



REPORT ON CYBERHARASSMENT AND OTHER HARMFUL CYBER BEHAVIOUR

The Law Reform Process

1. The PeopleACT published its Issues Paper on cyberharassment, cyber violence, and other harmful cyber behaviour on 8 April 2017, which served as a consultation document to obtain views and opinions from stakeholders on whether current laws in Malaysia are sufficient to tackle the problem of cyberharassment and other harmful cyber behaviour.
2. Five issues were outlined in the Issues Paper, namely:
 - Issue 1: Whether the current provisions in the Communications and Multimedia Act 1998 should be amended to specifically address cyber-harassment and other forms of harmful cyber behaviour;
 - Issue 2: Whether the current law is sufficient to address online sexual harassment;
 - Issue 3: Whether current laws prohibiting obscene publications is sufficient to tackle cyberharassment and other harmful cyber behaviour;
 - Issue 4: Whether current penal law adequately addresses threats of death and threats of rape and other abusive communications made using cyber technology;
 - Issue 5: Whether the current law is sufficient to deal with the offence of using cyber technology to seriously interfere with another's privacy.
3. Between April and December 2017, PeopleACT organised seven public consultations¹ where the PeopleACT discussed the content of the Issues Paper with civil society organisations, telecommunications companies, Internet service providers, government agencies including the Malaysia Communications and Multimedia Commission (MCMC), the Human Rights Commission of Malaysia (SUHAKAM), the Malaysian Bar, members of parliament (MPs), academicians, and legal practitioners.
4. The PeopleACT also contacted all 222 MPs, two state assembly persons, 24 civil society organisations, eight government agencies, seven media organisations, two statutory bodies, three telecommunication companies, 13 academicians, and 16 individuals, inviting them to submit their comments on the Issues Paper. The PeopleACT received submissions from six organizations.
5. Through the public consultation as well as direct submissions, the People ACT received many valuable comments and submissions and the PeopleACT is grateful for the contribution.
6. Based on the comments and submissions received as well as taking cognisance of the need to tackle this problem, the PeopleACT is proposing that cyberharassment is dealt

¹ 30 May 2017; 14 July 2017; 22 July 2017; 25 July 2017; 8 August 2017; 12 August 2017; and 4 September 2017.

with through legislation and an awareness raising campaign. The latter has been carried out by the PeopleACT since April 2017. As regards the former, this report, which includes draft legislation, is meant to assist the government and other stakeholders, by providing a legal framework, which could afford legal protection and remedies to survivors of cyberharassment and other harmful cyber behaviour in Malaysia. It is highlighted that the proposed draft legislation does not prescribe the type of punishment or the length of punishment. The PeopleACT has intentionally omitted this as it does not possess the expertise in this area and further work would need to be done on the detailed type and length of punishment.

7. The PeopleACT would like to reiterate its commitment to freedom of expression in accordance with international human rights standards i.e. that freedom of expression is the general rule. As it is not an absolute right, restrictions are permissible so far as it is provided by law (and interpreted narrowly); proportionate; and are necessary for the respect of the rights and reputations of others, or for the protection of national security, or public order, or public health or morals.
8. As specified in the Issues Paper, a number of laws are unsuitable (and therefore not considered) to be used to tackle cyberharassment and the like, as these laws, at its essence, unnecessarily restrict freedom of expression in Malaysia and could create additional barriers to freedom of expression in Malaysia:
 - Firstly, criminal defamation set out in section 499 of the Penal Code. The PeopleACT is of the opinion that to couch defamation within the realm of criminal law, which attracts imprisonment and heavy fines, is disproportionate and is not a permissible restriction to freedom of expression. The United Nations Special Rapporteur on Freedom of Expression has continued its call for governments to repeal criminal defamation laws;²
 - Secondly, the Sedition Act 1948 is unsuitable to be used to tackle the problem of cyberharassment as there is a lack of clarity with regard to fundamentals of the said legislation; this has the potential to leave a negative effect on freedom of expression in Malaysia. In addition, with Malaysia's commitment to the Human Rights Council to address concerns regarding the Sedition Act 1948,³ the PeopleACT feels that a separate exercise is required to deal with the Sedition Act 1948 to ensure the balance between freedom of expression and restrictions;
 - Finally, section 298A of the Penal Code, which makes it an offence for any person who "by words, either spoken or written, or by signs, or by visible representations, or by any act, activity or conduct, or by organizing, promoting or arranging, or assisting in organizing, promoting or arranging, any activity, or otherwise in any other manner (a) causes, or attempts to cause, or is likely to cause disharmony, disunity, or feelings of enmity, hatred or ill will; or (b) prejudices, or attempts to prejudice, or is likely to prejudice, the maintenance of harmony or unity, on grounds of religion, between persons or groups of persons professing the same or different religions". For this provision, the PeopleACT would like to highlight that in the case of *Mamat Daud & Ors v The Government of Malaysia*,⁴ the Supreme Court held that section 298A of the Penal Code is invalid and null and void. This was affirmed by the Court of Appeal in the case of *Tan Jye Yee & Anor v PP*.⁵

² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17, Human Rights Council, Twentieth session, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/137/87/PDF/G1213787.pdf?OpenElement>> accessed 28 March 2017.

