> for primary education, but to date, no concrete changes has been made. In the fifth form Moral Education textbook,<sup>52</sup> there were no women out of the six leaders portrayed and personalities featured for their commendable characteristics, values and contribution to society. The topic on "Good Nurturing" typically portrayed a mother doing household chores; although it is noteworthy that she asked for help from her boy child. Nonetheless, these images do nothing to break gender stereotypes and in fact serve to reinforce a woman's position in the home. There has not been comprehensive research on the typification of gender portrayals in religious texts, but the education of male and female roles within religious classes which are compulsory for Muslim students in national schools needs to be studied. Women's contribution to Malaysia's history also lacks visibility and recognition in the History textbooks and modules taught in schools.

#### **3.2 Curriculum**

The government report mentions the Ministry of Education's introduction of the subject Living Skills into the educational curriculum which enables both male and female students to learn domestic science or carpentry. However no data is provided on how many male and female students have actually opted for the domestic science and carpentry courses respectively. The actual results of this initiative are not made known. The government report also states that "considerable efforts are now being made to encourage female students to venture into science and technology courses" through gender sensitization among parents and all parties within the school system. The nature and content of this gender sensitization effort and the feedback or

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<sup>49</sup> Sabah Women Action Resource Centre (SAWO), "Women in Sabah. Needs, Concerns, Aspirations", 1992

<sup>50</sup> National Plan for Action, 1998, Strategic Objective B.4, Action #2

<sup>51</sup> National Plan for Action, 1998, Strategic Objective L.3, Action #2

<sup>52</sup> *Pendidikan Moral Tingkatan Lima*, Dewan Bahasa dan Pustaka, 9<sup>th</sup> Edition, 2000

response received has not been revealed so as to enable an assessment of its success or effectiveness in countering this concern.

### **3.3 Sex education**

The government appears to have a different understanding of what constitutes sex education; either understanding it as encouraging sexual promiscuity or simple biology. There is currently no formal sex education in schools that is explicitly stipulated as such. The proposal for having sex education in schools has surfaced for public debate time and time again, especially when sexual crimes like incest receive heightened media highlight. Although the government report states that action is being taken to incorporate sex education in school, the timeline, content of the subject, process and procedure that incorporates mechanisms of feedback from various stake holders and members of civil society has not been articulated or clarified.

## **4. Images of Women in the media**

Gender stereotypes are reinforced in the mass media. A Media Monitoring Research project (2002) initiated by the All Women's Action Society<sup>53</sup> shows a stereotyped imaging of women – mainly young, slim and fair women. The study revealed that there was minimal diversity in the depiction of gender roles as out of 208 advertisements studied, only 17 demonstrated gender diversity.

Research on the representations of women and men in news or feature articles could not be found. However, editorial control on the content of news rests largely with men. In a study on women journalists in Malaysia,<sup>54</sup> it was found that although women made up 40% of the journalists in the 36 participating print media organisations, they are underrepresented in decision-making positions. In the news media, only 7% in top management positions, and 20% in middle management positions are held by women. This significantly impacts upon the selection of content and newsworthiness, content and method of training for staff, editorial layout as well as promotional opportunities for women in the industry.

## **5. Expressions of sexuality**

The disparity of values in men and women in relation to sexuality is also present in most local religions and culture. Sexual prowess and right to sexual fulfillment is valued in men, whereas women are expected to uphold and be vessels of morality and chastity. This adds to the rigid binaries of what constitutes masculine and feminine behaviour which are tenaciously articulated and enforced.

### **5.1 Dress Code**

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<sup>53</sup> All Women's Action Society (AWAM), Media Monitoring Research, Preliminary Findings: Gender-sensitive and Gender-biased Advertisements, 8 March 2003, July 2002 – October 2002.

<sup>54</sup> Report on Women Journalists in Malaysia: Career Prospects and Concerns, Asian Institute for Development Communication (2001).

One of the primary indicators of this is in clothing and conduct. Analysis of sexual crimes still consider the inability of offenders to control their sexual urges and female survivors in provoking the attack through unsuitable dressing and behaviour.<sup>55</sup> This has far reaching implications in terms of response and support by the family unit, society and the handling of cases by government agencies within the criminal justice system.<sup>56</sup> In a rape case of two migrant women under detention by a police officer, the subsequently convicted<sup>57</sup> rapist was initially acquitted.<sup>58</sup> Some of the reasons given by the Sessions Court judge were the fact that the both women were married with children, and that they took their clothes off (without force). This seems to denote that only women who were chaste virgins could be raped, and all other pertinent factors in the rape under detention case were irrelevant.

The focus of “proper” attire rests primarily on women, with the emphasis on covering up parts of the body considered sexual including knees, ankles, arms, legs and hair.<sup>59</sup> There is greater State and local council intervention upon Muslim women to dress “appropriately”, especially in the states of Kelantan and Terengganu, where dress codes which require Muslim women to wear head scarves (*tudung*) have been introduced for civil servants in March 2000. The state of Terengganu has also banned the wearing of bikinis by female tourists in April 2002.<sup>60</sup> However, there also exist negative stereotypes of Chinese women’s sexuality based on their perceived choice of revealing clothing. A report by the PAS Central Council of *Ulamas* to a newspaper column<sup>61</sup> (which challenged PAS’ policy towards women and dress codes) questioned if the “Chinese culture of wearing skimpy shorts and singlets should be defended”.<sup>62</sup> This statement propagates a perception of an ethnic-based divide between moral and religious Muslim women and sexually aggressive Chinese women. Wearing of robes have been advocated by the Chief Minister of Kelantan, Datuk Nik Aziz, to be effective in discouraging Muslim men and women from committing crimes and actions that were against teachings of Islam.<sup>63</sup>

The Women’s Development Action Plan explicitly maintains that current sporting apparel is incompatible with “public decency” and “religious values”,<sup>64</sup> further explaining that this constitutes one of the reasons for women’s low participation in

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<sup>55</sup> “Women’s lifestyle can also lead to rape,” Comment, *The Star*, 19 March 2003; “Indecent dressing not proper in our society”, Comment, *The Star*, 17 July 2003; “Wear your sexy cloths in the confines of your home, please”, Comment, *The Star*, 24 July 2003; “Better be safe than sorry”, Comment, *The Star*, 24 July 2003. However, it is noteworthy that there are also responses from the public refuting the claims that women’s clothing lead to rape.

<sup>56</sup> See chapter on Violence Against Women for more details.

<sup>57</sup> Sessions Court, Ampang, 7 August 2003

<sup>58</sup> Sessions Court, Kuala Lumpur, 24 September 2002

<sup>59</sup> pp 51, 55, 58 & 69, *Malaysian Customs & Etiquette: A Practical Handbook*, 2000 (Times Media Private Ltd).

<sup>60</sup> “Bikinis banned in dress code for tourists”, 21 April 2002, AFP

<sup>61</sup> Column by Wong Chun Wai, “The PAS way to keep critics at bay”, 7 September 2003, *The Star*

<sup>62</sup> 15 October 2003, *Fikrah Harakah*

<sup>63</sup> 7 July 2003, *The Star*

<sup>64</sup> Women’s Development Action Plan, Part II (XIII) (92)

sports. Its action plan delineates immediate modification of sporting apparel for women to one that is more suitable in this context.<sup>65</sup> This disregards the impact of apparel on women's performance in sports, provides a cursory analysis of obstacles to women's participation in this field and prioritises instead the need to cover women's sexuality through effective public regulation.

## 5.2 Selective censorship and intervention on gender & sexuality

A local production of *The Vagina Monologues* – a play that deals with women's sexuality – had its second run's permit revoked by the local council<sup>66</sup> for being “obscene”.<sup>67</sup> This intervention by the local council as gateway to what constitutes public morality and decency, in effect sets a precedent that talking about women's sexuality is not permitted. Women have been banned from taking part in the national Quran reciting competition by the States of Terengganu and Kelantan, on the basis that their voice is considered as “*aurat*” (specific parts of the human body which are supposed to be covered according to Islam);<sup>68</sup> This implies the understanding of women's voices as sexual and thus restricted from the public spaces.

A national TV station aired a programme on “effeminate men”<sup>69</sup> and subsequently, one on “masculine women”, presenting men and women who apparently fall into such categories in a one-dimensional, demonising approach and as socially and morally problematic gays, lesbians, bisexuals or transsexuals.<sup>70</sup> On the other hand, an alternative presentation by a different television programme on the issue of female sexuality was banned by the Censorship Board for “promoting homosexuality”.<sup>71</sup> The then National Unity and Social Development Minister, Datuk Dr Siti Zaharah Sulaiman, stated that the issue of “soft” male students in local universities must be checked to avoid widespread negative impact on society. She reiterated “appropriate” gender norms stating that “males are perceived to be tough and sturdy” and proposed a course in local universities that will educate “these students (to be able to) act like the men they are”.<sup>72</sup>

## 5.3 Policing of Moral Crimes and Selective Prosecution

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<sup>65</sup> Women's Development Action Plan, Part II (XIII) (95), Table 13

<sup>66</sup> The first run was sold out

<sup>67</sup> “Debating over women's sexuality”, 14 February 2002, [www.malaysiakini.com](http://www.malaysiakini.com)

<sup>68</sup> “Voice As Aurat”, Sisters in Islam, 28 July 2000,

[<http://www.sistersinislam.org.my/PressStatement/28072000.htm>]; it is noteworthy that officials from the Federal Government criticised this move. However, both the states at that time were controlled by opposition party, PAS, who forwarded this understanding of the issue. The political dimensions of the context need to be taken into account.

<sup>69</sup> 12 July 2003, Edisi Siasat, NTV7; the programme is formatted as investigative broadcast journalism on current issues

<sup>70</sup> 25 August 2003, Edisi Siasat, NTV7; the programme is formatted as investigative broadcast journalism on current issues

<sup>71</sup> “An episode of TV series 3R banned”, 7 August 2003, *The Star*; 3R is a television programme aired on TV3 and Astro aimed at the empowerment of young women; the episode banned was *Identiti di Sebalik Cermin* (*Identity behind the Mirror*), a re-cut from the original segment *Bukan Gadis Biasa* (*Not a Normal Girl*), which was also not allowed to be screened.

<sup>72</sup> “Soft males issue not serious but must be addressed, says Minister”, 19 July 2003, *The Star*

Local authorities increasingly infringe upon the private space between individuals under the pretext of “morality” and “public decency” to control citizens’ behaviour, intimacy and/or sexuality. A morality campaign<sup>73</sup> have fined at least 170 couples RM30 and 100 since January 2003 for “indecent behaviour” – including hugging and kissing - under city bylaws for public parks<sup>74</sup> in the city of Ipoh alone. This campaign has been extended to three main cities: Ipoh, Kuala Lumpur and Penang.<sup>75</sup>

A press statement issued by Sisters in Islam documented a series of selective prosecution towards women in crimes related to sexuality: in June 2000, a woman pub singer was arrested and charged for insulting Islam but the male members of the band were let off; female juveniles caught in alleged sex parties have been sent to rehabilitation centres, but the juvenile male partners were only fined; Muslim women who took part in beauty contests are arrested and charged, but not Muslim men who took part in body-building contests; female sex workers are arrested but not their male clients; and women who abandon babies were arrested and charged but not the men who made them pregnant.<sup>76</sup>

*Khalwat*, or the crime of Muslim men and Muslim women being in close proximity as to give rise to “suspicion that they are engaged in immoral acts”<sup>77</sup> are policed and enforced by members of the public – Muslim men who are “trained” and paid circa RM30. It is gravely disturbing when members of the public are authorised to spy on other members of the public in their private activities, and be given the legal autonomy, and authority, to decide on what constitutes suspected “immoral behaviour” at the circumstance of arrest – especially when all the “moral police” are only made up of men, with corresponding prejudice towards female sexuality.

In a recent case of a Muslim woman being arrested at a raid in a nightspot, one of the enforcement officers photographed her while she was urinating (she was not allowed to leave the truck to ease herself).<sup>78</sup> The violating act was not authorised, but demonstrates the voyeuristic and sexist attitudes. In another instance, a married couple were arrested and held in police cells overnight because they could not produce their marriage certificate immediately.<sup>79</sup> This again, illustrates the zealotry exercised by the enforcement authorities in the regulation of citizen’s sexuality.

#### **5.4 Segregation of Spaces**

Religious spaces are subjected to sex segregation in Mosques, with women allowed in certain spaces, out of sight of the male Muslims. This strict segregation codes reflect the understanding of Mosques being a holy space and the apparent “dangers” of women’s sexuality affecting this if seen. This reinforces the concealment of

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<sup>73</sup> Stopped in June 2003 as a response to public protest

<sup>74</sup> “Malaysian officials censure couples for hugging and kissing in public parks”, 9 June 2003, *CA News*

<sup>75</sup> “Malaysia gets tough on non-Muslims”, 28 June 2003, *The Guardian*

<sup>76</sup> “Arrest of Women During Raids”, 14 December 2000, Sisters in Islam

<sup>77</sup> Section 27, Syariah Criminal Provisions Act (Federal Territories)

<sup>78</sup> “Press Coverage of Syariah Criminal Trial of Maslinda binti Ishak”, 23 June 2003, Sisters in Islam

<sup>79</sup> “Married couple sues religious police”, September 26 2002, Associated Press

women, women's sexuality and privileges male spaces. Hindu shrines also proscribe women unless they have reached menopause as women's menstruation – a physical indication of her sexuality – is deemed to be attracting “negative” aura.

In the states of Terengganu and Kelantan, PAS have imposed a gender segregation policy in supermarkets, swimming pools, cinemas and other entertainment outlets. The Women's Development Action Plan also advocates for sex-segregated swimming pools or covered swimming pools for women to encourage women's participation in sports.<sup>80</sup>

This inclination towards the separation of spaces between men and women only serves to accentuate perceived differences between men and women, and helps to naturalise other policies which provides for gender disparity. The concealment of women's bodies under the notion sexuality serves to accentuate the sense of shame that restricts women's mobility and participation in society, and ironically hyper-sexualises what it aims to veil.

## **RECOMMENDATIONS TO THE GOVERNMENT**

### **1. Institutions of race, culture and ethnicity**

Review national policies to address aspects of culture and religion, as well as gender stereotyping that perpetuate discriminatory practices against women. Ensure adequate representation of women in bodies and departments which have the authority over the interpretation and construction of religion and religious laws.

### **2. Marriage and family life**

- .1 Review laws and practices related to marriage and family life to eliminate discriminatory elements.
- .2 Review marriage counseling modules/ programmes to ensure an understanding of equality and rights of women within marriage are incorporated.

### **1. Education system**

Accelerate the review school textbooks and remove elements that perpetuate stereotyping of roles and responsibilities between men and women, and introduce gender relations and rights studies that incorporate sex education in school, teacher training colleges and universities.

### **2. Images of women in the media**

Conduct gender sensitisation trainings with media agents (editors; journalists; photographers; layout editors etc) in collaboration with the women's groups and incorporate a gender component into laws on media to ensure equal and fair representation of women. Look into the setting up of an independent Media Watch to research, monitor and analyse the content of media from a critical gender perspective and

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<sup>80</sup> Women's Development Action Plan, Part II (XIII) (92)

provide recommendations to media agents on how to overcome ongoing gender discrimination and negative imaging of women in the media.

**3. Reservation on Article 5**

Review the reservation entered on Article 5 and formulate a plan for its eventual removal.

## **ARTICLE 6**

### **TRAFFICKING AND EXPLOITATION OF PROSTITUTION**

The Government Report does not provide any information on the extent of the problem of trafficking and exploitation of prostitution in Malaysia. While statistics on trafficking and prostitution might be difficult to obtain due to the nature of the crime, it is important for the Government (especially the Royal Malaysia Police and Department of Immigration) to put in place mechanisms to identify the extent of the problem and analyse the patterns and movements of trafficked persons in and out of the country.

Information and statistics from various sources provide an indication of the extent of the problem:

- In the 1995 Asian Regional Migrant Meeting in Bangkok, Malaysia was identified on a list of sending and receiving countries as (i) receiving women from the Philippines, Indonesia, Thailand, Burma, South China and Russia, and (ii) sending women to Japan, Taiwan, Europe, Hong Kong and Australia.<sup>81</sup>
- The then Deputy Home Minister Datuk Chor Chee Heung was reported in the News Straits Times on 16th January 2003 to have said that over the past three years (2001-2003), 12,888 tourists and foreign students were detained for involvement in immoral activities, with 5,149 arrested for prostitution<sup>82</sup>. In the year 2002, those deported included 2,155 Indonesians, 1,230 Chinese, 946 Thais, 298 Vietnamese, 189 Filipinos, 138 Uzbeks and 125 Cambodians. The others were from Russia, India, Laos, Bangladesh, Poland, Kazakhstan and Sri Lanka.<sup>83</sup>
- Police statistics between November 2003 and March 2004 indicate a total of 2,340 foreign nationals were involved in prostitution: 795 from Indonesia, 787 from China, 507 from Thailand, 101 from the Philippines, 52 from Cambodia, 46 from Vietnam, 20 from Uzbekistan, and 32 from other countries.<sup>84</sup>
- During a 29 October 2003 visit to Kajang Women's Prison, SUHAKAM found that only 325 of the 1810 inmates were Malaysian. The remainder were foreign inmates, with 939 from Indonesia, 250 from the Republic of China, 137 from Thailand, 85 from Cambodia, 27 from Vietnam, 22 from Myanmar, 16 from the Philippines, and 9 from Uzbekistan.<sup>85</sup> Although all of these women were not necessarily victims of trafficking, at least some might have been trafficked into the country. In addition, of

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<sup>81</sup> Aegile Fernandez, "Globalisation of Sex Trade in Asia", presentation in Tenaganita, *Seminar on Trafficking in Women A Growing Phenomenon in Malaysia, 13 May 1995, Kuala Lumpur* (1998).

<sup>82</sup> Adrian David, "13,000 foreigners detained over past three years for vice", News Straits Times (16 January 2003).

<sup>83</sup> Ibid.

<sup>84</sup> Human Rights Commission of Malaysia (SUHAKAM), *Trafficking in Women and Children – A Cross Border and Regional Perspective: report of the Human Rights Commission of Malaysia*, p.20 (2004).

<sup>85</sup> Ibid p.8.



the 59 interviews they conducted with women at detention centres from January 2003 through April 2004, SUHAKAM found that 28 had been trafficked into the country.<sup>86</sup>

Although these numbers may show one aspect of the problem, these figures do not necessarily indicate the absolute number of trafficking victims, as many foreign women who have been trafficked for sex are charged with immigration offences instead of prostitution, women are trafficked for labour rather than sex work, and many trafficking victims are not arrested or “rescued”, thus will not be counted in the statistics.

In the many cases received and testimonies studied by Tenaganita<sup>87</sup> and Women’s Aid Organisation (WAO), women forced into the sex industry were guaranteed that they would have a legitimate job and a work permit upon their arrival in Malaysia. However they were instead forced to service clients in brothels; in many cases, they were paid poorly or not at all.

- In 2003 alone Tenaganita handled 30 cases of trafficked women from Indonesia, Cambodia, Vietnam, Thailand, Uzbekistan and China. Between 1995 and 2000, Tenaganita housed 90 women who were trafficked from Thailand, Philippines and India. Tenaganita is also assisting women from Cambodia and Vietnam. In 1994, Tenaganita handled over 15 cases of women who had been trafficked into Malaysia from southern Philippines.<sup>88</sup> These women were lured into the country under the pretext of good jobs, but they were raped and forced into prostitution.<sup>89</sup>
- In 2003, Women’s Aid Organisation (WAO) handled 11 cases involving women trafficked from China, Indonesia, Cambodia, Uzbekistan and Sri Lanka into Malaysia for prostitution. They too claimed they were promised good jobs and only upon their arrival in the country was the true nature of their “work” revealed. They had been servicing clients for more than 6 months before they managed to escape and were referred by the police to WAO.

One indication of progress is that the Human Rights Commission of Malaysia (SUHAKAM) has taken an interest in the issue of trafficking and has organised two major forums on trafficking, in April 2004 and October 2004. These events brought together many different agencies and NGOs to talk about the problem and begin to devise solutions. A report from the first forum, entitled “Trafficking in Women and Children: Report of the Human Rights Commission of Malaysia (SUHAKAM)”, includes the text of UN Conventions, examples of successes from other countries, and a comprehensive set of guidelines on trafficking (“Human Rights Standards for the Treatment of Trafficked Persons”) that was formulated by the Global Alliance Against Trafficking in Women (GAATW). Unfortunately, SUHAKAM reports are not tabled in Parliament and

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<sup>86</sup> Ibid p.9.

<sup>87</sup> Tenaganita is a Malaysian NGO committed to the protection of the rights of women and migrant workers.

<sup>88</sup> Irene Fernandez, “Foreword”, in Tenaganita report, *supra* n.1.

<sup>89</sup> Irene Fernandez, “Trafficking in Women – The Malaysian Reality”, in Tenaganita report, *supra* n.1.

Members of Parliament rarely discuss the findings of these reports which are made public.

## **CRITICAL AREAS OF CONCERN**

### **1. Effectiveness of existing legislation**

The Government report identifies the various laws that are in place to deal with trafficking and soliciting: The Penal Code, Immigration Act 1959/1963, The Anti-Money Laundering Act 2001, Restricted Residence Act 1993, Prevention of Crime Act 1959 and the Child Act 2001. While the existence of these laws accord some level of protection for victims and punishment for perpetrators, there are no specific laws put in place to deal with trafficking per se.

There is a critical need to study the effectiveness of available provisions in dealing with the very specific nature of trafficking and forced prostitution, in which the violation of a woman's rights occur at many different levels: when she is forced into prostitution, forced to have unprotected sex, is physically abused, not paid for services and punished by the law. The Human Rights Commission of Malaysia (SUHAKAM) has called for the enactment of a comprehensive anti-trafficking law that can be used to more effectively protect victims at all of these stages and to punish perpetrators.<sup>90</sup>

#### **1.1 Uneven enforcement of the law**

There is concern that it is the victims of trafficking and not the traffickers or pimps that are being arrested, charged and detained under these laws. Trafficked women are also being charged and deported for not possessing valid travel documents, and it is unclear whether foreign traffickers are being charged accordingly. It is crucial for the state to monitor and provide statistics as to the number of arrests, prosecutions and convictions obtained over the years under these laws to assess the effectiveness of these laws in dealing with what appears to be a growing phenomenon.

Even when traffickers are arrested and charged, they are often treated leniently by the law. In one case, bail of RM10,000 was allowed for two people charged with wrongfully confining two Chinese women with the intention of using them for vice, despite the Deputy Public Prosecutor's recommendation of RM50,000 in bail.<sup>91</sup>

#### **1.2 Lack of inter-agency coordination**

A number of different agencies play a role in trafficking cases, especially given the large number of individual pieces of legislation that can be used in a given case. At present, there is little or no coordination between the different agencies. The police, Department of Immigration, Attorney General's Chambers, and Welfare do not always work together to plan and carry out all of the steps involved in fighting trafficking, including identifying a location, performing the raid, identifying the victims, providing them with services, taking statements from the victims,

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<sup>90</sup> Adrian David, "Suhakam: Anti-Trafficking Act needed", *New Straits Times* (28 January 2005).

<sup>91</sup> "Two charged with pimping Chinese women", *The Star* (13 May 2003).

investigating the criminal activity, prosecuting the perpetrators, assisting the victims with return and repatriation. These agencies must coordinate their efforts, share information, and cooperate with one another to provide better protection and services to the victims and more effectively prosecute and punish the perpetrators.

### **1.3 The detention of trafficked women**

Many women who are trafficked and have come forward to lodge a complaint with the police become key witnesses to the investigation and are placed under “protective custody”. It is believed that some of these women are kept in prison while the case is pending investigation, a period which could range from 6 months to a few years.

In addition, many victims of trafficking are identified as illegal immigrants and not trafficking victims. They are therefore immediately turned over to the Department of Immigration to be charged under the Immigration Act with overstaying their visas. Their status as trafficking victims never surfaces and is not acted upon – they are not placed in appropriate shelters, provided with medical or counselling services, referred to the embassy of their home country, or given assistance in return and repatriation to the home country.

SUHAKAM reported that during one of its visits to the women’s prison in Kajang in January 2003, it observed that a large number of foreign nationals, mainly young girls, who were being held in remand.<sup>92</sup> While the majority were imprisoned for immigration offences (because their social visit visas had expired), there were also girls who had escaped from being held against their will but were then caught and held by the authorities. The girls had been lured into the sex trade with promises of jobs as domestic workers in restaurants or supermarkets. The subsequent imprisonment results in the criminalization of victims who, after facing misrepresentation, duress and coercion at the hands of their traffickers, should not be further victimized by the law.

## **2. The lack of sufficient support mechanisms**

### **2.1 The need for appropriate shelters for trafficking victims**

The Government report identifies the Social Welfare Department as the agency responsible for providing “protection, rehabilitation and counselling to girls and women below 18 who have been involved in vice and prostitution”. The report further identifies five rehabilitation centres throughout the country without revealing much information as to the conditions and type of programmes run in these centres. The centres, by name alone, denote that the girls housed there are delinquents in need of “rehabilitation”. The following are some additional concerns regarding these centres:

- How many girls are housed in each of these centres? Are the centres only for Malaysians? Are all the girls housed in these centres considered to have been involved in vice and prostitution?

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<sup>92</sup> SUHAKAM report, *supra* n.4, p.6.

- How long do they stay at the centres? Is there a particular programme that they undergo during their stay there?
- Are the girls given any form of counselling and medical support, considering the nature of the trauma they have undergone? While vocational and skills training is useful, women who have been trafficked could be dealing with more immediate concerns related to both physical and mental health: Sexually Transmitted Diseases/ Infections (STDs/STIs), badly performed abortions, trauma, fear of acceptance by family and friends and fear for their lives.

As the government report specifies that existing shelters are for those below the age of 18, there is also the question of what kind of support services the state has put in place for women above the age of 18. Further, foreign women are not included in the national legislation of the Social Welfare Department and therefore do not receive the protection, rehabilitation and other services established for Malaysians.

#### **4.1 The need for comprehensive support services**

While Tenaganita and WAO continue to offer services for women in need of support and assistance, there is no one-stop centre where trafficked women can access the full range of legal, medical and emotional assistance needed for their individual situation. Sex workers who are controlled by syndicates have their movements strictly monitored and are therefore unable to get information from or be contacted by social workers.<sup>93</sup> It is vital that when the opportunity presents itself for them to get out, they know exactly who they can call for help. However, due to the current enforcement trends, many women are afraid to come forward for fear of being charged and deported as well the fear of harassment from traffickers on themselves and their families. Trafficked women face other practical problems like inability to speak a local language that leaves them unable to communicate their predicament or even seek medical attention when needed.

##### **1. Violence inflicted on sex workers**

Although there are no figures to reveal the extent of this problem, the specific nature and environment of the sex work leaves women vulnerable to physical abuse and without access to medical and legal recourse. Sex workers have been known to work throughout pregnancies, to be forced to perform demeaning sex acts, to be beaten when unwilling to comply with client's demands and during raids, to be handcuffed and subjected to urine tests for drugs and HIV, with neither pre nor post counselling services made available in the event results are positive.<sup>94</sup> The general response is that abused sex workers and trafficked women have no *de facto* recourse to protection under the law, especially since they fear the law will be turned on them. Many therefore remain silent. Frequent raids may also have the effect of forcing this sector further underground, out of the reach of social workers who can offer them information on health, STDs, etc.

##### **2. Negative media imaging of trafficked women**

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<sup>93</sup> Suara Rakyat Malaysia (SUARAM), Malaysia Human Rights Report (1998), pg.112

<sup>94</sup> Ibid. 114

The media continues to play up the negative image of women involved in prostitution or those who have been trafficked without appreciating the social implications and discriminatory effect of their actions. Headlines that read “war on smut”, “attack against morality: 836 women detained” or “1081 women nabbed in raids on vice dens” continue to fan the perception that it is the foreign women who are at fault. Thus, the issues of immigrant legality and public morality clouds over the more complex issue of trafficking in women. This misleads the public and reduces support for victims of trafficking, as the problem is perceived as one of immorality and illegality and not of violations of human rights.

### **5. Ratification of International Conventions**

The Government of Malaysia is signatory to the Convention against Transnational Organised Crime, which has a Protocol to Prevent, Suppress and Punish Trafficking in Women and Children. To show a true commitment to this issue, however, the government must fully accede to this Convention and follow its provisions. In addition, the Government must also ratify the Convention on the Protection of Migrant Workers and their Families that came into force in 2003.

### **RECOMMENDATIONS TO THE GOVERNMENT**

1. All actions undertaken by the Government must be approached from a human rights perspective, using human rights standards and guidelines such as those articulated in Appendix 2 of “Trafficking in Women and Children: Report of the Human Rights Commission of Malaysia (SUHAKAM)”. The Government should begin build on the groundwork done by SUHAKAM and act on SUHAKAM’s recommendations.
  2. Conduct comprehensive and in-depth research on the extent and trends of the problem of trafficking in women and exploitation of prostitution in Malaysia, both in terms of trafficked victims and trafficking syndicates, so as to be better able to formulate a response to the situation.
- ### **3. Effectiveness of Existing Legislation**
- 4.1 Study the effectiveness of existing legislation and enact specific anti-trafficking legislation to arrest and prosecute traffickers as well as protect the rights of women who have been trafficked and exploited as prostitutes. Any new legislation or amendments to existing legislation must embrace a human rights perspective.
  - 4.2 Establish monitoring mechanisms on the enforcement of laws and policies related to trafficking in women and the exploitation of prostitutes. There should be effective enforcement of current laws against not only pimps and their runners, but also on the entire network that sustains the trafficking industry. This includes brothel owners, agents who bring in the women from other countries and clients who solicit sex services.

- 4.3 Sensitise law enforcement agents to understand trafficking as a human rights violation and to appreciate their obligation to protect and help victims of trafficking. Law enforcement agents need to be trained to identify rapidly and accurately victims of trafficking so as to be able to render the necessary assistance and protection. The criminalisation of victims is a legal infringement of a victim's rights and human dignity.

**4. The lack of sufficient support mechanisms**

- 4.1 Transform the punitive system that currently exists for trafficked victims into a support system by reviewing the effectiveness of existing rehabilitation centres in dealing with trafficked and prostituted women and identifying existing services for women above the age of 18. Revise the underlying policy of "rehabilitation centres", whose very name has a negative connotation, and replace the centres with shelters that provide counselling, medical and repatriation services for women who have been trafficked.
- 4.2 Establish support centres/ shelters that are equipped to handle cases of trafficked women, both local and foreign, and provide appropriate medical, counselling and legal services.
- 4.3 Review the cases of trafficked women placed in detention centres, as they are not perpetrators but victims who need protection during investigations. Ensure that trafficking victims are never placed in detention centres, but rather in proper shelters that can assist in treating and repatriating them.
- 4.4 Foster relationships with anti-trafficking agencies from both government and civil society sectors in other countries in the region. Use this cooperative network to assist in return and repatriation of trafficking victims.

**5. Negative media imaging of trafficked women**

Provide guidelines for the non-discriminatory portrayal of trafficked women by the media and introduce sensitization programmes for the media to appreciate the social implications of their reports. Encourage the media to treat traffickers as criminals instead of trafficking victims.

**6. Ratification of International Conventions**

Accede to the Convention against Transnational Organised Crime, including its Protocol to Prevent, Suppress and Punish Trafficking, and the Convention on the Protection of Migrant Workers and their Families.

## **ARTICLE 7**

### **POLITICAL PARTICIPATION AND PUBLIC LIFE**

In Malaysia 52% of eligible voters<sup>95</sup> and 47.1% of labour force participants<sup>96</sup> consist of women. While the figures show strong numbers in terms of women's presence in these two areas, these numbers do not reflect the low number of women in leadership and decision making positions and the difficulties they face in getting and staying effective in those positions.

It is inadequate to discuss the participation of women in politics, whether as voters, candidates, party members or elected members, without acknowledging two important aspects. First, ever-present gender disparities between men and women are affected and in turn affect social perceptions of women's ability to participate in politics and public life. Second, the political system and its machinery seem to be largely male, moneyed, and rely heavily on ethnicity and religious-based platforms and interests. This implies that women trying to enter politics are entering a playing field whose rules and boundaries have been set by male norms.

Therefore, enhancing women's participation in politics not only entails addressing gender disparities between men and women, but also in the long run moving away from the current gendered, privately-funded, first-past-the-post system election system to one that works toward removing barriers to women's participation. In addition, given that women's rights to political participation cannot be advanced where there is a lack of basic freedom to information, speech, association and assembly, these freedoms must be guaranteed and promoted through the abolition or repeal of acts that violate such fundamental rights.

#### **CRITICAL AREAS OF CONCERN**

##### **1 Women's low participation as candidates in the electoral process**

While there is no legislation that specifically bars women from participating in political processes, women's participation in this area is hampered by the existence of many other laws and social perceptions. Such laws (either Islamic or civil), including elections laws, and social perceptions indirectly limit women's negotiating power even within the private sphere, thus making it much harder for women to make their presence felt in the public sphere.

Although the 11<sup>th</sup> General Elections (2004) saw an increase in the number of female candidates contesting both Parliamentary and State seats (from 63 in 1999 to 97 in

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<sup>95</sup> Asian Political News, "Women candidates from Islamic party break with tradition" (22 March 2004), [http://www.findarticles.com/p/articles/mi\\_m0WDQ/is\\_2004\\_March\\_22/ai\\_114484630](http://www.findarticles.com/p/articles/mi_m0WDQ/is_2004_March_22/ai_114484630).

<sup>96</sup> Aliran Online, "The Non-State Sector: Rise of Human Rights Activism: Labour", <http://www.aliran.com/hr/js5.html>.

2004<sup>97</sup>), the number actually represents a mere fraction of the total number of candidates contesting a total of 219 Parliamentary seats and 505 State Assembly seats. The number is so small that even if all were successful in their candidacy, there would still not be sufficient numbers in Parliament to effect any real change for women.

Some of the barriers identified that could account for the low participation of women include:

### **1.1 Women marginalised within political parties**

While women form the bulk of members in several parties, their positions in the governance and decision-making of these parties are limited. In an IKMAS 5-part series on the Malaysian elections it was revealed that “men are twice more likely to become active political party members although proportionally more women saw themselves as supporters of a particular political party”.<sup>98</sup> The structures of most political parties are not conducive to women’s involvement, as women’s participation and movement within the party is generally restricted to the women’s wings. This is unlike the Youth arms of political parties, which are exclusively for male members and are perceived as the training grounds for the future leaders of the parties.

### **1.2 The high cost of elections**

The recent amendments to the Elections (Conduct of Elections) Regulations, 1981, which came into force in February 2004, increased the election deposit for candidates from RM 5,000 (US\$1317) to RM 10,000 (US\$2634) for the Dewan Rakyat (House of Representatives) and from RM 3,000 (US\$790) to RM 5,000 (US\$1317) for the State Legislative Assembly.<sup>99</sup> These figures are much higher than the deposits required for many other Commonwealth countries that have a higher GNP per capita compared to Malaysia.<sup>100</sup>

Whatever the justifications used for raising this deposit, the end result is discrimination against those who have little access to resources. In the aggregate, women in Malaysia earn approximately 50% of men’s incomes and therefore have far less access to resources, whether their own or corporate backing/donors, than men do. It follows that the disposable wealth available to women is much less than that available to men. So, even before women get to “first base” (i.e. nomination day), many are already out of the race simply because they cannot afford the RM 10,000.

Cultural and social attitudes also mean that many consider men as safer bets in politics, and therefore even for candidates that can access the party coffers, far more men are nominated than women.

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<sup>97</sup> Shaila Koshy, “More women elected but will they speak up?”, The Star Online: Malaysia Election 2004 (25 March 2004),

[http://thestar.com.my/election2004/story.asp?file=/2004/3/25/e2004\\_news/7619560&sec=e2004\\_news](http://thestar.com.my/election2004/story.asp?file=/2004/3/25/e2004_news/7619560&sec=e2004_news).

<sup>98</sup> Malaysiakini.com, “The Malaysian Voter – A Profile (Part 3)” (3 March 2004).

<sup>99</sup> Elections (Conduct of Elections) (Amendment) Regulations 2004, PU(A) 67/2004.

<sup>100</sup> Michael Pinto-Duschinsky, “Deposits”, Administration and Cost of Elections Project (last modified 16 November 2001), <http://www.aceproject.org/main/english/pc/pcc05b.htm>.



### **1.3 Social and cultural obstacles**

Besides the structural obstacles, there are also the more subtle norms and practices of society and culture that prevent women from venturing into this “traditionally-male realm”. Social conditioning that dictates that a women’s rightful place is in the home and the domestic sphere limits a woman’s negotiating power, whether in the private or public domain, and ultimately her ambition to get involved in politics. When the Islamic party PAS finally rescinded its decision to disallow women from participating in elections, it added the proviso that ‘all these women candidates must obtain the permission of their husbands before contesting’<sup>101</sup>. Many women who might desire to take up this challenge then find themselves without the necessary support mechanisms, such as help with the housework and child care, and are left to face the implication of neglecting their role as mothers and wives.

### **1.4 The image that must be projected by women during elections.**

While media coverage of both men and women candidates is intense, the scope of coverage for women candidates tends to take on a different angle. Journalists always show concern for the woman candidate’s family and an attempt to project her as someone who can “balance” family, career and politics. To illustrate, one female political candidate stated that when she was running as an independent candidate in the 1999 General Elections, journalists repeatedly asked her about her husband’s opinion of her candidacy<sup>102</sup>. These perspectives extend women’s perceived roles in the family into women’s roles in the political arena, something that never happens with men.

On top of this, women still have to work doubly hard to prove why they deserve their positions over men. An article in a local Malay daily went to great lengths to list the qualifications of each female Cabinet member – a reporting method that is usually reserved for ‘novice’ male politicians<sup>103</sup>. This implies that a seasoned female politician ranks at the same level as a beginning male politician in the eyes of the media.

### **1.5 Absence of local government elections**

Although women may refrain from entering politics at the state or national level due to the many obstacles mentioned, women might be more open and interested in getting involved in local-level decision making where the most immediate concerns of society are handled (i.e. personal safety, transport, road conditions, water and sanitation, etc).

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<sup>101</sup> Kazi Mahmood, “Malaysian Islamic Party Allows Women Candidates in Next Elections”, IslamOnline (25 January 2002), <http://www.islamonline.org/english/news/2002-01/25/article29.shtml>.

<sup>102</sup> Interview of Zaitun Kasim, an independent candidate under Women’s Candidacy Initiative, (7 May 2003).

<sup>103</sup> Misiah Taib, “Wanita Dalam Kabinet Berkelayakan, Berpengalaman”, Berita Harian (31 March 2004), [http://www.bharian.com.my/Misc/Pilihanraya2004/Pilihanraya/Hari/Rencana/20040331120523/Article/index\\_html](http://www.bharian.com.my/Misc/Pilihanraya2004/Pilihanraya/Hari/Rencana/20040331120523/Article/index_html).

Because local government/council elections were abolished in 1965, however, women are deprived of an important avenue through which they might be able to get involved. They are therefore unable to participate in decision making at a level that could in fact effect changes for women and society in general.

## **2. Low number of women as elected representatives**

For the past two elections, the number of elected women in Parliament has remained relatively unchanged. In 1999, 20 (10.4%) of the 193 Members of Parliament were women. Today women make up 23 (10.5%) of the 219 Members of Parliament. This figure falls far short of the 30% “critical mass” needed to truly make an impact.

Statistics by the Inter-Parliamentary Union show that Malaysia, with 9.2% women in its lower House, ranks 86<sup>th</sup> out of 183 countries in terms of the number of women in the lower or single House of government.<sup>104</sup> The Asian average of 15.2% is still out of Malaysia’s reach even after the latest elections in 2004.<sup>105</sup> This in effect means that women, who form 52% of voters, remain disproportionately unrepresented in government.

### **2.1 Absence of specific policy or measures to increase number of women in Parliament**

While the government report identified the main impediments to women’s participation and representation as “women’s family responsibilities, career demands and social inhibitions”,<sup>106</sup> there has been no concerted effort on the part of the government to analyse further or respond to these obstacles with a specific plan or policy.

Calls for 30% of all decision making positions in government to be reserved for women have not been taken up by the State as a policy despite the State’s commitment under Article 4 of CEDAW to put in place temporary special measures necessary to accelerate de facto equality between men and women. “Positive” changes are noted in the government report, such as increased commitment by political parties to raise female membership and encourage women to be more active, as well as the allocation by the Malaysian Chinese Association (MCA) of 30% of its municipal council posts for women by the year 2000<sup>107</sup>. Still, the State has an obligation to develop these isolated measures by non-state actors into government policy that is implemented and monitored by the State. It is not sufficient for the government to be optimistic that “other parties are likely to follow suit”.

### **2.2 Non-conducive environment faced by women representatives in Parliament.**

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<sup>104</sup> Inter-Parliamentary Union, “Women in National Parliaments: World Classification”, (as at 30 November 2004), <http://www.ipu.org/wmn-e/classif.htm>.

<sup>105</sup> Inter-Parliamentary Union, “Women in National Parliaments: Regional Averages”, (as at 30 November 2004), <http://www.ipu.org/wmn-e/world.htm>.

<sup>106</sup> Ministry of Women and Family Development, “Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)”, Article 7, para. 120.

<sup>107</sup> Ibid.

On 25<sup>th</sup> January 2002, the Women's Agenda for Change (WAC) issued a press statement voicing their concern and disappointment with a "deeply entrenched culture within Parliament of gender discrimination and sexism" where women MPs are either "condescendingly dismissed as young or emotional".<sup>108</sup> The incidents referred to include:

- (i) When a female MP asked a question regarding amendments to laws that discriminate against women, such as the Immigration Act 1963 and the Income Tax Act, she was told the laws in question were not discriminatory and that she should not be too emotional;<sup>109</sup>
- (ii) Lewd and patronising language was used to humiliate a female Member of Parliament – among other things, she was called her a little girl and asked to go home and "suck on a pacifier";<sup>110</sup>
- (iii) Condescending comments were directed at a young female MP – she was called "my child, as she's the same age as my daughter" and mocked as a woman who "would like to be the new Saint Joan of Arc (political martyr)".<sup>111</sup>

### **3. Women as informed voters**

No gender-specific legal or structural barriers exist for women exercising their individual right to vote. However, women voters are confronted by a lack of access to information about candidates and the issues that concern them. Because women hold domestic roles and duties, often in addition to paid jobs, few women are able to attend and listen to public political speeches that could give them the opportunity to assess the candidates themselves. Much of the information readily available to women is available only through the heavily-controlled mass media. For instance, a study of the media coverage during the 2004 elections concluded that both print and electronic media "overwhelmingly favoured the BN" (the ruling coalition) and "gave a much more lavish and positive coverage to the BN than the opposition".<sup>112</sup>

General concerns include whether women are able to make informed choices about the candidates, whether they are influenced by the choices and political leanings of the male members of their families and the number of women who actually vote on polling day.

### **4. Women's under-representation in public office or decision-making processes**

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<sup>108</sup> Women's Agenda for Change, "The Suspension of MP Fong Poh Kuan and Gender Discrimination in the Parliament" (25 January 2002), <http://www.wao.org.my/news/20020302wacgenderdiscrim.htm>.

<sup>109</sup> Dewan Rakyat pg 10 – 11 (24 October 2000), quoted in WAC, "The Suspension of MP Fong Poh Kuan and Gender Discrimination in the Parliament".

<sup>110</sup> Dewan Rakyat (29 March 2000), quoted in WAC, "The Suspension of MP Fong Poh Kuan and Gender Discrimination in the Parliament".

<sup>111</sup> Dewan Rakyat pg. 104-105 (11 December 2001), quoted in WAC, "The Suspension of MP Fong Poh Kuan and Gender Discrimination in the Parliament".

<sup>112</sup> Wong Kok Keong, "Propagandists for the BN (Part 1): RTM and TV3 were the main culprits", *Aliran Monthly*, Volume24(5) (2004), Page 17, <http://www.aliran.com/monthly/2004a/5i.html>.

Statistics compiled by the government indicate that the number of women in specific positions (local councillors, mayors, district officer, chief ministers, deputy chief ministers, etc) are minimal.

#### **4.1 Women judges**

The government report reveals dismal figures of women judges in the country (5 out of 16 Judicial Commissioners, 3 out of 36 High Court judges and 2 out of 6 Federal Court Judges), with no indication of the reason for these low numbers or plans for improving the situation.<sup>113</sup> In February 2005, a woman was appointed Chief Judge of Malaya, one of four top judicial posts, for the first time.<sup>114</sup>

Within the *Syariah* court system, no women have been appointed as judges. The Government of Malaysia has in fact entered a qualified reservation to Article 7(b) of CEDAW declaring that its application “shall not affect the appointment to certain public offices like the Mufti *Syariah* Court Judges and the Imam which is in accordance with the provisions of the Islamic *Syariah* Law”. There remains no explanation in the government report of the rationale for the continuation of the reservation.

Although there have been announcements by the government that women judges will be appointed in the *Syariah* courts, nothing has come of it even as recently as January 2005.<sup>115</sup> One of the excuses given has been that women lack the necessary qualifications,<sup>116</sup> however no plans to correct this situation, if it is in fact true, have been revealed.

#### **4.2 Lack of capacity-building for women into and in decision-making positions**

Although the government report acknowledges the under-representation of women in public office and key decision-making positions and shows an appreciation for the need for training, there are few activities, resources, training and support to help women both outside and in government positions strengthen their skills and abilities to take action and assume leading roles.

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<sup>113</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 15, para. 370.

<sup>114</sup> Jason Gerald and Ranjeetha Pakiam, “Siti Norma to be first woman Chief Judge”, *New Straits Times*, 7 February 2005.

<sup>115</sup> See Sisters in Islam Press Release (23 June 1999), <http://www.sistersinislam.org.my/PressStatement/23061999.htm>, and Sisters in Islam Press Release (March 2003), <http://www.sistersinislam.org.my/PressStatement/27032003.htm>. See also Online Women in Politics, “KL to appoint women as judges in *Syariah* Court” (10 August 2004), [http://www.onlinewomeninpolitics.org/archive/04\\_0810\\_my\\_syariahcourt\\_womenjudge.htm](http://www.onlinewomeninpolitics.org/archive/04_0810_my_syariahcourt_womenjudge.htm) (announcement that Malaysia would appoint women *Syariah* Court judges to handle child custody and other emotionally taxing cases); Santha Oorjitham, “Creating Greater Awareness of Women’s Rights in Islam”, BERNAMA (2 January 2005) (religious councils would be forwarding lists of proposed candidates soon).

<sup>116</sup> “Women *syariah* officers don’t meet judge criteria”, *The Star* (24 April 2003).

### **4.3 Inadequate and insufficient Gender Training**

There are several concerns regarding gender training programs conducted by and for government officials:

- (i) There is an inadequate emphasis on gender training for both women and men. Although some such trainings were conducted by training institutes like the National Institute of Public Administration (INTAN), recently such trainings have been discontinued because two of the key staff who conducted the gender training programmes have left that institution.<sup>117</sup>
- (ii) Most of the previous gender training programmes at INTAN were conducted for low-ranking personnel who have little influence over policy decisions. Gender training needs to be carried out for members of Legislative bodies (whether at National or State level) as well as top level, key personnel of all civil service departments so that gender sensitivity can be adopted at all levels of government.<sup>118</sup>

### **4.4 Lack of support services**

While there have been intentions to create child care facilities in the public service departments, such a policy still has not been gazetted at the parliamentary level. It was brought up for debate in the September 2003 Parliamentary session but the decision to take on child-care facilities has been shelved indefinitely.

## **5. Women in Trade Unions**

The government report acknowledges that while women constitute about one-third of trade union membership, their representation at the leadership level is estimated at less than 1%. Even in female-dominated unions, leadership positions tend to be held by men.

Women continue to have difficulties participating in unions and the leadership of unions due to the double burden of holding a job and managing a household, leaving them little time or opportunity to get involved in the union work. This has meant that trade unions are generally male-dominated, and it is difficult for women workers to break through this barrier and have their issues heard. With women forming only about a third of the union membership, the number of candidates from which leaders can be drawn is also reduced. Addressing this therefore would also mean having to identify and address the reasons as to why women are not in or are reluctant to join trade unions (see chapter on Women and Employment).

Lack of women's representation at leadership levels have evident impacts – namely on decisions and actions related to women that are taken by the union, including sexual harassment, child-care facilities, health and safety at work and equal career advancement opportunities.<sup>119</sup>

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<sup>117</sup> Women's Development Collective, "Beijing +10 Monitoring Project Country Research for SEAWATCH: Malaysia Report on Gender, Equality, Equity and Non-discrimination on Power Relations and Agency" p. 18 (May 2004).

<sup>118</sup> Ibid.

<sup>119</sup> Ibid at p. 22.

## **6. Women in non-governmental organisations**

There are no comprehensive data analysing the position of women in non-governmental organisations concerned with public and political life of the country. However, within the women's rights movement, women who make up the membership and leadership of women's rights NGOs face many challenges in carrying out their objectives and projects as they are subject to the many repressive and restrictive laws that exist in the country and continue to curtail freedom of speech, association and movement. The following is a list of some examples of incidents threatening such freedoms:

- Women's rights activists have in the past been detained under the Internal Security Act (detention without trial) and several have been arrested for charges of 'unlawful assembly'.
- In July 2003, the All Women's Action Society (AWAM) tried to organise a public rally against rape under the Citizens Against Rape (CAR) campaign, but the police arbitrarily denied the organisation a permit and threatened the organisers with arrest when they turned up to inform participants of the cancellation of the public rally.<sup>120</sup>
- Irene Fernandez, human rights activist and director of Tenaganita, was charged in 1996 under the *Printing Presses and Publications Act 1984* for "maliciously publishing false news" in the form of a memorandum entitled "Abuse, Torture and Dehumanised Treatment and Deaths of Migrant Workers at Detention Camps". The Magistrate's court in October 2003 found Fernandez guilty and sentenced her to 12 months in prison. Her case is currently under appeal.<sup>121</sup>
- In October 2003, Cynthia Gabriel, the Executive Director of SUARAM, a human rights organisation, was denied entry into Sarawak by the immigration authorities as her name was blacklisted. She was due to attend a workshop on globalisation and its impact on indigenous peoples in Malaysia.<sup>122</sup>
- In 2002, Women's Aid Organisation (WAO), despite being designated a safe house for victims of domestic violence by the Ministry of Women and Family Development, was raided by the Immigration Department for sheltering undocumented workers. WAO staff were threatened with handcuffs if they didn't cooperate. Three migrant domestic workers were arrested and although they were eventually released on a special pass, and the entire ordeal left both the women and children of the shelter traumatised.<sup>123</sup>

While of late there have been open channels of discussion between the government and the women's groups through meetings with the Ministry of Women, Family and Community Development and even the Prime Minister himself, these incidents shadow

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<sup>120</sup> Ibid at p. 8.

<sup>121</sup> Amnesty International, "Irene Fernandez defends rights of migrant workers despite conviction" (9 December 2004), <http://web.amnesty.org/library/Index/ENGASA280152004>.

<sup>122</sup> Lim Kit Siang, "DAP Media Statement: Is denial of entry of Suaram executive director into Sarawak ominous sign of a possible general rollback of human rights under a new Prime Minister in the months to come?" (19 August 2003), <http://www.malaysia.net/dap/lks2535.htm>.

<sup>123</sup> Women's Aid Organisation, "Media Release: Urgent Appeal by Women's Aid Organisation (WAO)" (6 November 2000), <http://www.wao.org.my/news/20001106theraid.htm>.

the work of the NGOs and hinder their full and effective participation in public and political life.

## **RECOMMENDATIONS TO THE GOVERNMENT**

### **1. Overall recommendations:**

- 5.1 For the Government of Malaysia to undertake comprehensive measures to ensure gender awareness at all levels.
- 5.2 Reforms to the electoral system to ensure a more representative system.
- 5.3 Repeal, amend and abolish all acts that hinder freedom of speech, association and assembly, including the freedom to unionise.

### **2. Women's low participation in the electoral process as candidates**

- 2.1 A full impact study is needed on the current election processes, especially with regard to women's participation in politics and the barriers that women face in running for office.
- 5.1 Train women intending to stand or who would like to stand as candidates.

### **3. Low number of women as elected representatives**

- 5.1 Introduce affirmative action policies that will encourage women to participate in politics. Such policies include:
  - Setting of quotas of at least 30% for women at the parliamentary and state levels
  - Ensuring all political parties reserve at least 30% of nominations to party positions, municipal council seats, state and parliamentary elections for women
  - Eliminating election deposits for women candidates
  - Setting up special public funds to support independent women candidates through elections
  - Ensuring that all political parties adopt a woman's platform that genuinely promotes the participation of women in decision-making positions in the political arena and also specifically addresses the problems of inequality between women and men in all sectors of society.
  - Reintroducing municipal council elections to enable Malaysians to participate actively in local government.

### **4. Women as informed voters**

- 4.1 Extend the campaign period from the current 7 days, so that women voters can have more time to assess their candidates.
- 5.1 Repeal laws that prevent freedom of information, including those that hamper the

freedom of the press so women are better informed about candidates.

**5. Women's under-representation in public office, decision-making processes and trade unions.**

- 5.1 The Ministry for Women should carry out impact studies on structural and attitudinal barriers to women's participation into and in leadership and decision-making positions.
- 5.2 Conduct capacity building for women officers to accelerate and ensure entry into those positions as well as discharge those duties with sufficient skill.
- 5.3 Conduct gender sensitivity training for all Members of Parliament and civil servants at all levels to build awareness of the concrete and attitudinal barriers to women's participation and advancement.

**6. Women in non-governmental organisations**

Repeal, amend and abolish repressive laws that infringe the fundamental rights and curb the active and effective participation of women and men in public life.



## ARTICLE 9 CITIZENSHIP

The Government Report states that the Constitution accords equal rights to men and women to acquire, change or retain Malaysian nationality and goes on to describe some of the laws and policies which affect Malaysian women.<sup>124</sup> However, it does not comprehensively discuss all of the provisions that are directly or indirectly discriminatory against women.

As the CEDAW Committee points out in General Recommendation No 21, nationality is critical to full participation in society.<sup>125</sup> A woman's nationality affects her right to vote and to stand for public office. It may affect her choice of residence and her access to public services and benefits. There is no indication in the Government Report whether the government plans to amend the laws related to nationality and immigration.

Malaysian women who marry foreign men are treated less favourably than Malaysian men who marry foreign women. These disparities find their root in the Federal Constitution of the country, the highest law of the land, and the *Immigration Act 1959*, Immigration Regulations 1963. Areas in which women are treated unfavourably are in relation to:

- (i) Obtaining permanent residence and citizen status for their husbands
- (ii) The status of their children, and
- (iii) Obtaining dependent passes for their foreign husbands, who, unlike foreign wives, are not entitled to such passes.

The rules effectively deny women the right to freely choose their spouse, which is a basic human right enshrined in Article 16(1)(b) of the CEDAW Convention. The rules also violate Article 15(4) of the CEDAW Convention, which requires that men and women be given the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

### CRITICAL AREAS OF CONCERN<sup>126</sup>

#### 1. Malaysian women married to foreign men

Spouses of Malaysian women who are not citizens face much longer delays in obtaining permanent residence status than spouses of Malaysian men. Often these delays exceed a ten year period.<sup>127</sup> Foreign husbands can only obtain permanent residence status based on their employment status in the country, whereas foreign wives are afforded the same privilege merely by virtue of their marriage to a citizen. Moreover, under paragraph 3(1)

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<sup>124</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 9, para. 144-149.

<sup>125</sup> CEDAW Committee, "Equality in marriage and family relations", General Recommendation No. 21, para. 6 (13th session, 1994),

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>

<sup>126</sup> Based on Women's Aid Organisation, CEDAW Baseline Report on Article 16 (December 2002).

<sup>127</sup> Ibid.

of the *Immigration (Prohibition of Entry) Order 1983*, non-professional foreign men who marry Malaysian women run the risk of losing their job permits and visas.

Furthermore, unlike foreign wives of Malaysian husbands, foreign husbands are not entitled to dependents passes.

Article 15(1) of the Federal Constitution provides that any married woman whose husband is a citizen is entitled, upon making an application to the Federal Government, to be registered as a citizen of the country. This right is not accorded to a married man whose wife is a citizen of the country. The law clearly discriminates against female citizens of the country. Malaysian women are denied the opportunity to continue working and living with their families in their home country once married to foreign men.

