MEMORANDUM ON THE LAW REFORM MARRIAGE AND DIVORCE ACT (AMENDMENT) BILL 2004

Joint Action Group Against Violence Against Women (JAG)

Comprised of:
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 Trades Union Congress (MTUC) – Women's Section

November 2004

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I. INTRODUCTION

The Joint Action Group Against Violence Against Women (JAG)[1] is a coalition of women's organizations that was formed in March 1985 to address issues of violence against women in the Malaysian society. Since that time, JAG's advocacy has expanded to issues of rape, Islamic family law, sexual harassment, domestic violence, and other laws and policies that discriminate against women. In all of its work, JAG applies a rights framework that stresses both gender equality and non-discrimination.

On 16 August 2004, JAG met with the Special Select Committee on the Penal Code and Criminal Procedure Code to make recommendations focusing on the amendments to the *Penal Code* related to rape. On 28 October 2004, JAG made a follow-up presentation on other issues relevant to women at the Penang public hearing.

This memorandum consists of the comments and recommendations JAG provided to the Select Committee on the proposed amendments to the *Law Reform (Marriage and Divorce) (Amendment) Bill 2004*. JAG would like to register its comments on the proposed Bill and request more transparency as the amendment process continues.

We note that there are several amendments proposed by the AG's Chambers that are a cause for concern. It would appear that these amendments were precipitated by at least 2 court decisions, both involving children.

The first set of amendments pertain to the issue of conversion of one of the spouses in a civil marriage to Islam and the consequences of that conversion on the non-converting spouse and children of the marriage.

The second set of amendments pertain to extending the period of maintenance of a child beyond 18 years of age. The proposed amendment allows the courts, "on the application of the child or any other person, [to] extend the order for maintenance to cover such period as it thinks reasonable to enable the child to pursue further higher education or training".

We wholly support this second set of the amendments. The courts should have the discretion, in appropriate cases and where either or both parents have the financial capacity, to ensure that a child is able to realize his full potential and aspirations.

We are however concerned over the proposed amendments consequent upon the conversion of a spouse to Islam, particularly the selective and arbitrary importation of syariah principles into the civil laws which appear to lead to injustice rather than enhance the protection afforded under the law to the more vulnerable spouse and children. We urge that the process in reforming the *Law Reform (Marriage and Divorce) Act 1976* continue in a careful and transparent manner to prevent the enactment of amendments that are detrimental to the rights of women.

[1] Currently JAG consists of Women's Centre for Change (WCC) Penang, Women's Aid Organisation (WAO), Women's Development Collective (WDC), All Women's Action Society (AWAM), Sisters in Islam (SIS) and Malaysian Trades Union Congress (MTUC) – Women's Section.

II. COMMENTS AND RECOMMENDATIONS ON LAW REFORM (MARRIAGE AND DIVORCE) (AMENDMENT) BILL 2004

A. Openness in the Law Reform Process

On 29th September 2004, the Attorney-General's Chambers convened a meeting to discuss proposed amendments to the *Law Reform (Marriage and Divorce) Act 1976*. The meeting was attended by representatives from the Syariah Judicial Department, the Ministry for Women and Family Development, JAIS, Perkim, Syarie Lawyers Association, ABIM, UKM, UIA and Sisters in Islam.

The fact that a meeting was sought from members of the public to discuss proposed amendments to statutory laws is welcomed. When every proposed law or proposed amendment to a law is shrouded in secrecy and made subject to the *Official Secrets Act 1972*, this move in soliciting public views and opinions is most appreciated. Such an action can only strengthen the nation's democratic and participatory processes. However, in order to ensure a full participatory process, the AG's Chambers should have consulted as wide a section of the public as possible and not merely groups representing the Muslim community.

B. Applicability of the Act and Status of Marriage Upon Conversion to Islam Section 3 & Section 51

Proposed Amendments:

1. Section 3

"This Act shall not apply to a Muslim or to any person who is married under Islamic law . . .; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a divorce on the petition of ***either party*** to a marriage where the other party has converted to Islam and such decree ***and any relief incidental thereto*** shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted".

2. Section 51

"(1) Where one party to a marriage has converted to Islam, ***either party*** may petition for divorce:"

Recommendation:

To clarify the status of the civil marriage upon conversion of a spouse. If either party may apply for divorce upon conversion of one spouse, then it follows that the civil marriage subsists and remains valid up until the order for dissolution of the said marriage is granted.

This could be done by the addition of a new Section 3(3A) that, "A marriage solemnised under the Act shall remain valid notwithstanding the conversion of either spouse to Islam unless a decree of divorce is granted under this Act".

Comments:

This clarification will ensure that there is no confusion as to the status of the civil marriage upon conversion and particularly there shall be no derogation of the rights of

the parties to maintenance, custody of the children of the marriage and matrimonial property even after conversion of one spouse, unless a divorce is granted by the civil courts.

