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*Permanent Representative of Malaysia  
Geneva*

24 May 2018

**MS. ALDA FACIO**

Chair of the Working Group on the issue of discrimination  
against women in law and practice  
Office for the High Commissioner for Human Rights  
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Madam,

I refer to your letter of 29 November 2017, ref. OL MYS 5/2017, in your capacity as Chairperson of the Working Group on the issue of discrimination against women in law and practice.

2. I wish to hereby transmit in the ANNEX the response of the Government of Malaysia in respect of the Working Group's position on Malaysian laws criminalizing adultery as outlined in the Working Group's aforementioned letter.
3. In thanking the Working Group for its understanding and cooperation, I would like to express my sincere hope that the attached response will be fully taken into account by the Working Group.

Please accept, Madam, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read 'Amran Mohamed Zin', written in a cursive style.

**Dato' AMRAN MOHAMED ZIN**  
Ambassador/Permanent Representative

## ANNEX

**RESPONSE TO THE COMMUNICATION FROM THE WORKING GROUP ON THE  
ISSUE OF DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE****CONCERNING THE CRIMINALISATION OF ADULTERY UNDER THE SHARIA  
CRIMINAL OFFENCES (FEDERAL TERRITORIES) ACT 1997 WHICH SEEMS TO  
CONTRAVENE INTERNATIONAL HUMAN RIGHTS NORMS AND STANDARDS**

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The Government of Malaysia wishes to underscore that our observations on the issues and allegations raised in the Communication are prepared in the interest of fair play and transparency and are based on official records and information after due consultation with the relevant Malaysian authorities. The observations are reflected in the subsequent paragraphs which are elucidated consecutively.

**Issue 1: Information on the impact of the criminalisation of adultery, including the number of prosecutions for adultery and the number of prosecutions instituted pursuant to a complaint of rape**

2. For the purpose of this observation, the Government of Malaysia would like to highlight the legislative history of section 23 of the Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559] and it provides as follows:

***“Sexual intercourse out of wedlock***

*23. (1) Any man who performs sexual intercourse with a woman who is not his lawful wife 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 whipping not exceeding six strokes or to any combination thereof.*

*(2) Any woman who performs sexual intercourse with a man who is not her lawful husband 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 whipping not exceeding six strokes or to any combination thereof.*

*(3) The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be prima facie evidence of the commission of an offence under subsection (2) by that woman.*

*(4) For the purpose of subsection (3), any woman who gives birth to a fully developed child within a period of six qamariah months from the date of her marriage shall be deemed to have been pregnant out of wedlock.”*

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3. From the provision above, it is an offence if either a man who performs sexual intercourse with a woman who is not his lawful wife or a woman who performs sexual intercourse with a man who is not her lawful husband. In section 2 of Act 559, "*zina*" means sexual intercourse performed between a man and a woman out of wedlock.

**(a) The rationale for the criminalisation of adultery in Act 559**

4. The Government would like to stress that the law criminalising adultery in Section 23 of Act 559 does not discriminate against women. The provision provides equal punishment for either a man who performs sexual intercourse with a woman who is not his lawful wife or a woman who performs sexual intercourse with a man who is not her lawful husband that on conviction, both he or she shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

**(b) Whether laws criminalizing adultery, such as the Syariah Criminal Offences (Federal Territories) Act 1997, are based on and result in discrimination and violence against women**

5. Section 23 of Act 559 was drafted based on Islamic principles. It is generally accepted and adhered to by the Muslim community in Malaysia as they acknowledge that the law is derived from the sources of Islamic law such as the Quran and Hadith. This issue will be dealt with based on the following assertions:

**i. It is far more common for women to get charged with the crime**

6. It is observed that there is no records or statistics to support the above statement. In the absence of any proof to support the statement, the accuracy of such statement is wholly denied as records show that both parties involved have been charged for the crime committed.

**ii. Syariah law imposes an evidential burden of four (4) male witnesses to prove the commission of a crime of adultery**

7. Generally, the testimony of two (2) men is sufficient for the establishment of a criminal violation under Islamic law. Yet, the law of adultery or *zina* requires four (4) witnesses. The evidential requirement for adultery was intended to protect women from frivolous charges. The requirement of four (4) male witnesses with all its restrictions and specifications as witnesses is a merciful measure from God to avoid incriminating innocent people. A male witness should be credible, free, Muslim and should have witnessed the actual act of intercourse. Thus, one who has lied previously or committed other reprehensible acts may not be a witness. A witness must also fully understand the significance of both the offence and the testimony.

