

MEMORANDUM

ON

LAWS AGAINST INCEST

Submitted by: Women's Crisis Centre, Penang
(currently known as Women's Centre for Change)

Endorsed by: Women's Development Collective
All Women's Action Society
Women's Aid Organisation
Sisters in Islam
Women's Agenda for Change

This document has been prepared by the WCC Penang. For further information, contact:
Lalitha Menon, Women's Crisis Centre, 24-D Jalan Jones, 10250 Pulau Pinang, Malaysia.
Tel: 04-2280342, Fax: 04-2285784, E-mail: wcc@wccpenang.org, Website: www.wccpenang.org.

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MEMORANDUM ON LAWS AGAINST INCEST

Introduction

The Women's Crisis Centre (WCC), Penang welcomes the Government's initiative to amend the legal provisions pertaining to the offence of incest in response to the recent public outrage over the high incidence of incest cases.

However, inasmuch as the WCC shares the public view that incest is a despicable and inexcusable offence, the WCC nevertheless wishes to caution against hurried and piece-meal introduction of legal amendments such as heavier and more punitive sentences without giving full thought to whether such amendments would bring about the desired social changes. Bearing in mind that the number of reported incest are only the tip of the iceberg and that of these even fewer cases reach the conviction stage, any legal changes which are made must ensure that, firstly, they are not only preventive but an effective deterrent against the recurrence of incest cases; secondly, they must encourage and embolden the victims and other family members to report any incidence of incestuous rape; and thirdly, they must be sufficiently protective of the victims and give paramount consideration to the interests of the victims from the very moment the legal and judicial process is set into motion.

The WCC therefore urges the government to give serious thought to the legal amendments being introduced so that they are not ad-hoc amendments which remain just a "knee-jerk" response to the public outcry but to ensure that the amendments are both comprehensive and well thought-out in order that all situations concerning incest are fully dealt with and that the desired long-term objectives of the legal reform are achieved.

Given the above-mentioned objectives, the WCC strongly feels that enhancing the punishment for incest to mandatory life sentences (presumably sentences for natural life as opposed to "imprisonment for life" which is equivalent to 20 years as is the current maximum term) or the death penalty (as has been proposed by some) and/or public whipping would, instead of serving their intended purpose, be more likely to backfire as the prospect of their own family members being put away for life or being hanged and/or being publicly whipped would effectively deter victims of incest from coming forward to report these incidents and diminish whatever little prospect there would be of the victims getting the necessary support and/or encouragement from the other family members to report such incidents. It should also

be borne in mind that where the punishment is a mandatory one, like a mandatory life sentence, or an extremely severe one, like the death penalty, the Courts are far more cautious in returning a verdict of guilt and are more likely to give the benefit of the doubt to the accused persons than if the punishment is at the Court's discretion.

Since law has never been a panacea for any social ill, the WCC further urges the government to give priority in conducting an urgent and in-depth study of the main underlying causes for the high incidence of incest cases and in taking the necessary measures to arrest those causes rather than merely exhausting all its energies in working out the worst possible punishment that could be meted out to the few perpetrators who actually get convicted of incest.

The government should also ensure that there is an adequate and well-placed support system for the victim and the other members of the victim's family which would come into play the moment the victim brings her complaint to the attention of the higher authorities so that economic considerations (fear of loss of the bread-winner of the family if the perpetrator is the father/step-father), embarrassment (e.g. undue publicity and identification of the victim; victim being made to repeatedly relate the details of the act; victim having to publicly narrate the details in Court and be subjected to rigorous cross-examination), intimidation (by the perpetrator once the report is made) and other such considerations which would deter the victims from coming forward are effectively eliminated or minimised. For instance, mothers and other family members who are aware of the offence would be more likely to report the matter if there is an assurance that some sort of financial aid would be given to victims of incest in cases where the perpetrator is the sole breadwinner so that the victim and his/her family would not become destitute if the accused is put away for a long term.

