



**Submission by Human Rights Watch
to the United Nations Committee
on the Elimination of Discrimination against Women
69th pre-sessional working group**

May 2017

Summary

This submission focuses on child marriage, marital rape, the situation of transgender persons, domestic workers, and education. It relates to Articles 1, 2, 6, 10, 11, 12, 15, and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (the “Convention”), and proposes issues and questions that Committee members may wish to raise with the government.

Gender Identity and Sexual Orientation (Articles 1, 2, 10, 11, 12)

Criminalization of Transgender Identities

Malaysia is one of few countries in which transgender people can be arrested simply for wearing clothing deemed not to pertain to their assigned sex. Under state Sharia (Islamic law) enactments, all 13 states and the Federal Territory prohibit “a man posing as a woman,” while three states prohibit “a woman posing as a man.” Four states have given legal authority to fatwas against “*pengkid*,” a colloquial term for trans masculine identity.¹

The Court of Appeal ruled in November 2014 that one such law, section 66 of Negeri Sembilan’s state Sharia enactment, violates the constitutionally protected rights to life and personal liberty, equality, freedom from gender discrimination, freedom of movement, and freedom of speech, assembly, and association. But the Federal Court, the country’s highest court, struck down that decision in October 2015 on technical grounds that the plaintiffs had failed to get judicial permission before initiating a constitutional challenge.²

Dozens of transgender women have been convicted under these laws. In June 2014, Islamic Religious Department officials arrested 16 transgender women and one child at a wedding in Negeri

¹ Human Rights Watch, “*I’m Scared to Be a Woman*”: *Human Rights Abuses Against Transgender People in Malaysia*, September 2014, <https://www.hrw.org/report/2014/09/24/im-scared-be-woman/human-rights-abuses-against-transgender-people-malaysia>, p.11.

² “Malaysia: Court Ruling Sets Back Transgender Rights,” Human Rights Watch news release, October 8, 2015, <https://www.hrw.org/news/2015/10/08/malaysia-court-ruling-sets-back-transgender-rights>.

Sembilan, sentencing the women to seven days in prison.³ In June 2015, Religious Department officials in Kelantan arrested nine transgender women at a private birthday party; they were later sentenced to fines or prison time for wearing women's clothing.⁴ In some cases, Religious Department officials or police have beaten transgender women or sought to extort money and sex from them during arrests.⁵

Violence, Discrimination, and HIV

Transphobic violence is often carried out with impunity. In February 2017, Sameera, a transgender woman, was murdered in Kuantan, the capital city of Pahang state.⁶ Police arrested five men for the crime in early April. They were released on bail and have not yet been tried.⁷ Police and transgender groups believe Sameera's murder is connected to an ongoing court case against two men who were accused of kidnapping, raping, and torturing her in February 2015.⁸ In September 2015, two men wielding iron bars brutally beat transgender activist Nisha Ayub outside her apartment building. Police have not identified any suspects.⁹

No law in Malaysia prohibits discrimination on the grounds of gender identity. Discrimination against transgender women in education, employment, and health care is common.¹⁰ Criminalization combined with discrimination causes transgender women to avoid public health facilities, inhibiting the HIV response in a country in which HIV prevalence among transgender people is estimated at 5.6 percent, compared to 0.4 percent among the general population.¹¹ The Islamic Religious Department's "HIV and Islam" manual, published in partnership with the Ministry of Health, claims transgender people are lacking in "religious comprehension" and need "counseling in sexuality and moral values." Its prevention advice includes: "Never commit to wrongful sexual acts like adultery, sodomy and lesbianism. The best way to protect yourself from sexually transmitted diseases like HIV is by avoiding adultery and sin."¹²

³ "Malaysia: End Arrests of Transgender Women," Human Rights Watch news release, June 23, 2014, <https://www.hrw.org/news/2014/06/23/malaysia-end-arrests-transgender-women>.