³ UN Press Release, 'Malaysia Sedition Act threatens freedom of expression by criminalising dissent', 8 October 2014, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15144#sthash.ZRjfUJs1.dpuf>> accessed 28 March 2017.

⁴ [1988] 1 CLJ 11.

⁵ [2015] 2 CLJ 745.

9. In conclusion, the PeopleACT would like to point out that cyberharassment and other harmful cyber behaviour is a growing problem in Malaysia and it is important that Malaysia acts now to tackle the problem. Since the publication of the PeopleACT's Issues Paper, the Ministry of Communication and Multimedia recorded 1,150 complaints relating to cyberbullying, harassment, menacing actions, misuse of personal information and photos with the intention to shame or humiliate another individual between January and July 2017.⁶ In addition, the same Ministry observed that there has been an increased use of the Internet by Malaysians particularly social media platforms – in 2017, there were 24.1 million Internet users in Malaysia, of which 89.3 per cent used social media platforms and 15.5 per cent were below the age of 19 years.⁷

⁶ Pemberitahuan Pertanyaan Dewan Rakyat, Soalan No. 384.

⁷ Dewan Negara, Parliament Ketiga Belas, Penggal Lima, Mesyuarat Ketiga, 7 December 2017, DN 7.12.2017.

I. A NEW PROTECTION AGAINST HARASSMENT ACT

- 1.1 The Issues Paper highlighted that other jurisdictions such as UK, Ireland, Singapore, and Australia have specific legislation that deals with cyberharassment and other harmful cyber behaviour – in particular the legislation in these countries explicate the different types of cyberharassment and the elements and key words of each offence clearly defined. Additionally, harassment offences in these jurisdictions require that the communication be *grossly* offensive (emphasis added) and that the harassing behaviour is persistent.
- 1.2 In contrast, sections 211 and 233(1) of the Communications and Multimedia Act 1998 (CMA 1998) offers a more general provision making it an offence if any communication is “indecent, obscene, false or menacing” and the said communication is intended to “annoy, abuse, threaten, or harass” any person.
- 1.3 The submissions and comments received by the PeopleACT agreed that the CMA 1998 was inadequate to deal with the different forms of cyberharassment because the provisions were vague and too wide. Some felt that the CMA 1998 was never intended to be used to tackle cyberharassment in a comprehensive manner. In addition, all felt that more specific offences were needed to deal with cyberharassment.
- 1.4 As regards the location of the anti-cyberharassment provision, most stakeholders felt that because the CMA 1998 was a problematic law i.e. that it has been used in ways that are incompatible with international human rights principles of freedom of expression, a standalone Act that addressed cyberharassment and other forms of harmful cyber behaviour would be more effective. A minority of stakeholders preferred to amend sections 211 and 233(1) of the CMA 1998 to make it more specific – for example, to delete the word “annoy” and to have a statutory definition of the word “harass”.
- 1.5 After considering all the comments and views received, the PeopleACT considers that a new stand-alone Act, entitled ‘Protection Against Harassment Act’ that proscribes the many forms of harassment is a better course of action to avoid confusion. It would also provide an opportunity to legislate clearer offences and provide for better and more suitable remedies for survivors of cyberharassment and the like.
- 1.6 Additionally, the objects and purpose of the stand-alone Act to tackle cyberharassment are different from the CMA 1998 – the objects of the CMA 1998 are focused on the industry i.e. to “promote national policy objectives for the communications and multimedia industry and to establish a licensing and regulatory framework... for the communications and multimedia industry...”. Whereas the proposed Protection Against Harassment Act is intended to protect individuals from harassment and other harmful cyber behaviour and deter grievous forms of cyberharassment. The draft Protection Against Harassment Act is at **Annex 1**.

Offence of harassment

- 1.7 As regards the specific offence of harassment, all the stakeholders were of the opinion that the offence of cyberharassment should include the elements of “persistent behaviour” and only “grossly” offensive communication would be punished. Stakeholders felt that the law should only be invoked in serious cases to avoid abuses and to ensure that freedom of expression is respected and protected.
- 1.8 The PeopleACT agrees that the threshold for the offence of harassment is not set too low so that communication that is merely annoying and irritating is not caught by the Act. As such, the PeopleACT recommends that the offence of harassment includes elements of “persistent behaviour” and that communication that causes only serious

alarm, distress, or harm is caught by the proposed Act. This would ensure that the offence is confined to conduct that is intentionally designed to harm or harass another person.

- 1.9 In addition, the PeopleACT feels that a general offence of harassment, which would cover online and offline harassment would be beneficial as the modes of transmitting harassing communication can take many forms and it would be prudent that the new proposed offence of harassment is generally worded to cover all modes of communication.

Offence of indirect harassment

- 1.10 To ensure situations where persistent harmful online communication concerning the survivor is not communicated to the complainant directly but such harmful communication is posted on a third party website or platform, for example social media sites maintained by the survivor's friends or relatives, are covered, it is recommended that the proposed Act includes an offence of indirect harassment.

