AWARE'S Recommendations on Sexual Assault Law in Singapore

For: Ministry of Law

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INTRODUCTION

AWARE has identified six areas of concern: (1) sentencing for rape, (2) the definition of consent, (3) the scope and language of outrage of/insult to modesty, (4) the relationship between rape and sexual assault by penetration, (5) the marital rape immunity and (6) the gross indecency offence.

1 SENTENCING—UNNECESSARY TO RESORT TO DEATH PENALTY

AWARE welcomes the Law Minister's concern that rape should be adequately punished and deterred. However, AWARE does not support the use of a default death penalty in cases involving the victim's death.

First, the most urgent priority for policies tackling sexual violence is to improve the processes for investigating cases and achieving convictions, not to increase penalties.[1] Numerous studies have shown that, in general, "the perceived certainty of punishment is a much stronger deterrent [against crime] than perceived severity".[2] Consequently, reporting and conviction rates impact women's safety more profoundly than do the sentences received by the small proportion of offenders who are ultimately convicted. In AWARE's experience, women are often hesitant to report sexual violence because they fear the lengthy and tedious investigation process; moreover, many women report that the default attitude of officers tends to be scepticism toward or outright disbelief of the victim. Instead of increasing the severity of penalties, a more effective solution would be to increase support for victims and streamline the process. This would increase the proportion of victims who are willing to come forward and thus increase the likelihood that rapists will be caught and punished.

Secondly, the paradigmatic example of a violent rape by a stranger in fact represents a small minority of all rapes. Police rape statistics from 2005 and 2006, as well as AWARE's experience,[3] show that most victims are raped by persons known to them, such as family members or friends, and that fatal (or near-fatal) violence is seldom involved. The proposed default death penalty would have no effect in punishing or deterring those cases.

Thirdly, although it is right to treat rape as an aggravating circumstance in a charge for murder, that does not justify departing from the general principle that the court has the discretion whether to impose the death penalty for a murder charge (other than under s 300(*a*)). This would run counter to the purpose of the 2012

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[1] For detailed discussion of this point, please refer to the two memoranda attached, which AWARE prepared for the Singapore Police Force.

[2] Robert Apel, "Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence" (2013) 29 Journal of Quantitative Criminology 67 at 73, citing studies including, most recently, Pratt *et al*, "The empirical status of deterrence theory: a meta-analysis" in *Taking stock: the status of criminological theory* (Cullen, Wright, and Blevins ed) (Transaction, 2008) at pp 367–395.

[3] Especially from counselling victims through AWARE's Sexual Assault Befrienders Service and Sexual Assault Care Centre.

amendments, which aimed to allow the severity of punishments to fit the seriousness of the individual crime.[4]

Fourthly, based on the Law Minister's clarifications reported in the media, there is no need to change the law to arrive at the desired result. The Honourable Minister stated that the proposed change "does not mean that there will be a death sentence, but that the onus is on the attacker, usually a man, to prove that he didn't intend to cause it (the victim's death)".[5] If, as stated, the concern is to punish and deter rapists and sexual assaulters who *intend* to cause death, the appropriate response is for the Public Prosecutor to frame the charge under s 300(*a*), which already carries the mandatory death penalty if made out.

Summary of recommendations:

- Maintain the current system of penalties, which are adequately severe.
- Implement measures to improve reporting and conviction rates, such as increasing victim support and making the reporting and prosecution process more victim-friendly.

2 CONSENT—LACK OF STATUTORY CLARITY

Currently, consent is not positively defined within the Penal Code.[6] AWARE's experience in counselling victims indicates that this absence creates uncertainty in victims as to whether a prosecutable offence has been committed against them. The lack of a statutory definition also unnecessarily complicates police decisions on whether to take up particular cases, as well as how they process victims who make reports. This ultimately leads to meritorious cases not being prosecuted as victims either decide not to proceed or have their cases rejected.

