

**QUESTIONNAIRE SUR LA FAISABILITÉ D'UN PROTOCOLE À
LA CONVENTION DE LA HAYE DU 23 NOVEMBRE 2007
SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS DESTINÉS AUX ENFANTS
ET À D'AUTRES MEMBRES DE LA FAMILLE
CONSACRÉ AU RECOUVREMENT INTERNATIONAL DES ALIMENTS
DESTINÉS AUX PERSONNES VULNÉRABLES**

établi par le Bureau Permanent

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**QUESTIONNAIRE ON THE FEASIBILITY OF DEVELOPING A PROTOCOL TO
THE HAGUE CONVENTION OF 23 NOVEMBER 2007
ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT
AND OTHER FORMS OF FAMILY MAINTENANCE
TO DEAL WITH THE INTERNATIONAL RECOVERY OF MAINTENANCE
IN RESPECT OF VULNERABLE PERSONS**

drawn up by the Permanent Bureau

*Document préliminaire No 1 de mai 2009 à l'intention
de la Commission spéciale de novembre 2009 sur la mise en œuvre de
la Convention de 2007 sur le recouvrement des aliments et
du Protocole de 2007 sur la loi applicable*

*Preliminary Document No 1 of May 2009 for the attention
of the Special Commission of November 2009 on the implementation of
the 2007 Child Support Convention and of
the 2007 Protocol on Applicable Law*

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Introduction

At its meeting of 1 to 3 April 2008, having regard to the Recommendation made by the Twenty-First Session of the Conference,¹ the Council on General Affairs and Policy of the Hague Conference invited the Permanent Bureau to prepare a questionnaire on the feasibility of developing a protocol to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* ("the 2007 Child Support Convention") to deal with the international recovery of maintenance in respect of vulnerable persons. It was recommended and concluded that the responses should be submitted to the Special Commission on the implementation of that Convention² and a report made to the Council meeting of 2010.

This Questionnaire is addressed to all the Members of the Organisation as well as non-Member States of the Organisation that participated as Observers in the Twenty-First Session of the Hague Conference on Private International Law held in The Hague from 5 to 23 November 2007.

In view of the possible preparation of an analysis of the responses before the November 2009 Special Commission and in the light of a number of additional documents that will be distributed during the next three months for comments at different dates in September and October,³ the Permanent Bureau would very much appreciate receiving your response to this Questionnaire (in either English or French) **before 24 July 2009**. Answers should be sent via e-mail to < secretariat@hcch.net > with the following heading in the subject field: "Questionnaire – Vulnerable Persons Protocol – [name of the Member of the Organisation / non-Member State]".

Identification

For follow-up purposes

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¹ Recommendation No 9 of the Final Act of the Twenty-First Session of the Hague Conference on Private International Law, 23 November 2007, provides that: "The Twenty-First Session [...] [r]ecommends that the Council on General Affairs and Policy should consider as a matter of priority the feasibility of developing a Protocol to the *Hague Convention [of 23 November 2007] on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the international recovery of maintenance in respect of vulnerable persons. Such a Protocol would complement and build upon the *Hague Convention of 13 January 2000 on the International Protection of Adults*."

² This Special Commission will take place in The Hague during the second and third weeks of November 2009. A convocation for the meeting with precise dates and a draft agenda will be sent in June 2009.

³ Such documents will include a draft Handbook for case workers on the operation of the 2007 Child Support Convention, a checklist for implementation, draft Recommended Forms, a draft Country Profile and preliminary documents on the development of iSupport, the international electronic case management and Internet based communication system in support of the 2007 Child Support Convention.

Uploading of the Responses onto the HCCH Website

The Permanent Bureau envisages uploading the responses to this Questionnaire onto the HCCH website, as this may assist other States / Organisation in preparing their own responses or their position before the November 2009 Special Commission. Does your State / Organisation agree to making its response available for uploading onto the HCCH website?

