

The Analysis of Child Sexual Grooming Offences in Malaysia

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Abstract

Children constitute vital stakeholders in the nation's development. Nonetheless, they are frequently under-represented in various situations, including child sexual grooming ("CSG") issues. In most CSG situations, children are oblivious that they are being exploited until they have been sexually assaulted to the degree of rape. In Malaysia, there is a growing concern about the CSG problem caused by sexual predators, which prompted the Malaysian government to enact the Sexual Offences Against Children Act 2017 ("SOACA"). The SOACA 2017 is the first piece of Malaysian legislation which specifically addressed offences on child sexual abuse ("CSA"). The paper aims to examine the correlation between legal inadequacies before the SOACA 2017 was enacted and how the SOACA 2017 addresses the cases on CSG. At the same time, the reported cases under the UK Sexual Offences Act 2003 ("SOA") will be referred to as well, as SOACA 2017 was modelled after UK SOA 2003.

Keywords: Child; Child Sexual Abuse; Grooming; Sexual Predator

1. Introduction

Children carry about one-third of Malaysia's 32.65 million population, amounting to 9.19 million individuals.³²³ Nonetheless, the Government often overlooks child sexual abuse

³²³ n/a, 'Statistics Dept: 9.19 million children under-18 in Malaysia in 2022' *The Star* (Kuala Lumpur, 28 Nov 2022) <<https://www.thestar.com.my/news/nation/2022/11/28/statistics-dept-919-million-children-under-18-in-malaysia-in-2022>> accessed 31 July 2023.

("CSA") issues.³²⁴ In Malaysia, there are two stages of public awareness of CSA issues. The first stage occurred in the 1980s due to frequent occurrences reported in the mainstream media.³²⁵ The Government responded to the public criticism by enacting child protection legislation, namely the Child Act 2001, and establishing a hotline for reporting suspected child abuse.³²⁶ In 1985, the SCAN Team research team was established to conduct clinical analysis and advise the Government on cases concerning child abuse.³²⁷

The first stage focuses on perpetrators within familial ties.³²⁸ Despite the occurrence of high-profile incidents, the general public was ignorant of the CSA problems caused by non-family members.³²⁹ There could be two causes for the lack of reaction. First, the general public is unaware of the vast amount of cases on CSA since most cases go unreported, and their data are classified as Government secrets.³³⁰ As a result, CSA issues remain marginalised, ignored, and never emerge on policy agendas. Second, no specific legislation addresses CSA, particularly child sexual grooming ("CSG"). As a result, no devoted body deals with the early discovery of sexual predators, and CSA victims are treated the same as adult victims. The issue has not been resolved, particularly in CSA cases; victims often opt not to reveal it to law enforcement because they experience a lack of support and humiliation.³³¹

The second stage follows the disclosure that Richard Huckle, a British national, was detained in December 2014 due to collaboration between Australian and British authorities.³³² Huckle pretended to be a trustable English teacher and Christian patron in Malaysia between 2011 to December 2014 and used his position to obtain the children's trust and manipulate them into engaging in sexual activities with him.³³³ In 2016, he was convicted in the United Kingdom for 71 criminal charges of CSA offences, with most of his victims being Malaysian children.³³⁴ This revelation has sparked outrage and dismay among Malaysians, as law enforcement has

³²⁴ Izmi Izdiharuddin B Che Jamaludin Mahmud, Nadzriah Ahmad and Rafizah Abu Hassan, 'A Legal Review between Impacts of Child Sexual Abuse and Criminal Compensation Order in Malaysia' (2022) 7 JISED 250.

³²⁵ Norbani Mohamed Nazeri, 'Development of Child Evidence in Malaysia' (University of Malaya - Griffith University International Law Conference, Kuala Lumpur, 2007) <<https://eprints.um.edu.my/13698/1/0001.pdf>> accessed 29 May 2023.

³²⁶ Irene Guat-Sim Cheah and Choo Wan Yuen, 'A Review of Research on Child Abuse in Malaysia' (2016) 71(Suppl 1) MJM 87.

³²⁷ Ahmad Yarina and others, 'Suspected Child Abuse and Neglect Team (SCAN team): Early Establishment, Success Stories, Challenges and The Way Forward' (2015) 12 JAS 60.

³²⁸ Yarina Ahmed and Siti Nur Fathanah Abd Hamid, 'Monster in the Family, Young Victims and Issues Across Border: Future Outlook of Child Sexual Abuse in Malaysia' (2020) 7 JCR 1713.

³²⁹ n/a, 'Tragic list of young innocent victims of monsters' *The Star* (Kuala Lumpur, 30 November 2019). <<https://www.thestar.com.my/news/nation/2012/03/13/tragic-list-of-young-innocent-victims-of-monsters>> accessed 29 May 2023.

³³⁰ Ananthalakshmi Anantha, 'How Malaysia allows child abuse to go unpunished' (*Reuters*, 14 November 2016) <<https://www.reuters.com/article/us-malaysia-sexcrimes-insight/how-malaysia-allows-child-abuse-to-go-unpunished-idUSKBN1390AT>> accessed 29 May 2023.

