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)
Women's Development Collective (WDC)
All Women's Action Society (AWAM)
Sisters in Islam (SIS)
Malaysian Trade Union Congress (MTUC) – Women's Committee

Contact Details:
Women's Centre for Change
24-D, Jalan Jones
10250 Penang
Tel: 04 228 0342
Fax: 04 228 5784
Email: wcc@wccpenang.org
Website: www.wccpenang.org

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INTRODUCTION

During its process of deliberations regarding amendments to the Penal Code and the Criminal Procedure Code, the Special Select Committee recently met with representatives from the Royal Police Commission of Malaysia, Attorney General's Chambers and Joint Action Group against Violence Against Women's (JAG). The meeting with JAG representatives was held on August 1, 2005 and JAG was invited to make submissions. JAG has submitted proposals on amendments to the Penal Code and Criminal Procedure Code in the past. The following memorandum presents follow-up submissions and pursuant to the discussion that took place and the concerns that were raised at the meeting with the Select Committee, several alternate amendments have been proposed in addition to the changes proposed earlier.

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)

4. 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 –

(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 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:
(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 or incapable of understanding the nature and consequences of that to which she gives consent;

(f) 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;

(g) 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;

(h) 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[1].

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 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:

[1] Adapted from S.153.1(4) of the Canadian Criminal Code.

(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[2].

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 other than the penis or object into the vagina or anus except when the 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.

[2] Adapted from S.153.1(5)(a) of the Canadian Criminal Code.

Exception – A person is not said to have committed sexual connection if the person is under sixteen years of age.

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

1. Under the present Penal Code, rape is narrowly defined as penile penetration. This implies that rape only happens when there is penile penetration.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. However, broadening the definition of rape in Section 375 must be accompanied with the deletion of the exception to rape and recognise that rape can happen in a marital relationship. Otherwise, broadening the definition of rape would also 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. We therefore recommend that the marital rape exception, if it is to be retained, be restricted to the insertion of the penis into the vagina.

9. If the marital exception to rape remains in force and the definition of rape is not broadened, then a new alternative section on rape by objects must be introduced and we propose that the alternative provision on sexual connection be introduced.

The exception in the proposed provision takes into account the inability of a person under the age of sixteen years to give consent.

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[3].

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.[4] 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

[3] Adapted from S. 128A of the New Zealand Crimes Act 1961 as amended by the Crimes Amendment Act (No. 3) 1985.

[4] For example, see: "Court acquits army dentist charged with rape at office", *The Star* (May 13, 2005), "GOF men acquitted of raping 13 year old", *The Sun* (January 31, 2004) and "Cop freed of rape", *The Sun* (September 24, 2002).

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.

(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.[5] 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.

[5] "Girl bound over in incest case", *The Star* (March 2, 2005).

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.

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

3. 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.[6]

[6] 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

4. Aggravated rape is a separate offence in various jurisdictions including India and Philippines.

5. 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;[7] a 14-year-old girl was raped by her boyfriend and his seven friends in Malacca[8] and an 23-year-old woman was raped and sodomized by three men last month.[9]

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man gets jail and whipping" *The Star* (July 2, 2005); and "Man jailed for raping Indon maid", *New Straits Times* (April 7, 2005).

[7] "Six Soldiers face gang rape charge", *New Straits Times* (January 21, 2005).

[8] "Pregnant woman gang-raped at food court", *The Star* (February 2003).

[9] "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.[10]

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.[11] 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

[10] See "Pregnant woman gang-raped at food court", *The Star* (February 2003).

[11] 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)

knowledge of his condition is immaterial, as the additional trauma faced by the victim is in itself an aggravating factor.

f) Presence of others

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.[12]

STALKING

[12] 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 dalam kes rogol", *Utusan Malaysia* (May 18, 2005)

EXISTING PROVISION

None

PROPOSED NEW PROVISION[13]

(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:

(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.

[13] 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.

(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.

(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.[14] 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.[15] 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

[14] 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.

[15] 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.

more likely than husbands and partners in the general population to sexually assault their partners.[16]

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 escape their pursuers.[17] Symptoms experienced by these victims include anxiety, panic attacks, sleep disturbances, intrusive flashbacks, suicidal thoughts and post-traumatic stress disorder.[18] 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.[19]

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

[16] 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.

[17] Sanjeev Anand, "Stopping Stalking: A Search for Solutions, A Blueprint for Effective Change" (2001) 64 Sask. L. Rev. 397 – 428.

[18] Karen M. Abrams & Gail Erlick Robinson, "Stalking Part I: An Overview of the Problem" (1998) 43 Can. J. Psychiatry 473 at 475.

[19] *Ibid.*

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 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 Cod*e 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, fiance, or fiancee, 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 XIIIB 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.[20] 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

[20] 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.

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 process cases more quickly, thus reducing the opportunity a batterer has to intimidate his partner into abandoning the charges.[21]

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 form 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 ….

[21] 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/pdffiles/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>.

(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.

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.

(2) 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, on 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.[22] 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

[22] See article: "Rapist to Pay Maintenance", *New Strait Times* (July 29, 2005).

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

Deletion of Section 498

JUSTIFICATION FOR DELETION OF SECTION 498

This section should be deleted since it demeans women and violates their dignity. It reinforces the idea that women are incapable of making sound judgments and decisions for themselves and that they cannot protect and take care of themselves. Furthermore, it is completely unnecessary in light of the kidnapping, abduction, wrongful restraint and wrongful confinement provisions in the Penal Code.

TERRORISM OFFFENCES

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

Section130B 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.