Offence of harmful electronic communication

- 1.11 Inspired by the Irish Harmful and Malicious Electronic Communications Act 2015 and taking cognisance of a number of incidents reported in the media and to the PeopleACT where Internet users have asked survivors to harm themselves or to kill themselves (words used included "Mati mati mati"; "U better jump from Penang bridge..."; and "Go get a rope and hang yourself"), the PeopleACT considers that such grievous comments should be halted to ensure a more empowering online environment.

- 1.12 Although Malaysia has yet to document a case where Internet users directly incite another to commit suicide, this problem seems to be emergent as there has been a number of reported cases of youths committing suicide because of cyber harassment by their peers.

- 1.13 As such, the PeopleACT recommends that the proposed Protection Against Harassment Act include a provision that makes it an offence for a person to incite or encourage another person to commit suicide or cause serious harm to themselves.

Offences of stalking and stalking involving fear of violence or serious alarm or distress

- 1.14 The Issues Paper highlighted that the Protection from Harassment Act in the UK defines the offences of stalking and stalking involving fear of violence or serious alarm or distress. It stops short of defining the offence of cyber stalking but the UK Crown Prosecution Service (CPS) Social Media Guidelines for Prosecutors provide examples of cyber-stalking.

- 1.15 Whilst the stakeholders did not provide views on stalking, the PeopleACT recommends that the proposed Protection Against Harassment Act includes the offences of stalking and stalking involving fear of violence or serious alarm or distress. In the survey conducted by the PeopleACT, of the 50.4 per cent who experienced online harassment, 31 per cent experienced online stalking. Also, according to the Women's Aid Organisation, more than 250,000 domestic violence survivors in Malaysia were stalked by their abusers⁸ and there are no laws that criminalise stalking. The Domestic Violence Act 1994 provides a remedy where victims of stalking can obtain a protection order but only against spouses, ex-spouses, or family members and only after there is

⁸ 'The Couch' to discuss the issue of stalking', *The Star Online* (Kuala Lumpur, 21 July 2017), www.thestar.com.my

proof of abuse; this does not address the problem that some stalkers are not related to their victims.

- 1.16 As such, the PeopleACT considers it highly desirable that the proposed Protection Against Harassment Act includes specific offences of stalking and that this offence of stalking is wide enough to cover the offence of cyber stalking. As to whether it is necessary to prove harm before it amounts to stalking, the PeopleACT recommends that like the UK Protection from Harassment Act, there should be two separate offences of stalking, where harm need not be shown and the offence of stalking involving fear of violence or serious alarm of distress. The rationale for having two separate offences of stalking is to ensure that where the course of conduct of stalking does not include harm, the punishment would be less than when stalking was carried out to cause fear, serious alarm, or distress or that violence will be used against another person.

Remedies

- 1.17 One of the main objectives of the proposed Protection Against Harassment Act is to provide legal protection to survivors of cyber harassment. As such, it is important that the said proposed Act includes clear remedies that can be sought by the survivor. Whilst this would require further detailed analysis, the PeopleACT recommends that the legal remedies that should be made available include damages, protection orders, expedited protection orders, warrant of arrest, and restraining orders.

II. ONLINE SEXUAL HARASSMENT

- 2.1 To briefly reiterate the current legislative provision in Malaysia with regard to sexual harassment, the Employment Act 1955 prohibits sexual harassment in the workplace and the case of *Mohd. Ridzwan Bin Abdul Razak* introduced the tort of sexual harassment.
- 2.2 Almost all submissions and comments received on the question of whether the current laws in Malaysia were adequate to tackle online sexual harassment concluded that the Employment Act 1955 and the tort of harassment may not be sufficient to deal with online sexual harassment. Many felt that because the Employment Act 1955 applies only to acts “arising out of and in the course of his employment”, this limitation excludes situations outside the work environment.
- 2.3 One stakeholder cautioned against criminalising online sexual harassment as many comments were made without the intention of sexually harassing another and made based on ignorance.
- 2.4 The PeopleACT agrees that current laws do not adequately address the problem of online sexual harassment (inside and outside the workplace) and as such do not provide adequate legal remedies to survivors of sexual harassment. The PeopleACT also agrees that sexual harassment should not be criminalised but it should be a civil wrong.
- 2.5 As regards which law should address sexual harassment, stakeholders felt that the CMA 1998 was not the appropriate legislation to include a sexual harassment provision; they preferred a new standalone Act and that the provision on sexual harassment does not make a distinction between online and offline sexual harassment or sexual harassment inside or outside the workplace.
- 2.6 As to the question of whether a general offence of harassment should be enacted to cover all forms of harassment including sexual harassment, not many stakeholders addressed this issue. For those who did, they were of the opinion that a general harassment provision would be preferred.
- 2.7 The PeopleACT observes that it is timely that sexual harassment provisions cover situations within and outside the work environment. This is in line with developments in case law where the Federal Court in *Mohd. Ridzwan Bin Abdul Razak*, in finding that there was sexual harassment made no requirement that the harassment should take place in the course of employment or that it had created a hostile working environment.
- 2.8 As regards the form of the sexual harassment provision, looking at UK and Singapore, these countries have either crafted laws prohibiting harassment generally, including sexual harassment or have both. In Singapore, there are no specific sexual harassment laws and that the Protection From Harassment Act 2014 has been used to address sexual harassment as well.
- 2.9 The UK has both – a specific legislation prohibiting sexual harassment in the workplace and a law prohibiting harassment generally. The Equality Act 2010 prohibits harassment, including sexual harassment in the workplace, when using public services, using businesses and other organisations that provide goods and services, when using transport, when joining a club or association, and when in contact with

public bodies.⁹ As expounded by the Issues Paper, the UK also has the Protection From Harassment Act 1997, which prohibits harassment generally.