³³¹ Masumova Fatima, 'A Need for Improved Detection of Child and Adolescent Sexual Abuse' (2016) 11 Am J Psychiatry Resid J 13.

³³² Karen McVeigh, 'Richard Huckle given 22 life sentences for abuse of Malaysian children' *The Guardian* (London, 6 June 2016) <<https://www.theguardian.com/uk-news/2016/jun/06/richard-huckle-given-23-life-sentences-for-abusing-malaysian-children>> accessed 29 May 2023.

³³³ Najwa Rosli, Nabilah Hani Ahmad Zubaidi and Farah Nini Dusuki, 'Regulating the Protection and Rehabilitation of Victims of Internet Child Pornography in Malaysia' (2019) 9 IJARBS 450.

³³⁴ Tan Geok Mooi and Noor Aziah Mohd Awal, 'Sexual Offences against Children Act 2017 (Act 792) - A Boost to Police Investigation and Prosecution' (2020) 10 IJASS 273.

never investigated Huckle.³³⁵ The government acknowledges that Malaysian laws are inadequate in dealing with CSA, especially in CSG situations.³³⁶

Further investigation indicated that Richard Huckle's grooming episodes are not isolated incidents. For example, a 2014 CyberSAFE survey shows 83% of schoolchildren are susceptible to online danger.³³⁷ This survey correlates with the information provided by the Royal Malaysian Police as the figure shows that an average of 60 children were subjected to sexual assault before 2014, and perpetrators are someone these children befriend through the cyber world.³³⁸ Further data from 2015 until May 2017 shows that there is a lack of detection of CSG cases despite a higher rate of children subjected to CSG:

Table 1. Child grooming reported cases in Malaysia

Year	Number of cases
2015	184
2016	183
From January until May 2017	117

(Source:) Royal Malaysia Police³³⁹

Upon the revelation of Richard Huckle and the prevalence of CSA, the Malaysian government introduced several legal reforms to deal with CSA cases in 2017, such as (1) the introduction of a specific child sexual abuse legislation, Sexual Offences Against Children Act 2017 ("SOACA 2017") which was enforced since 10.7.2017, (2) the establishment of specialised court in dealing with CSA cases, and (3) the publication of a guideline known as *Garis Panduan Khas Untuk Mengendalikan Kes Kesalahan Seksual Terhadap Kanak-Kanak Di Malaysia* ("Special Guidelines for Handling Cases Concerning Sexual Offenses Against Children in Malaysia") which aims to set a uniform approach between Malaysian agencies in dealing with CSA cases.

The legal reforms introduced by the Malaysian Government had been notified by ECPAT International, an international organisation for child advocacy, which recognised the SOACA 2017 as a "progressive step in protecting children from sexual exploitation & practical steps to prevent and respond to child sexual exploitation."³⁴⁰

³³⁵ Ananthalakshmi Anantha and Joseph Sipalan, 'British paedophile exploited stigma of abuse in vulnerable communities' (*Reuters*, 9 June 2016) <<https://www.reuters.com/article/us-britain-abuse-malaysia-idUSKCN0YV061>> accessed 29 May 2023.

³³⁶ Ananthalakshmi (n 330).

³³⁷ Rozana Sani, 'Cybersafety: Raising online citizens' *New Straits Times* (Kuala Lumpur, 21 September 2014) <<https://www.nst.com.my/news/2015/09/cybersafety-raising-online-citizens>> accessed 29 May 2023

³³⁸ n/a, 'Malaysia tops in South-east Asia for online child pornography' *The Straits Times* (Kuala Lumpur, 30 January 2018). <<https://www.straitstimes.com/asia/se-asia/malaysia-tops-in-south-east-asia-for-online-child-pornography>> accessed 29 May 2023.

³³⁹ Ibid.

³⁴⁰ ECPAT International, 'ECPAT Country Overview (Malaysia): A report on the scale, scope and context of the sexual exploitation of children' (October 2019). <<https://ecpat.org/wp-content/uploads/2021/05/ECPAT-Country-Overview-Research-Report-Malaysia-2019.pdf>> accessed 29 May 2023.

2. Literature Review

2.1 Definition of CSG

Despite its prevalence in Western media in the 1980s, there is a lack of consensus on the definition of CSG.³⁴¹ Nevertheless, this paper defines it as an offence in which the criminal engages with a child and creates trust to satisfy a person's sexual desire. A child can be defined as someone below the age of 18, consistent with the definition given by various Malaysian legislation.³⁴²

2.2 Offences before the SOACA 2017

Before the introduction of SOACA 2017, many legislations including the Penal Code, Film Censorship Act 2002 and Communications and Multimedia Act 1998 were used to investigate the CSG cases. However, the only legislation-related CSA case is Section 43 of the Child Act 2001 (prostitution) and Sections 14 & 15 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (child trafficking for sexual exploitation). These laws are inadequate because the police cannot propose a prosecution unless there is direct evidence that the CSA victim has already been subjected to a sexual assault. In a Sepang Session Court case, for example, an offender was only liable for statutory rape even though there was evidence that the offender sexually groomed the child through social media applications before committing the offence.³⁴³

2.2.1 Section 292 of the Penal Code & Section 5 of the Film Censorship Act 2002

Section 292(a) of the Penal Code is most commonly used to prosecute any case related to child pornography. Section 292(a) stipulates that a person will be liable for an offence if he or she possesses obscene material. Another potential child pornography offence is Section 5 of the Malaysian Film Censorship Act, in which it is unlawful to have an obscene film.