There has been some attempt to rectify this discriminatory practice. As of September 2001, as stated in the government report, foreign husbands were to be allowed to stay in the country under a social visit pass for one year as opposed to 3 months.<sup>128</sup> However, there are many conditions attached to this regulation that the government report does not mention. For example, the foreign husband is given this one-year pass so that he can find gainful employment, whereas the foreign wives of Malaysian husbands need not be employed to stay under a social visit pass. The foreign wife is seen as a dependent of the Malaysian husband.

In addition, Dato Shahrizat Abdul Jalil, Minister of the Ministry for Women, Family and Community Development, said that foreign men married to Malaysian women would be granted automatic work permits if they had been married for two years. The foreign spouse, however, should at least have technical skills if not professional qualifications<sup>129</sup>. Dato Seri Abdullah Ahmad Badawi, the then Deputy Prime Minister, echoed her statement in his speech by saying that tight immigration regulations biased against Malaysian women married to foreigners have been abolished.<sup>130</sup> It is however unclear how these policy announcements have been translated into action.

Because it is difficult to get permanent residence and work permits, women carry an unfair burden of supporting the entire family. The implementation of these discriminatory laws has resulted in the “forced” migration of women from this country. Malaysian women and their foreign spouses often choose to live in another country rather than struggling to keep up with immigration requirements they must fulfil to remain in Malaysia.

Under Budget 2001, it was announced that professional Malaysian women who marry foreigners and live abroad could apply for their husbands to be given permanent resident

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<sup>128</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 2, para. 73(vii).

<sup>129</sup> See “Shahrizat: Let divorced wife renew visas”, *The Star* (7 August 2001).

<sup>130</sup> See “Fair and Equal: Gender-biased immigration rules abolished, says DPM”, *The Star* (26 August 2001).

status within six months if they returned to the country to work.<sup>131</sup> The Budget 2001 proposal is vague and lacks specific details as to whether the PR status is to continue indefinitely or whether it would eventually lead to citizenship. This policy is also discriminatory and elitist, as it does not take into account all Malaysians, irrespective of their skills, who are working overseas. This move was prompted by an economic agenda to fulfil the shortage of professional skills.

## **2. Citizenship of children**

Children who are born outside Malaysia to a Malaysian woman and her foreign husband do not enjoy the same rights as children born outside Malaysia to a Malaysian man and his foreign wife. The Federal Constitution in Article 14(1)(b) provides that certain categories of persons are conferred citizenship by operation of the law. Part II of the Second Schedule of the Constitution categorises as a citizen every person born outside the Federation whose father is at the time of the birth a citizen. A child born outside Malaysia whose mother is a Malaysian citizen does not share the same privilege.

In 1959, Malaysia acceded to the United Nations Convention on the Nationality of Married Women. Regardless of the government's accession to this convention, the government has not taken any steps to grant Malaysian women the right to confer citizenship on their children.

Apart from the fact that the law is clearly discriminatory, these women face problems, especially if they choose to return to Malaysia with their children. This may happen particularly in the context of divorce or separation. Since the children are considered foreigners in Malaysia, their visas must be renewed on a regular basis and they cannot attend government schools. Such difficulties may very well force women to remain in unhappy marriages in a foreign country, thus depriving them the choice of returning home.

## **3. Foreign women married to Malaysian men**

There are two main categories of difficulties faced by foreign women who are married to Malaysian men:

- (i) Difficulties in getting jobs in Malaysia.
- (ii) Dependency on the husbands when applying for permanent residence status.

Regarding the second category, the Immigration Department procedures require husbands to be present and consent to their wives' applications for permanent residence status.<sup>132</sup> Women face deportation and separation from their children if their husbands refuse to support their applications for permanent residence status and their social visas expire.<sup>133</sup> Foreign wives who are separated or divorced from their husbands may be forced to leave the country because they are no longer eligible to apply for permanent

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<sup>131</sup> Kam Patsy, "Not quite good enough", *The Star* (8 November 2000).

<sup>133</sup> See K. Suthakar, "Department defends move to deport woman", *The Star* (21 August 1999); Wani Muthiah, "Prepare for the Worst", *The Star* (3 February 1999).

residence status, regardless of whether they have Malaysian children and regardless of the amount of time they have spent in Malaysia.<sup>134</sup>

These obstacles to obtaining permanent residence status deny women the right to remain in Malaysia, the country in which they may have been spouses and/or mothers for several years. During the application-processing period, which may be quite lengthy, husbands may exert control over their foreign wives due to their wives' dependency on their husbands' support of their applications. In some circumstances, delays in processing foreign wives' permanent residence applications may result in women remaining in abusive relationships. These women are at the mercy of their husbands and are effectively denied the entire range of rights afforded to women in marriage under Article 16 of the CEDAW Convention.

The acts of discrimination described in this section clearly violate Article 15(4) of the CEDAW Convention, which requires that men and women be given the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile. These acts also violate Article 9(2), which requires that states grant women equal rights with men in respect to the nationality of their children.

In 2000, there was a policy announcement that foreign wives who are separated or divorced can now apply for a social visit pass on a year-to-year basis. This was seen as a reprieve to foreign wives, especially for mothers who do not want to be separated from their Malaysian children. It still remains only a proposal, however, as there is no evidence that it has been put into effect.

#### **RECOMMENDATIONS TO THE GOVERNMENT**

1. The Federal Constitution and Immigration laws should be amended to eliminate discrimination based on sex. Article 15 of the Federal Constitution should be amended to allow women to have the same rights as men with regard to citizenship status of their foreign spouses.
2. The language of Schedule II of the Federal Constitution should be amended to allow both men and women to confer citizenship status on their children even when the child is born outside of Malaysia.
3. There should be a clear articulation of the policy regarding granting of permanent status applications and work permits for foreign spouses. The policy should treat both male and female citizens equally and not allow for wide administrative discretion.
4. The government should monitor and compile figures on how many foreign husbands of Malaysian women applied for permanent residence status and were either awarded or rejected this status in comparison to applications by foreign women married to Malaysian men.

5. Policy announcements regarding immigration issues must be followed up to ensure they have been translated to administrative directives.

## ARTICLE 10 EDUCATION

There are basically two main providers of education that come under the National Education Policy: the public or Governmental sector and the private or non-Governmental sector. A common general education curriculum is implemented in all schools, irrespective of the language medium of instruction, in order to prepare pupils for nation-wide assessments and examinations at the primary, lower secondary and upper secondary levels. Post secondary and higher level education is selective. The selection criteria being a combination of academic performance, aptitude and affirmative action policies which give opportunities to the *Bumiputra* and Indigenous peoples in order to narrow the socio-economic gaps between the ethnic communities. There are however still many residual gender based differences in access and opportunities and subtle discriminations which need to be carefully monitored and redressed.

### CRITICAL AREAS OF CONCERN

#### 1. Infrastructure and accessibility of the schools

The government report indicates that 82.9% of the primary schools and 58.5% of secondary schools in the country are located in rural areas.<sup>135</sup> While the figures are positive, without further indication of the spread of these schools in the 13 states and Federal Territory in Malaysia and the different locations within those states (i.e. plantation estates, indigenous settlements, etc), it is difficult to gain a true picture of the accessibility of education to the entire population.

A report from the state of Sabah states that infrastructure for good education is still poor especially in the rural areas. Many of these schools lack good teachers and good facilities. Children need to walk for miles to reach the nearest primary school. They may complete Standard Six, yet may be unable to read or write properly. Most secondary schools are concentrated in urban centers; as soon as a child reaches 13 years of age, he/she has to leave home in order to continue schooling. Many families in rural areas may be too poor to send their children away and often the girl child has to leave school to help in taking care of younger siblings and family chores.<sup>136</sup>

To eliminate the problem of distance from schools which affected the access of girls, the Government established hostels and residential schools, besides building new schools in populated areas. However data on their locations, criteria for admission and disaggregated data of students is necessary to ensure these schools are truly servicing the need of the rural community.

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<sup>135</sup> Ministry of Women and Family Development, "Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)", Article 10, para. 154.

<sup>136</sup> Report from the Sabah Women Action Resource Group (SAWO), June 2003

The government report identifies 28 special education primary schools and three special education secondary schools nationwide for disabled students.<sup>137</sup> However there isn't any sex disaggregated data to show the number of girls and boys attending these schools and whether these few schools are sufficient and capable of catering to the needs of the disabled community which is not homogenous but, depending on the type of disability, require specific facilities and medium of instruction (e.g. deaf, blind, etc). Many disabled children, especially those who have mobility problems and have to use wheelchairs or crutches are unable to attend schools due to environmental barriers, inaccessible school buildings and lack of suitable transportation facilities.

## 2. Dropout Rates

While the Government Report indicates that the drop out rates are lower for females than males at the primary, lower secondary and upper secondary levels, dropping out of school before completion of the 11 years of basic education is still a serious problem; in terms of numbers, the government data for 1995-1996 show a total of 15,349 dropouts from primary schools and 63,697 from secondary schools.<sup>138</sup> It is crucial that such data continue to be updated and collated so as to enable an analysis and identification of the problem areas.

Although more than 90% of the school age cohort is enrolled in Government and Government aided schools, the enforcement of the policy of Compulsory Education has been deferred. This is because the Education Act of 1996, Section 29A(2)<sup>139</sup> which makes it compulsory for all parents to school their children for not less than six years, also stipulates in Section 29A(4) that recalcitrant parents are liable to be either jailed for a period of six months or fined RM5,000 or both. Many of the parents who have been unable to send their children to school are believed to be among the poorer sectors of the community. The Ministry has urged all school principals and counselors to assist the Ministry in advising parents to send all their children to schools regardless of sex, and indicated that studies will also be undertaken to identify the real causes of dropping out, so that remedial measures can be undertaken before enforcing the provision on compulsory primary education. It would be useful to know the status and findings of these studies.

The causes of early dropouts include poverty, lack of access to schools, lack of financial resources, family work, negative parental attitudes towards education and selective examinations. Besides free education, the government has implemented several schemes to reduce the drop out rate such as the text book loan scheme, residential schools subsidized transport and the introduction of school buses, distribution of school uniforms, shoes, bicycles, junior financial grants, and nutrition programmes. While these incentives are available to all needy pupils, there is a need for disaggregated data (e.g. sex and

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<sup>137</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 10, para. 158.

<sup>138</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 10, para. 162, table 10.3.

<sup>139</sup> *Education (Amendment) Act 2002*, Act A1152. Came into force from 1<sup>st</sup> January 2003

location) of the recipients of these incentives so as to monitor the effectiveness of these initiatives.

Early marriage is a factor that could have an adverse impact on girls continued access to education and requires further study.<sup>140</sup> Further, girls who become pregnant when in school have also had to leave school as circumstances make it difficult if not impossible for them to continue their education after giving birth. Although those whose families can afford it will seek admission into private schools, others will simply face a bleak future where education is concerned. No specific government programmes to deal with the concerns of these girls are known and the issue and extent of the problem is also relatively unknown. The Welfare Department under the Ministry for Women, Family and Community Development has several facilities one of which is a rehabilitation institute called Taman Seri Puteri for girls who have been exposed to moral danger or involved in prostitution.<sup>141</sup> Little is known about the level and kind of education administered in these institutes which come under the purview of the Welfare Department and not the Ministry of Education.<sup>142</sup> It is crucial that these girls have continued access to formal education and not be stigmatised due to the pregnancy.

### 3. Literacy rates

The 1991 Literacy Census highlighted in the government report showed a narrowing of the gender gap in the literacy rates among the various age groups.<sup>143</sup> However, from the states of Sabah and Sarawak it was reported that illiteracy rates were still very high in the rural and remote areas, especially among the older generation. In these areas the culture of the people does not place literacy as an important requirement, but this attitude is gradually changing with development. Adult literacy classes cater to both men and women, but not necessarily in equal proportions. For the women, classes were organized by the Governmental community development agencies (e.g. KEMAS) the Women's Institutes, women NGOs and the women's wing of political parties. These contributed, to some extent, towards reducing the adult literacy gender gaps, however further study is needed in this area.

There are several continuing education programmes for both men and women in agriculture, micro and small scale business entrepreneurship, consumerism, health and nutrition, family life and parenting skills, religious practices, national unity, languages and organizational skills. With the current emphasis on a knowledge-based society in the ICT era, there are many programmes aimed at making women ICT savvy and computer literate. The National Council of Women's Organizations, the Ministry of Women, Family and Community Development, and various governmental agencies are involved

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<sup>140</sup> See Article 16 of NGO Shadow Report

<sup>141</sup> The Welfare Department's website [www.jkm.gov.my](http://www.jkm.gov.my)

<sup>142</sup> Information on the Welfare Department's website provides very general information as to the services provided at the Taman Seri Puteri Institutes which include counseling, formal and informal education and vocational training. Five institutes are listed, four out of which have the capacity to house 100-200 girls.

<sup>143</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 10, para. 166



in these continuing education programmes. Governmental and private funding and encouragement have made it possible for these programmes to reach a wide spectrum of women in the community

A study to determine the direction of life long training needed by women, whether working, home-based, or unwaged has been proposed<sup>144</sup>. The outcome of the study would provide information for the development of suitable training modules in various fields, such as (a) Environment, Forestry and Agriculture, (b) Legal Sciences, (c) Human and Social Sciences, and (d) Innovations in Information and Communication technologies. The study also proposes the setting up of “service centers” at local and district levels in order for training programmes to be accessible to as many women as possible.

#### **4. Curriculum and text books<sup>145</sup>**

There have been a number of studies to review the content of text books with a view to eliminate stereotyping in gender roles and perceptions. While the Government Report mentions specific guidelines on gender set by the Ministry of Education for writers of text books,<sup>146</sup> there is no further indication of what those guidelines are, how are they implemented/ enforced and what is the long term plan in terms of effectively changing the imaging and stereotyping of roles in existing text books. There are also teachers who have been known to impose their own views and biases in the process of teaching and administration. As a result teacher training courses and teacher in-service courses are now expected to be gender-sensitive. However without a monitoring mechanism, the impact of these measures is not known.

The teacher training programmes must also build capacity of teachers to inculcate value of equality between women and men and they importance of mutual respect between the sexes. They must develop the skill to encourage girls to move away from traditional stereotypical notions of what is appropriate for girls in terms of their education.

So far, the suggestions from women’s organizations to the Ministry of Education to include the study of Human Rights and the United Nations Conventions (including the CEDAW Convention) into the teacher training curriculum, as well as in the general studies curriculum at the undergraduate levels has not been given the due consideration expected.

#### **5. Living Skills and Vocational Options**

All curricula are the same for both boys and girls, whether in pre-school, primary, secondary, technical, undergraduate or professional courses in the universities and colleges. In co-curricular activities, certain team sports e.g. football, rugby, cricket and sepak takraw and certain uniformed activities such as Boy Scouts, Cadet and Military training are exclusively for boys. Other activities have both male and female participants,

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<sup>144</sup> Wazir Karim, KANITA, University of Science Malaysia, 2003 – A MKPW working paper

<sup>145</sup> See chapter on Article 5 of the NGO Shadow Report.

<sup>146</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 10, para. 188

but not necessarily in equal ratios. Although the curricula does not have gender differences or biases, certain subjects tend to be preferred or deemed more appropriate for girls, such as nursing, home science, food processing, nutrition, infant care and teacher education.

Generally speaking, career and vocational guidance provided in the schools is gender non prescriptive. But the role models tend to reflect the societal norms. Today, girls are being encouraged to go into studies that provide good career opportunities and potential growth such as in the new information and communication technology, bio technical studies, business management studies, and in science based professions. However, there is still the tendency for girls to choose studies and careers that are regarded as “women friendly”, and those that are considered more suitable for balancing a career and family life. In the area of Living Skills which include Manipulative skills, Home Economics and Agriculture, 97% of students who opted for Home Economic classes are girls and only 16.8% of the Manipulative Skills students are girls. While the Government Report acknowledges that this “phenomenon is probably due to cultural socialization to do with gender roles”, no further efforts are identified to deal with the situation.<sup>147</sup>

Enrolment of students in institutions of higher education needs to be monitored to ensure a balance of enrolment between boys and girls especially in technical fields.

## **6. Scholarships/ Loans**

The Government Report lists impressive numbers of girls that received scholarships/ loans for courses on teaching and education.<sup>148</sup> However in the spirit of widening the scope and eliminating stereotyping of gender roles, it would be useful for the government to reveal the number of male/ female recipients for all of the different categories/ courses that it offers financial aid.

The loan and scholarship schemes (National Higher Education Fund) now also extended to students in private institutions also needs to be managed not only to ensure gender balance but also to be used as an incentive to encourage girls to take up disciplines such as engineering or any other discipline that will ensure upward mobility in employment.

## **7. Women in key positions**

The Government Report itself has highlighted the disparity that currently exists with regards the number of women in top level/ decision making positions within the education system.<sup>149</sup> The report also identifies the lack of seniority of the women teachers as the root cause of this disparity as the selection for heads of schools is “mainly based on seniority of service”. While this might be the case, it is imperative that the government identify the reason why women do not have the requisite number of years and in the interim, come up with a temporary special measure to counter this disparity.

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<sup>147</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 10, para. 171.

<sup>148</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 10, para. 189-190.

<sup>149</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 10, para. 191-196.

## 8. Pre-school Education

Although the number of boys and girls participating in pre-school education is about even,<sup>150</sup> these figures reflect the fact that less than one third of the relevant age group is participating / accessing this level of education. Further data breaking down access in the different categories (i.e. income levels) and locations (i.e. urban/ rural) would be useful in identifying the gaps as there is a concern that pre-schooling is still very much urban based and catering to higher income categories.

## 9. Sports and physical education.

Physical education is compulsory for both boys and girls in the general education curriculum. Although the Government Report mentions that there are no regulations / prohibitions to hamper the participation of females in sporting activities there are some factors that need consideration. In separate sex schools, girls tend to have better opportunities as facilities are tailored to feminine needs, and the girls are less inhibited without the presence of the opposite sex. In co-educational institutions, boys tend to monopolise much of the facilities, such as the playing field, the gymnasium and the services of the coach, and there are more team sports for boys than for the girls, as well as national level organized games and sports. Public sporting facilities are still largely male favoured. This, in a way, reflects the cultural character and tradition of the society, but as women demand their rights to participate actively in sports, more and more facilities have now become accessible to women.

Sporting careers for girls are also still somewhat limited. It is also true to say that many girls are not too keen to undertake the risk in sporting activities. The assertion of the right of Muslim girls to wear the tudung (head scarf) could be construed by many as a deterrent for girls to be active in sport. While these factors might not prevent those who are keen and interested to participate, it is important to address some of these concerns which are possibly entrenched by social and cultural norms that stereotype gender roles and responsibilities. It would also be important to monitor the number of women involved in sporting activities/ programmes run by the state to identify any disparity that might exist in this area.

## RECOMMENDATIONS TO THE GOVERNMENT

### 1. Infrastructure and accessibility of the schools

- .1 Study existing infrastructure in schools and the accessibility of schools in the rural areas, specifically on plantation estates and indigenous community settlements.
- .2 Compile sex disaggregated data on access of disabled students to the special schools and review the sufficiency and suitability of these schools to cater to the needs of different disabilities.

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<sup>150</sup> Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 10, para. 184.

## **2. Dropout Rates**

- 3.1 To study the effectiveness of the various incentives taken to reduce the dropout rates and involve the participation of relevant NGOs in the drawing up of remedial measures to be undertaken.
- 3.2 To develop systems to enable pregnant girls to continue and complete their education. The national school curriculum should apply to the Taman Seri Puteri Institutes in dealing with the education of pregnant teenagers regardless of their ethnicity to ensure that they are not treated as delinquents. They should have the right to return to a normal school after their delivery.

## **3. Curriculum and text books**

- 3.1 To introduce and mainstream gender relations and rights studies which incorporate sex education in the curriculum of schools, teacher training colleges and universities.
- 3.2 Draw up a concrete and effective plan of action in tackling the continued existence of gender stereotyping in school text books which includes monitoring and enforcement provisions.

## **4. Living skills and vocational options**

Review the curricula for Living Skills to include infant care and nursing and identify plans for encouraging more boys to take up the subject of home economics.

## **5. Scholarships / Loans**

Provide sex disaggregated data on the recipients of government scholarships / loans for the various courses other than teaching and education.

## **6. Women in key positions**

Introduce temporary special measures to enable women to hold key decision making positions within the education system.

## **7. Pre-school education**

Provide further breakdown of data on access of boys and girls to pre-school education in the rural areas to identify any disparities that might exist.

## **8. Sports and physical education**

Provide sex disaggregated data on involvement in sporting activities/ programmes run by the state to identify any disparities that might exist.

## ARTICLE 11 EMPLOYMENT

### CRITICAL AREAS OF CONCERN

#### 1. Percentage of women in the workforce is still low

Throughout the 1990s, labor force participation rate among women has remained rather consistent between 47 to 44%. The figure, however, is still well below the participation rate for men, which is, 86 to 85%. It is also noticeable that women's labour force participation has stagnated to only 0.01% increment between years 2000 and 2003 (Table 11.1). This increment is still low compared with the participation of men in the labour force.

**Table 11.1: Percentage Labour Force Participation Rate by Gender, 1975-2004, Malaysia**

Gender	1975*	1980	1990	2000	2002	2003	2004
Male	86.0	85.9	85.3	83.1	81.5	82.1	80.9
Female	47.3	44.1	47.8	47.2	46.7	47.7	47.3
Malaysia	66.7	64.9	66.5	65.4	64.4	65.2	64.4

*Source: Labour Force Survey Report, various years*

*\*Data for 1975 are for Peninsular Malaysia*

Overall, Table 11.2 shows that from 2001-2004 there has been a slight increase in women as employers, employees and own account workers. However, female employers are still low and the majority of women are employees. In 2004 only 36.97% of employees were women. More than 69% of unpaid family worker were women.

**Table 11.2 Number of employed persons by employment status and gender, Malaysia, 2001 and 2004**

	2001			2004		
	Male	Female	%Female	Male	Female	%Female
<b>Employer</b>	269,900	36,000	11.81	306,800	46,500	13.16
<b>Employee</b>	4,619,400	2,535,700	35.44	4,683,000	2,746,700	36.97
<b>Own account worker</b>	1,171,600	402,100	25.55	1,250,800	444,600	26.22
<b>Unpaid family worker</b>	152,000	349,200	69.66	157,200	350,900	69.06
<b>Total</b>	6,212,900	3,323,000	34.85-	6,397,800	3,588,700	35.94

Source: Labour Force Survey Report 2001 and 2004

**Table 11.3: Number of Employed Persons ('000) by Age Group and Gender, Malaysia 2001, 2003 and 2004**

Age Group	2001			2003			2004		
	Total	Male	Female	Total	Male	Female	Total	Male	Female
15-19	562.2	341.6	220.6	499.2	312.8	186.5	482.9	299.6	183.3
20-24	1473.9	<b>871.8</b>	<b>602.1</b>	1472.1	<b>843.4</b>	<b>628.7</b>	1,404.4	<b>826.1</b>	<b>578.3</b>
25-29	1620.4	<b>1037</b>	<b>583.4</b>	1573.3	<b>952.5</b>	<b>620.9</b>	1,596.7	<b>967.2</b>	<b>629.6</b>
30-34	1399.6	<b>925.6</b>	<b>474</b>	1444.6	<b>922.3</b>	<b>522.3</b>	1,470.4	<b>931.1</b>	<b>539.2</b>
35-39	1258.7	831.8	426.9	1341.7	880.5	461.1	1,371.4	892.4	479.0
40-44	1108.2	728	380.2	1184.9	781.0	403.9	1,208.0	797.0	411.0
45-49	881.9	592.4	289.5	1005.0	667.8	337.3	1,035.6	686.7	348.9
50-54	661.3	471.8	189.6	719.3	504.8	214.4	762.9	528.6	234.3
55-59	355.8	257.4	98.4	396.2	285.1	111.1	416.9	294.4	122.5
60-64	212.9	154.6	58.3	233.4	173.5	59.9	237.4	174.7	62.7
<b>15-64</b>	<b>9535</b>	<b>6212</b>	<b>3323</b>	<b>9,869.7</b>	<b>6,323.6</b>	<b>3,546.1</b>	<b>9,986.6</b>	<b>6,397.9</b>	<b>3,588.7</b>

Source: Labour Force Survey Report 2001, 2003, 2004

Table 11.3 shows that the highest number of women in the work force is from the 25-29 and 30-34 age groups and, falling slightly in the 20-24 age group. Those who continue in the work force are still expected to care for their family, reinforcing the adage of 'women's double burden' at work and at home. According to a study on time usage by the Ministry of Women, women performed 75 per cent of housework such as childcare, cooking and house cleaning.<sup>29</sup> Research should be undertaken to study whether employability of women is impacted on by their marital status and lack of child care facilities.

Looking at Table 11.4, there is a slow increase in women from the 30-34 and 35-39 age groups. This raises several questions for which an answer is not available. Does marital status have an impact on the employability of women or are women opting out of the workforce due to marriage and child-care?

**Table 11.4: Age group of those in the labor force 2004**

Age group	Total	%	Male	%	Female	%
15-19	579,796	5.6	357,604	5.4	223,878	6.0
20-24	1,563,379	15.1	913,877	13.8	645,515	17.3

<sup>29</sup> *Bernama*, 8 August 2005

25-29	1,646,207	15.9	993,345	15.0	649,246	17.4
<b>30-34</b>	<b>1,490,904</b>	<b>14.4</b>	<b>946,989</b>	<b>14.3</b>	<b>544,770</b>	<b>14.6</b>
<b>35-39</b>	<b>1,387,369</b>	<b>13.4</b>	<b>907,255</b>	<b>13.7</b>	<b>481,338</b>	<b>12.9</b>
40-44	1,221,713	11.8	807,921	12.2	414,174	11.1
45-49	1,045,704	10.1	695,342	10.5	350,742	9.4
50-54	766,159	7.4	536,406	8.1	235,072	6.3
55-59	424,494	4.1	298,004	4.5	123,133	3.3
60-64	238,131	2.3	178,802	2.7	63,432	1.7
Total	10,353,500	100	6,622,300	100	3,731,300	100

Source: Labour Force Survey, 2004

Table 11.5 shows that women make up about one-third of Malaysia's total workforce, i.e., 31.4% - 1990, 33.9% - 1995, 34.5% - 2000, and 35.94% in 2004<sup>151</sup> and this has not changed much over the past 15 years.

Women's participation in the agricultural sector has also declined from 34.4% in 1990 to 26.8% in the year 2000 and only registering a slight increase at 28.1% in 2004 (Table 11.5).<sup>152</sup> Women are still involved in gender stereotyped occupations and if you look at the construction, wholesale and retail trade sectors, they are very male dominated. Besides that women are also lagging behind in the middle ranking occupations.

**Table 11.5: Number of employed person by gender within industry, 2004**

Industry	Male	Female	Total
Agriculture, hunting and forestry	967.0	378.9	1,345.9
Fishing	127.5	3.0	130.5
Mining and quarrying	32.4	2.3	34.7
Manufacturing	1,206.2	818.5	2,024.7
Electricity, gas and water supply	50.3	7.1	57.4
Construction	824.8	65.8	890.5
Wholesale and retail trade; repair of motor vehicles, motorcycles and personal and household	1053.9	553.3	1607.2
Hotels and restaurants	352.9	344.1	697.1
Transport, storage and communications	450.3	79.7	530.1
Financial intermediation	116.6	116.5	233.1
Real estate, renting and business activities	279.4	175.6	455.1
Public administration and defence; compulsory social	499.3	181.9	681.2

<sup>151</sup> Seventh Malaysia Plan, 1996-2000, eight Malaysia Plan 2001-2005 and Labour Force Survey Report, 2004. Malaysia.

<sup>152</sup> Ibid.

security			
Education	225.0	387.3	612.3
Health and social work	62.0	133.4	195.4
Other community, social and personal service activities	134.9	95.3	230.2
Private households with employed persons	13.5	245.5	259.0
Extra-territorial organizations and bodies	1.7	0.5	2.2

Source : Labour Force Survey Report, 2004, Malaysia

Female workforce in the professional category shows that it has increased from 9.4 percent in 1990 to 13.5 percent in the year 2000 (Table 11.5). However, a comparison is not possible for the year 2004 because the occupational categories have changes and are not consistent with those in years 1990 and 2000. This statistic is rather problematic for comparative purposes for the labor force participation rate of women is not constant. It is, therefore, difficult to establish if there is any genuine increase unless there is consistency. Such data is vital to gauge the improvements achieved by women which at the moment is rather difficult to discern. It can only be observed that women are still underrepresented in the legislator, senior official and manager positions. A large portion of the female workforce is in the semi-skilled production related jobs and they are also found working in the lower management level as clerks and other related work.

**Table 11.6: Percentage distribution of gender within occupation, 2004<sup>153</sup>**

	1990		2000		2004	
	Male	Female	Male	Female	Male	Female
Occupation	%	%	%	%	%	%
Legislators, senior officials and managers					10.1	5.8
Professionals					4.9	6.7
Technicians and associate professionals					11.6	13.0
Professional, Technical and Related Workers	6.4	9.4	8.9	13.5		
Administrative & Managerial	2.8	0.6	4.7	2.2		
Clerical workers					4.7	17.5
Clerical and related workers	7.0	14.1	7.1	17.5		
Service workers and shop and market sales					12.8	18.4
Sales	11.4	11.4	11.1	12.1		
Service	9.9	14.1	9.5	17.4		
Skilled agricultural and fishery workers					15.0	10.0
Agricultural workers	29.4	28.1	20.4	14.8		
Craft and related trade workers					15.4	5.2
Plant and machine-operators and assemblers					15.7	11.4
Elementary occupations					9.9	12.0
Production and related workers	33.1	22.3	38.4	22.6		
<b>TOTAL</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>



*Source: Labour Force Survey Report, 2004, Malaysia*

The government plans to provide a more favorable working environment for women to ensure their greater participation in the workforce. The private sector, the largest employer of women, have been encouraged to implement women-sensitive policies such as flexible working hours, day care centers and transportation facilities between the home and the place of work.<sup>154</sup> Some of the government's initiatives are as follows:

**Human Resource Development (reference 8<sup>th</sup> Malaysia Plan)**

- A Skills Development fund (SDF) is set up by the government to extend its coverage to include trainees in private institutions. Under the Eighth Malaysia Plan, Community Colleges are supposed to be established throughout the country to provide hands-on training for school drop outs, school leavers, workers and the public
- The Human Resource Development Council (HRDC) has intensified its efforts to encourage employers of SMEs to retrain their workers.
- The Human Resources Fund (HRDF), a training incentive fund for private sectors, has been expanded to include firms in the energy, education and training industries. There are several schemes under this fund including apprentice schemes, retraining schemes for retrenched workers etc which enable employers to draw on this fund.
- The National Vocational Training Council (NVTC) is meant to be strengthened under the Eighth Malaysia Plan.
- Electronic labour market information was to be implemented under the Eighth Malaysia Plan [4][4]

While government measures are being taken, there is inadequate information on its impact and to show that such initiatives are reaching out to those who are in need of such assistance, in particular the women. There are no indicators to show that such schemes are being monitored or that pro-active measures are employed to ensure that women and girls will benefit equally. There is also no indication or data to show that training of women are priorities in the Human Resource Funds or that employers are seriously looking into training programmes to upgrade the skills and knowledge of women workers.

It must be noted that there has not been any dramatic increase in the labor force participation rate of women over the last 10 years. As for transport and housing for women workers, employers have massively removed these facilities. In fact, provisions for foreign workers have been maintained but local workers are required to find and pay for their own transport and lodging.

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<sup>153</sup> The blank sections are due to change in categories under the Labour Force survey report.

<sup>154</sup> The Star. May 7, 1996.

## 2. Basic data on unemployment amongst women not available

The official definition of unemployment does not take account of the reasons why women may have given up the search for work. Women who fall under this category are thus classified as not economically active rather than unemployed. From Table 11.6, it shows that there are more unemployed men who have worked before as compared to women and a higher percentage of women who are classified as “never worked before”.

**Table 11.6 Percentage distribution of unemployed persons by work experience**

Work experience	2003			2004		
	Total	Male	Female	Total	Male	Female
Total	369,800 (100%)	235,800 (100%)	134,000 (100%)	366,900 (100%)	224,400 (100%)	142,500 (100%)
Worked before	64.8	70.1	55.4	63.6	70.7	52.4
Never worked before	35.2	29.9	44.6	36.4	29.3	47.6

Source: Labour Force Survey, 2003; Labour Force Survey, 2004

Unemployment rate for men has been declining from 4.3% in 1991 to 2.8% at the end of the Sixth Malaysia Plan in 1995. However, the unemployment rate for men has increased to 3.4% in 1999. There is no equivalent effort to measure the unemployment rate of women. Table 11.7 shows some of the reasons for not working.

**Table 11.7: Percentage distribution of persons outside labour force by gender and reasons for not seeking work, Malaysia 2001 and 2004**

Reasons for not seeking work	2001			2004		
	Total	Male	Female	Total	Male	Female
Schooling	35.1	68.1	23.7	37.9	66.7	27.1
Housework	54.7	3.4	72.4	50.1	2.8	67.9
Going for further studies	1.2	2.2	0.8	1.4	2.4	1.0
Disabled	1.6	4.2	0.7	2.0	4.9	0.9
Not interested	0.6	1.7	0.3	0.5	1.2	0.2
Retired	4.0	13.5	0.7	4.5	13.8	1.0
Others	2.8	6.8	1.4	3.6	8.1	1.9

Source: Labour Force Survey Report, 2001, 2004

## 3. Wage differentials

With respect to earnings, male-female wage differentials continue to exist in private sector establishments. However, these differentials are narrowing steadily, particularly in labor intensive industries where women are well represented. For example, in the electronics sub sector, the wage differential between male and female production operators has narrowed considerably such that average female monthly earnings as a percentage of male earnings increased from 82.7% in 1990 to 92.5% in 1993. Average monthly earnings of female thread and yarn spinners as a percentage of their male counterparts also increased from 93.8% in 1990 to 97.9 percent in 1993. In the public sector, there are no gender differences in pay for the same job. Again, unfortunately, the national statistics fail to track the wage differentials and there is no latest statistics to reflect current situation. Unfortunately, there is no updated information or data on the wage differentials of the various sectors and it is difficult to assess if there are any changes in wages for women.

According to Lee and Nagaraj (1995), discrimination and differences in endowments may attribute to male-female monthly wage differentials in the manufacturing sectors. Males have an advantage in terms of their more favorable occupational distribution, greater experience and better educational attainment. The author further remarked that providing women with more education and formal training may not necessarily reduce earning differentials between males and females and suggested further investigation of reasons why females are concentrated in subordinate labor groups and why they appear to be paid less for similar capital endowments may be more appropriate for an effective policy prescription. Women on average earn less than men. This gap has slowly narrowed in the past two decades, partly because women's wages are improving but also because men's wages are falling.

Malaysia ratified the ILO Convention No. 100 on equality of wages between men and women in September 1997. Women have enjoyed equality of wages in the public sector for a long time, even before Malaysia ratified the ILO Convention on equality of wages. However, wage differentials continue to exist in the private sector and there are no monitoring mechanisms or domestic laws in place to enforce equality of wages in the private sector.

NGOs and rights activists have been fighting for a minimum wage to be established and there is much disagreement on the amount to be fixed. NGOs and the Malaysian Trade Union Congress proposed that the minimum wage be fixed in the range of RM600-RM1,200. Hence, the issue of minimum wage is still a stalemate.

#### **4. Sexual harassment**

In August 1999, the Ministry of Human Resources launched the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace. Occurrences of Sexual Harassment at the Workplace are actually rampant. Many of these cases however, go unreported due to lack of proper complaint procedure, which includes confidentiality of investigations. In a research carried out by the All Women's Action Society and the

Women's Development Collective<sup>155</sup>, on the impact of the Code, it was found that while the Code sets out exemplary procedures and encourages the establishment of a comprehensive in-house mechanism to prevent and eradicate sexual harassment, not all in-house mechanisms exist.

Although the government has initiated the Code on the Prevention and Eradication of Sexual Harassment in the Workplace in August 1999 but it has not seen to the establishment of the in-house mechanism amongst employers. Where there are mechanisms in place, different procedures and features exist, reflecting a lack of uniformity in the implementation of the Code. There is a lack of a standardized or even average time frame in carrying out the complaint procedure. Another important factor is the lack of counseling facilities available to both the complainant and the perpetrator. The measures to protect the complainant against retaliation are also found inadequate, as concrete and clear measures are not spelt out.

### **5. Labour flexibilization.**

There is no data available on the percentage of contract workers in comparison to full-time workers and the percentage of female contract workers. There are no measures in place to see to it that employers don't exploit this group of workers and that their welfare and security is protected.

### **6. Control of and access to ICT**

The present phase of globalization and economic liberalization is very much facilitated by ICTs. The absence of women's voice and perspective indicates that ICTs, by itself will not solve the problem of social and economic inequality. These changes have serious implications for Malaysian women workers and it is important that some of the negative effects and trends be addressed so that their economic and employment status is not undermined.

Realizing the potential of particularly educated women in the K-Economy, the government amended the Employment Act “to include new and flexible working arrangements such as teleworking, part-time work and job sharing to enable women to integrate career with household duties” (Eight Malaysia Plan, 2001: 567). Teleworking, which is a specific mode of distant work through the use of ICT, is often touted as the future of work in the information age. But here again, women are framed by the patriarchal state in their “feminine” role as “homemakers”. At the end of the day, both domestic labor and working for a living will again burden women. Female teleworkers who are married recount stories of having to work from the kitchen or working late at night after their household chores are finished (Ng, 2001). ICT related employment is not reducing the burden of traditional role.

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<sup>155</sup> Ng, Cecilia, Zanariah Mohd Nor, and Maria Chin Abdullah (2003). A Pioneering Step Sexual Harassment and the Code of Practice in Malaysia. Women's Development Collective and Strategic Information Research Development. Malaysia.

## **7. Health and safety issues**

A recent study conducted jointly by NIOSH and the Japanese International Co-operation Agency found that more female than male administrative workers suffer from health problems related to poorly designed office furniture and workstations in the country. 77% of women office workers suffered eye strain compared to 63% men; similarly 69% of women suffered excessive fatigue from using computers too long compared to 59% of male office workers (The Star, 10 February 2003). This situation has not changed if one compares similar research conducted more than 10 years ago. Then it was found that, out of the 1140 employees surveyed in 1991, two-thirds of them experienced 'real' or 'extreme' problems related to eye problems and at least 50% of them reported they had numbness, tingling or stiffness of the shoulders and neck - symptoms related to repetitive strain injury (RSI) (Cardosa and Wan Fauziah, 1994).

Office furniture, workstations and the office work environment in general cause a lot of health problems for women but not much effort has gone into seeing to the improvement of the working environment that causes health problems. This may also have an impact on the reproductive health of women. Socso Act and Insurance schemes do not include provisions towards women's reproductive expenses or health, even though women are accepted as contributors. Their biological role in producing generations of workforce is not recognized to be worthy enough to be covered in any schemes. It is also important that government looks at the prevention of such health problems by addressing the issue.

In the Electronic industries, such as semiconductor wafer fabrication, semiconductor assembly, assembly of other electronic components, printed circuit and so forth there are many different types of work processes in which thousands of different chemicals are used. Workers are exposed to different types of hazards, depending on the type of work process that they are doing. The major hazards are chemical hazards, physical and ergonomic hazards.

In the Hospital and the service industry there are also major health issues. Nurses form a large proportion of healthcare workers in Malaysia and almost all nurses in Malaysia are women. According to the 2000 population census in Malaysia, there are about 50,000 nurses working in health care institutions, and they comprise about 2% of the female workforce in Malaysia. Due to the nature of their work, nurses are exposed to high risk of developing acute back injury and chronic back pain. There has been no data on the incidence of back pain among nurses in Malaysia. Chronic back pain is common among nurses in Kuala Lumpur and further studies need to be done to further assess the potential long term impact of this on the women themselves as well as their families.

In the Plantation Industries women are also facing health problems. For example palm oil and rubber are among Malaysia's main exports. Almost all of the pesticide sprayers at the plantations are women because they command lower wages than men. At present, there are about 30,000 women pesticide sprayers in the country, and health experts say many of them are working without much protection from the harmful chemicals that they handle on the job.

Under the Malaysian Occupational and Safety Health (OSHA) Act, it is required that a safety and health committee be formed if there are more than 40 sprayers in a plantation. Overall, there is a lack of monitoring of the sale, use and impact of the poisons in the plantations. The weak implementation of the regulations in the plantation sector has led to women workers being poisoned daily. Besides this, health or medical personnel have not been trained effectively to deal with pesticide poisoning and health.

There are no preventive health care measures being instituted in the form of coverage for medical check ups for women working in work environments that expose them to many types of health problems. Increase in various types of cancers and prolong illness means that medical expenses are on the rise, thus a consistent diagnosis could help prevent severe circumstances for the workers.

### **8. Women in the informal sector neither costed nor valued**

Women in the informal sector are not included in the labor force surveys therefore they are unaccounted in terms of their contribution to the economy. There is no formal definition for the informal sector. There are a substantial number of women working in the informal sector. Their contribution to the economy is neither costed nor valued. Many women are involved in home-based work and are paid piece rate or daily rate. The labor legislation, which applies mainly to the formal sector employees, does not protect home-based workers. Hence workers employed in subcontracted production are not entitled to benefits such as annual leave, sick leave, maternity leave/benefits, medical benefits, public holidays or social security. There are no regulations, which affect such work. The government seriously under enumerates women in the informal sector. There is no initiative to calculate their contribution to the economy.

### **9. Unionization**

Not all employees are free to form trade unions. In reality, employers subject employees to various forms of victimization. Employees intending to set-up a union have to follow very strict terms and procedures laid-out by the government. Electronics workers have been denied the right to organize into a national union,, while new unions are not recognized automatically even though all procedures and requirements are fulfilled, as they are further subjected to the employer's recognition, or Director General or Registrar of Trade Union's determining they are indeed registered in the appropriate industry union.

There is no formal data on women in leadership positions within the trade unions. Specific data on which sectors women are organized into unions is also not available. No national union is allowed to be formed in the electronics industry.

### **10. Other discriminatory employment practices**

#### **10.1 Retirement age**

The case of the Malaysian Airline Services (MAS) show that female cabin crew retires early at 40 years of age or 45 years for female supervisors, whilst all male cabin crew retire at 55 years of age. Upon early retirement, a female cabin crew receives a “special

gratuity at the rate of RM800 per year subject to income tax for every completed year of service with the Company”.

The existing employment conditions contravene Article 8[2] of the Federal Constitution, which clearly states that “there shall be no discrimination on the grounds only of religion, race, and descent, place of birth or gender”. This guarantees the right of women and men to equal pay for equal work or work of equal value. The gratuity offered to female cabin crew upon their early retirement is meager and shows a total disrespect towards the years of contribution that they have made towards building the good image of MAS.

Such a practice is not peculiar to the female cabin crew of MAS but is also known to happen in other industries. For example, at the Malaysia Helicopter Services Bhd. and Matsushita Electric, female workers retire at 50 years while their male colleagues retire at 55 years. Article 33.1 of the Collective Agreement in JG Containers (M) Sdn. Bhd. States that “all male employees shall retire on attaining the age of fifty-five (55) years, and females shall retire on attaining the age of fifty (50) years.”<sup>156</sup> Besides that Hotel, Bars and Restaurants also tend to retire their waitresses by the age of 50 while the waiter retires at 55 years.

### **10.2 Maternity benefits**

Another issue of contention is the maternity benefits offered to women workers. In the Collective Agreement between the management of MAS and MASEU, it states that “a married female cabin crew with five or more years of service ... shall be granted leave without pay from the date she is declared medically unfit to fly by a medical practitioner. The leave without pay shall commence not later than the end of her second month of pregnancy. She shall not be entitled to medical leave and compassionate leave during the period she is granted leave without pay.”

The denial of seven months' pay in the course of a woman's pregnancy is a violation of worker's right and it does not accord respect and recognition to women's contribution towards the growth and well-being of the company. This further perpetuates the stereotype roles that women's contribution is considered secondary to the workforce of MAS. Such a maternity policy falls short of ensuring an equitable coverage for women and infringes on their effective right to work. It also contradicts Article 11 of CEDAW which guarantees equitable maternity benefit as an inalienable right to all human beings.

### **10.3 Reproductive rights**

The female cabin crew of MAS is only entitled to maternity leave benefits “for not more than two surviving children. In the event that she becomes pregnant after having two surviving children, she shall resign from the Company, failing which the Company reserves the right to terminate her services.” This policy clearly coerces women to fit into a particular pattern of reproduction. This infringes on women's right to choose and to make their own decision freely and responsibly in terms of the number, spacing and timing of their children.

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<sup>156</sup> Quoted from the Non-metallic Mineral Products Manufacturing Employees' Union. 8 October 2003.

The case of Beatrice Fernandez vs. *Sistem Penerbangan Malaysia* exemplifies a violation of reproductive rights.<sup>157</sup> Beatrice applied for a declaration that provisions in the 1988 collective agreement were invalid as they were discriminatory against female flight stewardess and violated their right to have children.

The Court of Appeal [2004] 4 CLJ, 403 in hearing her application dismissed it, ruling that:

- Constitutional remedies protect individuals from violations of rights by the State or public authority. MAS was not a public authority and the assertion that it was “a Government agency” had not been substantiated.
- Although articles 8(1) and 8(2) of the Federal Constitution provide for equality before the law, they did not apply in this case because a collective agreement cannot be considered “law”.
- Article 8(2), which had been amended in 2001 to include gender as a prohibited grounds of discrimination, could not be applied retroactively.
- The Court also held that Section 37 of the Employment Act 1955 relating to “maternity protection” was not relevant in this case.<sup>28</sup>

In the case of the MAS, the Ministry of Women, Family and Community Development, has made an effort to dialogue with the MAS management on its discriminatory work policy for women. However, at the end of the day the Ministry has left it to the employers to decide on the fate of the female cabin crew. No efforts were made to monitor discriminatory work practices in other industries.

### **11. Domestic worker: non-recognition as a worker**

A foreign domestic worker is not recognized as a worker under the Malaysian laws. Domestic worker is categorised under the informal sector. They are labelled as maid, servant or domestic helper. Most importantly they are not covered under the Employment Act 1955 or any specific Act. Therefore their rights are not protected. Moreover, there are no standardized contracts for them except for Filipino domestic workers. The absence of standardized contract does not provide the mechanism to seek redress. This is one key reason why domestic workers have been abused and mistreated by the employers. Currently the existing contracts are signed between the recruiting agency and the employer. This further puts the domestic worker in a very vulnerable position with no protection at all on her rights.

There are differences in wages received by domestic workers based on their nationality. Filipino domestic workers receive RM500-RM750, the highest wages for domestic workers. Sri Lankan domestic workers get RM500 a month. But Indonesian and Cambodian domestic workers receive only RM350-RM400 per month. This wage policy

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<sup>157</sup> Ng, Cecilia and Peterson, Tashia (2005) “The Ninth Malaysia Plan; Gender, Rights and Democracy”, paper presented at Universiti Malaya and UN Malaysia Conference on Progress and Challenges in Human Development: Ideas for the Ninth Malaysia Plan, 11-12 July, Kuala Lumpur.

<sup>28</sup> In May 2005, Beatrice’s application for leave to appeal to the Federal Court was dismissed.



brought about by the government through its Memorandum of Understanding with the sending countries, allows for wage differentials to exist.

Due to their isolated working environment, domestic workers are exposed to various kinds of violations such as physical abuse, sexual abuse, unpaid wages and the withholding of documents. However these domestic workers have no right to seek redress because they are not protected under any laws. Domestic workers are only covered under the Employment Act 1955 on issue of unpaid wages where the worker can file a complaint on the employer at the Labour Court. If the domestic worker has a contract then she can only take up the case and seek redress through the courts on breach of contract. This process would cost the worker a lot in legal fees. Where there is no contract, which in actual fact covers the large majority of domestic workers, the migrant worker has no mechanism at all to seek redress.

In Malaysia, the Workmen Compensation Act 1952 and Occupational Safety and Health Act 1994 makes provision for securing the safety of persons including legal foreign workers whilst at work. In cases where foreign workers suffer injury as a result of accident arising out of and in the course of employment, the Workmen Compensation Act 1952 provides compensation. However, this Act does not apply to domestic workers.

## **12. Limited applicability of the Employment Act 1955**

Currently the Employment Act has wage restriction and applies only to workers earning less than RM1500.00. This limits the application and relevance of this act to the wider working population.

## **RECOMMENDATIONS TO THE GOVERNMENT**

### **1. Women in the workforce**

Genuine gender disaggregated data on employment is needed for planning and policy formulation purposes. Data is also needed for monitoring purposes. Government must enforce the generation of such data and make it available for analysis, which would be valuable for encouraging greater participation of women. Government can place conditions on both the private and public sector to have a minimum ratio of women employees on a cross-section basis.

### **2. Basic and consistent data on women**

Government need to generate and publish data that is not only sex disaggregated but also to have a consistent tracking of data so as to ensure a representative monitoring of the status of women.

Data on the unemployment rate for women is particularly required. Conditions must be made conducive for women to remain in the labor market and to re enter the labor market. Government should set up a special fund for unemployed women to get training

in current technological, language, communications and other work skills as required by the employment industry.

### **3. Wage differentials**

- 3.1 Monitoring mechanisms and domestic laws must be formulated to enforce equality of wages between men and women in the private sector. With such a law in place it would be punishable under the law if employers continue to practice discrimination in wages against women.
- 3.2 Establish a minimum living wage of RM900 for workers.

### **4. Enact the Sexual Harassment Act**

The enactment of a Sexual Harassment Act is advocated by women's organizations and they have argued that a national legislation will ensure that a clear definition is stated to determine sexual harassment, and this will be supported with coherent procedures and sanctions in place to ensure fair treatment of both complainants and perpetrators. Employers would have to comply to take action against sexual harassment.

### **5. Labour flexibilization**

There must be some regulations and measures in place by law to protect and ensure that this category of workers not exploited. Government should ratify ILO Convention no 177 to protect and improve the situation of homeworkers.

### **6. Control of and access to ICT**

Ensure that women have equal opportunities for continuous education and training related to ICTs. Establish telecenters to upgrade the skills and to provide employment to those marginalized by development. Establish special employment schemes to those made redundant as a result of technological changes, particularly older women who may find it difficult to re enter the labor market. Set up technological agreements between workers' representatives/unions related to technological changes.

### **7. Health and safety**

- 7.1 Establish proper collection and documentation of data on women workers and their health problems in all sectors of employment.
- 7.2 Establish internationally recognized standards and undertake regular assessment on ICT-related health and safety hazards.
- 7.3 There must be coverage by the employer for preventive health care in the medical benefits accorded to employees working in work environments that expose them to health problems especially through healthcare policies or through SOCSO by providing a yearly medical check-up which includes mammogram and pap smear for women.

### **8. Women in the informal sector**

Government needs to survey and tabulate data on the informal sector. Women engaged in the informal sector should be categorized as economically active, but presently they are seriously under enumerated.

### **9. Unionization**

Allow the formation of a National Electronic or State Based Electronic Union. Encourage more women to hold leadership positions in the public sector unions. Government should ratify ILO Convention no. 87

### **10. Other discriminatory practices**

Government needs to persist with securing a non-discriminatory work environment for women workers. They can ensure:

10.1 Increment of retirement age for all to 56 years of age.

10.2 All working women should be entitled to full maternity benefits..

10.3 Compliance of employers with Section 37 (c) of the Employment Act of 1955 (Act 265) which guarantees a woman the right to full pay and benefits for all births.

### **11. The domestic worker: non-recognition as a worker**

11.1 The government should recognize foreign domestic workers as workers through National Legislation. Foreign domestic workers should be covered under the Employment Act 1955 or any other separate legislation for their protection. All migrant women should have the right to seek redress in the different courts and be given the right to stay in the country while seeking redress. All migrant women should be given the right to work while seeking redress in the country to meet their daily basic needs.

11.2 It is recommended that the Workmen's Compensation Act 1952 and Occupational Safety and Health Act 1994 cover foreign domestic workers too.

### **12. Limited applicability of the Employment Act 1955**

Amend the Employment Act to cover employees drawing a wage of up to RM3,000.00.

## **ARTICLE 12**

### **HEALTH**

The Malaysian Health Care system is considered one of the success stories in the history of Malaysia. From the urban-centered and curative based services of the pre-Independence era, the health system has evolved to a network of both rural and urban services and shifted to provide promotive, preventive and curative health services. However, the Government Report, while providing some statistics and details of the variety of existing services and provisions for health care in the country; fails to deal with the underlying concern of gender inequalities that impact health and accessibility to health care.

The enjoyment of the human right to health is vital to all aspects of a person's life and well-being. It is the basic ingredient to ensure that people are able to participate fully in the social, economic and political processes of development. The right to health encompasses physical, mental, sexual and reproductive health where women's rights to have control over their own bodies and reproduction free of pressure, stigma need to be upheld.

The low social status of women often leads to a denial of rights – such as the right of access to information, adequate nutrition and health services such as family planning and reproductive health. Many laws and regulations have potential influence on reproductive health. For example whilst laws on abortion, rape and domestic violence can directly affect reproductive health, laws on education, employment and property which influence women's status have an indirect effect on reproductive health. Accessibility is affected by social and economic conditions, as well as attitudes and customs of the communities within which they live. It is important that any strategy or response to women's health take these factors into account.

### **CRITICAL AREAS OF CONCERN**

#### **1. Gender disaggregated data and analysis**

There is a critical need for the engendering of the health care system. The health data collected under the government's Health Management Information System (HMIS) has not been subjected to a gender disaggregated analysis. Even the burden of disease reported routinely by the Ministry of Health (MOH) through its annual report is not analyzed by gender and therefore assumed to be the same for both males and females. Many studies have shown that the burden of disease however is definitely different for men and women. The National Health and Morbidity Survey II (NHMSII)<sup>158</sup> reported that prevalence of hypertension, psychiatric morbidity, and cancers (all sites) were more prevalent among females than males. This highlights the importance of gender analysis in order to understand differences and the extent of the problem – to study how and why diseases affect women and men differently.

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1. 1. Ministry of Health, "Report of the Second National Health and Morbidity Survey Conference". Kuala Lumpur Hospital, 20-22 November 1997.

Despite major improvements in health services and impressive maternal mortality figures, women generally lack control over their sexuality and reproductive health. It is important to recognise that “the central issue is male-female power relations” and any strategy to improve women’s medical services and general health needs to apply a gender analysis to study “how and why do diseases affect women and men differently”. This involves studying as well “social explanations for health differentials” taking into account factors of class, race, education, socio-cultural aspects that intersect with gender to compound the level of disadvantage or discrimination on women’s health.<sup>159</sup>

## 2. Accessibility

In spite of the government’s success in improving physical accessibility of health facilities to its population, inequalities still exist. Even though “88.5% of Malaysians live within 5 km of a static health facility”<sup>160</sup>, the largest states of Sarawak, Sabah and Pahang have lower proportions of their populations within the 5 kilometer radius; that is 60, 76, and 79% respectively. Urban areas have better physical accessibility with 92% of the urban population living within 3 kilometers of a static health facility, compared to 69% for the rural population.<sup>161</sup>

Physical accessibility to health services is also affected by income. Table I shows that higher income quintile group lived nearer to all categories of health facilities compared to the lower income quintile group.

**Table I: Average Distance (kilometres) from Health Facilities by Income Quintile, 1996**

Income Quintile	Government Clinic	Government Hospital	Private Clinic	Private Hospital
1 (poorest)	5.7	23.6	14.2	172.3
2	4.7	17.7	7.9	108.3
3	4.5	14.9	5.8	79.7
4	4.0	12.8	4.6	56.2
5 (richest)	3.7	10.9	2.8	41.3

Source: Rozita Halina Hussein (2000), “Financing Health Care Through General Taxation in Malaysia”. In Proceedings of International Conference on Evidence-based Practice: Towards Evidence-based Policy Making in Health Sector Development, 4-6 September 2000.

