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Combating Child Pornography in Digital Era: Is Malaysian Law Adequate to Meet the Digital Challenge?

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ABSTRACT

Information Communication Technology (ICT) facilitates abuse and exploitation of children online, especially child pornography. A study conducted by the Internet Watch Foundation showed that ICT is responsible for the mushrooming of child pornography into a fast growing business and there is evidence to show that the victims of this abuse are getting much younger. Realising the severity of the threat, various conventions and conferences have been held to address the issue and discuss the methods in combating the problem. For example, the Cybercrime Convention criminalises all related acts of creating, producing, disseminating and possessing of any child abuse images. Similarly, various initiatives have been adopted to combat commercial and non-commercial sexual exploitation of children, particularly the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC). At the national level, countries such as the UK, US and South Korea have enhanced their laws and legal mechanism to safeguard children against these ICT facilitated crimes in line with the international conventions. Based on a comparative analysis, this paper aims to highlight the threat and how the three countries are addressing the problem and analyses the legal position in Malaysia in addressing and combating the use of ICT to commit crimes against children.

Keywords: Child pornography, online risks, online violence, abuse and exploitation, ICT crimes against children

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INTRODUCTION

Rapid technological advancement in ICT has created opportunities for criminals and individuals with mala fide intention to continuously misuse ICT to abuse, harm and exploit children. ICT provides access

for criminals to firstly contact, engage and 'be-friended' children, secondly exploit the children's innocence and ignorance of the threats or risks of ICT and thirdly collaborate to organise crimes that exploit and abuse children particularly in child pornography. Even though the Convention on the Rights of A Child (UNCRC) imposes responsibility on the member states to protect the rights of children, others especially parents, society, community and the children themselves also have a role to play in ensuring that the children are safe from harm, abuse and exploitation in the real and the virtual world. This paper analyses the approach of other countries or jurisdictions in addressing the issue and also looks at the adequacy of the Malaysian law in addressing and combating the use of ICT to commit crimes against children in Malaysia in this digital age. In particular, this paper focuses on a discussion relating to child pornography or child abuse materials only.

CHILD ABUSE MATERIALS OR CHILD PORNOGRAPHY

Child pornography is considered a heinous crime against children and ICT contributes towards the mushrooming of online child pornography. A report conducted by the Internet Watch Foundation in 2008 found there were 1,536 individual child abuse domains available on the internet and 58 percent were hosted in the United States. It also reported that child pornography is a fast growing business due to the demand in commercial websites for child abuse materials (IWF Annual Report, 2008). In addition, a study conducted by the National Centre for Missing and Exploited Children indicated that 83 percent of the abuse materials in the possession of arrested child pornography perpetrator contained images involving children between the ages 6 and 12, with 39 percent comprising of images of children between ages of 3 and 5, and 19% had images of infants and toddlers under age of 3. This study indicated that the victims are getting younger and the abuses are getting severe and horrid.

Fear for the safety of child victims is alarming. As a result, child pornography is regarded as an international crime and has become an international concern in various international congresses, namely:

1. World Congress on the Commercial and Exploitation of Children in Stockholm 1996;
2. Vienna International Conference on Combating Child Pornography, 1999
3. World Congress on the Commercial Exploitation of Children, Yokohama, 2001
4. World Congress on the Commercial Exploitation of Children, Rio de Janeiro, 2008

From these conferences, protection of children against this crime has been codified in various international human rights treaties governing child pornography, namely:

1. Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography, 2000 (OPSC);

2. Convention on Cybercrime or Budapest Convention, 2001
3. Council of Europe Convention on the Protection for Children against Sexual Exploitation and Sexual Abuse or Lanzarote Convention, 2007

CRIMINALISING ONLINE CHILD PORNOGRAPHY

Efforts have been made to criminalise child pornography at international, regional and national levels. Article 2 of the OPSC defines child pornography as any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. This definition covers both online and other forms of child pornography. Meanwhile, Article 3 of OPSC imposes obligations to State Parties to criminalise producing, distributing, disseminating, importing, exporting, offering, selling or possessing of child pornography as defined in Art 2. Art 3(1)(c) of the OPSC also obliges state parties to punish the possession of child pornography, especially for the purposes of producing, distributing, disseminating, importing, exporting, offering or selling. Being aware of the widespread distribution and accessibility of child pornography through the Internet, the Committee on the Rights of the Child has made specific recommendations regarding the adoption of legislation on the obligations of ISPs in relation to child pornography. Other concerns include ensuring convicted offenders to not continue exploiting children once they have served the sentence and the need to establish monitoring and surveillance mechanisms including a registry of the sex offenders.