2.10 Taking into consideration views from all stakeholders, since the Employment Act 1955 already prohibits sexual harassment in the workplace, the PeopleACT considers that a general harassment provision in a standalone Act i.e. the proposed Protection Against Harassment Act would be favourable and would provide Malaysians with protection similar to that in Singapore and the UK.

⁹ Equality and Human Rights Commission, 'Know Your Rights', www.equalityhumanrights.com.

III. REVENGE PORN

- 3.1 The Issues Paper highlighted that the interpretation of the words “obscene”, “indecent”, and “modesty” in the Penal Code and the CMA 1998 does not appear to be settled where on one hand, the 1960s case of *Mohamad Ibrahim v PP* adopted the test set out in the UK case of *R v Hicklin* of whether it tends to “deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a public of this may fall”; whereas in the more recent case of *PP v Chan Hon Keong*, obscenity is defined as “offensive to modesty or decency, lewd, filthy and repulsive”.
- 3.2 Whilst a comprehensive and cohesive test for what amounts to obscenity or indecency and the standard to which these concepts are measured against would be beneficial, the PeopleACT is of the opinion that in addition to defining key concepts, a law that specifically deals with revenge porn would afford the protection needed by survivors of revenge porn. For example, in the UK and Australia, sections 33 to 35 of the UK Criminal Justice and Courts Act 2015 and sections 41DA and 41DB of the Victoria Australian Summary Offences Act 1966 makes the act of distributing or disclosing online, intimate images, or photographs of another person without their permission, an offence. It is observed that in both these jurisdictions, the test for obscenity and indecency is settled but nevertheless these jurisdictions felt that specific provisions dealing with revenge porn was necessary.
- 3.3 Save for the MCMC, all stakeholders felt that the Penal Code and the CMA 1998 were not able to deal with harmful cyber behaviour such as revenge porn. Most who felt that the current laws were inadequate, wanted the Penal Code to be amended to include new provisions tackling revenge porn.
- 3.4 As such, the PeopleACT is of the opinion that two new provisions should be introduced in the Penal Code – firstly, a new section in the Penal Code that makes revenge porn an offence; and secondly, a new section that makes the threat of disclosing intimate images an offence - see **Annex 2** for a proposed new sections 509A and 509B.

IV. DEATH AND RAPE THREATS

- 4.1 One of the problems highlighted by the survey and complaints received by the PeopleACT was the use of threatening words to rape or kill a person. Whilst section 503 of the Penal Code could be used to deal with most incidents of threats of rape or death threats, there is one situation where section 503 of the Penal Code may not be adequate – this is where such threats are not communicated directly to the survivor but are posted on social media platforms of relatives and friends of the survivor. Because section 503 of the Penal Code requires that the threat is communicated to the survivor to be proven as an element of the offence, this may result in the offender not being held accountable for his or her action.
- 4.2 Stakeholders were divided on this issue – some felt that the Penal Code was sufficient to address rape and death threats and that since section 503 does not state the medium of communication, it could be applied to online and offline communications. Whereas others felt that the need for the threat to be communicated to the survivor is problematic – one example provided was if the offender did not tag the survivor in the social media post that threatened to kill or rape the said survivor.
- 4.3 Countries such as the UK, Australia, and Hong Kong have provisions in their laws that do not require the threat to be directly communicated to the survivor. In the UK, section 4 of the Public Order Act 1986 makes it an offence, *inter alia*, if a person “*displays* to another person any writing, sign or other visible representation which is threatening, abusive or insulting...” (emphasis added). In New South Wales, Australia, section 31 of the Crimes Act 1900 makes it an offence if a person *indirectly* (emphasis added) causes another to receive any threat to kill or inflict bodily harm. Similarly, section 26 of the Hong Kong Crimes Ordinance expressly states that it is not a defence that the threat was not addressed directly to the survivor provided that the threat was made or published in some manner with the intention that it should reach the survivor.
- 4.4 As such, to ensure that the Penal Code keeps pace with technological advancements and the different ways Internet users communicate online, the PeopleACT recommends that section 503 of the Penal Code is amended to deter and provide redress to incidences of rape and death threats that are currently not the subject of effective legal protection. The amendment should include the instance where even if the threats are not communicated to the survivor, it would still amount to an offence. See **Annex 2** for the proposed amendment to section 503 of the Penal Code.