More effective use could also be made of existing legal provisions such as those found in the Domestic Violence Act (section 6) so that the perpetrator is excluded from the home and the victim is protected from the intimidating presence of the perpetrator after he is charged without having to be placed in a welfare home for his/her safety.

In light of our concerns, the WCC hopes that the following proposals will assist in the formulation of a more comprehensive legal reform to address the issue of incest.

Legal Reform on Incest: Proposals for Change

The WCC understands that the amendments creating a new offence of incest vide Section 376A & Section 376B of the Penal Code which were passed in Parliament last year have yet to be enforced.

The WCC proposes that the aforesaid sections which are reproduced here be reviewed and amended before being enforced. In this respect, the WCC wishes to make some proposals on the changes which ought to be made. The reasons for the proposals made are also given.

Existing Provision on Incest

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 WCC Amendment

s. 376A (1) A person is said to commit incest if he or she sexually abuses another person whose familial 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 sexually abuse another person if:

- (a) the person has sexual intercourse with the other person without the other person's consent; or
- (b) the person penetrates the vagina or anus or mouth of the other person to any extent with the person's penis without the other person's consent; or
- (c) 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 without the other person's consent.

Explanation (1): Penetration to any extent is sufficient to constitute the sexual intercourse referred to in (2)(a);

(3) A consent is not consent as is intended by this section:

- (a) if the consent is given by a person under fear of injury or under a misconception of fact and if the person doing the act knows, or has reason to believe that the consent was given in consequence of such fear or misconception; or
- (b) if the consent is given by a person who, from unsoundness of mind or mental incapacity, whether temporary or otherwise, is unable to understand the nature and the consequence of that to which he/she gives his/her consent; or
- (c) if the consent is given due to coercion, manipulation, undue influence, assertion of authority, or breach of trust exercised or committed by the person doing the act; or
- (d) if the consent is given by a person who is under eighteen years of age.

Explanation (2): For the purposes of this section a reference to a familial relationship includes a relationship corresponding to a step relationship arising because of cohabitation in a de facto relationship or because of a foster relationship or a legal arrangement.

Reasons for the Proposed Changes

- a) “Sexual abuse” is preferred to “sexual intercourse” so that the offence of incest is not confined only to cases where sexual intercourse can be proven;
- b) “Sexual abuse” should be widely defined to cover the wide range of sexual abuses that may be committed on a victim;
- c) Where there is sexual abuse via intercourse proof of even the slightest penetration should be sufficient;
- d) The wording of the existing Section 376A and 376B(2) is such that the victims themselves could be charged with incest and it would then be upon the victim to prove his/her innocence by showing that the act was committed without his/her consent. If we are to

- encourage more victims to come forward and report incidents of incest there must not be any such probability/likelihood of the victim himself/herself being charged for the offence if he/she reports the incest. Moreover, our main concern is over cases of incest committed without the victim's consent or against his/her will. The lack/absence of consent on the part of the victim must therefore be made an essential ingredient of the offence of incest;
- e) Since it is often difficult to prove the lack/absence of consent in sexual offences all the 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;
 - f) "Relationship" must be specifically defined as familial relationship 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.

Existing Provision on Punishment for Incest

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 WCC 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 sentence of imprisonment imposed for a second or subsequent offence shall only commence at the expiration of the imprisonment to which he has been previously sentenced;

(5) The Court shall not have the discretion to exercise its powers under Sections 173A and 294 of the Criminal Procedure Code when sentencing an offender found guilty of an offence under this section;

(6) The Court may, in addition to any other sentence pronounced, direct that the offender be referred to rehabilitation treatment such as counselling.

