

**PRELIMINARY COMMENTS ON THE PROPOSED AMENDMENTS TO LAWS
RELATING TO DOMESTIC VIOLENCE AND SEXUAL CRIMES IN THE PENAL CODE
AND CRIMINAL PROCEDURE CODE**

TO

**YB NANCY SHUKRI, MINISTER IN THE PRIME MINISTER'S DEPARTMENT IN
CHARGE OF LAW AND
YB DATO' SERI DR. AHMAD ZAHID HAMIDI, MINISTER OF HOME AFFAIRS**

BY THE JOINT ACTION GROUP FOR GENDER EQUALITY (JAG)

First version 30 September 2013; second version 2 October 2013

The Joint Action Group for Gender Equality (JAG) urges the Government to revise the proposed amendments to the Penal Code and Criminal Procedure Code pertaining to domestic violence and sexual crimes before they are passed into law.

We recognise the positive aspects of some of these amendments, including recognising domestic violence in the Penal Code with increased punishment for spousal abuse, the clarification in the Criminal Procedure Code that domestic violence is a seizable offence, and heavier punishments for aggravated rape including gang rape.

However, domestic violence is more than spousal abuse. A domestic violence survivor can also be an ex-spouse, a *de facto* spouse, a child, an incapacitated adult, an adult son, daughter, father, mother, brother, sister or any other relative of the offender whom the court regards as a member of the family.¹

We also highlight alternatives to merely increasing imprisonment terms for sexual assault and rape, and taking a purely punitive approach to crime prevention. Rehabilitative and reparative approaches, together with imprisonment, will more effectively prevent recidivism.

In addition to these recommendations, we note other concerns regarding the introduction of these laws.

- i. The Government's attempt to pass substantive amendments to the Penal Code, the Criminal Procedure Code, the Prevention of Crime Act 1959, and other crime laws within less than 7 working days is contrary to the Government's rhetoric that it consults with, and listens to its citizens. **With this in view, JAG calls for the proposed amendments to be halted immediately, so that civil society and other stakeholders can be consulted meaningfully on these proposed amendments before they are passed into law.**
- ii. Other draconian laws have also been proposed in the amendments, which have the effect of reintroducing, among others, detention without trial. The right to fair trial includes the right to counsel and to be tried before a court of law. As a member of the Human Rights Council, Malaysia must meet and uphold international human rights standards, instead of allowing the regression of rights in our country.
- iii. There must be resources put into other preventive measures, including support services for victims, as well as rehabilitative support for offenders to ensure a lower rate of recidivism. This is a more holistic approach to crime prevention.

¹ Section 2, Domestic Violence Act 1994

- iv. While JAG commends the Government for taking the issue of violence against women more seriously through these amendments, JAG emphasises that timely implementation and enforcement of existing laws is crucial. Poor enforcement results in, among others, low conviction rates. No matter how heavy the punishment, non-implementation or enforcement will not deter perpetrators. Resources must therefore be put into strengthening existing systems in the implementation and enforcement of laws such as the training officers of the law and guidelines in implementation of the laws especially in the area of sentencing.

The Joint Action Group for Gender Equality (JAG) consists:

1. *All Women's Action Society (AWAM)*
2. *Persatuan Kesedaran Komuniti Selangor (EMPOWER)*
3. *Sisters in Islam (SIS)*
4. *Women's Aid Organisation (WAO)*
5. *Women's Centre for Change, Penang (WCC)*
6. *Perak Women for Women Society (PWW)*
7. *Persatuan Sahabat Wanita Selangor (PSWS)*
8. *Sabah Women's Action Resource Group (SAWO)*
9. *Tenaganita*

JAG's recommendations on proposed amendments to the Penal Code

1. Proposed amendments to new Section 326A² of the Penal Code: domestic violence offenses

In Clause 17 of the Penal Code (Amendment) Bill, to amend the proposed Section 326A to:

“Punishment for committing domestic violence

326A. Whoever commits an offence or offences against a person or persons as defined in Section 2 of the Domestic Violence Act 1994 under sections 44, 190, 323, 324, 325, 326, 327, 328, 334, 335, 350, 352, 354, 355, 357, 503, 507, or 509 may be punished with imprisonment which may extend to a term of twice as long as the maximum term or with fine which may extend to an amount twice as much as the maximum amount, or both for which he would have been liable on conviction for that offence or those offences under the relevant section or sections and shall be ordered to attend rehabilitative counseling.”