YES – Our response to the Questionnaire may be uploaded onto the HCCH website

NO – No detail of our response may be uploaded onto the HCCH website

In the absence of an answer to this question your response to the Questionnaire will be uploaded onto the HCCH website.

Background

The issue of the application of the 2007 Child Support Convention to vulnerable persons was raised during the Twenty-First Session of the Conference. According to some States, the 2007 Child Support Convention in its entirety should have been applicable on a mandatory basis to maintenance in respect of vulnerable persons. However, other States were not ready to accept this proposal without examining its full implication. There was not enough time to do so during the Session; which explains Recommendation No 9 of the Final Act of the Twenty-First Session.⁴

As an introduction to this Questionnaire it is necessary to explain the extent to which maintenance obligations in respect of vulnerable persons:⁵ (A) are already included within the compulsory scope of the 2007 Child Support Convention; (B) may be brought within its scope by a declaration made by a Contracting State under Article 2(3); (C) cannot be brought within the scope of the Convention; and, (D) are not *per se* within the scope of the *Hague Convention of 13 January 2000 on the International Protection of Adults* ("the 2000 Adults Convention").

(A) Maintenance obligations in respect of vulnerable persons which come within the compulsory scope of the Convention⁶

Where the vulnerable person is a child below the age of 21 years,⁷ maintenance obligations of a parent towards him or her come within the compulsory scope of the Convention by virtue of Article 2(1) *a*). The obligations arise from the parent / child relationship regardless of whether the child is or is not a vulnerable person.

Similarly where the vulnerable person is a spouse, maintenance obligations of the other spouse towards him or her come within the compulsory scope of the Convention if and when the conditions of Article 2(1) *b*) or *c*) are met. The obligations arise from the spousal relationship regardless of whether the spouse is or is not a vulnerable person.

There is only one case in which an obligation towards a vulnerable person as such comes within the compulsory scope of the Convention. The Convention provides in Article 37(3) that it shall apply, in the case of direct requests to competent authorities, "to a decision granting maintenance to a vulnerable person over the age specified in [Article 2(1) *a*)] where such decision was rendered before the person reached that age and provided for maintenance beyond that age by reason of the impairment".

(B) Maintenance obligations in respect of vulnerable persons which may be brought within the scope of the Convention by Contracting States

A Contracting State may by declaration bring within the scope of the Convention (or any part of the Convention) any obligation towards a vulnerable person which arises from a family relationship, parentage, marriage or affinity. The following are some examples:

⁴ See, *supra*, note 1, for the text of Recommendation No 9.

⁵ For the purpose of the 2007 Child Support Convention "vulnerable person" means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself" (Art. 3 *f*)).

⁶ It should be noted that the scope of the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* is broader than that of the Convention and that therefore the Protocol automatically applies to a broad range of maintenance obligations in respect of vulnerable persons, in particular to any such obligations which arise "from a family relationship, parentage, marriage or affinity" (Art. 1(1)).

⁷ Or 18 years depending on whether a State has made a reservation in accordance with Art. 2(2).

- an obligation of a parent towards a child over the age of 21 years where impairment arises after that age;
- an obligation of a parent towards a child over the age of 21 years where an impairment and an obligation arise before that age in cases other than those covered by Article 37(3);
- an obligation of one spouse towards the other where that other spouse is a "vulnerable person" in cases other than those covered by Article 2(1) *b*) and *c*);
- an obligation of any other specified relation (such as a grandparent, a grandchild, an uncle or aunt, a niece or nephew) towards a vulnerable person.

Any such declaration made by one Contracting State will give rise to mutual obligations between that State and any other Contracting State which has made an equivalent declaration (Art. 2(3)).

(C) Maintenance obligations in respect of vulnerable persons which cannot be brought within the scope of the Convention

It may well be that most recognised maintenance obligations towards vulnerable persons come within categories (A) and (B) above. However, some countries may recognise circumstances in which a maintenance obligation towards a vulnerable person is placed on a person or a body with no family relationship with the vulnerable person. Indeed, it is part of the purpose of this Questionnaire to discover the extent to which such obligations exist.

