



JOINT MEMORANDUM ON THE REFORM OF THE ABORIGINAL PEOPLES ACT 1954 AND ORANG ASLI POLICY AND ADMINISTRATION — TOWARDS BETTER ORANG ASLI SELF-DETERMINATION

A. INTRODUCTION

On 18 April 2019, Pusat KOMAS and the Bar Council Committee on Orang Asli Rights (“COAR”) held a Roundtable Discussion (“RTD”) to discuss the continued relevance of the Aboriginal Peoples Act 1954 (“APA”) in terms of Orang Asli rights and the wide powers the APA confers on the State over the Orang Asli.

22 representatives from the Orang Asli community, Orang Asli organisations, relevant non-governmental organisations, the University of Malaya, COAR and the Human Rights Commission of Malaysia (“SUHAKAM”) participated in the RTD. A list of participants and their organizational affiliations is attached to this memorandum as Annexure A.

The RTD was held at an opportune time in view of the National Orang Asli Convention 2019 (“NOAC 2019”) organised by the Federal Government in Putrajaya on 22 April 2019 which culminated in the adoption of 136 resolutions targeted towards restoring the dignity of the Orang Asli (*memartabatkan Orang Asli*) and addressing the sustained marginalisation of the Orang Asli. The resolutions are contained in a document known as *136 Resolusi Konvensyen Orang Asli Kebangsaan 2019* (“*136 OA Convention Resolutions*”). The Federal Government’s action in taking the initiative to appreciate and understand the various issues faced by the Orang Asli is lauded.

In this regard, the recent media statement by the Minister in the Prime Minister’s Department, P. Waythamoorthy, voicing the Federal Government’s intention to amend the APA to enable the Orang Asli themselves to appoint and remove their headmen¹ is also noted.

However, the provision governing Orang Asli headmen is but one of many provisions in the APA that are outdated and confer extraordinary governmental power to control most, if not all, material aspects of Orang Asli lives for the sake of their protection. Such provisions, which may have been relevant for security reasons during the Malayan Emergency and when the Orang Asli

¹ See “Govt mulls amending Aboriginal Peoples Act 1954 – Waythamoorthy”, *New Straits Times*, 23 April 2019.

community generally lacked mainstream administrative capacity, are outmoded and, from a human rights perspective, have no place in contemporary Malaysia.

Relevant to the issue of the dignity and empowerment of the Orang Asli as focused upon during the NOAC 2019, the proposals contained in this memorandum are a product of the RTD that: (i) built upon other discussions held by relevant stakeholders over the last few years; and (ii) focused on the extent participants desired governmental power and control over the affairs of the Orang Asli community; and (iii) discussed concomitant legal reforms and safeguards to ensure that such aspirations are achieved. These proposals function to complement the *136 Orang Asli Convention Resolutions* and the 18 recommendations made by SUHAKAM in its 2013 Report on the National Inquiry Into the Land Rights of Indigenous Peoples (“the SUHAKAM Report”) in respect of Orang Asli land rights. For clarity, the recommendations in the SUHAKAM Report include Recommendation 18 that calls for the establishment of an independent National Commission on Indigenous Peoples. While the previous Federal Government rejected Recommendation 18, due consideration should be given to this recommendation, with particular focus on the Orang Asli of Peninsular Malaysia.

B. KEY POINTS ON ORANG ASLI EMPOWERMENT AND SELF-DETERMINATION FROM THE RTD

1. Having referred to the relevant provisions of the APA concerning the protection of the Orang Asli and sought feedback on the role of Jabatan Kemajuan Orang Asli (“JAKOA”) during the RTD, there was a general consensus among the participants, and particularly the Orang Asli participants, that the extensive governmental statutory power possessed over the Orang Asli and their lands had not resulted in better protection of the Orang Asli and their lands, but increased State control over them, to their detriment.
2. There were familiar complaints of JAKOA’s failure to carry out its responsibilities, JAKOA officers acting in a manner prejudicial to Orang Asli interests, and a general culture of disrespect and condescension towards the Orang Asli pervading in JAKOA.
3. Consistent with the principles of self-determination contained in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) (and subsequently confirmed by the theme of the NOAC 2019), participants called for more control over their lives and lands and observed that the provisions of the APA did not reflect this intent.
4. The proposals from the participants in respect of greater control over the lives and lands of the Orang Asli during the RTD can be categorised into three main areas, namely: (i) autonomy in respect of matters relating to Orang Asli identity, adat and adat lands, and the right to free, prior and informed consent in relation to such matters; (ii) the right to prior and effective consultation in respect of laws and policies affecting the Orang Asli; and (iii) the substantial revamp and transformation of JAKOA, from an agency

