

**Press Statement
cum
Frequently Asked Questions
on the Report by
the Parliamentary Special Select Committee on
the Penal Code (Amendment) 2004 and the Criminal
Procedure Code (Amendment) 2004**

issued by

**The Joint Action Group For Gender Equality (JAG)
Monday, 26th June 2006**



All Women's Action Society
(AWAM)



Malaysian Trade Union Congress
- Women's Committee (MTUC)



Sisters In Islam (SIS)



Women's Aid Organisation (WAO)



Women's Centre For Change, Penang (WCC)



Women's Development Collective (WDC)

The Joint Action Group for Gender Equality¹ (**JAG**) has been engaged in the issues of violence against women for more than 20 years. At the turn of the 21st century, we saw an escalation in the severity and number of cases. We all remember the cases Canny Ong, Nor Suzaily, and Norita Samsudin who were brutalised and killed. The increase in numbers is borne out by the statistics from the Royal Malaysian Police as follows:

<u>Year</u>	<u>Number of cases reported</u>
2000	1217
2001	1386
2002	1431
2003	1479
2004	1765

After much lobbying by JAG and other human rights' groups, the Government convened the Parliamentary Special Select Committee on Penal Code (Amendment) 2004 and Criminal Procedure Code (Amendment) 2004 (*the Select Committee*).

JAG presented the Select Committee with 3 memoranda. The first was in September 2003, followed by another in October 2004 (*the 2004 Memorandum*) and the last in August 2005 (*the 2005 Memorandum*). These memoranda addressed the shortcomings in the laws, especially regarding rape and domestic violence, and proposed changes for these laws. The full texts of the 2004 and 2005 memoranda can be accessed at http://www.awam.org.my/networks/jag_vaw_issues.htm

The following FAQs aim to explain some of the questions that are raised about the existing rape, domestic violence and terrorism laws, and the Select Committee's proposed amendments to the said laws.

¹ Previously known as Joint Action Group Against Violence Against Women. The members remain the same, and we are All Women's Action Society (AWAM), Malaysian Trade Union Congress – Women's Committee (MTUC), Sisters In Islam (SIS), Women's Aid Organisation (WAO), Women's Centre For Change, Penang (WCC) and Women's Development Collective (WDC).

FAQs ON RAPE

Q: What is consent in the context of rape?

A: Consent means a woman **agreeing** to have sexual intercourse with a man. During a rape trial, the woman must prove she did **not** consent to have sexual intercourse or that it was done against her will. Proving a negative is difficult for the woman.

The issue of consent is a big challenge for women because it is very often raised in a rape trial. This is because 83% of women know the rapists.

Sometimes a woman struggles, hits out, screams and shouts to show her lack of consent or that it is against her will.

Sometimes a woman is so scared or she is threatened so that she does not struggle, hit out, scream or shout – but she is not consenting to have sex with the man. Submission to having sex is not consent.

Sometimes when the man has some form of authority over a woman, he may abuse that position of authority. A woman may submit to having sex with a man, e.g., when a bomoh says that he can 'rid her of the evils' possessing her by having sex with him. The Select Committee recognises these situations and proposes a new section 376 (f) of the Penal Code. This is a clear example of submission without consent.

Q: Will women make false reports to take advantage of the new section 376 (f) of the Penal Code?

A: There were concerns raised that women may abuse this section by 'fixing' their former boyfriends who refuse to marry them or to falsely accuse a man when she fails to obtain a favour from him after offering herself to him.

These beliefs relate to the long held stereotype that women lie and are therefore not credible. JAG is concerned that such myths continue even though there is no evidence to show that women lie more than men.

Q: When can consent be withdrawn?

A: Consent to have sexual intercourse can be withdrawn at anytime, even during the act. The right to say 'no' must be retained by the woman at all times, and men must respect that. Men must also bear the responsibility and duty to take reasonable care to ensure that women are consenting to have sexual intercourse. For example, a woman may agree to have dinner, watch a movie, go to his house for coffee, to kiss and touch. This does not indicate consent to having sexual intercourse. A man must ASK before he has sexual intercourse!

Q : Is it rape if a wife is forced to have sex with her husband without her consent or against her will?

