

WOMEN'S CRISIS CENTRE'S RESPONSES ON New Incest Provision and other Penal Code Amendments

INTRODUCTION

On 9th August, 2001, the *Penal Code (Amendment) Act* was passed. The Act includes the insertion of a number of Prostitution related offences from the *Women and Girls Protection Act (WGPA)* and the introduction of a new Incest provision.

The Women's Crisis Centre (WCC) Penang has previously called for an independent incest provision as well as the adoption of the former WGPA offences. We, therefore welcome these amendments. However, WCC urges that the following improvements be made:

NEW INCEST PROVISION

Issue 1

Currently, the amendments by way of the new sections 376A and 376B give the impression that incest is a victimless crime. It must be emphasised that incest often takes the form of child sexual abuse; the perpetrator normally being a person who has breached the victim's trust, sometimes even a person who is in a position of a parent (in *loco parentes*) whether in fact or at law. Under the new incest provision, any over-age person who consents to the incestual act is criminally liable, whether or not the consent was informed or given voluntarily. Protection must be afforded to victims by allowing them to be charged together with the perpetrator only where their consent was real. This will recognise incest as a crime with a victim.

Issue 2

Sexual acts, other than sexual intercourse, should be recognised under the incest provision. The new Sections 376A and 376B only refer to sexual intercourse and not other sexual acts such as carnal intercourse or penetration of the vagina or anus with objects. These other forms of sexual abuse are equally as traumatising for the victim and should be acknowledged as such under the incest provision.

Issue 3

The abuse of boys by other male members of the family should be included in the definition of incest. Among survivors of incest, between 25% and 50% are estimated to be boys.¹ Boys are recognised under the *Child Bill 2000* and should also be recognised as victims of incest. In keeping with Article 19 of the UN Convention on the Rights of the

Child (CRC), ratified by Malaysia in 1994, children must be protected from all forms of sexual violence.

This issue is not dealt with in the proposal below as it would require either the particular familial relationships to be defined in the incest provision, or a broader definition of incest. One example of a broader definition would be "the sexual abuse of one family member by another". This broad definition would capture all of the abuse the state wishes to curb with its new incest provision.

Recommendation:

It is suggested that the new sections 376A and 376B be amended as follows (changes underlined):

Incest

S376A. (1) A person is said to commit incest if he or she has sexual connection with another person of the opposite sex 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) Sexual connection includes sexual intercourse, carnal intercourse against the order of nature as defined under Section 377A and the introduction of any object into the vagina or anus.

Punishment for incest

S376B. (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 under circumstances falling under any of the following descriptions :

Firstly – Against his or her will.

Secondly – Without his or her consent.

Thirdly – With his or her consent, when his or her consent has been obtained by putting him or her in fear of death, or obtained under a misconception of fact.

Fourthly – With his or her consent, when his or her consent has been obtained through breach of trust which he or she has placed in the other person.

Fifthly – With his or her consent, when his or her consent has been obtained through undue influence.

Sixthly – With his or her consent, when, at the time of giving such consent, he or she is unable to understand the nature and consequences of that to which he or she gives consent.

Seventhly – With or without his or her consent, when he is under thirteen years of age or she is under sixteen years of age.

SECTION 372: EXPLOITATION FOR THE PURPOSES OF PROSTITUTION

The new section 372 adopts offences from the former *Women and Girls Protection Act 1973* (WGPA), applies them to both men and women and provides them with stricter penalties.

Women's Crisis Centre, Penang (WCC) supports the move for stronger and further-reaching penalties, however WCC recommends that omitted sections of WGPA should be included in the *Penal Code*.

Recommendation:

The presumption that was attached to section 16 of the WGPA has been omitted from the *Penal Code* amendments. This presumption is required so that the intent of the accused need not be proven. It should be re-introduced in to the *Penal Code* as follows (changes underlined):

S. 372 (4) For the purposes of this section it shall be presumed until the contrary is proven that –

- (i) a person who takes or causes to be taken into a brothel any person, has disposed of such person with the intent or knowledge mentioned in paragraph (a) of subsection (1) of Section 372.
- (ii) a person who receives any person into a brothel or harbours any person in a brothel has obtained possession of such person with the intent or knowledge mentioned in paragraph (a) of subsection (1) of Section 372.

ADDITIONAL RECOMMENDATIONS

In addition to the above recommendations, WCC proposes that special provisions be introduced to the *Penal Code* to recommend more severe sentencing for the following rape situations:

- (a) gang rape (rape by two or more persons);
- (b) rape by a person in a position of trust;
- (c) rape in cases where the victim is very young, very old, infirm, physically or mentally disabled, or pregnant;
- (d) custodial rape (rape while incarcerated or detained by employee of institution);
- (e) if the rapist was armed with a weapon at the time of committing the offence; and
- (f) if the rapist caused bodily harm to the victim while committing the offence.

CONCLUSION

Although the *Penal Code (Amendment) Act 2001* has already been passed without any amendment, WCC urges that the above recommendations be considered. Without the protection and recognition of all victims of incest, the positive intention of the new provisions may be undermined.

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ⁱⁱ A. Bentovin & P. Boston, "Sexual Abuse: Basic Issues, Characteristics of Children and Families" in A. Bentovin, et al. *Child Sexual Abuse Within the Family: Assessment and Treatment* (London: Wright, 1987) at 50; S. Ray "Adult Male Survivors of Incest: An Exploratory Study: (London, Ont.: HMS Press), E. Porter, *Treating the Young Male Victim of Sexual Assault: Issues and Intervention Strategies* (Orwell, VT: Safer Society Press, 1986).