Making services available and located near to homes do not guarantee accessibility. Lack of awareness or information about available services, as well as social and cultural factors (unable to leave the house without husband’s permission, lack of transportation, alternative child care arrangements, etc) may render available services inaccessible to certain women. The existence and effect of social and cultural constraints are different

<sup>159</sup> Wong Yut Lin, “Integrating the Gender Perspective in Medical and Health Education and Research”. Discussion paper presented at the expert group meeting on Women and Health: Mainstreaming the gender perspective into the health sector. 1998.

<sup>160</sup> Ministry of Women, Family and Community Development, Malaysia *Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report)*, 2004, para. 97

<sup>161</sup> Ministry of Health, “Report of the Second National Health and Morbidity Survey Conference”, Kuala Lumpur Hospital, 20-22 November 1997.

for men and women and therefore need to be studied from the gender perspective. Better understanding of the dynamics of these factors in society will help in the development of services that are more acceptable to the population especially those who need them most.

Affordability of services also affects accessibility. Currently as most of the health services provided by the MOH are almost free, the question of affordability is not an issue. However the corporatisation or privatization of health services are threatening to make affordability one of the factors that will reduce accessibility.

#### *Impact of privatisation*

Malaysia began the privatization of the health sector in 1993. Since the privatization of the medicine procurement section, other related sectors and the corporatisation of government hospitals, the cost of health care is slowly rising.<sup>162</sup> “The World Trade Organisation’s push for liberalized trade in the service industries (General Agreement on Trade in Services, GATS) poses a serious challenge to our accessible public healthcare system. The pressure to dismantle public sector healthcare, in favor of demand-driven systems and away from need-based priorities will have far reaching consequences for our primary health care system which is currently held in high esteem internationally”.<sup>163</sup> Malaysia’s coverage of primary healthcare has been impressive, despite the government’s “modest” health expenditures (about 2% of the Gross Domestic Product) – well below the recommended 5% by the World Health Organisation<sup>164</sup>. This puts into question where the problem actually lies – “the massive and sustained haemorrhage of senior, experienced staff from the government service to the private sector, due in part to the differentials in remuneration”.<sup>165</sup> Instead we are sold the notion that privatization would ensure a more cost effective, efficient and sustainable healthcare system. A notion that is hard to fathom in light of “indications that the 1996 privatisation of hospital support services (laundry, hospital equipment and facilities maintenance, cleansing services and clinical waste disposal) has resulted in dramatic increases in operational costs (as much as 3-4 fold”.<sup>166</sup>

The response has been to introduce a national health insurance fund. There has however not been any clear information or consultation on a viable and equitable healthcare financing scheme to help counter the rising cost of healthcare. Private health insurance companies are reaping the benefits of an increasingly concerned public, however such schemes are not an accessible alternative for all.

In a memorandum endorsed by 81 civil society groups and submitted to the Health Minister, Dr Chua Soi Lek it was presented that in 2003, government hospitals handled 80% of all patients who received in-patient treatment in Malaysia. It was also presented that as recorded in the Eighth Malaysia Plan, 25% of Malaysian citizens earn a monthly household income of less than RM1,000 and another 32.7% in the range of RM1,000 to

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<sup>162</sup> Women’s Agenda for Change, 1999, pg. 20.

<sup>163</sup> Chan Chee Khoo, “Health & Healthcare in Changing Environments: The Malaysian Experience”, 2000

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

2,000. In view of the public's low level of income and reliance on government healthcare, any additional cost to healthcare will have both an economic and health impact on the population<sup>167</sup>. As women in Malaysia earn approximately 50% of men's income and generally have the responsibility as care givers for children and the elderly, any increase in health care costs is an additional burden for them.

Furthermore, any attempt to introduce a National health insurance system needs to cover specific health needs and concerns of women. This includes reproductive and sexual health care (e.g. pap smear screening, maternity and antenatal care)

### 1. Unequal access for marginalized women

Access to health services is not equal for all women as there are still categories of women whose accessibility is compromised due to geographical location, status, social stigma, special needs or disabilities. It was reported that in 1994, out of 42 women who died in labour, 25 (60%) were Orang Asli or indigenous women<sup>168</sup>. The Government Report acknowledges "indirect and qualitative evidence to suggest that some groups of women e.g. disabled/ migrant/ aboriginal or indigenous women and those who are living/ working in estates and plantations are marginalized in terms of access to health services and facilities"<sup>169</sup>, however doesn't present a concrete strategy or plan of action to deal with this concern. Data on services and accessibility of health care for marginalised women including aboriginal/ indigenous, estate workers, sex workers and transsexuals, adolescents and disabled women need to be actively collected and analysed to ensure adequate and effective programmes and services are developed and implemented.

The NHMSII<sup>170</sup> survey showed that among women 20 years and above, 46.8% had regular breast examinations and 26% had regular pap smear examination. However lower proportions of rural women and women from low income groups had the same examinations done on them. Health services provided by the "flying doctors" into rural areas of East Malaysia appear to have been downsized due to economic reasons.

It is crucial for the government to collect and present data on the patterns of health service utilization among the various categories of marginalized women so that targets and strategies can be set to improve the quality of services. At the same time it is important for service providers to understand the barriers to service utilization among

<sup>167</sup> Aliran Monthly, Vol 24 (2004): Issue 11/12, "81 organisations say 'No' to privatization of hospital dispensaries"

<sup>168</sup> Nicholas C, "The Context of Orang Asli Poverty: Orang Asli Social Indicators", Briefing paper prepared for the sub-committee on poverty eradication of the National Economic Consultative Council (NECCII), EPU. Statistics quoted from The Sun 28<sup>th</sup> September 1996.

<sup>169</sup> Ministry of Women, Family and Community Development, Malaysia *Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report)*, 2004, para. 243

<sup>170</sup> Rozita Halina Hussein, 2000. "Financing Health Care Through General Taxation in Malaysia". In Proceedings of International Conference on Evidence-based Practice: Towards Evidence-based Policy Making in Health Sector Development, 4-6 September 2000.

these marginalized communities so that positive efforts can be taken to overcome these barriers.

## **2. Migrant Women**

Migrant women, especially migrant domestic workers find their right to health compromised on different levels. Their right to health services, confidentiality of results and treatment and reproductive rights; to have a family, children, etc are often both in policy and practice violated.

### *Different Fee Policy*

Since 1994, foreigners have been charged higher rates than locals for health services. Since May 2003, the fees for outpatient treatment have increased to RM15 for foreigners while that for locals remains at RM1. Whilst admissions to 3<sup>rd</sup> class wards are almost free for locals, foreigners are charged and are required to place a deposit prior to admission. Migrant women who have to go for surgery or for the delivery of a baby have to pay a deposit of RM600 in a government hospital. This makes it almost impossible for the migrant women to access treatment, leaving them to resort to self medication without proper medical guidance, putting their health at risk. Women who have been abused or sexually assaulted fear the hospital and those who have contracted STIs refrain from getting treatment. Their health is left to deteriorate and they become vulnerable to other forms of infection.

### *Mandatory Testing and Deportation*

Since January 2003, it is compulsory for migrant workers to undergo a medical examination upon arrival in Malaysia. Though performed randomly, it is discriminatory as migrant women are subjected to mandatory testing for more than 15 infectious diseases including HIV/ AIDs, STDs, tuberculosis, malaria and pregnancy. If they are found to carry any of those diseases or are pregnant, they are subject to deportation without treatment or medical assistance. The testing is often done without informing the migrant woman, without consent and without post-testing counseling. This is a discriminatory policy against migrants, especially the unskilled and semi skilled migrants, of which women form the majority. Professionals and expatriates do not undergo the same form of testing. This policy creates an environment of fear and loss of job security.

### *Breach of medical confidentiality*

At present the results of medical examinations conducted on migrant workers is channeled by a centralized agency called FOMEMA online to the Immigration Department which then notifies the employer of the results of medical examination of respective worker. In the case of HIV/ AIDs, this is a clear breach of confidentiality as the information is revealed without the consent of the migrant worker. This leads to stigmatization and discrimination in the workplace.

A single entry policy also doesn't allow migrant workers to enter the country with their spouse or partner. In 1996, another policy was entered into force which prohibits migrant workers from marrying. These policies coupled with poor knowledge and information on



HIV/ AIDs create an environment where migrant women workers are left vulnerable to infections.

### 3. Reproductive Rights and Reproductive Health Services

National family planning services which started in 1967 were integrated into the maternal and child services in stages and by 1990 family planning services were available at all maternal and child health (MCH) clinics. However, with the focus of reproductive health on married women, not much attention is given to women in other phases of their life cycle<sup>171</sup>. It is important to reach out to and ensure access to reproductive rights and health services to young and adolescent women, single women, and women not considered part of mainstream society like drug users, sex workers, etc who might feel stigmatised and unable to access such services.<sup>172</sup>

Following the International Conference on Population and Development (ICPD) in 1994, Malaysia has adopted the new concept of reproductive health. The focus is on a comprehensive, client-centered view of reproductive health and promotion of reproductive health in addition to family planning. There however has to be continuous and comprehensive (and confidential) monitoring of range of clients and services requested to ensure that it is responding to the real needs of women in the country.

In spite of family planning services being available in most health facilities, use of contraception among some sub-groups of women remains low. Contraceptive prevalence rate is about 55% (Table II) and varies by ethnicity and educational levels. The percentage of women using modern effective method was 29.9%, indicating that a large proportion of women (mostly Malay women) use traditional methods (whose effectiveness and safety are not known). The data also suggests differences in acceptance and accessibility by different ethnic and socio-economic groups. There are many misconceptions surrounding the use of different forms of contraception as a result of inadequate information and explanation, a lack of support by the health and family planning personnel and cultural barriers to the acceptance of certain methods.<sup>173</sup> “Women’s access to contraception appears limited by the present Information Education Communication (IEC) framework of family planning implementing agencies, and IEC efforts appear inadequate, in terms of quantity and quality, to reach women in need”.<sup>174</sup>

**Table II: Contraceptive Prevalence Rate and percentage of women currently using modern contraceptive method**

Year	Contraceptive Prevalence Rate (%)	% currently using a modern method
1966/67	8.8	NA
1970	16.1	NA
1974	35.3	24.8
1984	52.2	29.7

<sup>171</sup> Women’s Agenda for Change, 1999, pg 20

<sup>172</sup> Ibid.

<sup>173</sup> Roziyah Omar and Azizah Hamzah (eds.), *Women in Malaysia, Breaking Boundaries*, 2003, pg. 176

<sup>174</sup> Ibid. 178

1994	55.8	29.9
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Source: NPFDB, Population Profile Malaysia<sup>5</sup>

Women assume family planning duties more often than men do and generally bear the onus of safeguarding against pregnancy. The most widely used contraceptive method in Malaysia is the contraceptive pill taken by women (30.3%), followed by sterilization (14%), condoms (11.5%) and the IUD (7.2%).<sup>175</sup> In 1997, 75 percent of people who were introduced to birth control chose to use the contraceptive pill.<sup>176</sup> Almost all (99%) sterilization procedures are carried out on women. Certain birth control techniques used by women, including the contraceptive pill, often have side effects and lead to physical discomfort or psychological distress.

Some women are also being denied the right to make decisions about reproduction. Hospitals have refused to carry out tubal ligations and sterilization procedures on women without the consent of their husbands. These hospitals do not require the same consent from wives for similar surgeries performed on their husbands. Women are denied their right to bodily integrity and autonomy when husbands refuse them access to birth control or sterilization procedures.

Some practices in the health services such as limiting the provision of family planning services to only married women, or insisting that husbands must give consent for tubal ligation infringes on the woman's right to determine their own reproductive health. The practices need to be reviewed and changed accordingly.

In some societies, men make the key decision on the use of family planning methods. Thus women are also not given the opportunity to space their pregnancies.<sup>177</sup> Apart from denying women this basic right, women who bear too many children too close together may be at a high risk of damaging their health. Women should have the right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

Factors like gender discrimination and inequities that currently limit women's and men's access to confidential family planning services, the ability of women to negotiate the use of family planning for themselves, and effective use of contraceptive methods; need to be addressed. A study in Malaysia revealed that while there are various constraints and obstacles to the use of contraception, the husbands are "the most important constraint" as they fail to take an active part when it comes to the issue of contraception and often do not allow it<sup>178</sup>. By addressing the gender dynamics that hinder access to and use of family planning services, acceptability of services can be enhanced. These efforts will help

<sup>175</sup> "Demographic and Health Situation," in *Reviewing Malaysian Women's Status, Country Report in Preparation for the Fourth UN World Conference on Women*, coordinated by Jamilah Ariffin, 1994.

<sup>176</sup> National Population and Family Development Board, Health Statistical Table 4.18, Number of new family planning acceptors by method, Malaysia 1993 – 1997.

<sup>177</sup> Marina Hew, "Breaking Out of Tradition," *New Straits Times* (April 1, 1999), p. 1.

<sup>178</sup> Ibid. 176

women exercise their reproductive rights more freely and assist men in playing a more constructive role in their own reproductive health and that of their partners.

During the Eighth Malaysia Plan, the government had committed to the establishment of a National Women's Hospital as a specialist training and referral centre for women's health and well-being. However in the mid-term review of the Eighth Malaysia Plan there was no further mention of this hospital. It is sad to note that when faced with economic constraints, the Women's Hospital is put on hold whilst others still proceed. This shows that the government places lower priority in the establishment of a National Hospital, for Women.

## 1. HIV/AIDS

HIV which was first detected in Malaysia in 1986, was initially prevalent among male intravenous drug users. However as the percentages of cases contracted through sexual intercourse increased from 5.3% in 1990 to 18.1% in 1999, the number of women infected with HIV has increased. Despite a dip in figures in 2000, the figures of women infected with HIV have increased steadily over the past 3 years: 7.6% (2001), 9% (2002) and 10% (2003)<sup>179</sup>. Apart from sex-based differences in infection rates, there are profound differences in the underlying causes and consequences of HIV/AIDS infections in male and female. Differences in biology, sexual behaviour, social attitudes and pressures, economic power and vulnerabilities make women more susceptible to HIV infection than men. Acknowledging this, the Government Report has questioned the "appropriateness" of existing campaigns and strategies.<sup>180</sup>

One such strategy has been to implement mandatory premarital HIV testing for Muslim couples. The states of Johor, Perlis, Malacca and Perak have either implemented or are about to implement this. While this is being "sold as a measure to protect women from HIV infection",<sup>181</sup> it is based on false premises. Firstly, unequal gender relations between men and women is a fundamental reason why women are more vulnerable to HIV infection. Women lack the power to determine where, when and how sex takes place. If prevention is the objective, policies and programmes must address gender inequality.<sup>182</sup>

There is also the false assumption that if the test comes back negative, all is safe during the marriage. Besides ignoring the "window period" where false results are possible, there also needs to be some acknowledgement that a large proportion of married women are being infected by husbands who indulge in risky sexual behaviour. Any prevention

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<sup>179</sup> Ministry of Women, Family and Community Development, *Statistics on Women, Family and Social Welfare 2004*.

<sup>180</sup> Ministry of Women, Family and Community Development, *Malaysia Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report)*, 2004, para. 257.

<sup>181</sup> Azrul Mohd Khalib, "Forced HIV testing policy untenable", *Malaysiakini*, 1<sup>st</sup> March 2005.

<sup>182</sup> Women's Aid Organisation (WAO), "Testing is NOT Prevention: HIV/ AIDS Prevention for Women from a Gender Perspective", 26 November 2001.

strategy therefore has to first tackle the unequal gender relations, specifically, male privilege in the area of sexuality.<sup>183</sup>

In addition to issues of promiscuity, negotiating use of contraception, lack of financial independence, there is the larger issue of cultural sensitivity towards dealing with sexual issues. Women are reluctant to seek testing and medical treatment for HIV/AIDs for fear of being condemned as promiscuous and shunned by family and community. When the infected pregnant women transmit the infection to their babies, the term used to describe this vertical transmission, “*mother-to-child infection*”, focuses attention to the mother as the immediate source of infection. Yet a majority of women acquired their infection though a monogamous relationship with their husband.

There is also a lack of open discussion around sexual issues, leaving many ignorant about their bodies and sexually transmitted diseases. Public education programmes shy away from providing clear information about safe sex and condom use.

Another impact of HIV/ AIDS on women is on their roles in the home. As primary caretakers for sick members of the family and community, a lot of the social burden associated with HIV/ AIDs (i.e. of health care) fall on women. Increased demands on a woman’s time could have a negative impact on her own health. When mothers get infected, oftentimes the orphaned children are left to the care of their grandmothers.

## **2. Adolescent Health Programme.**

Recognising that adolescents have specific health needs, the Ministry of Health launched a National Adolescent Health Policy in 2000. The policy was however vague and superficial in its objectives and strategies. The policy addresses adolescents in generic terms and does not highlight the gender issues on adolescent health that should be considered. Adolescent reproductive health issues and rights are also silent within the policy. The fact that adolescent girls are both biologically and psychosocially more vulnerable than boys to sexual abuse, violence and prostitution, and to the consequences of unprotected and premature sexual relations; and therefore need different emphasis was not outlined within the policy.

## **RECOMMENDATIONS**

### **1. Gender disaggregated data and analysis**

- 1.1 To mainstream gender into health policy development, research, planning, service organisation and delivery.
- 1.2 Detailed socio-economic, ethnic and gender disaggregated data should be recorded in a standardised way in all national datasets and that analyses of these data should be routinely published as well as being made available to researchers for more detailed analyses.
- 1.3 All health data should be subject to gender-disaggregated analysis. Such analysis will enable evidence-based conclusion as to how and why diseases affect women

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<sup>183</sup> Ibid.

differently and whether there is equal access to men and women. If differences exist, to identify if the differences are due to discrimination, social conditions or other factors. Appropriate measures can be taken to developed and implemented to ensure that discrimination against women is eliminated.

- 1.4 In medical, clinical and user-focused research, sex should be a consistent key study variable. Those commissioning or undertaking health research should consider gender issues as an integral part of the planning and delivery of research programmes and projects. A better understanding of these differences will inform the development of a more tailored and effective approach to both the maintenance of health and the care and treatment of ill health in women and men.
- 1.5 As mental health problem seem to be more prevalent among women, further studies need to be done to identify factors that predispose women to mental health problems. Once identified, only then can appropriate preventive strategies be formulated and implemented.

## **1. Accessibility**

- .1 To ensure that equality in access to health care is achieved, there must be an understanding of social inequalities with regard to gender, ethnicity, age, class, and disability. Gender awareness training must be an integral element in the training of staff and managers at every level of the health sector.
- .2 To review the privatization of government health facilities and increase governmental allocation for the public health sector. To set up a regulatory body to include the participation of public interest, consumer and women's organisations in formulating a governmental fee schedule of health services that could be used as a guideline.
- .3 To release the details of the national health-financing scheme.

## **1. The need for more social science research in Reproductive Health Services**

- .1 Sexual and reproductive behaviour and ill-health have social and cultural origins as well as biomedical ones. We recommend that there be more social science research to provide the necessary scientific evidence to assess the choices people make in practice. Understanding and addressing the interplay between gender, race and cultural factors that limit women's and men's access to confidential services (including family planning services) is a vital prerequisite to tackle discrimination, disadvantage and inequalities.
- .2 In order to meet the needs of women including disadvantaged, marginalized and adolescent women, social science research can probe the extent to which informed choices are made and the barriers that people face in making these choices. Findings can point to gaps in existing services or in their delivery, and directions for change should be identified. Practices that discriminate against marginalized women should be reviewed and more user-friendly services should be developed to ensure better acceptability of services. Social science research can also monitor the extent to which interventions have been successful in changing behaviours, attitudes and perceptions.

## **1. Reproductive Rights and Health**

- .1 To ensure that reproductive health services are woman centered and rights-based, there needs to be a set of indicators to monitor women's ability to exercise their right to choose the number, spacing and timing of their children and to have the information and the means to do so safely, effectively, affordably, and in a manner that is acceptable to them. Apart from measuring Contraceptive Prevalence Rate (CPR), Total Fertility Rate(TFR) and Unmet Need in Family Planning, the proportion of all births that are unplanned and the prevalence of abortions are also important reproductive health indicators.
- .2 Practices that contravene the rights of women to health such as limiting family planning services to married women or requiring consent from husbands for tubal-ligation needs to be reviewed and changed accordingly. At the same time male responsibility and participation in reproductive health needs to be promoted and inculcated in the society.
- .3 Education is one of the most important indicators of informed decision-making in family planning matters. The programmes run by the NPFDB should continue but the target audience should be expanded to include as often as possible, both men and women. Owing to the general success of the programmes being currently run, the funding for such programmes that promote women's reproductive rights and reproductive health among disadvantaged women should be increased to meet the needs of more women.<sup>184</sup>
- .4 Government and private hospitals should be required to allow women to obtain services and surgery without the consent of their husbands.
- .5 A study needs to be undertaken to study the nature of family planning issues such as male acceptance of family planning and spacing of children. It should be expanded to encourage the participation of both urban and rural men and women to take equal responsibility for family planning.

#### **1. Unequal access for migrant workers**

- .1 Women migrant workers should be included in Malaysia's National Health policy and HIV/ AIDS campaigns in order to ensure their accessibility to health services and reduce their vulnerability. The failure to address people's health needs whether migrant or not, is a violation of human rights and social justice.
- .2 To review discriminatory practices against migrant workers including the practice of charging different fees for migrant workers both men and women.
- .3 Treatment should be given first priority instead of deportation.
- .4 Pre and post test counseling on HIV/AIDs should be provided to all migrants subjected to medical screening.

#### **1. Gender appropriate services in HIV/AIDS Programme**

- .1 To incorporate a gender analysis in the evaluation of HIV/AIDS transmission and programmes of action. Key to this is an understanding of the socially constructed aspects of male-female relations that underpin individual behaviour, as well as the gender-based rules, norms and laws governing the broader social and institutional

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<sup>184</sup> In 1997, the FFPA reached 3,293 women through this program. See Federation of Family Planning Associations, Malaysia, *Annual Report 1997*, p.23.

context. Gender analysis forms the basis for the changes required to create an environment in which women and men can protect themselves and each other.

- .2 We recommend the use of a more appropriate, gender-neutral term 'parent-to-child transmission (PTC)' instead of 'mother-to-child transmission' to be used to describe the vertical transmission of HIV to babies

### **1. Adolescent Health Programme**

- .1 We recommend that the government respect the rights of adolescents to information, education and counseling on sexual and reproductive health. The government should fulfill their rights through legal, administrative and budgetary measures that enable them to realize these rights,
- .2 We recommend that adolescent health policy be more apparent regarding gender issues pertaining to adolescent health so that more gender sensitive programmes will be developed to address the adolescent health needs of young men and women appropriately.

### **1. Training in gender and reproductive health**

- .1 We recommend that a training initiative in gender and reproductive health be developed to build institutional capacity in training centres in Malaysia so that appropriate training in gender and reproductive health can be offered. It will also lead to an increase the number of programme managers, planners, policy makers and trainers with both a gender perspective on health and technical skills needed to contribute to increasing access, quality and comprehensiveness of gender-sensitive reproductive health policies and programmes.

### **Additional references:**

1. National Population and Family Development Board, 2000. Population Profile Malaysia.
2. Ministry of Health, 2000. "Malaysia's Health 2000". Technical Report of the Director-General of Health, Malaysia 2000.

## **ARTICLE 13**

### **SOCIAL AND ECONOMIC RIGHTS**

#### **CRITICAL AREAS OF CONCERN**

##### **1. The right to family benefits**

###### **1.1 Poor families and single parent families**

Because Malaysia is not a welfare state therefore family benefits are minimal. Although poor families may receive assistance from low cost housing schemes and from the hard-core poverty alleviation programs but direct family benefits in terms of direct financial stipends to poor families who have children does not exist. Single-parent families also receive very little direct family allowance support from the government. The government also spends very little money on family benefits and childcare. Poor families may receive assistance from low cost housing schemes and from the hard-core poverty alleviation programs. However direct family benefits is minimal or non-existent.

###### **1.2 Maternity benefits and child-care facilities**

Currently under the labor provisions maternity benefits are given to women up to the fifth birth for a period of not less than 60 days. However many women say that this is not sufficient especially for breast feeding mothers. So there have been initiatives to increase the maternity leave from 60 days to 90 days.

Child-care facilities are lacking in Malaysia and are a major barrier to a married woman's participation in the labor force. Most private firms believe that the government should provide child-care services or it should be provided commercially. The Minister of Human Resource stated that over the last five years, there was a continuous lukewarm response by employers on the need to set up child-care centers at the workplace. Economic necessity requires mothers, as well as fathers, to work. They need assistance with child-care because, such care is costly and is not provided by corporations and businesses. It is hope that government takes an active role in providing child-care for working parents.

Present tax exemptions for employers to set-up child care centers are not taken up seriously by the employers. The Ministry of Human Resource has drawn up guidelines for the setting up of child-care centers and a committee of representatives of various government agencies was established as a one-stop service to assist employers who wish to set up such centers but there are no takers.

###### **1.3 Parental leave**

Although there are maternity benefits for all women up to the fifth birth, it is also important that the government recognize that family and parental leave should also include fathers. Currently fathers are given paternity leave up to a period of 7 days for the birth of each child in both the public and private sectors. Besides the birth of a child, there should also be job-protected leave for adoption of a child and caring for children



and family members who are seriously ill. This policy should encourage men to be involved in the caring responsibility too.

#### **1.4 Economic benefits**

In terms of economic benefits, the Income Tax Act 1978, Section 47(1) ensures that women's income can be assessed separately for tax purposes, and that women have the equal rights to all benefits as long as they are qualified. Section 47(1) of the Income Tax Act 1978 discriminates against women in that it only allows a man to deduct RM2,000 from his chargeable income as “wife relief” if the wife is living with him. But there is no corresponding provision in this Act to enable a woman to make a similar provision if she is the one supporting her husband.

### **2. The right to bank loans, mortgages and other forms of financial credit**

Most banks in Malaysia do not classify applicants according to gender, therefore it is not possible to ascertain how many women have benefited from or utilized these special loan schemes. Based on a study done in 1993, it was understood that the gender variable is not a determinant when vetting an applicant. Instead, an applicant is evaluated on his or her ability to repay the loan. The husband's signature is not required on a loan application made by a woman. There are two disadvantages faced by women, even though the existing system does not overtly discriminate women, there is no way to gauge if women are discriminated against, and if a woman feels she has been treated unfairly on the grounds of gender, there is no mechanism for her to appeal her case.

While no specific loans have been established for women in business, Bank Negara Malaysia provides, on a gender blind basis, various loan schemes to promote the development of certain sectors or activities. These include the Low Cost Housing Program, New Entrepreneur Fund Scheme, and Fund for Tourism and the Entrepreneur Rehabilitation Scheme.

### **3. The right to social safety nets**

In February 1998, MTUC proposed that a National Retrenchment Fund be setup to benefit workers who fail to receive retrenchment benefits upon retrenchment and workers who remain retrenched for a period longer than three months. The fund would be established based on a monthly contribution of RM2 shared equally by workers and employers. The employers association opposed the proposal on the grounds that it would be an unwarranted burden during tough economic times. The government supported this view but nevertheless agreed to look into the viability of the proposal.

### **4. The right to participate in recreational activities, sports and in all aspects of cultural life.**

A National Convention on Women and Sports was held in 1997 to discuss women's participation in sports and the barriers to their participation. It was discovered that women's participation in competitive sports was relatively low, and the need to research the determinants of this was expressed. A study submitted to the Department of Women's Affairs (Hal Ehwal Wanita under the then Ministry of National Unity and Social Development) in 1991 showed that women showed little interest in certain adventure - type sports like mountain climbing, parachuting, scuba diving, and most traditional sports

that have traditionally been male dominated. Presently, there are no overt obstacles to women's participation in recreational activities, sports or any aspect of cultural life. All girls are expected to fulfill their physical education requirements in school, as are their male counterparts. The only difference is that all Muslim female children are required to be appropriately attired, according to Islamic custom.

## **RECOMMENDATIONS TO THE GOVERNMENT**

### **1. The right to family benefits**

#### **1.1 Poor families and single parent families**

Government needs to allocate more funds for targeted direct family benefits for housing, child allowances for education, food and nutritional supplements for families living below poverty line and for single parent families.

#### **1.2 Maternity benefits and child-care facilities**

- Maternity leave to be increased from 60 days to 90 days in the public and private sectors. Amend the Employment Act to increase maternity leave. Ratify ILO Convention no 183.
- Provide community based child-care facilities or set up childcare centers at the workplace. A Government sponsored childcare scheme is needed and the funding of these centers should be based on compulsory taxation based on the following options:
  - i. Charging the employers through taxation
  - ii. Sharing of costs between employer, employee and government
  - iii. Child care subsidy

#### **1.3 Parental Leave**

Paternity leave to be extended to spouses in both the public and private sectors to 14 days. Government to amend the Employment Act to include this provision for male workers in both the public and private sectors so that they could care for their wives and newborn babies. Pass a family leave statute to cover both men and women for adoption of a child and for caring for children and family members who are seriously ill.

#### **1.4 Economic benefits**

Amend Section 47 (1) of the Income Tax Act to include “husband relief” for the same amount so that a wife could deduct from her chargeable income if she is supporting her husband.

### **2. The right to bank loans, mortgages and other forms of financial credit**

Set up a Women's Bank and increase micro credit financing.

### **3. Rights to social safety nets**

Set up a National Retrenchment Fund to benefit workers who fail to receive retrenchment benefits upon retrenchment and workers who remain retrenched for a period longer than three months.

### **4. The right to participate in recreational activities, sports and in all aspects of cultural life.**

Government should start a sports scholarship for both male and female students who excel in sports at college and university level.

## **ARTICLE 14**

### **RURAL WOMEN**

The rural women of Malaysia comprises a significant proportion of the country's population even as the country undergoes a rapid rate of industrialization, aimed at achieving a developed status by year 2020. The Government Report reveals that 38.01% of the population reside in rural areas (Population Census 2000), while women make up 48.74% of the rural populace.<sup>185</sup> In short, there are over 4 million women that come within the category of "rural women".

While the government report defines rural areas as gazetted areas with a population of less than 10,000 persons and non-gazetted areas,<sup>186</sup> it has focussed entirely on "mainstream" rural woman in Peninsular Malaysia. In so doing, the plight of a substantial section of women in this sector has been left out notably the specific concerns of estate women and indigenous women from the Peninsular, Sabah and Sarawak.

### **CRITICAL AREAS OF CONCERN**

#### **1. Rural Women**

The third National Agricultural Policy (1998-2010) is gender-neutral and does not identify priorities for women in agriculture. This appears to reflect the general approach to rural women which has resulted in rural women's concerns and development to be marginalised and overlooked in the agricultural sector.

#### **1.1 Recognition Of The Unpaid Labour Of Rural Women**

Rural women in Malaysia form a considerable labour force in the agricultural economy as unpaid family labour (in 2000 the figures stood at 69.2% in Peninsular Malaysia, 68% in Sarawak and 51.7% in Sabah).<sup>187</sup> Thus government statistics do not accurately portray rural women's participation in agriculture. Government statistics cover women who are paid workers in the estates, who work as hired labourers in estates and smallholders involved in agriculture, livestock, fishery, food processing and other related activities. From this perspective, the drastic decline of women in agriculture as reported in the current statistics from as high as 42% in 1970s to 10.9% in 2004<sup>188</sup>, is arguable for it is the contention here that the reduction reflects largely the reduction of women in the paid sector of agriculture (primarily the estate sector). As a result of the government's industrial and educational development strategies and the conversion in the early 1990s of many of the plantation estates into residential, industrial and other mega urban infrastructures, many rural women migrated into the manufacturing as well as government sectors. Unpaid women workers employed as

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<sup>185</sup> Ministry of Women, Family and Community Development, *Malaysia Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report)*, 2004, para 303.

<sup>186</sup> Ibid. para 229.

<sup>187</sup> Ibid. para 309.

<sup>188</sup> Labour Force Survey, Malaysia 2004)

family labour in smallholdings in the villages throughout the country still toil at their labour unrecognised as *bona fide* farmers and invisible to official statistics.

### 1.2 Rural Women overlooked in the agricultural revival of the country

During the late 80s and early 90s, agriculture was touted as the “sunset” industry in Malaysia and the government’s efforts concentrated on developing policies and strategies to propel the country into an industrialised state under the “Vision 2020” concept. However, the economic slowdown in late 1990s drove home the folly of neglecting the issue of national food security. The Third National Agricultural Policy re-emphasises strategies to boost food production by offering incentives, the creation of Food Production Parks to promote commercial farming and special funds such as the Fund for Food that provided credit for primary food production. In essence, this sparked a revival of the agricultural industry. Unfortunately, due to the invisibility of women farmers, women who have been active but neither paid nor recognised as producers of food crops are being marginalised and are not benefiting from this revival. Thus far,<sup>189</sup> there has been no woman participant in the few technological parks that have been set up. Although some women have secured loans for food processing enterprises from the Fund for Food Scheme, it is suspected that the number is still small.

### 1.3 Restructuring of programmes on the basis of gender equity

The Department of Agriculture (DOA) Malaysia was the first government agency (and may be the only one prior to 2000) to undertake a “gender sensitisation in development planning” project in 1994-1995. Unfortunately, the project was short-lived, when funding from the UNFPA ended. Nevertheless, the sensitisation programme had a positive impact on the women specific programme of the DOA which saw the rapid growth of the income-raising projects of women’s groups throughout the country. In 2003, the collective revenue generated by the 1,803 projects was RM94.5 million (US\$18.7 million).<sup>190</sup> In 1997, this programme was disbanded and renamed the Entrepreneur Development Section to enable men to also benefit from this programme. This restructuring took place throughout the organisation and women workers who were previously assigned and trained to handle rural women’s programmes were reassigned as generalists. This in effect retarded the empowerment progress of rural women and once again marginalises rural women in the very programme that was designed for them. Currently, male participants make up 7.2% of entrepreneurs in this programme,<sup>191</sup> but given the more aggressive nature of male entrepreneurs, undoubtedly they will soon overtake the more reticent rural women group.

Another gender insensitive move at the highest echelon of the government machinery is the attempt to abolish the “Successful Woman Farmer Award”, purportedly due to the “scarcity of woman who meet the criteria” as specified by the organizers, the

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<sup>189</sup> As at December 2003.

<sup>190</sup> Department of Agriculture data from official, Faridah Aini.

<sup>191</sup> Ibid.

Ministry of Agriculture and the various departments and agencies under it. The primary criterion is that the woman farmer must have achieved success in agricultural production *per se* (i.e. involvement in crop cultivation and livestock rearing). This is a classical “catch 22” situation since rural women were not given due recognition as farmers and were sidelined into downstream activities by the programmes of the development agencies. As an alternative, a “Successful Woman Entrepreneur Award” was introduced the past couple of years.

#### 1.4 Membership and leadership in associations

Rural institutions are not gender sensitive and do not nurture women into leadership roles. The smallest public administration unit in the country is the Village Development and Security Committee (JKKK). The JKKK is headed by the *Ketua Kampong* (Village Head) who presides over a small committee of appointed bureau heads. A woman, usually the chief of the WANITA UMNO<sup>192</sup> in the village, is in charge of the Welfare Bureau. In practice, this bureau does little more than cater to the needs of the committee meetings and village functions. In Sarawak, women are not represented in the JKKK<sup>193</sup>. The new *Desa Wawasan* (vision village) programme, launched by the government in 2000 to spearhead a vigorous dynamic community development movement in the villages, introduced a women’s affairs unit into the JKKK. In this new JKKK, the Women’s Affairs Committee includes women extension agents and several other women in the village. A study as to their mandates and actual roles in the JKKK needs to be carried out.

Women’s leadership role in the farmers associations is minimal due in part to the traditional role of rural women and the gender insensitive nature of the organisational set-up of the institution itself. In 2000, although female members comprise 25.1% of the total membership, women only make 4.2% of the Boards of Directors.<sup>194</sup> In the National Farmers Association (NAFAS), as at 2003, there was one woman board member out of the total 11.<sup>195</sup> While membership is accessible to anybody “involved with agriculture” without any specification on the magnitude of involvement, this has resulted in the institution turning into another political platform at the grassroots level feeding the political dominance of men and further marginalising women members. This limited role of women at the policy planning level of the farmers association has impacted the programmes designed for the women farmers negatively. They are not recognised as *bona fide* farmers and are not targeted as recipients of technology transfer in agriculture and participants in commercial farms. Their traditional active role in primary food production is further eroded with the increasing identification of rural women with food processing activities. While efforts appear to have been made to promote women’s participation in the farmer’s associations, the disappointing result is perhaps due to more than just a lack of interest. There is a need to identify

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<sup>192</sup> Wanita UMNO is the Women’s Division of the United Malays National Organisation, the main Malay political party in Malaysia.

<sup>193</sup> As at December 2003.

<sup>194</sup> Statistics from the National Farmers Association.

<sup>195</sup> Ibid.

the obstacles and strategise ways to increase women's participation in the farmer's associations both as members and leaders.

### 1.5 Limited access to skills training and extension programmes

In Malaysia, there is a strong government extension education and training programmes for rural women, offered by government agencies under the ministries of rural development, agriculture and health. The extension (non-formal education) programmes offered by government and non-government agencies have reached approximately 210,000 women. There is however the question of who provides programmes for women who are not clientele of certain government agencies, NGOs and political parties?

The Government Report focuses mainly on clientele of women specific programmes offered by agencies under the three ministries ((agriculture, land and rural development) such as DOA, Farmers' Organization Authority (FOA), Federal Land Development Authority (FELDA), Federal Land Consolidation and Rehabilitation Corporation (FELCRA), Rubber Industry Smallholder Development Authority (RISDA) and the Community Development Department (*Jabatan Kemajuan Masyarakat*) KEMAS. With the exception of KEMAS, each of the agencies target specific groups of rural women defined by their primary agricultural activity. Theoretically, KEMAS of the Ministry of Rural Development is not tied to a specific target group but the emphasis is more on community development and is strongly affiliated to the ruling party. In addition the Ministry of Rural Development have several Regional Development Authorities (RDAs) that spearhead developments in designated areas earmarked for development. The primary focus of these RDAs is infrastructural development and coordination of the services of line agencies.

**Rural Women Participation in Extension and Training, 2000<sup>196</sup>**

	Agensi	Total number of clientele families	No of women's groups	Membership
1.	DOA (Peninsula)	478,000 (1990 census)	1,364	34,097
2.	FOA	589,858	142	35,282
3.	RISDA	341,694 (1992 census)	673	13,674
4.	FELDA	256,000	324	113,000
5.	FELCRA	73,580	81	14,383
		1,730,132	2,584	210,436

<sup>196</sup> Composite report prepared from submissions of participating agencies (DOA, FOA, RISDA, FELDA and FELCRA)

	<b>Total</b>			
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The above data shows that only a small proportion of rural women are reached by agricultural development programmes; this is estimated at around 12% of the target families and 5% of the total 4 million rural women in government statistics. This means a majority of rural women from the farming communities do not benefit from the family life education and agricultural extension programmes. Furthermore, owing to the fact that the target groups of most of the government agencies overlap, with the exception of FELDA which is exclusive, there is considerable duplication of the beneficiaries and therefore the actual figures are less than the cumulative reported by the different agencies involved.

A more serious consideration is that rural women or their families who do not own any piece of land, or belong to any political parties or NGOs, probably do not receive benefits or have access to such programmes offered by government agencies, NGOs and political parties. They are more often overlooked and not accounted in government statistics; they remain invisible. The success of the Amanah Ikhtiar Malaysia (AIM)<sup>197</sup> project among the women in the rural areas lends credence to this belief as women had few opportunities to improve their livelihoods, they were eager to participate and maintain their credit rating to continue with this project.

### 1.6 Access to agricultural credit and loans

The government report referred to the highly successful micro-credit programme (inspired by the Grameen Bank concept) wherein rural women form the bulk of the beneficiaries. However, this programme has its setbacks that in effect threaten the real success of the programme. It has been reported that husbands were encouraged to start small businesses by getting their wives to apply for micro-credit schemes<sup>198</sup>. There is also the issue of the extent to which these schemes actually empower women beyond merely providing financial assistance. Such effects, if left unchecked undermine efforts to empower rural women who continue to be subservient to their husbands and lose the opportunity to be truly independent from an economic and social perspective.

### 1.7 Self Help Groups

As indicated in the government report, there are several women's groups operating in the rural areas under the aegis of various agricultural and rural development agencies. Unfortunately, most of these organisations do not have a formal vertical structure that will afford the rural women a collective voice, and the government report while acknowledging the lack of rural women in decision-making positions, has not offered a viable solution to this gap. The Women's Institute (WI), a nationwide organisation

<sup>197</sup> The Amanah Ikhtiar Malaysia (AIM), a microfinance NGO for poverty eradication, targeting women in Malaysia..

<sup>198</sup> UNFPA-97 field data from project on "Enhancing Family Health Status Through the Promotion of Gender Sensitive Healthy Living Practices".



which has been in existence since the early days of independence is an exception but unfortunately in recent years they have not featured very actively in the rural context.

### **1.8 Health status of rural women**

While much is said of the achievements in terms of health infrastructure and programmes, there is a concern whether specific health issues of rural women are being identified and dealt with satisfactorily: these include health concerns of aged women, victims and care givers of drug abusers and HIV/ AIDS. For example, a study conducted in Kemaman, Terengganu indicates that wives of fishermen were found to be vulnerable to HIV/AIDS infection.<sup>199</sup>

The issue of access to health facilities also need to be highlighted. While a high percentage of the rural population live within a 5 kilometre radius of a static health facility, the triple role of women as mothers, wives and productive labour, as identified in the government report, raise a concern of whether women are actually able to find the time and have the resources to access this facility. Data on the number of rural women who have actually used the facility and for what concerns would be useful information in determining the true status of women's health in the rural sector.

### **1.9 Poverty**

While the government report identifies the Hardcore Poverty Programme that aims to improve the living conditions of the hardcore poor through housing subsidies, free textbooks, food subsidies and scholarships, no mention is made of who exactly and how many have benefited from this programme. There are specific pockets of rural women living in poverty. Although there are gender issues that single out rural women, poverty however appears to be the root cause of a lot of the problems. That being the case it is very difficult to extricate gender issue from poverty. So any form of gender discrimination only exacerbates the poverty issue.

#### ***Women headed households***

In some states in Malaysia, there are more than 20% of small holder farm families that have women headed households.<sup>200</sup> The impact of marginalising rural women workers is most severe in these households and is perhaps one of the reasons why rural poverty among women headed households continue to exist despite the government's efforts to alleviate poverty in the country. The incidence of poverty among women headed households increased from 15.1% in 1997 to 16.1% in 1999.<sup>201</sup>

## **2. Estate Women**

Post independence saw the fragmentation of many estates, especially those that once belonged to the colonial powers. Currently there are about 300,000 estate workers, half of

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<sup>199</sup> Vulnerability of Rural Women: A Baseline Study of the Level of Knowledge and Attitude Towards HIV/AIDS Among Women in Three Villages in Kemaman, Terengganu Malaysia, presented at the 6<sup>th</sup> International Congress on AIDS in Asia and the Pacific, 2001.

<sup>200</sup> Department of Agriculture (DOA), Agricultural census, 1990.

<sup>201</sup> Eighth Malaysia Plan (2001-2005), Chapter 20 Women and Development, para 20.20

which are women. With rapid urbanization, the younger population of the estates also began to migrate to the urban centres seeking greener pastures. Although there has been some improvement to life in the estates, the main characteristic of the estate as being poor and the lack of opportunities compared to the mainstream population in the urban areas, remain true until today. A common feature of estate life is poor social and health facilities. The main concern of any private enterprise, such as the estate, is profit. Therefore although the workers are provided with basic facilities like housing, water, electricity, clinics and schools, the provisions are limited and standards far from satisfactory.

## **2.1 Employment and wages**

Women in estates can seek various types of employment related to estate work, such as rubber tapping, application of pesticides and weed-killers, oil palm harvesting for young plantations and collecting fruit bunches. These are heavy work-loads and some pose health hazards for women. The application of pesticides for instance can have a negative impact on the health of women later on in life, especially in relation to their reproductive health.<sup>202</sup> Women who are nursing young children are therefore not able to take up most of these jobs. The most they can do is to run child minders or crèches in the estates. Other job opportunities are hard to come by as the estates are usually away from town centres. While there is equal wage for equal work, men usually can earn more due to the physical nature of available work being more suitable for men. As a lot of rubber estates are being converted into oil palm, the older generation of workers cannot cope with the heavy duties associated with oil palm estates. Crop conversion cannot be helped as estate management tries to maximize profit in a very competitive global market. In the process older workers, both men and women especially, suffer the consequences.

Poverty remains the main issue for estate women. Although there is now a safety net for them with a guaranteed monthly income of RM325, the amount is considered too low and single wage earner families still live below the poverty line.<sup>203</sup> Although estate workers have free housing, water and electricity that contribute towards improved real income, the quality and consistency of these facilities can be erratic.

## **2.1 The right to adequate housing**

Housing has over the years been a crucial issue for the estate communities. The change over to industrialization in the 1980s has seen many plantation companies selling or developing their land. This resulted in numerous forced evictions of terminated estate workers who had over the years, and in some cases for generations, lived on the estate land. Many refused to accept the offer to purchase low-cost houses at a price that was beyond their means and instead chose to challenge and draw accountability from their employers for past promises of housing should the estate be developed. Documentation of this issue has identified in many instances, women at

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<sup>202</sup> Tenaganita and Pesticide Action Network (PAN) Asia and the Pacific, "Poisoned and Silenced: A Study of Pesticide Poisoning in the Plantations", March 2002

<sup>203</sup> "Still mired in poverty despite 'historic' deal", New Straits Times, 27<sup>th</sup> April 2003

the forefront of the community's struggles: The Breamer Estate in Selangor and Ladang Stratshila in Perak are examples of such cases.<sup>204</sup> These women are workers/ex workers of the plantation, many of whom are widows and, as in the case of the Breamer Estate, elderly women who for 10 years fought for their right to housing.<sup>205</sup> The right to adequate housing is also a critical issue for female headed households within the estates.

### **2.3 Health concerns**

Women in estates are employed for rubber tapping, the application of pesticides and weed-killers, oil palm harvesting for young plantations and collecting fruit bunches. Much of the work is heavy and involves the application of hazardous materials which pose a health hazard for women, especially in terms of reproductive health.<sup>206</sup> Inadequate protective gear such as gloves, overalls, boots and respiratory equipment appears to still be an issue even though for some of the herbicides, the usage of protective gear is mandatory. Young children and families of the pesticide sprayers are also exposed to pesticides daily due to the proximity of their homes to the field.<sup>207</sup> Existing estate clinics are still not upgraded to the level of district hospitals. The clinics offer child and maternity services that cater to the needs of pregnant women. However work related health problems may be overlooked. Since better health services are only available in towns, most women are reluctant to go as such visits cost money and time. While work related accidents are covered under SOCSO, health hazards that emerge later in life due to long time exposure to chemicals pose a problem for the women and their families.

### **2.4 Social Problems**

The estate culture is rather dismal. There have been a number of cases of abuse against women, suicides and alcoholism amongst men. This could be due to the hard life they lead and also lack of proper social and cultural outlets. When their youth migrate to the urban areas, their feelings of deprivation are aggravated and the lack of conduit for better work opportunities may have led them to be involved in criminal activities, often highlighted in the local media.

## **3. Indigenous Women**

Indigenous communities in Malaysia exist within the Peninsular and in West Malaysia (i.e. in Sabah and Sarawak). The Orang Asli (original people) from Peninsular Malaysia is a collective term for 19 ethnic sub-groups located in the Peninsular Malaysia which represent a mere 0.5% of the national population. Women make up about 49% of this

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<sup>204</sup> Documentation by groups such as Community Development Centre (CDC) and SUARAM has highlighted these struggles.

<sup>205</sup> In a landmark deal, this struggle was concluded in 2003 with the developer providing each worker free low cost housing as promised. The women who lead the struggle won the Malaysian Human Rights Award for 2003.

<sup>206</sup> Tenaganita and Pesticide Action Network (PAN) Asia and the Pacific, "Poisoned and Silenced: A Study of Pesticide Poisoning in the Plantations", March 2002.

<sup>207</sup> *ibid.*

community.<sup>208</sup> The indigenous communities of Sabah and Sarawak are similarly varied. In Sabah, there are 38 different ethnic groups, while in Sarawak there are about 37 ethnic groups.<sup>209</sup>

There is little official data on the position of indigenous women in Malaysia and the government report does little to offer further insight into their status and position the society. Critical concerns for this category of women include the fact that women of these communities lie at the intersection of discriminatory policies against indigenous peoples and discriminatory attitudes towards women and as a result have a greater burden to overcome.

### 3.1 Land rights and the effects of resettlement

Land issues are of great concern for the indigenous communities of Malaysia. There is a famous quote by an Orang Asli captured by Iskandar Carey, “The town belongs to the Chinese, the village belong to the Malays, the jungle belongs to us. You take away our jungle we have nothing left”. This poignant statement made by the Orang Asli sums up their predicament. The traditional perception of land for the Orang Asli is that it is communal property with individuals owning the crops they cultivate. However, the laws that exist have the potential of depriving the community of their land. The Aboriginal People’s Act 1954 exploits the traditional land concept by allowing State authorities to only gazette land as Orang Asli areas and reserves but not to alienate land (i.e. give titles) to Orang Asli. Further, the State Authority may require by order, the community to leave the area offering compensation at its discretion for the loss of crops but not of the land.<sup>210</sup> With development steadily encroaching into the jungle, the Orange Asli are being pushed further and further into the interior.

In Sarawak, a major concern has been the resettlement of the indigenous communities to make way for the development of hydro-electric projects. Classic cases are the Batang Ai resettlement scheme in the 1980s and the Bakun resettlement scheme that began in the late 1990s. In Sabah, native customary lands of the indigenous communities are being taken for big development projects like plantations. There has been much concern of the processes adopted in such instances: issues of lack of consultation with the relevant communities and adequate compensation have been raised by NGOs.

All of these have a major impact on the women of these communities who face all the implications of displacement. When land is taken away and these communities are pushed further interior, this increases for women the burden of production and reproductive work. Loss of easily accessible resources for food, medicine and material for handicraft from the forest, river and loss of land for farming mean women have to walk farther to collect forest produce and complete their daily chores. Once resources are too far away or dangerous for them to get to, the traditional role

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<sup>208</sup> Colin Nicholas, *Orang Asli Women and the Forest*, 2003, pg.3

<sup>209</sup> All Women’s Action Society (AWAM) and National Women’s Coalition, *For Land, For Life* (not dated)

<sup>210</sup> Ibid.

of women in gathering forest produce for food and craft gets taken over by men who have more access to the market economy.

If they are sick, have problems with childbirth or have a medical emergency, they are unable to access hospitals themselves due to the distance. If women need to attend to official matters, e.g. obtaining documents for their land, birth certificates or identity cards for themselves or their children, the distance, coupled with poor infrastructure hinders them, resulting in women not having any legal documents. Without access to transportation, which either is not available or monopolised by the men, women find themselves house bound and the sole carers of the children and elderly. “What was a more egalitarian way of life, where productive and reproductive roles were shared more equally, is fast becoming one that favours men as “heads”.<sup>211</sup> “The net result for women is that it has reduced, and will reduce, their significant role as producers, carers, educators, holders of communal knowledge, and guardians of culture. Instead, increasingly housebound, limited and dependant, they become marginalised members of the community with reduced decision making power, little bargaining power and diminished respect and status.”<sup>212</sup>

### 3.2 Economy: Wage discrimination and non recognition of women’s work

In Peninsular Malaysia, there are now many Orang Asli women who seek work outside of their community. Due to their poor education and skills, most of them are hired as casual labour in plantation and farms. Jobs taken up include digging, applying fertilizer, harvesting fruits, digging up tubers (cassava, sweet potato) and carrying loads. As casual labourers they are usually unprotected, hired and fired at the fancy of the employer. A study done among the Semai community shows that Orang Asli women suffer from double discrimination; firstly they are paid less than non-Orang Asli workers, and secondly they are paid less than their male counterparts.<sup>213</sup>

With the liberalization of foreign labour intake into the work force, the Orang Asli suffer further discrimination as local employers opt for the better skilled and “easier” to manage foreign workers.

The resettlement schemes in Sarawak have also left many concerns for women in terms of work. Most of the handiwork involved in producing *rotan* (cane) based items like mats, baskets for sale or use is done by the women of the community. However in one of the resettlement schemes it was documented that due to the distance, it is harder to get the material needed and the fact that the women have to travel far to obtain it means they are dependent on the men in the community who have access to transportation<sup>214</sup>. In addition to that, there is a concern that there will be insufficient work on nearby plantations to sustain the resettled communities leaving the women

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<sup>211</sup> SUARAM, Final Report of the Fact Finding Mission: May 7-14 1999, *Empty Promises, Damned Lives, Evidence from the Bakun Resettlement Scheme in Sarawak*, 1999, pg.37

<sup>212</sup> Ibid.38

<sup>213</sup> Colin Nicholas, *Orang Asli Women and the Forest*, 2003, pg.100.

<sup>214</sup> SUARAM, Final Report of the Fact Finding Mission: May 7-14 1999, *Empty Promises, Damned Lives, Evidence from the Bakun Resettlement Scheme in Sarawak*, 1999, pg.38

and younger generation to seek work in urban areas where they will be vulnerable to exploitation and unfavourable conditions of work.<sup>215</sup>

In Sabah, where the population is predominantly living in rural areas, rural women represent an integral part of the economy, participating in agricultural production, fishing and the managing the households. Women in this sector also dominate the village-level handicraft industry for sale and self consumption. Women are also the bulk of the traders at the weekly markets selling products (agriculture, handicraft and food).<sup>216</sup> However, despite this, their work remains “invisible” with official statistics failing to recognise their contribution. This has its implications for the status of women in the sector.<sup>217</sup> Development projects are targeted at men, agricultural extension workers approach the men of the households to offer services and projects that are actually reserved for women invariably revolve around teaching skills and improving their roles on the domestic front as wives and mothers.<sup>218</sup>

### **3.3 Health concerns**

It is vital that the government report specifically on the health status of this community and provide up to date statistics on all the health indicators of indigenous women. It was reported that in 1994, out of 42 women who died in child labour, 25 (60%) were Orang Asli women.<sup>219</sup> As a result of the risks at birth, the state has introduced a system of “birthing” whereby a pregnant woman is forced to stay at the hospital for a month prior to delivery. No woman is permitted to deliver at home. Apparently such a move is not well received by the women as it separates them from the families and they feel alienated within the hospital environment. While the intention of this “birthing” concept is good, maybe it should be reviewed and a better response developed to accommodate the sensitivity of the Orang Asli women.

The maternal-child health services provided by the state are commendable throughout the country. However it seems that the women who do not fall under the category of pregnant or nursing a baby tends to escape from the health screening. So the women suffer from all sorts of diseases like tuberculosis, malaria, leprosy, cholera, goitre, typhoid, measles and whooping cough. As a whole, the Orang Asli face greater health problems especially for those who live in the interior due to poor access to proper health systems.

The degradation of the natural environment has affected the women’s health. In the past men and women use to forage from the jungle all kinds of herbs, fish and animals for food. The pollution of the rivers, especially by logging has destroyed the

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<sup>215</sup> Ibid. 39

<sup>216</sup> Sabah Women Action Resource Group (SAWO), *Women in Sabah: Needs, Concerns, Aspirations*, 1992, pg. 23-24.

<sup>217</sup> Ibid. 24

<sup>218</sup> Ibid. 24-25

<sup>219</sup> Nicholas, Colin, “The Context of Orang Asli Poverty: Orang Asli Social Indicators”, Briefing paper prepared for the sub-committee on poverty eradication of the National Economic Consultative Council (NECCII), EPU. Statistics quoted from The Sun 28<sup>th</sup> September 1996

rich source of protein from the river. It is a case of double jeopardy for the women as their natural source of protein is destroyed and they do not have the cash or knowledge to buy protein rich food from the market. There is also concern for the levels of HIV/ AIDs and other sexually transmitted diseases for without adequate knowledge and education, members of the community are vulnerable both when they enter the urban setting and when outsiders enter their community.

### **3.4 Education**

The state has made provisions for free education up to secondary levels and also easy access to loans for tertiary education. However for the Orang Asli, being poor and living at the outskirts of towns, even in the far interior, they have not been able to reap the benefits of the education system. As a group there is a very high drop out among the Orang Asli children. The dropout rate is anything between 50%-60%.<sup>220</sup>

In Sabah it was discovered that the majority of rural students find it difficult to continue their education. Girls are also more likely to have limited access to education due to social and economic pressures and as a result make up the higher number of drop outs and illiterates.<sup>221</sup> It is imperative that current statistics are put together to identify the extent of the problem in both Sabah and Sarawak and formulate adequate responses.