Justification

- 1.1. The majority of domestic violence cases reported in Malaysia **do not** involve spouses who commit an offense during the subsistence of a valid marriage.

According to police statistics,³ in 54% of reported domestic violence cases in 2012, the victim and perpetrator were not married to each other. The Domestic Violence Act 1994 applies not only to acts committed by someone against his or her spouse, but also to his or her former spouse, a *de facto* spouse, a child, an incapacitated adult, or any other member of the family. The proposed Section 326A should also apply to all these categories of relationships. Otherwise, that new section would not apply to more than half of domestic violence cases.

- 1.2. Domestic violence is also investigated under other provisions in the Penal Code other than Sections 323, 324, 325, 326, 334, and 335.

Besides the Penal Code Sections 323, 324, 325, 326, 334, and 335, domestic violence is also investigated under Sections 44, 190, 327, 328, 350, 352, 354, 355, 357, 503, 507, and 509.⁴ In particular, Sections 44, 190, 350 and 503 were identified by the Attorney General's Chambers at an inter-agency meeting in March 2012 as the relevant provisions under which psychological violence can be investigated. Psychological violence is recognised as a form of domestic violence under the Domestic Violence Act.

- 1.3. Mandatory imprisonment may deter a victim from reporting a case and deter judges from delivering guilty verdicts. Alternative punishments must be considered.

The current wording of the amendment seems to impose a mandatory imprisonment of exactly twice as long as the maximum term for which he would have been liable on conviction for a particular offense. This may have adverse impacts on society where it may discourage reporting

² The proposed Section 326A under the Bill reads “326A. Whoever, during the subsistence of a valid marriage, causes hurt to his spouse and commits an offense under section 323, 324, 325, 326, 334, or 335 shall be punished with imprisonment for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence under the relevant section.”

³ See Appendix I for a more detailed breakdown.

⁴ See Appendix II for a list

and the proffering of charges in court. The court should be given discretion in deciding on the length of prison terms. To ensure commensurate punishment besides imprisonment, an appropriate fine, rehabilitative therapy and a compensation order under Section 426(1A) must also be considered.

- 1.4. The proposed amendment as it stands does not provide for a doubling of a fine as a form of punishment.

JAG notes that when perpetrators are charged in court for domestic violence, which is most commonly charged under Section 323 for voluntarily causing hurt, a fine is the usual punishment. The maximum fine is RM2,000 – a woefully low sum.

2. Proposed amendments to new Section 352A⁵ of the Penal Code: use of criminal force

In Clause 18 of the Penal Code (Amendment) Bill 2013, amend the proposed Section 352A to:

“Punishment for using criminal force during domestic violence

352A. Whoever assaults or uses criminal force on any person as defined under Section 2 of the Domestic Violence Act 1994 may be punished with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand ringgit, or with both and shall be ordered to attend rehabilitative counseling.”

Justification

- 2.1. The justifications are as stated above.

3. New proposed amendment to the Penal Code: delete the exception to the definition of rape under Section 375 of the Penal Code to criminalise marital rape

In the Penal Code (Amendment) Bill, add a clause that deletes the exception under Penal Code Section 375. The exception that should be deleted reads: “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,” and deletes Explanation 1 and Explanation 2.

Justification

- 3.1 Rape in a marriage is widely accepted under international standards. The United Nations *CEDAW Committee* requested the Malaysian government to enact legislation criminalizing marital rape in 2006, defining such rape on the basis of lack of consent of the wife.⁶

⁵ The proposed Section 325A under the Bill reads: “325A. Whoever, during the subsistence of a valid marriage, assaults or uses criminal force on his spouse shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand ringgit, or with both.”