It was previously assumed that once a person has converted to Islam, he (or she) loses his ability to seek any relief before a civil court in matters pertaining to the civil marriage. Therefore, Sections 3 and 51 were intended only for the benefit of the non-converting spouse. This view cannot be supported under a dual system of law. A marriage that is solemnised pursuant to *Law Reform (Marriage and Divorce) Act 1976* can only be dissolved under the same laws. Either party to the said marriage therefore should be given access to the civil courts to dissolve the marriage as well as seek any relief incidental thereto e.g. custody, maintenance and division of matrimonial property.

Where the jurisdiction to seek divorce and ancillary relief is granted to the civil courts, then such jurisdiction should be made exclusive in order to avoid conflict of laws and contradictory decisions from two separate courts i.e. the syariah court and the civil court. It is undesirable that parties be allowed to submit the same application to both courts simultaneously ("forum-shopping").

In fact, we would even go so far as to say that unless and until the parties have resolved all matters pertaining to the said marriage, they should not be allowed to enter into a second marriage. This would ensure that the existing family is protected and all provisions are made for the family prior to the converting spouse marrying again under syariah laws. It goes against all principles of equity and justice to allow a converting spouse to neglect his responsibilities under the civil marriage solely on the grounds that he / she has converted to Islam. Allowing the converting spouse to do otherwise may even encourage abuse of process because any time a spouse wishes to abdicate responsibility, all he/she has to do is convert to Islam. Thus we also recommend that each state consider amendments to this effect to their respective syariah enactments.

C. Section 54
Proof of Breakdown of Marriage

Proposed Amendment:
Section 54
(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say –

(a) that the respondent has committed adultery…
(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; ….
(c) that the respondent has deserted the petitioner…
(d) that the parties to the marriage have lived apart for a continuous period of at least two years.
(e) ***that either party to the marriage has converted to Islam***.

Recommendation:
That Section 54 not be amended.

Comments:
The conversion of one party to Islam is specially dealt with in Section 51. Where special provisions are made under the law, there is no need to rely on general provisions like Section 54.

D. Section 77
Converting wife cannot be ordered to pay maintenance to incapacitated husband

Proposed Amendment:
Section 77
"(2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.
(3) Nothing in this section shall authorise the court to make an order for a woman who has so converted to Islam to pay maintenance to her husband or former husband".

Recommendation:
That Section 77 not be amended as proposed.

Comments:
There is no reason why a husband who is incapacitated should not be maintained by his converting spouse or former spouse. This proposed amendment is discriminatory and would lead to injustice. For example, the couple may be married for 40 years and should the parties then divorce, the incapacitated husband can only look to maintenance from his wife or his former wife if she does not convert to Islam. Islam is a religion that promotes justice and each Muslim is exhorted to act with kindness and equity.

E. Section 81(2)
Termination of responsibility to maintain wife or former wife 3 months upon conversion

Proposed Amendments:
Section 81
(1) Except where an order for maintenance is expressed to be for any shorter period or where any such order has been rescinded, and subject to section 82, an order for maintenance shall expire –
(a) if the maintenance was unsecured, on the death of the husband or of the wife, whichever is the earlier;
(b) if the maintenance was secured, on the death of the spouse in whose favour it was made.
(2) Where an order for maintenance is in respect of divorce under subsection 51(1), such order shall expire –
(a) if the maintenance was unsecured, on the death of the husband or the wife, or three months after the conversion, or if the wife is pregnant upon the birth of the child or termination of the pregnancy, whichever is the earlier; or

(b) if the maintenance was secured, on the death of the husband or the wife, or three months after the conversion, or if the wife is pregnant upon the birth of the child or termination of the pregnancy, whichever is the earlier.

Recommendation:
That Section 81 not be amended.

Comments:
Save and except where there is sufficient matrimonial assets awarded to the wife, this amendment may potentially result in immediately subjecting the non-converting spouse or former spouse to poverty. The law must be conscious that it is dealing with human lives and to remove the life support of a dependant spouse upon three months notice cannot be justified.

Even in syariah, there is scholarly debate on the meaning of maintenance during iddah, in that the exhortion for Muslim men to provide accommodation and maintenance to his former spouse for a period of approximately three months after divorce should be deemed to be the minimum period and not maximum period for which a man is required to maintain his former spouse.

In any event, a divorced Muslim wife who is denied maintenance after the iddah period under the syariah has the recourse to apply for mut'ah (compensation) which is calculated on a per diem basis for the duration of the marriage. The selective importation of a syariah principle to limit maintenance to the iddah period without providing any alternative recourse to a divorced non-Muslim wife is a prime example of how the arbitrary selection of syariah principles can lead to injustice and lower public opinion on the capacity of the syariah to provide justice for women.