V. INTERFERENCE INTO THE RIGHT TO PRIVACY

- 5.1 When the PeopleACT highlighted this subject matter in its Issues Paper, it wanted to tackle the problem of doxxing i.e. where Internet users maliciously post on one or several social media platforms, a copy of the identification card, birth certificate or personal details such as home address, date of birth, or car registration number, without the consent of the individual whose personal details are being made public.
- 5.2 Through its research, the PeopleACT observed that the actionable tort of invasion of privacy was very much unsettled where the Courts were still contending with the idea of whether to recognise the right to privacy as a fundamental liberty (as recognised in *Maslinda Ishak, Lee Ewe Poh, and Sivarasa Rasiah*), or whether the right to privacy is limited to matters of private morality and modesty only (*M. Mohandas Gandhi*), or whether there is no tort of invasion of privacy (*John Dadit and Mohamad Izaham Mohamad Yatim*). In addition, the Personal Data Protection Act 2010 (PDPA) applies only to commercial transactions.
- 5.3 Other jurisdictions such as the European Union and Hong Kong have recognised the problem of doxxing and have ensured that their laws are able to hold offenders accountable. Section 64 of the Hong Kong Personal Data (Privacy) Ordinance makes it an offence for *any person* (emphasis added) to disclose any personal data of a data subject, which was obtained from a data user without the latter's consent and with an intent to i) obtain gain for himself/herself or another person; or ii) cause loss to the data subject or if the unauthorised disclosure causes psychological harm to the data subject. The EU Directive 95/46/EC regards individuals posting personal data on a public website about another person without his or her consent, as a data controller and that person would have to abide by the obligations set out in EU Directive 95/46/EC.
- 5.4 Stakeholders unanimously agree that the Penal Code, the PDPA, and the tort of invasion of privacy may not be sufficient to deal with the problem of doxxing. Most felt that the threat to a person's privacy in the case of doxxing is much bigger than the protection that section 509 of the Penal Code could offer and there was a need for a new legal provision to protect personal privacy rights online.
- 5.5 The PeopleACT agrees with the views of stakeholders that doxxing is a serious interference into a person's right to privacy, particularly in view of the permanence and speed of online communications. However, the PeopleACT is of the opinion that doxxing should not be criminalised - it should only be a civil wrong.
- 5.6 As to where this cause of action should be situated, some stakeholders felt that the cause of action should be contained in the PDPA. Although the preamble of the PDPA states that objective of the PDPA is to "regulate the processing of personal data in commercial transactions...", some stakeholders felt that it was timely that the protection afforded by the PDPA was enlarged to include protection beyond commercial transactions and that Malaysia should look to personal data protection laws in the EU and Hong Kong where individuals are held accountable for doxxing and are bound by the data protection principles.
- 5.7 Therefore, the PeopleACT recommends that the PDPA is amended to include doxxing as a new cause of action by introducing a new section to the PDPA to make the unlawful disclosure of personal data an offence - see **Annex 3** for the draft new section and other consequential amendments.

ANNEX 1

PROTECTION AGAINST HARASSMENT BILL 2018

intituled

An Act to protect persons from harassment and similar conduct.

[]

ENACTED by the Parliament of Malaysia as follows:

Short title and commencement

1. (1) This Act may be cited as the Protection Against Harassment Act 2018.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

PART 1 - PRELIMINARY

Interpretation

2. In this Act, unless the context otherwise requires—

“court” means the Sessions Court.

“communication” means any words, image, message, expression, symbol or other representation, that can be heard, seen or otherwise perceived by any person;

“course of conduct” means,

- (a) in the case of conduct in relation to a single person, conduct on at least two occasions in relation to that person; or
- (b) in the case of conduct in relation to two or more persons, conduct on at least one occasion in relation to each of those persons.

“offending communication”, in relation to any contravention of a provision under this Act, means any communication or statement made in contravention of that provision;

“publish”, in relation to a communication or statement, means to make the communication or statement available in any form such that the communication or statement is or can be heard, seen or otherwise perceived by the public in Malaysia or any section of the public in Malaysia, and includes cause to be published;

“respondent”, in relation to an action under section 8 or an application for an order under section 9, 10, or 11, in respect of a contravention of a provision of this Act, means the person alleged to have contravened that provision for the purposes of that action or application.

PART 2 - OFFENCES

Offence of harassment

3. (1) Any person who, intentionally or recklessly, pursues a course of conduct, that interferes with the other's peace and privacy or causes harassment or serious alarm, distress, or harm to the other, by any means –

- (a) use any threatening, abusive, or insulting words or behaviour; or
- (b) make any threatening, abusive, or insulting communication,

thereby causing that other person or persons or any other person (the survivor) harassment or serious alarm, distress, or harm, shall be guilty of an offence.

(2) For the purposes of this section, the person whose act is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct would seriously interfere with the other's peace and privacy or cause harassment or serious alarm, distress, or harm to the other.

(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—

- (a) that it was pursued for the purpose of preventing or detecting crime;
- (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or
- (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

ILLUSTRATIONS

(a) X and Y are co-workers. At the workplace, X loudly and graphically describes to the other co-workers X's desire for a sexual relationship with Y in an insulting manner. X knows that Y is within earshot and intends to cause Y distress. Y is distressed. X is guilty of an offence under this section.