### **RECOMMENDATIONS TO THE GOVERNMENT**

1. Review, formulate and integrate gender perspective in development policies and programmes for the rural sector (especially in the 9<sup>th</sup> Malaysia Plan), based on the rights and needs of the rural, estate and indigenous communities; placing them at the centre of all development policies through open discussions and consultations.

### **Rural Women**

2. Women's active participation in rural and agricultural economies should be acknowledged, incorporated and highlighted in all national agricultural policies and programmes on rural development. The role of rural women in food production and food security should be identified and strategies emplaced to empower women farmers to become viable women agriculture entrepreneurs.
3. The new Ministry of Women, Family and Community Development (MWFCDD) to monitor that rural women are not being marginalized at all levels of the programme planning and implementation: to initiate gender sensitisation programmes at all levels of the government machinery and set up well publicised complaints bureau or mechanism.
4. The Ministry of Agriculture and Agro-based Industry and the Ministry of Rural and Regional Development to target women (at least 30%) as active participants and beneficiaries of agricultural technology and agro-based commercialisation

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<sup>220</sup> Hassan Mat Nor, *Kajian Keciciran Di Kalangan Pelajar Orang Asli Peringkat Sekolah Rendah*, 1997

<sup>221</sup> Sabah Women Action Resource Group (SAWO), *Women in Sabah: Needs, Concerns, Aspirations*, 1992

programmes; engage women in decision-making positions at all levels in agencies and committees on programme planning and implementation especially in primary food production as well as in downstream activities.

5. To ensure that **women are included in Entrepreneurial and Techno-preneurial Development programmes** for small and medium scale enterprises, taking into considerations the differences between needs of men and women; and to provide technical as well as managerial supports throughout the development process, from infancy to full-pledged stage of enterprise development. Women graduates in bio-industry, agriculture and related fields such as animal husbandry / livestock management, fishery / aqua-culture as well as in food processing should be targeted as potential apprentice for entrepreneurial and techno-preneurial development programmes.
6. Women engaged in agriculture and agro-based micro-enterprise as well as small scale entrepreneurs, must be empowered with the technical know-how, management skills and be able to access and utilize the credit facilities available such as the Fund for Food program under the Agriculture Bank. In the spirit of CEDAW, the onus is upon the agencies and institutions serving the rural population to open a window for rural women to have access to training in agricultural technology, modern management and communication skills and credit facilities.
7. Promote and empower women to become members of Extension Group Farming (currently male-dominated) so as to enable them to access new technologies, modern farm management and other resources currently enjoyed by male members. It should be noted that there are “women farmers” and non-farmers involved in food processing as well as producing crafts. Opportunities and support should be given to women farmers as individuals to join the Extension Group Farming, or to members of Women Extension Group, who choose to change or diversify their production activities into “mainstream agriculture”, i.e. in food production which include livestock rearing, horticulture, floriculture, aquaculture, ornamental/aquarium fish etc.
8. Review the membership criteria in the farmers associations and revert to the initial condition that only *bona fide male and female* farmers are allowed to join as ordinary members to ensure that the interests of farmers and their families remain the priorities of these associations. Some countries stipulate that at least 50% of the family income should come from agriculture related activities as a precondition for membership.
9. Consolidate the various government extension programmes for rural women to avoid unhealthy rivalry, conserve scarce resources and extend the reach of the services to benefit more women especially the women from poor landless families.
10. Strengthen the self-help organisations by providing them with the necessary resources and infrastructure and study consolidating the various agricultural based



women's groups under an umbrella body to impact the development planning and implementation process effectively.

11. Rural women must be educated on health issues, especially STIs and HIV/AIDs. The dissemination of knowledge relating to HIV/AIDS should be an integral part of the education package of programmes targeted for rural women and girls.

#### **Estate Women**

12. Monitor the standard of housing, health, education facilities provided by the private corporations for their plantation workers to ensure adequate provision and access to services and facilities.
13. The Ministry of Agriculture, through the Pesticide Board, to monitor the compliance of plantations on usage of pesticides in the estates. Women workers must be made aware of the danger and supplied with the necessary protective gear. Estate clinics should be upgraded equal to district hospitals and there should be regular monitoring of women's reproductive health besides maternal care services.
14. Estate women should be given family life education training, especially in nutrition, health and general money and household management. Pregnant and nursing mothers should be provided with free supplementary nutrition.
15. Estate women, who are not able to be employed in the plantations should be given the opportunities to do home-based contract work to earn extra income. There should also be a study on the sufficiency of the recently established minimum wage for plantation workers.
16. To monitor agreements made with plantation workers on security of tenure, relocations, housing and compensation and that further development plans of plantation estates are sustainable and ensure social, gender equality in activities implemented.

#### **Indigenous Women**

17. To develop strategies that integrates the concerns of indigenous women without alienating them from their culture, traditional source of sustenance and psychological well-being: Initiatives that attempt to reduce poverty, ill health and low educational status need to take into account the sensitivities of the group and ensure sustainable livelihoods for the indigenous women and their families.
18. Carry out comprehensive and gender sensitive development efforts to increase subsistence, income levels, entrepreneurship and participation among indigenous women. Strengthen the monitoring role of government agencies charged with the development of land to ensure sustainability, social and gender equality.

19. Facilitate participation of indigenous women in decision making and development planning at all levels and within all societal structures. Consultation and discussion should be the basis of settlement.
20. The family life education training under the JHEOA is an important channel to positively influence the well being of the Orang Asli women and their families, and as such should have access to expertise and resources that can assist in strengthening their educational programmes. The facilities and expertise in the other government agencies serving rural women in the country should be tapped for a start.
21. Indigenous women must not only have access to land but must also be given ownership of titled land. Land titles must be given not only to male heads of households but must be co-owned by the wife. There must be adequate compensation if their family land is relinquished for government projects.

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## ARTICLE 15 EQUALITY IN THE LAW

As already stated in the chapter on articles 1-4 of this shadow report, Malaysia has yet to pass any legislation to adopt fully the provisions of the CEDAW Convention but instead opted to give effect to it in a piecemeal fashion which has resulted in continued gaps and contradictions in the implementation of the CEDAW Convention.

### CRITICAL AREAS OF CONCERN

#### 1. Equality before the law

The constitution of Malaysia only protects women from discriminatory acts by the government pursuant to Article 8(2) of the *Federal Constitution*.<sup>222</sup> Fundamental liberties as enshrined in article 8(2) (prohibition of discrimination on the grounds of gender) does not extend to the protection of a person against gender discrimination by a non-state actor.

In any event, article 8(2) exempts discrimination entrenched in the Constitution and the Constitution itself allows discrimination against women in articles 15, 24, 26 and the Second Schedule.<sup>223</sup>

#### 2. The validity of contracts and private instruments that discriminate against women

It is worth noting, as mentioned in the government report,<sup>224</sup> that while the language of the Contracts Act 1950 is gender neutral, it does not contain any specific provision to render void any contracts and/or other private instruments which have the effect of discriminating against women, for example in the case of employment contracts.

The government report does not address the issue of whether contracts that perpetuate gender discrimination could be void. While Section 24 of the Contracts Act provides that a contract can be deemed void if the object and consideration of the contract is unlawful in full or in part, there has been no instance when this provision was used to invalidate a discriminatory contract.

However, before deeming whether to invalidate any contract, the courts must first recognize and determine what discrimination is. In holding that Malaysia Airlines did not discriminate against women when it prohibited its female flight attendants from becoming pregnant, the Court of Appeal said, “in any event, we do not think it can be argued that art. 2(3) of the First Schedule of the collective agreement is discriminatory

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<sup>222</sup> See *Beatrice Fernandez v Sistem Penerbangan Malaysia* [2004] 4 CLJ 407 where the Court of Appeal held that “it is elementary that constitutional law is a branch of public law” and therefore did not protect the plaintiff from discriminatory acts of another private individual.

<sup>223</sup> See the chapter on articles 1-4 and 9 of this shadow report for further details.

<sup>224</sup> Malaysia Report to the United Nations Committee on the Elimination of Discrimination against Women (First and Second Report), Ministry of Women, Family and Community Development, December 2004, paras 359

just as it cannot be reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory against men”.<sup>225</sup>

The Federal Court, in deciding not to grant leave to appeal, went further to say that constitutional equality [article 8(1) provides that every person is equal before the law and entitled to equal protection of the law] extends only to persons in the same class and unless and until the *Employment Act 1955* is amended to expressly prohibit any term and condition of employment that requires flight stewardesses to resign upon becoming pregnant, such clauses are subject to our *Contracts Act 1950* and continue to be valid and enforceable”.<sup>226</sup>

Likewise the decision also puts into question the level of protection afforded to women in terms of maternity benefits. The government report referred to this benefit but has again failed to point out that while the *Employment Act 1955* compels employers to provide maternity benefits to women, the courts have held the provision not to mean that the same employers are prohibited from stipulating that any employee who becomes pregnant shall be dismissed from employment.

Thus it has now become critical that the principles of non-discrimination under CEDAW be immediately adopted by domestic legislation and gender equality / gender anti-discrimination legislation be forthwith enacted.

### 3. Legal status, rights and obligations of Married Women

The *Married Women Act, 1957*<sup>227</sup> mentioned in the government report,<sup>228</sup> while accords married women the status of *femme sole* under the law, qualifies the position for married Muslim women. Section 3 of the *Married Women Act* states that the status, rights and obligations of married Muslim women and their property is subject to the Islamic Law and the customs of the Malays governing the relations between husband and wife in the states of Johore, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur. In the remaining states of Malacca and Penang, Muslim women's rights are subject to the Islamic Law of the state in all cases to which Islamic Law extends.

The qualification to the *Married Women Act* seems to illustrate a typical attitude that appears to confuse Victorian notions with Islamic notions. There should be no need for such qualification in respect of Muslim women, as Islamic law has always recognized the married women's rights of property and powers of contract, long before such recognition was accorded under English law upon which the civil law is based. The English law only

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<sup>225</sup> See *Beatrice Fernandez v Sistem Penerbangan Malaysia* [2004] 4 CLJ 407 where the Court of Appeal held that “it is elementary that constitutional law is a branch of public law” and therefore did not protect the plaintiff from discriminatory acts of another private individual.

<sup>226</sup> *Beatrice Fernandez v Sistem Penerbangan Malaysia* [2005] 2 CLJ713. The case is more fully discussed in the chapter on articles 1-4 of the NGO Shadow Report

<sup>227</sup> The Act initially prohibited legal action between spouses except for the protection of property (and not person) and was amended in 1994 to make way for the Domestic Violence Act which allowed victims to claim compensation for injury caused by her/his spouse.

<sup>228</sup> Para 360

began to recognize such rights through the enactment of a series of statutes in the late 19<sup>th</sup> century, e.g. the Married Women's Property Act of 1882 in England.

During the British colonial era, in a case in the 1860s, Chulas vs. Kolson<sup>229</sup>), it was observed by a civil court in the former Straits Settlements that

*"... the rule of English law which vests in the husband various rights in the property of his wife were inapplicable in a Mahometan (sic) marriage ... her right of property and her powers of contract are unaffected by the marriage; under Mahometan law she remains in this respect like an English feme sole".*

There has been much uproar over the campaign to acknowledge marital rape as a punishable crime with accusations and claims that it will ruin the marriage institution and goes against Islam. JAG-VAW in their memorandum to the Special Select Committee on Penal Code and Criminal Procedure Code submit as follows:

*"The myth that a husband is unable to rape his wife due to irrevocable licence for sex as provided under the Penal Code finds its basis not in the laws of Allah (swt) but in English common law prior to the 1800's. In their justification for not recognising marital rape, English law lords often quoted East in his Treatise on the Pleas of the Crown, "a husband cannot by law be guilty of ravishing his wife on account of the matrimonial consent which she cannot retract". In perpetuating this myth, Muslims are justifying and keeping alive a myth created by Victorian Englishmen (and their forefathers) who viewed women as little more than property, a view certainly rejected by Islam. Sûrah an Nisa 4.19 commands, "O ye who believe! Ye are forbidden to inherit women against their will..."*

#### **4. Ownership and recognition of interest in property**

CEDAW recognises that formal equality does not necessarily result in substantive equality. As stated in the government report<sup>230</sup>, Malaysia adopts the Torrens system of land registration. Thus the duly registered owner of any property would be deemed its legal owner, regardless of gender. However it is a norm for the matrimonial home to be registered solely in the name of the husband, even where both spouses may have contributed to the payments thereof.

Section 323 of the *National Land Code 1965* allows for the filing of a private caveat over a piece of property by:-

- “(a) any person claiming title to or registrable interest in land or any right to such title or interest;
- (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
- (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b)”

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<sup>229</sup> (1867) Leic. 460

<sup>230</sup> Ibid. Para 362

The effect of filing of a private caveat serves as notice to the world of the caveator's interest therein and prevents the registration of any transactions in the subject property without the knowledge of the caveator. However as a wife would only have an equitable (and not legal and hence registrable) interest in the property this interest may not be deemed sufficient for the purposes of lodging a caveat against the matrimonial home. While not discriminatory on the face of it, nonetheless in view of cultural norms the amendment of the National Land Code to recognize the rights of spouses and children would go far to redress the situation.

## 5. Legal System

In considering the legal system, the government report should take into account the fact that under the Federal Constitution a plural legal system operates in Malaysia. In Peninsular Malaysia, *syariah* law applies to the personal law of Muslims while the civil law applies to Muslims in all other respects and to the Non-Muslim populace in general. In East Malaysia both *syariah* law and the civil law apply, but there is an additional provision for native customary law and legal system which have jurisdiction over native laws or customs where at least one of the parties is a native.

### 5.1 Federal and state jurisdictions

As a Federal state, power is distributed between the federal and the state governments in accordance with Article 74 of the *Federal Constitution*. The Ninth Schedule of the *Federal Constitution* sets out matters within the Federal and State jurisdiction: The Federal government has jurisdiction over matters which include internal security, civil and criminal law, administration of justice etc.<sup>231</sup> While the State has jurisdiction over matters that involve amongst others, Islamic law, Malay custom, personal and family law, offences by persons professing Islam, and the *Syariah* Courts.<sup>232</sup>

In general except for an effort initiated in early to mid 1980's there has been little attempt by the respective states to codify a standardised *syariah* law. The unavailability of a standard registry also complicates registration of marriage and divorce and all but makes searches on marital status impossible particularly in a system that allows polygyny and given the modern mobility of Malaysians. Although there is talk of the Federal Legislature requesting states to consent to a uniform Islamic law for the whole federation, Islamic law in Malaysia varies from State to State and the organisation, structure, jurisdiction and powers of each *Syariah* court is also confined to its own territory.

Difficulties have arisen due to the issue of overlapping jurisdiction between the State & Federal legislative authority and between the *Syariah* and Federal court system, as well as from the existence of the Native Court system. For example, in 1993 the legislative assembly of the state of Kelantan, ruled by the Islamist opposition party, passed a Bill governing Islamic criminal law (*Hudud* offences under *Syariah* law) although the bill has yet to receive the assent of the Sultan and therefore has not passed into law. In July 2002, the Terengganu State Legislative Assembly, then also

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<sup>231</sup> Federal Constitution, List I of the Ninth Schedule

<sup>232</sup> Federal Constitution, List II of the Ninth Schedule

ruled by the opposition Islamist party, passed the *Syariah Criminal Offences (Hudud and Qisas) Bill 2002* despite widespread protests from women's groups and NGO's throughout Malaysia. These laws are generally viewed as being highly discriminatory towards women and it is feared that if passed into law it may result in abuse and injustice towards women.

Among the provisions which are viewed to be discriminatory to women are the following:-

- (i) that the law recognises only the testimony of upstanding Muslim men to any crime;
- (ii) that a woman who fails to obtain a conviction of her rapist may be charged for qazaf [false accusation of illicit intercourse (zina)] and liable to whipping of up to 80 strokes; and
- (iii) that an unmarried pregnant woman who fails to prove that she was raped may be liable to be charged with zina (illicit intercourse) which carries the penalty of stoning to death.

Due to the uproar, the Bill has since been amended to include rape provisions as defined in the *Penal Code*, although these are the very provisions which women's groups are seeking to amend.

The Federal Government has clearly stated that it views the Bill to be unconstitutional, as it covers criminal matters, which are within the Federal List. Yet, argued the Islamist party, the governing political party have themselves been guilty of enlarging the jurisdiction of *syariah* law by including criminal provisions such as incest, illicit sex (so far as it can be applied to rape), prostitution, pimping, sodomy and gambling - all of which are crimes under the *Penal Code* or other Federal law and within the jurisdiction of the Federal government. The Minister in the Prime Minister's Department, Datuk Seri Dr. Rais Yatim, was quoted as saying: "Technically I have to agree, those offences you have mentioned should not be there; but the states were allowed to legislate on them, albeit with lesser penalties, leaving us in a curious position now."<sup>233</sup>

## 5.2. Administration of Estates

The government report<sup>234</sup> also refers to the *Probate and Administration Act 1959* which regulates the management and administration of testate and intestate property. It is important to clarify that while probate and administration of estates falls within the purview of the Federal legislature, the law of succession affecting Muslims is determined by the *syariah* law implemented in each State. Thus while the *Probate and Administration Act 1959* and the *Wills Act 1959* do not discriminate on grounds of gender, in *syariah* law, a Muslim male beneficiary is entitled to twice the share of a female beneficiary. Therefore male children are entitled to inherit twice the share of female children. Even if a Muslim desires to correct this bias, he can only will away a maximum of 1/3 of his estate (which is still open to challenge by his beneficiaries if it is deemed to be an attempt to circumvent the entitlements). The issues affecting the

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<sup>233</sup> The Star Newspaper, 6<sup>th</sup> August 2002

<sup>234</sup> Ibid. para 363

administration of Muslim estates are examined in greater depth hereinafter, under Article 16 of the CEDAW Convention.

### **5.3 Native customary laws**

In the two States of Sabah and Sarawak where native customary law applies, the situation is even less certain. There are many native communities - in Sabah alone 39 different ethnic groups are recognized - all of which have their own set of customs. In Sabah, although some native law and customs have been incorporated into the formal legal system of the State, much that has been formalised deals with administrative aspects, leaving the actual content of the law to local interpretation and practice.<sup>235</sup> Additionally many native laws are not codified, leading to uncertainty on jurisdictional and content issues. Native Courts in the districts are headed by native chiefs assisted by the village head and appeal lies to District Officers and ultimately to the Native Court of Appeal, which is presided over by a High Court judge. However many native customary laws are discriminatory towards women (an example would be inheritance rights in the Murut community) and the interpretations of these laws are frequently in the hands of native leaders and Native Court officers who are male. Women's groups have not to date actively sought the codification of the customary laws as this may only formalise and codify such discrimination. .

The Native Court process tends to be informal. Records are rarely kept, evidence is usually given orally, cases tend to be documented in very simple form, and written judgments and grounds of decision rarely issued. Further, cases do not form a binding precedent on the courts and decisions are confined to the district or village. While women may legally have access to and be able to file cases in the Native Courts, due to social and cultural constraints they have limited access in comparison to men.

Under this system, a native may elect to seek settlement in a Native Court instead of the Civil Court. This is a popular choice in the villages, where the Native Court is more accessible. This may be disadvantageous for women in certain circumstances. For example, in cases of sexual offences both parties are liable to pay a fine (*sogit*) even though the woman may have been a victim or may have been underage. These cases would be treated as offences against the community rather than the person and the native chiefs may impose payment of *sogit* in the form of chickens, buffalo or other livestock. Thus a crime under the *Penal Code* which is also acknowledged as a wrongful act under customary laws may be heard and punished by the Native Courts and are not reported to the police. One weakness of the system of customary penalties is that a *sogit* which may have been significant several decades ago may now be insufficient to accord with the gravity of the offence.

## **6. Conflict of jurisdiction**

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<sup>235</sup> Sabah Women Action Resource Group (SAWO), *Women in Sabah: Needs, Concerns, Aspirations*, 1992, pg.95



Over the years, there have been several cases and concerns arising out of the conversion of one spouse to Islam. While the right to religion is protected in the Federal Constitution,<sup>236</sup> in light of the dual legal system governing Muslim and non-Muslim personal law separately, such conversions can lead to difficult and complex situations involving maintenance, guardianship and custody of children, conversion of children and inheritance issues.

In the case of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 CLJ 416, a Hindu mother filed for custody of her two children. Her former husband had converted to Islam and converted their minor children without her knowledge or consent. The High Court decided in April 2004 that the civil court had no jurisdiction to hear a case involved the issue of conversion to Islam. The decision meant that the Hindu mother who has no legal standing in the Syariah Court is left with no remedy at law.

The *Law Reform (Marriage and Divorce) Act 1976* envisages these kinds of conflict by providing that the non-converting spouse may petition the civil court for divorce but fails to provide an avenue to resolve the varied other complications arising from the conversion of one spouse<sup>237</sup>. Unless there is a venue which enables both parties to seek a resolution regarding their marriage, custody of their children and other ancillary matters, this problem will persist. As Shamala's marriage was a civil marriage, it followed that the civil courts should be seized with jurisdiction to resolve any conflicts that arose as a result of a conversion. It is undesirable that there be simultaneous petitions before different courts. It is also undesirable that a conversion of a spouse should provide that spouse with an avenue to evade his/ her responsibilities towards his/ her spouse and children.<sup>238</sup>

In July 2004, the High Court however revised its decision in the abovementioned case, granting the mother actual custody of the children conditional on her maintaining the religion of the children as Islam. While the custody issue appeared resolved, the question of the right of a parent to determine the religion of his/ her children, especially without the consent of the other parent, as was done by the father in this case, remains an open ended one.<sup>239</sup>

The issue of conflict of jurisdiction is a critical one as it has implications on one's right to freedom of religion and right to marriage and family. Need a civil marriage where one spouse has converted actually be dissolved? Are the rights of parents where one is Muslim and the other non-Muslim actually different, vis a vis their children? Where are the children's rights in all of this?

## **7. Freedom of Movement and Residence**

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<sup>236</sup> Federal Constitution, Article 11

<sup>237</sup> *Law Reform (Marriage and Divorce) Act, 1976*. Section 51 states that where one party to a marriage has converted to Islam, the other party *who has not converted* may petition for divorce.

<sup>238</sup> Jacqueline Ann Surin & Cindy Tham, "Whose Child?", 17<sup>th</sup> July 2004. [www.sun2surf.com](http://www.sun2surf.com)

<sup>239</sup> Salbiah Ahmad, "A View on Infant Conversions to Islam", *Aliran Monthly*, vol. 24 (2004) Issue 9.

Articles 14, 15, 24 and 26 of the *Federal Constitution* affect the residence and citizenship status of foreign spouses of Malaysian women and the citizenship of the children of such unions by continuing to expressly discriminate against women's rights by prohibiting foreign husbands from being granted citizenship, Malaysian women from conferring citizenship on their children and foreign husbands from receiving permanent residence status<sup>240</sup>. While this issue is dealt with under Article 9 of the CEDAW Convention, the effect of these discriminatory laws on citizenship for foreign husbands of Malaysian wives and the transmission of citizenship to their children, results in Malaysian women either being forced to either give up their homeland or face the burden of being the sole breadwinner for their families.

It should be noted that under the Special Provisions for East Malaysia under Part VII of the Immigration Act 1959/63 section 66(2) Sabahan men are not required to obtain a Permit or Pass for their spouse, but the same does not hold true for Sabahan women. Similarly, a West Malaysian man entering Sabah on a permit or a pass is able to confer "dependent" status on his spouse, but West Malaysian women are unable to do so. Based on this, claiming unrestricted freedom of movement and residence for women caught in this bind would be disingenuous at best.

## **RECOMMENDATIONS TO THE GOVERNMENT**

### **1. Equality before the law**

To review the provisions of the Federal Constitution in view of the amendment to Article 8(2) and that any provisions contrary to the spirit of Article 8(2) including the articles highlighted hereinabove, be amended forthwith;

### **2. The validity of contracts and private instruments that discriminate against women**

To amend section 24 of the Contracts Act 1950 to include a provision rendering void any contracts which have the effect of discriminating on the grounds of gender;

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<sup>240</sup> Art. 14(1)(b) and the Second Schedule Part II identifies the following persons as citizens by operation of law, "every person born outside the Federation whose father is at the time of the birth a citizen...", art 15(1) reads, "Subject to Article 18, any married woman whose husband is a citizen is entitled upon making application to the Federal Government, to be registered as a citizen if the marriage was subsisting and the husband a citizen at the beginning of October, 1962, or if she satisfies the Federal Government (a) that she has resided in the Federation throughout the two years preceding the date of the application and intends to do so permanently; and (b) that she is of good character.", art. 24(4) reads, "If the Federal Government is satisfied that any woman who is a citizen by registration under Clause (1) of Article 15 has acquired the citizenship of any country outside the Federation by virtue of her marriage to a person who is not a citizen, the Federal Government may by order deprive her of her citizenship." and art. 26(2) reads, "The Federal Government may by order deprive of her citizenship any woman who is a citizenship by registration under Clause (1) of Article 15 if satisfied that the marriage by virtue of which she was registered has been dissolved, otherwise than by death, within the period of two years beginning with the date of the marriage.".

**3. Ownership and recognition of interest in property**

Amend section 323 of the National Land Code 1965 to recognize the interests of wives/children in the matrimonial/ family home as being caveatable interests;

**4. Legal Systems**

- .1 To enact a National Syariah Law to supersede the respective State Enactments as soon as possible, to eradicate the uncertainty as well as the potentially discriminatory laws faced by Muslim women.
- .2 To review Native customary law in East Malaysia, to take into account women's concerns and perspectives with a view towards the systematic codification of native customary laws in the course of which laws having a discriminatory effect towards women should be abolished with the consent of the native community. There should be clearer delineation of the jurisdiction of Native Courts, and standardization of the major customary law offences and penalties.
- .3 To review existing procedures to ensure the Civil Court system be rendered friendlier and more accessible towards women and children, with attention given to their special needs.

**1. Conflict of jurisdiction**

- .1 To clarify the status of a civil marriage upon conversion of a spouse and to review the *Law Reform (Marriage and Divorce) Act 1976* accordingly.
- .2 To review procedures and issues of jurisdiction in matters involving the conversion of a spouse to Islam to ensure ancillary matters of maintenance, custody and guardianship can be settled efficiently in one venue.

**1. Freedom of Movement and Residence**

To review immigration laws that continue to discriminate against women.

## ARTICLE 16

### EQUALITY IN MARRIAGE AND FAMILY

Malaysian women face discrimination in marriage and divorce due to structural and legal inequalities. The Government of Malaysia's initial refusal to accept any part of Article 16 of the CEDAW Convention upon accession to the Convention indicates its apparent reluctance to extend full equality to women in this sphere. Although the Government has now withdrawn its reservations to 16(b), (d), (e), and (h), the reservations that remain preclude full equality for women in family life.

Malaysia operates a dual legal system, based on both English common law and Islamic law. Civil courts have jurisdiction over the majority of laws, including contracts, torts, property, crime, and constitutional and administrative matters. The Law Reform Marriage and Divorce Act (1976) regulates marriage relations for persons who do not profess the Islamic faith. The *Syariah* courts, which are established and regulated by the states, have jurisdiction over Islamic family law matters. Article 121(1A) of the Federal Constitution, introduced in 1988 by constitutional amendment, states that the civil courts have no jurisdiction in matters that fall within the *Syariah* court jurisdiction.<sup>241</sup>

#### CRITICAL AREAS OF CONCERN

#### 1. Disparities Faced By Women under Both Civil and *Syariah* Law

##### 1.1 Age of Marriage

Women in Malaysia are permitted to marry at a younger age than men, under both the civil and *Syariah* laws. Under the *Law Reform (Marriage and Divorce) Act 1976 (LRA)*, while the minimum age for marriage is 18 for boys, a female who has completed her sixteenth year can marry with the authorization of the Chief Minister.<sup>242</sup> The minimum age for marriage under the *Islamic Family Law (Federal Territories) Act 1984* is 18 for men and 16 for women, except that they may marry at younger ages with the permission of the *Syariah* Judge in certain circumstances.<sup>243</sup>

Women are generally encouraged to marry early to shield them from what is believed to be temptation and danger from the time they reach puberty.<sup>244</sup> As such, it is predominantly women who make applications for permission to marry under the minimum prescribed age. In 1997, 854 applications for marriages of young girls between the ages of 16 and 18 were made and approved by the Registration of Marriages Department. For the first six months of 1998, there were 437 applications made by women and approved by the department. In the Selangor *Syariah* High Court, there were

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<sup>241</sup> See Article 15 of the NGO Shadow Report for further details.

<sup>242</sup> *Law Reform (Marriage and Divorce) Act 1976*, section 10 [hereinafter LRA].

<sup>243</sup> *Islamic Family Law (Federal Territories) Act 1984*, section 8 [hereinafter IFLA].

<sup>244</sup> Gavin W. Jones, *Marriage and Divorce in Islamic Southeast Asia*, Oxford University Press (1994), p. 116.

27 applications for marriage by people under the minimum age in 1999.<sup>245</sup> Figures contained in The Population and Housing Census 2000, show that among adolescents aged 10-14 years, there were more married girls (6,146) than boys (4,478). In fact out of the 2.49 million children within the age group of 10 – 14 in Malaysia, 10,624 (0.4%)<sup>246</sup> were married, 235 widowed and 77 divorced or permanently separated.

Women who marry young frequently forfeit their opportunities for further education. Female students who drop out of school have lower employment opportunities and lower bargaining powers in marriage, making them more vulnerable to economic dependence and further inequalities within the marriage. Moreover, young women who marry and become saddled with heavy responsibilities are more likely to have marital problems, which may lead to divorce.

The government has declared reservations with respect to article 16.1(a) on the “same right to enter into marriage” and paragraph 2 of the CEDAW Convention which calls for legislation to specify a minimum age of marriage and an official registry compulsory and has not indicated any plans to amend the respective laws to bring it into conformity or remove the reservations. This can also be construed as a violation of the Government’s obligation under the Convention on the Rights of the Child, ratified on 17<sup>th</sup> February 1995, to protect the rights of the child. In Article 1 of the Convention on the Rights of the Child, a child is defined as every human below the age of eighteen.

## 1.2 Economic Dependency

During the course of marriage, women run a much higher risk of becoming economically inferior to and even dependant on their husbands. The overall percentage of women in the workforce has been hovering for the past few years around 44.6% (1999) and 47.7% (2003). This is in comparison to male labour force participation which was at 82.1% in 2003.<sup>247</sup>

A significant number of women in Malaysia are expected to remain at home after marriage as homemakers while their husbands take on the role of breadwinners. While some may opt out of the workforce on their own accord, this is also due to pressure from the spouse, family and society in general. Some women are expressly forbidden to work by their spouses. During their absence from the labour market, skill requirements may change considerably, particularly as new technologies are constantly being introduced. If and when they rejoin the workforce, they enter disadvantaged.<sup>248</sup>

Further, many women who choose (or are given the choice) to pursue careers, are made to feel their careers are of secondary importance. This condition where a working woman

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<sup>245</sup> Statistics available at the Website published by the Pendaftar Mahakamah Tinggi Syariah Selangor at <http://www.selangor.gov.my/statistik/askjmss99.htm>.

<sup>246</sup> “10,600 child marriages reported in 2000”, *The Star*, 23 March 2002.

<sup>247</sup> Ministry of Women, Family and Community Development, *Statistics on Women, Family and Social Welfare* 2004

<sup>248</sup> Aneeta Kulasegaran, “Women’s and Children’s Rights – And the Protection Offered by Domestic Laws”, paper presented at the 12<sup>th</sup> Commonwealth Law Conference, Kuala Lumpur, September 1999.

remains primarily responsible for domestic duties is referred to as the ‘double burden’. These women suffer from physical and psychological stress of balancing the demands of both a career and domestic duties and as a result of which, are more likely to pass up promotions and career advancement opportunities, making them more likely to become economically dependant on their husbands, especially if there are children involved.

Women who are economically dependant on their husbands find it very difficult to break away from problematic or abusive marriages and in starting a new life for themselves and their children. 45% of women seeking shelter at a local refuge were housewives or unemployed and financially dependant on their husbands.<sup>249</sup> Divorce, maintenance and custody proceedings are costly. Furthermore “current divorce law ignores the obvious fact that women are not socio-economic equals of men in the Malaysian society.”<sup>250</sup> There is an expectation in divorce law that a wife who has the same education and skills yet has been a homemaker will be able to re-enter the workplace at the same level as her husband. However, in reality as a result of not working or realizing her potential, she may re-enter the workforce with fewer skills and less seniority, resulting in a lower standard of living.

## **2. Disparities Faced by Women under the Civil Law**

The disparities faced specifically by women of other faiths in relation to marriage, principally relate to the breakdown of a marriage. In 2003, 63,764 marriages and 3,318 divorces were registered with the Marriage Registration Department.<sup>251</sup> Women face many more problems compared to men while travelling the long road to divorce. It must be noted that most of these problems are closely connected to and are rooted in the disadvantaged status of the woman while she is married. The themes of economic dependence and social subjugation run through this entire part.

### **2.1 Divorce**

Divorce is a costly affair. Mutual consent divorces cost on average between RM3,000 to RM5,000. Contested divorces are more expensive and can cost anything from RM5,000 to RM50,000. The disparities faced by women in divorce primarily revolve around the concern of finances. Financial arrangements usually take the form of division of property and or maintenance issues. Women in marriage are already in a vulnerable position based on the fact that they are likely to be economically dependant on their husbands; this position becomes even more precarious upon divorce.

#### *Mutual consent divorce*

In mutual consent divorces, section 52 of the LRA provides that couples may seek a divorce and determine the terms of the divorce by mutual consent. The mutual consent divorce process can still however be coercive if the wife is financially dependent on her husband and wants custody of the children. Women may agree to less than favourable terms in order to avoid the cost and delay of a contested divorce. The husband may

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<sup>249</sup> Statistics from the Women’s Aid Organisation (WAO) for 2004

<sup>250</sup> Kamaruddin, a law professor at the International Islamic University, Malaysia

<sup>251</sup> Ministry for Women, Family and Community Development, National Registration Statistics, *Statistics on Women, Family and Community Development*, 2004

threaten that he will fight for custody of the children if his wife does not agree to terms that are more advantageous to him. The presumption that women and men in mutual divorce cases have equal bargaining positions is untrue.

#### *Contested Divorces*

In cases of contested divorces, the couples in question have to consult a conciliatory body, referred to as a marriage tribunal. The conciliatory body must certify that there has been a breakdown in the marriage prior to any party seeking or obtaining a divorce in court. There is a conciliatory body usually affiliated with the Marriage Registration Department, located in most districts in Malaysia. Generally, the conciliatory bodies are made up of a government welfare officer, the assistant registrar of marriages and any member of the public deemed suitable.

#### *Unregistered marriages*

Women who enter into unregistered marriages conducted through religious institutions face one of the most egregious situations. These invalid marriages are generally conducted in temples and even in private homes. Many women do not realise that a marriage is not legally valid unless it is registered, and that unregistered marriages prevent women from obtaining maintenance or a portion of the marital property upon divorce or the death of the husband. They are entitled to nothing because their marriages are not legally recognized to have ever existed. Women in these circumstances face a lower standard of living for themselves and their children following separation from their de facto husbands. If women are unable to support themselves financially without their husbands, they are less likely to seek to leave a troubled or abusive marriage.

## **2.2 Division of property**

#### *Void or voidable marriages*

In the event that the marriage is declared void or voidable, a woman often receives an inequitable division of property. A marriage may be declared void or voidable for several reasons, including situations when one of the spouses entered into the marriage as a minor, under false pretences, or the marriage was not consummated. In normal divorces, the court is closely guided by laws which govern the division of property. In the event the marriage is declared void or voidable, judges are given an absolute discretion in determining the division of property. Often when this happens, women are denied an equitable share of property. The unfair division of property is a result of an absence of laws closely regulating the division of property coupled with the social norms that lead to a man being awarded a greater amount of property. The woman's domestic contributions are rarely valued at the same level as a man's financial contributions.

#### *Valid marriages*

In divorce proceedings relating to valid marriages, the law states that property acquired before marriage by one spouse is not divided between the spouses upon divorce, unless the other spouse or both spouses have substantially improved this property. Women as noted earlier are more likely to be homemakers or bear a double burden while married. They often forfeit or are made to forfeit any opportunities to earn a sizeable enough amount of money to substantially improve the property. Men, who are more likely to

work outside the house and are free to pursue their careers, are more likely to be deemed to have “substantially improved” the property. This clearly fails to recognize the contributions of homemakers and undervalues the contributions and sacrifices made by women while married.

### **2.3 Maintenance**

Women seek maintenance for themselves and their children more frequently than husbands seek maintenance from their wives. In 1997 and 1998 over 100 women sought legal assistance from the government sponsored Legal Aid Bureau, looking for maintenance from their husbands.<sup>252</sup> In stark contrast, only two men sought maintenance from their wives in each of those years.

Women however face many problems in seeking maintenance. Firstly, there is the difficulty in establishing their husbands’ incomes. Two senior family law practitioners in the Klang Valley who each average 100 divorce cases each year noted that 80% of women were not able to prove all their husbands’ earnings accurately in court. Although the court can require a man to declare his earnings the provisions for discovery are slow and not effective. The court has no investigatory powers and can only rely on the documents produced in court. If the woman is ignorant of her husband’s sources of income and the man refuses to admit them, the court would be none the wiser. This is especially a problem when the husband owns his own business enterprise.

Typically, enforcement proceedings are lengthy and costly. Currently, a woman is required by law to be represented by a lawyer to pursue legal action against the children’s father for not paying maintenance. Many women are unable to afford a lawyer to file enforcement proceedings in the court and fail to meet the criteria of the Legal Aid Bureau<sup>253</sup> for free legal assistance. In the survey conducted, 80% of the women whose husbands’ failed to make maintenance payments did not pursue enforcement proceedings. More than half of these women chose not to proceed with enforcement because of financial considerations. One client of the Women’s Aid Organisation failed to receive any payment as her husband lost his job as soon as the order was made. She too could not afford a lawyer to enforce the claim.

Another problem with maintenance is the fact that men do not make their payments regularly. In such instances, although there has been a judgment by the courts stating that the father owes the mother and their children the payments, the man still refuses to pay or hides a significant portion of his income. There is also a lack of enforcement of such orders by the court. Senior family law practitioners estimate that more than 50% of men do not make regular maintenance payments or fail completely to make any payments. Attachment orders are seen to be the most reliable mechanisms for enforcing the maintenance order. However, orders to attach the man’s wages can only be obtained at enforcement proceedings. Considering the fact that the very women who are in most need

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<sup>252</sup> Statistics from Biro Bantuan Guaman for years 1997 and 1998.

<sup>253</sup> The Legal Aid Bureau applies a means test to assess an applicants’ income. Only those who fall into the lower income bracket are entitled to free legal assistance. Many women who have not been receiving maintenance might fail this test but do not have the money to pursue these claims on their own.



of maintenance will probably not be able to afford enforcement proceedings in the event of their husband's failure to make payment, the law appears quite perverse.

#### **2.4 Lack of knowledge about the law**

Unfortunately, many women and their families do not know about or understand the law, which allows exploitation on the part of their husbands. For instance, women who do not understand that a religious ceremony alone does not constitute a valid marriage in the eyes of the law may find themselves in unregistered marriages where they do not have rights granted by the law for marriage or divorce.

This can also lead to problems related to polygamy. Various customary laws in Malaysia permitted polygamy for non-Muslim couples until 1982, when it was banned by the LRA. However, polygamy continues to exist in practice notwithstanding the law, and many women do not know that polygamy outside of Islam has been banned. Men enter into polygamous marriages by marrying in a traditional religious ceremony and not registering the marriage.<sup>254</sup> Men also have been known to threaten to marry other women unless their wives bend to their will.<sup>255</sup>

### **3. Disparities Faced by Women under the Syariah Law**

Muslim women are being discriminated against under certain legal provisions of the State Islamic family laws. As personal law is a matter under the jurisdiction of the States, each of the 13 States is able to enact its own set of laws governing the personal laws of Muslims in that state. The inconsistencies between the laws of the various States pose a problem for enforcement. In 1984, the Federal Parliament enacted the Islamic Family Law (Federal Territories) Act 1984 (Act 303) for the Federal Territories. Many of the states adopted slightly altered versions of this model law, but several states, specifically the states in the northern part of the country, have adopted their own family law enactments that restrict women's rights in marriage and divorce much more than the Federal Territories Act. The Islamic Family Law (Federal Territories) Act 1984 was amended in 1994 and many activists and scholars consider some of the amendments to be regressive in terms of women's rights.

The introduction of the Islamic Family Law (State of Selangor) Enactment 2003 as a possible blue print in efforts to standardise the provisions on Islamic law among the States is cause for concern because discriminatory provisions both in form and effect exist in the Enactment and will result in further injustice to Muslim women in Malaysia.<sup>256</sup>

#### **3.1 Marriage Guardianship (*wali nikah*)**

The concept of *wali* as a means to "protect" women entering into marriage is a very paternalistic attitude, carrying with it the implication that women have no capacity to

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<sup>254</sup> See, e.g., Women's Aid Organisation case study dated 26 January 1999

<sup>255</sup> Muharyani Othman, et. al., "Treading carefully a thorny issue," *New Straits Times* (May 1, 1997), p. 1.

<sup>256</sup> Sisters in Islam (SIS Forum), "Violation of Muslim Women's Human Rights: Further Discrimination against Muslim Women under the Selangor Islamic Family Law Bill 2003 through Selective Gender Neutral Provisions", 29<sup>th</sup> May 2003

protect themselves. This attitude may indeed have been proper in medieval societies,<sup>257</sup> but it is hardly relevant under the present socio-economic circumstances, where many women are educated and also earn their own living.

The concept is even more detrimental for women when the archaic provisions on *wali mujbir* are adopted. *Wali mujbir* allows the woman's father or paternal grandfather, the *wali*, to marry off his virgin daughter without her consent under certain conditions. These conditions are that the *wali mujbir* and prospective husband are not hostile to her, the prospective husband is of the same status as she is (*kufu*) and the prospective husband is able to pay a reasonable *maskahwin* (*mahr mithl*). Although a majority of the state enactments provide that a woman cannot be compelled into marriage, the enactments in the states of Kelantan, Kedah and Malacca contain provisions on *wali mujbir*.<sup>258</sup>

The doctrine of *ijbar* (compulsion) has always been controversial even in the medieval Islamic societies, as there is no justification for it in the *Qur'an* or *Sunnah*.<sup>259</sup> On the contrary, the Prophet's Traditions emphasize the right of a woman to be married only with her free choice and consent. The doctrine of *kufu* cannot be deemed as sufficient protection for a woman if she may still be compelled into a marriage against her will with a man who is her "equal". Moreover, in the jurisdictions where *ijbar* is no longer allowed, there is the tendency to consider the doctrine of *kufu* as limiting the woman's choice of a husband i.e. that she is not to be allowed to choose to marry a man who is not her "equal". Her *wali* may therefore refuse his consent in such cases.

### 3.2 Polygamy

#### *Conditions for entering a polygamous marriage*

Muslim men who want to enter a polygamous marriage have to complete an application to marry, in which the applicant must specify, among other things, his income, financial obligations, number of proposed dependants, and the views of his existing wife (or wives) to the marriage.<sup>260</sup> Thereafter, a judge will evaluate the application and grant permission for the marriage if satisfied that the husband can support his wives, that the marriage is "just and necessary" and that the applicant will be able to provide equal treatment to his wives.<sup>261</sup>

On attempts to control polygamy and prevent its abuse among the Muslims, it is often reported that *Syariah* judges merely tend to give emphasis to a man's financial capacity to support more than one family in deciding whether he should be given permission to

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<sup>257</sup> However, even in the medieval era, the Hanafi school of law has already held that the *wali* is required only for marriages involving minor boys and girls, and that no *wali* is needed for the marriage of a competent adult woman.

<sup>258</sup> SUHAKAM, Report on the Roundtable Discussion: Rights & Obligations under CEDAW, 2004. Annex 7 – CEDAW & Islamic Family Laws in Malaysia by Cik Nik Noraini bte Nik Badli Shah, Sisters in Islam (SIS Forum)

<sup>259</sup> The doctrine of *ijbar* may in fact be traced to the tribal norms that existed in the pre-Islamic Arabian society, and also to the early period of Roman law.

<sup>260</sup> IFL, Section 23(3).

<sup>261</sup> IFL, Section 23(4).

contract a polygamous marriage. Scant regard is given to the other conditions which are aimed at securing justice to wives.

In the case of *Aishah Abdul Rauf vs. Wan Mohd Yusof Wan Othman* [1990] 3 MLJ 1x, the reason given by the husband for wanting to contract another marriage was that of legitimizing his love for another woman. The Syariah Appeals Committee observed that while this may be sufficient ground to show why the proposed marriage was “necessary”, it has no relevance to the question of whether the proposed marriage was “just” – both being conditions that need to be fulfilled under the Islamic Family Law Act and justice is mandatory in the *Qur’an*. The Islamic Family Law (State of Selangor) Enactment 2003 attempts to change this by amending the condition from “just AND necessary” to just OR necessary”. This appears to be a deliberate attempt to nullify the decision in the above case.<sup>262</sup>

#### *Inconsistencies in the different State laws*

The existence of separate State jurisdictions has also enabled men to take advantage of the most convenient law for personal gain. Thus in this case of *Aishah vs Wan Mohd Yusof*, the husband was able to circumvent the decision of the Selangor Syariah Appeal Committee, which rejected his application to marry another woman, by simply crossing to the State of Terengganu to get married. Some states have even fewer requirements for entering into polygamous marriages. In Perak, a man may marry a second wife without the permission of the court merely by making a declaration that he will treat his wives equally, and in Kelantan and Terengganu, a judge is given complete discretion regarding applications for polygamous marriages.<sup>263</sup>

#### *Enforcement and penalties*

The state recognises that laws must be put into place to minimise the conditional rights to polygamy. However, the implementation of the Syariah law has failed to regulate polygamy as evidenced by the high number of marriages occurring without the court’s permission. In the year 1999, there were 228 cases of polygamous marriages without the permission of the court in Selangor.<sup>264</sup>

The statutory penalties provided in the law are insufficient to serve as an effective deterrence for men who contravene the law as husbands who contract polygamous marriages without the proper permission of the Court are usually merely ordered to pay a small fine. Men who marry without applying to the court can be punished either by imprisonment up to six month or fines up to RM1,000 (USD\$264) or both.<sup>265</sup> Kelantan is the most lenient state as it imposes a fine of RM300 or 1 month imprisonment or both.<sup>266</sup>

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<sup>262</sup> Sisters in Islam (SIS Forum), “Violation of Muslim Women’s Human Rights: Further Discrimination against Muslim Women under the Selangor Islamic Family Law Bill 2003 through Selective Gender Neutral Provisions”, 29<sup>th</sup> May 2003

<sup>263</sup> Sisters in Islam, Memorandum on Reform of the Islamic Family Law on Polygamy, 1996, p.3.

<sup>264</sup> Statistics available at the Website published by the Pendaftar, Mahkamah Tinggi Syariah Selangor at <http://www.selangor.gov.my/statistik/askjmss99.htm>.

<sup>265</sup> IFLA, Section 123.

<sup>266</sup> Dr. Zaleha Kamaruddin, 2001, p.111.

Nevertheless, if a marriage is entered into without the permission of the court, the polygamous marriage still may be registered. Furthermore, no man has yet been jailed for entering into a polygamous marriage. In fact, the common practice is to fine the man a mere RM 300 (US\$80).<sup>267</sup> Men also may escape the restrictions on polygamy in a particular state or jurisdiction simply by moving to another jurisdiction. Such lenient sanctions and jurisdictional loopholes do little to deter violations of the law. This is apparent in the case of Saadiah and her husband who managed to escape the restrictions placed by the courts by eloping to Bachok Narathiwat, Thailand. Her husband only had to pay a fine of RM400 when he registered their marriage in Kuala Lumpur.<sup>268</sup>

The standard practice by the courts nowadays is to record the existing property belonging to the husband and the existing wife when the husband's application to contract polygamous marriage is granted. This is to ensure that the wife has a just and adequate share of the property acquired prior to the husband's marriage to another women.<sup>269</sup> It is still left to the discretion of the judges to grant the proportionate amount depending on the contribution of the parties to the property.

#### *Public perception*

Part of the problem on polygamy is that there is a general misconception in society that polygamy is the 'right' of every Muslim male and that to challenge this right is to challenge the word of Allah *swt*. However, a reading of verse 4:3 in the Qur'an clearly shows that polygamy is not an unconditional right of the Muslim man. On the contrary, it is a responsibility to ensure that justice should be done to widows and orphans. It has therefore been suggested that polygamy in Islam should be looked at not as a "male right" but as a "female privilege". As such, it is thus necessary that all the parties to be involved in a polygamous marriage – the husband, the existing wife and the prospective wife – should be aware of the potential responsibilities and consequences and agree to it before such a marriage could be contracted.

It is frequently forgotten that polygamy is not special to Muslims. Prior to the Law Reform (Marriage and Divorce) Act 1976, non-Muslim men in Malaysia were able to enter into polygamous marriages under their respective customary laws. The Law Reform Act drastically reformed the family law for the non-Muslims – from unlimited polygamy under customary laws to absolute monogamy under civil law.

### **3.3 Divorce and ancillary reliefs**

#### *Application of divorce by wife*

Although the law provides that women may apply for divorce through *ta'liq*, *fasakh* or *khul'* there have been numerous complaints and difficulties by Muslim women.<sup>270</sup>

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<sup>267</sup> Id.

<sup>268</sup> Refer to Case Study #1 in Women's Aid Organisation, "Appendix 1", *WAO CEDAW Baseline Report on Article 16* (Dec. 2002).

<sup>269</sup> Zaleha Kamaruddin, p.382.

<sup>270</sup> Refer to Case Studies in Women's Aid Organisation, "Appendix 1", *WAO CEDAW Baseline Report on Article 16* (Dec. 2002).

A woman has to endure endless delays to obtain a divorce. No time limit has been set at each step of the process a woman has to go through in her application for divorce. The husband's failure to attend counselling sessions, to be present at court hearings, to attend arbitration proceedings can delay the divorce by several years. Even though the law provides that the *hakam* appointed by the court can pronounce divorce on behalf of the husband if the parties fail to effect reconciliation, the court is most reluctant to use this provision.

There have also been numerous complaints by women regarding the delays they often face when seeking ancillary reliefs such as, arrears of maintenance, *iddah* maintenance, *mutaah* and *harta sepencarian*, and the problems and complications in having to file separate applications for the various claims. The existence of separate state jurisdictions also enables a man who has been ordered to pay maintenance to his wife and children to easily evade payment by moving to another state

*Pronouncement of divorce by husband*

In contrast, husbands can easily and quickly divorce their wives as divorce pronouncements made outside the court may be registered under section 55A of the Islamic Family Law Act. There is at present no provision under section 55A that the court, in approving the unpermitted divorce, make orders to ensure that the divorced wife's financial rights are secured. The court order in this case should cover the divorced wife's right to *iddah* maintenance, *mutaah* and *harta sepencarian*. There should be a presumption in the law that a husband who pronounces *talaq* without the permission of the court has divorced his wife without just cause.

The state imposes penalties on men who divorce their wives outside of court. The law provides that men will have to pay up to RM1,000 (USD 263) or be imprisoned for up to six months.<sup>271</sup> In reality the state imposed penalties are insufficient to prevent men from divorcing their wives unilaterally outside of court. Although the law provides some room for imposing penalties, the sanctions specified by the law often are reduced or not enforced at all. In many instances, men are not prosecuted or have to pay only minimal fines.<sup>272</sup> One case in Melaka illustrates this point. A man who divorced his wife outside of court received a sentence of RM 80 (USD 21) and, if the fine was not paid, 3 weeks in prison. After paying the fine, he was entitled to register the divorce.<sup>273</sup> As this case demonstrates, by permitting men to register divorces previously conducted outside of court,<sup>274</sup> Syariah law does not effectively discourage this practice.

Since the Syariah courts began enforcing the IFLA and punishing men for divorcing outside of the court, there has been an increase of 80% of the court's revenue obtained from men who contravene the *talaq* divorce procedures.<sup>275</sup> Professor Zaleha Kamaruddin suggests this increase of revenue reveals that the penalties "have not been successful in

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<sup>271</sup> IFLA, Section 124.

<sup>272</sup> *Executive Summary on Socio-legal Status of Women in Malaysia* (1997), p. 2.

<sup>273</sup> *Melaka v. Ismail bin Jaafar*, (1989) 7 JH 100 (Pendakwa Mahkamah Syariah).

<sup>274</sup> IFLA, Section 55A.

<sup>275</sup> Zaleha Kamaruddin, 1995, p. 46.

controlling the abuse of divorce in the Muslim community in Kuala Lumpur.”<sup>276</sup> Alternatively, the data may actually show that the courts are doing a better job at enforcement. Notwithstanding these differing interpretations, it is likely that greater penalties will be necessary in order to deter men from leaving their wives and families through unlawful divorces.

*Extending the right of fasakh to the husband*

The Islamic Family Law (State of Selangor) Enactment 2003 has now generally extended the right to divorce by *fasakh* to men as well. Previously, only the wife was generally given the right to apply for *fasakh*. The Enactment now extends the right to *fasakh* to husbands.<sup>277</sup> Amending the law to provide for a husband’s right to *fasakh* would have been justified if he is no longer allowed to unilaterally divorce his wife by *talaq*. There is a conflict of juristic views among the four *Sunni* schools of law as to whether the right to *fasakh* should be given to the husband. For instance, the Hanafi view grants the right to *fasakh* only to the wife, while the other views grant the right to both spouses in cases of one spouse suffering from infectious disease or physical unfitness for conjugal relations. In the Enactment, the grounds for a husband to apply for *fasakh* have been extended further than that. What is the implication of the husband being allowed to divorce his wife either through *talaq* or through *fasakh*? Perhaps the benefit for the husband is that, in cases of *fasakh*, he need not pay *iddah* maintenance and *mut’ah* to his former wife.<sup>278</sup>

*State mechanisms*

The Department of Women’s Development (Jabatan Pembangunan Wanita) of the Ministry of Women, Family and Community Development has set up several *Rumah Nur* (formally known as Pusat Khidmat Wanita/ Women’s Service Centers) for women undergoing marital problems, divorce, abuse and single mothers. These centers are established in fifteen states and ten districts throughout the country.<sup>279</sup> However, little is known about the effectiveness of these centers in providing support and counseling. The Department also runs a counseling unit for individuals and families. Established on 15<sup>th</sup> October 2001, the unit handles cases via telephone, face to face and through its online chat service. In 2003 the unit received 2,442 social cases (e.g. divorce, domestic violence, sexual harassment, rape, etc)<sup>280</sup>.

The Syariah Judicial Department under Dato’ Sheikh Ghazali has issued Practice Directions to Syariah Courts to reduce the delays in divorce proceedings. Practice Direction No. 2 of 2001 directs the mention of cases within 21 days after the case has

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<sup>276</sup> Id.

<sup>277</sup> IFLA, Subsection (1)(a),(c),(d),(f),(h)(i), (h)(ii), (h)(iv) and (h)(v) as well as under subsection (2).