Furthermore, under syariah law, a father is to maintain his daughter until she is married. Whilst we do not support the arbitrary importation of syariah principles, a curious question to be noted is why the drafters saw fit to select the syariah principle that serves to shorten the period of maintenance to be provided by a Muslim husband to his divorced non-Muslim wife but not the syariah principle that serves to extend the period of maintenance to be provided by a Muslim father to his daughter, whether Muslim or non-Muslim.

F. Section 82
Termination of maintenance upon remarriage or adultery

Proposed Amendment:
Section 82
"(1) The right of any divorced person to receive maintenance … shall cease on his or her marriage to or living in adultery with any other person.
(2) The right of any divorced person to receive maintenance …under any agreement shall cease on his or her marriage to or living in adultery with any other person unless the agreement otherwise provides.
(3) This section does not apply to divorce under Section 51(1)".

Recommendation:

That Section 82 not be amended as proposed.

Comments:
We have already recommended that there not be discrimination against the non-converting spouse in that his or her rights upon divorce should not be less than the rights of divorced persons due to other causes. Therefore there is no necessity to add this new subsection as proposed by the AG Chambers.

G. Section 89
Religion of child upon conversion of father

Proposed Amendment:
Section 89
(1) An order for custody may be made subject to such conditions as the court may think fit to impose and subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relation to the upbringing and education of the child.

(2) Without prejudice to the generality of subsection (1), an order for custody may—
(a) contain conditions as to the place where the child is to reside …. ;
Provided that in deciding the religion in which he or she is to be brought up, the court shall take into consideration the personal law of the child.
(b) provide for the child to be temporarily in the care and control of some other person ….
(c) provide for a child to visit a parent deprived of custody ….
(d) give a parent …the right of access to the child…;
(e) prohibit the person given custody from taking the child out of Malaysia.

Recommendation:
To amend to, "***Provided that in deciding the religion in which the child is to be brought up, the court shall take into consideration the personal law of the child <u>at birth</u>".***

Comments:
The AG's Chambers in its notes explained that, "According to the principle of conflict of law, children are presumed to follow the religion of the father which under Jewish law, the children are presumed to follow the religion of the mother".

This presumption does not take into account the fact that the parent who attends to the day to day needs of the child and spends quality time with the child is most likely to have the greatest influence over the child. It is also discriminatory in its effect. Given that the *Constitution* provides that there shall be no discrimination on the basis of gender (see Article 8(2) of the *Constitution*) and given that the law provides that both parents shall have equal parental rights over the child (see Section 5 of the *Guardianship of Infants Act 1961*), which includes the right to determine the religion of the child, such a presumption is untenable. To preserve and apply an archaic discriminatory presumption at law in the face of Article 8(2) is unconstitutional.

A more equitable way of dealing with this issue is to provide that the child's religion shall remain unchanged except with the consensus of both parents. The child shall then have the right to choose his or her religion upon attaining 18 years of age.

Even if the law were to hold that a child shall be deemed to be Muslim and at age 18 have the option to change his or her religion, this appears to ignore the problems with apostasy under syariah law. It also creates uncertainty in the determination of the child's religion. At law, the welfare and best interest of the child is always of paramount consideration. It is thus better to grant the child the sole right to determine his or her religion upon attaining the age of majority.

H. Section 95
Maintenance of child to pursue higher education

Proposed Amendment:
Section 95
Except where the order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, whichever is the later.
Provided always that the court may on application by the child or any other person, extend the order for maintenance to cover such period as it thinks reasonable to enable the child to pursue further higher education or training.

Recommendation:
Proposed amendment to Section 95 is supported.

III. CONCLUSION

For nearly two decades, JAG has been lobbying for legal reforms on issues relating to women and children to effect gender equality and non-discrimination. This memorandum reflects on-going efforts of JAG to continue to campaign for women's rights and obligations in Malaysia.

Some of the proposed amendments to the Law Reform (Marriage and Divorce) Act 1976 would result in serious injustices against women and would also distort Islamic concepts about marriage and divorce. JAG urges that the process of reforming the Act be as open and transparent as possible.

In addition, JAG wishes to highlight the fact that Malaysia has been a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) since 1995. Under the Convention, Malaysia has the international obligation to implement policies and laws that eliminates discrimination against women and supports equality.

Conventionally, the courts do not consider international instruments ratified by the executive arm of the Government of Malaysia unless that instrument is tabled in Parliament and adopted through legislation as law of the nation. In the premise, it is crucial that the legal obligations of CEDAW be adopted through an act of Parliament. This adoption will ensure that the courts consider and enforce the obligations under CEDAW. It is important that the courts utilise this convention in its deliberations and decisions.

JAG hopes that Malaysia will make such a move to keep in line with international standards and uphold rights for all citizens.