having control over the Orang Asli into a government service agency that efficiently aids the needs of the Orang Asli community.

5. Proposals made by the participants for greater Orang Asli control and self-determination prominently featured the incorporation of indigenous rights standards contained in UNDRIP and called for any future laws and policy reforms on Orang Asli to include such standards.

C. PROPOSED WAY FORWARD FOR THE REVIEW OF ORANG ASLI LAWS FOR GREATER SELF-DETERMINATION AND EMPOWERMENT

1. The current provisions of the APA are paternalistic and place an inordinate proportion of power over the Orang Asli and their lands in the hands of the Federal and State Governments. Many of the provisions were intended to address security concerns during the Malayan Emergency and the then-prevailing lack of Orang Asli expertise to manage their own official administration, which to some extent are no longer relevant to the current situation of the Orang Asli.
2. While these statutory powers are intended for the protection of the Orang Asli, they also can be abused to control Orang Asli lives and lands and in some cases, arguably violate the fundamental liberties afforded to the Orang Asli under Part II of the Federal Constitution.
3. Additionally, broad government responsibility over the Orang Asli places an unnecessary administrative burden on the Federal and State Governments that should be shared with or delegated to the Orang Asli community.
4. Examples of wide-ranging Federal power in the APA include but are not limited to:
 - 4.1 Sections 14 and 15 – The Director General of JAKOA (“the DG”) and Federal Minister having charge of Orang Asli affairs (“the Minister”) have the ultimate power to exclude any persons from Orang Asli inhabited areas, reserves and areas;
 - 4.2 Section 3(3) – The ultimate decision of who is or is not an Orang Asli (or in other words, whether an Orang Asli leads an Orang Asli “way of life”) lies with the Minister;
 - 4.3 Section 16 – The ultimate power to remove an Orang Asli headman lies with the Minister;

- 4.4 Section 4 – The DG is solely responsible for the administration, welfare and general development of the Orang Asli;
 - 4.5 Sections 6, 9 and 12 – In respect of lands, the DG possesses powers to control activities conducted within Aboriginal areas, Orang Asli land transactions and monetary compensation awarded to the Orang Asli for loss of traditional lands respectively; and
 - 4.6 Section 19 – The Minister has wide powers to make regulations affecting the Orang Asli including redefining their ethnicity.
5. Examples of State Government power over Orang Asli land matters in the APA that potentially run counter to common law developments in the Malaysian appellate courts recognising Orang Asli customary land and resource rights (see *Kerajaan Negeri Johor v Adong bin Kuwau* [1998] 2 MLJ 158; *Kerajaan Negeri Johor v Sagong bin Tasi* [2005] 6 MLJ 289; *Ketua Pengarah Jabatan Hal Ehwal Ehwah Orang Asli v Mohamad bin Nohing (Batin Kampung Bukit Rok) and another appeal* [2015] 6 MLJ 527) include, but are not limited to:
- 5.1 Sections 6 and 7 – The State Authority has the power to declare, vary and revoke Aboriginal reserves and Aboriginal areas with minimal **statutory** recourse for the Orang Asli;
 - 5.2 Section 8 – The State Authority has the power to determine (and consequently intervene into) the rights of customary occupation within declared Aboriginal reserves or areas;
 - 5.3 Section 10 – The State Authority has the power to evict the Orang Asli from Malay or other reserved lands with minimal **statutory** recourse for the Orang Asli; and
 - 5.4 Section 12 – Inconsistent with the constitutional right to property under article 13 of the Federal Constitution (see *Kerajaan Negeri Johor v Adong bin Kuwau* [1998] 2 MLJ 158), the State Authority has the statutory power to determine whether or not to grant adequate compensation for the loss of Orang Asli lands.
6. Additionally, the State Authority also possesses the power to declare any group of Orang Asli as an “aboriginal ethnic group” within the meaning of the APA (see section 2).
7. As can be gleaned from many other Orang Asli studies and consultations including the *136 OA Convention Resolutions*, there is no doubt that more than 60 years of