(D) The 2000 Adults Convention does not apply to maintenance obligations *per se*

Even though the 2000 Adults Convention does not apply to maintenance obligations *per se*, it is applicable to the issue of powers of representation which would include provisions to make arrangements for the international recovery of maintenance on behalf of the adult who is not in a position to protect his or her interests. For example, in accordance with Article 15 of the 2000 Convention, the law of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in Article 15(2) has been designated expressly in writing, would govern the existence, extent, modification and extinction of powers of representations. Article 16 which provides for the withdrawal or modification of powers of representation by measures taken by an authority having jurisdiction under the 2000 Convention would also be applicable.

In the light of this background, the objectives of the Questionnaire are:

- (1) to learn more from States concerning maintenance provisions under domestic laws in respect of vulnerable persons;
- (2) to identify any special rules which may need to be added to the 2007 Child Support Convention, by way of a protocol, with regard to those maintenance obligations in respect of vulnerable persons which are within or are capable of being brought within the scope of the Convention; and
- (3) to identify any categories of maintenance obligations towards vulnerable persons which at the moment cannot be brought within the scope of the Convention.

Questions

(A) Maintenance obligations in respect of vulnerable persons which come within the compulsory scope of the Convention

1) Does the law of your State / Organisation provide specifically for maintenance obligations arising from a parent-child relationship towards a vulnerable person under the age of 21 years (or 18 years)?

YES

NO

We note that the definition provided under footnote number 5 in the Background paper, defines 'vulnerable person' to mean a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself. Although the term 'vulnerable person' is not found and defined under Malaysian law, there are other terms used in some statutes to refer to 'vulnerable person' such as 'persons with disabilities', 'mental or physical disability' and 'incapacitated'. The relevant laws are as follows—"

(a) Persons with Disabilities Act 2008 [Act 685]

Reference is made to section 2 of Act 685, where the meaning of the term "*persons with disabilities*" include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society. Act 685 is "*an Act to provide for the registration, protection, rehabilitation, development and well being of persons with disabilities, the establishment of the National Council for Persons with Disabilities, and for matters connected therewith*". There are no specific provisions under Act 685 regarding maintenance obligations arising from parent-child relationship.

(b) Law Reform (Marriage and Divorce) Act 1976 [Act 164]

Act 164 is an Act to provide for monogamous marriages and the solemnisation and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto. Act 164 also provides for general maintenance obligations for spouse and children.

In the case of the maintenance of "a child who is under physical or mental disability", section 95 of Act 164 provides as follows:

"Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, on the ceasing of such disability, whichever is the later."

Under this provision, it is clear that the maintenance of a child who is under physical or mental disability can be extended even after he has attained the age of eighteen years.

In addition thereto, the following Sections 2, 87, 92, 93 and 94 of Act 164 are also relevant and are referred to:

Section 2 of Act 164 defines "child of the marriage" as-

"a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption."

The meaning of "child" is provided under section 87 of Act 164, which states the following:

"In this Part, wherever the context so requires, "child" has the meaning of "child of the marriage" as defined in section 2 who is under the age of eighteen years."

Section 92: Duty to maintain children.

"Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof."

Section 93: Power for court to order maintenance for children.

"(1) The court may at any time order a man to pay maintenance for the benefit of his child -

(a) if he has refused or neglected reasonably to provide for the child;

(b) if he has deserted his wife and the child is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the child in the custody of any other person.

(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

(3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child."

Based on sections 92 and 93 of Act 164, it is apparent that it is always the duty of a parent to maintain his/her children, including his or her 'vulnerable children'. Therefore, the rights of vulnerable children to maintenance are guaranteed and protected under Act 164.

(c) Islamic Family Law (Federal Territory) Act 1984 (Act 303)

In Malaysia, Islamic family law matters are governed by the respective State Islamic Family Law Act/Enactments. For the purpose of this questionnaire, reference will be made to the Islamic Family Law (Federal Territories) Act 1984 (Act 303).

Section 72. Duty to maintain children.