<sup>278</sup> Violation of Muslim Women’s Human Rights: Further Discrimination against Muslim Women under the Selangor Islamic Family Law Bill 2003 Through Selective Gender Neutral Provisions, by Sisters in Islam (SIS Forum Malaysia), 29 May 2003

<sup>279</sup> [www.kpwkm.gov.my](http://www.kpwkm.gov.my)

<sup>280</sup> Statistics on Women, Family and Social Welfare 2004, Ministry for Women, Family and Community Development.

been filed and Practice Direction No. 4 of 2001 directs the postponements should only be granted on reasonable grounds and that a date should be given for the next hearing.<sup>281</sup>

### 3.4 Financial provisions

#### *Payment of mutaah to divorced wife*

The payment of *mutaah* is obligatory under the Shari'i law even if the wife has been *nusyuz* (e.g. in *Piah v. Che Lah*<sup>282</sup> a Perlis case where the wife's claim for iddah maintenance was dismissed on the ground that she was *nusyuz* in leaving the matrimonial home, but her claim for *mutaah* was allowed). However, it is unfortunate that the language of the statutory provision translates *mutaah* as "consolatory gift", thus giving the layman the impression that it is merely a voluntary gift that may be made to a divorced wife, rather than as a mandatory form of compensation. The statutory provision also does not mention the factors to be taken into consideration in assessing a "fair and just" amount for *mutaah*.<sup>283</sup>

#### *Payment of tebus talaq to divorced husband*

By contrast, the statutory provision regarding the payment of *tebus talaq* to a husband is to be assessed "having regard to the status and means of the parties." The statutory provision on *tebus talaq* is rather curious, as under traditional Islamic law, the amount of compensation due to the husband was limited to the *mahr* or gifts that had been made by the husband to the wife. The statutory provision therefore allows a husband to claim an unlimited amount for *tebus talaq*, an amount that may be grossly in excess of any *mahr* or gifts that he had made to the wife. This is particularly unfair to women as the amount of *mahr* in local marriage is purely nominal (e.g. RM80 in some states and as little as RM22.50 in others).<sup>284</sup>

#### *Nusyuz*

Part of the problem faced by women in seeking redress is the provision on *nusyuz* which states that a wife is not entitled to maintenance when she "unreasonably refuses to obey the lawful wishes and commands of the husband." Many unjust allegations of *nusyuz* are made against a woman by the husband who neglects to pay maintenance to the wife, and at the same time disputes her right to apply for divorce. We have received reports of many cases of wives who have been accused of *nusyuz* even when they have left the marital home with their husbands' permission or because of fear of physical violence or mental abuse. The statutory provision apparently regards *nusyuz* as the wife's disobedience to the husband, even though in Islam, *nusyuz* is actually the disruption of marital harmony by either spouse.

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<sup>281</sup> Sisters in Islam, Press Statement: "Delays in Divorce Cases" (24 August 2001).

<sup>282</sup> (1983) 3 JH 220.

<sup>283</sup> Sisters in Islam (SIS Forum), Violation of Muslim Women's Human Rights: Further Discrimination against Muslim Women under the Selangor Islamic Family Law Bill 2003 Through Selective Gender Neutral Provisions, 29 May 2003

<sup>284</sup> Violation of Muslim Women's Human Rights: Further Discrimination against Muslim Women under the Selangor Islamic Family Law Bill 2003 Through Selective Gender Neutral Provisions, by Sisters in Islam (SIS Forum Malaysia), 29 May 2003

No state intervention has been identified to eliminate this disparity. However, there is a provision that says that *nusyuz* should be treated as a separate claim and not used as a ground for not paying maintenance. WAO interviewed a Syarie Judge who claimed that he deals with *nusyuz* as a separate issue and only when the husband has lodged a complaint at the Religious Department as soon as the wife is presumed to be *nusyuz*. If the husband claims that the wife has been *nusyuz* only after the wife had filed a claim for maintenance and while the case is being heard then the judge would not admit the accusation in court.<sup>285</sup>

Although there is a provision, yet the application of the provision appears to be biased. As in the case of Aida Melly, where she had been able to prove that she was not *nusyuz*, the husband was not penalised for making false statement.<sup>286</sup>

### 3.5 Guardianship of children

The amendments to the *Guardianship of Infants Act 1961* granting mothers the equal right to guardianship of their children only applies to non-Muslims as Muslim women come under the jurisdiction of Syariah law which currently recognizes only the right of men to be guardians. Even though an administrative directive was issued to enable all mothers, including Muslim mothers, to sign official documents on matters related to their children, it is hoped that the right of Muslim mothers to be guardians of their children will also be explicitly recognized by law.

### 3.6 Inheritance

The administration of the Syariah laws on inheritance emphasize the provision that male heirs be given a double share under the *faraid* distribution, without emphasizing on the rationale for this rule - that the man has the legal responsibility to provide maintenance for the family, and thus every female should always have a man to provide for her needs, be he a father, a brother, a husband or a son. In today's society, however, many women have to earn a living and contribute towards the family needs. Moreover divorced or widowed mothers often have to provide for their children's needs without assistance from the ex-husband or another male relative. There is no mechanism in the present legal system for women to obtain the redress that would reflect the balance and justice that was originally intended by the Syariah.

In pre-Islamic Arabia, women had no inheritance rights and Islam introduced the rule that women should also have the right to inherit property. The concept of men receiving a greater share in inheritance was not a feature that was special to Islamic law. The *Distribution Act 1958* for the non-Muslims in this country previously provided that the husband of a deceased woman would receive the whole of her estate, while the wife of a deceased man would only receive one third of his estate if he had children, or one half if

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<sup>285</sup> WAO interview with a Syarie Judge in July 2001.

<sup>286</sup> Refer to Case Study # 2 in Women's Aid Organisation, "Appendix 1", *WAO CEDAW Baseline Report on Article 16* (Dec. 2002).



he had no children. However, this discrimination against non-Muslim women has been removed in the 1990s with the amendment to the *Distribution Act*.

In looking at the rules of inheritance, it may be possible to derive guidance from customary practices that were protective of women. It is often assumed that indigenous cultural and customary practices generally discriminate against women. However, there were also customary practices that were beneficial to women. For instance, the division of property under the customary law of the matrilineal *adat pepatih* among the Malays in the state of Negeri Sembilan and part of Malacca has increasingly been discredited as un-Islamic since after the Second World War. Under this custom, ancestral land was inherited by women through the female line of descent, while men were excluded from inheriting ancestral property. However, ownership was in fact, actually communal or collective, as male members of the clan may have rights to the use of the ancestral property, although they could not own it. Married men would have the right to reside on his wife's ancestral land, while unmarried men would have the right to reside on the ancestral land held by his mother or sisters or female relatives. While property ownership was in the hands of the female members of the clan, other forms of authority were held by the male members of the clan. In a sense, the female holder of ancestral property was the trustee for her clan, as she may not sell or dispose of it merely at her own will, but should preserve it for the next generation. Therefore it has been argued that the *pepateh* law may not necessarily contradict Islamic law, as Islamic law also recognizes the system of *waqf* or trusteeship of property, and women were not barred from property ownership or administration of *waqf* under Islamic law.<sup>287</sup>

### 3.7 Harta sepencarian

The traditional view on *harta sepencarian* is that a wife may claim one-third of the properties acquired by the husband during the marriage in recognition of her contributions in looking after the family. The *Islamic Family Law (Federal Territories) Act 1984* however introduces gender neutral language<sup>288</sup> to enable either spouse to claim a share in the properties acquired by the other spouse during the marriage. The *(State of Selangor) Enactment 2003* extends the gender neutral language to the provision relating to division of property if the husband contracts a polygamous marriage – it allows “any party” to claim *harta sepencarian* before a polygamous marriage is contracted. Therefore it could be abused by unscrupulous husbands, as technically, a husband who is going to marry a new wife would also be entitled to claim *harta sepencarian* from his existing wife or to apply that their matrimonial home should be sold and the proceeds divided.<sup>289</sup> It is unjust to use gender neutral language in the context of division of property upon polygamy as only men may contract polygamous marriages. Looking at the selective gender neutral provisions in the 2003 Enactment, the approach appears to be to provide that many of the rights that were traditionally enjoyed by women only should now be

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<sup>287</sup> Askiah Adam, “Malay women in Islam: Adat and Islam – Conflict or Conjunction?” in Islam, Gender and Women's Rights, An Alternative View, Sisters in Islam.

<sup>288</sup> IFL Act 1984, section 58.

<sup>289</sup> IFL (Selangor) Enactment 2003, Section 23(10)(b)..

extended to men as well, but that all the rights that have been traditionally enjoyed by men should continue to be retained by men only.<sup>290</sup>

While the gender neutral language on *harta sepencarian* is similar to the provisions on matrimonial property in the Law Reform Act, the effect is however discriminatory towards Muslim women because other provisions in the Islamic Family laws are not gender neutral (e.g. the allowance for men to contract polygamous marriages, to get a double share of inheritance and to unilaterally divorce their wives). This could mean that a Muslim man with more than one wife could claim *harta sepencarian* from each of his wives. It also further weakens a Muslim's wife's negotiating position on divorce and ancillary relief if her husband disputes her application for divorce as he could also bring a claim for *harta sepencarian* against her.

The problem for Muslim women is further compounded due to a persistent misconception regarding the traditional "one-third rule". It is said that women are entitled to "one-third of the properties acquired during the marriage". What is meant by this is that women are entitled to one-third of the properties acquired by the husband, as traditionally, the husband was the sole acquirer of the properties and the wife's contribution is regarded as the passive contribution in managing the household. Even in those days, however, the wife may be given as much as one-half in the then-exceptional circumstances where she had made some active contribution towards the acquisition of the properties.

In the present day circumstances, it is unjust and discriminatory against women to regard one-third as the "normal" share to be given to the wife. Even one-half may be inadequate in circumstances where the woman has carried the double burden i.e. giving her financial contributions for the upkeep of the family as well as her non-financial contribution in doing most of the housework and looking after the children. In such situations, it is the wife who should be given a greater share, perhaps two-thirds or more, of the properties acquired during the marriage. The interests of the children should also be considered in the division of *harta sepencarian*.

### **3.8 Status of Muslim and non-Muslim women**

There is due concern that the use of religion has often perpetuated discrimination against Muslim women and denied them the increasing sphere of rights that is being granted to their non-Muslim counterparts. It would be most unreasonable for Muslim women to find themselves occupying a civil status that would be legally inferior not only to the status of Muslim men but also to that of non-Muslim women, and to find that they are unable to exercise some of the rights that may be exercised by all the other citizens in Malaysia i.e. the men and women of other faiths.

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<sup>290</sup> Sisters in Islam (SIS Forum), Violation of Muslim Women's Human Rights: Further Discrimination against Muslim Women under the Selangor Islamic Family Law Bill 2003 through Selective Gender Neutral Provisions, 29<sup>th</sup> May 2003.

While the amendment to Article 8(2) may prohibit discrimination that is solely on the basis of sex, discrimination may still be allowed if the basis for such discrimination is said to be on the ground of sex coupled with that of religion.

## **RECOMMENDATIONS TO THE GOVERNMENT**

### **I. Disparities faced by Women under both Civil and Syariah Law**

#### **1. Age of Marriage**

- 1.1 The IFLA and the LRA should be amended to raise the minimum age for marriage of girls to eighteen. Increasing the minimum age to be the same for women as for men would permit more women to complete their education. Additionally, the IFLA should be amended to set out specific criteria as to when young women or men should be allowed to marry under the minimum age.
- 1.2 A register for documentation of underage marriages should be established at the chief minister's office to monitor the number of underage marriages and the justification for these marriages. The results should be published in a report and shared with the Ministry of Women and Family Development (MWFD) as well as with the National Advisory Council for Women (NACIWID). Furthermore, the report could be available to NGOs and MWFD to be utilised as an advocacy tool for the general population.

#### **2. Economic Dependency**

- 18.2 The government should identify target groups in both rural and urban areas where it is most evident that women suffer from a double burden. Parenting programmes targeted at joint parenting between fathers and mothers should be carried out in these areas. The content of these programmes which are at the moment offered by the National Population and Family Development Board should be widely available to the public and both public bodies and NGOs involved in the areas of instruction should be afforded an opportunity to participate in the designing of course materials.
- 18.3 The contents of the parenting programme classes need to be evaluated. The programme needs to be monitored as to whether these classes stress the importance of male responsibility in the family especially in the area of family planning and the upbringing of children. It also needs to be determined whether these classes support

woman's right to work or whether the emphasis is still on the woman's reproductive role and as the homemaker.

- 18.4 Consider a National Childcare Strategy. It appears evident from the poor response to the government's offer of tax incentives to corporations that set up Childcare Centres at the workplace that a different strategy should be employed. To emphasize to the public and private sector that childcare is a societal responsibility, the government must strive for legislating laws that require employers to contribute and facilitate in providing childcare for their employees. The private sector and the government could share the costs of such programmes by offering on-site childcare for employees' infants and children. The government should subsidise and make well-monitored affordable childcare more available to low-income parents including single mothers who cannot afford adequate childcare.
- 18.5 The existing National Child Care Strategies need to be monitored for their effectiveness and accessibility to mothers, especially working mothers. Questions that need to be answered are: where these services are predominately available (i.e. urban versus rural areas, public versus private companies); cost to parents if any; quality of the services; etc.
- 18.6 There should be government-initiated studies of need in the following areas, which should be able to provide accurate data concerning the issues and implement reform where necessary.
- (a) Tax benefits for single mothers
  - (b) Greater availability of affordable childcare both in the workplace and residential areas.
  - (c) Maternity and paternity benefits
  - (d) Employment policies supporting traditional and untraditional gender roles and
  - (e) Housing policies benefiting families with children
- 18.7 When there are children involved, divorce law should try to maintain family and economic stability for the children by insisting their lifestyle and standard of living remain constant after the divorce. The Law Reform Act and the Islamic Family Law Act should be amended to include a formal articulation of the value of a homemaker's contribution to the family. The courts should recognize the value of a homemaker and the fact that the husband's career has largely been unburdened by domestic responsibilities by demanding more frequently that the husband support the wife who undertook such responsibilities.

### **3. Guardianship**

All forms requiring signatures of guardians need to be edited to include the words: 'guardian: father/mother', where the signature of either is legally recognised and all appropriate officers/personnel need to be educated on the Guardianship of infants Act 1999.

#### **4. Divorce**

The Minister of Law should institute a family court system for both civil and Syariah matters which will have the objective of resolving family disputes in an efficient and amicable manner. The goal is to prevent further injury to family and family members, which occurs when they are forced into taking a confrontational stance. A family court system will have comprehensive jurisdiction over all matters related to family<sup>291</sup>:

- Divorce, judicial separation and nullity
- Custody, care, control and access to children
- Division of matrimonial assets
- Domestic violence (Interim Protection Order and Protection Orders)
- Maintenance for dependent spouses
- Maintenance for dependent children
- Adoption

## **II. Disparities Faced by Women under Civil Law**

#### **5. Divorce**

18.2 The members of the conciliatory bodies should be trained in marriage counselling and specifically about the dynamics of domestic violence. This should be made obligatory by amending section 106 of the Law Reform Act to include specific qualifications for the staff of the conciliatory bodies.

18.3 Members of the Conciliatory Bodies must have appropriate qualifications for the post. Members must be gender sensitive, have experience and/or training in marriage counselling and have experience in dealing with marriage and divorce.

18.4 Judges must be sensitised in gender issues, especially judges working in family disputes, so that they are aware, sensitive and proactive in divorce and maintenance cases. This is especially true for women who apply for mutual divorces and give up property claims for fear of custody battles of their children. While processing divorce cases, judges need to more sensitive and value women's housework and not decide the case solely on financial contributions of spouses.

#### *Unregistered marriage*

18.5 The Registration of Marriages Department should press forward with its plan to implement a national computerized system for registering marriages and should ensure that all religious institutions have easy access to the database. Temples conducting marriages need to ask for the copy of registration of marriage and need to keep proof of this in their records. Without a copy of the proof of registration of marriage, priests should not conduct marriages. To discourage priests conducting illegal and unregistered marriages, stiff penalties should be introduced.

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<sup>291</sup> *Memorandum on Setting Up a Family Court in Malaysia*, Bar Council Family Law Committee (2002).

- 18.6 The 'Compulsory Marriage Registration' Act should be enforced more effectively. The State, in collaboration with NGOs, should monitor religious institutions conducting marriages, especially if they are conducting marriages that will not be registered.
- 18.7 The criminal justice system should aggressively prosecute polygamists to the full extent of the law (maximum 10 years) as a deterrent to others. Penalties given to polygamous husbands should be monitored to assess whether judges are applying the maximum penalty possible.
- 18.8 A woman who finds herself in a polygamous marriage should be allowed to apply for a speedy divorce with fair maintenance and property for her children and herself.
- 18.9 Under the Civil Law, marriages that are not registered are not legally recognised by the State and its institutions. Therefore, if a man enters more than one marriage that is not registered, it is not considered polygamous since the marriages are not legally recognised. These relationships are categorised as de facto and legally the women cannot make any claims i.e. maintenance. This is one of the main reasons that marriages need to be registered. A provision needs to be developed for women in de facto marriages to claim for maintenance, especially where children are involved.
- 18.10 The Government and NGOs must work together to organize more public awareness campaigns regarding the need to properly register one's marriage and the negative impact of polygamy on women. Public awareness campaigns of designated marriage temples through visual and audio media should be conducted on a continual basis. In addition, the campaign needs to focus on the issue of legality of temple marriages.

## **6. Division of Property**

A new provision in the LRA should extend Section 76 of the LRA, which governs division of property upon divorce and separation, to include couples whose marriages have been declared null and void by the court. This amendment will help to ensure that both parties receive a fair portion of the property shared by the couple during the period the couple lived together.

## **7. Maintenance**

- 18.2 Recognising that wives may be burdened to a greater extent by household and childcare duties, and, thus, may not have the opportunity to earn wages outside the home, Section 76 of the LRA should be amended to give equal weight to household and childcare work and financial contributions.
- 18.3 The Legislature should adopt provisions in the LRA and IFLA that would require men who are delinquent in paying maintenance to their ex-wives or children to pay the legal fees incurred by the recipient of the payments during the enforcement procedures. This reform would permit more women to pursue legal action against their ex-husbands who fail to make court ordered payments.

- 18.4 The LRA should be changed to allow both men and women to file and pursue applications for enforcement of maintenance payments without legal representation. There should also be a mechanism to allow for automatic salary attachments upon conferment of a maintenance order. Although the law allows for salary attachments upon conferment of a maintenance order, this provision has not been utilised to its fullest. The use of this law by judges and lawyers is essential for women's right to maintenance.
- 18.5 In regard to self-employed husbands, a mechanism needs to be implemented where for example, a bailiff can be appointed to recover payments from defaulting husbands. Moreover, a bailiff system will prevent lengthy and costly court procedures which are traumatic and too expensive for women. Yet another system that can be explored is a setting up of a collecting agency which will receive and collect from all husbands who are issued maintenance order.
- 18.6 The government in collaboration with women's NGOs should be encouraged to create a database on the number of defaulting cases. This could potentially be an important tool for future advocacy.
- 18.7 Section 95 of the LRA should mandate that fathers continue to pay maintenance for their children's expenses until the children reach the age of 23. This revision will reduce the financial burden on mothers and perhaps encourage fathers to remain more connected to their children.

### **III. Disparities faced by Women under the Syariah Law**

#### **8. Syariah law**

- 8.1 Overall, one of the primary causes of discrimination encountered by women is the lack of a uniform set of laws. Therefore, Parliament should mandate that all Malaysian states and federal territories adopt a uniform set of Syariah laws. The uniform law also should guarantee reciprocity among the Syariah courts in different states, such that court orders in one state would apply to the same person in a different state. These reforms would prevent people from escaping legal responsibilities or court orders in one jurisdiction by moving to another jurisdiction in Malaysia. Also, in the preparation of a standard codification or uniform law, what is equally important is the need to ensure that the uniform law must involve an enlightened and progressive interpretation of the Syariah.<sup>292</sup>
- 18.2 Amend Syariah laws that discriminate against women, using as basis the principles of equality, justice, freedom and virtues prescribed by the Qu'ran.

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<sup>292</sup> SUHAKAM, Report on the Roundtable Discussion: Rights & Obligations under CEDAW, 2004. Annex 10 – Concluding Remarks by Dato' Ranita Mohd Hussein, SUHAKAM.

### **9. Minimum age of marriage**

The Islamic Family Law (Federal Territories) Act 1984 (Act 303) should be amended to raise the minimum age for marriage for girls to eighteen. This amendment would permit more women to complete their education, which would enable them to be less dependent on their spouses. An increase in the minimum age of marriage also would prevent women from taking on family responsibilities at a young age.

### **10. Right to enter into marriage**

JAKIM should omit the consent requirement for a woman's marriage by repealing Section 13 of the IFLA. The Islamic Hanafi School of law supports the position that women and men may consent to their own marriages without the consent of a third party. The repeal of this law would give women the same right as men to marry the spouse of their choice.

### **11. Polygamy**

18.2 Section 123 of the IFLA should be amended to impose a minimum fine of RM1,000 and a mandatory minimum four-week prison sentence (maximum 1 year) as a deterrent to the practice of husbands entering into polygamous marriages without the permission of the court.

18.3 The repealed Syariah law provision (Section 23(3)(e)) that required a polygamous marriage not to reduce, directly or indirectly, the standard of living of the man's existing wife (or wives) and children should be reinstated. This formerly was a requirement in the IFLA for entering into polygamous marriages, which ensured that a polygamous marriage would not affect the man's existing family financially, nor otherwise undermine his contract obligations to his prior marriage.

18.4 Section 23 of the IFLA should state that prior to allowing a husband to enter into an additional marriage, the court will decide the amount of maintenance payments and property owed to the husband's current wife (or wives). This allocation of payments and property should occur automatically, without requiring the first wife to file a special application for this relief. This reform would help ensure that the first wife's standard of living is not affected by a subsequent marriage.

18.5 According to the Hanbali school of law, the *ta'liq* agreement (marriage contract) may provide an option for divorce if the man enters into a polygamous marriage. If a marriage contract provides an option for divorce and if the husband enters into a polygamous marriage and his wife applies for a *ta'liq* divorce, the courts should automatically grant the wife a divorce. This reform would give the wife an option to divorce without experiencing significant delays in the courts. Several other Islamic countries have adopted this position.

18.6 The Syariah courts must improve the application process for polygamous marriages. The specific reforms to the application procedures set forth in Sisters In Islam's Memorandum on Reform of the Islamic Family Laws on Polygamy, which was submitted to Datuk Seri Dr. Mahatir Mohamad on 11 December 1996, should be



implemented. Applications must be scrutinised by judges, and applicants must provide legitimate supporting documents for their applications.

## 12. Divorce

12.1 The IFLA should require that matters of custody, maintenance and property division be settled between the parties prior to registering a *talaq* divorce conducted without the permission of the court. This will ensure that each party is treated fairly before the divorce is registered.

18.2 Additionally, *talaq* divorces occurring outside of the court should not be registered until the *talaq* occurs inside the court according to court procedures

18.3 Recognising that a *talaq* divorce conducted without the permission of the court is a divorce under unjust circumstances, wives of men who divorce without the permission of the court should automatically be entitled to substantial *muta'ah* (financial compensation for women who are divorced under unjust circumstances).

18.4 The penalties for entering into a unilateral *talaq* divorce outside of court should be more severe, as the existing penalties have not been effective at ensuring that *talaq* divorces are conducted inside the court. Men who divorce outside of court should be charged fines of up to RM 5,000 or imprisoned for up to one year. These penalties should be enforced rigorously by the courts to deter men from divorcing women in this manner.

18.5 The conciliatory committee process set forth in Sections 47(5) through 47(15) of the IFLA should be abolished. These proceedings unnecessarily prolong and complicate divorce cases. This amendment would leave one procedure, the *Hakam* proceedings, to resolve matters between the parties.

18.6 The *Hakam* arbitration proceedings should be limited to a maximum of six months. If the arbitration fails, the court should record a judgment for the case immediately at the end of the six month period.

18.7 Supporting evidence from police and medical reports should be considered sufficient for proving spousal abuse in a *fasakh* or *ta'liq* divorce proceedings. Current requirements to produce eyewitnesses are unrealistic given that most spousal abuse occurs when the husband and wife are alone in their homes. Moreover, allegations of violence in divorce proceedings should not require the same level of proof that is required in criminal proceedings.

18.8 Syariah Courts should not discount testimony offered by family members or female witnesses.

## 13. Maintenance

18.2 There is a need for public awareness on the rights of women to claim maintenance as most women are unaware that they are entitled to different kinds of maintenance.

18.3 An effective mechanism needs to be developed to enforce and provide sufficient maintenance to wives. This could be on similar lines with the recommendations for women under the civil law.

18.2 There is a strong need for speedy court proceedings in order to ensure that women are not traumatised further and forgo their right to maintenance in order to avoid the traumatic experience.

#### **14. *Nusyuz***

18.2 Sections 59(2) and (3) of the IFLA concerning *nusyuz* of a wife should be repealed. The current law forces some women to remain in abusive relationships.

18.3 Alternatively, if the concept of *nusyuz* remains in the IFLA, Section 59 should be amended to apply both to men and women. The *Qur'an* provides that *nusyuz* constitutes bad behaviour on the part of both men and women in a marriage.

18.4 Until such time as the concept of *nusyuz* is repealed or applicable to men, the courts should require that all allegations of *nusyuz* be proven by the husband with strong corroborative evidence. This reform would ensure that women are not denied maintenance payments unjustly.

#### **15. Delay in obtaining a divorce and ancillary relief**

15.1 It is essential to create rules to speed up maintenance, divorce and division of property cases. This is to minimize both the emotional and financial stress that women face while undergoing these proceedings.

18.2 The requirement to certify a couple's attendance at religious counselling prior to filing for a divorce should be eliminated. Alternatively, the Religious Department counselling required before a woman applies for a divorce should be limited to a maximum of three months; and the failure of the husband to attend counselling sessions should not adversely affect the woman's right to file for a divorce. A woman should not be penalised for her husband's negligent or deliberate efforts to frustrate her petition for divorce.

#### **16. Division of Property**

Section 58 of the IFLA should be amended to provide equal value to women's non-wage contributions, such as childcare and housework, and financial contributions in determining the division of marital property. This amendment would encourage judges to place the same value on work performed inside and outside of the home.

#### **17. Guardianship**

18.2 Recognising that both men and women under the Syariah law should have equal rights with respect to their children, Section 88 of the IFLA should be amended to allow not just fathers, but also mothers, to be appointed legal guardians of their children.

18.3 At the moment women have equal rights to guardianship of children by way of an administrative circular, but it needs to be studied whether this circular has been filtered down and accepted by the institutions women come in direct contact with i.e. school administration, immigration officers and so on. All concerned personnel need to be educated on the administrative circular.

18.4 All forms requiring signatures of guardians need to be edited to include the words: 'guardian: father/mother', where the signature of either one is legally recognised. This process needs to be continually monitored to ensure that women's right to guardianship is being upheld by all institutions.

### **18. Custody**

18.1 Under Syariah law, remarriage should not affect men's or women's rights to custody of children unless the remarriage affects the welfare of the child. The current law may unjustly deny women the right to remarry and maintain custody of their children from a prior marriage.

18.2 Fathers and mothers should both be equally responsible for maintaining their illegitimate children.

### **19. Inheritance**

To look into other concepts, besides Hukum Faraid, that are not prohibited under Islamic law, including the concepts of testamentary bequests and that of trusteeship of property allowed under the Islamic system of *waqf*.

## GENERAL RECOMMENDATION 19

### VIOLENCE AGAINST WOMEN AND GIRLS

The Government Report details the existing legal instruments covering violence against women, however omits to provide an analysis of the effectiveness of these laws, its enforcement mechanisms and support structures and services. A critical aspect of the fight against violence against women is also the monitoring and collection of data so as to be able to respond to emerging trends and the concerns of specific categories of women: for example, migrant domestic workers and women in detention. The obligation of the government in this regard is a comprehensive one that demands making the connections between discrimination against women, gender-based violence and violations of human rights and fundamental freedoms.

#### CRITICAL AREAS OF CONCERN

##### 1. Prevalence of violence against women

Over the years there appears to be an increase in the number and intensity of reported cases of violence against women. The media has been highlighting these cases and drawing the public's attention and outrage against such violent sexual crimes against women. The collection and updating of data on the prevalence and trends of violence against women is important towards developing strategies and effective responses, as well as to demystify some of the false assumptions around cases of violence against women.

##### *Domestic Violence*

Women are more likely than men to be victims of domestic violence which is a gross violation of fundamental human rights, the right to life, personal security and safety, to be free of degrading and inhumane treatment and to be free of torture. In Malaysia, husbands or boyfriends physically beat approximately 1.8 million women or 39% of women above the age of 15 years<sup>293</sup>. Most women who fled their homes and sought shelter at the Women's Aid Organisation (WAO) were victims of domestic violence.<sup>294</sup> In the year 2003, there were 2,555 cases of domestic violence reported to the police, 636 cases reported to the department of social welfare and 165 cases reported to the Ministry.<sup>295</sup>

##### *Rape*

The number of rape cases reported to the police have increased steadily over the years: 1217 in 2000, 1386 in 2001 and 1479 in 2003.<sup>296</sup> The figures are even more astounding bearing in mind that only one out of ten rape survivors reports rape.<sup>297</sup> The nature of

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<sup>293</sup> Rashidah Abdullah, Rita Raj-Hashim and Gabriele Schmitt, *Battered Women in Malaysia, Prevalence, Problems and Public Attitudes*, Women's Aid Organisation, 1995, p.5

<sup>294</sup> In 2004, 53% of the cases received by WAO for shelter and 62.7% of face to face counseling cases were domestic violence cases.

<sup>295</sup> Ministry for Women, Family and Community Development, *Statistics on Women, Family and Social Welfare 2004*, 2004

<sup>296</sup> Ibid.

<sup>297</sup> Rohana Arifin (ed.), *Shame, Secrecy and Silence: A Study of Rape in Penang*, 1997

reported rape cases, as monitored by All Women's Action Society (AWAM), seems to indicate some disturbing trends. Rape survivors tend to be younger with 55.8% of the women who reported rape being younger than 16. There are also an increased number of reported cases of rape against children of tender age. This reveals the vulnerability of young women to sexual assault by older men (97.5% of suspects were over 16).<sup>298</sup> Gang rapists tend to be younger with an average age of 25.1 compared to 30.9 years of age for the average rapist.<sup>299</sup> There have been reports on cases of custodial rape where a 13 year-old detainee reported rape while in a temporary detention centre in Kota Kinabalu.<sup>300</sup> Similar cases were also reported in the district of Ampang Jaya police station.<sup>301</sup>

Marital rape also continues to remain a very real concern. Statistics gathered by AWAM indicate that in the years 2000-2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands. WAO's National Research on Domestic Violence (1989-1992) also reveals that of the 60 battered women who sought help, 50% reported that their husbands had used physical force during sexual intercourse.<sup>302</sup> Women who are raped by their husbands are likely to be raped many times – often 20 times or more. These wives are often coerced into sex or are unable to refuse because of threats of physical violence, financial dependence on their husbands, fear for the safety and protection of their children. Women in these circumstances are usually trapped in a vicious cycle of sexual abuse.<sup>303</sup>

#### *Sexual Harassment*

In a survey conducted by Women's Development Collective (WDC), 35% of the respondents reported that they had experienced one or more forms of sexual harassment in their place of work. These responses varied by company with some as high as 46.3% to as low as 19.6%. The survey disclosed that the most common form of harassment was verbal harassment with 17 of 45 respondents (38%) identifying with it. The other forms of harassment were physical harassment (33%), visual (13%), psychological (9%) and non-verbal (7%).<sup>304</sup>

Sexual harassment has long been recognized as a problem by many sectors in Malaysian society. In Malaysia, the first survey on sexual harassment was conducted by the Women's Section of the Malaysian Trades Union Congress (MTUC) in 1987. The study reported that 11 to 90% of the female respondents experienced sexual harassment in the

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<sup>298</sup> All Women's Action Society (AWAM), *The Rape Report, An Overview of Rape in Malaysia*, 2002, pg.40

<sup>299</sup> Ibid. 44

<sup>300</sup> WAO Press Statement, "Alleged Rape Survivor is a Malaysian", 8 October 2002

<sup>301</sup> See section 7 on Women in Detention.

<sup>302</sup> Rashidah Abdullah, Rita Raj-Hashim and Gabriele Schmitt, *Battered Women in Malaysia, Prevalence, Problems and Public Attitudes*, Women's Aid Organisation, 1995

<sup>303</sup> Joint Action Group against Violence Against Women (JAG-VAW), *Memorandum to the Special Select Committee on penal code (amendment) 2004 and criminal Procedure code (amendment) 2004*, 2004

<sup>304</sup> Cecelia Ng, Zanariah Mohd Nor, Maria Chin Abdullah, *A Pioneering Step: Sexual Harassment & the Code of Practice in Malaysia*, Women's Development Collective, 2003

workplace.<sup>305</sup> In the 1990s, a survey of 586 public administrators (422 men and 164 women) in the northern states of Peninsular Malaysia reported that 43.4% of the men and 53% of the women faced at least one form of sexual harassment.<sup>306</sup>

#### *Abuse of Migrant Domestic Workers*

An analysis by WAO of the media coverage of foreign domestic worker abuse cases reveals that this is a recurring phenomenon. Between July 1997 and August 1998 there were 19 cases of foreign domestic worker abuse in Malaysia. Within this 13-month period, at least one case of abuse occurred each month. Of the 19 cases, 11 involved physical abuse and assault in varying degrees of severity, three were cases of sexual abuse including rape and attempted rape by an employer, two cases of confinement and seven involved the withholding of passports and / or wages by employers.<sup>307</sup> Between the years 1995 to 2002, a total of 60 migrant workers were referred to the WAO, 39 of which were suffering from some form of abuse.

## **2. The Scope of Violence against Women**

### **.1 Domestic violence**

While the coming into force of the Domestic Violence Act 1994 (DVA) in 1996 was a positive step in the battle against violence against women, women's groups have identified and highlighted several concerns and problems with the provisions of the Act and its enforcement<sup>308</sup>. The Women's Center for Change (WCC) submitted a Memorandum on the Review and Proposals for Amendment to the Domestic Violence Act to the then Prime Minister and Ministry of National Unity and Social Development in 1999. The Memorandum is attached as **ANNEX 3**. To date there have been no developments on this.

The definition of domestic violence in the DVA is insufficient. Its definition does not reach the full ambit of domestic violence as it omits reference to mental, psychological and emotional forms of domestic violence. Domestic violence also isn't defined as a separate, specific crime in itself in the DVA, but has to be read together with the Penal Code. This limits the scope of domestic violence as criminal law doesn't take into account the different context and dynamics of domestic violence cases; the fact that it is typified by repeated and habitual violence and intimidation used in an intimate setting. For example, simply charging an offender with repeated counts of "voluntarily causing hurt" does not do justice to months or years of repetitive acts of physical, verbal, sexual, emotional and psychological abuse.<sup>309</sup>

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<sup>305</sup> Zarizana Abdul Aziz and Dr. Cecelia Ng, *Combating Sexual Harassment: The Way Forward*. Presented at the 11<sup>th</sup> Malaysian Law Conference, 8 to 10 November 2001, Kuala Lumpur

<sup>306</sup> Ibid.

<sup>307</sup> WAO Research and Advocacy on foreign domestic worker abuse <http://www.wao.org.my/research/fdw.htm>

<sup>308</sup> Women's Center for Change (WCC), *Memorandum titled Review and Proposals for Amendments to the Domestic Violence Act submitted in 1999*. Submitted by WCC to the Prime Minister and the Ministry of National Unity and Social Development.

<sup>309</sup> Joint Action Group against Violence Against Women (JAG-VAW), *Memorandum to the Special Select Committee on Penal code (amendment) 2004 and Criminal Procedure code (amendment) 2004*, 2004

## .2 Rape

Despite amendments to the rape laws in 1989, there are still several areas that require further attention and action.<sup>310</sup> JAG-VAW submitted its Memorandum to the Special Select Committee on Penal Code (Amendment) 2004 and Criminal Procedure Code (Amendment) 2004 in October 2004. This Memorandum is attached as **ANNEX 4**. While there have been some positive statements made by the government around some of these proposed amendments, to date no actual amendments have been made. More recently, JAG-VAW submitted another Memorandum to the Special Select Committee on Penal Code (Amendment) 2004 and Criminal Procedure Code (Amendment) 2004 in August 2005. This Memorandum is attached as **ANNEX 5**.

### *The definition of rape*

Under the Penal Code, rape is narrowly defined as penile penetration, excluding offences that involve the insertion of objects into the vagina or anus or forced oral sex. As a result of this, such offenders are charged with molestation or assault with intent to outrage modesty, which carry lesser sentences. There is also the need for a specific section on aggravated rape to define a situation involving rape that is deemed to cause additional trauma to the survivor, be it physical or psychological. In a case involving four men who gang raped a 40 year old woman and inserted a bottle into her anus, poured kerosene and set her on fire, they were only charged with manslaughter and jailed for 5 years.<sup>311</sup>

### *Marital rape*

Marital rape is not recognized under the Penal Code as a crime. The Penal Code's exclusion of marital rape as a sexual crime<sup>312</sup> retains the traditional notion of rape as a sexual act instead of a violent crime. No wife who has been raped considers the act to be merely sex. It is a form of violence, aimed at violating the victim in one of the most humiliating manners. Whilst trying to preserve the rights of married persons to engage in consensual sex with each other, it is alarming that the result of equating sex with rape appears to be condoning violence against women in the home. In punishing marital rape, the law does not prohibit or even restrict married couples from engaging in consensual sex.

There has been much uproar over the campaign to acknowledge marital rape as a punishable crime with accusations and claims that it will ruin the marriage institution and goes against Islam. JAG-VAW in their memorandum to the Special Select Committee on Penal Code and Criminal Procedure Code submit as follows:

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<sup>310</sup> Anti Rape Task Force, *Memorandum on the Proposed Amendments to Laws Related to Rape*, September 2003.

<sup>311</sup> All Women's Action Society (AWAM), *The Rape Report, An Overview of Rape in Malaysia*, 2002, pg.54

<sup>312</sup> The exception to section 375 Penal Code provides "Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in the Federation as valid, is not rape." Further explanation is provided for women living separate from their husbands, who have obtained injunctions and Muslim women living separately from their husband during the period of 'iddah' shall not be deemed to be a wife for the purposes of this section.

“The myth that a husband is unable to rape his wife due to irrevocable licence for sex as provided under the Penal Code finds its basis not in the laws of Allah (swt) but in English common law prior to the 1800’s. In their justification for not recognising marital rape, English law lords often quoted East in his *Treatise on the Pleas of the Crown*, “a husband cannot by law be guilty of ravishing his wife on account of the matrimonial consent which she cannot retract”.

In perpetuating this myth, Muslims are justifying and keeping alive a myth created by Victorian Englishmen (and their forefathers) who viewed women as little more than property, a view certainly rejected by Islam. Sûrah an Nisa 4.19 commands, “O ye who believe! Ye are forbidden to inherit women against their will...”.”

### **.3 Sexual harassment**

In August 1999, the Ministry of Human Resources launched the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace. While the code is a noteworthy attempt by the government to define and address the problem of sexual harassment in the workplace, in reality, the Code is only a voluntary code and cannot be enforced. It need not be implemented by companies or employers and at worst is ignored. 4,500 companies have adopted the code and implemented their own policies on sexual harassment in the workplace,<sup>313</sup> however, as noted by the Deputy Minister, these companies comprise approximately 1.125% of the 400,000 employers registered with PERKESO.

There is a need for legislation on sexual harassment to require employers to prevent its occurrence and to provide victims with timely and meaningful access to legal redress. The JAG-VAW, on 30<sup>th</sup> March 2001 presented the Deputy Minister of Human Resources with a Proposed Sexual Harassment Bill. This Bill is attached as Annex 3. To date, there have been no developments on this.

### **.4 Migrant domestic workers**

There are no specific legislations that protect the rights of migrant domestic workers in Malaysia. Conversely, migrant domestic workers who are abused are ensured redress through our criminal justice system as Malaysian criminal laws are applicable to all nationals who stay in this country. Although there are sympathetic police officers who have brought women to the WAO shelter, not all police officer have been diligent in following up with the case. This could be due to lack of resources and a case overload thus making the migrant domestic workers case a low priority.<sup>314</sup> The attitude appears to be that if a migrant domestic worker is abused/injured, it should then be the responsibility of their respective embassies rather than that of the Malaysian Government. The police should be reminded that the offence was committed here in Malaysia by a Malaysian citizen.

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<sup>313</sup> New Straits Times, 21<sup>st</sup> March 2001

<sup>314</sup> Meera Samanther, Lee Shook Fong, Ivy Josiah, “Is the Domestic Worker Safe at Home?” A paper presented at the National Consultation on foreign Domestic Workers, 31 July 2002. A case study was presented whereby the investigation officer did not immediately take the injured worker to the hospital but only 2 weeks later when the wounds has healed.



## **2. Enforcement: Investigation and Court process**

### **.1 Investigation Process**

Despite the acknowledgement of certain gender based violent offences in the laws, there is still much that needs to be done to ensure the effectiveness and enforcement of these laws. It is crucial at this stage to ensure survivors and victims are treated with respect and a level of sensitivity for the trauma they have had to endure. The following are some aspects of the enforcement process that remain problematic.

#### *Domestic Violence*

Although domestic violence is defined under the DVA, the offence must be contained in the Penal Code before further action can be taken. Besides limiting the scope of domestic violence, this has also brought about other complications as it is also then subject to the rules of the Criminal Procedure Code (CPC). Under the CPC, non-seizable offences, of which most domestic violence cases are, require an Order to Investigate to be issued by the Deputy Public Prosecutor before further action can be taken. The DVA provides that an Interim Protection Order (IPO) may be issued “during the pendency of investigations”. This means that domestic violence victims cannot get an IPO until the Deputy Public Prosecutor issues the Order to Investigate. Without a full understanding of the nature of domestic violence, this creates unnecessary complications and delays for the victims who might need urgent protection.

The lack of specific procedures to ensure speedy service of the IPO on the perpetrator and to inform the victims whether service has been effected, leave the victim vulnerable and uncertain as to their safety. Further, as the IPO expires upon the completion of investigations, victims also need to be informed immediately of any change in the status of their case. Only if the perpetrator is charged in court, can she apply for a Protection Order from the court.

#### *Rape cases*

The police have several methods of identifying the perpetrator. However the requirement for a direct identification through a line up continues to remain a traumatic and disturbing method employed by the police. Not only does the survivor have to come face to face with the man who raped her, to positively identify the suspect, she has to walk up to him and tap his shoulder.<sup>315</sup> Besides being traumatic, many survivors might fear retaliation in the event he is set free.

It is crucial that a review of these procedures in the investigation process be done bearing in mind the interest of the survivor and victim. The procedures need to be sensitive to the trauma survivors have undergone and to also be supportive of their vulnerabilities and concerns.

### **3.2 Court / Judicial Process**

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<sup>315</sup> All Women's Action Society (AWAM), *The Rape Report, An Overview of Rape in Malaysia*, 2002, pg. 76

There are several aspects of the judicial process that violate the woman's right to a fair trial where she is treated with dignity and respect. Instead, the trial procedures for sexual assault cases often present a hostile environment that is both traumatic and discriminatory for the woman survivor who decides to testify. Questions around her demeanor after the rape, on why she delayed making a police report and placing emphasis on the need for physical evidence of force, play to the false assumptions / myths of rape: that the woman asked for it, that she is merely crying rape, that she enjoyed it, etc. Many have equated such line of questioning with a second rape as the survivor is left reliving the trauma of the crime.

Delay and postponements of cases is also a factor that continues to cause stress to the survivors and are especially difficult for migrant domestic workers who chose to stay back to see the case through to its conclusion.

*Cross-examination of rape survivor's past sexual history*

Section 146A of the Evidence Act states that no evidence may be adduced in cross examination concerning the sexual history of the survivor with any other person other than the accused. This provision still contains loopholes wherein the survivor's sexual history is allowed to be questioned. Such instances include questioning around the issue of the sexual relationship between the survivor and the accused, in rebuttal to issues raised by the prosecution and where there is evidence of the survivor actually having intercourse with another during the time in question. While these questions do not breach the Evidence Act provision, the intention remains the same, that of casting doubt on the "morality" of the rape survivor in the hope of winning the case.<sup>316</sup>

*Disclosure of victim's identity*

In court, the survivor has to state her name, age and address in full view and hearing of the accused and courtroom. Besides a breach of privacy, the survivor also is put at risk as the accused now knows where she lives. Although there are court provisions that provide for the court to be closed for specific purposes, the judge normally orders the hearing in camera only when testimony on the actual rape is being given. The survivor also has to mix with the public outside the courtroom as she awaits trial or during breaks.<sup>317</sup>

*Burden of proof and corroboration*

In a rape trial, the burden is on the survivor to prove that she did not consent. Research from various jurisdictions reveal the difficulties in proving lack of consent. For example, the requirement to show signs of struggle or injury to prove lack of consent fails to appreciate the distinction between consent and submission<sup>318</sup>. Further, the court practiced rule that the evidence of a survivor in a sexual offence case needs to be corroborated continues to pose obstacles to the fair and efficient handling of such cases. Many

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<sup>316</sup> All Women's Action Society (AWAM), *The Rape Report, An Overview of Rape in Malaysia*, 2002.

<sup>317</sup> Ibid.

<sup>318</sup> Anti Rape Task Force, *Memorandum on the Proposed Amendments to Laws Related to Rape*, September 2003.

countries like Canada and the United Kingdom have recognized that there is little justification for this requirement and have done away with the practice.<sup>319</sup>

## **2. Infrastructure and Support Services**

### *One Stop Crisis Centers*

In 1994, the Ministry of Health set up the first One-Stop-Crisis Centre (OSCC) in the Accident and Emergency Department of the Hospital Kuala Lumpur. Besides medical treatment, women also benefit from the assistance of social workers and police personnel stationed there. Most government hospitals currently have an OSCC functioning however consistency of services vary and some form of monitoring of services and training for service providers would be useful.

### *Shortage of social welfare officers*

As the Social Welfare Department is the primary facilitator of the DVA, all victims seeking protection under this Act, must meet with social welfare officers before their case can proceed to court. In practice, it is the social welfare officers who apply to the courts for the protection orders for the victims of domestic violence. There is however a severe shortage of social welfare officers which seriously delays the process of obtaining protection orders.

### *Shortage of women police officers*

Although the police established a Sexual Offences Unit in 1986, there is a critical lack of women officers in that unit, especially considering their scope of work involves dealing mainly with women who have survived sexual crimes. An Investigating officer handles several rape cases per week, and the heavy workload does not enable her to give adequate time and support to the survivors.<sup>320</sup>

### *No designated shelters for domestic violence survivors*

There are 48 welfare institutions in Malaysia and none of them specifically for survivors of rape, domestic violence or women facing crisis.<sup>321</sup> Survivors are instead placed in homes for orphans, juvenile delinquents and the elderly. These homes are not equipped with personnel to counsel and care for domestic violence survivors.

The DVA currently permits the issuance of exclusive possession of a shared residence only when “there is no other way to secure the personal safety of any protected person for the time being”.<sup>322</sup> This approach unjustly privileges the interests of the abuser over the victim. The court only has the jurisdiction to order exclusive possession of a shared residence upon issuing a Protection Order (which is applied for when the accused is charged in court) and not while the case is pending investigations. However the need to be safe in one’s own home is crucial during both these stages of the case. Further, an order for exclusive possession of a shared residence is to be revoked if a “suitable

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<sup>319</sup> Ibid.

<sup>320</sup> All Women’s Action Society (AWAM), *The Rape Report, An Overview of Rape in Malaysia*, 2002.

<sup>321</sup> Social Statistics Bulletin, 2000, p.189

<sup>322</sup> Domestic Violence Act 1994, section 6(4)

alternative residence” is found for the victim. This includes temporary shelters, hostels or homes of friends or relatives. This is unacceptable as “punishes” and prevents the victim from continuing to live in her home while the abuser gains complete possession.

### **3. Lack of gender sensitive public officers**

While there have been some improvements to the laws and support structures, there is still a general lack of understanding of the issue of violence against women among public officers resulting at times in gender insensitive approaches and attitudes both in dealing with the victims themselves or handing of the cases. Although the Government Report mentions conducting gender sensitization trainings for policy and programme implementers, no mention is made of consistent and comprehensive training for service providers who come into contact with survivors to ensure they understand the dynamics of violence against women and are able to respond appropriately.

### **4. The abuse of migrant domestic workers**

The violence that is perpetrated against migrant domestic workers is exacerbated by the discriminatory policies that govern their work and lives in the country, leaving them vulnerable and unable to seek support and redress.

The recruitment of migrant domestic workers implemented by the Immigration Department is based on a single entry policy where the domestic worker is registered to one employer. This policy deters the reporting of abuse by the employer, as a domestic worker does not have the right to leave and change her employer. The termination of her employment with the registered employer may instead lead to deportation and loss of income.

If a case is lodged with the police, the domestic worker will have to apply for a Special Pass from the Immigration Department to stay within the country legally and wait for the outcome of her case. This Special Pass costs RM100 (USD26) and has to be renewed every month<sup>323</sup>.

According to the Employment (Restriction) (Exemption) Order, 1972 migrant workers who have obtained the Special Pass are not allowed to work while they wait for their cases to be settled in court or the labour department. As a result many are discouraged from bringing legal action against their employers as the prolonged court cases mean long periods without income.

In response to the purported increase in number of domestic workers absconding, the government in April 2001 introduced a security bond of RM500 to the employers<sup>324</sup> to cover the cost of detention and deportation of the migrant workers once arrested. This may result in employers imposing inhumane restrictions on the movement and communication of the domestic worker with others, based on the underlying

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<sup>323</sup> The Home Ministry has waived the cost of this Special Pass for abused foreign domestic workers seeking refuge at Women’s Aid Organisation (WAO)

<sup>324</sup> Immigration Regulation 1963, Regulation 18

preconception that foreign domestic workers are easily influenced and will be lured into vice or immoral activities should they have contact with the outside world.

While the government has taken some positive steps over the years to regulate and provide services for migrant workers, the effectiveness of these efforts however remain unknown:

- The establishment of a Cabinet Committee on Foreign Workers: What is the mandate of this Committee, who are its members, how often does it meet and what has been the outcome of this Committee?
- The setting up of a police hotline for migrant Worker abuse: Is there sufficient publication of this hotline, how many calls were received and what is the breakdown of reasons for calling, what kind of advice or counseling do the callers receive?
- The blacklisting of employers who have abused their domestic help: How effective has this list been, how many employers have been blacklisted and who monitors the application of this list (i.e. to ensure blacklisted employers' further applications for domestic workers are rejected)?
- Speedier police investigations and charges against the perpetrators have been noted if the case attracts media attention: How many charges have been filed in court and what is percentage of convictions and degree of sentencing?

## **5. Women in Detention**

Women in detention include women convicted of crimes, those awaiting the completion of their trials, asylum seekers and those who are being held for protective or immigration reasons.<sup>325</sup> The percentage of women prisoners in Malaysia is estimated to be around 4.7% and growing.<sup>326</sup> There are various types of detention in Malaysia administered by various legislations and applying different legal measures. These include lock-up; prison; detention without trial under the Internal Security Act (ISA), Emergency (public Order and Prevention of Crime) Ordinance, Special (Preventive Drugs Measures) Act; juvenile detention; drug rehabilitation centres; rehabilitation of young girls; detention camps for undocumented immigrants; and religious rehabilitation centres.

Overcrowding appears to be a common problem. For example 11 women arrested for unlawful assembly were held at the Kapar Police Lock-up which was gazetted for only 1 detainee and women detainees for the district of Kelang.<sup>327</sup> SUHAKAM also reported that its visit to the Kajang Women's Prison revealed that 787 women prisoners were being detained in a facility built for 450. At one point, the facility was said to have had about 1,200 detainees.<sup>328</sup> This has implications for health, sleeping conditions and privacy.

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<sup>325</sup> Penang Statement on Women in Detention, 3<sup>rd</sup> Expert Meeting on Women and Justice, January 12 – 14, 2003, Penang, Malaysia

<sup>326</sup> Bastian, Setphanie, Paper presented at the 3<sup>rd</sup> Expert Meeting on Women and Justice, January 12 – 14, 2003, Penang, Malaysia

<sup>327</sup> Zarizana Abdul Aziz, Paper presented at the 3<sup>rd</sup> Expert Meeting on Women and Justice, January 12 – 14, 2003, Penang, Malaysia

<sup>328</sup> Ibid

Educational and rehabilitation programmes are also very limited and in some cases non-existent. SUHAKAM's visit to the Moral Rehabilitation Centre for Girls at Batu Gajah, Perak revealed an acute shortage of professional teachers to help those preparing for national exams.<sup>329</sup> In the Kajang Women's Prison, no educational programmes, rehabilitation or formal counseling for young prisoners were implemented except for religious classes. Recreational facilities, if any were limited.<sup>330</sup>

During a visit by SUHAKAM to a police lockup following a complaint by a woman detainee that she was ordered to strip by the police, it was revealed that the police conduct a body search and order detainees to strip regardless of the crime they are being charged for. Detainees are also ordered to squat so that any hidden objects would fall out.<sup>331</sup>

In August 2003, a police constable was found guilty of raping two migrant women, a Filipina and Indonesian, at a police lock-up. Initially acquitted of the charge on the basis that the sexual intercourse seemed voluntary "just like between husband and wife", the case highlighted the still applied myths of rape and allowed evidence of past sexual conduct with person unrelated to the accused into evidence.<sup>332</sup> However, on the remittance of the case to court he was sentenced to 15 years jail and ordered 17 strokes of the rotan. The Deputy Public Prosecutor in proposing the maximum sentence argued that as a policeman, he had "taken advantage of his authority by oppressing the weak who were at his mercy as they were illegal immigrants without travel documents".<sup>333</sup> The case has exposed the vulnerability of women in detention to sexual assault and the need for specific provisions to deal with this.

## **RECOMMENDATIONS TO THE GOVERNMENT**

### **1. Prevalence of violence against women**

To put in place mechanisms to monitor not only the prevalence of gender based violence but to analyse emerging trends and areas of concern. This information should be made easily available to the public so as to create awareness and demystify some of the false assumptions made around violence against women.

### **2. The scope of violence against women**

- .1 To review the provisions of the Domestic Violence Act based on the memorandum entitled Review and Proposals for Amendments to the Domestic Violence Act submitted by the Women's Center for Change (WCC) in 1999.
- .2 To review the provisions of the Penal Code, Criminal Procedure Code, Evidence Act based on the memorandum by the Joint Action Group against Violence Against Women (JAG-VAW) to the Special Select Committee on Penal Code (Amendment)

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<sup>329</sup> Ibid

<sup>330</sup> Ibid

<sup>331</sup> Rights in Detention in Malaysia by Zarizana Abdul Aziz. Women in Action No.3, 2003, Isis International Manila

<sup>332</sup> Ibid

<sup>333</sup> "Policeman gets 15 years and 17 strokes for rape of Indon, Filipina", Utusan Express, Kuala Lumpur, 8 August 2003.

2004 and Criminal Procedure Code (Amendment) 2004 and the Anti Rape Task Force, Memorandum on the Proposed Amendments to Laws Related to Rape, September 2003.

- .3 To enact a sexual harassment law based on the proposed sexual harassment bill submitted by JAG-VAW.
- .4 To review the laws affecting migrant domestic workers to ensure adequate coverage and protection from violence.
- .5 To hold consultations with the relevant parties including the NGOs working in these areas to study the above reviews proposed.

#### **1. Enforcement: Investigation and Court process**

- .1 To review all aspects of the investigation process for cases of gender based violence to ensure speedy redress and gender sensitive responses to these cases, especially for cases of domestic violence and rape.
- .2 To ensure the police do away completely with the face to face identification parade and use a one-way mirror in all cases involving rape and sexual assault
- .3 To review the rules of evidence in court to remove any loopholes and provisions that continue to cause trauma to survivors who testify especially involving the cross examination of the rape survivors past sexual history, disclosure of a survivors identify and the need for burden of proof and corroboration in rape cases.

#### **1. Infrastructure and Support Services**

- .1 Allocations are needed in the State's annual budget to ensure that there are enough resources for all the agencies involved in combating violence against women. These include budgets for more staff, setting up of shelters and a special fund for women and children in crises
- .2 To provide shelters specifically designated for survivors of domestic violence and sexual assault equipped with trained personnel who can counsel and offer appropriate care.
- .3 To ensure OSCCs are set up in all district hospitals and to establish an in house mechanism to monitor the services and staffing requirements of all OSCCs to ensure effectiveness. The existing protocols and guidelines should be reviewed to accommodate changing needs and requirements.
- .4 To employ more welfare officers and women police officers to handle cases.

#### **1. Lack of gender sensitive public officers**

- .1 To implement compulsory ongoing training programmes for all public officers (i.e. police, welfare officers, medical personnel and judiciary) on issues of violence against women. Training modules on gender, violence against women and rights of migrant workers developed in consultation with the relevant NGOs should be included as part of the curriculum in police training schools
- .2 A more concerted and consistent approach to public education on issues of violence against women to be developed. Media campaigns are needed to increase awareness of women's rights and to bring about a change in the mindset of the Malaysian public on issues of domestic violence, rape, sexual harassment and rights of migrant domestic workers.