In the context of rape, AWARE has encountered a number of victims who, when they went to the police, were asked questions focusing on their verbal agreement to the act of penetration, without sufficient attention being paid to potentially consent-vitiating factors such as the victim being threatened or drugged. One victim decided not to proceed with the report because she was told that she would be "whacked in court" for having had previous consensual sexual relations with the perpetrator, even though such prior relations do not legally rule out rape. There are several cases where the police seemed to believe that a victim who did not use physical force to resist the perpetrator, must have consented to the penetration. The investigating

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[4] Ministry of Law, "Fact sheet on the proposed amendments to the Penal Code and Criminal Procedure Code" (15 October 2012) < https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/fact-sheet-on-the-proposed-amendments-to-the-penal-code-and-criminal-procedure-code.html>.

[5] As quoted in Hoe Pei Shan, "Study sought on default death sentence", *The Straits Times*, 14 July 2014.

[6] Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Singapore and Malaysia* (LexisNexis, 2nd Ed, 2012) at p 387 ("*Criminal Law*"), [12.105]. The learned authors describe this absence as "unfortunate".

officers either were not aware, or did not make it clear to the victim, that physical submission does not in itself amount to consent.[7]

Other times the misconception originates with the victims themselves. One victim assumed that her agreement to earlier acts of sexual intimacy meant that she had also consented to penetration. Unfortunately, she realised the true legal position only when AWARE counselled her, after she had already told the police that the penetration was consensual, based on this misunderstanding.

Such misconceptions on the part of police and victims stem in part from the lack of a statutory basis for consent. A clear definition for the purposes of sexual offences, such as "voluntary agreement … to engage in the sexual activity in question",[8] should therefore be provided to aid the understandings of both police and victims.

Similarly, s 90 of the Code, which specifies some circumstances precluding consent, should also be improved to make it clearer and more accessible.

First, s 90 is confusingly phrased: it states that "[a] consent is not such consent as is intended by any section of this Code" in such circumstances. It would be clearer and less artificial if the provision stated that these circumstances preclude consent, or simply that no consent is obtained under these circumstances.[9]

Secondly, s 90 is dislocated from the sexual offences, where the lay reader would expect to find such information. Instead, it is found in Chapter IV, General Exceptions, because s 90 relates primarily to the positive defence of consent. It would be preferable to have a more specific definition for the purposes of sexual offences,[10] including an express statement that consent must be to specific activity, and not to sexual activity in general (*e.g.* consent to sexual touching does not necessarily imply consent to penetration). Illustrations of what is and is not valid consent in the sexual context should also be added to further aid comprehension. Serious misunderstandings are common among victims, police officers, and even legal professionals. For instance, the misconception that "injury" in s 90(a) is limited to physical injury is one which even the learned editors of *Ratanlal and Dhirajlal's Law of Crimes* have fallen prey to.[11] Illustrations could help to dispel such misconceptions.

Thirdly, because of its generality, s 90 omits other common circumstances which should also preclude consent in the context of sexual offences. Two notable circumstances stated in the Criminal Code of Canada are where "the accused counsels or incites the complainant to engage in the activity by abusing a position of

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[7] See *e.g.* *PP v Victor Rajoo* [1995] 3 SLR(R) 189, [40]–[41].

[8] Wording taken from the Criminal Code of Canada (R.S.C., 1985, c. C-46) ("Canadian Criminal Code"), s 273.1(1).

[9] *Criminal Law* at p 387, [12.105] ("The law should reflect the reality: there is simply no consent in such cases").

[10] See *e.g.* the Canadian Criminal Code, s 273.1(2).

[11] As pointed out in *Criminal Law*, p 560, [19.18].

trust, power or authority" or where "the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity".[12] Such circumstances, which are consistent with (albeit not expressly recognised in) the existing scheme of the Code,[13] should be accepted and given a statutory basis.

Fourthly, s 90 does not expressly state that the list of circumstances is not exhaustive, potentially misleading the lay reader. This should be expressly stated.[14]

Finally, the significance of mistake as to consent—currently covered only under the mistake of fact defence (s 79)—should be incorporated into s 90. Victims are generally unaware that only *reasonable* mistakes as to consent act as a defence. For the avoidance of doubt, this information should be integrated into the definition of consent.

Summary of recommendations:

- Expressly define (and illustrate) consent for the purposes of sexual offences.
- Expand the list of circumstances precluding consent for the purposes of sexual offences and make it clear that the list is non-exhaustive.