- inordinate governmental power over the Orang Asli as provided in the APA has failed to sufficiently alleviate the marginalisation of the Orang Asli community.
8. To facilitate the greater empowerment of the Orang Asli as proposed by the Orang Asli in section B above and indeed the *136 OA Convention Resolutions*, the outmoded APA and other laws specifically applicable to the Orang Asli are in need of reform.
 9. There is a plethora of policy frameworks upon which Orang Asli law reform can be grounded and it is not the intention of this memorandum to speculate and extrapolate on preferred frameworks for the Orang Asli particularly when they have not been consulted on such matters.
 10. In this respect, it is vital for any law, policy, institutional and practice reforms that concern the Orang Asli community to take into account all previous consultations held with all sections of the community and in the future, be preceded by prior and effective consultation with all sections of the community and at every stage of the reform process.
 11. Subject always to the consultation process envisaged in paragraph 10 above and paragraph 15 below, the following proposals for legal reform are made on the assumption that the current administrative framework for the Orang Asli — namely the Minister, DG and JAKOA — is to remain.
 12. To increase Orang Asli empowerment and self-determination within the current administrative framework and facilitate the transition of JAKOA from an administrative agency to a service agency as proposed in section B paragraph 4 above, law reforms should include legal safeguards to ensure there is an equitable balance of power between the Government and the Orang Asli community.
 13. The legal safeguards referred to in paragraph 12 above should take the form of rights to free, prior and informed consent and to prior and effective consultation that are in compliance with international best practices on indigenous and human rights.
 14. Accordingly, it is suggested that the Federal Government adopt the following approach in reviewing and amending laws on the Orang Asli:
 - 14.1 In respect of land and resource matters, the Federal Government immediately take action to implement items 1-8 under “Fokus 1: Tanah” in the *136 OA Convention Resolutions* having due regard to the provisions contained in UNDRIP on lands, resources and territories. In this regard, the Federal Government should additionally:

- 14.1.1 take immediate steps to implement the recommendations made in the SUHAKAM Report;
 - 14.1.2 survey the Orang Asli lands to be protected pursuant to item 2 under “Fokus 1: Tanah” of the *136 OA Convention Resolutions* in prior and effective consultation with local Orang Asli communities; and
 - 14.1.3 ensure that the recognition of Orang Asli land and resource rights by the Malaysian courts is not impaired or compromised in any way.
- 14.2 In respect of other aspects of the APA which come squarely within the Federal jurisdiction including but not limited to the preamble and sections 2, 3, 4, 5, 6, 9, 12, 14, 15, 16, 17, 18, 19 of the APA, the following is suggested:
- 14.2.1 The preamble should be reviewed to incorporate the empowerment and self-determination intention of the proposed law reform;
 - 14.2.2 APA provisions relating to the definitions of Orang Asli and their identity — for example, section 2 (the definitions of Orang Asli (aboriginal) ethnic groups, Orang Asli (aboriginal) language, Orang Asli (aboriginal) racial group and Orang Asli (aboriginal) way of life), section 3 (definition of Orang Asli (aborigine) and section 19 (Ministerial powers of regulation) — should be reviewed to empower Orang Asli self-identification rather than governmental determination;
 - 14.2.3 APA provisions relating to headmanship or Orang Asli customary decision-making institutions — for example, section 4 (*proviso* on adat matters); section 16 (Orang Asli headman) and section 19 (Ministerial powers of regulation) — should be reviewed having due regard to items 1-9 of “Fokus 5: Kepimpinan” and “Fokus 1: Tanah” in the *136 OA Convention Resolutions* and the relevant provisions of the UNDRIP on the recognition of and respect for indigenous institutions;
 - 14.2.4 APA provisions relating to the DG’s powers in relation to Orang Asli lands and resources contained in sections 6, 9 and 12 should be reviewed to be consistent with future amendments to laws concerning Orang Asli land and resource rights, and in the meantime, be amended to incorporate an element of free, prior and informed consent of the local Orang Asli community, as elaborated in paragraph 14.2.9 below;
 - 14.2.5 The DG’s powers in relation to adoption contained in section 18 of the APA should incorporate an element of free, prior and informed consent

