

CHILD ABUSE IN MALAYSIA: LEGAL MEASURES FOR THE PREVENTION OF CRIME AND PROTECTION OF THE VICTIM

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I. ABSTRACT

Child abuse is not a new phenomenon. It happens all over the world. From the statistics, child abuse is not something that we should take lightly. Even though many steps have been taken by the government, cases of child abuse keep increasing. Hence, it should be taken seriously, and we must provide the way to protect the victim and to prevent it from happening. In Malaysia, many laws have been passed with the objective of protecting the welfare of the child. At the same time, the law also tries to prevent the crime from being committed. This paper will discuss the Malaysian Child Act 2001 (Act 611) which came into force on 1 August 2002. The Act attempts to promote the rights of the child and at the same time aims to implement the United Nations Convention on the Rights of the Child (UNCRC). However, the discussions will only focus on the provisions relating to the welfare of the child abuse victim and the rights and responsibilities of the public to prevent child abuse. As the victim of the abuse may later on be required to give evidence in a court of law, being a child, it is expected that a normal criminal justice procedures should not be applied to them. There should be a special way of obtaining and allowing them to give evidence. In 2007, the Evidence of Child Witness Act was passed with the aims to make provisions relating to giving of evidence by child witnesses. It is the aim of this paper to see how such laws are effective in protecting the child abuse victim.

II. INTRODUCTION

Child abuse and violence are of global concern and have long been unresolved issues. Even though many steps have been taken by the government to prevent them, statistics show that child abuse cases keep increasing. Children experience violence in spaces most familiar to them: in homes, schools and in the communities they live in. They also suffer abuse and exploitation in orphanages, in places of detention and on streets. The willful maltreatment of children has been recognized internationally as a matter of great sociological impact with legal significance and medical concern. Law is one of the mechanisms to ensure that all the policy and planning of the government run smoothly. For example, it is a policy of the government of Malaysia that no child is abused or neglected. Therefore, the government of Malaysia has passed legislation to protect the child from being abused and also to ensure the perpetrator is punished. The Domestic Violence Act 1994 and the Child Act 2001 are the main laws which govern cases of child abuse. The other laws which dealt with the case of child abuse are the Penal Code and the Evidence of Child Witness Act 2007.

III. DEFINITION OF CHILD

Age is an important factor in determining whether a person is a child or not. It is important to determine whether a person is considered as a child because if he is a child, specific provisions of law which provides for the protection of a child will be applicable. Therefore, the child will be protected from being exploited. The Child Act which was passed in 2001 (Act 611) to consolidate three major statutes governing children and young persons, i.e., the Juvenile Court Act 1947, Child Protection Act and Women and Girls Protection Act 1973, defines a child as all persons aged below 18 years. The definition is also in line with Article 1 of the Convention on the Rights of the Child 1991, i.e., a child is defined as someone who is under the age of 18.

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IV. DEFINITION OF CHILD ABUSE

It is difficult to define child abuse with precision as there can be no universal meaning based on a broadly acceptable value. This is because the form of neglect may not be an abuse of one community but it may be considered as a form of abuse in another society. The World Health Organization defines child abuse as all forms of abuse whether physical, emotional, sexual, neglect, abuse, maltreatment or exploitation which may cause injury or damage to the health, life, development or dignity of the child done by those who have the responsibility, trust or authority over the child. Sometimes we need to differentiate between abuse and the rights of the parent to discipline their child. The parent has the right to discipline their child as long as it is done in a reasonable manner and moderate in degree and otherwise does not constitute cruelty.

V. FORMS OF CHILD ABUSE

Child abuse can be divided into four kinds—emotional, physical, sexual and neglect. It usually consists of a pattern of behaviour which may include more than one kind of abuse. It may take the form of failure to meet a child's need for affection, attention and stimulation (even though good physical care may be provided) or that may be constant verbal abuse, rejection, threat of violence or attempts to harm the child. It may also refer to the negative behaviour of the parents or guardians towards children under their custody. Physical abuse occurs when a child is injured by a parent or guardian. An act or omission would amount to "physical abuse" if they occur intentionally or with intent to injure the child. The examples of physical abuse are kicking, punching, shaking, strangling, beating until he passes out and breaking bones. While injuries which are always associated with physical abuse are bruises, scratches, brain damage, bleeding and some cases involving death, sexual abuse is defined as involvement of children in sexual activities where they do not fully understand what is being done or the impact of the consent given, or the act is something contrary to role of the family. The example of sexual abuse included the act of having sex with a child, rape, incest, exposing genitals, sexual sadism, child prostitution and child pornography. Acts of molestation like holding, kissing, rubbing private parts of children and unnatural sexual behaviour are also sexual abuses. Neglect can be defined as the persistent and serious failure to provide basic physical, emotional and developmental needs in terms of health, education, emotional development, nutrition, shelter and a safe life for children. (Malaysia's National Policy). Neglect occurs when caretakers fail to provide children with essential food, clothing, shelter, medical care, education, nurturance, or love.

