REPRESENTATIONS OF DAP SARAWAK to the Parliamentary Select Committee on Amendments to the Penal Code and the Criminal Procedure Code (CPC) – *1 November 2004*

I INTRODUCTION

DAP Sarawak welcomes the Select Committee decreed by Parliament to gather public feedback on matters concerning proposed amendments to the Penal Code and the Criminal Procedure Code ("CPC").

Of late, members of the public had raised numerous complaints and grouses on increase in crime rates and the inadequacies of the criminal justice system to deal with crime. Criminal activities have resulted in loss of properties and human lives, yet the rakyat feel that law enforcement and execution had not kept pace with the moving of time. We feel that law making is not only the responsibility of the legislature. Very often, law makers should gauge also the temperature on the ground. In a nutshell, public response is crucial. An efficient democratic system works only if Parliamentarians are sensitive to the mood of the people. It is our fervent hope that in so far as Parliament desires to make any law touching on matters concerning the welfare of the rakyat, more Select Committees would be established in the future to tap public feedback.

In view that many organisations and individuals have made representations on the Proposed amendments contained in Rang Undang-Undang D.R.15/2004 and D.R.16/2004, I will not concentrate solely on them apart from saying that the proposed amendments are inadequate and, regretfully, unnecessary.

We believe that in order to better protect our society, there are other areas of substance which deserve better attention. But it will be a colossal effort to comment on all the inadequacies in the Penal Code and the CPC. On behalf of DAP Sarawak, I will endeavour to raise some pertinent areas of concern and, hopefully, make some proposals for the Select Committee and Parliament to consider.

II SEXUAL CONNECTION BY OBJECT

An amendment has been proposed to introduce s.377CA to the Penal Code whereby 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 20 years and shall also be liable to whipping.

The proposed offence can be committed by either sex. We feel that the amendment is too broad. It potentially covers the situation where the introduction of objects to the vagina or anus of a person is carried out for proper medical purposes. It should be a fundamental premise that the criminal law ought to emphasise the "violence" aspect, as distinct from the "sexual" aspect, of "non-consensual" sexual impositions. In that premises, we propose:

(i) that such acts between consenting and willing adults in private as a result of excessive passion should not be made an offence; and

(ii) that it should be made clear that where the introduction of object into the vagina or anus of any person is carried out for proper medical services, it does not come within the purview of the contemplated amendment. Reference can be made to s.61A (1)(a) of the Crimes (Sexual Assault) Amendment Act, 1981, NSW.

III ABSOLUTE IMMUNITY FAVOURING BOYS UNDER 13

The crimes of rape and incest are on the rise. Those reported are a mere tip of the iceberg. A lot of these crimes have been swept underground because of family embarrassment and the stigma attached to the victims. Rapes and incest committed by youngsters are not unheard of nowadays, but we have a law that has not followed the churning of time and the progress of society. I am talking about s.113 of the Evidence Act, 1950 which says:

> "It shall be an irrebutable presumption of law that a boy under the age of 13 years is incapable of committing rape".

Section 113 sits unpleasantly and unfittingly under Chapter VII of the Evidence Act which concerns Burden of Proof. This law is shocking. It makes no sense. If a boy under the age of 13 cannot commit rape, he cannot be convicted of rape, because he, in very simple language, cannot be capable of having sexual intercourse with another person. By the same token, he also cannot commit incest.

Why should there be such an absolute rule granting absolute immunity to a boy under the age of 13? Why boys under the age of 13 cannot commit rape?

If Parliament is serious in protecting women, it is high time that this law be changed. It is no longer true that a boy under the age of 13 are necessarily incapable of the full sexual act. The age of puberty has, by virtue of improved conditions of life, diet and health over the last century, dramatically decreased for males as well as females.

We propose that Parliament do away with this immunity by enacting that a person shall not, by reason only of age, be presumed incapable of committing rape or having sexual intercourse with another person or of having an intent to have sexual intercourse with another person.

IV MARITAL RAPE

Much debate has surfaced in recent months about Parliament making laws for marital rape. Ministers had made many such statements. It is unfortunate that such an intention has not materialized.