However, Sections 292(a) and 5 only apply CSG if the offender records the minor victim's private parts, such as genital photographs. For instance, a 21-year-old woman pleaded guilty under Section 292 to recording an obscene video of a 15 years old girl.³⁴⁴ Meanwhile, in Singapore, Chan Chun Hong was convicted among other pornography offences under Section 292 (1) (a) of the Singapore Penal Code (*pari materia* with the Malaysian Penal Code respectively) after organising a child sex trip to Cambodia and exchanging child pornographic materials through emails with other internet users.³⁴⁵

³⁴¹ Georgia M Winters, Leah E Kaylo and Elizabeth L Jeglic, 'Toward a Universal Definition of Child Sexual Grooming' (2021) 43 DB 926.

³⁴² Age of Majority Act 1971, s 2; Child Act 2001, s 2(1); Sexual Offences Against Children Act 2017, s 2(1).

³⁴³ n/a, 'Penuntut rogol gadis bawah umur dipenjara, sebat' *Berita Harian* (Sepang, 14 November 2018) <<https://www.bharian.com.my/berita/kes/2018/11/498049/penuntut-rogol-gadis-bawah-umur-dipenjara-sebat>> accessed 28 May 2023.

³⁴⁴ Juriah Abdul Jalil, 'Combating Child Pornography in the Digital Era: Is Malaysian Law Adequate to Meet the Digital Challenge?' (2015) 23(S) *Pertanika J Soc Sci & Hum* 137.

³⁴⁵ *Chan Chun Hong v PP* [2016] SGHC 75.

2.2.2 Section 354 of the Penal Code

Section 354 is a genderless offence, which means that the victim can be either male or female. Section 354 provides that it is an offence if a person commits an assault or uses criminal force that is likely to cause outrage at the victim's modesty. An example of the application of Section 354 is the case of *Kamarul Azamin Mohamad*, where the offender was sentenced to eight years imprisonment and one stroke of whipping for touching the private part of a student at primary school.³⁴⁶

Nevertheless, there are two reasons why Section 354 is not an appropriate offence to prosecute CSG cases. First, the offender cannot be liable if the child consented to the offender's criminal force or assault. This deficiency can be illustrated in the case of *Samuel John Marisinapen* which one of the reasons for the acquittal is that the child, aged 12 and 6 months, consented to the sexual conduct committed by the offender.³⁴⁷

Second, another deficiency would be whether the grooming conduct can be considered assault under Section 354. One of the key elements establishing an assault is the offender's conduct which amounts to a threatening gesture against the victim.³⁴⁸ In the United Kingdom, several cases like *Fairclough v Whipp*,³⁴⁹ *DPP v Rogers*,³⁵⁰ and *R v Sutton*³⁵¹ show a deficiency of law in the connection between the assault and CSA cases. In these three cases, the courts held that an indecent assault could be established if a hostile act existed. For instance, in *Fairclough*, the offender was charged with committing an indecent assault on a nine-year-old child by inviting the girl to touch him while walking along a riverbank. It was held that the offender was not guilty because of a lack of threatening conduct.³⁵²

2.2.3 Sections 377D and 377E of the Penal Code

Section 377D of the Penal Code focuses on the offender who commits gross indecency against the victim. Section 377E covers a victim under 14 who engages in gross indecent conduct after being encouraged by the offender. One of the earliest reported cases under Section 377E was in 2005 when the offender was convicted of paying RM 10 to a child in exchange for sexual gratification.³⁵³

In modern days, gross indecency has been given a broader interpretation to cover every aspect of sexual activity that may harm the child.³⁵⁴ However, it is noted there are several gaps in Sections 377D & 377E in addressing CSG cases:

- i. A CSA victim between 14 and under 18 is not entitled to the same protection as a victim below 14. It is because if the offender commits an offence of gross indecency to a victim below 14 years old, he can be liable for a punishment of not less than three

³⁴⁶ *PP v Kamarul Azamin bin Mohamad* [2021] 8 MLJ 502.

³⁴⁷ *Samuel John Marisinapen v PP* [2018] 11 MLJ 775.

³⁴⁸ C. K. Thakker and others, *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860* (26th edn, Bharat Law House 2007).

³⁴⁹ [1951] 2 All ER 834.

³⁵⁰ [1953] 2 All ER 644.

³⁵¹ [1977] 3 All ER 476 (CA) Crim LR 569.

³⁵² *Fairclough* (n 349).

³⁵³ *Kassim bin Utus v PP* [2005] 6 MLJ 320.