⁴ "Malaysia: Court Convicts 9 Transgender Women," Human Rights Watch news release, June 22, 2015, <https://www.hrw.org/news/2015/06/22/malaysia-court-convicts-9-transgender-women>.

⁵ Human Rights Watch, *"I'm Scared to Be a Woman,"* pp. 27-30.

⁶ Justice for Sisters, "Justice for Sameera – Ensure Thorough Investigation & Hold Perpetrators Accountable," March 3, 2017, <https://justiceforsisters.wordpress.com/2017/03/03/justice-for-sameera-ensure-thorough-investigation-hold-perpetrators-accountable/> (accessed April 28, 2017).

⁷ "Brothers in Sameera case freed," *The Star*, April 30, 2017, <http://www.thestar.com.my/news/nation/2017/04/30/brothers-in-sameera-case-freed/> (accessed May 15, 2017).

⁸ "Murder Believed to be Linked to a Kidnapping," *The Star*, February 25, 2017, <http://www.thestar.com.my/news/nation/2017/02/25/murder-believed-to-be-linked-to-a-kidnapping-sameera-was-main-witness-in-abduction-case/>, (accessed May 1, 2017).

⁹ Boo Su-Lyn, "Battered and bruised, award-winning transgender activist fears assault complaint may be ignored," *The Malay Mail Online*, September 15, 2015, <http://www.themalaymailonline.com/malaysia/article/battered-and-bruised-award-winning-transgender-activist-fears-assault-compl> (accessed April 28, 2017).

¹⁰ Human Rights Watch, *"I'm Scared to Be a Woman,"* pp. 44-53.

¹¹ *Ibid.*, pp. 47-48. One transgender woman told Human Rights Watch she was arrested while distributing condoms as part of her HIV prevention work. *Ibid.*, p. 22.

¹² JAKIM, *Manual on HIV/AIDS in Islam*, 2010, on file with Human Rights Watch, pp. 5, 42.

Legal Gender Recognition

There is no legal procedure in Malaysia for transgender people to change their names and gender markers on their identity cards. Transgender people who have approached the National Registration Department to request such changes have been rejected. In July 2016, a Kuala Lumpur High Court instructed the National Registration Department to change a transgender man's documents, finding that the right to life includes the plaintiff's "right to live with dignity as a male and be legally accorded judicial recognition as a male," but the National Registration Department successfully appealed the ruling.¹³

Criminalization of Same-Sex Conduct

Both federal criminal law and state Sharia enactments criminalize adult consensual same-sex conduct, discriminating against lesbian and bisexual women.¹⁴ A recent JAKIM (Islamic Religious Department) report indicates that 13 women were arrested for *musahaqah* (sex between women) between 2009 and 2012, and two women were arrested in September 2014 in Johor, though it is not known whether they were convicted.¹⁵ JAKIM has promoted so-called conversion therapy, a discredited approach to "changing" a person's sexual orientation or gender identity through psychological treatment, faith-based methods, or counseling.¹⁶

Human Rights Watch recommends the Committee ask the government of Malaysia:

- Will state Religious Departments end the practice of conducting raids targeting transgender people, and repeal provisions of state Sharia enactments that criminalize transgender people?
- What steps has the government taken to discourage violence by private citizens against transgender women and other members of sexual and gender minority groups, and to ensure accountability for hate crimes?
- Will the government establish a rights-based procedure to allow transgender people to change their name and sex marker on their identity documents?
- Will Malaysia pass comprehensive anti-discrimination legislation that prohibits discrimination based on gender identity, gender expression, and sexual orientation, among other grounds?
- What steps will the government take to reduce HIV prevalence among transgender women and other key populations?

Human Rights Watch recommends to the Committee that it call upon the government of Malaysia to:

¹³ Shaila Koshy, "Court overturns decision in trans man's case," *The Star*, January 17, 2017, <http://www.thestar.com.my/news/nation/2017/01/06/court-overturns-decision-in-trans-mans-case-there-is-merit-in-nrd-appeal-says-judge/> (accessed May 12, 2017). Courts in previous cases have issued conflicting opinions as to whether individuals who have undergone SRS can be administratively recognized according to their chosen gender. See "*I'm Scared to Be a Woman*," pp. 55-57.