It seems that Malaysia is still living in the ecclesiastical era although marriage is now legally a secular institution. Spousal immunity rule dates back about 300 years. In Hale's *Pleas of the Crown*, written in the 17th century but not published until 1736 (Volumn.1, p.629), it was written:

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

But that was then, 300 years ago. During those ecclesiastical times, the wife had no separate property rights and could be assaulted for disciplinary reasons within the family. Today, in the eyes of the law, and certainly under our federal constitution, the wife is regarded as being generally equal with the male. In 2 cases decided by our courts, it was said:

(1) All men (meaning, male and female) are equal before the law and are entitled to equal protection of the law: Malaysia British Assurance Bhd v Chung Choi Yoke (2003) 4 AMR 124

(3) The Federal Constitution does not discriminate against the sexes: Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah (2003) 5 MLJ 106

In the premises, it is high time to enact laws on marital rape. Our secular society should not compel a wife to submit to the force of a husband when they are divorced or separated by a court order or by a separation agreement, or when the court had granted decree nisi of divorce to the husband and wife, or where there was in force an injunction order against molestation, or that the husband had given an undertaking to the court not to make any advances to the wife. The wife should be allowed to refuse her husband's advances when there is concrete evidence of infidelity, evidenced by the husband suffering from a venereal disease of which the wife had no role to play. Additionally, if a wife has a recent surgical operation, and both husband and wife had been advised that sexual intercourse may be dangerous or fatal, or where the wife is pregnant with a sensitive pregnancy capable of being precipitated by sexual intercourse into a miscarriage.

Domestic sexual assault rarely occurs in the absence of ordinary assault. Domestic violence is a serious and widespread social problem not limited to assault by the husband against the wife but by the wife against husband as well. Parliament should play some role in educating both men and women that physical violence within the family is disapproved of by society generally.

The likelihood of prosecutions of husbands for sexual assault against the wives, or the likelihood of such allegations being difficult to prove should not detract from the importance of making provision against marital rape.

We propose that Parliament makes law abolishing the husband's immunity, so that under certain specified circumstances sexual intercourse by force in a marital relationship becomes marital rape.

V PUNISHMENT FOR RAPE AND INCEST

The heinous crimes called rape and incest are on the rise in our country. It is an ultimatum that our society has become sick. An incident of rape is sufficient to stigmatize a victim for life. She is caught in a dilemma whether to report or not to report to the police. This is particularly serious when the rape happens to occur in an incestuous relationship. Often, the relationship of the offender and the victim deters another entry into the statistics book.

Sadly, there is an acute lack of awareness of the effects of rape and incest on the victims. Political leaders had not been particularly sensitive. Words uttered such as "if you cannot avoid rape you may as well lie there and enjoy being raped" are not only deplorable but must be condemned.

In all cases of rape and incest that are brought to the courts, the victims will have to face insidious and relentless cross-examination, even touching on matters most personal. They, having been raped, have to suffer the utmost indignity to have to again recount and relive the event which they rather erase from their mind. Often, they had to recount the event in glaring and most intimate detail. Instead of deterring an offender, the system and nature of evidence-taking discourage and deter the victim. Yet, often, we see that the sentences meted out are grossly inadequate.

Law makers had been harping on increasing the penalties to be meted out on offenders, ranging from death penalty, castration, to life imprisonment.

Is punishment for rape adequate? Section 376 of the Penal Code provides:

> "Whoever commits rape shall be punished with imprisonment for a term of not less than 5 years and not more than 20 years, and shall also be liable to whipping."

Punishment for incest is provided in s.376B. Whoever commits incest shall be punished with imprisonment for a term of not less than 6 years and not more than 20 years, and shall also be liable to whipping.

Sentences meted out in our courts in rape and incest cases have frequently been around the 10 to 15 years mark. To the victims and their families, this is never adequate.

But the cry by certain politicians in the Government that a rape offender has to be sentenced to death is an admission that our system has failed. The statistics on the incidents of rape and incest cases can also be taken as an admission that the sentencing structure is inadequate and not deterrent enough. On top of this is the inadequacy and inefficiency in our prosecutorial system whereby convictions are hard to come by – this shall be dealt with in a moment.

The present law under s.376 of the Penal Code is unsatisfactory. While prescribing a penalty of between 5 and 20 years, it has accomplished the punishment for only one sexual offence – rape. But rape cases are not as straight forward as sexual intercourse without consent. Often, force is pegged with divergent degrees of bodily injuries or threats to life. In other words, s.376, as it presently stands, fails to take into account the divergent degrees of violence and moral turpitude factors.

We propose the followings:

(a) there should be a graduation of offences of sexual assault, with distinct ranges of penalties, rather than one offence of rape with a virtually unlimited penalty range;

(b) the penalty structure should emphasise upon the “violence” and “moral turpitude” factors in sex offences cases, rather than upon the element of “sexual contact”;

(c) where violence is inflicted, or where there is a threat of violence involving objects, offences should be defined so as to exclude the requirement that the prosecutor proves as part of its case, that sexual penetration occurred and that the complainant victim did not consent to it; and

(d) the minimum penalty has to be maintained, but the maximum penalty structure is to be increased from 20 years to 30 years plus whipping. This will entail an amendment to be made to the Criminal Justice Act, 1953, especially s.3(ii) thereof on the definition of life sentence. In some deserving cases, even imprisonment for the natural life of the convicted offenders is not overly harsh.