³⁵⁴ *R v Sears* [2018] SADC 94.

years and not more than fifteen years and whipping under Section 377E. However, if the child is aged between 14 to 17, the punishment is less severe, carrying a sentence of imprisonment not exceeding two years under Section 377D of the Penal Code.

- ii. Under Section 377E, the prosecutor must establish that the offender incites a child to act grossly indecently with the offender or another person. Therefore, the offender who sexually communicates with the CSA victim will not immediately be liable for an offence unless the offender's conduct influences the child, later causing the child to commit gross indecency. If the prosecutor cannot prove that the offender incites a child to do an act of gross indecency, the offender can still be liable for the offence under Section 377D of the Penal Code. However, as explained earlier, the punishment under Section 377D is not as severe as Section 377E.

2.2.4 Sections 509 of the Penal Code

Section 509 concerns offences relating to acts and conduct intending to insult the victim's modesty or intrude on the victim's privacy, regardless of the victim's gender. The offender can be liable for a punishment of imprisonment not exceeding five years or with a fine or both.

The term 'modesty' is not defined in Section 354 of the Penal Code. However, it has been stated that the term modesty encompasses all forms of indecent behaviour towards women, such as sending a letter containing inappropriate advances to a woman within the ambit of Section 509.³⁵⁵ The application of Section 509 in the CSG case was reported in 2017 when the offender was convicted for sending his male organ to a journalist posing as an underage girl.³⁵⁶ In sentencing the offender, the Magistrate concurred that under Section 509, the prosecutor is not required to prove the victim's age as long as the communication causes insult to the modesty of the person who receives the sexual message.³⁵⁷

2.2.5 Sections 211 & 233(1) of the Communications and Multimedia Act 1998

Section 211 forbids any individual from using a content applications service to provide indecent, obscene, false, menacing, or offensive content to annoy, abuse, threaten, or harass another person. Section 233(1) states that an offender is liable for an offence if he inappropriately utilizes network facilities or network services by initiating obscene, indecent, false, menacing, or offensive communication intending to annoy, abuse, threaten, or harass another person. Both provisions are inapplicable in CSG cases because Section 211 applies only if the person provides content application services such as subscription broadcasting or terrestrial free-to-air television. Section 233(1) requires evidence that the victim has been subjected to annoyance, abuse, threat, or harassment, which is improbable if the CSA victim is unaware of or has consented to the grooming process. It should also be noted that the

³⁵⁵ Thakker (n 348).

³⁵⁶ Nurbaiti Hamdan, 'Trader jailed and fined over lewd photo' (*The Star*, 18 May 2017)

<<https://www.thestar.com.my/news/nation/2017/05/18/trader-jailed-and-fined-over-lewd-photo-man-sent-picture-of-genitals-to-journalist-who-was-posing-as/>> accessed on 27 May 2023.

³⁵⁷ *ibid.*

grooming process is complex, as it is difficult to identify between caring and manipulative behaviour unless abusive conduct occurs.³⁵⁸

3. Methodology

This paper employs a doctrinal research method to discuss the effectiveness of SOACA 2017 in addressing CSG issues. Pearce et al. define doctrinal research as “the research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty, and predicts future developments.”³⁵⁹

4. Findings & Discussion

Since the introduction of SOACA on 10.7.2017, the data showed improved detection of CSA cases. For example, 1921 cases in 2018, 1,865 cases in 2019, & 1,373 cases from January to September 2020 were classified as CSA cases.³⁶⁰ This paper will discuss the substantive and procedural legal reforms introduced in SOACA 2017 concerning CSG cases.

4.1 Substantive legal reform

No reported CSG cases under SOACA 2017 have been found in online database research at LexisNexis and CLJLaw, as most reported cases involve physical injury against the CSA victims under Section 14 of the SOACA 2017. It is also noted that recent legal amendments to SOACA 2017 will be enforced on 11.7.2023.³⁶¹ Therefore, this research will rely on foreign-reported cases similar to CSG cases under SOACA 2017. There are three types of CSG-related offences under SOACA 2017, sexually communicating with a child (Section 11), child grooming (Section 12) and meeting following child grooming (Section 13).

First, Section 11 of SOACA 2017 states that it shall be an offence for someone to sexually communicate with a child or encourage a child to communicate sexually. The provision is in *pari materia* with Section 15A of the UK SOA 2003.

There are a few discussions concerning Section 11 SOACA 2017. First, what are the modes of communication that are considered under Section 11? According to the Explanatory Notes of SOA 2003, sexual communication encompassed every method of communication, ranging from email, text message, written note or oral communication, including talking sexually to a child via a chat room or sending sexually explicit text messages inviting a child to communicate sexually.³⁶²

The subsequent discussion in dealing with the Section 11 is that the offence is construed as strict liability and not age-discriminatory.³⁶³ The legal provision of Section 11 differs from

³⁵⁸ Elizabeth L Jeglic, Georgia M Winters and Benjamin N Johnson, ‘Identification of Red Flag Child Sexual Grooming Behaviors’ (2023) 136 Child Abuse Negl 105998.