(b) X writes a letter containing threatening words towards Y intending to send the letter to Y to cause him alarm. X decides not to send the letter and throws it away. Y finds the letter and is alarmed. X is not guilty of an offence under this section as he had no reason to believe that the letter would be seen by Y.

Offence of indirect harassment

4. (1) Any person who pursues a course of conduct, by any means -

- (a) use any threatening, abusive or insulting words or behaviour; or
- (b) make any threatening, abusive or insulting communication,

which is heard, seen or otherwise perceived by any person likely to be caused harassment or serious alarm, distress, or harm, shall be guilty of an offence.

(2) For the purposes of this section, it is a defence for the respondent to prove —

- (a) that he or she had no reason to believe that the words or behaviour used, or the communication made, by him would be heard, seen or otherwise perceived by the survivor; or
- (b) that his or her conduct was reasonable.

ILLUSTRATION

X and Y are classmates. X posts a vulgar tirade against Y on a website accessible to all of their classmates. One of Y's classmates shows the message on the website to Y, and Y is distressed. X is guilty of an offence under this section.

Offence of harmful electronic communication

5. (1) A person who, without lawful authority or reasonable excuse, intentionally or recklessly shares a harmful electronic communication shall be guilty of an offence.

(2) For the purposes of this section an electronic communication shall be considered harmful where it —

- (a) incites or encourages another to commit suicide; or
- (b) incites or encourages another to cause serious harm to themselves,

and it intentionally or recklessly causes serious alarm, distress, or harm to the other, is guilty of an offence.

Offence of stalking

6. (1) A person ("A") who, without lawful authority or reasonable excuse, stalks another person ("B") is guilty of an offence.

(2) For the purposes of this section, A unlawfully stalks B if –

- (a) the course of conduct amounts to harassment in breach of section 3(1);
- (b) the acts or omissions involved are associated with stalking;
and
- (c) the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.

(3) The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking –

- (a) following a person;
- (b) contacting, or attempting to contact, a person by any means;
- (c) monitoring the use by a person of the internet, email or any other form of electronic communication;
- (d) entering or loitering in any place (whether public or private) outside or near the survivor's or a related person's

place of residence or place of business or any other place frequented by the survivor or the related person;

- (e) interfering with property in the possession of the survivor or a related person (whether or not the accused person has an interest in the property);
- (f) giving or sending material to the survivor or a related person, or leaving it where it will be found by, given to or brought to the attention of, the survivor or a related person;
- (g) watching or spying on a person;
- (h) Threatening or sending obscene emails or text messages;
- (i) Spamming, where the accused sends the survivor multiple junk emails;
- (j) "Baiting", or humiliating peers online by labelling them as sexually promiscuous;
- (k) Leaving improper messages on online forums or message boards;
- (l) Unwanted indirect contact with a person that may be threatening or menacing, such as posting images of that person's children or workplace on a social media site, without any reference to the person's name or account;
- (m) Posting "photoshopped" images of persons on social media platforms;
- (n) Hacking into social media accounts and then monitoring and controlling the accounts;

- (o) Sending electronic viruses;
- (p) Sending unsolicited emails.

ILLUSTRATIONS

These acts are acts associated with stalking of A by B:

(a) A repeatedly sends emails to B's subordinate with suggestive comments about B's body.

(b) A repeatedly circulates revealing photographs of a classmate (B) to other classmates.

(4) For the purposes of this section, section 6(3) is not an exhaustive list and in considering whether an act or acts amount to stalking, the court shall consider other acts by A and conclude whether these acts constitute stalking even if they are not listed in section 6(3). Harassment that includes any one or more of the behaviour listed in section 6(3) shall not automatically be considered stalking. The court shall assess as a whole whether the act or acts fit the generally received interpretation of the word stalking.

Offence of stalking involving fear of violence or serious alarm or distress

7. (1) A person ("A") whose act or acts -

(a) amount to stalking; and

(b) either –

- i. causes another ("B") to fear, on at least two occasions, that violence will be used against B; or

- ii. causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities,

is guilty of an offence if A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

(2) For the purposes of this section A ought to know that A's course of conduct will cause B to fear that violence will be used against B on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause B so to fear on that occasion.

(3) For the purposes of this section A ought to know that A's course of conduct will cause B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities if a reasonable person in possession of the same information would think the course of conduct would cause B such alarm or distress.

(4) It is a defence for A to show that —

- (a) A's course of conduct was pursued for the purpose of preventing or detecting crime;
- (b) A's course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or
- (c) the pursuit of A's course of conduct was reasonable for the protection of A or another or for the protection of A's or another's property.

(5) For the purposes of this section, "substantial adverse effect" may include -

- (a) B changing his or her route to work, work patterns, or employment;
- (b) B arranging for friends or family to pick up children from school (to avoid contact with A);
- (c) B putting in place additional security measures in his or her home;
- (d) B moving home;
- (e) B is suffering from physical or mental ill-health;
- (f) the deterioration in B's performance at work due to stress;
- (g) B stopping /or changing the way he or she socialises.

PART 3 - REMEDIES

Damages

8. (1) A contravention of any sections in Part 2 may be subject of a claim in civil proceedings by the person who is or may be the survivor of the act or acts in question.