VI. FACTORS THAT CONTRIBUTE TO CHILD ABUSE

There is generally no single factor that results in abuse. There is also no known cause of child abuse. Nor is there any single description that captures all families in which children are victims of abuse. However, research has proved that there are a number of risk factors or attributes commonly associated with maltreatment. The risk factors can be grouped into four domains, i.e. parent or caregiver factors, family factors, child factors and environmental factors.

VII. LEGAL MEASURES TO PREVENT AND PROTECT THE VICTIM

It is undoubted that law is the important component to prevent abuse and neglect. Therefore, most countries have passed laws for the protection of the children. For example, the Children Act 2001 in Ireland, the Protection of Children and Juveniles Ordinance in Hong Kong, and the Children and Young Persons Act 2001 in Singapore. As for Malaysia, a number of laws are providing the protection for the abused child.

A. The Child Act 2001

The Child Act 2001 brought major changes in the law relating to the protection of the child in Malaysia where the rights of the child were recognized openly by the government. The preamble of the Act recognized children as an important component of the society and since the children are not mature, protection and special care should be given to them. The Child Act provides provisions to protect abused children or children in need of care and protection as follows:

1. Restrictions on Media Reporting and Publications

In order to protect the interest and welfare of the child, any mass media report regarding any child in respect of whom custody is taken under Part V of the Child Act shall not reveal the name, address or educational institution, or include any particulars calculated to lead to the identification of any child so concerned whether as being the person against or in respect of whom action is taken or as being a witness to the action. The picture of any child concerned or any other person, place or thing which may lead to the identification of any child concerned also shall not be published in any newspaper or magazine or transmitted through any electronic medium (section 15(1) and (2) of the Child Act 2001).

2. Taking a Child into Temporary Custody

It is the duty of a protector/police officer to take a child into temporary custody and put him or her in a safe house. Here, protector means the Director General, the Deputy Director General, Divisional Director of Social Welfare, Department of Social Welfare, the State Director of Social Welfare of each state, any social Welfare Officer appointed under the Child Act 2001. If the protector or police officer is satisfied on reasonable grounds that a child is in need of care and protection, they may take the child into temporary custody (section 18 of the Child Act 2001).

3. Duty to Inform the Relevant Authority of Abuse

The duty to inform is imposed on the medical officer or medical practitioner who believes on reasonable grounds that a child he is examining or treating is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or has been sexually abused (section 27(a) of the Child Act 2001). Failure to report is an offence and shall on conviction be liable for a fine not exceeding five thousand ringgit or imprisonment for a term not exceeding two years or both (sections 27(b) of the Child Act 2001). The duty to report is also extended to the family members of the child and the child care provider (sections 28 and 29 of the Child Act 2001). This is different as compared to the Child Protection Act 1991 which only imposed the duty on medical practitioners. Looking to these two additional categories, it can be said that there are two categories that also have the possibility to know of the abuse cases earlier than the medical practitioner. Section 2 of the Act defines "member of the family" as including a parent or a guardian, or a member of the extended family, who is a household member, while household member is defined as a person who ordinarily resides in the same household as a child. While child care provider is defined as a person who looks after one or more children for valuable consideration for any period of time, the duty to report arises according to section 28(1) and section 29(1) when the respective parties have the reasonable grounds to believe that a child is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or has been sexually abused. Here, the standard used is whether a reasonable man based on reasonable grounds believes that the child is being abused. Since the law makes it compulsory for the family member and child care provider to report abuse, failure to comply with the duty is an offence under section 28 of the Act and if convicted is to be released on bond on conditions to be determined by the Court. Failure to comply with the bond will render the person liable to a fine not exceeding RM5,000.00 or to imprisonment for a term not exceeding two years or both. It is suggested that the duty to report should be extended to neighbours as well as teachers because they are the people who always deal with the child and may have seen the signs of abuse.