A: According to the law now, it is not rape.

Q: Why is that so?

A: Historically, English law provided that when a woman marries, she is deemed to have given herself to her husband and is his property and thus he has a right to her body. Due to our colonial past, that English law became Malaysian law. However, England and many other countries now recognise marital rape as a crime.

Q: Why is marital rape still not a crime in Malaysia?

A: The reason given by the Select Committee is that it is against Syariah laws and other religions.

JAG urges the authorities to continue to uphold the paramount principle of justice, especially when considering the issue of marital rape. This principle is present in all religions.

AWAM's statistics for the years 2000-2002 show that 52% of women who had been subjected to domestic violence were forced to have sex with their husbands. Women who are raped by their husbands are likely to be raped many times – often 20 times or more. These wives are often coerced into sex or are unable to refuse because of threats of physical violence, financial dependence on their husbands, fear for the safety and protection of their children.

That is not justice for the wives. Agreeing to be married does not mean giving up the right to say 'no' to forced sexual intercourse.

Muslims are called to uphold human dignity. Muslims should not be cruel or violent. Allah (swt) commands Muslims to "Eschew all sin open or secret." Sûrah al An'am 6.120 (translation Yusuf Ali). This message of Islam is universal and without exception.

The Prophet Muhammad (saw) himself treated his wives with nothing less than love respect and tenderness. Abu Hurairah reported that the Holy Prophet (saw) said, "The most perfect of the believers in faith is he who is the best in conduct, and the best of you are those who are the best to their wives." (Tarmizi).

Therefore, recognising the existence of marital rape would not be in contradiction to the spirit of Islam.

JAG maintains its call for the removal of the exception in S375 of the Penal Code, and to make marital rape a crime.

Q: Does the Select Committee address the issue of husbands forcing their wives to have sexual intercourse?

A: Yes it does, but it is clearly a position of compromise. The new section 375A of the Penal Code proposed by the Select Committee makes it an offence for a husband to threaten his wife or someone else with hurt or death in order to have sexual intercourse.

However, threats which are not related to causing hurt or death is not provided for in this new section e.g. the threat by husbands to stop giving their wives money for marketing; or that they will divorce their wives and take away their children.

Q: Are the situations listed in the new section 376(2) comprehensive?

A: They are not. The Select Committee proposes that a rapist be given a heavier punishment when in the course of raping her, he:

- i. causes hurt to the woman, or any other person; or
- ii. puts her in fear of death or hurt to herself or someone else; or
- iii. rapes her in the presence of other people; or
- iv. rapes a girl under 16 without her consent; or
- v. rapes a girl under 12; or
- vi. gets consent from a woman by using his position of authority over her, or because of their professional relationship or other kinds of relationship of trust.

The Select Committee recognises that these situations cause additional trauma to the women.

But other situations are not included by the Select Committee in the new section and they are:

- i. when the rapist has HIV/AIDS, other sexually transmitted or communicable diseases; or
- ii. where the woman is mentally or physically disabled; or
- iii. gang rape; or
- iv. when the rapist rapes the woman more than once; or
- v. when the woman is drugged or intoxicated; or
- vi. when the rape is being taped, videoed or photographed.

JAG urges the authorities to include these situations in the proposed section.

Q: Do we need minimum sentencing for rape offences?

A: Yes, we do.

Before minimum sentencing was introduced, sometimes rapists were not even sentenced to jail. There were also instances of rapists being given only one or two weeks or months of imprisonment. Sentences like these do not reflect the seriousness of the crime.

Research has shown that many rapists deny that they are responsible for their crimes. Rehabilitation is a long term process. JAG

proposes that the minimum sentence of five (5) years be maintained so that chances of rehabilitation may be increased.

Q: What are the limitations of the new section 377CA of the Penal Code?

A: The section only provides for the insertion of an object into the vagina or anus without consent as a crime.

However, JAG urges the authorities to consider that the main aim of this provision is to criminalise a form of sexual violation.

If we take the ordinary meaning of object, then a finger is excluded from that definition. So if a man were to insert his finger into a woman's vagina without her consent, this section will not be relevant. Naming only two (2) of the body's orifices also limits the applicability of this new section.