3 MODESTY—A CONCEPT IN NEED OF MODERNISATION

AWARE believes that the terms "outrage of modesty" (s 354) and "insult [to] modesty" (s 509) are confusing and inappropriate. In the sexual context, "modesty" is irretrievably associated with women and with chastity.[15] Its use as a concept is therefore out of step with the contemporary recognition that men, too, are harmed by non-consensual sexual conduct, and that men and women deserve protection regardless of whether they are "modest" in their behaviour.[16]

Furthermore, "outrage of modesty" is an opaque and confusing term. AWARE's experience with victims indicates that retaining the archaic phrasing impedes the ability of police to effectively communicate with victims regarding such crimes. In particular, many victims have stated that police officers asked them questions such as "Were you outraged?" in order to determine whether an offence had been committed. These victims were thus given the false impression that the offence was dependent on their subjective sense of outrage, rather than the nature of and intention/knowledge behind the act.

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[12] Canadian Criminal Code, s 273.1(2)(*c*), (*e*).

[13] The first circumstance could be viewed as a specific instantiation of the "fear of injury" factor. The second circumstance is impliedly acknowledged in s 377C(*a*) of the Code, which states that "penetration is a continuing act from entry to withdrawal". This means that a woman may withdraw her consent at any time during a sexual encounter: *Criminal Law*, 379, [12.89].

[14] Compare the Canadian Criminal Code, s 273.1(3), which states that "Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained".

[15] See *e.g.* the definition in the Indian case of *Rupan Deol Bajaj v KPS Gill* AIR 1996 SC 309 at [14] (including "womanly propriety of behaviour; scrupulous chastity of thought").

[16] *Criminal Law*, p 375, [12.84].

The Code should therefore be updated to reflect the prevailing understanding of non-consensual sexual conduct as a violation of an individual's right to control what is done to his or her body, instead of as an "outrage" of an abstract quality called "modesty". The natural term to use would be "sexual assault". This would harmonise s 354 with the offence under s 376, the marginal note to which reads "Sexual assault by penetration".

In addition to the inappropriateness of the term "modesty", AWARE has two other concerns about s 354 as it stands.

The first is that s 354 is, counter-intuitively, parked under criminal force and assault, rather than under sexual offences. To complete the integration and to increase the section's accessibility to laypersons, s 354 should be placed within the same category (sexual offences). The section should also be redrafted in similar terms to s 376, expressly stating that sexual conduct in the absence of consent will be an offence.

The second is that due to the requirement of intention or knowledge in s 354, there may be a possibility that even a wholly unreasonable belief that the victim was consenting would negate the *mens rea* of the crime.[17] This interpretation, if accepted, would afford insufficient protection to victims and be too lenient to offenders who carelessly assume consent to be present. Such uncertainty should be dispelled by expressly providing that the *mens rea* will be satisfied so long as the offender did not *reasonably* believe that the victim was consenting to the touching.

Finally, insult to modesty under s 509 should also be modernised. Men as well as women deserve protection against offensive sexual speech, gestures, and intrusions into privacy; s 509 should therefore not be limited to female victims. Instead of defining the offence in terms of modesty, a gender-neutral phrase such as "word or gesture of a sexual nature intended to offend" could be used. This would bring s 509 in line with more recent legislation such as the Protection from Harassment Act 2014, which provides protection regardless of the victim's gender, and also with the Attorney-General's Chambers' commendable push toward gender neutral language in general.[18]

Summary of recommendations:

- Replace the term "outrage of modesty" under s 354 with "sexual assault".
- Redraft the provision to parallel s 376 (sexual assault by penetration) and relocate it under sexual offences.
- Redraft s 509 to be gender-neutral in both effect and language.

[17] *Criminal Law*, p 389, [12.111].
[18] Walter Sim, "Attorney-General's Chambers to simplify language used in Singapore's laws", *The Straits Times*, 29 July 2014 <http://www.straitstimes.com/news/singapore/more-singapore-stories/story/attorney-generals-chambers-simplify-language-used-singap>.