B. The Child Witness Act 2007

As the victim of the abuse may later on be required to give evidence in the court of law, being a child, it is expected that a normal proceeding cannot be applied to them. There should be a special way of obtaining and allowing them to give evidence. According to section 118 of the Evidence Act 1950 if the child can understand the nature of the question put to him and can give a rational answer to that question, he is competent to give evidence. A child being a competent witness will be treated as an adult witness. He is expected to retell the story, live, on the day of the trial in front of the judge, court officials, defence counsel and the alleged offender. This is a strange environment for the child, and it can rapidly confuse him. The young child may also find it frightening to see the accused in court. The child will also be subjected to cross-examination by the defence counsel which will not only traumatize the child but also make him less likely to tell the truth. In Malaysia, the Evidence of the Child Witness Act was passed in 2007 with the objective of reducing the trauma experienced by child witnesses in court appearances. The Act provides for child witnesses to give evidence in the courtroom but shielded by a screen between the witness and the accused person or a child charged with the offence or by the live link or by video recording.

1. Video Recording

In this case, the child witness should be interviewed by a qualified and experienced person and a videotape of the interview should be used as evidence at trial. Video recording means a video recording of the oral evidence of the child witness in the form of an interview conducted by a police officer or other officer and the child witness, expressed upon any format, made with a view to its admission as evidence of examination in chief of the child witness. The major advantages of the use of the recorded evidence are less trauma for the child, the freshest possible evidence is obtained, pleas of guilty are encouraged and the accused who asserts his/her innocence is in a better position to do so when he/she knows all the details of the child's evidence before the trial. However, the video recorded evidence may be attacked as improper by the defence counsel since it may involve leading questions asked in order to conduct an effective interview. This may discredit the reliability of the statement given by the child witness. (Appendix)

2. Live Links or Closed-Circuit Television

Live link means a live TV link or other arrangement whereby the child while absent from the courtroom is able to see or hear or be seen and heard by the persons in the courtroom. The section provides for the evidence to be given in a normal way except that the witness will not be in the courtroom. It is mainly introduced to minimize the stressful effect of a court appearance upon child witnesses in alleged child abuse cases. Examination of the child witness may be done through the court or an interpreter or an intermediary authorized by the court. The intermediary communicates the questions put to the child witness and communicates the child's answer to the person putting the questions. He also explains the questions and answers to be understood by the child but shall not prompt or influence the child or disrupt the questioning. If the accused person is unrepresented, he is not entitled to question a child witness directly but he may do so through an intermediary.

3. Screening

A child witness, while giving evidence in Court, may be prevented by means of a screen or other arrangement from seeing and being seen by the accused or a child charged with an offence. However, the screen or other arrangement shall not prevent the child witness from being able to see, and to be seen by, the Court, the prosecutor, the advocate for the accused or the child charged with any offence and the interpreter.

4. Accompanying Adult

The court may allow a child witness to be accompanied by an adult while giving evidence, presumably to give physical comfort and assurance to the child to lessen the trauma. Section 9 of the Child Witness Act provides that the court may allow a child witness to be accompanied by one or more adult but the adult accompanying the child shall not prompt the child witness to answer the question or influence the answer or disrupt the questioning of the child witness.

5. Formal Court Attire

Formal court attire may be dispensed with. This is provided in section 10 of the Evidence of Child Witness Act 2007. This can be seen as one of the ways to make the courtroom appear friendly and normal in cases where the child witness gives evidence in the courtroom. It cannot be denied that the experience of being a witness is unpleasant and even daunting for most children. The usual set-up of courtrooms and court personnel are intimidating from children's perspectives, who, for this very reason may be discouraged from giving reliable testimony. The objective of this section is to make the courtroom appear friendly and normal in cases where the child witness gives evidence in the courtroom.

