
The Suitability of the Penal Code in Governing Cyber Child Grooming in Malaysia

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ABSTRACT

The soaring usage of internet and social networking sites among children around the globe has given an adverse effect towards the children. The dark side of the internet has lead to child sexual exploitation and makes them as an easy prey for cyber predators since they are naïve and vulnerable creature. One of the alarming problems that concern children's online is being a victim of cyber child grooming. In Malaysia, there is neither specific legislation nor provision of law is available to prosecute paedophile that commit cyber grooming unlike our counterparts the United Kingdom, Australia and Singapore. Thus in the absent of such legal provision, no matter how grave the behaviour is it cannot be prosecuted unless it is formally prohibited by law. The only option available to prosecute cyber groomer is by resorting to traditional criminal law which is the Penal Code (Revised 1997) particularly Section 377E of the PC. But there is a concern on whether Section 377E of the PC is a suitable piece of legislation that can be used against cyber child groomer since it is an offence committed in a virtual world. This article aim to discuss and examine the suitability as well as the strengths and weaknesses of the Penal Code (Revised 1997) in governing online child grooming in Malaysia, with special reference to the current legal position in the United Kingdom, particularly Sexual Offences Act 2003 and Indecency with Children Act 1960.

Keyword: *cyber child grooming, Malaysia, penal code, section 377E*

INTRODUCTION

Malaysia is one of the countries that move towards the technology driven nation and still on its way to achieve the status of developed country. One can see that among the prominent contributions of modern technology is the availability of hybrid communication medium which offers easy access of the internet, anywhere at all time. The supremacy of internet has dramatically changed our way of life in constructive and unconstructive ways. The vicious side of internet connectivity is that it helps to escalate criminal opportunities in the cyberspace and one can be a victim of heartless cyber predator.

The internet users in Malaysia are from a different walk of life with different age categories. One of the categories of internet users that captured our attention is children and the usage of

internet among children in Malaysia is consistently increased.¹ According to the Malaysia Communications and Multimedia Commission (MCMC), 16.5 percent of the internet user is below the age of 18 and the youngest user that was encountered during the survey was seven years old.² It is not something bizarre to see that children from as early as five years old know how to use smart phone, tablet, iPad and other communication devices to gain access to the YouTube channel. Later when they know how to read and write they will move one step forward by having their own account in any of the social networking sites or chat rooms. Though most of the social networking sites like Facebook and Twitter imposed minimum age limit to its users which is 13 years old but such restriction can be easily bypass by using fake personal information.

By allowing children at the young age to socialize through the social networking sites it has lowered the bar for individuals with criminal intentions to reach out to children or young people and explore their sexual fantasy without any restriction of psychical boundaries. In another word, the dark shadow of the internet will lead to child sexual exploitation such as child pornography, cyber child molestation and cyber child grooming. Statistic by the Federal Bureau Investigation (FBI) indicates that in 2010 there were 20,200 reported cases on cyber crime which relate to the online sexual exploitation of children in the United States.³ Thus based on the above facts we do have a valid cause to worry that our children may become a victim of cyber predator and for this paper the focus is on the cyber child grooming.

Until this date there is no reported case on cyber child grooming in Malaysia except for one Malaysian that has been convicted by the Singapore court for committing this offence towards 15 years old Singaporean girl. Though there are no such cases reported yet, should there be an arrest what provision of law should be used to prosecute and convict the offender. Should the offender be released without any punishment? This is because no matter how grave is the offence it cannot be prosecuted unless it is formally prohibited by law. In Malaysia there is no specific governing legislation for this kind of offence therefore it is vital to discuss the appropriate law that can govern this kind of offense. By having a proper piece of penal legislation it can work as a preventative measure before this epidemic breaks into our country.