**6. Abuse of Migrant Domestic Workers**

- 6.1 To review the various policies and regulations that effect migrant domestic workers leaving them vulnerable to abuse. This includes reexamining the imposition of Special Passes for those seeking legal redress or awaiting completion of court proceedings. To re-evaluate the recruitment policy which is based on a single entry policy as it deters migrant domestic workers from seeking redress for fear of deportation.
- 6.2 All migrant domestic workers should on arrival be given an orientation on their rights and provided emergency telephone numbers and other resources for dealing with crises and abuse.
- 6.3 To develop a multi agency approach with a secretariat to handle all cases of abuse in cooperation with the police, welfare, court, immigration, hospitals and NGOs. The existing multi agency networks should be enhanced and broadened to encompass all forms of violence against women.

**7. Women in Detention**

- 7.1 To promote and support education regarding the human rights of women in detention, including public education about the conditions faced by them in detention and gender sensitive training for lawyers, judges, law enforcement officers and personnel in detention centers.
- 7.2 To investigate and prosecute persons accused of violating the human rights of women in detention.
- 7.3 To emphasise the rehabilitation of women in detention. Alternative detention models to be studied that encourage rehabilitation.



**THE NATIONAL CONFERENCE ON THE CONVENTION ON THE ELIMINATION OF  
ALL FORMS OF DISCRIMINATION AGAINST WOMEN  
(CEDAW CONVENTION)  
21 & 22 AUGUST 2004**

**WORKSHOP PARTICIPANTS**

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**Article 16 – Marriage and Family**

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**JAG-VAW MEMORANDUM ON EQUALITY FOR MALAYSIAN WOMEN  
SUBMITTED TO THE PRIME MINISTER ON 25<sup>TH</sup> MAY 2004**

**1. ISLAMIC FAMILY LAW AND THE ADMINISTRATION OF JUSTICE IN THE SYARIAH SYSTEM – Submitted by Sisters in Islam**

No.	Issue	Recommendations Law Reform	Recommendations Policy	Agency / Unit involved
1.	<b>Islamic Family Law</b>	<ul style="list-style-type: none"> <li>To reform the substance and implementation of the Islamic Family Law to ensure justice and equality for Muslim women.</li> </ul>	<ul style="list-style-type: none"> <li>To form an interagency committee, inclusive of women's groups to review the Islamic Family Law and also the current draft amendments that discriminate against women.</li> <li>To use several memorandums submitted by women's groups as the basis for the review.<sup>334</sup></li> <li>To establish a National Registration of Muslim Marriages and Divorce</li> </ul>	<ul style="list-style-type: none"> <li>Law Division, Prime Minister's Office</li> <li>Jawatankuasa Teknikal Undang-Undang Syariah, JAKIM</li> <li>Ministry of Women and Family Development</li> <li>Attorney-General's Chambers</li> <li>Women's groups working on law reform</li> </ul>

<sup>334</sup> For details, please refer to enclosed SIS memorandums:

- - Memorandum Perbandingan Rang Undang-Undang Keluarga Islam (Negeri Selangor) 2003 Dengan Enakmen Undang-Undang Keluarga Islam (Negeri Selangor) 1984. 16 May 2003.
- - Violations of Muslim Women's Human Rights: Further Discrimination Against Muslim Women Under the Selangor Islamic Family Law Bill 2003 Through Selective Gender Neutral Provisions. 29 May 2003
- - Memorandum Perceraian Dan Tuntutan Sampingan Dalam Prosiding Mahkamah Syariah, 2000.
- - Memorandum on Reform of the Islamic Family Law and Administration of Justice in the Syariah System in Malaysia (in English and Bahasa Malaysia), 1997
- - Reform of the Islamic Family Law on Polygamy, 1996

			<ul style="list-style-type: none"> <li>To adopt a uniform Islamic Family Law with arrangements for reciprocal enforcement of syariah court judgements among all states<sup>335</sup></li> </ul>	<ul style="list-style-type: none"> <li>Jawatankuasa Teknikal Undang-Undang Syariah, JAKIM</li> <li>Jabatan Kehakiman Syariah, JAKIM</li> </ul>
2.	<b>Syariah Judicial System</b>		<ul style="list-style-type: none"> <li>To establish a Federal Syariah Court of Appeal served by a panel of circuit judges to hear all appeal cases in the country<sup>336</sup></li> <li>To appoint women as judges.</li> </ul>	<ul style="list-style-type: none"> <li>Jawatankuasa Teknikal Undang-Undang Syariah, JAKIM</li> <li>Jabatan Kehakiman Syariah, JAKIM</li> </ul>
3.	<b>Training of Judges and Court Officials</b>		<ul style="list-style-type: none"> <li>To provide continuing legal education to judges and court officials on codified law and procedure to upgrade knowledge and skills.</li> <li>To enable women's groups to provide input into ILIP training programmes and meetings of judges.</li> </ul>	<ul style="list-style-type: none"> <li>Jabatan Kehakiman Syariah, JAKIM</li> <li>Institut Latihan Islam...(ILIP)</li> </ul>

## 2. LAWS, POLICIES and PROCEDURES RELATED TO RAPE - Submitted by AWAM

<sup>335</sup> Please refer enclosed SIS memorandum on Syariah Criminal Offences Act and Fundamental Liberties, 1997, pp 9-11.

<sup>336</sup> Ibid, p 11.

No	Issue	Recommendations Law Reform	Recommendations Policy Reform/Administrative Action	Agency /Unit Involved
1	<b>Rape</b>	<ul style="list-style-type: none"> <li>To amend Sections 375 and 376 of the Penal Code.<sup>337</sup></li> <li>To amend Sections 146A and 133B of the Evidence Act</li> <li>To amend Section 426 of the Criminal Procedure Code</li> </ul>	<ul style="list-style-type: none"> <li>To review the existing rape protocol to minimise the trauma of rape survivors and to expedite investigations.</li> <li>To direct the Ministry of Home Affairs to review the Memorandum on Laws Related to Rape in consultation with the relevant agencies and women's groups.</li> </ul>	<ul style="list-style-type: none"> <li>Ministry of Home Affairs</li> <li>Attorney-General's Chambers</li> <li>Law Division, Prime Minister's Department</li> <li>Ministry of Women &amp; Family Development</li> <li>Women's groups involved in law reform.</li> </ul>

### 3. DOMESTIC VIOLENCE : REFORM OF LAW, POLICIES and PROTOCOLS

- Submitted by WOMEN'S AID ORGANISATION

No	Issue	Recommendations Law Reform	Recommendations Policy Reform/Administrative Action	Agency /Unit Involved
1	<b>Domestic Violence</b>	<ul style="list-style-type: none"> <li>To reform the substance and implementation of the Domestic Violence Act to ensure immediate protection and to widen the definition of domestic violence to include psychological violence</li> </ul>	<ul style="list-style-type: none"> <li>To set up an interagency committee, inclusive of women's groups, to review the Domestic Violence Act and the final report submitted by the sub-committee of the National Steering Committee on Violence Against Women.</li> <li>to set up an interagency monitoring committee in every state to review cases of domestic violence, rape, incest and sexual harassment with a view to standardise and improve delivery of services.</li> </ul>	<ul style="list-style-type: none"> <li>Ministry of National Unity</li> <li>Ministry of Women &amp; Family Development</li> <li>Police</li> <li>Attorney-General's Chambers</li> <li>Women's groups involved in law reform</li> <li>Police</li> <li>Ministry of Health One Stop Crisis Centre</li> <li>Welfare Department.</li> </ul>

<sup>337</sup> For details of all the amendments listed, see the Memorandum on Laws Related to Rape, submitted by the Anti-Rape Task Force, August 2003.

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#### 4. OTHER AREAS OF DISCRIMINATION AGAINST WOMEN

No	Issue	Recommendations Law Reform	Recommendations Policy Reform/Administrative Action	Agency /Unit Involved
1	<b>Right to Equal Guardianship</b>		<ul style="list-style-type: none"> <li>To take steps to ensure that the cabinet decision in 2000 that mothers be given the right to sign their consent on matters regarding their children be implemented.</li> <li>To send out a clear directive to all Ministries and relevant Government departments to print new forms which require the signature of the Guardian to now read signature of Father/Mother/Guardian.</li> </ul>	<ul style="list-style-type: none"> <li>Ministry of Home Affairs</li> <li>Ministry of Education</li> <li>Ministry of Health</li> </ul>
2	<b>Right of Foreign Wives</b>		<ul style="list-style-type: none"> <li>To allow foreign wives estranged, separated, divorced or widowed to continue to live in the country.</li> <li>To enable such foreign wives to sponsor themselves for continued stay in the country, without dependence on a husband.</li> </ul>	<ul style="list-style-type: none"> <li>Ministry of Home Affairs</li> </ul>
3.	<b>Equal Right to Citizenship</b>	<ul style="list-style-type: none"> <li>Amend Article 15 of the Federal Constitution to allow Malaysian women married to foreign man to confer citizenship on their husbands and children born overseas.</li> </ul>		<ul style="list-style-type: none"> <li>Ministry of Home Affairs</li> </ul>
4.	<b>Gender Bias in the retirement age of women</b>		<ul style="list-style-type: none"> <li>To standardise the retirement age for women to be same as men on the basis of the constitutional guarantee of non-discrimination on the basis of gender</li> </ul>	<ul style="list-style-type: none"> <li>Prime Minister's Department</li> </ul>

5.	<b>Maternity Benefits</b>		<ul style="list-style-type: none"> <li>• To increase maternity leave to 90 days according to ILO Convention 183 (is this right?)</li> <li>• To set up subsidised childcare centres at all workplaces and residential areas</li> <li>• To set up breastfeeding facilities at the workplace</li> <li>• To introduce 5-day paternity leave in the private sector</li> </ul>	<ul style="list-style-type: none"> <li>• Ministry of Human Resources</li> </ul>
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## 1. NATIONAL MACHINERY FOR WOMEN

No.	Issue	Recommendations Law Reform	Recommendations Administrative Action	Agency / Unit involved
1.	<b>Role of Ministry of Women and Family Development</b>		<ul style="list-style-type: none"> <li>The MWFD to play the lead role in advocating, rather than facilitating, law and policy reform to advance the status of women.</li> </ul>	<ul style="list-style-type: none"> <li>Ministry of Women and Family Development</li> </ul>
2.	<b>Role of the Majlis Penasihat Wanita Negara</b>		<ul style="list-style-type: none"> <li>To upgrade the status of this advisory body into a National Commission on the Status of Women with statutory powers to interalia review all laws, policies and regulations that discriminate against women and to propose actions (?) to advance the status of women.</li> </ul>	<ul style="list-style-type: none"> <li>Ministry of Women and Family Development</li> </ul>
3.	<b>Gender Bias in Government</b>		<ul style="list-style-type: none"> <li>To introduce compulsory gender sensitisation training for all in Government and law makers, including Ministers, top government officials, civil and syariah court judges and officials and Members of Parliament.</li> </ul>	<ul style="list-style-type: none"> <li>Ministry of Women and Family Development</li> <li>INTAN</li> <li>ILKAP</li> <li>ILIM</li> </ul>



## **MEMORANDUM (REVISED) REVIEW & PROPOSALS FOR AMENDMENTS THE DOMESTIC VIOLENCE ACT 1994**

### **Introduction**

The Domestic Violence Act (DVA), enacted in 1994, is widely recognized as an important measure in the broader goal to end domestic violence in Malaysia. In addition to acknowledging domestic violence as a public concern, the DVA aims to provide greater legal protection to domestic violence victims.

The utility of the DVA necessarily depends on effective implementation. As an organization dedicated to the eradication of domestic violence, the Women's Crisis Centre (WCC) in Penang has been closely monitoring the execution of the DVA since its implementation in 1996. Borne from the WCC's experiences, this memorandum identifies various implementation concerns and makes recommendations to improve the situation. The WCC hopes to stimulate an ongoing discussion about the needs of domestic violence victims and how the DVA can be best used to meet those needs.

The WCC makes the following recommendations, all of which will be further elaborated below:

- Clarify the duties of public officers
- Ensure efforts at reconciliation are initiated by victims and do not undermine their safety
- Recognize lawyer's right of appearance at court
- Recognize victim's ability to appear in court on her own behalf
- Broaden the definition of domestic violence under the DVA
- Broaden the availability of protection under the DVA to offences other than the Penal Code offences
- Eliminate the requirement of obtaining an Order to Investigate for non-seizable offences before obtaining an Interim Protection Order
- Allow the "pendency of investigations" requirement to be fulfilled by Magistrate's direction to investigate a crime under the Criminal Procedural Code
- Expedite the issuance of the Interim Protection Order
- Expedite service of Interim Protection Order on aggressors and inform victims when service is effected
- Completion of investigations
- Increase access to warrant of arrest power
- Introduce presumption in favour of exclusive possession for protected persons
- Increase access to exclusive possession for protected persons

- Eliminate "suitable alternative residence" of victim as a ground for revoking an exclusive possession order
- Confer right of occupation to victim who has been granted an exclusive possession order
- Ensure that counselling adopts a stand that denounces domestic violence
- Establish an appropriate counselling body with well trained counsellors
- Ensure that informants shall not incur liability for making notification of an occurrence of domestic violence
- Ensure that public officers are protected from prosecution for execution of their duties under the DVA

## **II. Preliminary Observations**

### **A. Domestic Violence and Abuse of Women**

In its breadth, the DVA extends protection to any member of a family who is subject to domestic violence. The WCC is pleased that the law reflects the reality that no one is immune from domestic violence and thus offers protection to a wide range of people. At the same time, it is also important to recognize the reality that the most prevalent form of domestic violence is the abuse of a woman by her partner (or ex-partner). For this reason, the WCC's concerns pertain primarily to abused women and many of the recommendations in this memorandum revolve around abuse of women. Nevertheless, it is important to recognize that similar problems of dominance and control occur in all relationships where power inequalities result in domestic violence.

### **B. Aims of the Domestic Violence Act**

The primary aim of the DVA is to assist victims of domestic violence with a view to ensuring their safety from future abuse. This goal provides a basic guide to interpretation of the Act. The provisions and procedures under the Act should therefore be interpreted expansively in accordance with its legislative purposes.

### **C. The Nature of Domestic Violence**

In order to employ the DVA effectively, it is crucial to understand the distinct character of domestic violence as opposed to other types of violent crime. Domestic violence is characterized by at least five features:

- it is perpetrated by someone close to the victim, usually her partner or ex-partner;
- it happens in intimate settings which are presumed by society to be sites of support and care;
- it is a recurring form of abuse generally characterized by a cycle of violence in which the abuse is followed by a period of respite after which tensions build up again and eventually explode into another violent episode;
- the abuser uses domestic violence to control and coerce the victim; and

- the abuse has profound emotional and psychological effects on the victim, who often believes (and is often told by the abuser) that she is to blame for the violence.

Another distinctive aspect of domestic violence is that women who seek outside help to end the domestic violence usually do not come at the first instance of abuse. Often they have endured sustained abuse for years, and have reached a point where the violence has escalated or become intolerable.

It must therefore be recognized that any attempt to obtain external assistance may place the victim in grave danger of extremely violent repercussions. An abuser may become even more irate at any independent action by the victim. Many women have been savagely beaten upon attempting to leave the abusive situation.

#### **D. State Responsibilities Regarding Domestic Violence**

For the above reasons, the point of contact with outside authorities is an absolutely critical period. State bodies bear a heavy responsibility to respond to the needs of the domestic violence victim quickly and effectively. This responsibility is heightened by the fact that the woman may have come forward for assistance based on the reasonable expectation that the DVA entitles her to legal protection.

### **III. Implementation Issues Under the DVA**

#### **1. Clarify duties of public officers (Sections 19(1) and 19(2))**

**Recommendation:** clarify the responsibilities of public officers attending to domestic violence victims to encourage the adoption of a pro-active stance against domestic violence. Require medical and police officers need to be trained and sensitized with respect to domestic violence issues and to make speedy referrals to victims who require further assistance. Police actions should be interpreted in light of the purposes of the DVA, thus guided by the principle that their primary responsibility is to assist and protect victims of domestic violence.

A victim of domestic violence seeking help for the first time has various needs. At this stage she is extremely vulnerable and needs to feel safe. The victim needs to be assured that she is not to blame for the abuse. She also needs to speak to a caring person who can advise what options are available to her. She may need a safe place to stay or accompaniment to her home to safely collect personal belongings.

**Medical Officers:** The victim's first contact with outside authorities is often the hospital. Unlike the case of abused children under the Child Protection Act, there is no requirement that medical officers report suspected incidence of domestic violence. Be that as it may, medical officers at hospitals need to have thorough training on the detection of and sensitivity to domestic violence. They must be able to properly advise abused women of their options, and should have contact information for the police, welfare and other social service agencies readily available for referrals.

**Medical Social Workers:** Medical social workers who are attached to most major hospitals also play a crucial role in counselling and assisting victims of domestic violence. To this extent, the WCC recommends that such medical social workers be similarly recognized and be empowered under the act as "enforcement officers" (see

below) in order that the victim may be spared the trauma of again relating her experiences to another social worker (from the Ministry of Social Welfare).

**Police Officers:** Recognizing that the police are also often the first point of contact, the DVA imposes duties on police officers to assist victims of domestic violence. The DVA defines police officers, together with welfare officers, as enforcement officers, whose duties are outlined in Section 19. These duties include:

- explaining the victim's right to protection against domestic violence;
- assisting her to file a complaint ;
- providing or arranging transportation to the nearest hospital for treatment;
- providing or arranging transportation to an alternative residence or safe shelter; and
- accompanying the victim to collect personal belongings.

From the WCC's experience, there is some confusion with respect to the nature and extent of police duties to domestic violence victims. The effectiveness of the DVA depends upon an interpretation of the duties that will provide victims with comprehensive assistance. For example, a police officer who accompanies a victim to her home in order to collect her belongings must also be prepared to compel an uncooperative aggressor to give the victim free access into the home. Failure to demonstrate such assertiveness means that the victim may not only be denied her belongings, but also exposes her to further intimidation by the abuser. Similarly, a police officer who witnesses a breach of an Interim Protection Order (IPO) or a Protection Order (PO) should intervene at the time of the violation, rather than withholding assistance until the woman files another complaint at the police station.

## **2. Ensure efforts at reconciliation are initiated by victims and do not undermine their safety (Section 11)**

Recommendation: Reconciliation attempts should only be undertaken upon the request of the victim and only after an IPO has been obtained to ensure her safety.

Although abused women want domestic violence to stop, not all victims seek a permanent separation from the abuser. The desire to sustain the relationship may be based on financial needs, children's needs, emotional attachment or social pressures. In light of this reality, the WCC supports reconciliation attempts under the DVA provided that they are initiated by the victim and there is assurance that she will be protected from further violence. In order to engage in the efforts at reconciliation as an equal and valued participant, the woman must be confident that she is no longer vulnerable to domestic violence.

For this reason, an IPO must be obtained before reconciliation begins. The current policy of permitting reconciliation to ensue before an IPO has been obtained is highly problematic because it appears to prioritize reconciliation above protection. This inclination to pursue reconciliation efforts in a climate of fear of further abuse thwarts the goals of the DVA. Such a policy does not offer effective protection to domestic violence victims and offers little hope that reconciliation attempts will result in an improved family situation for the victim.

### **3. Recognize lawyer's right of appearance at court (Section 12)**

Recommendation: the DVA should be interpreted to assume that victims enjoy the benefit of legal representation in all matters pertaining to domestic violence cases unless such benefit has been specifically withdrawn. Alternatively, amend the DVA to affirm the right of domestic violence victims to legal representation.

Previously, a woman seeking protection from an abuser could only apply for a restraining order upon filing (or undertaking to file) for divorce under the Law Reform (Marriage and Divorce) Act 1976 or the respective State Islamic Family Law Enactments. This technical process often denied access to abused women because it was expensive, required lawyers, and could only be instituted at the High Court.

The WCC is therefore pleased that the DVA attempts to make the process of obtaining protection more accessible than it has been in the past. The DVA permits enforcement officers to appear in court with women seeking protection. This step facilitates the process for victims, who might otherwise be unfamiliar with court settings.

Unfortunately, implementation of the DVA has curtailed legislative intent to improve access to protection. In some cases, Magistrates have questioned the right of women to be represented by lawyers when applying for an IPO (some women may have private lawyers relating to divorce proceedings or may have legal assistance from the Legal Aid Bureau). There appears to be no valid rationale for such a restrictive reading of the DVA. There is nothing in the Act that withdraws the victim's right to legal representation. In fact, the DVA specifies that enforcement officers are to "assist" women in filing a complaint, not "represent" them. Moreover, this restrictive reading runs counter to the legislative provisions that are specifically geared to improve access to protection orders by the court.

The easiest way to remedy this situation would be to adopt a broad interpretation of the DVA without inserting unnecessary restrictions. In the alternative, the Act should be amended to openly state that domestic violence victims always have a right to legal representation.

### **4. Recognize victim's ability to appear in court on her own behalf (Section 12)**

Recommendation: the DVA should be interpreted to assume that domestic violence victims are able to go directly to the court to seek protection orders on their own behalf.

Although most women applying for protection orders have been accompanied by an enforcement officer to date, there is nothing in the DVA that prevents a victim from applying for an IPO on her own. She should therefore be able to go directly to the court and seek protection on her own behalf without the aid of enforcement officers or lawyers. This interpretation naturally flows from the general principle to read the DVA in a way that facilitates access to protection from domestic violence.

### **5. Broaden definition of domestic violence under DVA (Sections 2 and 3)**

Recommendation: The definition of domestic violence should be broadened to encompass all forms of abuse, including mental, psychological and emotional harm which threatens a person's personal well being or safety, or causes that person to fear for, or to be apprehensive about the same.

The DVA does not make domestic violence a crime. Rather, it simply defines domestic violence to encompass physical injury, threats of physical injury, forced acts, forced confinement and damage to property. This definition, while reasonably broad, does not reach the full ambit of domestic violence. Due to the fact that domestic violence is not a separate crime, it must be captured by provisions in the Penal Code in order to fall within the DVA. For example, domestic violence under the DVA includes compelling a person to engage in any conduct, including sexual acts, from which a victim has right to abstain (Section 2).

The WCC commends the recognition that a person has a right to engage or abstain from sexual acts. Yet this provision, which seems to protect a victim from sexual activity to which she has not consented, does not protect her if the abuse does not fall under a recognized crime. Thus, a woman who is forced by her husband to watch him have sex with another woman, view pornographic material, or pose nude for home video, are all acts from which a woman has a right to abstain, yet they are not crimes under the Penal Code. A victim of domestic violence in this position is thus left without relief under the DVA.

In addition, the current definition of domestic violence omits reference to mental, psychological and emotional forms of domestic violence. In light of the centrality of abuse of power and trust to all types of domestic violence, non-physical violence may be just as debilitating as physical injury. A few of the many examples of mental harm include: threats of withdrawing financial support; threats to send the children away, constant ridicule and belittlement; the abuse of drugs such that a woman fears injury to her partner, herself or her children and the moral corruption of children. A victim in these circumstances may have a serious need for protection.

For these reasons, the definition of domestic violence in the DVA must be broadened in order to protect all victims of domestic violence and thus allow for greater access to IPOs.

## **6. Broaden the availability of protection under the DVA to offences other than the Penal Code offences (Section 3)**

Recommendation: the DVA and other legislation, in particular the Child Protection Act 1991 and the Women and Girls Protection Act 1973, should be read harmoniously such that the fullest protection possible is provided to victims of abuse. Protection orders under the DVA should therefore be available for abuses defined in other Acts.

Although the DVA limits itself to crimes under the Penal Code, there are other Acts dealing with issues that intersect with those implicated in the DVA. The Women and Girls Protection Act for example makes it an offence for a person to force a woman

into prostitution and the Child Protection Act makes it an offence to abuse or traffic in children.

In addition to physical and sexual violence, the Child Protection Act also protects children against emotional abuse, neglect and exploitation, thus acknowledging the gravity of non-physical abuse.

In order to give women and children the fullest protection possible, the DVA should be interpreted in harmony with both these legislations. Protection orders under the DVA should therefore be available to prevent further incidence of abuse as defined in the Child Protection Act and the Women and Girls Protection Act 1973.

#### **7. Eliminate the requirement of obtaining an Order to Investigate for non-seizable offences before obtaining an Interim Protection Order [IPO] (Section 4)**

Recommendation: the DVA should be amended to allow issuance of IPO other than during the pendency of investigations. In the alternative classify domestic violence as a seizable offence either under a separate provision of the Criminal Procedure Code or under the DVA.

Early conceptions of the DVA posited domestic violence as a civil offence. However, this view produced a division of powers conflict due to the Syariah courts' jurisdiction over Muslim marriages. The WCC and other advocates of the DVA supported the move to transform the DVA into a criminal statute for two main reasons. First, it would overcome the jurisdictional division. Secondly, it would emphasize the fact that domestic violence is a crime and therefore a matter of public concern.

However, this change has produced unforeseen implementation concerns. Although domestic violence is defined under the DVA, it does not constitute a separate crime. Rather, the domestic violence offence must be contained under a suitable provision of the Penal Code.

The Criminal Procedure Code distinguishes crimes under the Penal Code as seizable offences (that is, offences involving grievous bodily hurt or the use of weapons and for which investigations may automatically commence) and non-seizable offences (for which an order to investigate must be issued by the Deputy Public Prosecutor prior to the commencement of investigations). This classification however does not take into account the unique nature of domestic violence; the fact that it is almost always a recurring crime naturally exacerbates the harm to the victim.

Since most domestic violence cases are considered non-seizable, the police cannot investigate unless explicitly instructed to do so by the Deputy Public Prosecutor.

Section 4(1) of the DVA specifies that an IPO may be issued "during the pendency of investigations" into the domestic violence.

Because an IPO can only be ordered during the pendency of investigations, this classification of offences presents an obstacle to domestic violence victims. In essence, victims of non-seizable offences cannot get an IPO unless the Deputy Public Prosecutor orders investigations to commence.

There is therefore a pressing need for public prosecutors to work closely with enforcement officers to ensure that investigations are undertaken whenever

appropriate. Unfortunately, Deputy Public Prosecutors, are not necessarily readily accessible to abused women in small towns throughout Malaysia.

In Penang, the WCC is happy to report that the Deputy Public Prosecutor has been most responsive to the needs of domestic violence victims and has appropriately issued orders to investigate their cases.

It is also important to note that evidence of investigation must be brought before the court. Unless the investigating officer provides proof of investigation, the IPO may be set aside.

#### **8. Allow "pendency of investigations" requirement to be fulfilled by Magistrate's direction to investigate a crime under the Criminal Procedural Code (Section 4(1))**

Recommendation: Amend the DVA to provide that its requirement that investigations be pending prior to the issuance of an IPO is fulfilled when a Magistrate takes cognizance of an offence under s. 133 of the Criminal Procedure Code and directs investigations into the crime.

Under Section 133 of the Criminal Procedure Code, the Magistrate can, on his or her own initiative, direct investigations into crimes if s/he believes such actions are warranted. A Magistrate who so takes cognizance of an offence under s. 133 can issue a summons to bring the accused person before the court.

In this way, the Magistrate's actions should be considered sufficient to fulfil the "pendency of investigations" requirement with respect to applying for an IPO.

#### **9. Expedite the issuance of the Interim Protection Order (Section 4)**

Recommendation: the IPO should be obtained within 24 hours from the commencement of investigations (either 24 hours after an order to investigate is issued or 24 hours after a complaint of a seizable offence is made).

In light of the need to protect victims as quickly as possible, original proposals on the DVA asserted that the IPO should be issued within 24 hours from the time of complaint. As it stands, the Act is silent on time limits regarding the issuance of the IPO. Consequently, the WCC is aware of domestic violence cases in which the receipt of an IPO was delayed for two weeks.

The consequences of this delay can have disastrous results for victims of domestic violence. Still vulnerable to the abuser, whose rage is often intensified due to the victim's attempt to stop the violence, the victim cannot return home and may not have a safe alternative place to stay. Many women may be forced to be on the run, possibly with her children, while waiting for an IPO.

This delay in issuing the IPO must be rectified. In failing to provide quick and effective protection to victims of domestic violence, the delay thwarts the primary purpose of the DVA. The absence of time limits regarding the issuance of the IPO is even more glaring in light of the DVA provision that an abuser arrested for the



contravention of a protection order shall be brought before the judge within 24 hours (Section 7(3)(a).

At a minimum, victims in danger of further violence should be treated with the expedience provided to their abusers.

#### **10. Expedite service of Interim Protection Order on aggressors and inform victims when service is effected (Section 17)**

Recommendation: Amend the DVA to require that service of the IPO shall be given priority by the police. Preferably the IPO should be served on the offender within 24 hours after being delivered to the police by the Registrar. In addition, the victim should be promptly informed when service is effected.

The WCC is concerned about the omission to specify a time limit for the service of the IPO on abusers. Although Section 17 of the DVA states that the IPO must be delivered to the police by the Registrar within 24 hours of being issued, it does not delineate a similar time period during which the officer must serve the IPO. Consequently, there may be a long and volatile gap of time for service during which the victim is vulnerable to the recurrence of domestic violence. Lawyers affiliated with the WCC have had cases where service of the IPO to the offender took over two months to be effected.

In addition, there is no requirement in the DVA to inform victims whether service has been effected or not. The victim consequently does not know if or when she is protected. Worse still, she may believe she is protected when she is not.

It is therefore crucial that the victim be informed of service and this responsibility should rest with the police who are already charged with the duty to serve the IPO.

#### **11. Completion of Investigations (Section 4)**

Recommendation: the police should be required to complete investigations speedily and inform domestic violence victims immediately of any change of status in the investigations pertaining to their case.

The IPO expires when investigations end. At that point, the aggressor is charged if circumstances mandate such action. A victim who feels she still needs the protection of a court order to ensure her safety must then apply for a PO.

This transition period is an important time for the victim. She needs to know the status of her case and the IPO in order to take appropriate steps to protect herself from further domestic violence. In practice, however, there is no obligation on the police to inform the victim of the status of her case. As a result, she does not know whether the abuser is being charged or when the IPO expires.

This uncertainty leaves her vulnerable to the abuser in at least two ways: firstly, she may conduct herself in ways that expose her to danger thinking she is under the protection of an IPO when in fact she is not; and secondly, she may not be aware that she can apply for a PO and thus lose the protection of a court order to which she is entitled. It is therefore essential that the police inform the victim immediately when there is a change of status in the domestic violence case, especially if the IPO will expire.

Lastly as the entitlement of the victim to a PO is dependant on charges being preferred against the abuser, the WCC is concerned that investigations be undertaken and concluded expeditiously and a provision be incorporated into the DVA to that effect.

## **12. Increase access to warrant of arrest power (Section 7(1))**

Recommendation: the warrant of arrest power should be incorporated into all protection orders (POs) and interim protection orders (IPOs) as a matter of course.

The DVA permits the court to append a warrant of arrest to an IPO or a PO. The purpose of the warrant of arrest power is to empower the police to immediately apprehend someone suspected of violating a court order. The purpose of this power is to protect the victim from further violence while demonstrating that defiance against the court will not be tolerated.

The WCC is pleased that the DVA recognizes the gravity of domestic violence and the need to act quickly in order to prevent ongoing abuse. However, the Act currently requires the victim to request that the warrant of arrest power be attached to the protection order. A woman who attends court without representation or assistance is not likely to know that the warrant of arrest power exists, and therefore she cannot request it.

The WCC therefore recommends that the warrant of arrest power be incorporated into all protection orders (POs) and interim protection orders (IPOs) as a matter of course. This pro-active step would simplify the process of obtaining protection, ease the burden on victims, and clarify the responsibilities of police officers.

## **13. Introduce presumption in favour of exclusive possession for protected persons (Section 6(4)(a))**

Recommendation: Amend the DVA to include a default rule that confers exclusive possession of a shared residence to a protected person unless extenuating circumstances merit alternative arrangements.

Currently, the DVA permits the issuance of exclusive possession of a shared residence only when "there is no other way to secure the personal safety of any protected person for the time being" (Section 6(4)). The rationale for this condition appears to be based on maintaining the "status quo" and not uprooting persons from their homes except as a last resort.

However, this view of the situation unjustly privileges the interests of the abuser over the needs of the victim, especially since almost all victims, by definition, have less power than their abusers. Moreover, most domestic violence cases under the DVA involve women being abused by their partners and many of these women have children, who will follow their mothers.

In the spirit of preserving the family and minimizing disruption to the children's lives, it is more appropriate to award exclusive possession to the victim than to the abuser. For this reason, the WCC advocates the introduction of a default rule that would confer exclusive possession of a shared residence to the victim unless extenuating

circumstances merit alternative arrangements. A default rule to this effect would appropriately recognize the needs of victims.

The WCC emphasizes that it does not advocate the default rule as a means of punishing the abuser. Punishment for violations of the law can only be determined by the court. Rather, the WCC's position is based on the need to find pragmatic and equitable solutions during a difficult transition period for both parties. The reality is that exclusive possession must be awarded to one party while the other seeks shelter elsewhere.

In light of power inequalities, the hardship of uprooting a victim and most likely her children, and the respective resources available to the parties, there is a more compelling case for conferring exclusive possession to the protected person than to the abuser as a matter of course. If an abuser feels that there are special reasons why the presumption in favour of victims should not apply, he can make his arguments before the court. However, an order of exclusive possession in favour of the abuser should be granted only in exceptional circumstances when it is clear that he would suffer extreme hardship in comparison to the protected person.

#### **14. Increase access to exclusive possession for protected persons (Section 6(1)(a))**

Recommendation: the court's discretion to make orders of exclusive possession to protected persons should be available at both the IPO and PO.

Unlike the warrant of arrest power, the ability of the court to order exclusive possession of a shared residence to a protected person exists only for the PO (Section 6(1)(a)). However, the need to stay at home in safety may be equally important for a victim at the IPO stage as at the PO stage. Thus the exclusive occupation order should be available at both time periods.

Consonant with the proposal that the IPO be issued within 24 hours, this proposal to make available exclusive possession immediately upon occurrence of domestic violence will serve to minimise the trauma faced by the victim and her children.

#### **15. Eliminate "suitable alternative residence" of victim as a ground for revoking exclusive possession order**

Recommendation: Eliminate section 6(4)(a) of the DVA, which states that an order for exclusive possession for the protected person is to be revoked if a suitable alternative residence is found for the protected person.

The DVA presently states that an order of exclusive possession shall be revoked if "a suitable alternative residence is found for the protected person" (Section 6(4)(a)). The DVA's definition of "alternative residence" is "the premises or accommodation which the victim is or has been compelled to seek or move into as a result of domestic violence" (Section 2). This definition is broad enough to encompass the desperate and makeshift arrangements that women and children fleeing abuse manage to find with little or no resources. Such arrangements include temporary shelter at a crisis centre, hostel or the home of a friend or relative.

The DVA allows for the anomalous result that these clearly temporary arrangements may be considered a "suitable alternative residence", thus preventing victims from

continuing to live in their homes. This situation is particularly unfair given that possession of the home may be granted to an abuser even though the home may be jointly owned or leased by the abuser and the victim.

The DVA effectively awards possession to the abuser while seriously disrupting the life of the victim and perhaps the lives of her children as well. From the perspective of the victim, this result may well resemble punishment for attempting to free herself from a violent situation. This result would be an affront to the ultimate aim of the legislation: to be an instrumental part of the fight to end domestic violence.

A final note should be made with respect to a victim who has fled her home. Her flight must not be construed as evidence that she does not need to live there anymore or that she has broken up the family and must therefore pay the consequences of her actions. A victim in these circumstances leaves because she is in danger. She has taken the extreme step of fleeing because she desperately needs an alternative to the domestic violence. She is not responsible for breaking up the family; the family is already severely damaged by domestic violence. Any argument favouring exclusive possession for the abuser that is based on the notion of the victim's wrongdoing in leaving the home is founded on fundamental misconceptions of the causes and effects of domestic violence.

#### **16. Confer right of occupation to victim who has been granted exclusive possession order (Section 4(2))**

Recommendation: Reform the DVA such that a protected person's right of exclusive occupation of a shared residence is recognised as a registrable interest.

In order to ensure that a protected person who is awarded exclusive possession be able to exercise that right of occupation where the abuser is the sole registered proprietor of the home, the WCC advocates for exclusive possession rights to be recognized as a registrable interest under the National Land Code. (Such interest to possession is already recognised under English law.)

Once the right to possession becomes a registrable interest, victims may lodge a caveat against the property. Such a caveat would protect the victim's right to possession from being overtaken by the right of a bona fide purchaser who acquires the property from the abuser for good consideration without notice of the victim's rights.

Once the right to exclusive possession is recognised, this can also serve to assist a person who has been granted similar rights to possession pursuant to divorce settlements to protect their interests from a partner who attempts to dispose of the property notwithstanding the first party's interest to possession.

#### **17. Ensure that counselling adopts a stand that denounces domestic violence (Section 11)**

Recommendation: court-ordered counselling should adopt a stand that firmly denounces domestic violence. The counsellor must affirm the victim's right to live free of violence and emphasize that no one deserves to be abused.

Section 11 of the DVA permits a court to refer one or both parties to conciliatory bodies for rehabilitation therapy or psychotherapy. Such court order could be issued along with, or instead of, an IPO.

The WCC is pleased that this remedial option is available under the Act. However, the option must be exercised only under appropriate circumstances. In addition to ensuring that such counselling is only pursued with the free consent of the victim when her safety has been assured, the WCC is also concerned about the types and goals of counselling that are adopted.

Victims of domestic violence, especially women abused by their partners, must not be advised to "be patient and wait for her reward in the afterlife". Counselling of this sort is detrimental to the needs of victims and does nothing to prevent future incidence of abuse.

Rather, victims need to be assured that they are not to blame for the abuse and that no one has the right to commit domestic violence. Abusers must be made to take responsibility for their actions.

#### **18. Establish an appropriate counselling body with well-trained counsellors (Section 11(4))**

Recommendation: a counselling body that is thoroughly trained on the dynamics of domestic violence and which is able to handle the volume of cases should be established.

At the present time, it is unclear what body will be responsible for administering the counselling orders of the court. If the conciliation tribunals set up under the Law Reform (Marriage and Divorce) Act or those of the Syariah courts are being considered for the purposes of the DVA, it must first be clear that the tribunals can effectively manage the increased demand in their services and that they freely espouse the purposes of the DVA.

The proper functioning of such a counselling body will also depend upon well-trained and highly sensitized counsellors (regard to be given to the Counselling Act) who understand the complexities of domestic violence. The safety of domestic violence victims and prevention of further abuse must be at the forefront of all counselling efforts.

#### **19. Ensure that informants who make any notification of an occurrence of domestic violence shall not incur any liability**

Recommendation: informants who make any notification of an occurrence of domestic violence shall not incur any civil or criminal liability (including breach of professional etiquette)

In the move to shift society's perception of domestic violence from a private matter to a public matter (as all crimes are matters of public concern), it is important that persons who witness or are aware of incidences of domestic violence report the said violence.

The WCC believes that providing immunity for such informants (e.g. as provided under the Child Protection Act) will emphasise the importance of the role of members

of the public towards ensuring that every person in that most fundamental unit of society, namely the family, is safe.

**20. Ensure that public officers who act in good faith in executing their duties under the DVA are immune from prosecution**

Recommendation: public officers who act in good faith should be granted immunity from prosecution.

It has come to the WCC's attention that abusers, when exposed, have in the past retaliated by threatening public officers who assist victims of domestic violence. In order that public officers may discharge their duties fearlessly and diligently, such officers should not be subjected to prosecution by abusers.

Abusers must also be made to understand that domestic violence is wrong and further public officers are merely implementing the will of society in creating violence-free homes.

**IV. Conclusion**

Some of the reservations that have been directed against the DVA stem from the concern that the Act would encourage the disintegration of the family unit. This conceptualization of domestic violence is fundamentally flawed. In providing protection to an abused person, the DVA is assisting someone whose family is already attacked by domestic violence. In other words, a victim who seeks the assistance of the DVA is, by definition, seeking refuge from a broken family.

In fact, the DVA is attempting to protect the family unit from further attack by domestic violence. By providing protection to a victim and her children, the DVA may well play a crucial role in preserving a family that is attempting to recover from abuse. The DVA deals with the effects of domestic violence and must not be confused as its cause.

In Malaysia, there is the concept of "keluarga bahagia", or the ideal of the happy family. It is an ideal to which we must all strive. To do so, we must understand that a happy family is a family without violence where every member is valued and safe in the home.

In addition, we must recognize that a fundamental principle of every religion and every community is to strive for harmonious relationships within the family. We all share a grave duty to protect the family as a whole as well as its individual members.

The DVA is an important instrument in the struggle to end domestic violence in Malaysia. The DVA has already had a positive impact on the lives of some women by providing them with much needed protection orders. Yet the full potential of the DVA has yet to be realized.

The recommendations outlined in this memorandum advocate reforms to the legislation and to the implementation of the Act in order to bring us closer to attaining

that potential. The introduction of the DVA is a critical first step, and it is our responsibility as a society to move onward from there with a firm commitment to ending domestic violence.

# **MEMORANDUM TO THE SPECIAL SELECT COMMITTEE ON PENAL CODE (AMENDMENT) 2004 AND CRIMINAL PROCEDURE CODE (AMENDMENT) 2004**

## **Comments and Recommendations on:**

- 1. Criminal Procedure Code (Amendment) Bill 2004  
and Penal Code (Amendment) Act 2003**
- 2. Marital Rape - Section 375 (Exception) Penal Code**
- 3. Law Reform (Marriage and Divorce) (Amendment)  
Bill 2004**
- 4. Domestic Violence Legislation**

**Submitted by:**

**Joint Action Group Against  
Violence Against Women (JAG)**

**Comprise:**

**Women's Centre for Change, Penang (WCC)**

**Women's Aid Organisation (WAO)**

**Women's Development Collective (WDC)**

**All Women's Action Society (AWAM)**

**Sisters in Islam (SIS)**

**Malaysian Trade Union Congress (MTUC) – Women's Section**

***Penang  
28 October 2004***



**MEMORANDUM TO THE  
SPECIAL SELECT COMMITTEE ON PENAL CODE  
(AMENDMENT) 2004 AND CRIMINAL PROCEDURE CODE  
(AMENDMENT) 2004**

**Penang • 28 October 2004**

**Submitted by Joint Action Group Against Violence Against Women (JAG)**

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## I. INTRODUCTION

The Joint Action Group Against Violence Against Women (JAG)<sup>338</sup> was formed in March 1985 as a coalition of women's organizations to address issues of violence against women in the Malaysian society. Since that time, JAG's advocacy has expanded to issues of rape, Islamic family law, sexual harassment, domestic violence, and other laws and policies that discriminate against women. In all of its work, JAG applies a rights framework that stresses both gender equality and non-discrimination.

In 16 August 2004, JAG met up with this Special Select Committee to make presentations focusing on the amendments to the *Penal Code* on Rape. At the said meeting, JAG indicated that it would make a follow-up presentation on other issues relevant to women at the Penang public hearing. The Committee also encouraged JAG not to confine its presentation only to the amendments to the *Penal Code* and the *Criminal Procedure Code* but also to bring up other relevant legal reforms.

This memorandum presents JAG's comments and recommendations on the following :

1. *Criminal Procedure Code (Amendment) Bill 2004*  
and *Penal Code (Amendment) Act 2003*
2. Marital Rape - Section 375 (Exception) *Penal Code*
3. *Law Reform (Marriage and Divorce) (Amendment) Bill 2004*
4. Domestic Violence Legislation

Apart from the amendments to the *Penal Code* and the *Criminal Procedure Code*, JAG's concerns with items 2, 3, and 4 above relates to the following:-

- With regard to marital rape, JAG recommends the exception in section 375 of the *Penal Code* be deleted to criminalise this form of violence. The appendix shows legislation against marital rape in countries around the world;
- Provisions in the Domestic Violence Act 1994 have to rely on the *Penal Code* and *Criminal Procedure Code* instead of operating independently and this often hampers the effectiveness of the Act. JAG requests the Special Select Committee consider a number of recommendations on amending the *Penal Code* and *Criminal Procedure Code* to better protect victims of domestic violence. In addition, JAG requests a Select Committee recommendation for a comprehensive review and reform of the Domestic Violence Act 1994. These recommendations are the result of JAG's monitoring the implementation of the *Domestic Violence Act* since its coming into effect in 1996;
- JAG is concerned about the proposed amendments to the *Law Reform (Marriage and Divorce) Act 1976*. JAG would like to register its comments on the proposed Bill and request more transparency as the amendment process continues.

JAG thanks the Special Select Committee for taking the time and effort to meet with NGOs and the public about reform of the Penal Code and Criminal Procedure Code. JAG especially appreciates the government's efforts to improve legislation and procedures relating to violence against women.

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<sup>338</sup> Currently JAG consists of Women's Centre for Change (WCC) Penang, Women's Aid Organisation (WAO), Women's Development Collective (WDC), All Women's Action Society (AWAM), Sisters in Islam (SIS) and Malaysian Trades Union Congress (MTUC)- Women's Section.

## II MEMORANDUM

### 1. CRIMINAL PROCEDURE CODE (AMENDMENT) BILL 2004 AND PENAL CODE (AMENDMENT) ACT 2003

#### A. INTRODUCTION

The Criminal Procedure Code (Amendment) Bill 2004 (the Bill) consists of a range of amendments pertaining to the scope, investigation, powers of arrest, trial procedures and sentencing powers for various offences relating predominantly to sexual violence and terrorism. Some of the amendments proposed are in furtherance of the amendments made to the Penal Code vide the Penal Code (Amendment) Act 2003 (the Act) which came into force on 25/12/2003 and created a new category of offences relating to terrorism.

Whilst welcoming many of the changes that have been proposed, the Joint Action Group Against Violence Against Women (JAG) wishes to express its concern as regards the implications of some of the amendments proposed under the Bill and those passed under the Act and to propose amendments considered appropriate in the circumstances.

#### B. CRIMINAL PROCEDURE CODE (AMENDMENT) BILL 2004 AND PENAL CODE (AMENDMENT) ACT 2003: Provisions, Comments and Recommendations

##### I. Section 2(1) & Section 293 of the CPC (Sections 2 & 16 of the Bill) Definition of Youthful Offender & Sentences for Youthful Offenders

###### **Proposed Amendment:**

The amendments propose to raise the age of “Youthful Offender” from that of a child “above the age of 10 and under the age of 16 years” to one “above the age of 18 and below the age of 21” whilst at the same time retaining the sentencing provisions for youthful offenders provided under section 293 save for subsection (2) which gives the Court a discretion to impose a small fine on the parent or guardian in addition to or instead of punishing the offender. The amendments also propose to substitute all references to the Juvenile Courts Act in section 293 with the Child Act 2001.

###### **Recommendation:**

Amend the definition of “youthful offenders” to mean children between 10 and 18 so that it covers all juveniles (ie children under 18) as the sentences prescribed under section 293 are appropriate only for offenders in that age group. Offenders between the ages of 18 and 21 can be dealt with under section 294 in appropriate cases as section 294 also provides for binding over of offenders under a bond. References to the *Juvenile Courts Act* in section 293 can then be substituted with the *Child Act*.

###### **Comments:**

It is to be noted that section 293 was framed to suit the sentencing of youthful offenders as currently defined ie children who would be liable to be sentenced pursuant to the provisions of the *Juvenile Courts Act* (now *Child Act*). When this definition is amended to cover only offenders between 18 and 21 then section 293 would not be appropriate. References to the Juvenile Courts Act cannot be substituted with the *Child Act* as the *Child Act* only applies to offenders under 18 years of age.

## II. Section 130B of the *Penal Code* (section 5 of the Act)

### **Amendment :**

section 130B(2) –“terrorist act” means any act or threat of action within or beyond Malaysia that – *inter alia*

- (a) .....
- (i) involves prejudice to national security or public safety;  
where the act or threat is intended or may reasonably be regarded as being intended to
- (aa) .....
- (bb) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organisation to do or refrain from doing any act.....

### **Recommendation :**

Limit the definition of “terrorist act” by deleting 130B(2)(i) and (bb)

### **Comments:**

Section 130B of the *Penal Code (Amendment) Act 2003* has defined “a terrorist act” to include amongst other things, acts which involves prejudice to national security or public safety where it is intended to influence or compel the Government to do or refrain from doing any act.

This definition appears to be exceedingly broad, especially where it states that any act which involves prejudice to national security or public safety intended to influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or even any international organisation to do or refrain from doing any act can be considered a terrorist act. Such a definition is too wide and may be liable to abuse as the test to be applied of what involves prejudice to national security or public safety is very subjective and even an innocent act can be considered as being prejudicial to national security or public safety. Furthermore, a wide range of actions eg the work of NGOs involve work that is intended to influence or compel the Government to do or refrain from doing any act. Such a wide definition for what constitutes a terrorist act detracts from the main concern of the legislation, that is, to act against terrorism to protect national security.

## III. Ancillary Investigative Powers in relation to Terrorism Offences – Public Prosecutor given the power to intercept communications and admissibility of intercepted communications (New Section 106C)(Section 5 of the Bill)

### **Proposed Amendment:**

The Bill now proposes to empower the Public Prosecutor to authorize a police officer to intercept certain communications if the Public Prosecutor considers that the communications are likely to contain information relating to the commission of a terrorism offence. The information so obtained, whether before or after the person concerned is charged will be admissible at his trial in evidence.

### **Recommendation:**

We recommend that the provision be amended so that this power be given to the Court to authorise interception on the application of the Public Prosecutor if he had reasonable grounds for believing that the communication will contain information relating to the commission of a terrorist offence and not otherwise.

There should be sufficient safeguards incorporated so that this power cannot be exercised arbitrarily against just any person. The Court should also be given the power to decide whether evidence thereby acquired may be admissible in evidence at the trial of the accused concerned.

**Comments:**

Like other powers by the Court to issue warrants, this power should similarly be given to the Court and not the Public Prosecutor. Furthermore, the power that is proposed to be given to the Public Prosecutor appears to be far too wide since it can be exercised so long as the Public Prosecutor “*considers that it is likely to contain information relating to the commission...*”. Such a power may be liable to abuse as the powers of a Public Prosecutor are generally exercisable by Deputy Public Prosecutors throughout the country unless otherwise expressly stated and there is no burden upon the Public Prosecutor to show that he had reasonable grounds for believing that the communication will contain information relating to the commission of a terrorism offence. It may also be used to infringe upon the privacy of any individual regardless of whether or not he is suspected of being involved in a terrorist offence as the provision does not limit the exercise of the said power only to communications pertaining to a person suspected of being involved in a terrorist offence. The power given also means that the Public Prosecutor can acquire and use the evidence acquired without the knowledge of the accused after he is charged.

**IV. Evidence through live video and television links allowed (new Section 272B)(Section 13 of the Bill)**

**Proposed Amendment:**

Subsection 1 of section 272B bill now proposes to introduce a new section into the act to enable a witness, other than the accused, with leave of the court, to give video or live evidence through a live video or live television link in any trial or inquiry if it is expedient and in the interest of justice.

Section 272B(2) then goes on to list specific offences in the Penal Code to which the court can apply this provision, including offences of rape, outrages on decency and inciting a child to act of gross indecency.

**Recommendation:**

Amend section 272B(2)(c) to read “such other offences as the Court may in its discretion deem appropriate”

**Comments:**

Whilst the introduction of the ability to give evidence through live video and television links is clearly a step in the right direction, we recommend that the Court be given a discretion to allow the giving of evidence through live video or live television link in appropriate cases.

The above proposal is in view of the fact that apart from the offences specifically mentioned, there are other offences under the Penal Code and Child Act where such a method of giving evidence may be appropriate and it would be too cumbersome if the power to determine for which offences such testimony should be allowed is vested in the Minister instead of the Courts. For instance, it may be appropriate to give evidence in cases of trafficking of children for prostitution (section 372 and 373 of Penal Code) via this method and the Court would be the best judge of when this would be the appropriate mode of giving evidence. However, these provisions have not been mentioned in section 272B.

Rather than having to list every offence where giving evidence through live video and television links may be appropriate, we recommend that the Court be given discretion to allow such a form of evidence.

**V. Offences requiring police supervision (Section 295)(section 18 of the Bill)**

**Proposed Amendment:**

The Bill has been amended to require the Court to direct an offender convicted for the sexual offences mentioned (sections 376, 377C & 377E) to undergo police supervision after the expiration of the sentence.

**Recommendation:**

Widen the range of offences which require police supervision after expiration of sentence

**Comments:**

We recommend that the range of offences where the offender is required to undergo police supervision upon expiration of the sentence be widened to include other offences such as offences involving the trafficking of women and offences under the Child Act as there is a greater likelihood of such offences being repeated elsewhere by the same offender.

**VI. Legislative framework for the operation of the Compensation/ Assistance Board for rape survivors**

**Proposed Amendment:**

None

**Recommendation:**

Introduce the legislative framework for the operation of the Compensation/ Assistance Board for rape survivors

We propose that the structure of the scheme ensure that the following aspects be clearly spelt out:

1. Administration of the Scheme – outline the powers of the claims officers to assess applications and to decide on awards;
2. Eligibility to apply for compensation – set out the main types of injuries for which compensation will be available – in particular offences where sexual violence is present. This should include mental as well as physical injuries;
3. Eligibility to receive compensation – set out the circumstances in which the Board may refuse or reduce an award. This should include the applicant's level of co-operation with the police, whether there is danger of the offender benefiting unfairly from the award;
4. Consideration of applicants – set out how and when the applicant must apply for compensation and how claims officers must decide the application. Importantly, set out the time limit for making and processing of applications and the standard of proof required;
5. Types and limits of compensation – set out the different types of compensation, that is, compensation for injuries suffered, loss of earning capacity and any other special costs that have to be endured by the survivor. Also set out the maximum and minimum monetary compensation available under the scheme;

6. Standard amount for compensation – set out the formula for working out awards for injuries under the tariff. The tariff should list injury descriptions and the levels that the Board can award for each of them;
7. Compensation for loss of earning – set out the conditions under which the applicant can claim for lost earnings or the ability to earn.
8. Compensation for special expenses – set out the conditions under which the applicant can claim for special expenses due to the criminal injury;
9. Compensation in fatal cases – set out the conditions under which compensation may be applied for and paid when the victim of a crime has died after a criminal injury that is covered by the scheme;
10. Effect of award on other payments – whether other relevant payments that the applicant may be entitled to or court awarded compensation will be taken into consideration when considering the award required for loss of earnings or care costs;
11. Determination of applications and payment of awards – set out the rules about deciding and notification regarding applications and method of paying awards;
12. Reconsideration, review and rehearing of cases;
13. Tariff of injuries – Listing of injuries and its associated tariff which in turn relates to a compensation level.

**Comments:**

There have been reports that the government has indicated support for the proposal made by the Anti-Rape Task Force in the Memorandum on Laws related to Rape that a Compensation/Assistance Board to offer financial compensation to the injuries suffered by victims of sexual violence be set up. However there is no legislative framework for the operation of such a Board as yet.

**VII. Mandatory therapy for sexually based offences**

**Proposed Amendment:**

None

**Recommendation:**

We recommend that in addition to requiring offenders to undergo police supervision, mandatory rehabilitative therapy be prescribed within the legislation for sexual offenders.

**Comments:**

Counseling, therapy and treatment has been shown to be one of the ways of stopping sexual offenders from re-offending.

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## 2. MARITAL RAPE – SECTION 375 (EXCEPTION) PENAL CODE

### INTRODUCTION

At the August 2004 Parliamentary Special Select Committee public hearing held in Kuala Lumpur, the Joint Action Group against Violence Against Women (JAG) presented the Anti-Rape Task Force's Memorandum on Laws Related to Rape which called for, amongst others, the deletion of the Exception to Section 375, so that marital rape can be recognized as a penal offence. At the same time, the Human Rights Commission of Malaysia (SUHAKAM) made a similar call to legislate against sexual abuse and violence within marriage. SUHAKAM's recommendations drew much publicity.

Under the current Malaysian laws, husbands are allowed to rape their wives with impunity. Marital rape is a form of violence against women and is an abuse of the rights of a person. In a civilized society, marital rape would be deemed unacceptable and should be criminalized.