“(1) Except where an agreement or order of Court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention, and education as are reasonable having regard to his means and station in life or by paying the cost thereof.

“(2) Except as aforesaid, it shall be the duty of a person liable under Hukum Syara', to maintain or contribute to the maintenance of children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.”

Section 73. Power of Court to order maintenance for children.

(1) The Court may at any time order a man to pay maintenance for the benefit of any child of his-

(a) if he has refused or neglected to provide reasonably for his child;

(b) if he has deserted his wife and the child is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the child in the custody of any other person.

(2) The Court shall have the corresponding power to order a person liable under Hukum Syara', to pay or contribute towards the maintenance of a child where it is satisfied that having regard to his means it is reasonable so to order.

(3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or to the trustee for the child.

Under Act 303, there are few provisions that give protection to 'vulnerable person' and they are extensive in nature.

For example, under section 60 of Act 303, the court can order 'any person' liable according to Hukum Syarak, to pay maintenance to 'another person', who is incapacitated by reason of mental or physical injury or ill-health. Section 60 of Act 303 reads as follows:

“The Court may order any person liable thereto according to Hukum Syarak, to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health and the Court is satisfied that having regard to the means of the first-mentioned person it is reasonable so to order.”

The words 'any person liable according to Hukum Syarak' in this provision would include the paternal grandfather, male siblings and paternal uncles. By virtue of section 3 of the Interpretation Acts 1948 And 1967 [Act 388], it may also include the Baitulmal (Baitulmal is the Treasury for tithes). The phrase 'another person' in this provision is wide enough to include a child.

Maintenance of a child who has a mental or physical disability is also recognized under paragraph 79(c) (i) and (ii) of Act 303. Under these provisions, the maintenance period even can go beyond the age of 18. Section 79 of Act 303 reads as follows:

“Except—

(a) where an order for maintenance of a child is expressed to be for any shorter period; or

(b) where any such order has been rescinded; or

(c) where any such order is made in favour of—

(i) a daughter who has not been married or who is, by reason of some mental or physical disability, incapable of maintaining herself;

(ii) a son who is, by reason of some mental or physical disability, incapable of maintaining himself,

the order for maintenance shall expire on the attainment by the child of the age of eighteen years, but the Court may, on application by the child or any other person, extend the order for maintenance to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training.”.

Unlike Act 164, under sections 72 and 73 of Act 303, the responsibility to maintain the children, including ‘vulnerable children’ is always on the father. In his absence or inability, the duty will shift to ‘a person liable under Hukum Syarak’ such as the paternal grandfather, male siblings, paternal uncles and the Baitulmal, as the case may be. This is provided for under subsections 72(2) and 73(2) of Act 303.

However in the case of illegitimate children, including ‘vulnerable illegitimate children’, it is always the duty of the mother to maintain the children. This is provided for under section 80 of Act 303. In her absence or inability, the duty will shift to the maternal grandfather, maternal uncles and the Baitulmal, as the case may be.

In light of the above, although Malaysian law does not specifically provide for maintenance obligations arising from a parent-child relationship towards a vulnerable person under the age of 18 years and/or until such further period as the court thinks reasonable, to enable the child to pursue further or higher education or training (in the case of Malaysia) but by virtue of sections 92 – 94 of Act 164, and sections 72, 73 and 79 of Act 303, maintenance obligations towards the child arises regardless whether the child is vulnerable or not as long as the provision of Acts 164 and 303 are satisfied and the child is below the age of 18 and/or until such further period as the court thinks reasonable, to enable the child to pursue further or higher education or training. Section 94 of Act 164 and section 79 of Act 303 even go further by extending the maintenance period to go beyond the age of 18 for a child who is under a physical or mental disability until such disability ceases. In addition thereto, the Islamic law provides for an indefinite duration for the maintenance obligation for a disabled child by virtue of section 79 of Act 303.

[NOTE: Since both Act 164 and Act 303 are enacted by Parliament, they have equal status]

2) Does the law of your State / Organisation provide specifically for maintenance obligations for a spouse towards a vulnerable spouse?