THE CONCEPTUAL PERSPECTIVES OF CYBER CHILD GROOMING

Before we can further discuss on the legislation that govern cyber child grooming in Malaysia, it is proper if we first visit and understand the concept of cyber child grooming. Cyber grooming is one of the computer related crime whereby grooming itself is a form of traditional crime that can be committed offline but with the assistance of information technology, it has change the modus operandi of this offence by employing internet as a new tool to commit the crime. By using internet as a mean of communication with the victim it has expand the scale of the crime

¹ Hariati, Azizan. (2012, April 29). Do you know who your kids are talking to. *The Star*. Retrieved from <http://www.thestar.com.my/News/Nation/2012/04/29/Do-you-know-who-your-kids-are-talking-to/>

² Malaysia Communication and Multimedia Commission. (2012). Internet user survey 2012. Retrieved from <http://www.skmm.gov.my/skmmgovmy/media/General/pdf/InternetUsersSurvey2012.pdf>

³ Brut, P. (2008). *The Predator Fear*. Retrieved January 22, 2008, from <http://www.pbs.org/wgbh/pages/frontline/kidsonline/safe/predator.html>

beyond the political boundary of a state. Grooming can be define as an opportunity where the offender finds it as a process to facilitate them in sexually abuse the child and on the surface this process seems innocent. Grooming can be classifies into two types, first, individual grooming which refers to an act where the groomers manipulate a child into preparing him or her for sexual abuse, whilst, second, industrial grooming refers to an act where the groomers tackle the whole system or the public as to believe that they "present no risk to children."⁴

According to the Australian Institute of Criminology, child grooming is a technique where the offender chose a target area as to attract the child and befriends with them, at the same time makes them feel special by talking about a particular interest which later developed to intimate conversation.⁵ But when the act grooming a child takes place in the cyber world where internet is used as a tool to solicit children then it is known as cyber child grooming. The internet is used by the paedophiles to establish contact and groom the child and subsequently meet him or her to engage in sexual activities. The conversation between the child and the groomer not necessarily a sexual content, it might be on the child's general interest but at the end it will lead to intimate conversation. The impact of this crime is critical, not just to the children but also to their parents or guardians. Exposure to such sexual information is not needed at the early stage of life, as children must not be exposed to these types of information since it could lead to moral and emotional disorder as well as social problems in the society.

THE GOVERNING LEGISLATION FOR CYBER CHILD GROOMING

In Malaysia the main statute that regulate on criminal offences is Penal Code, Act 574 (herein after referred as PC). This significant legislation commonly used in relation to offences committed in the real world but occasionally it can be apply to cyber related crime because the *mens rea* and *actus reus* of traditional crime still be applicable to this type of crimes, what is differ is just the mode which the offence is committed. In our Penal Code the closest provision that might be possible to be used against the online child groomer is Section 377E. This particular provision was inserted into the Penal Code in 1989 through Act A727 and the prominent feature of this new amendment was on the sexual offences, where it affords greater protection to young girls and women against sexual violence.⁶ The new Section 377E of the PC read as follows:

"Any person who incites a child under the age of fourteen years to any act of gross indecency with him or another person shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to whipping."

As per debated in Dewan Rakyat, Section 377E of the PC was introduced to enable a charge to be made against the paedophiles that incite children into committing an act of gross

⁴ O'Connell, R. (2003). *A typology of child cyber exploitation and online grooming practices*. Retrieved July 28, 2014, from http://www.netsafe.org.nz/Doc_Library/racheloconnell1.pdf

⁵ Australian, Institute of Criminology. (2008). *Online child grooming laws: Australian High Tech Crime Brief*. Cranberra, Australia: Author. Retrieved from <http://www.aic.gov.au/documents/C/C/6/%7bCC6758CF-CDC0-458A-BEAC-ABC0BB19F1A8%7dhtcb017.pdf>

⁶ Norbani Mohammad Nazeri. (2010). Criminal Law Codification and Reform in Malaysia: An Overview. *Singapore Journal of Legal Studies*, 375-399. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802646

indecenty.⁷ Based on the wording of the provision itself, conviction under this section will succeed only if the elements of incitement and any act of gross indecenty are present. Penal Code does not define what incitement and gross indecenty is, according to Webster dictionary incite can be define as arouse, set in motion, to move to action by persuasion, to stir up, stimulate, encourage. In the case of *Young v Cassell*⁸ the word incite was define by the court as means to rouse, to stimulate, to urge or spur on, to stir up, to animate. Concise Oxford Dictionary defines indecenty as offending against recognised standard of decency.