JAG recommends that the marital exception in Section 375 of the Penal Code be abolished:

### RECOMMENDATION

#### Section 375: Rape

##### To delete:

*Exception* – Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in the Federation as valid, is not rape.

*Explanation 1* – A woman –

- (a) living separately from her husband under a decree of judicial separation or a decree *nisi* not made absolute; or
- (b) who has obtained an injunction restraining her husband from having sexual intercourse with her;

shall be deemed not to be his wife for the purpose of this section.

*Explanation 2* – A Muslim woman living separately from her husband during the period of *iddah*, which shall be calculated in accordance with the *Hukum Syara'*, shall be deemed not to be his wife for the purposes of this section.

### COMMENTS

#### The Need to Abolish the Marital Rape Exception in Section 375

The marital rape exception originated from an archaic British common law concept whereby the wife, upon entering the contract of marriage, is deemed to have given herself to her husband and is treated as the husband's property. The British marital rape exception was codified in Malaysia's Penal Code and has remained to this day. The exception is carried over into the Domestic Violence Act, so that even in a domestic violence situation, a husband can be prosecuted for using physical violence against his wife, but not for raping her.

AWAM's statistics for the years 2000-2002 show that 52% of women who had been subjected to domestic violence were forced to have sex with their husbands. Women who are raped by their husbands are likely to be raped many times – often 20 times or more. These wives are often coerced into sex or are unable to refuse because of threats of physical violence, financial dependence on their husbands, fear for the safety and protection of their



children. Women in these circumstances are usually trapped in a vicious cycle of sexual abuse.

Research has revealed that marital rape survivors suffer far more severe and long-term psychological consequences as compared to victims raped by strangers due to the violation of trust and its occurrence in the purportedly “safe” and intimate home environment. The shock, terror, and betrayal experienced by rape survivors are often exacerbated rather than mitigated by the marital relationship. In part, because of the repeated abuse, these women live in constant terror.

### **Muslim Husbands and Marital Rape**

Several Muslim religious scholars argued that the recommendations calling for the repeal of the marital rape exception (as highlighted by SUHAKAM) were “going against Islam and ruining the marriage institution” (Mingguan Malaysia 21/8/04) or due to “Western influence” (Utusan Malaysia 22/8/04). A religious advisor was reported to have said, “the subject of marital rape, when a husband forces a wife to have sex against her will, is relevant only to non-Muslims” (New Straits Times 23/8/2004) adding that “Islamic law is adequate to check a husband’s abuses”.

Islam is a religion of justice and peace which exhorts Muslims to uphold human dignity. To say that Islam abhors cruelty and violence is an understatement. Allah (swt) commands Muslims to “Eschew all sin open or secret.” Sûrah al An'am 6.120 (translation Yusuf Ali). The message of Islam is universal and without exception.

The Prophet Muhammad (saw) himself treated his wives with nothing less than love respect and tenderness. Abdullah bin Umar reported that during the lifetime of the Holy Prophet, the companions treated their wives most politely for fear that a Commandment concerning them might be revealed (Bukhâri). Abu Hurairah reported that the Holy Prophet (saw) said, “The most perfect of the believers in faith is he who is the best in conduct, and the best of you are those who are the best to their wives.” (Tarmizi)

In Sûrah al Nisa 4.19 with regard to the treatment of wives, it was commanded, "... On the contrary, live with them on a footing of kindness and equity, If ye take a dislike to them, it may be that ye dislike a thing, and God brings about through it a great deal of good.” (translation Yusuf Ali)

Islam grants rights to both husband and wife. Each has a right over the other. Whilst the husband has a right to have sexual relations with his wife, a wife similarly has the right to sexual relations with her husband. The Prophet (saw) himself have advised men not to neglect this duty to meet the needs of their wives. Abdullah bin Amr bin Al-As narrated, "Prophet Muhammad (saw) said, “O Abdullah! I have been informed that you fast all the day and stand in prayer all night?” I said, ‘Yes, O Allah's Apostle!’ He said, “Do not do that! Observe the fast sometimes and also leave them at other times, stand up for the prayer at night and also sleep at night. Your body has a right over you and your wife has a right over you.” (Bukhâri)

The myth that a husband is unable to rape his wife due to irrevocable licence for sex as provided under the Penal Code finds its basis not in the laws of Allah (swt) but in English common law prior to the 1800's. In their justification for not recognising marital rape, English law lords often quoted East in his *Treatise on the Pleas of the Crown*, “a husband cannot by law be guilty of ravishing his wife on account of the matrimonial consent which she cannot retract”.

In perpetuating this myth, Muslims are justifying and keeping alive a myth created by Victorian Englishmen (and their forefathers) who viewed women as little more than property, a view certainly rejected by Islam. Sûrah an Nisa 4.19 commands, “O ye who believe! Ye are forbidden to inherit women against their will...”

### **Rape is not sex, it is violence**

No wife who has been raped considers the act to be merely sex. It is a form of violence, aimed at violating the victim in one of the most humiliating manners. Whilst trying to preserve the rights of married persons to engage in consensual sex with each other, it is alarming that the result of equating sex with rape appears to be condoning violence against women in the home. In punishing rape, the law does not prohibit or even restrict married couples from engaging in consensual sex. To equate sex with rape is to equate a caress with a beating.

In an English landmark decision of *Regina v R* [1993] 1 CLJ 1, the law lord said, “Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances.... There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault.”

### **Marital Rape Reporting**

Another public discussion relates to implementation; that if marital rape is criminalised, women will suddenly report rapes in large numbers, sometimes falsely or maliciously. Studies have also shown that criminalising marital rape has not resulted in a large increase in police reports, prosecutions, and convictions for marital rape.

Today there are many countries that have either enacted marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These countries include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. The criminalisation of marital rape in these countries both in Asia and around the world indicates that marital rape is now recognized as a violation of human rights (*Refer to Appendix*).

As seen with other forms of domestic violence, wives are generally reluctant to report marital rape because of a fear of retaliation, sense of family loyalty, social and financial dependence, or fear of what will happen to their children. They prefer to avoid the social stigma and scandal that reporting attracts.

Thus it is unlikely, as already proven through the experience of other countries, that criminalising rape would open the floodgates. In reality the criminalisation of marital rape would serve to emphasise the fact that the State would not tolerate violence against women including all forms of domestic violence whether they be sexual, physical or psychological. This would ensure that for those women who can no longer tolerate their husbands' violating them physically and sexually (for rape often is accompanied with other forms of assault), the law provides redress.

### **Conclusion**

Marital rape is a form of violence against women that cuts across cultural, religious and ethnic boundaries. There is an urgent need to recognize and legislate against marital rape in Malaysia. Legislation against sexual violence within a marriage will send a clear message to all citizens that sexual violence, whether it happens in public or in private, is a violation of

rights and will not be tolerated. The government must take the responsibility to legislate and act against perpetrators of violent crimes.

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### 3. LAW REFORM (MARRIAGE AND DIVORCE) (AMENDMENT) BILL 2004

#### I. Introduction

On 29<sup>th</sup> September 2004, the Attorney-General's Chambers convened a meeting to discuss the proposed amendments to the Law Reform (Marriage and Divorce) Act 1976. The meeting was attended by representatives from the Syariah Judicial Department, ABIM, the Ministry for Women and Family Development, JAIS, Perkim, Syarie Lawyers Association ABIM and UKM, UIA and Sisters in Islam.

The fact that a meeting was sought from members of the public to discuss proposed amendments to statutory laws is welcomed. These days when every proposed law or proposed amendments to laws is shrouded in secrecy and made subject to the *Official Secrets' Act 1972*, this move in soliciting public views and opinions is most welcomed. This move can only strengthen the nation's democratic and participatory processes. However in order to ensure full participatory process, the AG's Chambers should have consulted as wide a section of the public as possible and not merely groups representing the Muslim community.

We note that there are several amendments proposed by the AG's Chambers which are a cause for concern. It would appear that these amendments were precipitated by at least 2 court decisions, both involving children.

The first set of amendments pertain to the issue of conversion of one of the spouses in a civil marriage to Islam and the consequences of that conversion of the non-converting spouse and children of the marriage.

The second set of amendments pertain to extending the period of maintenance of a child beyond 18 years of age. The proposed amendment allows the courts, "on the application of the child or any other person, [to] extend the order for maintenance to cover such period as it thinks reasonable to enable the child to pursue further higher education or training".

We wholly support the second part of the amendment. The courts should have the discretion, in appropriate cases and where either or both parents have the financial capacity, to ensure that a child is able to realize his full potential and aspirations.

We are however concerned over the proposed amendments consequent upon the conversion of a spouse to Islam particularly the selective and arbitrary importation of syariah principles into the civil laws which appear to lead to injustice rather than enhance the protection afforded under the law to the more vulnerable spouse and children.

#### II. Section 3 & Section 51 Applicability of the Act and Status of Marriage Upon Conversion to Islam

##### Proposed Amendment:

A. Section 3 - "This Act shall not apply to a Muslim or to any person who is married under Islamic law ....but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under Section 51 from granting a divorce on the petition of *either party* to a marriage where the other party has converted to Islam and such decree *and any relief incidental thereto* shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted."

B. Section 51(1) – Where one party to a marriage has converted to Islam, *either party* may petition for divorce:"

**Recommendation:**

To clarify the status of the civil marriage upon conversion of a spouse. If either party may apply for divorce upon conversion of one spouse, then it follows that the civil marriage subsists and remains valid up until the order for dissolution of the said marriage is granted.

This could be done by the addition of a new Section 3(3A) that, “A marriage solemnised under the Act shall remain valid notwithstanding the conversion of either spouse to Islam unless a decree of divorce is granted under this Act.”

**Comments:**

This clarification will ensure that there is no confusion as to the status of the civil marriage upon conversion and particularly there shall be no derogation of the rights of the parties to maintenance, custody of the children of the marriage and matrimonial property even after conversion of one spouse unless a divorce is granted by the civil courts.

It was previously assumed that once a person has converted to Islam, he (or she) loses his ability to seek any relief before a civil court in matters pertaining to the civil marriage and therefore Sections 3 and 51 were intended only for the benefit of the non-converting spouse. This view cannot be supported under a dual system of law. A marriage that is solemnised pursuant to *Law Reform (Marriage and Divorce) Act 1976* can only be dissolved under the same laws. Either party to the said marriage therefore should be given access to the civil courts to dissolve the marriage as well as seek any relief incidental thereto e.g. custody, maintenance and division of matrimonial property.

Where the jurisdiction to seek divorce and ancillary relief is granted to the civil courts, then such jurisdiction should be made exclusive in order to avoid conflict of laws and contradictory decisions from two separate courts i.e. the syariah court and the civil court. It is undesirable that parties be allowed to submit the same application to both courts simultaneously (“forum-shopping”).

In fact, we would even go so far as to say that unless and until the parties have resolved all matters pertaining to the said marriage, they should not be allowed to enter into a second marriage. This would ensure that the existing family is protected and all provisions are made for the family prior to the converting spouse marrying again under syariah laws. It goes against all principles of equity and justice to allow a converting spouse to neglect his responsibilities under the civil marriage solely on the grounds that he / she has converted to Islam. Allowing the converting spouse to do otherwise may even encourage abuse of process because any time a spouse wishes to abdicate responsibility, all he/she has to do is convert to Islam. Thus we also recommend that each state consider amendments to this effect to their respective syariah enactments.

**III. Section 54****Proof of Breakdown of Marriage****Proposed Amendment:**

Section 54(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say –

- (c) that the respondent has committed adultery...
- (d) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; ....
- (e) That the respondent has deserted the petitioner...

- (f) That the parties to the marriage have lived apart for a continuous period of at least two years.
- (g) *that either party to the marriage has converted to Islam.*

**Recommendation:**

That Section 54 not be amended.

**Comments :**

The conversion of one party to Islam is specially dealt with in Section 51. Where special provisions are made under the law, there is no need to rely on general provisions like Section 54.

**IV. Section 77****Converting wife cannot be ordered to pay maintenance to incapacitated husband****Proposed Amendment:**

Section 77(2) - The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.

*(3) Nothing in this section shall authorise the court to make an order for a woman who has so converted to Islam to pay maintenance to her husband or former husband."*

**Recommendation:**

That Section 77 not be amended as proposed.

**Comments:**

There is no reason why a husband who is incapacitated should not be maintained by his converting spouse or former spouse. This proposed amendment is discriminatory and would lead to injustice. For example, the couple may be married for 40 years and should the parties then divorce, the incapacitated husband can only look to maintenance from his wife or his former if she does not convert to Islam. Islam is a religion that promotes justice and each Muslim is exhorted to act with kindness and equity.

**V. Section 81(2) & Section 95****Termination of responsibility to maintain wife or former wife 3 months upon conversion and maintenance of child to pursue higher education****Proposed Amendment:**

A. Section 81(1) Except where an order for maintenance is expressed to be for a ny shorter period or where any such order has been rescinded, and subject to section 82, an order for maintenance shall expire –

- (h) if the maintenance was unsecured, on the death of the husband or of the wife, whichever is the earlier;
- (i) if the maintenance was secured, on the death of the spouse in whose favour it was made.

*(2) Where an order for maintenance is in respect of divorce under subsection 51(1), such order shall expire –*

- (j) if the maintenance was unsecured, on the death of the husband or the wife, or three months after the conversion, or if the wife is pregnant upon the birth of the child or termination of the pregnancy, whichever is the earlier; or*
- (k) if the maintenance was secured, on the death of the husband or the wife, or three months after the conversion, or if the wife is pregnant upon the birth of the child or termination of the pregnancy, whichever is the earlier.*

**B.** Section 95 Except where the order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, whichever is the later.

*Provided always that the court may on application by the child or any other person, extend the order for maintenance to cover such period as it thinks reasonable to enable the child to pursue further higher education or training.*

**Recommendation:**

That Section 81 not be amended. Proposed amendment to Section 95 is supported.

**Comments:**

Save and except where there is sufficient matrimonial assets awarded to the wife, this amendment may potentially result in immediately subjecting the non-converting spouse or former spouse to poverty. The law must be conscious that it is dealing with human lives and to remove the life support of a dependant spouse upon three months notice cannot be justified.

Even in syariah, there is scholarly debate on the meaning of maintenance during iddah, in that the exhortation for Muslim men to provide accommodation and maintenance to his former spouse for a period of approximately three months after divorce should be deemed to be the minimum period and not maximum period in which a man is required to maintain his former spouse.

In any event, a divorced Muslim wife who is denied maintenance after the iddah period under the syariah, has the recourse to apply for mut'ah (compensation) which is calculated on a per diem basis for the duration of the marriage. The selective importation of a syariah principle to limit maintenance to the iddah period without providing any alternative recourse to a divorced non-Muslim wife is a prime example of how the arbitrary selection of syariah principles can lead to injustice and lower public opinion on the capacity of the syariah to provide justice for women.

Furthermore, under syariah law, a father is to maintain his daughter until she is married. Whilst we do not support the arbitrary importation of syariah principles, a curious question to be noted is why the drafters saw fit to select the syariah principle that serves to shorten the period of maintenance to be provided by a Muslim husband to his divorced non-Muslim wife but not the syariah principle that serves to extend the period of maintenance to be provided by a Muslim father to his daughter, whether Muslim or non-Muslim.

**VI. Section 82**

**Termination of maintenance upon remarriage or adultery**

**Proposed Amendment:**

Section 82(1) The right of any divorced person to receive maintenance ... shall cease on his or her marriage to or living in adultery with any other person.

(2) The right of any divorced person to receive maintenance ...under any agreement shall cease on his or her marriage to or living in adultery with any other person unless the agreement otherwise provides.

(3) *This section does not apply to divorce under Section 51(1).*

**Recommendation:**

That Section 82 not be amended as proposed.

**Comments:**

We have already recommended that there not be discrimination against the non-converting spouse in that his or her rights upon divorce should not be less than the rights of divorced persons due to other causes. Therefore there is no necessity to add this new sub-section as proposed by the AG Chambers.

## **VII. Section 89**

### **Religion of child upon conversion of father**

#### **Proposed Amendment:**

89(1) An order for custody may be made subject to such conditions as the court may think fit to impose and subject to such conditions, if any. As may from time to time apply, shall entitle the person given custody to decide all questions relation to the upbringing and education of the child.

- (2) Without prejudice to the generality of sub-section (1), an order for custody may –
- (a) contain conditions as to the place where the child is to reside .... ;  
***Provided that in deciding the religion in which he or she is to be brought up, the court shall take into consideration the personal law of the child.***
  - (b) provide for the child to be temporarily in the care and control of some other person ....
  - (c) provide for a child to visit a parent deprived of custody ....
  - (d) give a parent ...the right of access to the child...;
  - (e) prohibit the person given custody from taking the child out of Malaysia.

#### **Recommendation:**

To amend to, ***“Provided that in deciding the religion in which the child is to be brought up, the court shall take into consideration the personal law of the child at birth.”***

#### **Comments:**

The AG’s Chambers in its notes explained that, “According to the principle of conflict of law, children are presumed to follow the religion of the father which under Jewish law, the children are presumed to follow the religion of the mother.”

This presumption does not take into account the fact that the parent who attends to the day to day needs of the child and spends quality time with the child is most likely to have the greatest influence over the child. It is also discriminatory in its effect. Given that the *Constitution* provides that there shall be no discrimination on the basis of gender (see Article 8(2) of the *Constitution*) and given that the law provides that both parents shall have equal parental rights over the child (see Section 5 of the *Guardianship of Infants Act 1961*) which includes the right to determine the religion of the child, such a presumption is untenable. To preserve and apply an archaic discriminatory presumption at law in the face of Article 8(2) is unconstitutional.

A more equitable way of dealing with this issue is to provide that the child’s religion shall remain unchanged except with the consensus of both parents. The child shall then have the right to choose his or her religion upon attaining 18 years of age.

Even if the law were to hold that a child shall be deemed to be Muslim and at age 18 have the option to change his or her religion, this appears to ignore the problems with apostasy under syariah law. It also creates uncertainty in the determination of the child’s religion. At law, the welfare and best interest of the child is always of paramount consideration. It is thus better to grant the child the sole right to determine his or her religion upon attaining the age of majority.

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## 4. DOMESTIC VIOLENCE LEGISLATION

### *Introduction*

Domestic violence is one of the most serious crimes in Malaysia because of its pervasiveness in Malaysian society (an estimated 39 percent of Malaysian women have been abused by their partners) and the insidiousness and invisibility of its nature (the crime most often takes place in the intimate, “safe” space of a home).

The Domestic Violence Act 1994 (DVA) is closely tied to provisions in the *Penal Code* and the *Criminal Procedure Code* (CPC). Section 3 of the DVA requires that the Act be read together with the provisions of the *Penal Code*. While the DVA sets out its own procedures for obtaining Interim Protection Orders (IPOs) and Protection Orders (POs), all of the procedures relating to police reports, appearing before courts, and arrests of offenders implicitly work together with provisions in the CPC.

The Joint Action Group Against Violence Against Women (JAG) recognizes that several of the obstacles faced by domestic violence victims in obtaining protection from offenders derive from confusion over this interaction between the DVA and the *Penal Code* and *CPC*. This memo serves to present recommendations on how to clarify provisions in the *Penal Code* and *CPC* to better protect the victims of domestic violence.

### 1. (a) Broaden the definition of domestic violence under the *Domestic Violence Act* (Section 2)

(b) Provide domestic violence as a separate offence under the *Domestic Violence Act* or the *Penal Code* with weighted punishments for varying levels of physical, psychological, emotional, or sexual violence

### **Proposed Amendments :**

Whoever commits domestic violence, that is,

- (a) wilfully or knowingly placing or attempting to place the victim in fear of physical injury;
- (b) causing physical, *psychological or emotional* injury to the victim by such act which is known or ought to have known would result in physical *psychological or emotional* injury;
- (c) compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise ~~from which the victim has a right to abstain;~~
- (d) confining or detaining the victim against the victim’s will;
- (e) causing mischief or destruction of damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim;
- (f) *stalking or intimidating the victim by threats, persistent communications, persistent ridicule or belittlement or other forms of emotional or psychological abuse;*
- (g) *giving, sending, transmitting or publishing offensive materials to the victim or in such a way that the offensive material will be found by or brought to the attention of the victim;*

*and the act is directed against –*

- (i) his or her spouse *whether de jure or de facto*;
- (ii) his or her former spouse;
- (iii) a child;
- (iv) an incapacitated adult; or
- (v) any other member of the family.

*shall be punished with imprisonment for a term which may extend to 7 years or with fine or with both.*

#### **Comments :**

The above provision is based on the definition of domestic violence as stipulated in Section 2 of the *Domestic Violence Act* (DVA). A central aspect of the dynamics of domestic violence is psychological and emotional abuse, alone or accompanying cycles of violence and intimidation. Even when there is no physical abuse, victims can be subject to stalking, repeated phone calls, threats of withdrawing financial support, threats of harming or taking children away, ridicule or social isolationism. By broadening the definition of domestic violence, these forms of abuse can be addressed.

Section 3 of the DVA provides for the DVA to be read together with the *Penal Code*, but does not introduce domestic violence as a separate, individual offence in the *Penal Code*. This means that the charges under the *Penal Code* are treated like average offences, rather than reflecting the serious and persistent nature of domestic violence.

Because domestic violence is a unique type of crime, typified by repeated and habitual violence and intimidation used in an intimate setting, it cannot be adequately addressed by existing *Penal Code* measures, which are drafted to address individual acts of violence or intimidation rather than repetitive acts. Simply charging an offender with one, two, or even five individual counts of “voluntarily causing hurt” does not do justice to months or years of repetitive acts of physical, verbal, sexual, emotional, and psychological abuse a victim may have experienced. By including a separate offence called “Domestic Violence”, the seriousness of repetitive and intimate violence can be addressed. The offence should also be made seizable.

Penalties for the crime should also be weighted based on severity and duration of the violence. Alternatively, the offence can be charged together with existing crimes or used as a penalty enhancement.

Failure to provide for domestic violence as a separate offence would necessitate amendments to several sections of the *Penal Code* for example Sections 503, 506 and 509 to provide for domestic violence and the punishments in relation thereto.

## **2. Proposed Amendments to Criminal Procedure Code**

### **(a) Section 23 -Arrest without warrant**

**Existing Provision**

Section 23 stipulates the circumstances under which a police officer or penghulu may arrest a person without a warrant.

**Recommendations**

To add new subsection 23(1)(l) as follows:-

23(1) Any police officer or penghulu may without an order from the Magistrate and without a warrant of arrest –

(a) any person who has been concerned with any offence in Malaysia which is a seizable offence ....

*(l) any person against whom an IPO has been issued under the Domestic Violence Act 1994(DVA) who has contravened that IPO or PO as specified in section 7(2)*

**Comments**

The existing Section 7 of DVA does not protect the victims from further violence therefore adding a new subsection 23(1)(l) will provide a mandate to police officers to address contravention of the IPO or PO immediately. This will better protect victims of domestic violence from repetitive and persistent attacks.

**(b) Section 108 – Special Powers only in Seizable Offences****Existing Provision**

Section 108(2) No police officer shall in a non-seizable case exercise any of the special powers in relation to police investigations given by this Chapter without the order of the Public Prosecutor

**Recommendations**

To amend add Subsection (2) to section 108 as follows:-

Section 108(2) No police officer shall in a non-seizable case *except in cases involving domestic violence* exercise any of the special powers in relation to police investigations given by this Chapter without the order of the Public Prosecutor.

**Comments**

Domestic violence should be deemed a seizable offence so that victims do not need to wait for a Public Prosecutor to issue an Order to Investigate before they can file for an Interim Protection Order or a Protection Order and so that the police can commence investigation without an order to investigate from the Public Prosecutor.

Section 108 of the CPC should be amended to allow domestic violence cases to proceed immediately without waiting for an Order to Investigate (OTI) from the Public Prosecutor, so that Interim Protection Orders (IPOs) and Protection Orders (POs) can be obtained as quickly as possible. Under the current Act, many of the domestic violence cases are considered non-seizable offences, thus require an OTI issued by a Deputy Public Prosecutor to commence the investigation. This thwarts the aim of protecting victims of domestic violence because the process for obtaining an IPO can be and often is significantly delayed.

**3. Proposed Amendments to the Domestic Violence Act****(a) Section 4 - Interim Protection Order & Section 5 - Protection Order**

**Existing Provision**

Application procedures for Interim Protection Order or Protection Order

**Recommendation**

Simplify and stipulate clearly procedures for applications and issuance of Interim Protection Orders (IPOs) and Protection Orders (POs).

**Comments**

The procedures for applying for and issuing IPOs and POs should be simplified, and either the DVA or its related regulations should carefully enumerate these simplified procedures. Otherwise, the relevant players – police officers, welfare officers, and the courts have no choice but to establish their own individual procedures that vary from court to court and district to district. For example, some magistrates require the victim to return to court every 2 months for the magistrates to review the case as there is presently no requirement for the police to inform the courts of the status of investigations.

Further the DVA does not provide a timeline regarding when IPOs or POs must be applied for by enforcement offices, so victims are left vulnerable until police officers, welfare officers or magistrates decide to take up the application.

The requirement that investigations must be ongoing in order for the victim to apply for IPOs combined with the CPC requirement that non-seizable offences require an Order to Investigate (OTI) from the public prosecutor means that many victims have to wait for police to obtain an OTI to open investigations in order to apply for the IPOs. This process delays the issuance of the IPOs.

**(b) Section 6 - Types of Orders to be included in Protection Order****Existing Provision**

Section 6 - Provides for types of orders that may be included in Protection Order such as right of exclusive possession, restraining the aggressor from entering the victim's residence, ordering the aggressor from communicating with the victim and allowing victim continued use of vehicle

**Recommendations**

1. Require judges to specifically ask all victims whether orders (a) through (f) need be included in the IPO or PO
2. Expand the availability of the special orders (a) through (f) to Interim Protection Order

**Comments**

It is unclear whether the victim must request the inclusion of the orders specified in Section 6 to the PO or whether the court automatically considers adding them. These special orders should also be made available for IPOs and not only POs.

Victims who are traumatised by domestic violence might not know or think to ask for these special provisions when they come before the court. The DVA should require judges to specifically question victims on whether the victims require the special orders to be included so that the judge can determine whether to include such orders in the IPO or PO.

**(c) Section 7 - Powers of Arrest to be attached to every IPOs and POs**

**Existing Provision**

(1) Where the court is satisfied that the person against whom a protection order .... is made is likely to cause physical injury to the protected person..., the court may attach a power of arrest to such protection order or interim protection order, as the case may be.

**Recommendation**

To amend as follows : *(1) The court shall attach a power of arrest to every protection order or interim protection order, as the case may be.*

**Comments**

Currently, powers of arrest may be attached to IPOs and POs if the court finds there is a likelihood that the protected person will suffer an actual physical injury at the hands of the person against whom the IPO is drawn. This allows for inconsistent attachment of powers of arrest depending on whether the victim requests it, whether the judge independently considers attaching powers of arrest and is satisfied of the potential for physical violence, and the amount of evidence the victim can and must provide about potential violence. As mentioned above, victims also do not always know to ask for powers of arrest to be attached or to provide evidence regarding likely physical injury. Furthermore, powers of arrest are only to be attached based on the likelihood of *actual physical* injury, which does not include trespass, harassment, retaliation, etc. This means that if a defendant is likely to violate the protection order in ways other than actual physical violence, the victim is not protected through the IPO with powers of arrest. It also means that victims are not protected from defendants who do not seem likely to cause physical injury but actually do commit such violence. Powers of arrest should be automatically attached to all IPOs and POs.

**(d) Section 16 - Record of Complaints****Existing Provision**

Section 16- Record of Complaints

**Recommendations**

Expand record-keeping requirements to include mandatory analysis of complaints, Interim Protection Orders (IPOs), and Protection Orders (POs), and making records and analysis accessible to the public

**Comments**

In addition to requiring courts to maintain a registry of records, the Act should require an administrative agency or independent NGO to compile and analyse national statistics on domestic violence. All records and analysis should be accessible to the public. Additionally, reporting procedures should be standardized so that all police districts and all States maintain uniform practices.

**(e) Section 17 - Proof of service of Protection Order****Existing Provision**

Section 17 –Proof of service of Protection Order to be filed with court within 7 days

**Recommendations**

Require court registrar to forward order to police for service within 48 hours of pronouncement of the order and require service of Protection Order or Interim

Protection Order on offender within 72 hours. Police to notify complainant and court registrar of service of order.

### Comments

The current Act has no requirement for informing the complainant whether the offender has been served. This results in complainants believing they are already protected before the offender has been served or fearing that they are not protected because they do not know whether service took place. The amendments to the Act should require that the police officer serve the IPO or PO on the offender within 72 hours from receipt of the order from the court, then provide proof of that service both to the complainant and to the Registrar. Timeline should also be provided for the court registrar to forward the order to the police.

## (f) Section 19 - Duties of Enforcement Officers

### Existing Provision

Section 19(1) The duties of an enforcement officer shall include –

- (a) assisting a victim of domestic violence to file a complaint ...
- (b) providing or arranging transportation ...

### Recommendations

Expand duties of enforcement officers to include: *“19(1)(f) informing the victim of the status of the investigation, status (including service) of the Interim Protection Order (IPO) or Protection Order (PO), and, if applicable, rights with regard to securing further protection against domestic violence.”*

### Comments

Victims of domestic violence are vulnerable, especially after they report the abuse and file for IPOs and POs. Victims are made all the more vulnerable when they lack basic information about their cases. For instance, victims are not protected by an IPO until the IPO is served on the offender. Without knowing whether the IPO has been served, a victim does not know whether she is free to return to a daily routine. When the investigation ends, the IPO expires. Without knowing whether the investigation is concluded, a victim will not know whether she is still safe from violence. Upon the commencement of the criminal proceedings the victim must apply for a Protection Order to retain protection.

## (g) To add provision for victims to represent themselves in Court

### No Existing Provision

### Recommendations

Adding new section that explicitly affirms the right of victims to appear in court on their own behalf and the right of a lawyer to appear in court on behalf of a victim so

follows, *“Nothing in this Act shall be interpreted to limit a victim’s right to appear in court on her own behalf or limit a lawyer’s right to appear in court on behalf of a victim-client”.*

### Comments

Although nothing in the statute restricts victims from appearing in court on their own behalf, unaccompanied by welfare or enforcement officers, nor restricts a lawyer’s right

to represent a victim in court, inconsistent implementation of the Act has left victims and lawyers unclear as to their rights of appearance.

### ***Conclusion***

While JAG acknowledges the importance of the *Domestic Violence Act* in the fight against domestic violence, it also recognises that several weaknesses in the Act that are intimately linked with the *Penal Code* and the *Criminal Procedure Code*. JAG requests the Committee recommend that the Government comprehensively reviews and reforms the Domestic Violence Act 1994 together with other laws which hinder its effectiveness. JAG believes that implementation of these recommendations will allow police officers, welfare officers, social workers, courts, social service providers, NGOs, and counsellors to better work together to protect victims of domestic violence.

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## **III. CONCLUSION**

For nearly two decades, JAG has been lobbying for legal reforms on women and children to effect gender equality and non-discrimination. This memorandum reflects on-going efforts of JAG to continue to campaign for women's rights and obligations in Malaysia.

JAG wishes to remind the Special Select Committee that Malaysia is a signatory of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) since 1995. Under the convention, Malaysia has the international obligation to implement policies and laws that eliminates discrimination against women and supports equality.

Conventionally, the courts do not consider international instruments ratified by the executive arm of the Government of Malaysia unless that instrument is tabled in Parliament and adopted through legislation as law of the nation. In the premise, it is crucial that the legal obligations of CEDAW be adopted through an act of Parliament. This adoption will ensure that the courts consider and enforce the obligations under CEDAW. It is important that the courts utilise this convention in its deliberations and decisions.

JAG hopes that this Special Select Committee will highly recommend such a move to keep in line with international standards and uphold rights for all citizens.

## APPENDIX

### Legislation Against Marital Rape: other countries

#### Introduction

Recently, marital rape has become a contentious issue in Malaysia, with some parties advocating the abolition of the Penal Code's marital rape exception and other parties upholding the conjugal rights of a husband. There are however, no just arguments for the raping of one's wife: marital rape is a form of violence against women that is unequivocally wrong and should be criminalised.

The experience of countries in Asia and around the world has been that legislating against marital rape exception is the first step in raising awareness and changing attitudes about the injustice of marital rape. While marital rape itself has not been eliminated in these countries, governments have at least taken a step to recognize it as a violation of a person's rights and declared it a criminal act. Public awareness and knowledge that marital rape is a crime for which husbands may be prosecuted can be an effective deterrent to marital rape.<sup>1</sup>

The following sections will first outline the nature and prevalence of marital rape, and then discuss the current status of marital rape under Malaysian laws. The remainder of the paper will present information about marital rape laws around the world.

#### Types of marital rape

Generally, researchers have classified marital rape into three types: battering rape, force-only rape, and sadistic / obsessive rape.<sup>339</sup>

The first type is "*battering rape*", which describes the experience of women who are the victims of physical beatings and forced sex, often combined with verbal degradation. Far more force than necessary is used to overcome their victims and the forced sex appears to be just one part of the hostility. The sexual assault may occur during or after the battering.

A second and equally common type of marital rape is "*force-only rape*", in which the husband uses only as much force as is necessary to coerce his wife into sex. This coercion often involves just using his greater weight, size, and strength to hold her down. It sometimes includes twisting an arm behind her back or holding a pillow over

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<sup>1</sup> For example, one article from the United States discusses an interview with Ross, a businessman who used forced sex as a weapon against his wife. The article continues, "Ross admits that had spousal rape been a crime for which he could have been prosecuted at the time of this act, he probably would have resisted the forced encounter". Lisa R. Eskow (1996), "The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution", *Stanford Law Review* 48, 677-709.

<sup>339</sup> Sarah M. Harless (2003), "From the bedroom to the courtroom: the impact of domestic violence law on marital rape victims", 35 Rutgers L. J. 305; Raquel Kennedy Bergen (1999), "Marital Rape", VAWNet Applied Research Forum, <http://www.vaw.umn.edu/documents/vawnet/mrape/mrape.pdf>



her face. As terrifying as such bodily force can be, the husband's purpose does not appear to be the infliction of physical injury, but rather the overpowering of resistance. Although marital

rape and domestic violence are often associated, the existence of "force-only rape"

demonstrates that marital rape must be viewed as a problem distinct from domestic violence.

At the brutal end of the continuum is "*obsessive rape*", which is the least prevalent but most cruel. The husbands tend to be hypersexed, perverse and often involved with pornography. The victim's suffering often becomes a source of pleasure for the perpetrator. The victims of obsessive rapes are unwilling participants who are forced into sex without their consent and despite their resistance.

### Marital rape statistics

Statistics demonstrate that most of the rapes that occur in Malaysia and around the world are not perpetrated by strangers. For example, a study conducted on 133 sexual offenders at Kajang and Sungai Buloh prisons found that only 20% of sexual offenders committed those offences against strangers. The remaining number of sexual offences, 80%, were against victims known to the offenders: 30% against friends, 23% against daughters, 16% against relatives, 8% against neighbours and 1.5% against siblings.<sup>340</sup> These statistics are echoed in a 1999 Australian study in which 80 percent of all victims knew the offender.<sup>341</sup> An All Women's Action Society (AWAM) study reports that between 2000 and 2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands and, physical force was used during sexual intercourse. Similar statistics were also seen in the Women's Aid Organisation (WAO) National Research on Domestic Violence (1989-1992).<sup>342</sup>

Women who are raped by their husbands are likely to be raped many times – often 20 times or more.<sup>343</sup> In a 1999 Australian study, 47% of married / *de facto* married women had been victimised two or more times, compared with 18% of never married victims.<sup>344</sup> One study in the United States found that stranger rape survivors reported

<sup>340</sup> Zarizana Abdul Aziz, "Family Cannot be a Place of Violence", WCC Penang, 16 September 04, <http://www.wccpenang.org/Family%20cannot%20be%20a%20place%20of%20violence.htm>

<sup>341</sup> Denise Lievore (2003), "Intimate Partner Sexual Assault: The Impact of Competing Demands on Victims' Decisions to Seek Criminal Justice Solutions", Australian Institute of Criminology, [http://www.aic.gov.au/conferences/other/lievore\\_denise/2003-02-AIFS.pdf](http://www.aic.gov.au/conferences/other/lievore_denise/2003-02-AIFS.pdf), citing Australian Bureau of Statistics 1999, *Crime and Safety Australia, April 1998*.

<sup>342</sup> Memorandum on Laws Related To Rape: Proposals for Amendments, Submitted by the Anti-Rape Task Force September 2003

<sup>343</sup> Raquel Kennedy Bergen (1999), "Marital Rape", VAWNet Applied Research Forum, <http://www.vaw.umn.edu/documents/vawnet/mrape/mrape.pdf>, citing Raquel Kennedy Bergen (1996), *Wife Rape: Understanding the response of survivors and service providers*, Thousand Oaks, CA: Sage; David Finkelhor & Kersti Yllo (1985), *License to rape: sexual abuse of wives*, New York: Holy, Rinehart, & Winston; Diana Russell (1990), *Rape in Marriage*, New York: Macmillan Press.

<sup>344</sup> Denise Lievore (2003), "Intimate Partner Sexual Assault: The Impact of Competing Demands on Victims' Decisions to Seek Criminal Justice Solutions", Australian Institute of Criminology,

an average of 1.3 rapes each while women raped by husbands or ex-husbands reported an average of 13.2 rapes each.<sup>345</sup>

Studies have found that wives who experience both physical and sexual abuse such as marital rape have higher levels of psychological problems than wives who have only been battered.<sup>346</sup> These effects are elevated partially because women who are victims of marital rape are assaulted, often repeatedly, by those they once presumably trusted. Furthermore, these assaults often take place in the intimate and “safe” space of the home. As is often mentioned in marital rape discussions, when a woman is raped by a stranger, she has to live with the memory of the rape; when a woman is raped by her husband, she is forced to live with her rapist.<sup>347</sup> The shock, terror, and betrayal experienced by rape victims generally are often exacerbated rather than mitigated by the marital relationship. According to research, women who had been raped by their husbands reported greater negative long-term effects (including sexual dysfunction and the inability to trust men and or form intimate relationships) than victims of any other kind of rape.<sup>348</sup>

### Current Malaysian Law

Under current Malaysian law, Section 375 of the Penal Code (Act 574) provides that “sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force” is *not* rape, but rather is an *exception* to the offence of rape. Hence men cannot be prosecuted for marital rape and women do not have an inherent right to refuse their husbands.

The marital rape exception in the Penal Code is said to derive from British common law, particularly from the writings of an early British jurist by the name of Sir Matthew Hale. He wrote in the *History of the Pleas of the Crown*, published in 1736: “The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>349</sup>

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[http://www.aic.gov.au/conferences/other/lievore\\_denise/2003-02-AIFS.pdf](http://www.aic.gov.au/conferences/other/lievore_denise/2003-02-AIFS.pdf), citing Australian Bureau of Statistics 1999, *Crime and Safety Australia, April 1998*.

<sup>345</sup> Patricia Mahoney (1999), “High Rape Chronicity and Low Rates of Help-Seeking Among Wife Rape Survivors in a Non-Clinical Sample: Implications for Research and Practice”, *Violence Against Women* 5(9), 993-1016.

<sup>346</sup> Jennifer Bennice and Patricia Resick (2003), “Marital Rape: History, Research, and Practice”, *Trauma, Violence, & Abuse* 4(3), 228-246, citing J.A. Bennice, P. Resick, M.B. Mechanic, and M. Astin (2003), “The relative effects of intimate partner physical and sexual violence on PTSD symptomatology”, *Violence & Victims* 18(1), 87-94; Diana Russell (1990), *Rape in Marriage*, New York: Macmillan Press; N.M. Shields, P.A. Resick, & C.R. Hanneke (1990), “Victims of marital rape”, in R.T. Ammerman & M. Hersen (Eds), *Treatment of family violence* (pp. 165-182), New York: Wiley ; M.A. Whatley (1993), “For better or worse: The case of marital rape”, *Violence & Victims*, 8(1), 29-39.

<sup>347</sup> David Finkelhor & Kersti Yllo (1985), *License to rape: sexual abuse of wives*, New York: Holy, Rinehart, & Winston.

<sup>348</sup> Kersti Yllo, “Marital Rape”, <http://www.bwjp.org/documents/Marital%20Rape%20Word.doc>.

<sup>349</sup> Jennifer Bennice and Patricia Resick (2003), “Marital Rape: History, Research, and Practice”, *Trauma, Violence, & Abuse* 4(3), 228-246.

Further, wives were traditionally viewed as property. According to Blackstone's common law "unities" doctrine, a husband and wife merged into a single legal entity upon marriage, with the husband assuming complete control of their joint existence. The unities doctrine thus "legitimated the propertization of women through marriage."<sup>350</sup>

The British marital rape exception was codified in Malaysia's Penal Code and has remained to this day. Because of the marital rape exception in the Penal Code, marital rape is also excluded from the Domestic Violence Act 1994. Part (c) of the definition of domestic violence under the Domestic Violence Act reads:

"domestic violence" means compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, *from which the victim has a right to abstain*.

Because women do not have a right to abstain from forced sexual intercourse under section 375 of the Penal Code, marital rape does not fit within the definition of domestic violence and cannot be prosecuted as a crime. Thus, it is only when marital rape is coupled with other physical violence that the crime of domestic violence arises, and the crime is not the rape itself, but the other physical violence. In effect, Malaysian laws do not allow a husband to beat his wife, but they allow him to rape her.

Of the three types of rape, force-only rapes are the most difficult to prosecute due to lack of injury and corroborating evidence. This category of rape is currently the most acceptable in the eyes of the law since there is often no accompanying physical violence that could be used to charge the husband with crimes invoked in the Domestic Violence Act. It is the wives who are victims of force-only rape who would be most empowered by clear recognition of their autonomy and right to self-determination through removal of the marital rape exception.

SUHAKAM's (Human Rights Commission of Malaysia) recent proposal to the Parliamentary Select Committee to recognise marital rape as a penal offence drew opposition from some Muslim religious leaders who felt that this additional right to women was due to "Western influence" and was against the intent of God. But Islam is a religion of peace that requires Muslims to uphold human dignity and abhors violence and cruelty against women.<sup>351</sup> Rape is not sex, but a form of violence and cruelty that should not happen to any woman, outside or within a marriage.

### ***A comparative analysis of marital rape law reform***

Marital rape is recognised as a crime in many countries around the world, including Albania, Algeria, Belgium, Canada, Denmark, France, Germany, Ireland, Italy, Mauritania, Norway, Scotland, South Africa, Sweden, Tunisia, the United Kingdom

<sup>350</sup> Lisa R. Eskow (1996), "The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution", *Stanford Law Review* 48, 677-709.

<sup>351</sup> Zarizana Abdul Aziz, "Family Cannot be a Place of Violence, WCC Penang, 16 September 2004, <http://www.wccpenang.org/Family%20cannot%20be%20a%20place%20of%20violence.htm>

and all 50 states in the United States.<sup>352</sup> In the Asia Pacific, Australia, Hong Kong, Japan, New Zealand, the Philippines, Taiwan, Vietnam, and most recently Indonesia have criminalised marital rape, generally through removal of the marital rape exception. Australia and New Zealand wrote a definition of marital rape into law about 20 years ago, and the other countries' legislative changes have been more recent. China's rape laws do not technically include an exception for rape within a marriage, though they have sometimes been interpreted to exclude marital rape. In May 2002, The Supreme Court of Nepal has declared that husbands who force their wives to have sex can now be charged with rape.<sup>353</sup> Aggressive lobbying for similar changes is currently taking place in Pakistan.<sup>354</sup>

One recent development in this area took place on 8 August 2004 when the Seoul, Korea, Central District Court decided that sexual acts cannot be demanded by force, even amongst married couples. It found that the "sexual choice must not be infringed upon between married persons," and in doing so provides legal basis for punishing marital rape in the same way as rape in other situations. The court's decision runs counter to a judgment by the Korean Supreme Court, which in 1970 said that forced sex was not rape when between a husband and wife.<sup>355</sup> The Court distinguished this case from the 1970 Supreme Court case because the husband stopped short of penetration, thus the case was about sexual abuse and not marital rape *per se*.<sup>356</sup>

On 15 September 2004, Indonesia enacted a domestic violence law that effectively bans marital rape through criminalisation of "forced [non-consensual] sexual relations" within a household. Although the bill does not mention the word "rape", courts could interpret this provision to mean that marital rape is now a crime.<sup>357</sup>

The following represents a brief overview of marital rape laws in several countries in Asia and around the world.

## Australia

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<sup>352</sup> The Society for the Scientific Study of Sexuality, "What Social Scientists Know...: about Rape" [http://www.sexscience.org/publications/index.php?category\\_id=440&subcategory\\_id=335](http://www.sexscience.org/publications/index.php?category_id=440&subcategory_id=335)

<sup>353</sup> Ramyata Limbu, "Marital Rape Outlawed By Nepal's Supreme Court", Panos London, 1 October 2002 <http://www.panos.org.uk/newsfeatures/featuredetails.asp?id=1062>; "Nepali women score victory as court rules marital rape", We! newsletter from Isis International Manila, May 2002, <http://www.isiswomen.org/pub/we/archive/msg00075.html#nepaliwomen>.

<sup>354</sup> AFP, "A small step on marital rape, but Asia remains divided", Khaleej Times, 27 August 2004, [http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/theworld/2004/August/theworld\\_August726.xml&section=theworld&col=](http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/theworld/2004/August/theworld_August726.xml&section=theworld&col=)

<sup>355</sup> Editorial, "Guilty Verdict for Marital Rape", The Hankyoreh, 24 August 2004 <http://www.minjok.com/english/index.php3?code=25171>

<sup>356</sup> Ji-Seong Jeon & Jin-Kyeong Kim, "Man Convicted of Sexually Assaulting Wife in First-of-its-kind Ruling", 20 August 2004, <http://english.donga.com/srv/service.php3?bicode=040000&biid=2004082114278>

<sup>357</sup> "Domestic Violence Now a Crime", Laksamana.Net, 15 September 2004, [http://www.laksamana.net/vnews.cfm?ncat=45&news\\_id=7498](http://www.laksamana.net/vnews.cfm?ncat=45&news_id=7498).

By 1991, every state in Australia had abolished the marital rape exception. That year, the High Court considered the issue of marital rape in *R v L* (1991), BFW at 860, and rejected the defendant's argument that the immunity conflicted with a Commonwealth law that, when enacted, allowed marital intercourse without consent.<sup>358</sup>

Researchers in Australia have found that rapes committed by strangers are far more likely to be reported than rapes committed by acquaintances, friends, or partners.<sup>359</sup> One 1999 study found that "assault not involving injury and assault perpetrated by a current partner were less likely than other types of assault to be reported [to police]".<sup>360</sup>

## China

The PRC law provides: It is a crime "to rape women with force, threat or other means."<sup>361</sup> The law has never had an explicit exception for marriage, nor does it provide an explanation of what constitutes rape in marriage. Some Chinese legal scholars believe that the rape laws do not shield husbands from prosecutions.<sup>362</sup> In practice, however, the record is much more complicated.

## Hong Kong

In 2000, the Hong Kong Special Administrative Region (SAR) government began public consultation on whether and how the marital rape exception embedded in its British-derived laws should be eliminated.<sup>363</sup> The relevant portion of the law, Section 118(3) of the Crimes Ordinance, reads:

***A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.***

The term "unlawful sexual intercourse" was traditionally interpreted according to British law, thus incorporating the Hale doctrine that rape cannot occur within a marriage.

<sup>358</sup> "Sexual Offences", <http://law.anu.edu.au/criminet/trape.html>.

<sup>359</sup> Patricia Weiser Eastal (1992), "Rape", *Violence Prevention Today*, Canberra: Australian Institute of Criminology.

<sup>360</sup> C. Coumarelos and J. Allen (1999), *Predicting Women's Responses to Violence: The 1996 Women's Safety Survey*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice no. 47, NSW Bureau of Crime Statistics and Research, Sydney.

<sup>361</sup> Li Dun, "A Discussion Caused by Marital Rape", Women of China website, <http://www.womenofchina.com.cn/WOC/ShowArticle2.asp?ID=1237&ArticlePage=2&BigClassId=7>

<sup>362</sup> Wang Ying (2004), "More and more women saying no to abusers", China Daily, 3 March, [http://www.chinadaily.com.cn/english/doc/2004-03/03/content\\_311452.htm](http://www.chinadaily.com.cn/english/doc/2004-03/03/content_311452.htm).

<sup>363</sup> Chiu Man-chung (2004), "Contextualising the Rhetoric of Sexual Violence in Hong Kong", *China: An International Journal* 2(1), 83-107.

On 4 July 2002, the Hong Kong Legislative Council amended the rape laws by enacting two provisions that expand the meaning of “unlawful sexual intercourse” to include marital intercourse:

*117(1B) For the avoidance of doubt, it is declared that for the purposes of sections 118, 119, 120, and 121 and without affecting the generality of any other provisions of this Part, ‘unlawful sexual intercourse’ does not exclude sexual intercourse that a man has with his wife.*

*118(3A) For the avoidance of doubt, and without limiting the generality of any other section, it is declared that in subsection (3)(a), ‘unlawful sexual intercourse’ includes sexual intercourse between a husband and his wife.*

It is unclear the extent to which these provisions have been used in the Hong Kong criminal justice system.

## **Indonesia**

Indonesia is the latest nation to adopt a domestic violence bill, which includes a provision that could be interpreted to criminalise marital rape. This provision states that the penalty

for forcing another person in the same household to have sex with a person is a jail sentence ranging from 4 years to 15 years; or a fine ranging from Rp12 million to Rp300 million. Although it does not mention marital rape, either to include or exclude it, a judge could interpret it to include rape within a marriage. The victim alone can initiate proceedings without any other witnesses. Prior to the enactment of the bill, 5,934 complaints of violence against women – not marital rape or even stranger or acquaintance rape – were reported to the police in 2003.<sup>364</sup> The bill was enacted by the Indonesian Parliament on 15 September 2004 and is scheduled to be signed by the president later in 2004.<sup>365</sup>

## **Japan**

Japanese law makes no distinction between spousal rape and any other form of rape.<sup>366</sup> Article 177 of its Penal Code defines the act of rape as:

*‘A person who, through violence or intimidation, has sexual intercourse with a female person of not less than thirteen (13) years of age commits the crime of rape and shall be punished with imprisonment at forced*

<sup>364</sup> “Domestic Violence Now a Crime”, Laksamana.Net, 15 September 2004, [http://www.laksamana.net/vnews.cfm?ncat=45&news\\_id=7498](http://www.laksamana.net/vnews.cfm?ncat=45&news_id=7498).

<sup>365</sup> Fauwaz Abdul Aziz, “Scholar: Follow Indonesia, criminalise marital rape”, Malaysiakini.com, 9 October 2004, <http://www.malaysiakini.com/news/30655>

<sup>366</sup> AFP, “A small step on marital rape, but Asia remains divided”, Khaleej Times, 27 August 2004, [http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/theworld/2004/August/theworld\\_August726.xml&section=theworld&col=](http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/theworld/2004/August/theworld_August726.xml&section=theworld&col=)

*labour for a limited term of not less than two years. The same shall apply to a person who has sexual intercourse with a female person under thirteen (13) years of age.*<sup>367</sup>



## **Mauritania**

Spousal rape is illegal under Mauritania's rape laws.<sup>31</sup>

## **New Zealand**

In New Zealand, the marital rape exemption was abolished in 1985 when the present Section 128 to the Crimes Act, 1961 was enacted. Sub-section (4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred.<sup>368a</sup> Further, the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence *R. v. D.* (1987) 2 NZLR 272 (CA). There is now, therefore, no distinction in principle to be drawn between sexual violation in marriage and outside of marriage.<sup>369</sup> New Zealand provides for a maximum penalty of 20 years' imprisonment for having sex with anyone, including spouses, without consent.



## **Philippines**

The Anti-Rape Law, RA 8353, signed on 30 September 1997, broadened the definition of rape and reclassified it as a crime against persons and not just against chastity. The law allows for marital rape but provides that the "subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty." If the marriage is proven void, however, the crime and the penalty shall not be extinguished.<sup>370</sup> A twin law, RA 8505, the Rape Assistance and Protection Act, was enacted in 1998 to provide a rape shield ruling out use of the sexual history of the victim in court and protective measures for rape survivors.<sup>371</sup>

## **Taiwan**

<sup>367</sup> Interpol, "Legislation of Interpol member states on sexual offences against children – Japan", <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaJapan.asp>

<sup>31</sup> Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, "Integration of the Human Rights of Women and the Gender Perspective on Violence Against Women, Addendum 1: International, regional and national developments in the area of violence against women, 1994-2003", 27 Feb 2003, para.387, <http://www.hri.ca/fortherecord2003/documentation/commission/3-cn4-2003-75-add1.htm>.

<sup>368a</sup> Crimes Act, 1961, Section 128, <http://www.rapecrisis.org.nz/court/index.asp>

<sup>369</sup> Saurabh Mishra & Sarvesh Singh (2003), "Marital Rape — Myth, Reality and Need for Criminalization", PL WebJour 12, <http://www.ebc-india.com/lawyer/articles/645.htm>

<sup>370</sup> Committee on Women, House of Representatives, Philippines, "Anti-Rape Law Signed", <http://www.philwomen.net/house/news/rapelaw.html>

<sup>371</sup> Mercedes Llarinas-Angeles, "Monitoring the Philippine Rape Laws: The Policy and the Myths", paper presented at Townsville International Women's Conference – Australia, 3 - 7 July 2002.

In Taiwan, courts recognise the right of a woman to sue her husband for rape or assault if she is forced into sex against her will. In 1999, the Taiwan government passed legislation that permits the prosecution of the crime of rape without requiring the victim to press charges. According to a law passed in 1997, rape trials no longer are public unless the victim consents. The Code of Criminal Procedure establishes the punishment for rape as not less than 5 years' imprisonment, and those convicted usually are sentenced to from 5 to 10 years in prison. There were 2,042 cases of rape or sexual assault reported in 1999. A total of 627 persons were indicted for the crime of rape and 197 were convicted.<sup>372</sup>

## Tunisia

Marital rape is a crime under the Penal Code of Tunisia.<sup>373</sup>

## United Kingdom

The marital rape exemption was abolished in its entirety in 1991. The House of Lords held in *R. v. R.*<sup>374</sup> (1992) 1 AC 599, (1991) 4 All ER 481 (HL) that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should no longer be applied. Corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in the decision of *SW v. UK* (1996) 21 EHRR 363.<sup>375</sup>

Despite the fact that the relationship between the victim and the offender is one of the sentencing factors, the chair of the British Sentencing Advisory Panel stated that: "Sentencing practice does appear to be more lenient when the victim and offender were known to each other." This same sentencing panel released a report calling for courts to deal with intimate rapes the same way as stranger rapes and an eight-year minimum jail term for horrific rapes.<sup>376</sup>

## United States

In the United States, rape laws are governed by the individual states, not by the federal government. On 5 July 1993, marital rape became a crime in all 50 states under at least one section of the states' sexual offence codes. Nevertheless, in 33

<sup>372</sup> United States Department of State, Bureau of Democracy, Human Rights, and Labor (2001), "Country Reports on Human Rights Practices – 2000, China (Taiwan only)", <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/783.htm>

<sup>373</sup> Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Tunisia. 31/05/95. A/50/38, para. 228 at p.55.

<sup>374</sup> <http://www.ebc-india.com/lawyer/articles/Ref10#Ref10>

<sup>375</sup> Saurabh Mishra & Sarvesh Singh (2003), "Marital Rape — Myth, Reality and Need for Criminalization", PL WebJour 12, <http://www.ebc-india.com/lawyer/articles/645.htm>

<sup>376</sup> "Marital rape as serious as stranger rape", BBC News, 25 May 2002, [http://news.bbc.co.uk/2/hi/uk\\_news/england/2007528.stm](http://news.bbc.co.uk/2/hi/uk_news/england/2007528.stm).



states, there are still some exemptions given to husbands from rape prosecution – when she is unable to consent (eg. she is physically or mentally impaired, unconscious or asleep).<sup>377</sup>

In the United States, studies in the mid-1990s suggested that marital rape accounts for 25 percent of all rapes, and that one-third to one-half of battered women are raped by their partners at least once. Studies from the United States indicate that only 2 percent of rape reports are false reports, the same as for most other felony crimes.<sup>378</sup>

## 🇻🇳 Vietnam

Although not specifically or individually mentioned under the Penal Code, marital rape can be addressed under general provisions.<sup>379</sup>

## Conclusion

Marital rape is an extremely serious crime, prevalent throughout Western and Eastern societies. Women who experience rape in marriage suffer severe physical and psychological trauma from the abuse, which is often repeated many times. In Asia and around the world, many countries have abolished the marital rape exception, thereby providing for the possibility of prosecuting husbands who rape their wives. This has been extremely important symbolically in these countries, as it demonstrated the government and society's evolving respect for women and the need to protect women from all forms of violence.