⁶ Paragraph 22 of the 2006 Concluding Comments by the Committee on the Elimination of Discrimination Against Women.

- 3.2. The current exception reinforces one of the gender stereotypes of women. In effect, it provides that women - especially wives - are not credible, and that they tend to lie and exaggerate. There is no empirical research that supports this gender stereotype. Gender stereotyping discriminates against women as it disallows them from seeking the full protection of the law. It violates their right to life, to live in dignity, and to be free from violence.
- 3.3. Pursuant to Article 8(2) of the Federal Constitution, gender discrimination is unconstitutional. This exception should not be allowed to remain in the Penal Code.

4. New proposed amendment to the Penal Code: reclassify “sexual connection by object” as a form of rape⁷

In the Penal Code (Amendment) Bill, add a clause amends the Explanation under Section 375 of the Penal Code to the following:

“Explanation – Penetration, including using a penis, other body parts, or an object, into any orifice is sufficient to constitute the sexual intercourse necessary to the offense of rape.”

Justification

- 4.1 This is consistent with the Explanatory Statement of Clause 22 of the Bill itself which describes the offence as “rape by using any object”.
- 4.2 The World Health Organisation defines rape as “physically forcing or otherwise coerced penetration - even if slight-of the vulva or anus, using a penis, other body parts or an object.”⁸

JAG recommendations on proposed amendments to the Criminal Procedure Code (CPC)

5. New proposed amendment to the CPC: amend Section 295(1A)⁹ of the CPC on rehabilitative counselling

⁷ The existing Section 377CA reads: “377CA : Sexual connection with an object. Any person who has sexual connection with another person by the introduction of any object into the vagina or anus of the other person without the other person’s consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping.”

⁸ See WHO (2002), World Report on Violence and Health, http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf

⁹ The existing Section 295(1A) CPC reads: “When a person is convicted of an offence under section 376, 377C, 377CA or 377E of the Penal Code before any Court, whether or not he has previously been convicted of any offence, the Court shall direct that he be subject to the supervision of the police for not less than one year and not more than 3 years, commencing immediately after the expiration of the sentence passed on him.”

Add a clause in the Criminal Procedure Code (Amendment) 2013 Bill to amend Section 295(1A) of the CPC to:

“When a person is convicted of an offence under section 326A, 352A, 376, 377C, 377CA and/or 377E of the Penal Code before any Court, whether or not he has previously been convicted of any offence, the Court shall direct that he be subject to the supervision of the police for not less than one year and not more than 3 years commencing immediately after the expiration of the sentence passed on him.”

Justification

- 5.1 World Health Organisation’s document *Intervening with Perpetrators of Intimate Partner Violence: A Global Perspective* (2003) cites research evidence which shows that intervention made with perpetrators of domestic violence (e.g., batterer intervention programs) can help to reduce further physical abuse by the perpetrator. Additionally it appears that such intervention can also inhibit renewed acts of non-physical abuse by participants.

6. New proposed amendment to the CPC: amend Section 295A¹⁰ of the CPC on rehabilitative counselling

Add a clause in the Criminal Procedure Code (Amendment) 2013 Bill to amend Section 295A of the CPC to:

“Rehabilitative counselling

295A. (1) The Court may in addition to the order made under subsection 295(1A) order a period of rehabilitative counselling for the convicted person within his period of imprisonment; and

(2) The rehabilitative counselling shall be under the Minister charged with the responsibility for prisons.

(3) Where the Court does not impose a sentence of imprisonment, it may in addition to the order made under subsection 295(1A) order a period of rehabilitative counselling for the convicted person for a period of not less than one year and not more than 3 years commencing immediately after the expiration of the sentence passed on him.”

Justification

- 6.1 Rehabilitative counselling provides a form of non-punitive corrective alternative, which may encourage victims of domestic violence to report the violence they face as it is less threatening to his or her family.