Based upon the earlier discussion on the concept of cyber grooming, it seems that there is a possibility that this provision can be invoke to prosecute the groomers since before they sexually abuse the child or commit any act of gross indecenty, the paedophile will usually incites or persuade the child by having a conversation with the them. The general public usually presumed that a conversation for the purpose of inciting child to commit an act of gross indecenty usually contain a sexual or pornographic content. But what if such conversation does not hold any element of incitement to commit any act of gross indecenty in which it is not an intimate conversation and does not contain sexual content. Based on the reported cases and study conducted, initial conversation between the groomers and the child most of the time did not contain any sexual content because before the actual meeting take place the groomers will obtain the child's trust and confidence.⁹ The conversation usually involves on the child's interest such as the topic of music, sports, school whereby such conversation does not cause any suspicious. In this instance, conviction based on Section 377E of the PC cannot be made possible. Furthermore to secure conviction under this section prosecution would have to show that there was an act of gross indecenty, in other word action can only be taken after the immoral conduct had been materialized and the child has become the victim. However if the only evidence is that is that the groomer only had general intent to persuade the child to sexual relation with him, charge under Section 377E of the PC could not be made out against him. This is the obstacle to successful prosecution.

To further discuss on the suitability of Section 377E of the PC in governing the cyber child grooming reference can be made on the current legal position of cyber child grooming in the United Kingdom since it is among the earliest country that has legislation on child grooming. The main statute that provides protection toward children against sexual abuse in the United Kingdom is the Indecency of Child Act 1960 (herein after referred as ICA) however in 2003 this Act was repealed by the Sexual Offences Act 2003 (herein after referred as SOA). Though Section 1 of the ICA is worded slightly different than Section 377E of the PC, but it still can be a useful guideline in providing answer for this discussion since both provisions is pertain to the same subject matter and the same effect which is inciting a child to an act of gross indecenty. Section 1 of the ICA read as follows:

⁷ Malaysia Parliament. (1989). *Parliamentary debate House of Representatives, seventh parliament, third session 1989*. Retrieved July 27, 2014 from <http://www.parlimen.gov.my/files/hindex/pdf/DR-22031989.pdf>

⁸ [1914] 33 NZLR 852

⁹ Gillespie A. A., (2004). *Internet grooming: The new law*. Retrieved July 27, 2014, from www2.essex.ac.uk/clc/hi/childright/article/

"Any person who commits an act of gross indecency with or towards a child under the age of sixteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding £400, or to both."

It was argued that incitement to commit sexual offence under Section 1 of the ICA can be extended to child grooming both online and offline grooming. However it has been found that it is difficult for the prosecution to prove the case in establishing the element of an act of gross indecency which the victim has been incited with. In the case where serious criminal offence is on trial the law will be construed narrowly and therefore the prosecution need to establish that there is an intention to commit, and incitement to be involved with and the specific act of indecency. The charge cannot be made out on the basis that the offender only has the general intent to convince the child to have sexual relation with him, without any specific evidence of incitement to commit particular unlawful acts.

For instance in the case of Milton Keynes, a thirteen years old girl was under impression that the man she was chatting with is 'a fifteen year's old boy where they had arranged a meeting. Fortunately, the girl had asked her mother to tag along to that meeting and they was surprised as they found that a forty seven year old man was waiting for her that had travelled all the way from Newcastle to Milton Keynes to meet the girl. The man was arrested but was later released without charged.¹⁰ In the case of Kenneth Lockley the Police had set up a sting operation whereby they had arranged a meeting at a hotel in London. Lockley thought he was about to meet a nine years old girl and was arrested at the hotel. Four condoms were found on him however the charges was dropped as the defence had argued that there was no actual attempt of unlawful sexual intercourse as there was no child that actually involved.¹¹

Due to the inadequacy of Section 1 of the ICA in encountering the issue of child grooming, the parliament in the United Kingdom decided to enact a new legislation known as Sexual Offences Act 2003 (SOA) that provides a comprehensive protection for children against sexual exploitation which includes child grooming. Section 15 of the SOA is the primary provision that governs child grooming whereby it provides that where an adult meets or travels to meet a minor either male or female with the intention of committing a sexual offence, will be guilty of an offence if the person had met or communicated with the minor on two or more previous occasion.