³⁵⁹ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 Deakin LR 83.

³⁶⁰ Izmi (n 324).

³⁶¹ Sexual Offences Against Children (Amendment) Act 2023.

³⁶² Explanatory notes to the Serious Crime Act 2015, s 67.

³⁶³ DR Deb 3 April 2017, Bil. 17, 83 <<https://www.parlimen.gov.my/files/hindex/pdf/DR-03042017.pdf>>.

Section 15A of SOA 2003 as, in the latter, the offender's *mens rea* and age must be established.³⁶⁴ It means that the offender must intend to communicate with a child to obtain sexual gratification, and a person can be liable for an offence if that person is 18 years old and above.³⁶⁵

Therefore, a sweetheart defence, a consensual relationship between children, cannot negate a crime's element.³⁶⁶ Several child advocacy groups, such as the CRIB Foundation (Child Rights Innovation & Betterment) & Voice of the Children, expressed deep concerns over criminalising two consensual children from engaging in a sexual relationship.³⁶⁷ They stated that education should be prioritised since they believed it is normal for children to have mutual sexual curiosity.³⁶⁸ This view is consistent with the court's approach in dealing with young offender's consensual sexual relationships, as in *Mohammad Arfah Jasmi* (20 years old offender v 13 years old victim),³⁶⁹ *Nor Afizal Azizan* (19 years old offender v 13 years old victim),³⁷⁰ and *Maxesythal Anak Sulang* (22 years old offender v 14 years old victim). In these cases, the court encouraged imposing a rehabilitation sentence rather than long-length imprisonment, or else the detention will have a consequential impact on the offender's future.³⁷¹

The third issue is how to determine whether the communication is considered sexual. Section 11(2) of the SOACA 2017 provides for two situations: (a) the communication relates to sexual activity, in which the offender encourages the CSA victim to engage in sexual activity. If the offender asks the CSA victim to engage in sexual intercourse or masturbation, the communication falls within the definition of sexual activity.³⁷² Second, (b) any reasonable person would consider the communication itself to be sexual. There are limited judicial decisions in the Malaysian legal system in this context. However, Section 11(3) provides that a person cannot be subjected to criminal sanction if the communication is for education, scientific or medical purposes.

The English law provides that the issue of whether the communication is considered sexual is a question of fact.³⁷³ Whether or not any conduct is sexual is based on the judge's discretion, and it is irrelevant to look at the offender's view when the said offender committed such conduct.³⁷⁴ However, the judge should not exercise discretion arbitrarily, and it may suggest that the social norm is vital in determining whether certain conduct is sexual. There are a few examples from English cases:

³⁶⁴ Sexual Offences Act 2003, s 15A.

³⁶⁵ *ibid.*

³⁶⁶ Dr Deb (n 363).

³⁶⁷ Fatimah Zainal and Ragananthini Vethasalam, 'Loopholes in new law need to be plugged, say experts' *The Star* (Petaling Jaya, 30 March 2023) <<https://www.thestar.com.my/news/nation/2023/03/30/loopholes-in-new-law-need-to-be-plugged-say-experts>> accessed 10 July 2023.

³⁶⁸ *ibid.*

³⁶⁹ *PP v Mohammad Arfah Jasmi* [2008] 7 CLJ 836.

³⁷⁰ *Nor Afizal bin Azizan v PP* [2012] 6 MLJ 171.

³⁷¹ *PP v Maxesythal ak Sulang* [2021] 1 LNS 767.

³⁷² Explanatory notes to the Sexual Offences Act 2003, s 78.

³⁷³ *Regina v H* [2005] EWCA Crim 732, [2005] 1 WLR 2005.

³⁷⁴ *Attorney General's Reference (No 1 of 2020)* [2020] EWCA Crim 1665, [2021] QB 441.

- i. *R v Bradburn (Ashley)*: The offender sent a picture of his erect penis and asked the child to send him a photograph of her breasts.³⁷⁵
- ii. *R v Evans*: The offender forwarded BlackBerry messages, "Would you fuck me? Where would you fuck me? Fast or slow? Skin to skin?".³⁷⁶
- iii. *R v Miller (Douglas Andrew)*: The offender approached the children and asked if they would like to earn £30. After being refused, he later asks the children whether they can give him a hand job.³⁷⁷
- iv. *R v Q (S)*: The offender told the child that plastic vaginas feel like the real thing in a Skype conversation. Later, the child heard the sound of a vacuum cleaner and moaning sounds made by the offender and was told by the offender that he was masturbating, which incited the child to do the same thing.³⁷⁸

Next is child grooming offences under Sections 12 and 13 of SOACA 2017. Section 12 prescribes child grooming as communication by any means with a child to commit or to facilitate the commission of offences of making or producing (Section 5), preparing to make or produce (Section 6), using a child in making or producing (Section 7), exchanging or distributing (Section 8) of the child sexual abuse material, physical, sexual assault on a child (Section 14), non-physical sexual assault on a child (Section 15), sexual performance by a child (Section 15A), sexual extortion of a child (Section 15B) or any offences states under the schedule of SOACA 2017 ("CSA offences"). Section 12 is not based on any foreign legislation, and there is no reported case from the Malaysian judiciary. However, there is no requirement to prove that the offender commits CSA offences or that the communication needs to be sexual, as long as it is established that the purpose of communication is to commit or facilitate committing CSA offences.