(2) On such a claim, damages may be awarded for, *inter alia*, any anxiety caused by the harassment and any financial loss resulting from the harassment.

Protection order

9. (1) A survivor under Part 2 may make an application to the court for a protection order.

(2) A court may make a protection order if it is satisfied on the balance of probabilities that –

- (a) the respondent has contravened any section in Part 2 in respect of the survivor;
- (b) the contravention referred to the paragraph (a) is likely to continue, or the respondent is likely to commit a contravention of any section in Part 2 in respect of the survivor; and
- (c) it is just and equitable in all circumstances.

(3) A protection order may be made under subsection (2) for all or any of the following purposes –

- (a) in the case of a likely contravention or likely continuing contravention of any section in Part 2, prohibiting the respondent from doing any thing in relation to the respondent or any related person, as may be specified in the order;
- (b) in the case of a likely contravention or likely continuing contravention of any section in Part 2, that the respondent shall not, for such period as the court may specify, communicate by any means with the survivor or that the respondent shall not approach within such distance as the court shall specify of the place of residence or employment of the survivor;
- (c) in the case of a likely contravention or likely continuing contravention of any section in Part 2 involving an offending communication, requiring that no person shall publish or continue to publish the offending communication;

- (d) in the case of a likely contravention or likely continuing contravention of any section in Part 2 involving an offending communication, requiring the respondent to remove or delete specific electronic communication(s);
- (e) that the respondent shares an apology or correction as the court deems appropriate in the circumstances;
- (f) the giving of any direction as is necessary for and incidental to the proper carrying into effect of any order made under paragraph (a) or (b).

(4) A protection order may be made subject to such exceptions or conditions as may be specified in the order.

(5) An order under subsection (3)(c) and any direction under subsection 3(c) made with respect to that order shall take effect in respect of the person to whom such order or direction applies –

- (a) from the date when such order or direction, as the case may be, is served on him in such manner as may be prescribed;
- (b) where the court dispenses with the service of such order or direction, from the date when the service on him or her of such order or direction, as the case may be, is dispensed with by the court; or
- (c) such later date as the court may specify.

(6) A protection order shall cease to have effect after such period as the court may specify in the order.

(7) The court may, on application of the survivor or any person to whom the protection order applies, vary, suspend, or cancel the protection order or extend the duration of the protection order.

(8) Any person (except the respondent) to whom an order under subsection (3)(c) applies shall not be subject to any civil liability under any law or contract for any act done for the purpose of complying with any order under subsection (3)(c).

(9) A person who fails to comply with the terms of an order under this section shall be guilty of an offence and the survivor may apply for the issue of a warrant for the arrest of the respondent.

Expedited protection order

10. (1) Where, upon an application for a protection order under section 9, the court is satisfied that -

- (a) there is prima facie evidence that –
 - i. the respondent has contravened any section in Part 2 in respect of the survivor;
 - ii. the contravention referred to in sub-paragraph (i) is likely to continue, or the respondent is likely to commit a contravention of any section in Part 2 in respect of the survivor imminently; and
 - iii. the contravention referred to in sub-paragraph (ii), if continued or committed, is likely to have a substantial adverse effect on the survivor; and
- (b) it is just and equitable in all the circumstances for the protection order to be made on an expedited basis,

the court may make an expedited protection order for all or any of the purposes of section 9(3), notwithstanding that notice of the application has not been served on the respondent or has not been served on the respondent within a reasonable time before the hearing of the application.

(2) An expedited protection order shall take effect in respect of the person to whom such order applies –

- (a) from the date when such order is served on him or her in such manner as may be prescribed;
- (b) where the court dispenses with the service of such order, from the date when the service on him or her of such order is dispensed with by the court; or
- (c) such later date as the court may specify.

(3) An expedited protection order shall cease to have effect on the earlier of the following dates –

- (a) 28 days after the date of the making of the expedited protection order;
- (b) on the first day of the hearing of the application for the protection order.

(4) Section 9 (4), (7) and (8) shall, with the necessary modifications, apply to an expedited protection order.

(5) There shall be no appeal against a decision of the court made under this section.

(6) A person who fails to comply with the terms of an order under this section shall be guilty of an offence and the survivor may apply for the issue of a warrant for the arrest of the respondent.

Restraining order on conviction

11. (1) A court sentencing or otherwise dealing with a person convicted of an offence in this Act may (as well as sentencing him or her or dealing with him or her in any other way) make an order under this section.

(2) The order may, for the purpose of protecting the survivor(s) of the offence, or any other person mentioned in the order from conduct which –

(a) amounts to harassment; or

(b) stalking,

prohibit the person convicted of the offence from doing anything described in the order.

(3) The order may have effect for a specified period or until further order.

(4) The prosecutor, the respondent or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.

(5) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (4).

(6) If without reasonable excuse the respondent does anything which is prohibited from doing by an order under this section, he is guilty of an offence.

(7) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order.

ANNEX 2

PENAL CODE AMENDMENT BILL 2018

intituled

An Act to amend the Penal Code.