Towards that end, we therefore propose that there should be several categories of sexual assault, with a gradation of penalty, category 1 being more serious than category 2 and so forth. Hence, we propose:

Category 1:

(a) Sexual assault causing death to the victim.

The penalty for Category 1 offences shall come under the purview of s.302 and s.304 Penal Code. In the event of the latter, the imprisonment term should be the natural life of the convicted offenders.

Category 2:

(a) maliciously inflicting grievous bodily harm upon another person with intent to have sexual intercourse with that person ;

(b) maliciously inflicting grievous bodily harm upon another person with intent to have sexual intercourse with a third person who is present or nearby, for example, as frequently happens, the offender attacking a

courting couple and injures the boyfriend in order to intimidate the girl into sexual activity;

(c) gang rape, whether or not grievous bodily harm is inflicted on the victim and other person present or nearby; and

(d) conspiracy to commit gang rape, whether or not grievous bodily harm is inflicted on the victim and other person present or nearby.

The penalty for category 2 offences should be a minimum of 15 years and a maximum of 30 years plus whipping. Even an imprisonment term for the natural life of the offenders may not be overly harsh.

Category 3:

(a) maliciously inflicting bodily harm upon another person or threatens to inflict bodily harm with intent to have sexual intercourse with that person;

(b) maliciously inflicting bodily harm upon another person (eg, a boyfriend) or threatens to inflict bodily harm upon another person (ie, the boyfriend) with intent to have sexual intercourse with a third person who is present nearby (example, his girl friend).

The penalty for category 3 should be a minimum of 10 years and a maximum of 20 years plus whipping.

Category 4:

Sexual Intercourse without consent, that is rape simpliciter. This is the category presently covered under s.376 Penal Code. The penalty should be increased from a minimum of 5 years to 8 years. The maximum term is to be maintained.

Category 5:

Indecent assault and act of indecency.

This category is covered by the present s.354 of the Penal Code and can be maintained without amendment.

The shortcomings of the Penal Code in protecting women is hence now apparent, ie, although there are divergent and graduating degrees of violence and moral turpitude, yet, Categories 1, 2 and 3 are not catered for in the present Penal Code.

We further propose that in all categories of rape and incest, the offender shall be whipped, irrespective of age, subject, of course, to medical certification. A man over 55 years of age who by the present law is spared the whip but who has the capability to rape should be able to withstand the whip. Elderly would-be offenders will be compelled to think twice before they embark on a selfish rampage and carnage that is capable of destroying a girl/woman's life.

VI INCEST

Sexual intercourse with any person in a prohibited relationship is incest. Section 376B(2)(b) provides that whoever commits incest shall be punished, but that it shall be a defence to a charge against a person if it is proved that the act of sexual intercourse was done without his or her consent.

The rationale of s.376B(2)(b) is not comprehensible. Incest is incest whether consent existed or not. We propose that s.376B(2)(b) be repealed, so as to make the issue of consent irrelevant in a charge of incest.

VII THRESHOLD AGE FOR CONSENT

The present law deems that a girl under the age of 16 is incapable of giving consent to sexual intercourse. Hence, sexual relationship with a girl of 16, with or without consent, is deemed a statutory rape.

In order to discourage or curb promiscuity against the young females, thereby protecting society, Parliament should consider raise the threshold age for consent from 16 to 18 years of age.

VIII AMENDMENT TO CPC – REMAND

No matter how efficient our police authorities are, they cannot be expected to complete investigation of a case within 24 hours after a person is arrested. Section 117 of the CPC allows the person who has been arrested and detained in custody to be produced by the police before a magistrate who thereupon

will remand the subject for a specified period, not exceeding 15 days in the whole.

It has been a common complaint that s.117 has been rampantly abused, so much so that the fundamental liberty of a subject has been compromised. It has frequently been the case that the police will apply to the magistrate to remand the subject for 14 days, treating the magistrate as a rubber stamping authority.