of the local Orang Asli community, as elaborated in paragraph 14.2.9 below;

14.2.6 APA provisions relating to the DG's powers in relation to Orang Asli administration, welfare, development, education and regulations (eg. section 4, 17, 19 etc.) should be reviewed to include an Orang Asli or where appropriate, a communal prior and effective consultation element elaborated in paragraph 14.2.9 below;

14.2.7 Section 19 of the APA relating to the Minister's power to make regulations should be amended to reflect the empowerment and self-determination approach of the proposed legislative reform and incorporate an Orang Asli or where appropriate, a communal prior and effective consultation element elaborated in paragraph 14.2.9 below;

14.2.8 Sections 14 and 15 of the APA on the restriction of the freedom of association of Orang Asli should be removed; and

14.2.9 The concepts of "free, prior and informed consent" and "prior and effective consultation" mentioned in this paragraph 14 and its application should be: (i) in compliance with international best practices on indigenous and human rights; and (ii) defined by statute and elaborated by regulations made after prior and effective consultation with the Orang Asli community.

15. In line with the Federal Government's intent to respect the dignity of the Orang Asli and the principle of consulting with and obtaining the free, prior and informed consent of the Orang Asli before introducing any changes to laws and policies affecting them as contained in articles 18 and 19 of the UNDRIP, it is proposed that the Ministry in charge of Orang Asli Affairs obtain approval from the Malaysian Cabinet to form a working group consisting of Government and relevant independent experts on the Orang Asli and community representatives to study, review and recommend specific amendments to the laws concerning Orang Asli as outlined above or other amendments as deemed fit. Consultation drafts of any proposed laws and policies should be provided to all relevant stakeholders with the intention of obtaining and considering timely and effective input from all parties concerned.

ANNEXURE A

List of Participants

(1) Siti Zabedah Kasim	Bar Council Committee on Orang Asli Rights
(2) Yogeswaran Subramaniam	Bar Council Committee on Orang Asli Rights
(3) Zenathnara a/p Narayanasamy	Bar Council Committee on Orang Asli Rights
(4) Faribel Fernandez	Pusat KOMAS
(5) Jerald Joseph	SUHAKAM
(6) Joshua Ericsson	SUHAKAM
(7) Helmi Fendy Mohamad Idris	SUHAKAM
(8) Abel Athi Kumar	SUHAKAM
(9) Sarah Adibah Hamzah	SUHAKAM
(10) Prof Dr Ramy Bulan	Law Faculty, University of Malaya
(11) Dr Kamal Solhaimi	Anthropologist, University of Malaya
(12) Tijah Yok Chopil	Chairperson, Jaringan Kampung Orang Asli Semenanjung Malaysia
(13) Dolah Tekoi	Member, Jaringan Kampung Orang Asli Semenanjung Malaysia
(14) Rizuan Tempek	Member, Jaringan Kampung Orang Asli Semenanjung Malaysia
(15) Yusri Ah Hon	Deputy President, Jaringan Orang Asal SeMalaysia
(16) Zurdi bin Baharu	Jaringan Orang Asal SeMalaysia
(17) Salmiah binti Anai	Jaringan Kampung Orang Asli Pahang
(18) Shafie Dris	Jaringan Kampung Orang Asli Pahang
(19) Dr Colin Nicholas	Center for Orang Asli Concerns
(20) Norya Abas	Persatuan Orang Asli Semenanjung Malaysia
(21) YB Bob Monalan	Senator, Dewan Rakyat
(22) Ooi Kiah Hui	Malaysian Care