YES

NO

The obligation for maintenance for a spouse towards a vulnerable spouse is specifically provided under Malaysian Civil law. Under Islamic Law, it is always the duty of the husband to maintain the wife at all times while the wife owes no obligation at all towards the husband.

(a) Law Reform (Marriage and Divorce) Act 1976 [Act 164]

In the case of ‘incapacitated husband or former husband’, the court may order a woman to pay maintenance to her incapacitated husband or former husband by virtue of subsection 77(2) of Act 164. Subsection 77(2) reads as follows:

“The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.”

(b) Islamic Family Law (Federal Territories) Act 1984 (Act 303)

Reference is made to sections 59 and 60 of Act 303.

Section 59. Power of Court to order maintenance of wife, and the effect of nusyuz.

“(1) The Court may, subject to Hukum Syarak, order a man to pay maintenance to his wife or former wife.

(2) Subject to Hukum Syarak and confirmation by the Court, a wife shall not be entitled to maintenance when she is nusyuz, or unreasonably refuses to obey the lawful wishes or commands of her husband, that is to say, inter alia—

(a) when she withholds her association with her husband;

(b) when she leaves her husband’s home against his will; or

(c) when she refuses to move with him to another home or place,

without any valid reason according to Hukum Syarak.

(3) As soon as the wife repents and obeys the lawful wishes and commands of her husband, she ceases to be nusyuz.”

Section 60. Power of Court to order maintenance of certain persons.

“The Court may order any person liable thereto according to Hukum Syarak, to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health and the Court is satisfied that having regard to

the means of the first-mentioned person it is reasonable so to order."

Under Islamic law, it is always the duty of a husband to maintain a wife, whether she is vulnerable or not. Subsection 59(1) of Act 303 covers both situations. This duty will lapse only in the case where the wife is *nusyuz* (subsection 59(2) of Act 303).

Thus, there is no obligation on the wife to provide maintenance to a vulnerable husband but as stated in section 60 of Act 303, the Syariah Court may order any person liable thereto according to *Hukum Syarak*, to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the Court is satisfied that having regard to the means of the first-mentioned person it is reasonable so to order.

The term 'any person' in section 60 does not apply to the former husband or the wife or the former wife, but instead the father, paternal grandfather, male siblings, paternal uncles and the Baitulmal, as the case may be.

In other words, under Islamic law, the obligation to pay maintenance is only for men and not for women unless she has a child who is born out of wedlock.

3) Can you please identify any special rules which may need to be added to the 2007 Child Support Convention, by way of a protocol, with regard to maintenance obligations: a) arising from a parent-child relationship towards a vulnerable person under the age of 21 years (or 18 years); or, b) for a spouse towards a vulnerable spouse:

a) _____

b) _____

(B) Maintenance obligations in respect of vulnerable persons which may be brought within the scope of the Convention by Contracting States

4) Does the law of your State / Organisation provide specifically, in respect of vulnerable persons, for maintenance obligations arising from:

- a family relationship YES / NO
- parentage YES / NO
- marriage YES / NO
- affinity YES / NO

In addition to the explanation provided for questions 1 and 2 above, reference is also made to section 99 of Act 164, and sections 72, 78 and 80 of Act 303.

Section 99 of Act 164: Duty to maintain child accepted as member of family.

“(1) Where a man has accepted a child who is not his child as a member of his family, it shall be his duty to maintain such child while he or she remains a child, so far as the father and the mother of the child fail to do so, and the court may make such orders as may be necessary to ensure the welfare of the child:

Provided that the duty imposed by this subsection shall cease if the child is taken away by his or her father or mother.

(2) Any sums expended by a man maintaining such child shall be recoverable as a debt from the father or mother of the child.”

Section 72 of Act 303: Duty to Maintain Children

“(1) Except where an agreement or order of Court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention, and education as are reasonable having regard to his means and station in life or by paying the cost thereof.