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8. Besides that, the strict evidential requirement for adultery is also intended to preserve the privacy of Muslims as one of the most valued principles in Islam. In Muslim societies, men usually have limited access to enter other houses as compared to women. The requirement of four (4) male witnesses makes it more difficult to prove adultery as it is not easy to find four (4) male witnesses at any one time.

9. Therefore, the purpose of imposing the evidential burden of producing four (4) male witnesses to prove the commission of a crime of adultery is not based on discrimination or violence against women but intended to protect women from frivolous charges and to preserve the privacy of Muslims. It is to be highlighted that the requirement of four (4) male witnesses applies only to *hudud* punishments which is not practised in Malaysia.

**iii. The pregnancy of a woman will constitute prima facie evidence of sexual intercourse out of wedlock**

10. Pregnancy as proof of adultery has been agreed upon by many Islamic scholars. A private illicit sexual act becomes public when pregnancy occurs. Thus, it becomes absolutely necessary for the pregnant woman to justify her pregnancy either by claiming rape or marriage. If she fails to do so or fails to prove either, and there are no other uncertainty or *shubuhah* in the matter, then the pregnancy becomes proof of *zina* without the need for four (4) male witnesses or a confession.

11. Further, other evidences such as evidence based on deoxyribonucleic acid (DNA), medical reports and closed-circuit television (CCTV) records can also be considered by the court if the crime cannot be proved by four (4) male witnesses. Adultery proved by these evidences is punishable under *ta'zir*. *Ta'zir* refers to punishment for offences at the discretion of the judge or ruler of the state. Act 559 only provides for *ta'zir* punishments as *hudud* punishments are not practised in Malaysia.

12. Therefore, the pregnancy of a woman as *prima facie* evidence of the sexual intercourse out of wedlock is not based on discrimination or violence against women. It is merely taken as *prima facie* evidence which can be rebutted by further evidence proving that the pregnancy was not caused by adultery but by other means such as pregnancy by artificial insemination or that rape had occurred. The law protects women by requiring strong evidence to support allegations of adultery, making such offences difficult to prove. It also provides punishment to those who accuse without bringing witnesses to prove such accusations.

**ANNEX****v. Women's right to seek justice against the accusation of committing a crime of adultery**

13. Ibn Hazm, an Islamic scholar, argued that a woman who reports having been raped by a specific man should not be viewed as making a false accusation. She however should be viewed as a plaintiff seeking justice, and hence should not be liable.

14. As a plaintiff, the woman has two (2) options: she should be asked for a clear proof or *bayyinah* supporting her claim, and if she produces it then the man should be punished accordingly; or in the event the woman is not able to produce adequate evidence, then the man would have to take an oath that he did not attack her, nor did he force her into any action. After the oath, the two parties are free to leave and neither of them is liable for any punishment whatsoever.

15. Although the Syariah law allows men to be witnesses in their own accusations, his testimony must also be consistent with three (3) other male qualified witnesses to prove the accusation. In this instance, the testimony of male accuser will be compared to the three (3) other testimonies to determine the veracity of the testimonies.

16. The requirement of additional evidential proof when it comes to women is a protection given to women in Islam. It safeguards women against any malicious accusations or any ill-intended persecution or prejudice from others. This higher evidential burden makes it more difficult to charge women.

17. It would be unfair to conclude that the basis for requiring more witnesses in the case of women is based on discrimination. In fact, it is more of recognising women's role in society and the inherent physical make of women as compared to men. It also protects women from the harsh judgment of men and being generally frailer than men, may be subjected to unfair treatment by men.

**vi. Legislation criminalizing adultery may exacerbate gender based violence as women who are accused and or convicted of adultery tend to be targets of violence and abuse by members of family, community or law enforcement officers, due to a belief that they deserve to be punished for their moral crimes**

18. The criminalisation of adultery in Syariah law is to encourage responsibility of partners and to safeguard women against social problems that may arise from having to raise a child on her own. In this sense it seeks to avoid future discrimination or violence that may be experienced by the mother and the child. This should not be construed as discriminatory but rather to achieve fairness.