The symbolic value of abolishing the marital rape exception is extremely high. Eliminating the exception sends a clear signal that any rape – within or outside a marriage – is inherently wrong and unacceptable in a modern society.

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<sup>377</sup> Raquel Kennedy Bergen (1999), “Marital Rape”, VAWNet Applied Research Forum, <http://www.vaw.umn.edu/documents/vawnet/mrape/mrape.pdf>

<sup>378</sup> Lisa R. Eskow (1996), “The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution”, *Stanford Law Review* 48, 677-709 at 694, citing Eloise Salholz, Sex Crimes: Women on Trial, Newsweek, Dec. 16, 1991, at 23 (quoting Morrison Torrey).

<sup>379</sup> Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, “Integration of the Human Rights of Women and the Gender Perspective on Violence Against Women, Addendum 1: International, regional and national developments in the area of violence against women, 1994-2003”, 27 February 2003, para. 1235 and 1237, <http://www.hri.ca/fortherecord2003/documentation/commission/e-cn4-2003-75-add1.htm>.

# **MEMORANDUM TO THE SPECIAL SELECT COMMITTEE ON THE PENAL CODE AND CRIMINAL PROCEDURE CODE**

**Submitted by:**

**Joint Action Group Against  
Violence Against Women (JAG)**

**Comprise:**

**Women's Centre for Change, Penang (WCC)**

**Women's Aid Organisation (WAO)**

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## **PUNISHMENT FOR RAPE**

### **EXISTING PROVISION (PENAL CODE)**

**S.376** Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years and shall also be liable to whipping.

### **PROPOSED AMENDMENT**

**S.376** Whoever commits rape shall be punished with imprisonment for a term not less than five years and not more than twenty years, shall be liable to whipping, and shall also be ordered to undergo a period of mandatory rehabilitative counselling as the court deems necessary.

Exception : Rape of a woman above fourteen years of age but under sixteen years of age with her consent by a man under eighteen years of age shall be punished with imprisonment for a term which may extend to five years or with fine which may extend to five thousand ringgit or with both.

### **EXISTING PROVISION (CRIMINAL PROCEDURE CODE)**

**S.2** “youthful offender” includes any child convicted of an offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of ten and under the age of sixteen years in the opinion of the Court before which such child is convicted.

### **PROPOSED AMENDMENTS**

**S.2** “youthful offender” includes any child convicted of an offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is under the age of eighteen years in the opinion of the Court before which such child is convicted.

To substitute all references to the Juvenile Courts Act in section 293 with the Child Act 2001.

### **JUSTIFICATION FOR MAINTAINING MINIMUM SENTENCE**

1. It is important to maintain the minimum mandatory sentence for rape. Prior to the introduction of the minimum mandatory sentence of 5 years, judges were sentencing convicted rapists for as low as 6 months. This was wholly inadequate and failed to reflect the serious nature of the crime, particularly when seen in light of judgments for some of the other crimes during the same period; for example, where a man who only stole a bicycle was sentenced to 1 year imprisonment.
2. Providing the exception for child offenders under 18 years, in what would otherwise be a consensual sexual relationship, with a girl under 16 years ensures that such children are not unduly punished. This exception also ensures that older men are not allowed to prey on young girls and get away with light sentences.
3. The courts maintain their discretion to bind over the following persons:-
  - (a) youthful offenders – the court may instead of awarding any term of imprisonment ... order the offender to be discharged after due admonition or order the delivery of the offender to an adult with a good behaviour bond (s.293 of the Criminal Procedure Code);
  - (b) first offenders – the court may instead of awarding any term of imprisonment ...direct that the offender be released on his entering into a good behaviour bond (s.294 of the Criminal Procedure Code);
  - (c) having regard to the character, age, health or mental condition – the court may without proceeding to record a conviction, dismiss the charge after admonition or caution to the offender or discharge the offender conditionally with a good behaviour bond (s.173A Criminal Procedure Code)
1. Amending section 2 of the Criminal Procedure Code on the definition of “youthful offender” ensures that the Criminal Procedure Code is consistent with the definition of child under the Child Act 2001.

#### **JUSTIFICATION FOR REHABILITATIVE COUNSELLING**

Research abroad has shown that sex offenders can be more justly, humanely and positively helped to return to society and not re-offend through counselling and treatment, which begins within the prison system and continues outside in the community, as needed. Much work has been done in this regard in Britain.

The treatment required has to be long term as research has shown a high level of denial amongst offenders in accepting responsibility for committing rape. This is one of the reasons for suggesting that the minimum mandatory 5 years jail sentence be maintained.

Providing for rehabilitative counselling demonstrates the government's commitment in dealing with sex offences. Given the recidivist nature of sexual offences, such rehabilitation is important notwithstanding the additional costs that will have to be incurred. Rehabilitative counselling should therefore be made mandatory.

## **RAPE**

### **EXISTING PROVISIONS (PENAL CODE)**

**S.375.** A man is said to commit "rape" who, except in the case hereafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when consent has been obtained by putting her in fear of death or hurt to herself or to any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
- (d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
- (e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
- (f) with or without her consent, when she is under sixteen years of age.

*Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.*

*Exception – Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognised in the Federation as valid, is not rape.*

*Explanation 1 – A woman –*

- (g) living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or*
- (h) who has obtained an injunction restraining her husband from having sexual intercourse with her,*  
*shall be deemed not to be his wife for the purposes of this section.*

*Explanation 2 – A Muslim woman living separately from her husband during the period of ‘iddah, which shall be calculated in accordance with Hukum Syara’, shall be deemed not to be his wife for the purposes of this section.*

**S.377A.** Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

*Explanation – Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.*

**S.377B.** Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

**S.377C.** Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

**Bill DR15/2004 377CA.** Any person who has sexual connection with another person by the introduction of any object into the vagina or anus of the other person

shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping."

#### PROPOSED AMENDMENTS

**S. 375(1)** A man is said to commit "rape" who has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

- (i) against her will;
- (j) without her consent;
- (k) with her consent, when consent has been obtained by putting her in fear of death or hurt to herself or to any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
- (l) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
- (m) with her consent, when, at the time of giving such consent, she is unable to understand or incapable of understanding the nature and consequences of that to which she gives consent;
- (n) with her consent, when the accused being a public servant or a person in a position of trust, power or authority or a person with whom the complainant is in a relationship of dependency abuses such position to obtain consent;
- (o) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in sexual intercourse;
- (p) with or without her consent, when she is under sixteen years of age.

(2) Nothing in subsection (1) shall be construed as limiting the circumstances that invalidates the victim's consent<sup>380</sup>.

#### Explanation:

1. Sexual intercourse for the purposes of this section includes the insertion of the penis into the vagina, anus and mouth or the insertion of, any part of the body

<sup>380</sup> Adapted from S.153.1(4) of the Canadian Criminal Code.



or object into the vagina and anus except when the latter is made strictly for medical purposes by a medical practitioner.

2. Penetration to any extent is sufficient to constitute the sexual intercourse necessary for the offence of rape.
3. It is not a defence to a charge of rape that the accused believed that the complainant consented to the act if:

(a) the accused's belief arose from the accused's self-induced intoxication, or recklessness or wilful blindness; or

(b) the accused did not take reasonable steps to ascertain that the complainant was consenting<sup>381</sup>.

4. It is not a defence to the charge of rape that the accused believed that the complainant is over sixteen years of age if the accused did not take reasonable steps to ascertain her age.

#### **Deletion of Sections 377A, 377B, 377C and proposed 377CA in Amendment Bill DR15/2004**

**In the alternative, although we strongly recommend broadening the definition of rape to include insertion of objects and body parts into the vagina or anus of a woman, if the Committee cannot either:-**

- **support the broadening of the definition of rape; or**
- **remove the exception of recognising that a husband having sexual intercourse with his wife without her consent can be recognised as rape;**

**then we propose either that:**

- **the exception of marital rape be restricted to insertion of the penis into the vagina (preferable); OR**
- **not incorporating explanation (1) and replacing Sections 377A, 377B, 377C and the proposed Section 377CA with the following:-**

**S.377AA. Whoever voluntarily has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person or the insertion of any part of the body or object into the vagina or anus except when the**

<sup>381</sup> Adapted from S.153.1(5)(a) of the Canadian Criminal Code.

latter is made strictly for medical purposes by a qualified medical practitioner without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

Exception – A person is not said to have committed sexual connection if the person is under sixteen years old.

Explanation – Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.

#### **JUSTIFICATION FOR BROADENING THE DEFINITION OF RAPE AND DELETING THE PROVISIONS ON CARNAL INTERCOURSE**

5. Under the present Penal Code, rape is narrowly defined as penile penetration. This implies that rape only happens when there is penile penetration.
6. Cases have shown that objects like 10-foot poles, bottles and cloth hangers have been used when women and children are raped. These cases provide evidence that rape is not just a sexual act, but a crime of violence.
7. The fact that the existing Penal Code does not recognise other forms of penetration in rape cases has limited the circumstances in which rape is acknowledged to have been committed. A classic example is when a medical examination shows that penetration has occurred and could possibly be caused by a hard, blunt object, but the doctor cannot verify that it is a penile penetration because of the absence of sperm. When such evidence is presented in court, and there is no other evidence of penile penetration, the prosecutor is unable to prove rape because of its current narrow definition.
8. Although a man may be charged under section 377A for sexual connection with a woman by the introduction of penis into the anus or mouth, or under the proposed section 377CA by the use of objects, both sections 377A and the

proposed section 377CA do not make consent an issue. Technically, a husband and wife may be charged under these sections for what would otherwise be consensual sexual acts. Therefore, we propose repealing sections 377A, 377B and 377C in the *Penal Code* as well section 377CA, yet to be passed. It is irrelevant whether these sections are currently being used in this manner since they nonetheless leave too much discretion in the hands of public prosecutors to charge a person in this manner.

9. Sections 354 and 377D of the *Penal Code* on assault with intent to outrage modesty and outrage of modesty should not be preferred against offenders who make use of objects in committing rape. These sections carry a considerably lower sentence than rape although the violation is of equal gravity.
10. The amendment to include insertion of objects as part of rape in Section 375 aims to discredit the long-held view that rape is merely a result of excessive passion. It reiterates the point that sexual assault is violence and it is more than just the penile penetration.
11. The proposed amendment also recognises the fact that a victim of an assault in which a bottle or other objects are inserted into the vagina or anus may be just as, or much more seriously injured, physically and/or psychologically, than, a female into whose vagina a man's penis is inserted without consent. The fact remains that both are acts of violence against a woman using sex as a weapon.
12. However, broadening the definition of rape in Section 375 must be accompanied by the deletion of the exception to rape and recognise that rape can happen in a marital relationship. Broadening the definition of rape cannot be undertaken in the face of such exception otherwise it would similarly broaden the scope of the exception and a man who has sexual connection with his wife without her consent can similarly not be charged for the sexual connection.

13. If the marital exception to rape remains in force, then a new alternative section on rape by objects must be introduced and we propose that the alternative provision on sexual connection be introduced.

#### **EXISTING PROVISION (EVIDENCE ACT 1950)**

##### **Restrictions on evidence at trials for rape.**

**S. 146A** Notwithstanding anything in this Act in proceedings in respect of the offence of rape, no evidence and no question in cross-examination shall be adduced or asked, by or on behalf of the accused, concerning the sexual activity of the complainant with any person other than the accused unless –

- (a) it is evidence that rebuts, or a question which tends to rebut, evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
- (b) it is evidence of, or a question on, specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
- (c) it is evidence of, or a question on, sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence or question relates to the consent that the accused alleges he believed was given by the complainant.

#### **PROPOSED AMENDMENTS**

##### **Evidence at trials for rape.**

**S.146A (1)** Notwithstanding anything in this Act in proceedings in respect of the offence of rape, no evidence and no question in cross-examination shall be adduced or asked, by or on behalf of the accused, concerning the sexual activity of the complainant with any person other than the accused unless -

- (a) it is evidence that rebuts, or a question which tends to rebut, evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;

- (b) it is evidence of, or a question on, specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
- (c) it is evidence of, or a question on, sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence or question relates to the consent that the accused alleges he believed was given by the complainant.
- (2) The fact that a person does not protest or offer physical resistance to sexual intercourse or is not found to have physical signs of resistance does not by itself constitute consent to sexual intercourse for the purposes of this section<sup>382</sup>.

### JUSTIFICATION

Under the current regime, judges often conclude that the complainant had consented to sexual intercourse on the basis that no evidence of physical resistance was adduced by them.<sup>383</sup> However, requiring proof of protest or physical resistance endangers the lives of victims even more, and such a burden should not be imposed.

### INCEST

#### EXISTING PROVISION

**s. 376A.** A person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.

#### PROPOSED AMENDMENT

**s. 376A (1)** A person is said to commit incest if he or she has sexual intercourse or sexual connection with a close family member whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.

<sup>382</sup> Adapted from S. 128A of the New Zealand Crimes Act 1961 as amended by the Crimes Amendment Act (No. 3) 1985.

<sup>383</sup> For example, see: "Court acquits army dentist charged with rape at office", *The Star* (May 13, 2005) and "Cop freed of rape", *The Sun* (September 24, 2002).

(2) A person is said to have sexual connection with another person if:

(a) the person penetrates the vagina or anus or mouth of the other person to any

extent with the person's penis; or

(b) the person penetrates the vagina or anus or mouth of the other person to any

extent with any object or any part of the person's body other than the penis for sexual gratification

Explanation (1): Penetration to any extent is sufficient to constitute the sexual intercourse or sexual connection;

Exception – A person is not said to have committed incest :-

(a) if the person has sexual intercourse or sexual connection under fear of injury or under a misconception of fact; or

(b) if the person has sexual intercourse or sexual connection due to unsoundness of mind or mental incapacity, whether temporary or otherwise, inability to understand the nature and the consequence of incest; or

(c) if the person has sexual intercourse or sexual connection due to coercion, manipulation, undue influence, assertion of authority, or breach of trust exercised or committed by the other person doing the act; or

(d) if a person is under sixteen years of age.

Explanation (2): For the purposes of this section, reference to relationship with a close family member includes relationship corresponding to a step relationship arising out of cohabitation in a de facto relationship or because of a foster relationship or a legal arrangement.

## JUSTIFICATION

1. "Sexual connection" must be included so that the offence of incest is not confined only to cases where sexual intercourse can be proven. Furthermore, incest can be committed by family members of the same sex, which also makes the inclusion of the term "sexual connection" essential;
2. The slightest penetration should be sufficient;
3. The current wording of sections 376A and 376B(2) is such that the victims themselves can be charged with incest and it is then upon him/her to prove

his/her innocence by showing that the act was committed without his/her consent. For example, in a recent case, the Syariah High Court of Kelantan bound over a 17 year old girl for “committing incest” with her father.<sup>384</sup> Although this was a Syariah case, unless exceptions are made to the incest provisions, the sentence may as likely be delivered by a civil criminal court. If we are to encourage more victims to come forward and report incidents of incest, we must eliminate any probability/likelihood of the victims themselves being charged for the offence when they report it.

4. Since it is often difficult to prove the lack/absence of consent in sexual offences, all situations in which consent ought to be deemed vitiated must be adequately covered. This is particularly crucial in incest cases since in most cases the victim usually yields to the perpetrator’s demands on account of the authority/influence imposed by the perpetrator over the victim by the sheer nature of the familial relationship between them. It is therefore necessary that in such situations the apparent consent given be deemed to be vitiated;
5. “Relationship” must be specifically defined to confine it to persons within the family but at the same time be given a wider meaning to cover de facto familial relationships, e.g. cases of de facto adoption or fostering.

## **PUNISHMENT FOR INCEST**

### **EXISTING PROVISION (PENAL CODE)**

**s. 376B** (1) Whoever commits incest shall be punished with imprisonment for a term of not less than six years and not more than twenty years, and shall also be liable to whipping.

(2) It shall be a defence to a charge against a person under this section if it is proved:-

- (a) that he or she did not know that the person with whom he or she had sexual intercourse was a person whose relationship to him or her was such that he or she was not permitted under the law, religion, custom or usage applicable to him or her to marry that person; or
- (b) that the act of sexual intercourse was done without his or her consent.

*Explanation:- A person who is under sixteen years of age, if female, or under thirteen years of age, if male, shall be deemed to be incapable of giving consent.*

<sup>384</sup> “Girl bound over in incest case”, *The Star* (March 2, 2005).

**PROPOSED AMENDMENT**

**S. 376B** (1) Whoever commits incest shall be punished with imprisonment for a term of not less than six years and not more than twenty years, and shall also be liable to whipping and if the other person on whom the act is committed is under the age of eighteen, then the offender shall be punished with imprisonment for a term of not less than ten years and not more than twenty years, and shall also be liable to whipping;

(2) For a second or subsequent offence, the offender shall be liable to a term of imprisonment of not less than ten years and not more than twenty years and shall also be liable to whipping;

(3) Nothing in any written law shall prevent a sentence of whipping being imposed or executed on any male above the age of fifty for this offence;

(4) The Court may, in addition to any other sentence pronounced, direct that the offender be referred to rehabilitation treatment such as counselling.

**JUSTIFICATION**

1. It is felt that the minimum and maximum sentences prescribed for incest are sufficient and that sentences such as life sentences, death penalty and/or public whipping and too high a minimum mandatory sentence would be counter-productive in that they would deter victims from reporting incidents of rape against their family members/relatives;
2. The discretion in sentencing should be maintained by the Courts, which should take a more serious view of the public interest and impose appropriate sentences. If sentencing trends are found to be inadequate, it is for the higher Courts in the judicial system to call up these cases for revision and to set the appropriate judicial precedent and clarify the applicable principles rather than for the legislature to dictate the sentences to be imposed in all cases;
3. It would, however, be more appropriate to prescribe heavier minimum sentences in cases of incest committed against juveniles and for second or subsequent offences to distinguish the various degrees of offences;
4. Since many incest cases involve male perpetrators above the age of 50, they should not be allowed to escape the punishment of whipping merely by reason of their age;



5. The Court should also be given the power to direct that the offender be sent for rehabilitation treatment, such as counselling, while imprisoned as a preventive measure against recurrence of the same offence.

## **AGGRAVATED RAPE**

### **EXISTING PROVISION**

None

### **PROPOSED NEW PROVISIONS**

**S.375(3) Aggravated Rape:** A person is said to commit “aggravated rape” when he commits rape as defined in s.375(1) in any of the following circumstances:

- a) the rape is committed by a person in position of authority or trust over the victim or in relation to the victim;
- b) the rape is committed in the presence of any other persons physically, virtually or through recording;
- c) the offender is infected with Human Immuno-Deficiency Virus (HIV) / Acquired Immune Deficiency Syndrome (AIDS) or any other sexually transmitted infections at the time of the rape;
- d) the victim is pregnant at the time of the rape;
- e) the victim is mentally ill and/or has physical disability at the time of the rape;
- f) the rape is committed by more than one man;
- g) the victim is intoxicated or drugged;
- h) the offender inflicts actual bodily harm or threatens to inflict bodily harm on the victim by using or threatening to use a weapon or any other instrument at the time of, or immediately before or after, the commission of the offence;

- i) the victim is under the age of sixteen years and the rape is committed without her consent;
- j) the victim's consent was obtained by deceiving her into believing that the sexual intercourse is for religious, medical, hygienic or curative purposes.

**S.376A. Punishment for Aggravated Rape:** Whoever commits aggravated rape shall be punished with imprisonment for a term of not less than ten years and not more than twenty-five years, shall be liable to whipping, and shall also be ordered to undergo a period of mandatory rehabilitative counselling as the court deems necessary.

**S.376B. Punishment for Subsequent Rape:** When the offender has been previously convicted of rape or any sexual offence, he shall be punished with imprisonment for a term of not less than ten years and not more than twenty-five years, shall be liable to whipping, and shall also be ordered to undergo a period of mandatory rehabilitative counselling as the court deems necessary.

#### **JUSTIFICATION FOR AGGRAVATED RAPE**

1. The offence of aggravated rape needs to be introduced in order to reflect the gravity of rape situations that cause additional trauma to the victim, be it physical or psychological, as well as to demonstrate society's utter disapproval and intolerance for such acts. Currently, under the Malaysian law, there is no additional penalty for aggravated rape or any recognition of the need to impose a more severe punishment reflecting the particularly heinous nature of the crime.
2. The aggravating circumstances are proposed on the basis of increasingly greater perversity of the offender manifested in the commission of the crime as shown by:
  - i. the motivating factor;
  - ii. the place of commission;
  - iii. the means and ways employed; and/or
  - iv. the personal circumstances of the offender or victim
1. As the law on rape currently stands, there is no graded scale of punishment for rape cases in Malaysia. Judges have the discretion to punish the rapist to any number of years within the minimum and maximum terms prescribed by the law. The irony is that a young man who has consensual sex with his girlfriend who is almost 16 years of age can have the same penalty imposed on him as a man who brutally attacks and rapes a woman. The proposed amendments are therefore

necessary as the Court, on its own, will not make the distinction as demonstrated by various precedents.<sup>385</sup>

2. Aggravated rape is a separate offence in various jurisdictions including India and Philippines.
3. The proposed inclusion of aggravated rapes distinguishes and classifies the seriousness of the crime in the following situations:

**a) Defendant in a Position of Authority**

A person acting in an official government position, who takes advantage of his official position to induce a woman to have sexual intercourse with him or rapes a woman under his custody or the custody of his subordinates, flagrantly abuses his authority and must be additionally penalized for doing so.

Similarly, a police/prison officer who rapes a woman under his custody or a member of the management or staff of a hospital - be it private or government - who rapes a woman under his custody should also be categorized as committing aggravated rape.

**b) Gang Rape**

This type of rape is perpetrated by a group of offenders who “take turns” to rape a victim. Group members may also participate by forcing the victim to submit (by physical force or threat) while other group members commit the rape.

A number of such cases have been reported in recent years. For example: an 18 year old girl was raped by six soldiers from the Sikamat Regiment 4 Artillery Camp on New Year’s Day;<sup>386</sup> a 14-year-old girl was raped by her boyfriend and his seven friends in Malacca<sup>387</sup> and an 23-year-old woman was raped and sodomized by three men last month.<sup>388</sup>

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<sup>385</sup> For arbitrariness exhibited by the judges in sentencing, see: “Jail for man who wants to wed schoolgirl he raped”, *The Star* (April 19, 2005); “Rapist dad jailed 40 years”, *The Star* (January 28, 2005); “Army man gets jail and whipping” *The Star* (July 2, 2005); and “Man jailed for raping Indon maid”, *New Straits Times* (April 7, 2005).

<sup>386</sup> “Six Soldiers face gang rape charge”, *New Straits Times* (January 21, 2005).

<sup>387</sup> “Pregnant woman gang-raped at food court”, *The Star* (February 2003).

<sup>388</sup> “Three charged with raping and sodomising woman”, *The Star* (July 13, 2005).

The degradation and humiliation experienced by victims of gang rapes is far worse than that experienced by a victim raped by one person, and should be reflected in the punishment for the perpetrators.

***c) Pregnant Victim***

Raping a pregnant woman must be treated as aggravated rape since it inflicts additional trauma on the victim, endangers the victim's health and life, and in addition, poses serious risk of injury to the foetus.

For instance, in February 2003, an eight month pregnant woman was dragged to a deserted spot at a food court in Penang where she was gang raped by four men.<sup>389</sup>

Whether the offender had knowledge of the victim's pregnancy should be immaterial, since the additional trauma experienced by the victim is in itself an aggravating factor.

***d) Victim Intoxicated or Drugged***

There have been a number of cases where offenders have intoxicated victims before raping them.<sup>390</sup> However, it is proposed that it is immaterial whether the victim is drugged or intoxicated by the offender or out of her own free will. The rape must constitute aggravated rape on the basis that the offender has taken advantage of the victim's vulnerability.

***e) Defendant has a Disease***

In situations where the offender is infected with HIV and/or any other forms of sexually transmissible infections, the victim faces increased risk of becoming infected. In cases where the victim is actually infected, she faces the risk of death as well as physical and mental suffering in addition to the trauma of rape. Rape in such cases should be categorized as aggravated rape. Whether the offender had knowledge of his condition is immaterial, as the additional trauma faced by the victim is in itself an aggravating factor.

***f) Presence of others***

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<sup>389</sup> See "Pregnant woman gang-raped at food court", *The Star* (February 2003).

<sup>390</sup> For examples, see articles: "Stewardess alleges she was raped by colleague", *The Star* (March 16, 2005); "Raped while under a spell", *New Straits Times* (March 4, 2005); "Form Five girl claims adoptive dad raped her", *The Star* (May 10, 2005); "Waitress alleges Rape", *The Sun* (July 19, 2005)

Presence of other people exacerbates the agony and trauma suffered by a rape victim. While it empowers the rapist who is able to assert his masculinity and power, it aggravates the degradation experienced by the victim, and therefore deserves a higher penalty.

***g) Victim with Mental Illness or Physical disability***

A victim who is mentally ill or physically disabled is even more vulnerable and likely incapable to fight off the rapist than a victim who does not suffer from mental illness or physical disability. Taking advantage of the vulnerability of such a victim must constitute aggravated rape.

***h) Use of weapons***

Even with a crime of robbery, the crime is treated more seriously if weapons are used to rob a person. Use of weapons is an aggravating factor and should be punished accordingly in rape cases as well.

***i) Deceit***

There has been a spate of cases where victims who sought alternative “medical” treatment were fraudulently taken advantage of by “bomohs” or “sinsehs”, who raped the victims under the pretence of treating them.<sup>391</sup>

## **STALKING**

### **EXISTING PROVISION**

None

### **PROPOSED NEW PROVISION<sup>392</sup>**

(1) Whoever commits the crime of stalking, that is with intent to cause another person physical or mental harm or to be apprehensive or fearful, he or she engages in one or more of the following actions:

<sup>391</sup> For examples, see Articles: “Woman allegedly raped by bomoh”, *The Star* (December 8, 2004); “Bomoh dihukum penjara 11 tahun”, *Mingguan Malaysia* (March 27, 2005); “Polis Tahan bomoh wanita damlam kes rogol”, *Utusan Malaysia* (May 18, 2005)

- (a) following the other person or anyone known to them;
- (b) keeping the other person or anyone known to them under surveillance;
- (c) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
- (d) loitering outside the residence or workplace of the other person or anyone known to them;
- (e) loitering outside a place that the other person or anyone known to them frequents;
- (f) entering or interfering with the property of the other person or anyone known to them;
- (g) sending offensive material to the other person or anyone known to them or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or anyone known to them;
- (h) publishing or transmitting offensive material in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or anyone known to them;
- (i) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;
- (j) acting in another way that could reasonably be expected to cause the other person to be apprehensive or fearful

shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand ringgit, or with both.

(2) For the purposes of this section, causing a [person](#) to fear physical or mental harm includes causing the [person](#) to fear physical or mental harm to anyone known to them.

(3) For the purposes of this section, a person is taken to have the requisite intent if at the relevant time the person knew, or ought to have known that the conduct would, or would be likely to, cause the other person physical or mental harm or to be apprehensive or fearful.

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<sup>392</sup> Adapted from s.562AB of New South Wales Crimes Act 1900, s.192 of Tasmania's Criminal Code Act 1924 and s.264 of the Canadian Criminal Code.

(4) For the purposes of this section, the prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm.

## JUSTIFICATION

Studies in other countries demonstrate a strong link between stalking and other forms of physical violence. For example, a Federal Bureau of Investigation (FBI) study found that 90 percent of American women who were killed by their husbands were stalked prior to their murders.<sup>393</sup> A study documenting the homicides of 551 women in Ontario, Canada between 1974 and 1990 by their current or former boyfriends or spouses also showed that many of the women killed had been stalked prior to meeting their untimely and violent ends.<sup>394</sup> In addition, U.S. Department of Justice Office of Justice Programs' report on stalking and domestic violence showed that husbands or partners who stalk their partners are four times more likely than husbands or partners in the general population to physically assault their partners, and they are six times more likely than husbands and partners in the general population to sexually assault their partners.<sup>395</sup>

Even when the victims of stalking behaviour are not physically harmed, the experience can leave profound emotional and psychological scars, permanently changes the lives of the people who are victimized and also affects their friends, families and co-workers. Stalking victims often feel compelled to resign from their jobs, change their names and move, leaving friends and family behind in order to

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<sup>393</sup> The FBI study is cited in R. Cordes, "Watching over the Watched: Greater Protection Sought for Stalking Victims" (1993) 29:10 Trial 12 at 13.

<sup>394</sup> M. Crawford & R. Gartner, "Woman Killing: Intimate Femicide in Ontario: 1974-1990" (Toronto: The Women We Honour Action Committee, 1992) at 2. This study did not precisely indicate the number of women stalked prior to being killed because police and coroner records at that time did not consistently note the presence of stalking behaviour antecedent to homicides. However, through the authors' interviews of witnesses, police officers, and coroner officials, it was ascertained that many of the women killed had been stalked prior to being killed.

<sup>395</sup> U.S. Department of Justice, Office of Justice Programs, "Stalking and Domestic Violence: The Third Annual Report to Congress under the Violence Against Women Act" (Washington: Violence Against Women Grants Office, 1998) at 15.



escape their pursuers.<sup>396</sup> Symptoms experienced by these victims include anxiety, panic attacks, sleep disturbances, intrusive flashbacks, suicidal thoughts and post-traumatic stress disorder.<sup>397</sup> Those who have been harassed by former intimate partners in particular may also feel guilt and lowered self-esteem, because they perceive that others are criticizing them for poor judgment in choosing their partners.<sup>398</sup>

As stalking is not a crime in Malaysia, there is no nationally representative statistics for its prevalence in the country. However, studies conducted in other jurisdictions clearly show that stalking is highly dangerous. It often occurs over an extended period of time and may result in serious physical and mental health consequences to the victim. In addition, although, majority of stalkers have been in relationships with their victims, there are many who either never met their victims, or were just acquaintances. Without a strong criminal justice response, stalkers may feel justified in continuing and even escalating their behavior. It is therefore proposed that stalking be criminalized in the *Penal Code*.

## **DOMESTIC VIOLENCE**

**1. JAG proposes creating domestic violence as a separate offence under the *Penal Code* or the *Domestic Violence Act* with weighted punishments for varying levels of physical, psychological, emotional, or sexual violence. Alternatively, JAG proposes increased penalty for crimes under sections 323, 325, 341, 342, 350, 351, 426 and 506 of the *Penal Code* when they are committed against those with whom the accused has a close personal relationship.**

### **PROPOSED NEW PROVISION**

(1) Whoever commits domestic violence by,  
(a) wilfully or knowingly placing or attempting to place the victim in fear of

<sup>396</sup> Sanjeev Anand, “Stopping Stalking: A Search for Solutions, A Blueprint for Effective Change” (2001) [64 Sask. L. Rev. 397](#) – 428.

<sup>397</sup> Karen M. Abrams & Gail Erlick Robinson, “Stalking Part I: An Overview of the Problem” (1998) 43 Can. J. Psychiatry 473 at 475.

<sup>398</sup> *Ibid.*

physical, psychological or emotional injury;

(b) causing physical, psychological or emotional injury to the victim by such act

which is known or ought to have known would result in physical psychological or emotional injury;

(c) compelling the victim by force or threat to engage in any conduct or act, sexual

or otherwise;

(d) confining or detaining the victim against the victim's will;

(e) causing mischief, destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim;

(f) stalking or intimidating the victim by threats, persistent communications, persistent ridicule or belittlement or other forms of emotional or psychological

abuse;

(g) giving, sending, transmitting or publishing offensive materials to the victim or

in such a way that the offensive material will be found by or brought to the attention of the victim;

and the act is directed against –

(i) his or her spouse, whether de jure or de facto;

(ii) his or her former spouse;

(iii) a member of the family;

(iv) a person who ordinarily shares a household with the other person;

(v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and

in

particular –

(a) the amount of time the persons spend together;

(b) the duration of the relationship;

(c) the place or places where that time is ordinarily spent;

(d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be

ordered to participate in an appropriate counselling program designated by the court.

(2) Nothing in subsection (1) shall preclude charging an accused under another applicable provision in the Penal Code instead of (1).

### **ALTERNATE PROPOSED PROVISIONS AND AMENDMENTS**

If domestic violence is not made a separate offence, as proposed above, then following amendments and additions should be made to the *Penal Code* in order to impose higher penalty for crimes under sections 323, 325, 341, 342, 350, 351, 426 and 506 when they are committed against those with whom the accused has a close personal relationship.

#### **S.351A. Assaulting or using criminal force in a close personal relationship.**

Whoever assaults or uses criminal force against:

- (i) his or her spouse, whether de jure or de facto;
- (ii) his or her former spouse;
- (iii) a member of the family;
- (iv) a person who ordinarily shares a household with the other person;
- (v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and

in

particular –

- (a) the amount of time the persons spend together;
- (b) the duration of the relationship;
- (c) the place or places where that time is ordinarily spent;
- (d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be ordered to participate in an appropriate counselling program designated by the court.

Explanation—injury for the purposes of this section includes physical, psychological or emotional injury.

#### **S.341A. Wrongful restraint of a person with whom the other person has a close personal relationship.**

Whoever wrongfully restrains:

(i) his or her spouse, whether de jure or de facto;  
(ii) his or her former spouse;  
(iii) a member of the family;  
(iv) a person who ordinarily shares a household with the other person;  
(v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and  
in  
particular –  
(a) the amount of time the persons spend together;  
(b) the duration of the relationship;  
(c) the place or places where that time is ordinarily spent;  
(d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be ordered to participate in an appropriate counselling program designated by the court.

**S.342A. Wrongful confinement of a person with whom the other person has a close personal relationship.**

Whoever wrongfully confines:

(i) his or her spouse, whether de jure or de facto;  
(ii) his or her former spouse;  
(iii) a member of the family;  
(iv) a person who ordinarily shares a household with the other person;  
(v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and  
in  
particular –  
(a) the amount of time the persons spend together;  
(b) the duration of the relationship;  
(c) the place or places where that time is ordinarily spent;  
(d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be

ordered to participate in an appropriate counselling program designated by the court.

**S.323A. Punishment for voluntarily causing hurt to a person with whom the other person has a close personal relationship.**

Whoever voluntarily causes hurt, except in the case provided for by section 334, to:

- (i) his or her spouse, whether de jure or de facto;
- (ii) his or her former spouse;
- (iii) a member of the family;
- (iv) a person who ordinarily shares a household with the other person;
- (v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and

in

particular –

- (a) the amount of time the persons spend together;
- (b) the duration of the relationship;
- (c) the place or places where that time is ordinarily spent;
- (d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be ordered to participate in an appropriate counselling program designated by the court.

**S.325A. Punishment for voluntarily causing grievous hurt to a person with whom the other person has a close personal relationship.**

Whoever voluntarily causes grievous hurt, except in the case provided for by section 335, to:

- (i) his or her spouse, whether de jure or de facto;
- (ii) his or her former spouse;
- (iii) a member of the family;
- (iv) a person who ordinarily shares a household with the other person;
- (v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and

in

particular –

- (a) the amount of time the persons spend together;
- (b) the duration of the relationship;
- (c) the place or places where that time is ordinarily spent;
- (d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be ordered to participate in an appropriate counselling program designated by the court.

**S.426A. Punishment for mischief with intent to cause distress or annoyance to a person with whom the other person has a close personal relationship.**

Whoever commits mischief with intent to cause, or knowing that it is likely to cause distress or annoyance, to:

- (i) his or her spouse, whether de jure or de facto;
- (ii) his or her former spouse;
- (iii) a member of the family;
- (iv) a person who ordinarily shares a household with the other person;
- (v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and

in

particular –

- (a) the amount of time the persons spend together;
- (b) the duration of the relationship;
- (c) the place or places where that time is ordinarily spent;
- (d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be ordered to participate in an appropriate counselling program designated by the court.

**S.506A. Punishment for criminal intimidation of a person with whom the other person has a close personal relationship.**

Whoever commits the offence of criminal intimidation against:

- (i) his or her spouse, whether de jure or de facto;
- (ii) his or her former spouse;

(iii) a member of the family;  
 (iv) a person who ordinarily shares a household with the other person;  
 (v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and  
in  
particular –  
 (a) the amount of time the persons spend together;  
 (b) the duration of the relationship;  
 (c) the place or places where that time is ordinarily spent;  
 (d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be ordered to participate in an appropriate counselling program designated by the court.

**Proposed new punishment provision for stalking a person with whom the other person has a close personal relationship.**

Whoever commits the offence of stalking [as defined in the previous section] against:

- (i) his or her spouse, whether de jure or de facto;
- (ii) his or her former spouse;
- (iii) a member of the family;
- (iv) a person who ordinarily shares a household with the other person;
- (v) a person who has a close personal relationship with the other person, to be determined with regard to the nature and intensity of the relationship, and  
in  
particular –  
 (a) the amount of time the persons spend together;  
 (b) the duration of the relationship;  
 (c) the place or places where that time is ordinarily spent;  
 (d) the manner in which that time is ordinarily spent;

shall be punished with imprisonment for a term which may extend to ten years or with fine which may extend to five thousand ringgit or with both and may also be

ordered to participate in an appropriate counselling program designated by the court.

### **JUSTIFICATION FOR THE NEW DOMESTIC VIOLENCE PROVISIONS**

Section 3 of the *Domestic Violence Act* provides for the *Domestic Violence Act* to be read together with the *Penal Code*, but does not introduce domestic violence as a separate offence in the *Penal Code*. This means that charges under the *Penal Code* are treated like average offences, rather than reflecting the serious, persistent and often repetitive nature of domestic violence.

Because domestic violence is a unique type of crime, characterised by repetitive and habitual violence and intimidation in an intimate setting, it cannot be adequately addressed by existing *Penal Code* measures, which are drafted to address individual acts of violence or intimidation rather than repetitive acts. Simply charging an offender with one, two, or even five individual counts of “voluntarily causing hurt” does not do justice to months or years of repetitive acts of physical, verbal, sexual, emotional, and psychological abuse a victim may have experienced. By including a separate offence called “Domestic Violence”, the seriousness of repetitive and intimate violence can be addressed. The offence should also be made seizable. Furthermore, penalties for the crime should be weighted based on severity and duration of the violence. Alternatively, existing crimes within the *Penal Code*, such as, assault, mischief, intimidation and others, should impose stricter penalties when such crimes are committed in a domestic setting against persons with whom the accused has a close personal relationship.

Legislatures in numerous other jurisdictions acknowledge and have accordingly declared that crimes of violence against victims with whom the perpetrators have a close relationship merit special consideration and should be punished with harsher penalties. For example, section 243(e)(1) of the *California Penal Code* states:

(e)(1) When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancée, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program, as defined in Section 1203.097, or if none is available, another appropriate counseling program designated by the



court. However, this provision shall not be construed as requiring a city, a county, or a city and county to provide a new program or higher level of service as contemplated by Section 6 of Article XIII B of the California Constitution.

(2) Upon conviction of a violation of this subdivision, if probation is granted, the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(A) That the defendant make payments to a battered women's shelter, up to a maximum of five thousand dollars (\$5,000).

(B) That the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offence.

For any order to pay a fine, make payments to a battered women's shelter, or pay restitution as a condition of probation under this subdivision, the court shall make a determination of the defendant's ability to pay. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. Where the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of this section, the community property may not be used to discharge the liability of the offending spouse for restitution to the injured spouse, required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents, required by this section, until all separate property of the offending spouse is exhausted.

Similarly, Sweden introduced a new offence in its Penal Code to deal with repeated punishable acts directed by men against women having a close relationship with the perpetrator (*gross violation of a woman's integrity*) as well as children and other closely related persons (*gross violation of integrity*). Section 4(a) of Chapter 4 of the *Swedish Penal Code* states:

A person who commits criminal acts as defined in Chapters 3, 4 or 6 against another person having, or have had, a close relationship to the perpetrator shall, if the acts form a part of an element in a repeated violation of that person's integrity and suited to severely damage that person's self-confidence, be

sentenced for *gross violation of integrity* to imprisonment for at least six months and at most six years.

If the acts described in the first paragraph were committed by a man against a woman to whom he is, or has been, married or with whom he is, or has been cohabiting under circumstances comparable to marriage, he shall be sentenced for *gross violation of a woman's integrity* to the same punishment.

The new crime allows the courts to impose harsher sentences for crimes in Chapters 3, 4 and 6, which include criminal acts like assault, unlawful threat or coercion, sexual or other molestation, sexual exploitation, etc. in situations where they are part of a process which constitutes a violation of integrity, which is often the case with domestic violence, and thus allows them to take the entire situation of an abused woman into account. The new crime does not exclude simultaneously indicting the perpetrator for, for instance, aggravated assault or rape.

Furthermore, various courts in the United States have responded to the challenge of domestic violence cases by setting up “Domestic Violence Courts”, which seek to enhance victim and child safety and ensure batterer accountability.<sup>399</sup> The court structure varies amongst the different jurisdictions. Some jurisdictions have created courts (often called dedicated courts) that handle all criminal and civil cases involving domestic violence. Other jurisdictions have created courts that handle all criminal domestic violence cases, or all misdemeanours. Other court systems have created dedicated teams of prosecutors that work only on domestic violence prosecutions. Because all domestic violence cases are dealt with by the same group of judges or prosecutors, these individuals are able to gain expertise in the issues, become sensitive to the needs of victims and ensure more consistency in the treatment of these cases. In addition, dedicated courts or prosecution teams are also able to

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<sup>399</sup> For example, categories of crimes, which may be heard in a specialized Domestic Violence Court in California, include, but are not limited to:

- • Section 273.5 of the California Penal Code: willful infliction of corporal injury on a spouse, former spouse, cohabitant, former cohabitant etc.
- • Section 242 of the California Penal Code: Battery - any willful or unlawful use of force or violence upon the person of another.
- • Section 243 (e) of the California Penal Code: battery against a spouse, cohabitant, parent of the defendant's children etc.
- • Section 240 of the California Penal Code: Assault - an unlawful attempt, coupled with a present ability to commit a violent injury etc.
- • Section 136.1 of the California Penal Code: intimidation of victims and witnesses.
-

process cases more quickly, thus reducing the opportunity a batterer has to intimidate his partner into abandoning the charges.<sup>400</sup>

Failure to provide for domestic violence as a separate offence would necessitate amendments to several sections of the *Penal Code*, for example, sections 323, 325, 341, 342, 350, 351, 426, 503, 506 and 509 etc., as outlined above, in order to penalize violence perpetrated in domestic settings .

## 2. Proposed Amendments to Criminal Procedure Code

### (a) Section 23 – Arrest without warrant

#### EXISTING PROVISION

Section 23 stipulates the circumstances under which a police officer or penghulu may arrest a person without a warrant.

#### PROPOSED AMENDMENTS

**To add new subsections 23(1)(l) and 23(1)(m) as follows:-**

**23(1)** Any police officer or penghulu may without an order from the Magistrate and without a warrant of arrest –

(a) any person who has been concerned with any offence in Malaysia which is a seizable offence ....

(l) any person against whom an IPO has been issued under the Domestic Violence Act 1994 (Domestic Violence Act) who has contravened that IPO or PO as specified in section 7(2)

(m) This subsection would allow a police officer or penghulu to arrest any person who has been charged under the proposed domestic violence provisions without a warrant.

<sup>400</sup> For a descriptive study of domestic violence courts in the state of California, see: D. MacLeod and J.F. Weber, "Domestic Violence Courts: A Descriptive Study", Judicial Council of California, Administrative Office of the Courts (May 2000)  
<<http://www.courtinfo.ca.gov/programs/cfcc/pdf/files/dvreport.pdf>>.

For an overview of domestic violence court system in the state of New York, see: G.E. Pataki and C.G. Parker, "New York State Domestic Violence Courts Program Fact Sheet", New York State Division of Criminal Justice Services <<http://criminaljustice.state.ny.us/ofpa/domviolcrtfactsheet.htm>>.

For the issue of domestic violence and the process of development and implementation of a domestic violence court in Vancouver, Washington, see: R. B. Fritzler and L. M.J. Simon, "Creating a Domestic Violence Court: Combat in the Trenches", Court Review, vol. 37 (2000): 28  
<<http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9FritzlerSimon.pdf>>.

**JUSTIFICATION**

The existing Section 7 of *Domestic Violence Act* does not protect the victims from further violence therefore adding a new subsection 23(1)(l) will provide a mandate to police officers to immediately intervene and arrest a person who has contravened an IPO or PO. This will better protect victims of domestic violence from repetitive and persistent attacks.

**(b) Section 108 – Special Powers only in Seizable Offences****EXISTING PROVISION**

**S.108(2)** No police officer shall in a non-seizable case exercise any of the special powers in relation to police investigations given by this Chapter without the order of the Public Prosecutor

**PROPOSED AMENDMENT**

**To add Subsection (2) to section 108 as follows:-**

**S.108(2)** No police officer shall in a non-seizable case except in cases involving domestic violence exercise any of the special powers in relation to police investigations given by this Chapter without the order of the Public Prosecutor.

**JUSTIFICATION**

Domestic violence should be deemed a seizable offence so that victims do not need to wait for a Public Prosecutor to issue an Order to Investigate before they can file for an Interim Protection Order or a Protection Order and so that the police can commence investigation without an order to investigate from the Public Prosecutor.

Section 108 of the CPC should be amended to allow domestic violence cases to proceed immediately without waiting for an Order to Investigate (OTI) from the Public Prosecutor, so that Interim Protection Orders (IPOs) and Protection Orders (POs) can be obtained as quickly as possible. Under the current Act, many of the domestic violence cases are considered non-seizable offences, thus require an OTI issued by a Deputy Public Prosecutor to commence the investigation. This thwarts the

aim of protecting victims of domestic violence because the process for obtaining an IPO can be and often is significantly delayed.

The above provision is based on the definition of domestic violence as stipulated in Section 2 of the *Domestic Violence Act*. A central aspect of the dynamics of domestic violence is psychological and emotional abuse, alone or accompanying cycles of violence and intimidation. Even when there is no physical abuse, victims can be subject to stalking, repeated phone calls, threats of withdrawing financial support, threats of harming or taking children away, ridicule or social isolationism. By broadening the definition of domestic violence, these forms of abuse can be addressed.

**(c) Multiple offences of domestic violence should be heard together**

**Section 164 – The Charge**

**EXISTING PROVISION**

**S.164** Three offences of same kind within twelve months may be charged together.

(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code, or of any other law for the time being in force:

Provided that, for the purpose of this section, an offence punishable under section 379, 380, 382, 392, 393, 394, 395, 396 or 397 of the Penal Code shall be deemed to be an offence of the same kind as an offence punishable under any other of the said sections, and that an offence punishable under any section of the Penal Code or of any other law for the time being in force shall be deemed to be an offence of the same kind as an attempt to commit such an offence, when such an attempt is an offence.

**PROPOSED AMENDMENT**

**To add an exception to section 164 as follows:-**

Exception: Section 164(1) does not apply in cases involving domestic violence. When a person is accused of the crime of domestic violence on more than one occasion, whether in respect of the same person or not, he may be charged with and tried at one trial for all such crimes.

## JUSTIFICATION

Since domestic violence cases are usually characterized with repetitive violence, where the crime is typically committed a number of times (and may exceed three) before a victim will normally even lodge a complaint, the procedural limitation in s.164 poses an additional burden on a victim of domestic violence and must be eliminated. The exception will allow dealing with the case more effectively and efficiently as well as prevent the additional trauma a victim would face if forced to undergo a number of trials to account for all the episodes of domestic violence.

## COMPENSATION TO VICTIMS OF CRIME

JAG in its earlier memorandum proposed for the establishment of a “Compensation/Assistance Board” for rape victims. However, if that recommendation cannot be implemented, JAG alternatively proposes that compensation to victims under section 426 of the *Criminal Procedure Code* be made mandatory. Such compensation shall be paid by the convicted offender.

## EXISTING PROVISION (CPC)

**S.426** (1) The Court before which a person is convicted of any crime or offence may, in its discretion, make either or both of the following orders against him, namely:

- (a) an order for the payment by him of the costs of his prosecution or such part thereof as the Court directs;
- (b) an order for the payment by him of a sum to be fixed by the Court by way of compensation to any person, or to the representatives of any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed.

- (1) The Court shall specify the person to whom any sum in respect of costs or compensation as aforesaid is to be paid, and the provisions of section 432 [except

paragraph (d) of subsection (1) thereof] shall be applicable to any order made under this section.

- (3) The Court may direct that an order for payment of costs, or an order for payment of compensation, shall have priority, and, if no direction be given, an order for payment of costs shall have priority over an order for payment of compensation.
- (4) To the extent of the amount which has been paid to a person, or to the representatives of a person, under an order for compensation, any claim of any such person or representatives for damages sustained by reason of the crime or offence shall be deemed to have been satisfied, but the order for payment shall not prejudice any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order.
- (5) Every order made under this section by a Magistrate shall be appealable to the High Court.

#### ALTERNATIVE PROPOSED AMENDMENT

**S426.** (1) The Court before which a person is convicted –

- (a) of any crime or offence under Chapter XVI and other crimes involving injury or intent to injure shall make an order for the payment by him of a sum to be fixed by the Court by way of compensation to any person, or to the representatives of any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed;
- (b) of any other crime may, in its discretion, make an order for the payment by him of a sum to be fixed by the Court by way of compensation to any person, or to the representatives of any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed.

(2) The Court before which a person is convicted of any crime or offence may, in its discretion, make an order for the payment by him of the costs of his prosecution or such part thereof as the Court directs.

(3) The Court shall specify the person to whom any sum in respect of costs or compensation as aforesaid is to be paid, and the provisions of section 432 ~~except~~

~~paragraph (d) of subsection (1) thereof~~ shall be applicable to any order made under this section.

(4) In case the Court makes an order for the payment of costs, an order for payment of compensation to the victim shall have priority over an order for payment of costs.

(5) To the extent of the amount which has been paid to a person, or to the representatives of a person, under an order for compensation, any claim of any such person or representatives for damages sustained by reason of the crime or offence shall be deemed to have been satisfied, but the order for payment shall not prejudice any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order.

(6) Every order made under this section shall be appealable.

#### **PROPOSED GUIDELINES**

In addition, in the absence of watching brief counsel for the victim, prosecutors should be trained to provide the court with due assistance in determining the quantum of compensation. Furthermore, rules should be developed regarding rates or scales of payment of compensation or expenses.

#### **JUSTIFICATION FOR MANDATORY COMPENSATION**

1. It is a well-established fact that rape victims experience grave emotional trauma from the crime, which can often last for a significant period of time. Post rape trauma and post-traumatic stress disorder (PTSD) are not uncommon among rape victims, which necessitate medical attention. In addition to that, the shock and trauma may result in loss of earnings due to time away from work, or loss of earning capacity. Also, there may be medical expenses incurred from the rape, e.g. where the rape resulted in a miscarriage of pregnancy or where the victim contracts a sexually transmitted disease from the offender. If the rape results in death, it is also imperative that her surviving family be compensated for the grievance, and this should cover funeral expenses.



2. The recent case of convicted rapist, Seow Eng Aik in Penang, who was ordered by the Sessions Court to pay RM 4,000 to the Government as compensation for keeping the victim, an Indonesian maid, in Malaysia during the period of the trial is a move in the right direction, particularly since it was the Deputy Public Prosecutor who submitted the application requesting that Seow pay the maintenance costs.<sup>401</sup> However, as evident from court files on Summons No. 62(74)–102-2004, no application was made seeking compensation for the victim. It is equally, if not more, important that the rape victims themselves be adequately compensated for the physical and psychological injuries suffered as a result of this crime of violence, and that their gravity be acknowledged.
3. Victims of crimes are entitled at law to commence a civil suit in tort against the offender. However, this imposes an additional burden on already traumatized victims who have to suffer through reliving the painful experience in a second court trial as well as bear the substantial costs of civil litigation.
4. Currently section 426 is rarely utilised by the courts to compensate victims and prevent the necessity for a civil suit. Making the award for compensation mandatory in crimes involving the human body would address this crucial issue.

## **ENTICING OR TAKING AWAY OR DETAINING WITH A CRIMINAL INTENT A MARRIED WOMAN**

### **EXISTING PROVISION**

**S. 498.** Whoever takes or entices away any woman who is and whom he knows, or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person or conceals or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years or with fine, or with both.

### **PROPOSED AMENDMENT**

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<sup>401</sup> See articles: “Rapist to Pay Maintenance”, *New Strait Times* (July 29, 2005); “Hawker rapist gets 36 years”, *The Star* (July 29, 2005).

## Deletion of Section 498

**JUSTIFICATION FOR DELETION OF SECTION 498**

This is an archaic provision ..

**TERRORISM OFFENCES****EXISTING PROVISION (PENAL CODE AMENDMENT ACT 2003)**

**S. 130B(2)** –“terrorist act” means any act or threat

of action within or beyond Malaysia that – *inter alia*

(a) .....

(i) involves prejudice to national security or public safety;

where the act or threat is intended or may reasonably be regarded as being intended to

(aa) .....

(bb) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organisation to do or refrain from doing any act.....

**PROPOSED AMENDMENT**

Limit the definition of “terrorist act” by deleting 130B(2)(i) and (bb).

**JUSTIFICATION**

Section 130B of the *Penal Code (Amendment) Act 2003* has defined “a terrorist act” to include amongst other things, acts which involve prejudice to national security or public safety where it is intended to influence or compel the Government to do or refrain from doing any act. This definition is exceedingly broad, especially where it states that any act which involves prejudice to national security or public safety intended to influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or even any international organisation to do or refrain from doing any act can be considered as a terrorist act. Such a definition is liable to abuse as the test to be applied of what involves prejudice to

national security or public safety is very subjective and even an innocent act can be considered as being prejudicial to national security or public safety. Furthermore, a wide range of actions, for example the work of NGOs, involve work that is intended to influence or compel the Government to do or refrain from doing any act. Such a wide definition for what constitutes a terrorist act detracts from the main concern of the legislation, that is, to act against terrorism to protect national security.

### **EXISTING BILL PROVISION (Ancillary Investigative Powers in relation to Terrorism Offences)**

#### **New Section 106C (Section 5 of the Bill)**

The Bill now proposes to empower the Public Prosecutor to authorize a police officer to intercept certain communications if the Public Prosecutor considers that the communications are likely to contain information relating to the commission of a terrorism offence. The information so obtained, whether before or after the person concerned is charged will be admissible at his trial in evidence.

### **PROPOSED BILL PROVISION**

We recommend that the provision be amended so that the Court has the power to authorize interception of communication on the application of the Public Prosecutor, if he had reasonable grounds for believing that the communication will contain information relating to the commission of a terrorist offence and not otherwise.

There should be sufficient safeguards incorporated so that this power cannot be exercised arbitrarily against just any person. The Court should also be given the power to decide whether evidence thereby acquired may be admissible in evidence at the trial of the accused concerned.

### **JUSTIFICATION**

Like other the Court has other powers, for example, the power to issue warrants, this power should also be given to the Court and not the Public Prosecutor. Furthermore, the power that is proposed to be given to the Public Prosecutor appears to be far too wide since it can be exercised so long as the Public Prosecutor “*considers that it is likely to contain information relating to the commission...*”. Such a power may be liable to abuse as the powers of a Public Prosecutor are generally exercisable by

Deputy Public Prosecutors throughout the country unless otherwise expressly stated and there is no burden upon the Public Prosecutor to show that he had reasonable grounds for believing that the communication will contain information relating to the commission of a terrorism offence. It may also be used to infringe upon the privacy of any individual regardless of whether or not he is suspected of being involved in a terrorist offence as the provision does not limit the exercise of the said power only to communications pertaining to a person suspected of being involved in a terrorist offence. The power given also means that the Public Prosecutor can acquire and use the evidence acquired without the knowledge of the accused after he is charged.