Section 13 is an extension to Section 12, which prescribes a more severe imprisonment punishment if the offender takes a step further to travel or physically meets with the child upon committing Section 12. Section 13 is modelled after Section 15 of UK SOA 2003 and Section 131B of the New Zealand Crimes Act 1961. In addition, the CSG offences under Singapore Penal Code are also based on Section 15 of UK SOA 2003 with several modifications.

Like Section 11 of the SOACA 2017, Sections 12 and 13 of the SOACA 2017 are non-age discriminatory and genderless offences. Comparatively, Section 15 of UK SOA 2003 is more specific whereby the grooming process occurs between an offender adult at least 18 years old and a child under 16 years old.

The central importance of Section 13 is that it must establish that the offender travels to commit or facilitate the commission of CSA offences. Based on the common law, the possible evidence that the offender intends to commit the Section 13 offence may be drawn from the latest communications between the offender and the child that triggered the meeting and the offender's previous conduct before the meeting occurred, such as travels to the meeting

³⁷⁵ *R v Bradburn (Ashley)* [2017] EWCA Crim 1399.

³⁷⁶ *R v Evans* [2012] EWCA Crim 2183.

³⁷⁷ *R v Miller (Douglas Andrew)* [2016] EWCA Crim 1249.

³⁷⁸ *R v Q (S)* [2014] EWCA Crim 2546.

with ropes, condoms, and lubricants.³⁷⁹ There are several examples of Section 13 based on English cases, such as:

- i. *R v Johnson*: The offender, a Sunderland professional footballer, pleaded guilty to several sexual exploitation acts against a 15 years old girl who is his football fan. The CSA victim often met him after matches, and the offender obtained her phone number. The offender continuously communicates flirtatious messages with that girl via WhatsApp and asks her to delete the messages at every communication end. The offender later asked her to use the Snapchat application, on which messages were deleted after 10 seconds unless it was saved. Throughout those communications, the offender had met the CSA victim twice in his car and committed sexual activity. The Crown Prosecutor has used those saved messages and his internet searches about the age of consent as evidence of child grooming.³⁸⁰
- ii. *R v Mansfield*: The offender pleaded guilty to sending several consensual sexually explicit text messages communicating with a child of around 13-14 years old via internet chat rooms, email, mobile phone conversations, and text messages and followed by meeting with her at Newmarket, UK.³⁸¹
- iii. *R v Tomlinson*: The offender used various stratagems and devices like riddles and puzzles on several occasions to attract the attention of a 9 years old girl. At the last meeting, the offender met her and committed a sexual assault on her.³⁸²
- iv. *R v Mohammed*: The offender worked as a security guard on a building site in Bury and used to chat with the local school girls who would hang around the site. One of the girls introduced to him was E. E, a vulnerable girl with significant learning and behavioural problems. The offender and E exchanged telephone numbers and made several intimate communications. At one time, E ran away from her foster home and stayed at the offender's home. The communication in the mobile phone of the E and the offender was used as evidence of sexual grooming.³⁸³

4.2 Procedural legal reform on SOACA 2017

The SOACA 2017 provided several legal procedural reforms to improve the conviction rate of CSA cases, such as Sections 17, 18, and 20. Section 17 deals with the presumption that a child is competent to give evidence before the court. The reason for the inclusion of Section 17 is that there is a stereotype that the court requires special precautions to take the child's statement as there is a possibility that the child does not fully understand the effect of taking an oath and is unable to distinguish between reality and fantasy.³⁸⁴

Section 18 of SOACA 2017 deals with the requirement to corroborate the evidence of a child as a witness. Before SOACA 2017 was introduced, the corroboration rule of child witness depended on whether the witness could give a sworn statement. If the child witness can

³⁷⁹ Explanatory Notes to the Sexual Offences Act 2003, s 15.

³⁸⁰ [2017] EWCA Crim 191, [2017] All ER (D) 135 (Mar).

³⁸¹ [2005] EWCA Crim 927, [2005] All ER (D) 195 (Apr).

³⁸² [2005] EWCA Crim 2681, [2005] All ER (D) 159 (Oct).

³⁸³ [2006] EWCA Crim 1107, [2006] All ER (D) 167 (Apr).

³⁸⁴ *Chao Chong v Public Prosecutor* [1960] MLJ 238.

provide a sworn statement, the evidence must corroborate as a matter of rule and prudence.³⁸⁵ It means that if the judge believes in an uncorroborated child statement, the judge must record a corroboration warning in the judgment before convicting the offender.³⁸⁶ If the child gives an unsworn statement, the evidence of the child must be corroborated as a matter of law. Section 133A of the Evidence Act 1950 provides that a failure to corroborate the child's unsworn statement can lead to the conviction being quashed.