¹⁰ The existing Section 295A CPC reads: “1. The Court may in addition to the order made under subsection 295(1A) order a period of rehabilitative counseling for the accused person within his period of detention. 2. The rehabilitative counseling shall be under the Minister charged with the responsibility for prisons”.

¹⁰ Section 295A of the CPC currently reads: “Rehabilitative counselling 295A. (1) The Court may in addition to the order made under subsection 295(1A) order a period of rehabilitative counseling for the accused person within the period of his detention. (2) The rehabilitative counseling shall be under the Minister charged with the responsibility for prisons.”

6.2 Rehabilitative counselling may eventually make a shift in the mind-set of the convicted person, and is more effective in preventing recidivism, than a purely punitive approach.

7. Amendment to First Schedule of the CPC

In the First Schedule of the Criminal Procedure Code, add clarification notes to the column 3 heading and the column 7 heading, as illustrated below:

1 Penal Code Section	2 Offense	3 Whether the police may ordinarily arrest without warrant or not*	4 Whether a warrant or a summons shall ordinarily issue in the first instance	5 Whether bailable or not	6 Whether compoundable or not	7 Maximum punishment under the Penal Code**
-------------------------------	--------------	--	---	------------------------------------	--	---

* May arrest without warrant if in commission of domestic violence as defined under section 2 of the Domestic Violence Act 1994

** For cases of domestic violence as defined under section 2 of the Domestic Violence Act 1994, the maximum imprisonment term may be extended up to twice the maximum punishment

Justification

7.1 Domestic violence offences are currently deemed seizable offences under Section 18A of the Domestic Violence Act 1994. However, this Section is very rarely implemented as such due to confusion with the provisions of the Criminal Procedure Code, especially the First Schedule. Therefore the above additions are suggested to the Table in the Schedule to remove the confusion on seizable offences and avoid the delay in obtaining protection from immediate harm as is the increasing norm in domestic violence situations.¹¹

8. Amendment to Clause 2(5) of the CPC on seizable offences

In Clause 2 of the Criminal Procedure Code (Amendment) 2013 Bill, amend the proposed Section 2(5) of the CPC to:

“(5) Notwithstanding the definition of “seizable offence” in subsection (1), an offence under the Penal Code is a seizable offence if it is expressly provided in any other written law that the offence is a seizable offence, including in cases involving domestic violence as defined under Section 2 of the Domestic Violence Act 1994.”