(2) Except as aforesaid, it shall be the duty of a person liable under Hukum Syara', to maintain or contribute to the maintenance of children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.”

In cases where the father dies or is missing or is incapable of maintaining his child, the paternal grandfather, male siblings and paternal uncles will be responsible for the maintenance obligation. Subsection 72(2) of Act 303 provides that the Syariah court has power to order a person liable under Hukum Syarak to maintain the child if his/her father is dead or his whereabouts unknown or if and in so far that he is unable to maintain him/her. This clause is wide enough to cover the situation where a father is incapable to maintain his legitimate child.

In the questionnaire, by virtue of the inclusion of affinity, the scope is extended to illegitimate child, adopted child of heterosexual parents who are not married to each other or homosexual parents or children born out of rape. Unlike the civil law, it is important to note that according to *Hukum Syarak*, where it involves relationship that does not fall under the definition of family relationships from the Syariah perspective for reasons of illegitimacy, adoption, cohabitation or marriage which are not recognized by *Hukum Syarak*, the original rulings on maintenance obligations would not be applicable.

Be that as it may, Act 303 imposes a duty on a man to maintain a child accepted as a member of his family which includes an adopted child. This is provided for under section 78 of Act 303 which reads as follows:

Section 78: Duty to maintain child accepted as member of family.

“(1) Where a man has accepted a child who is not his child as a member of his family, it shall be his duty to maintain the child while he or she remains a child, so far as the parents of the child fail to do so, and the Court may make such orders as may be necessary to ensure the welfare of the child.

(2) The duty imposed by subsection (1) shall cease if the child is taken back by either of his or her parents.

- (3) *Any sum expended by a man in maintaining a child as required by subsection (1) shall be recoverable from the father or mother of the child.*"

With regard to an illegitimate child, Act 303 imposes a duty on a mother to maintain her illegitimate child. This is because, under the Islamic law, an illegitimate child derives his *nasab* (lineage) from the mother. In her absence or inability, the duty will shift to the maternal grandfather, maternal uncles and the Baitulmal, as the case may be.

Subsection 80(1) of Act 303 provides as follows:

"Section 80: Duty to maintain illegitimate children.

- (1) *If a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the Court, upon due proof thereof, may order the woman to make such monthly allowance as the Court thinks reasonable."*

5) Does your State / Organisation intend to extend the application of the whole or any part of the Convention to maintenance obligations arising from a family relationship, parentage, marriage or affinity which would include vulnerable persons?

- YES
 NO
 Not yet determined

6) If you replied YES to Question 5), please indicate the relationship(s), which would include vulnerable persons, to which you would extend the Convention:

- family
 parentage
 marriage
 affinity

7) If you replied YES to Question 5), please indicate the parts of the Convention to which you would extend the relationship(s) identified in Question 6):

- the whole Convention
 the whole Convention, with the exception of Chapters II and III
 other, please specify: _____

8) Please identify any special rules which may need to be added to the 2007 Child Support Convention, by way of a protocol, with regard to those maintenance obligations in respect of vulnerable persons which are capable of being brought within the scope of the Convention:

(C) Maintenance obligations in respect of vulnerable persons which cannot be brought within the scope of the Convention

9) Does the law of your State / Organisation provide specifically for maintenance obligations which **do not** arise from a family relationship, parentage, marriage or affinity in respect of vulnerable persons?

YES

NO

See explanation for question 1.

Act 685 can be construed as providing maintenance to persons with disabilities through other means other than monetary.

Section 38 of Act 685 provides the following:

“(1) The Government shall provide the necessary lifelong protection and social support system including ensuring that the welfare of persons with severe disabilities remain unaffected after the death of their parents or their caregivers in order to enable the persons with severe disabilities to lead a better quality of life.

“(2) Any non-governmental organization intending to provide or providing institutional care for persons with severe disabilities or the caregivers for persons with severe disabilities may make an application for an incentive for providing such care to the Council in such form and manner as may be prescribed.