¹⁴ Human Rights Watch, *I'm Scared to Be a Woman*, p. 74.

¹⁵ Email communication with Justice for Sisters, May 12, 2017.

¹⁶ Rachel Roberts, "Malaysian government openly endorses gay conversion therapy," *The Independent*, February 14, 2017, <http://www.independent.co.uk/news/world/malaysia-gay-conversion-therapy-endorses-lgbt-rights-islam-a7578666.html> (accessed May 12, 2017).

- Repeal state Sharia provisions that prohibit “cross-dressing.”
- Halt all state Religious Department raids targeting transgender people.
- Repeal laws that prohibit consensual same-sex conduct.
- Prohibit discrimination on the grounds of gender identity, gender expression, and sexual orientation, through comprehensive anti-discrimination legislation.
- Establish a legal gender recognition procedure that allows transgender people to change their names and the gender markers on their identity cards, based on self-declaration, without requiring medical or psychiatric intervention.
- Ensure that HIV prevention efforts targeting transgender people and other key populations are inclusive and non-judgmental.
- Prohibit government use or endorsement of conversion therapy to try to change the gender identity or sexual orientation of LGBT people.

Child marriage, rape, and marital rape (Articles 2, 15, 16)

Child marriage is associated with many harmful consequences, including health dangers associated with early pregnancy, lower educational achievement for girls who marry earlier, a higher incidence of domestic violence, and an increased likelihood of poverty.¹⁷

Malaysia has a reservation to article 16(1)(a) of the Convention regarding woman having the same right to enter into marriage.¹⁸ Malaysia has a dual legal system, with civil law and Sharia law. Civil law sets the minimum age of marriage at 18 for non-Muslims, but girls aged 16 and older can marry with the permission of their state’s chief minister.¹⁹ For Muslims, Islamic law sets a 16-year minimum age for girls and permits even earlier marriages, with no apparent minimum, with the permission of a Sharia court.²⁰

While it is difficult to find reliable data on the rate of child marriage in Malaysia, in May 2016 the Women, Family and Community Development Ministry reported that 9,061 child marriages were recorded during the previous five years.²¹

After visiting Malaysia in 2014, the UN special rapporteur on the right to health expressed concern about the prevalence of child marriage, noting that he was “very worried about information received

¹⁷ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and general comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014), CEDAW/C/GC/31-CRC/C/GC/18, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement> (accessed April 25, 2017), paras. 20-23.

¹⁸ “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage,” Convention on the Elimination of All Forms of Discrimination against Women, art. 16(1).

¹⁹ Law Reform (Marriage and Divorce) Act 1976, as amended January 2006, art. 10.

²⁰ Islamic Family Law (Federal Territory) Act 1984, as amended 2005, Act 303, art. 8.

²¹ Martin Carvalho, “Fewer child marriage cases now, says ministry,” *The Nation*, May 19, 2016, <http://www.thestar.com.my/news/nation/2016/05/19/fewer-child-marriage-cases-now-says-ministry/> (accessed April 25, 2017).

indicating that, in an attempt to reduce the incidence of premarital sex, children born out of wedlock, and child abandonment, certain authorities are encouraging underage marriage.”²²

In 2016, Malaysia amended the 2001 Child Act to include increased measures for the care and protection of children, such as a registry for perpetrators who committed crimes against children, a National Council for Children, and a provision for legal representation to be appointed for a child who is charged with an offense if the child is incapable of appointing counsel. However, it did not ban all forms of marriage by girls and boys under 18, as called for by some politicians, the National Human Rights Commission, Suhakam, and rights activists.²³ The amendments came into force in January 2017.²⁴

In April 2017 Member of Parliament (MP) Teo Nie Cheng from the opposition Democratic Action Party proposed an amendment to the Sexual Offences Against Children bill to include a ban on child marriage. The proposal was defeated.²⁵