Based on the wording of Section 15 of the SOA, the pertinent requirement that should be present is that there must be a previous communication or contact at least on two occasions before the physical act of meeting or travelling in order to complete the physical requirements for the offence. Whereby the *actus reus* of the offence does not call for any act of gross

¹⁰ Childnet International. (2000). *Online grooming and United Kingdom law*. Retrieved 24 July, 2014, from <http://www.childnet.com/downloads/online-grooming.pdf>

¹¹ Lane, M. (2000, May 23). Netting pedophile online. BBC News. Retrieved from http://news.bbc.co.uk/2/hi/uk_news/760521.stm

indecentry unlike Section 1 of the ICA and Section 377E of the PC. As for *mens rea*, the element of intention is determined when the groomer meets or travels to the meeting place with an intention to commit sexual offence. This is the satisfactory part of this provision where it allows police to intervene much earlier before the child become a victim of sexual predator. For example action can be taken once a child receives sexually suggestive communications over the internet or child is seen being met by a stranger in suspicious circumstances. Furthermore the term communication under Section 15 of the SOA covers both online and offline communication so that the same provision can be applicable for cyber and real world grooming. One should take note about the borderless nature of cyber related offences in which the place where the cause of action exist might be different with the victim's location. As for this purpose Section 15 of the SOA is also designed to include the earlier communications that had taken place outside the United Kingdom, whereby this provision have extra territorial effect in relation to location of the child or the cyber predator.

OTHER RELATED LEGISLATION

Other than Penal Code there are other legislations that can be referred to with regard to cyber related crime which relate to child content. Under the Communication and Multimedia Act 1998 (herein after referred as CMA), there are two provisions that regulate on the offensive content namely Section 211 and Section 233. These two provisions focus on the obscenity of content whereby it is an offence under the law for an application of service provider or other person using a content application service to provide such obscene or indecent content with intent to abuse or harass any person.¹² It may be argued that this provision can be relied in prosecuting an offender of cyber child grooming at the stage whereby during the preliminary act prior to the meeting of the offender and the victim the enforcement could charge the offender based on the conversation in chat room, emails or obscene pictures that was transmitted by the offender to the victim with the intend to groom the child to an indecentry act.

However, Section 211 of CMA regulates the prohibition on the obscene content meanwhile Section 233 of the CMA prohibit the use of network facilities to create and transmit communication which among others contain obscene content, whereby both provisions requires an obscene content transmitted by the offender to the victim.¹³ This seems a bit conflicting with the concept cyber child grooming itself, whereby the communication between victim and offender does not necessary requires a transmission of an obscene content. An offender may form a special bond with the victim by taking a particular interest in the child by making her feel special and therefore the victim may not feel harassed until the day they meet and physical sexual harassment has actually occurred. There are offenders who strategically choose victims who tend to express agreement in Chat Rooms but not say a lot because these victims value attention, understanding and friendship are known to be vulnerable by the offender. Therefore, it

¹² Norazlina, Abdul Aiz, & Mazlina, Mansoor. (2011). Cybersex in Malaysia: The line between freedom of expression and threat to morality. *Current Law Journal*, (2011) 1(xxxiii), Retrived from <http://www.newcljlaw.com/Members/DisplayArticle.aspx?ArticleId=131792931>

¹³ Sarabdeen, J., & Molina, M. (2010). *Social network sites and protection of children: Regulatory framework in Malaysia, Spain and Australia*. Retrieved July 27, 2014, from <http://www.wseas.us/e-library/transactions/computers/2010/89-261.pdf>

can be said that the CMA is not suitable to regulate cyber child grooming as the elements in proving charges is not easily proved in such case.

CONCLUSION

There has been no single legislation in Malaysia until this date that can be used to prosecute cyber child groomer. Even Section 377E PC which is the main provision that protect children from being a victim sexual exploitation cannot be extended and not suitable to govern the offence of cyber child grooming. This provision only practicable after the child fall as a victim of sexual exploitation and during this stage it is considers as to late in providing physical and mental protection toward the child's victim. In the future if there is a case to be reported on the cyber child grooming it almost impossible for the prosecution to frame a charge against the accused and it is definite that the paedophile can walk freely without any conviction. By having a legislation that specifically dedicates to govern cyber child grooming in our Penal Code it would be sufficient to send a chilling effect to would be sex predators and for those who persist will be apprehend more easily.