[]

ENACTED by the Parliament of Malaysia as follows:

Short title and commencement

1. (1) This Act may be cited as the Penal Code (Amendment) Act 2018.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

Amendment of section 503

2. The Penal Code [*Act 574*] which is referred to as the "Code" in this Act, is amended in section 503 by inserting the following subsection -

“It shall be no defence to a charge under section 503 to prove that the threat was not addressed directly to the person whose person, reputation or property was to be injured, or to the person (if any) against whom the illegal act was to be committed, or to the person whom it was intended to alarm, or to the person whose conduct was intended to be affected, if the threat was made or published in some manner with the intention that it should reach the person whom it was intended to alarm, or (as the case may be) whose conduct was intended to be affected, and that it did reach such person.”

New section 509A

3. The Code is amended by inserting after section 509 the following section:

“Disclosure of intimate image”

509A. (1) Whoever, intending to cause distress to another, discloses an intimate image, without the consent of the individual who appears in the said intimate image, commits an offence under this section.

(2) It is not an offence under this section for the person to disclose the image to the individual who appears in the said intimate image.

(3) It is a defence for a person charged with an offence under this section to prove that –

- (a) he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting, or investigating crime;
- (b) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and he or she

reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest; or

- (c) he or she reasonably believed that the image had previously been disclosed for reward and he or she had no reason to believe that the previous disclosure for reward was made without the consent of the individual mentioned in subsection (1).

(4) For the purposes of this section and section 509B –

- (a) A person “discloses” something to a person if, by any means, he or she gives or shows it to the person or makes it available to the person. Something that is given, shown, or made available to a person is disclosed –
 - i. whether or not it is given, shown, or made available for reward; and
 - ii. whether or not it has previously been given, shown, or made available to the person.
- (b) An “intimate image” means a moving or still image that shows something that is not of a kind ordinarily seen in public and -
 - i. it shows all or part of an individual’s exposed genitals or pubic area;
 - ii. it shows something that a reasonable person would consider to be sexual because of its nature; or
 - iii. its content, taken as a whole, is such that a reasonable person would consider it to be sexual.
- (c) References to an “image” shall include –
 - i. a negative version of an image described in subsection (4)(b); and

- ii. data stored by any means which is capable of conversion into an image described in subsection (4)(b)

(5) Subsection (6) applies in the case of –

- (a) images that consist of or includes an image that has been altered in any way;
- (b) an image that combines two or more images; and
- (c) an image that combines an image with something else.

(6) The image is not intimate if –

- (a) it does not consist of or include an image that is itself intimate;
- (b) it is only intimate by virtue of the alteration or combination mentioned in subsection (5); or
- (c) it is only by virtue of the alteration or combination mentioned in subsection (5) that the person mentioned in subsection (1) is shown as part of, or with, whatever makes the image intimate.

ILLUSTRATION

A person (A) posts a photograph of another person (B) on a social media website without B's express or implied consent and the photograph depicts B engaged in sexual activity.

New section 509B

4. The Code is amended by inserting after section 509A the following section:

“Threat to disclose intimate image”

509B. (1) Whoever (A), threatens another person (B) to disclose an intimate image of B or of another person (C) and the distribution of the intimate image would violate the privacy of B and A intends that B will believe, or believes that B will probably believe, that A will carry out the threat, commits an offence.

(2) For the purposes of this section, a threat may be made by any conduct and may be explicit or implicit.

ANNEX 3

PERSONAL DATA PROTECTION (AMENDMENT) BILL 2018

intituled

An Act to amend the Personal Data Protection Act 2010.

[]

ENACTED by the Parliament of Malaysia as follows:

Short title and commencement

1. (1) This Act may be cited as the Personal Data Protection (Amendment) Act 2018.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

Amendment of the preamble

2. The Personal Data Protection Act 2010 [*Act 709*], which is referred to as the “principal Act” in this Act is amended in the preamble by substituting for the words “in commercial transactions” the words “relating to individuals”.

Amendment of section 2(1)

3. The principal Act is amended in section 2(1) by inserting the words “Except as otherwise provided under this Act” before the words “this Act applies”.

New section 42A

4. The principal Act is amended by inserting after section 42 the following section:

“Unlawful disclosure of personal data”

42A. (1) A person shall not knowingly or recklessly, without the consent of the data user -

- (a) obtain or disclose personal data or the information contained in personal data; or
- (b) procure the disclosure to another person of the information contained in personal data.

(2) Subsection (1) does not apply to a person who shows –

- (a) that the obtaining, disclosing, or procuring –
 - i. was necessary for the purpose of preventing or detecting crime; or

- ii. was required or authorised by or under any enactment,
by any rule or by the order of a court,
- (b) that he or she acted in the reasonable belief that he or she had in law the right to obtain or disclose the personal data or information, or, as the case may be, to procure the disclosure of the information to the other person,
- (c) that he acted in the reasonable belief that he would have had the consent of the data user if the data user had known of the obtaining, disclosing, or procuring and the circumstances of it, or
- (d) that in the particular circumstances the obtaining, disclosing, or procuring was justified as being in the public interest.

(3) A person who contravenes subsection (1) is guilty of an offence.