“(3) The Council may, if it is satisfied that the application of the non-governmental organization or caregivers referred to in subsection (2) should be considered, grant such incentive as it deems appropriate with the approval of the Minister responsible for finance.”

Be that as it may, the word “maintenance” is not defined under Malaysian law, but the term “maintenance order” is defined under section 3 of Married Woman and Children (Enforcement of Maintenance) Act 1968 (revised 1988) as –

“(a) an order made under section 3 of the Married Women and Children (Maintenance) Act 1950 (Act 263);

“(b) an order for the payment of periodical sums by way of maintenance or alimony to a wife or for the benefit of any child under the Law Reform (Marriage and Divorce) Act 1976 (Act 164);

“(c) a maintenance order confirmed by the court under the Maintenance Orders (Facilities for Enforcement) Act 1949 (Act 34); and

“(d) where this Act are made applicable by virtue of an authorization under section 14 to or in respect of a maintenance order made by a Syariah Court shall include such order.”

Therefore, under the Malaysia law, the maintenance obligations mentioned therein does not include protection, rehabilitation, development and well being of persons with disabilities provided by the government. Clarification is sought whether the term “maintenance obligations’ referred to under this questionnaire would include the lifelong protection and social support system provided by the government.

Under the general principles of Islamic law, both adopted and illegitimate children are not children arising from family relationship, parentage, marriage or affinity (kindly see explanation for question 4).

10) Please identify any categories within your State / Organisation of maintenance obligations towards vulnerable persons which at the moment cannot be brought within the scope of the Convention:

(i) In the questionnaire, by virtue of the inclusion of affinity the scope is extended to illegitimate child, adopted child of heterosexual parents who are not married to each other or homosexual parents or children born out of rape. It is important to note that according to *Hukum Syarak*, where it involves a relationship that does not fall under the definition of family relationships from the Syariah perspective for reasons of illegitimacy, adoption, cohabitation or marriage which are not recognized by *Hukum Syarak*, the original rulings on maintenance obligations would not be applicable.

(ii) Under Islamic law, unlike the civil law, there is no obligation on the wife to provide maintenance to a vulnerable husband but as stated in section 60 of Act 303, the Syariah Court may order any person liable thereto according to *Hukum Syarak*, to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health and the Court is satisfied that having regard to the means of the first-mentioned person it is reasonable so to order.

11) Please identify any special rules which may need to be added to the 2007 Child Support Convention, by way of a protocol, with regard to those maintenance obligations in respect of vulnerable persons which at the moment cannot be brought within the scope of the Convention:

General questions

12) Does your State / Organisation have bilateral, regional or international agreements in place that deal specifically with maintenance obligations in respect of vulnerable persons?

[] YES
[x] NO

(a) It should however be highlighted that Malaysia signed the Convention on the Rights of Persons with Disabilities ("PwD Convention") on 8 April 2008. Malaysia has not yet ratified the PwD Convention. Although the PwD Convention does not deal specifically with maintenance obligations in respect of vulnerable persons, the Convention does, *inter alia*, obligate State Parties to ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care (Article 28(2)(c) of the PwD Convention).

Article 28 of PwD Convention provides the following:

"Article 28 - Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including

adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

- a. To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;*
- b. To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;*
- c. To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;*
- d. To ensure access by persons with disabilities to public housing programmes;*
- e. To ensure equal access by persons with disabilities to retirement benefits and programmes."*

- (a) Malaysia also ratified the Convention on the Rights of the Child ("CRC") on 17 February 1995. Article 23 of the CRC provides, inter alia, for special care and assistance to be given to disabled children.**

Article 23 of CRC provides the following:

"1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling

States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries."

13) If you replied YES to Question 12), please identify the categories of maintenance obligations towards vulnerable persons which fall within the scope of the bilateral, regional or international agreements referred to therein:

14) Do you see the need for the development of a protocol to deal with the international recovery of maintenance in respect of vulnerable persons?

YES
 NO. Not at the moment.

15) Any other remarks:

* * *

Thank you!