Local organizations have long documented cases in which men raped girls and successfully evaded criminal charges by marrying their victims.²⁶ Some government officials, such as Sarawak's minister of welfare, women and community well-being, Fatimah Abdullah, and the minister of women, family and community development, Datuk Seri Rohani Abdul Karim, have condemned cases where rapists have sought to evade prosecution through marriage.²⁷ Men who marry their victim can be prosecuted for rape committed before marriage, which has happened in a few high-profile cases.²⁸

Marital rape is not criminalized in Malaysia. Between 2004 and 2006, a government-opposition Special Committee (established to review marital rape laws in the context of amendments to the Penal Code) decided that marital rape was not a crime. In May 2015, Nancy Shukri, minister in the

²² Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras, Visit to Malaysia (19 November–2 December 2014), A/HRC/29/33/Add.1, May 2015, <http://www.ohchr.org/EN/Issues/Health/Pages/CountryVisits.aspx> (accessed April 25, 2017), para. 43.

²³ Suhakam welcomes Child Act amendments, but wants legal marrying age raised to 18,” *The Nation*, April 18, 2016, <http://www.thestar.com.my/news/nation/2016/04/18/suhakam-welcomes-amendments-to-child-act/> (accessed May 11, 2017); Heather Barr and Linda Lakhdhir (Human Rights Watch), “Time to Ban Child Marriage in Malaysia,” commentary *Malaysiakini*, April 29, 2016, <https://www.hrw.org/news/2016/04/29/time-ban-child-marriage-malaysia>; A Bill Entitled An Act to amend the Child Act 2001, https://www.cljlaw.com/files/bills/pdf/2015/MY_FS_BIL_2015_39.pdf (accessed May 11, 2017).

²⁴ “It is time to abolish corporal punishment,” *Malaysiakini*, <http://www.malaysiakini.com/letters/380981> (accessed May 2, 2017).

²⁵ “Malaysia passes child sex crimes law, does not ban child marriage,” *Reuters*, April 5, 2017, <http://www.reuters.com/article/us-malaysia-sexcrimes-law-idUSKBN177oZH> (accessed May 2, 2017).

²⁶ “Malaysia’s child brides: Men accused of rape are marrying their alleged victims in order to avoid prosecution,” *Aljazeera*, August 12, 2016, <http://www.aljazeera.com/indepth/features/2016/08/malaysia-child-brides-160810123204474.html>; “Malaysia passes child sex crimes law, does not ban child marriage,” *Reuters*, April 5, 2017, <http://www.reuters.com/article/us-malaysia-sexcrimes-law-idUSKBN177oZH> (both accessed April 25, 2017).

²⁷ “Outcry over man discharged of statutory rape,” *Borneo Post*, July 29, 2016, <http://www.theborneopost.com/2016/07/29/outcry-over-man-discharged-of-statutory-rape/>; “Government will intervene in cases of rapists marrying underage victims,” *Astro Go Read*, August 4, 2016, http://astrogoread.astro.com.my/topics/article/b_1637-s_1688-8853572 (both accessed May 11, 2017).

²⁸ Heather Barr, “Marrying Your Rapist in Malaysia, Men Try to Avoid Rape Charges Through Forced Child Marriage,” January 26, 2017, <https://www.hrw.org/news/2017/01/26/marrying-your-rapist-malaysia>.

Prime Minister's Department, announced that the government had no plans to include marital rape in rape laws.²⁹

In April 2017, the Domestic Violence (Amendment) Bill 2017 was introduced. The bill, which included amendments to strengthen protection and to expand the definition of domestic violence, among others, had the support of women's groups. They called for effective enforcement and said the law required further improvement.³⁰ The amended bill does not include marital rape in the definition of domestic violence. The Women's Aid Organisation alleged that the government excluded marital rape from the original Domestic Violence Act, passed in 1996, because the act is "attached to the Penal Code, which specifies that a woman does not have the right to abstain from sexual relations unless she is divorced, judicially separated, or has obtained a restraining order on her husband."³¹