However, Section 18 of SOACA 2017 changes this legal reasoning by allowing the court to convict the offender even if the child gave an unsworn statement. The legality of Section 18 was scrutinised in the High Court of *Chan Kok Poh*.³⁸⁷ The court held that Section 18 is constitutional as it does not infringe the fundamental liberties provisions stated in the Federal Constitution.³⁸⁸ Furthermore, the doctrine of *generalia specialibus non derogant*, a specific provision in a specific law overrides a general provision in a general law applies such that the specific provision of Section 18 of the SOACA 2017 prevails over the general law of Section 133A of the Evidence Act.³⁸⁹

Furthermore, Section 20 of the SOACA 2017 provides for the presumption of age of a child which requires the offender to take all reasonable steps to ascertain the child's age first. If the offender fails to do so, it would not serve as a defence to negate the CSA case. The purpose of Section 20 is to negate the criminal defence of mistake on the victim's age in that the offender has in good faith believed that the sexual counterpart is above the age of consent.³⁹⁰

In relation, Section 114A of the Evidence Act further eases for a prosecutor to prove the identity of the person as online grooming is notorious for being anonymous. It creates a presumption of facts in which a person whose name, photograph or pseudonym appears on any internet publication is presumed to publish in the said publication. However, relying on the presumptions under Section 114A of the Evidence Act 1950 and Section 20 of the SOACA may not suffice to convict the offender in the CSG case. It is because the constitutional principle in Malaysia does not allow double presumption in criminal cases.³⁹¹

5. Conclusion

Before the introduction of SOACA 2017, there were several legal deficiencies in dealing with CSA cases, especially CSG issues, such as physical injury must occur and the issue of consent. Despite there being no reported cases of CSG issues, the situation in the common law had been expanded in Malaysia through SOACA 2017 and Sections 11 – 13 in particular, as the law allows for sexual predators to be convicted even if the child consented to sexual communication. This demonstrates that the protection against CSA had been expanded in Malaysia.

³⁸⁵ *Loo Chuan Huat v Public Prosecutor* [1971] 2 MLJ 167b.

³⁸⁶ *Ibid.*

³⁸⁷ *Chan Kok Poh v Public Prosecutor* [2022] 9 MLJ 755.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ *Abdullah v Regina* [1954] 1 MLJ 195.

³⁹¹ *Alma Nudo Atenza v PP* [2019] 5 CLJ 780.

Bibliography

- Abdullah v Regina [1954] 1 MLJ 195
- Age of Majority Act 1971
- Alma Nudo Atenza v PP [2019] 5 CLJ 780
- Ananthalakshmi A and Sipalan J, 'British paedophile exploited stigma of abuse in vulnerable communities' (*Reuters*, 9 June 2016) <<https://www.reuters.com/article/us-britain-abuse-malaysia-idUSKCN0YV061>> accessed 29 May 2023
- Ananthalakshmi A, 'How Malaysia allows child abuse to go unpunished' (*Reuters*, 14 November 2016) <<https://www.reuters.com/article/us-malaysia-sexcrimes-insight/how-malaysia-allows-child-abuse-to-go-unpunished-idUSKBN1390AT>> accessed 29 May 2023
- Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007
- Chan Chun Hong v PP [2016] SGHC 75; [2016] 3 SLR 465
- Chan Kok Poh v Public Prosecutor [2022] 9 MLJ 755
- Chao Chong v Public Prosecutor [1960] MLJ 238
- Cheah IG and Yuen CW, 'A Review of Research on Child Abuse in Malaysia' (2016) 71(Suppl 1) MJM 87
- Child Act 2001
- Communications and Multimedia Act 1998
- DPP v Rogers [1953] 2 All ER 644
- DR Deb 3 April 2017, Bil. 17, 83 <<https://www.parlimen.gov.my/files/hindex/pdf/DR-03042017.pdf>>
- ECPAT International, 'ECPAT Country Overview (Malaysia): A report on the scale, scope and context of the sexual exploitation of children' (October 2019) <<https://ecpat.org/wp-content/uploads/2021/05/ECPAT-Country-Overview-Research-Report-Malaysia-2019.pdf>> accessed 29 May 2023
- Evidence Act 1950
- Fairclough v Whipp [1951] 2 All ER 834
- Film Censorship Act 2002
- Hamdan N, 'Trader jailed and fined over lewd photo' (*The Star*, 18 May 2017) <<https://www.thestar.com.my/news/nation/2017/05/18/trader-jailed-and-fined-over-lewd-photo-man-sent-picture-of-genitals-to-journalist-who-was-posing-as/>> accessed on 27 May 2023
- Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin LR 83
- Izmi ICJM, Ahmad N and Hassan RA, 'A Legal Review between Impacts of Child Sexual Abuse and Criminal Compensation Order in Malaysia' (2022) 7 JISED 250
- Jalil JA, 'Combating Child Pornography in the Digital Era: Is Malaysian Law Adequate to Meet the Digital Challenge?' (2015) 23(S) *Pertanika J Soc Sci & Hum* 137
- Jeglic EL, Winters GM and Johnson BN, 'Identification of Red Flag Child Sexual Grooming Behaviors' (2023) 136 *Child Abuse Negl* 105998
- Karen M, 'Richard Huckle given 22 life sentences for abuse of Malaysian children' *The Guardian* (London, 6 June 2016) <<https://www.theguardian.com/uk-news/2016/jun/06/richard-huckle-given-23-life-sentences-for-abusing-malaysian-children>> accessed 29 May 2023
- Kassim bin Utus v PP [2005] 6 MLJ 320
- Loo Chuan Huat v Public Prosecutor [1971] 2 MLJ 167b