VIII. CONCLUSION

Despite significant strides made by the government in improving child protection measures, in recent years, the cases of child abuse keep increasing. The laws and procedures alone cannot solve the problem. It is only one of the methods of providing a solution to the problem. More efforts should be taken to make society aware that child abuse is a crime and can cause a country to lose human potential. The Department of Social Welfare under the Ministry of Women, Family and Community Development and NGO's have carried out awareness campaigns periodically in mass-media and a nationwide campaign through posters and billboards as the main source of medium. As for the protection of the victim, they also provide

shelter for the victim. Community-based projects should also be developed which involve the society at large to create awareness that child abuse is a crime. They should be made aware of the current situation, the law concerning the issues and measures taken by the government and government agencies.

Appendix

Abstract:

Child victim safety and comfort were ensured by the establishment of the Child Interview Centre (CIC) which has started in 2002. The main purpose for its establishment is to record the evidence of victims / witnesses through video recording (DVD) under the provisions of the Evidence of Child Witness Act 2007 (sec 6 and 7). Therefore, since its establishment, child victims were dealt with in a friendly environment where audio and video recordings of the child's interview at the CIC were being used as evidence in chief of the child.

This practice reduces the trauma suffered by the child victims/witnesses. Moreover, from the recordings tendered in courts, we can see that the whole process was made in a comfortable environment and they did not show fearful expressions. Apart from that, the professionally trained interviewer did give the child chances to utilize the equipment provided in the centre to explain the acts done by culprits. This practice has proven to be efficient as they can explain better using this equipment and were very helpful to the Prosecution.

Issues (Background):

- 1) The CIC was introduced in the year of 2002, and until recently CICs were only in 3 different states. Small districts were facing problems to refer a child victim to CIC since these districts are located in remote areas.
- 2) Several problems have been detected in relation to the implementation of the CIC. These include difficulties in translating the languages other than the National Language, shortage of interpreters in other languages/dialects (in cases where the victims were not fluent in Bahasa Malaysia), manner of questioning by the recording officers such as the use of leading questions during recordings giving rise to a challenge by the defence and shortage of trained recording officers because of promotions or being transferred to another department.

Strategy and Implementation:

- 1) In 2003, the CIC were established only in three states which are Johor, Pulau Pinang and Kuala Lumpur. Now, the number has increased to 15 with a ratio of 1 CIC for each state in Malaysia.
- 2) To enhance the quality of the CIC, (with regard to the facilities and environment) as well as recordings of interviews, Training of Trainer on Child Interviewing Skills for D11 officers were organized with full support from Unicef Malaysia (in 2013). The Ministry of Women, Family and Community Development of Malaysia, also organized various trainings, which includes counselling skills, religious input, handling specific groups of children (young/older/disabilities), child development (behavioural, language and cognitive), Preparation Of Transcript Course, Preparation Of Transcript immediately after recording and preparation for accredited interpreters. For sexual cases, only experienced Investigating Officers who were certified as interviewing officers were allowed to deal with sexual victims because they have better knowledge on the matter.

Progress and Results:

- 1) As far as the CIC records are concerned, since 2003 up to now, a total number of 15 CIC have been established with a ratio of one CIC for each state. A total number of 2711 recordings have been conducted throughout Malaysia with a total number of 108 recordings used and tendered in court. This number is not much compared to the recordings done due to the accused who had pleaded guilty at the very early stage of trials and there are also victims who can speak extremely well in court, better than the video taken.
- 2) An evaluation of the effectiveness of the CIC and the recordings tendered in courts was done during the Magistrates and Sessions Court Judges Trainings which are held annually. During the

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course, feedback was given by the judicial officers informally. From the feedback, the evaluation showed that Magistrates and Judges exhibited a higher level of sensitivity in dealing with the victim during the cross examination process where lawyers are not allowed to badger the child victim and there were occasions where the court dismissed irrelevant questions from the defence which made the child uncomfortable.

Good Practice:

- 1) The Child Interview Center has been very helpful for children to give evidence with more confidence and they were free from the rigid courtroom processes. Hence, the Prosecution Division in ensuring that the child witness is protected from the normal courtroom processes of having to confront the perpetrator in court has issued a directive that evidence of a child witness (especially in sexual cases) to be taken by way of recordings from the CIC.
- 2) The focus of CIC on producing quality recordings has led to trainings organized for the recording officers.
- 3) The judicial officers on the other hand have shown a high level of sensitivity when dealing with child victims. Moreover, judges who have experienced a trial using the CIC recordings have shared their valuable experience with their colleagues to create awareness of CIC and the law involved in the process of admitting the CIC recordings.