FAQs ON DOMESTIC VIOLENCE

Q: Do we need a separate offence for domestic violence in the Penal Code?

A: Yes, we do. Currently domestic violence is defined in the Domestic Violence Act (DVA). However, in order for a charge to be brought to court, that act of domestic violence must be an existing crime in the Penal Code. There is no separate provision in the Penal Code that names domestic violence as a crime. So if a husband hits his wife, he is not charged with the crime of domestic violence under the DVA, but “voluntarily causing hurt” under S321 of the Penal Code.

Domestic violence is a unique type of crime that is repetitive in nature, and which occurs in the intimate settings of the home. The Penal Code addresses only individual acts of violence or intimidation and not repetitive acts.

JAG proposes that there should be a separate offence called “Domestic Violence” in the Penal Code. That offence must be made a seizeable offence to give recognition that domestic violence is serious. There should also be various grades of punishment to reflect the severity of the physical, psychological, emotional, or sexual violence.

The Select Committee has not addressed this issue.

Q: If my husband follows me around, phones or sms me so often that it causes me psychological distress, are these acts of domestic violence and punishable as crimes under the Penal Code?

A: No. This is because stalking and causing psychological distress are not defined as domestic violence, or crimes under the Penal Code.

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This example shows how difficult it is to charge the husband because the acts must:

- i. be defined as domestic violence under the DVA; and
- ii. be found as a crime under the Penal Code.

Annually, 90% of women seeking counselling at the WAO refuge have suffered psychological violence.

JAG proposes to broaden the definition of domestic violence to include psychological injury, stalking and transmitting offensive material. These should also be made crimes under the Penal Code.

Q: If my boyfriend hits me, is he guilty of domestic violence under the DVA?

A: No. This is because a boyfriend is not recognised as a “member of the family”.

JAG proposes to broaden the definition of domestic violence to protect those in close personal relationships. Domestic violence happens in different kinds of intimate relationships and not just marital ones.

13% of women seeking refuge at WAO suffered domestic violence by their boyfriends or live-in partners.

The Select Committee did not include this in their proposed amendments.

FAQs on Terrorism

Q: Do we need a separate offence for committing “terrorist acts”?

A: No, there is sufficient legislation in place to take care of “terrorism” and “terrorist acts”. For example, when the Al Ma’unah group stole the army’s weapons in Grik, the offenders were all charged under Section 121 of the Penal Code *Waging or attempting to wage war or abetting the waging of war against the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri*. Under Section 121, it covers at least three elements, namely, if the purpose or intention is:

- a. staging an insurrection to challenge the government;
- b. having an insurrection by force or violence; and
- c. having an insurrection to accomplish an object of a general public nature.

Besides, there are definitely sufficient legal provisions to cover other offences such as possessing firearms, causing serious hurt to person and damaging property.

The new wide definition of ‘terrorist acts’ infringes our fundamental liberties as guaranteed under the Federal Constitution. JAG calls for the removal of all provisions in the Penal Code regarding terrorism and terrorist acts.

Q: As citizens speaking out about social issues, are we committing “terrorist acts”?

A: The wide definition proposed by the Select Committee defines “terrorist act” to mean an act or threat of action within or beyond Malaysia where the act or threat:

- i. is made with the intention of advancing a *political, religious, or ideological cause*;

- ii. is intended or may reasonably be regarded as being intended to:

- iii. *intimidate* the public or a section of the public; or

- iv. *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.

So well meaning social actions may be perceived as ‘terrorist acts’. For example, civil societies holding dialogues or providing critical feedback to government agencies may be deemed to “influence the Government of Malaysia” and hence be classified as a “terrorist act”.

Q: Is the power to intercept communications meant to monitor terrorist offence or is it for eavesdropping?

A: It is highly likely that individual privacy would be infringed. The Select Committee’s amendment seems to give full powers to the Public Prosecutor to “detain, intercept or listen to any conversation by telecommunications”.

The powers to decide on the interception of communications must rest with the judges of the High Court and not the Public Prosecutor. The Judiciary will then be able to be the check and balance to ensure that the section is not used indiscriminately and to protect the privacy of individuals.