In March 2017, Democratic Action Party MP Teresa Kok, a member of the Select Committee on the Review of the Penal Code and Criminal Procedure Code, stated that it was difficult to include marital rape in the law because of the difficulty of proving marital rape and problems with the term "marital rape," including translating the term and explaining it to mullahs, those trained in Muslim law and doctrine. Instead, the Penal Code criminalizes a "husband causing hurt in order to have sexual intercourse."³² Under article 375a, "Any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years."³³

The Committee's General Recommendation No. 19 includes marital rape as a form of domestic violence, stating, "Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes."³⁴

Human Rights Watch recommends to the Committee that it ask the government of Malaysia:

- Does the government plan to reform the law to make the legal age of marriage 18 for both women and men of all faiths?
- Does the government have plans to reform the law to ban all marriage under the age of 18, or to limit marriages under age 18 to those permissible under international law only (in exceptional circumstances, with judicial approval, after the age of 16)?

²⁹ "Govt maintains marital rape not criminal," *Nation*, June 10, 2015, <http://www.thestar.com.my/news/nation/2015/06/10/govt-maintains-marital-rape-not-crime/> (accessed April 25, 2017).

³⁰ Joint Action Group for Gender Equality, "Proposed changes to domestic violence law are good," April 5, 2017, <http://www.malaysiakini.com/news/378090> (accessed April 25, 2017).

³¹ Women's Aid Organisation, "Domestic Violence," undated, http://www.wao.org.my/Domestic+Violence_37_5_1.htm (accessed April 25, 2017).

³² Sheith Khidhir Bin Abu Bakar, "Why it's hard to make marital rape a crime," *Free Malaysia Today*, March 12, 2017, <http://www.freemalaysiatoday.com/category/nation/2017/03/12/why-its-hard-to-make-marital-rape-a-crime/> (accessed April 25, 2017).

³³ Malaysia Penal Code, Act 574, as at January 1, 2015, art. 375a.

³⁴ Committee on the Elimination of Discrimination against Women, "General Recommendation No. 19: Violence against women," 1992, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf (accessed April 25, 2017).

- What plans has the government made to end all child marriage by 2030 as set out by Sustainable Development Goal target 5.3?
- Does the government intend to develop a National Action Plan to end child marriage?
- How many cases of child marriage have been documented since 2006?
- How many cases of have been documented since 2006 in which girls were married to the man who previously raped them?

Human Rights Watch asks the Committee to call upon the government of Malaysia to:

- Raise the minimum legal age of marriage to 18 for all men and women.
- Investigate all complaints of child marriage promptly, intervene to prevent child marriage wherever possible, and prosecute anyone who has facilitated or arranged a child marriage in violation of the law.
- Create and implement a comprehensive National Action Plan to end child marriage by 2030, with the participation of women's and children's rights groups, health professionals, educators, law enforcement, and local government.
- Make marital rape a criminal offense.

Domestic Workers (Articles 2, 6, 11)

The vast majority of domestic workers in Malaysia are women. Malaysia's labor laws exclude domestic workers from several key employment protections. The 1955 Employment Act excludes domestic workers from legal protections set out in provisions on rest days, limits to hours of work, public holidays, annual leave, sick leave, and maternity protections. Malaysia's 1952 Workman's Compensation Act also excludes domestic workers.

Malaysia's immigration law ties a foreign domestic worker's residency to her employer, so the employer can terminate her contract at will and refuse permission to transfer jobs, causing her to become undocumented and liable to immediate deportation. These policies make it difficult for domestic workers to make complaints for fear of retaliation, and to change employers, even in cases of abuse.

Many employers deduct part or all of their domestic worker's salary for six or more months to recoup their recruitment costs, putting intense financial pressure on domestic workers who must repay their own debts (often for recruitment brokers' fees in the sending country), and are expected to send money to support their families at home.