- Masumova F 'A Need for Improved Detection of Child and Adolescent Sexual Abuse' (2016) 11 Am J Psychiatry Resid J 13
- Mooi TG and Awal NAM, 'Sexual Offences against Children Act 2017 (Act 792) - A Boost to Police Investigation and Prosecution' (2020) 10 IJASS 273
- Nazeri NM, 'Development of Child Evidence in Malaysia' (University of Malaya - Griffith University International Law Conference, Kuala Lumpur, 2007) <<https://eprints.um.edu.my/13698/1/0001.pdf>> accessed 29 May 2023
- n/a, 'Malaysia tops in South-east Asia for online child pornography' *The Straits Times* (Kuala Lumpur, 30 January 2018). <<https://www.straitstimes.com/asia/se-asia/malaysia-tops-in-south-east-asia-for-online-child-pornography>> accessed 29 May 2023
- n/a, 'Penuntut rogol gadis bawah umur dipenjara, sebat' *Berita Harian* (Sepang, 14 November 2018) <<https://www.bharian.com.my/berita/kes/2018/11/498049/penuntut-rogol-gadis-bawah-umur-dipenjara-sebat>> accessed 28 May 2023
- n/a, 'Statistics Dept: 9.19 million children under-18 in Malaysia in 2022' *The Star* (Kuala Lumpur, 28 Nov 2022) <<https://www.thestar.com.my/news/nation/2022/11/28/statistics-dept-919-million-children-under-18-in-malaysia-in-2022>> accessed 31 July 2023
- n/a, 'Tragic list of young innocent victims of monsters' *The Star* (Kuala Lumpur, 30 November 2019) <<https://www.thestar.com.my/news/nation/2012/03/13/tragic-list-of-young-innocent-victims-of-monsters>> accessed 29 May 2023
- Nor Afizal bin Azizan v PP [2012] 6 MLJ 171
- Penal Code
- PP v Kamarul Azamin bin Mohamad [2021] 8 MLJ 502
- PP v Maxesythal ak Sulang [2021] 1 LNS 767
- PP v Mohammad Arfah Jasmi [2008] 7 CLJ 836
- R v Bradburn (Ashley) [2017] EWCA Crim 1399
- R v Evans [2012] EWCA Crim 2183
- R v Johnson [2017] EWCA Crim 191, [2017] All ER (D) 135 (Mar)
- R v Mansfield [2005] EWCA Crim 927, [2005] All ER (D) 195 (Apr)
- R v Miller (Douglas Andrew) [2016] EWCA Crim 1249
- R v Mohammed [2006] EWCA Crim 1107, [2006] All ER (D) 167 (Apr)
- R v Q (S) [2014] EWCA Crim 2546
- R v Sears [2018] SADC 94
- R v Sutton [1977] 3 All ER 476 (CA) Crim LR 569
- R v Tomlinson [2005] EWCA Crim 2681, [2005] All ER (D) 159 (Oct)
- Thakker CK and others, *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860* (26th ed, Bharat Law House 2007)
- Rosli N, Hani N, Zubaidi A, and Dusuki FN, 'Regulating the Protection and Rehabilitation of Victims of Internet Child Pornography in Malaysia' (2019) 9 IJARBSS 450
- Samuel John Marisinapen v PP [2018] 11 MLJ 775
- Sani R, 'Cybersafety: Raising online citizens' *New Straits Times* (Kuala Lumpur, 21 September 2014) <<https://www.nst.com.my/news/2015/09/cybersafety-raising-online-citizens>> accessed 29 May 2023
- Sexual Offences Act 2013
- Sexual Offences Against Children Act 2017
- Winters GM, Kaylo LE and Jeglic EL, 'Toward a Universal Definition of Child Sexual Grooming' (2021) 43 DB 926

- Yarina A and Hamid SNFA , 'Monster in the Family, Young Victims and Issues Across Border: Future Outlook of Child Sexual Abuse in Malaysia' (2020) 7 JCR 1713
- Yarina A and others, 'Suspected Child Abuse and Neglect Team (SCAN team): Early Establishment, Success Stories, Challenges and The Way Forward' (2015) 12 JAS 60
- Zainal F and Vethasalam R, 'Loopholes in new law need to be plugged, say experts' *The Star* (Petaling Jaya, 30 March 2023) <<https://www.thestar.com.my/news/nation/2023/03/30/loopholes-in-new-law-need-to-be-plugged-say-experts>> accessed 10 July 2023