A subject is most vulnerable during remand, especially if he/she is one who has no former experience in the police cells. He/she is cut from the outside world for being disallowed to telephone to their families. He/she faces lots of uncertainties and could easily crumble. Cases of subjects being starved while in remand or being assaulted, even in the uppermost sanctum of the police headquarters at Bukit Aman, are well documented. It always happens that a male in remand is left with only his brief to shelter. The environment is cold, unclean and unfriendly. Many have complained that even convicted criminals deserve better treatment, not to mention the presumption of law in their favour that they are as yet to be proven guilty.

We propose the following:

(a) Every subject arrested should be entitled to make one (1) phone call to the family or his lawyer before being sent into the lock up;

(b) Proper facility should be made available to those under remand, including adequate food, drinks, blankets and medical attention;

(c) Parliament should amend s.117 and make clear provisions that the police authorities should not arbitrarily apply for remand, but that the Magistrate has power to grant remand for a maximum of 3 days, and any extension thereafter can only be justified on good and justified grounds.

IX SHORTCOMINGS IN PROSECUTORIAL & JUSTICE SYSTEM

No law is useful without proper enforcement. No proper enforcement is possible without sufficient personnel, and a system of efficient personnel management.

At present, most of the prosecuting jobs are handled by officers taken from amongst the ranks of the police. Apart from being prosecutors, these officers

remain police officers and are also required to discharge general duties as police officers, including conducting raids and investigation works. Compared to those officers who are not prosecuting, theirs is generally a case of more work, same pay. There is no incentive. Handicapped by time and loads of work, they cannot be expected to discharge their duties properly and efficiently. In many cases, they can be considered bias in favour of their colleagues in the sense that crime busters and investigating officers are fellow colleagues. During the times when a procedure was flawed, the prosecuting officers end up protecting and siding their colleagues. In a nutshell, the present prosecutorial system does not ensure that prosecuting officers are able to act independently.

For reasons which only Parliament knows, many of the prosecuting officers are not well trained to meet the challenge of their work. There had been cases where prosecuting officers had been transferred to administrative work after just 3 or 4 years in the prosecuting department, when they were just about to get the feel of their jobs. New prosecuting officers are not able to rise to meet the stringent demands of a prosecutor's job. What use is a successful raid or arrest and a reasonable investigation but you fall at the last hurdle to bring criminals to book, ie, the prosecution stage?

Many prosecuting officers have little or no time to interview witnesses before trial. The result has frequently been that witnesses and complainants-victims are unable to testify properly. It is already hard for a trained man to recount what meals he took 24 hours ago, it is far more difficult for a layman or a complainant-victim to recount to considerable detail the events that had occurred to him some 3, 5 or 10 years ago, considering that a charge may take such length of time to come up to be tried.

Statistically, but most regretfully, crime does seem to pay. A young criminal defence lawyer confessed that he is unable to count more than a handful of convictions out of a hundred cases defended by him. He was able to recall that all 10 rape cases he defended for his clients ended in acquittals. The statistics do not auger well for the criminal justice system. It reflects the shortcomings of the investigation processes and prosecutorial system.

We also have seen instances when a subject has been wrongly charged, or cases of wrongful conviction. The case of Anwar Ibrahim is an example when he was acquitted by the Federal Court on sodomy charges, but by then he had remained in jail for years. Of course, his could not be the only isolated case.

We propose the followings:

(a) Improve the efficiency of the present prosecution system. The prosecuting officers should confine themselves to prosecuting work. Witnesses, be they complainant, victims and police witnesses, should be interviewed before trial so that they were able to remember the events, to refresh memory and able to testify properly in court so as to bring criminals to book;

(b) Parliament should set up an independent prosecuting body. The DPP should take over all levels of prosecution. At present, this is not done in magistrate and sessions courts which cover the bulk of criminal cases, in particular, all cases apart from capital offences;

(c) Parliament should allow private practitioners to be engaged on an ad hoc basis as crown prosecutors, especially in the event that the DPP cannot spare manpower; an example can be borrowed from England where by virtue of the Crown Prosecution Service Act (1984), prosecution jobs were taken from the police by barristers and solicitors;

(d) Parliament should make laws compensating those who had been wrongfully charged and/or convicted. A cue can be taken from the well known dingo case in Northern Territory, Australia, when Lindy Chamberlain and her husband were charged and found guilty of killing their baby Azaria when their assertion was that their baby was taken by a dingo. After years in jail, the guilty verdict was overturned and the couple compensated for injustice done to them; and

(e) Parliament should make laws to fully indemnify all those suspects who are ultimately discharged and acquitted by the Courts against all costs and expenses incurred by them in their defence.

X CONCLUSION

We thank the Select Committee for the indulgence. We are prepared to enlighten any matters and proposals we have made herein which may not have been clear.

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