The governments of Indonesia and Cambodia have previously suspended sending domestic workers to Malaysia because of their concerns about abuse suffered by their nationals. Disagreements between those countries and Malaysia have surfaced while negotiating Memorandums of Understanding (MOUs) to oversee migration of domestic workers. These MOUs have extended weaker protections to domestic workers than those available to other workers under labor laws, and do not contain effective enforcement mechanisms. According to local organizations, the number of

Indonesian domestic workers in Malaysia has dropped significantly, while cases of abuse of Cambodian domestic workers continue to surface regularly.

In our 2011 report *“They Deceived Us at Every Step”*: Abuse of Cambodian Domestic Workers Migrating to Malaysia, Human Rights Watch documented cases in which the combination of deception and indebtedness during recruitment, forced confinement, unpaid wages, and threats of retaliation for escaping or failing to pay debts amounted to forced labor, including trafficking and debt bondage.³⁵

Malaysia has made some efforts to strengthen its trafficking law, conducted a few trainings, and held some public awareness campaigns. However, trafficking victims face many barriers to obtaining redress, and prosecutions for trafficking into forced labor remain rare.

Human Rights Watch recommends to the Committee that it ask the government of Malaysia:

- What are Malaysia’s plans to guarantee the right to non-discrimination in the workplace for domestic workers in Malaysia, regardless of their nationality?
- What remedies are available to domestic workers in Malaysia who face labor abuses, gender-based violence, or forced labor including trafficking?
- What specific steps has government taken to identify trafficking victims among individuals detained for immigration violations?

Human Rights Watch asks the Committee to call upon the government of Malaysia to:

- Provide full labor rights protections for foreign and national domestic workers in Malaysia in line with the International Labour Organization (ILO) Domestic Workers Convention and other relevant ILO conventions.
- Strengthen regulations governing recruitment and employment agencies, with clear mechanisms to monitor and enforce these standards.
- Prohibit the practice of salary deductions by employers, recruitment brokers, and agents.
- Investigate rigorously allegations of human trafficking, forced labor, food deprivation, sexual abuse, physical abuse, and forced confinement of domestic workers, and appropriately prosecute those found responsible.

Education (Article 10)

Malaysia in June 2015 endorsed the Safe Schools Declaration, which outlines various common-sense actions that countries can take to reduce the negative consequences of armed conflict on education.³⁶ Malaysia also chaired the working group on children and armed conflict during its

³⁵ Human Rights Watch, *“They Deceived Us at Every Step”*: Abuse of Cambodian Domestic Workers Migrating to Malaysia, October 2011, <https://www.hrw.org/report/2011/10/31/they-deceived-us-every-step/abuse-cambodian-domestic-workers-migrating-malaysia>.

³⁶ Safe Schools Declaration, https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe_schools_declaration.pdf (accessed April 10, 2017).

membership of the UN Security Council in 2015 and 2016, and led the unanimous adoption of Resolution 2225 (2015) during its presidency of the Council.

A key element of both the Safe Schools Declaration and Resolution 2225 is that governments take concrete measures to deter the military use of schools. In this respect, Malaysia's 1983 Military Manoeuvres Act prohibits the entry or interference with any school or ground attached to any school in the course of conducting military operations.³⁷

Malaysian troops who participate in UN peacekeeping operations are also obliged by UN regulations to not use schools in their operations.³⁸

Human Rights Watch recommends to the Committee that it ask the government of Malaysia:

- What steps has Malaysia taken in line with Security Council Resolution 2225 (2015), to take concrete measures to deter the military use of schools?
- What steps has Malaysia taken to implement the commitments in the Safe Schools Declaration?

Human Rights Watch asks the Committee to call upon the government of Malaysia to:

- Take concrete measures to deter the military use of schools, including by bringing the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* into domestic military policy and operational frameworks, as per the commitment made in the Safe Schools Declaration.

³⁷ Military Manoeuvres Act, December 28, 1983, art. 7.

³⁸ UN Infantry Battalion Manual, 2012, section 2.13, "Schools shall not be used by the military in their operations."