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**(e) Whether the criminalization of sexual relations between consenting adults should be regarded as an interference with the privacy of the individuals concerned**

19. Preservation of the privacy of Muslims is one of the most valued principles in Islam. Most Muslim scholars agree that there are generally two (2) classification of rights; namely rights of man owed to God; and the rights of man to other man

20. In Malaysia, the Islamic Religious Departments are the authorities responsible to receive reports from the public as regard to adulterous activities involving persons professing Islam. Upon receiving such a report, it becomes the duty of the Islamic Religious Department to investigate and to arrest the offenders if they find that an offence has been committed.

21. The criminalization of sexual relations between unmarried yet consenting adults should be regarded as intended to protect the right of society for the purpose of public interest or *maslahah* rather than the privacy of the individuals concerned.

22. *Maslahah* literally means benefit or interest. For al-Ghazali, an Islamic scholar, *maslahah* consists of considerations which secure a benefit or prevent a harm but which are, simultaneously, harmonious with the objectives of the *Syariah* or *Maqasid Syariah*. These objectives consist of protecting the five (5) essential values, namely religion, life, intellect, lineage and property.

23. *Maslahah* is divided into three (3) types, namely, the essentials (*daruriyyat*), the complementary (*hajiyyat*) and the embellishments (*tahsiniyyat*). The prohibition of *zina* classified into the essentials (*daruriyyat*). The essentials are those on which the lives of people depend, and whose neglect leads to total disruption and chaos. They consist of the five essential values (*al-daruriyyat al-khamsah*) namely religion, life, intellect, lineage and property. These must not only be promoted but also protected against any real or unexpected threat which undermines their safety.

24. The prohibition of *zina* is to protect one of the essential values namely lineage as *zina* would threaten lineage or *nasab*. The prohibition of *zina* is also absolute and without exception. It is an act that attacks the foundational unit of society, the family and also results in the birth of children outside of marriage. *Syariah* aims to protect against such chaos and against the damage to the family unit caused directly by adulterous relationships and also indirectly due to the stigma attached to adultery. The punishments prescribed against an offender of *zina* serve as a deterrent to others.

25. Therefore, the criminalization of sexual relations between consenting adults is not to be taken as an interference with the privacy of the individuals concerned.

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Rather, it is to protect the interest of the public as a whole and to prevent harm or chaos and ultimately, preserve public order and morality.

**(f) The number of prosecutions for adultery and the number of prosecutions instituted pursuant to a complaint of rape**

26. The offence of adultery is provided for under the respective States' Syariah Criminal Offences Act, Enactments and/or Ordinance. The statistics shows that the total number of prosecutions under Section 23 of Act 559 at the Syariah Courts in the Federal Territories from 2013 to 2017 is 24 cases only. Based on records, there is no prosecution instituted pursuant to a complaint of rape.

**Issue 2: Information on any measures that the Government of Malaysia has taken or intends to take in order to implement the recommendations by United Nations human rights mechanisms, referred to in the Communication, and to bring its legislation into compliance with international human rights law**

27. The Government notes the Working Group's recommendation for the Government of Malaysia to comprehensively review the provisions of Act 559 and to remove all provisions that discriminate against, or have a discriminatory impact on women, including those regarding adultery. We also note that this recommendation is in line with Article 2 of the CEDAW.

28. As a State Party to the CEDAW, Malaysia respects and guarantees the rights provided under the CEDAW subject to reservations made. In line with Article 8(2) of the Federal Constitution, the existing domestic legislations including Act 559 had been enacted to ensure justice be served without undermining the principle of non-discrimination in gender equality.

29. The Government of Malaysia also reiterates its commitment in upholding and implementing its current legal framework and policies pertaining to matters related herein on the basis of equality and without distinction or discrimination between men and women.

30. With regard to the recommendation pertaining to the punishment of stoning prescribed by the *Hudud* penalties under Syariah law, the Government wishes to inform that such punishment is not practised in Malaysia.

**Conclusion**

40. As a State Party to the CEDAW, the Government of Malaysia is cognisant of its obligations and commitment towards strengthening efforts to reject all forms of discrimination as well as violence against women. Malaysia remains committed to not only recognise the important role of women but also to ensure that the rights of

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women continue to be promoted and protected. The principles and provisions of CEDAW have been gradually incorporated into domestic legislation.

41. Malaysia's commitment in promotion and protection of the rights of women is evidenced by several policies, administrative decisions, programmes and amendments to laws in order to grant equal rights to women, and to remove discrimination against them in social, educational, economic and political spheres.