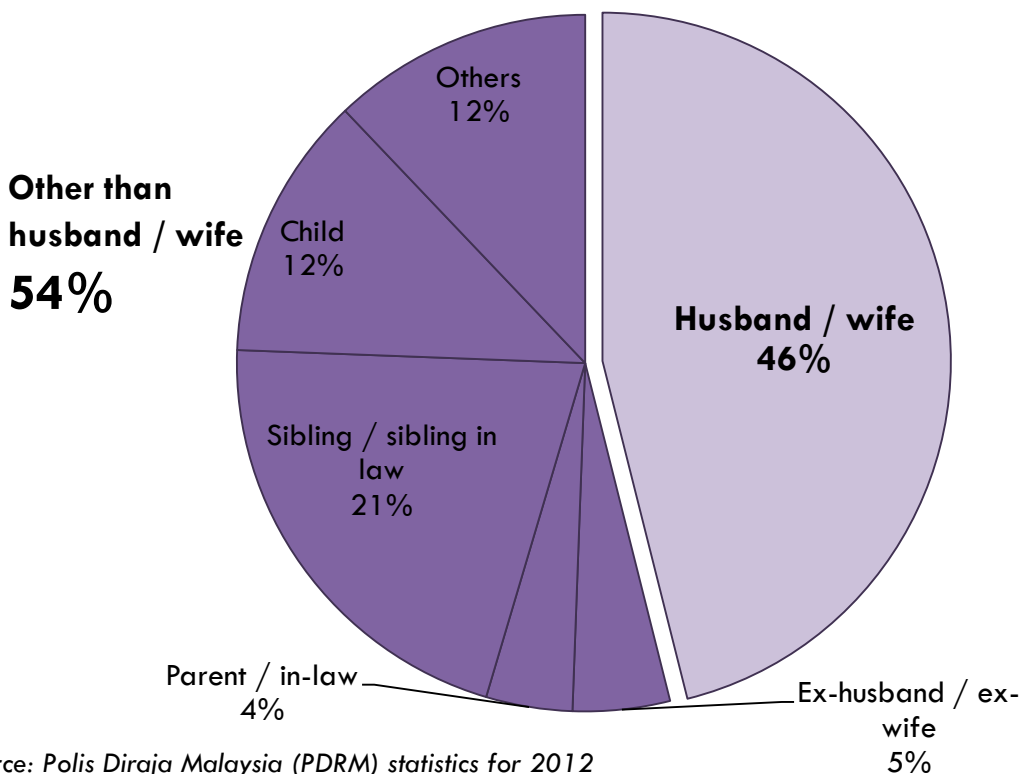
Justification

8.1 JAG has noted that Section 18A of the Domestic Violence Act 1994 which states that all domestic violence offences are seizable offences, is rarely implemented. In order to make it absolutely clear, JAG proposes the amendments above, as well as in the First Schedule of the Criminal Procedure Code where the offences charged under the Penal Code are, in fact, domestic violence.

¹¹ 2(a) (b) and (c) of the JAG Memorandum to the Special Select Committee on Penal Code (Amendment) 2004 and Criminal Procedure Code (Amendment) 2004, pages 21, 23, and 24.

Appendix 1: Polis Diraja Malaysia statistics on domestic violence, 2012

Relationship of alleged perpetrator to survivor, Malaysia, 2012
In 54% of reported domestic violence cases, the victim and perpetrator were not married to each other.



Appendix 2: List of Penal Code provisions to include under Section 326A

“Injury”

44. The word “injury” denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

Threat of injury to induce any person to refrain from applying for protection to a public servant

190. Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application, for protection against any injury, to any public servant legally empowered as such to give such protection or to cause such protection to be given, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

Punishment for voluntarily causing hurt

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt, 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.

Voluntarily causing hurt by dangerous weapons or means

324. Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to three years or with fine or with whipping or with any two of such punishments.

Punishment for voluntarily causing grievous hurt

325. Whoever, except in the case provided by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Voluntarily causing grievous hurt by dangerous weapons or means

326. Whoever, except in the case provided by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.

Voluntarily causing hurt to extort property or to constrain to an illegal act

327. Whoever, voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer, or any person interested in such sufferer, to do anything which is illegal, or which may facilitate the commission of an offence, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine or to whipping.

Causing hurt by means of poison, etc., with intent to commit an offence

328. Whoever administers to, or causes to be taken by any person, any poison or any stupefying, intoxicating, or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing hurt on provocation

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with

imprisonment for a term which may extend to one month or with fine which may extend to one thousand ringgit or with both.

Causing grievous hurt on provocation

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment for a term which may extend to four years or with fine which may extend to four thousand ringgit or with both.

Criminal force

350. Whoever intentionally uses force to any person, without that person's consent, in order to cause the committing of any offence, or intending by the use of such force illegally to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Punishment for using criminal force otherwise than on grave provocation

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment for a term which may extend to three months or with fine which may extend to one thousand ringgit or with both.

Assault or use of criminal force to a person with intent to outrage modesty

354. Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years or with fine or with whipping or with any two of such punishments.

Assault or criminal force with intent to dishonour a person, otherwise than on grave provocation

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

Assault or criminal force in attempt wrongfully to confine a person

357. Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, 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.

Criminal intimidation

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Criminal intimidation by an anonymous communication

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or by having taken precautions to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment for a term which may extend to two years, in addition to the punishment provided for the offence by section 506.

Word or gesture intended to insult the modesty of a person

509. Whoever, intending to insult the modesty of any person, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such person, or intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extend to five years or with fine or with both.