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REFERENCES

- [1] Australian, Institute of Criminology. (2008). *Online child grooming laws: Australian High Tech Crime Brief*. Cranberra, Australia: Author. Retrieved from <http://www.aic.gov.au/documents/C/C/6/%7bCC6758CF-CDC0-458A-BEAC-ABC0BB19F1A8%7dhtcb017.pdf>
- [2] Baines, V. (2008, November). *Online child sexual abuse: The law enforcement response*. Paper presented at ECPAT International to the World Congress III Against Sexual Exploitation of Children and Adolescents 2008, Rio de Janeiro, Brazil.
- [3] Childnet International. (2000). *Online grooming and United Kingdom law*. Retrieved 24 July, 2014, from <http://www.childnet.com/downloads/online-grooming.pdf>
- [4] Explanatory notes for Section 15 of the Sexual Offences Act 2003. Retrieved July 28, 2014, <http://www.legislation.gov.uk/ukpga/2003/42/notes/division/5/1/15>
- [5] Gillespie A. A., (2004). *Internet grooming: The new law*. Retrieved July 27, 2014, from www2.essex.ac.uk/clc/hi/childright/article/

- [6] Hariati, Azizan. (2012, April 29). Do you know who your kids are talking to. *The Star*. Retrieved from <http://www.thestar.com.my/News/Nation/2012/04/29/Do-you-know-who-your-kids-are-talking-to/>
- [7] Lane, M. (2000, May 23). Netting pedophile online. *BBC News*. Retrieved from http://news.bbc.co.uk/2/hi/uk_news/760521.stm
- [8] Law of Malaysia, Penal Code [Act 574]
- [9] Legislation United Kingdom, Indecency of Child Act 1960
- [10] Legislation United Kingdom, Sexual Offences Act 2003
- [11] Malaysia Communication and Multimedia Commission. (2012). Internet user survey 2012. Retrieved from <http://www.skmm.gov.my/skmmgovmy/media/General/pdf/InternetUsersSurvey2012.pdf>
- [12] Malaysia Parliament. (1989). *Parliamentary debate House of Representatives, seventh parliament, third session 1989*. Retrieved July 27, 2014 from <http://www.parlimen.gov.my/files/hindex/pdf/DR-22031989.pdf>
- [13] Norazlina, Abdul Aiz, & Mazlina, Mansoor. (2011). Cybersex in Malaysia: The line between freedom of expression and threat to morality. *Current Law Journal*, (2011) 1 (xxxiii).
- [14] Norbani Mohammad Nazeri. (2010). Criminal Law Codification and Reform in Malaysia: An Overview. *Singapore Journal of Legal Studies*, 375-399. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802646
- [15] O'Connell, R. (2003). *A typology of child cyber exploitation and online grooming practices*. Retrieved July 28, 2014, from http://www.netsafe.org.nz/Doc_Library/racheloconnell1.pdf
- [16] O'Leay, J.R, & D'Ovidio R. Online sexual exploitation of children. *The International Association of Computer Investigative Specialists*. Retrieved from <http://www.nga.org/files/live/sites/NGA/files/pdf/0703ONLINECHILD.PDF>
- [17] Sarabdeen, J., Molina, M. (2010). *Social network sites and protection of children: Regulatory framework in Malaysia, Spain and Australia*. Retrieved July 27, 2014, from <http://www.wseas.us/e-library/transactions/computers/2010/89-261.pdf>
- [18] United Kingdom Parliament. (2003). *House of Lords debate on Baroness Blatch's proposed amendments to the Criminal Justice and Court Service Bill*. Retrieved July 27, 2014 from <http://www.publications.parliament.uk/pa/ld199900/ldhansard/pdvn/lds00/text/01108-06.htm>
- [19] Wall, D. *Cybercrimes: New wine, no bottles*. London: Mac Millan, 1999.

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