4 RAPE AND SEXUAL ASSAULT BY PENETRATION

Given the similarities between rape and sexual assault by penetration, AWARE's view is that the offence of rape would be more clearly framed as a subset of sexual assault by penetration, rather than as an entirely separate offence as it is now. For instance, the Code could, having first defined sexual assault by penetration, provide that "sexual assault by penetration is rape when the penetrating object is the offender's penis". The rape-specific provisions could follow that definition, but still come under the section on sexual assault by penetration. This would signal the recognition that sexual assault by penetration is not necessarily a lesser offence than rape.

Additionally, in light of the drive toward greater gender-neutrality in both the language and substantive protection afforded by the law, AWARE believes that the offence of rape should be reformulated to recognise the physical and psychological reality that—just as with outrage of modesty/sexual assault—men can also be victims of this form of sexual violence. The gender of the victim should thus no longer be relevant to the offence of rape.

Summary of recommendations:

- Incorporate the offence of rape (s 375) as a subset of the offence of sexual assault by penetration (s 375).
- Make the offence of rape gender-neutral as regards the victim.

5 MARITAL RAPE—AN OUTDATED EXEMPTION

Although the 2007 amendments to the Code were a step forward, AWARE's view is that they did not go far enough. It should not be necessary for a woman to bring herself within one of the exceptions to the marital rape exemption under s 375(4); instead, the exemption should not exist at all.[19]

The marital rape exemption stems from the archaic notion that a married woman is in a perpetual state of consent to sexual intercourse with her husband.[20] This is incompatible with the ethos of contemporary Singapore, which recognises the individual agency and bodily integrity of all women. In particular, marital rape was recognised as a form of sexual violence against women in the Declaration on the Elimination of Violence against Women adopted by the United Nations General Assembly.[21] Although that Declaration is not legally binding, Singapore has endorsed its conclusions by signing the Declaration on the Elimination of Violence Against Women in the ASEAN Region.[22]

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[19] Albeit the current exceptions to the marital rape exemption should continue to be judicially relevant as circumstances that are probative of a lack of consent.
[20] *Criminal Law*, p 379, [12.89].
[21] UN Resolution 48/104 of 20 December 1993.
[22] Issued on 30 June 2004 in Jakarta, Indonesia by the Foreign Ministers.

Further recognition that marriage does not dispense with consent is found in s 376(2) of the Code. This does not provide any marital exemption whatsoever, thereby implicitly acknowledging that a married woman deserves unconditional protection from sexual assault by penetration. It is inconsistent and arbitrary for this protection to vanish when the instrument of penetration happens to be the penis.

Some opponents of repealing the marital rape exemption have relied on the evidential difficulties that can arise in the context of marital rape. AWARE's view is that the problem is only unusually acute where corroborating evidence is absent. Under those circumstances, an adequate safeguard against wrongful conviction already exists in the form of the "unusually compelling or convincing" standard found in the case law.[23] There is therefore no reason to retain the marital rape exemption, which, even cast in the best light, is an inappropriately blunt tool for a task which the law of evidence already performs.

Summary of recommendations:

- Remove the marital rape exemption from s 375.

6 GROSS INDECENCY—AN UNNECESSARY OFFENCE

AWARE supports the rights of women and men to have equal opportunities in all aspects of their lives. AWARE is troubled by the continued retention of s 377A, which needlessly undermines this equality of opportunities. As noted by commentators including the Law Society in its submissions to the Ministry of Home Affairs,[24] the fundamental aim of criminal law is to prevent and punish harm to other persons. Non-consensual sexual conduct is punished elsewhere in the Code; consensual sexual conduct, because it does not harm either participant, ought not to be criminalised regardless of the position one takes on its morality.

AWARE therefore reiterates its support for the abolishment of s 377A in its entirety.

Summary of recommendations:

- Repeal s 377A.

[23] Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik [2008] 1 SLR(R) 601 (CA) at [37]–[39].
[24] Law Society of Singapore, "Executive Summary of Council's Report on the Proposed Amendments to the Penal Code" <http://www.lawsociety.org.sg/forMembers/ResourceCentre/FeedbackinPublicConsultations/2007/ExecutiveSummaryProposedAmendmentstothePenal.aspx>.