Reasons for the Proposed Changes

- a) It is felt that the minimum and maximum sentences prescribed for incest are sufficient and that sentences such as life sentences or the 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;
- b) The discretion of imposing an appropriate sentence should also be maintained by the Courts, which should, however, take a more serious view of the public interest and impose appropriate sentences. Nevertheless, if the trend of sentencing is 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 judicial precedent and the principles applicable rather than for the legislature to dictate the sentences to be imposed in all cases;
- c) 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;
 - d) Since a lot of incest cases do 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;
 - e) The discretion of imposing concurrent sentences for second or subsequent offences ought to be removed so that the perpetrators are not “rewarded” with “two-in-one” sentences despite having committed incest on more than one occasion or on more than one victim as incest is often committed repeatedly over a period of time and has a more traumatic effect on the victim or victims than some other crimes;
 - f) In order to ensure that the minimum mandatory sentence is imposed in all cases of incest the Court’s discretion of binding over the accused as provided by the Criminal Procedure Code should be completely removed;
 - g) The Court should also be given the power to direct that the offender be sent for rehabilitation treatment such as counselling while undergoing imprisonment as a preventive measure against recurrence of the same/similar offence.

Amendment of Other Legal Provisions

Amendment of the Penal Code would however be insufficient and inadequate if it is not accompanied by simultaneous amendments to the Criminal Procedure Code, the Courts of Judicature Act and the Evidence Act to afford more effective protection to the victims of incest.

The relevant provisions and the amendments proposed by the WCC are:

Criminal Procedure Code

s. 259 Power to postpone or adjourn proceedings

(1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the Court may, by order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused if in custody: provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding eight days at a time: provided further that where a Government Medical Officer has certified that the complainant will not be able to give evidence before a certain date the accused may be remanded until such date notwithstanding that the term of remand may exceed eight days.

Here a proviso should be added to limit the Court's power to adjourn any trial in incest cases so that trials of incest cases are completed within six months from the date the accused is charged (as is being done for criminal cases involving Government servants) so that the trauma of the victim in attending Court proceedings is minimised;

s. 264 Evidence to be taken in the presence of accused

Except as otherwise expressly provided all evidence taken under Chapters XVII, XIX, XX, XXI and XXII shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his advocate.

Since the Criminal Procedure Code does allow evidence to be taken in the absence of the accused if there is express provision to that effect provisions should be introduced to allow the testimony of the victim to be pre-recorded on video camera and to be admitted in lieu of examination-in-chief of the victim. For purposes of cross-examination of the victim, provisions should be introduced to give the Court the discretion to allow the victim to be cross-examined either in the absence of the accused or without the victim having to face or be in the same room as the accused;

s. 388 When person accused of non-bailable offence may be released on bail

(1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by such Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:....

This provision should be amended to include a proviso that in incest cases bail should not be allowed if there is a real likelihood that the accused may interfere with the complainant or threaten the complainant.

The proviso should also state that in the event the accused is released on bail, it shall be subject to the condition that the accused is prohibited/restrained from sharing the victim's place of residence/alternative residence and from making personal, written or telephone communication with the victim as is provided for in section 6 of the DVA.

Evidence Act

s. 133A Evidence of child of tender years

Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section;

Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

The above proviso should not be applied to cases of incest as it is generally very difficult for corroborative evidence to be obtained in cases involving incest and other sexual offences.

The trial Judge should instead be required to seek expert opinion on the credibility of the child witness to assist the Judge in assessing the truthfulness of the child's testimony.

Courts of Judicature Act

s. 15 Courts to be open and public

(1) The place in which, any Court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access;

Provided that the Court shall have power to hear any cause or matter or any part thereof in camera if the Court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason so to do.

(2) A Court may at any time order that no person shall publish the name, address or photograph of any witness in any cause or matter or any part thereof tried or held or to be tried or held before it, or any evidence or any other thing likely to lead to the identification of any such witness; and any person who acts in contravention of any such order shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

The Court's power to order that no person shall publish the name, address or photograph of any witness in any cause or matter or any part thereof tried or held or to be tried or held before it, or any evidence or any other thing likely to lead to the identification of any such witness should be extended to include the publication of the name, address or photograph of even the accused in appropriate cases of incest from the time the accused is charged in Court for incest since in such cases the identification of the accused would easily lead to the identification of the victim.