The Budapest Convention makes online child pornography a crime. Article 9 (1) mandated State Party to adopt legislation that criminalises the conduct of producing child pornography for the purpose of distribution through a computer system, offering or making available child pornography through a computer system, procuring child pornography through a computer system and possessing child pornography in a computer system or on a computer data storage medium. For this purpose, the Convention defines child pornography to include a minor engaged in sexually explicit conduct, a person appearing to be a minor engaged in sexually explicit conduct and realistic images representing a minor engaged in sexually explicit conduct. The Convention categorises offences related to child pornography as content related offences. This makes both the activity involved in child pornography and the product of such activity a criminal offence. The Lanzarote Convention also criminalises all activities and conduct relating to child pornography but added 'knowingly obtaining access, through information and communication technologies to child pornography' as a crime. The Convention refers the term 'child pornography' as 'any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes" [Art 20 (2)]

At the regional level, the European Commission, for example, has issued a new directive 2011/92/EU to combat sexual exploitation and child pornography to replace Council framework Decision 2004/68/JHA. The new directive follows the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007 or Lanzarote Convention. The EU regard enforcement as one of the important mechanisms to combat child pornography measure and adopt several measures including creating a special unit to combat child pornography within the law enforcement service of the Member States. The Unit uses different channels of police cooperation, in particular Interpol, Europol and sets up the contact point in the Member States to combat cybercrime, which are operational 24 hours a day and to venture into the possibility of obliging internet service providers to retain traffic-related data and to set up their own control system (Europol, 2010).

Apart of the legislative approach, EU also adopts a resolution to prevent the dissemination of illegal contents on the internet especially child pornography. On this matter, the EU has issued a directive on the Communication on Illegal and Harmful Content (Content Directive) on the Internet and a Green Paper on the Protection of minors and human. The Content Directive provides a policy to fight against harmful and illegal contents on the Internet that also include child abuse materials.

Efforts to combat and criminalise online child pornography have also taken place at the national level where countries such as the UK, US and South Korea have improved and extended the scope of their existing law to address this particular issue. In these three jurisdictions, all activities and conduct involved in producing, disseminating and possessing child abused materials are criminalised and definition of child pornography has been extended to include computer graphic images of a child.

Criminalising the activities involved in online child pornography in line with the requirement of the OPSC and the Cybercrime Conventions

a. The UK Approach

The UK has amended the existing laws governing child pornography to address the challenges of technology and incorporated the international standard laid down by the Cybercrime Convention into their laws. As a result, the Protection of Children Act 1978 has been amended to effect the criminalisation of taking, making, distributing and possession of child pornography. With the above development, UK legislated against the production, possession and distribution of child pornography in whatever form. The application of the laws can be seen in various cases. In *R v Bowden* [2000] 1 Cr App R (S) 26 and *R v Jayson* CA [2002] EWCA Crim. 683, the court held that downloading an image of a child from the internet amounts to 'making' a photograph,

which is an offence contrary to Section 1 of the Protection of Child Act. The act of downloading causes the image to exist on the screen, which therefore becomes a photograph. In *R v Fellows and Arnold* [1977] 1 CR App R 244, the 1st Appellant had uploaded and stored child sexual abuse images on his employer's computer that enabled users to both display and print the images. Those who have the password could access those images. The password also allowed them to access the archive and assisted in the growth of the archives in which the 2nd defendant was one of them. Both were charged under the Protection of Child Act 1978, the Obscene Publications Act 1959 and the Criminal Justice and Public Order Act 1988. The Court in this case held that a file on a database, which can be displayed on screen and printed out, constitutes a copy of a photograph and uploading such images constitutes possession with a view to their being distributed or shown. However, in relation to possession of an indecent image of a child, some knowledge of its existence was held to be necessary as illustrated in the case of *Atkins v Director of Public Prosecution and Goodland v Director of Public Prosecutions* [2000] 2 Cr App R 248 (QB). Nevertheless, in the case of *R v Harrison* [2008], viewing a child abuse image on a pop-up advertisement amounts to criminal offence if the defendant knew that the images would pop up and once viewed was automatically saved. This is because the pop up left automatic traces on users' computers. Accordingly, the law in the UK criminalises all activities involved in the production, distribution and possession of child pornography in whatever form and the court plays an important role in applying the laws to cover online and offline child pornographic materials.

b. The US Approach

In the US, child pornography is regarded as an obscene expression of speech that is not protected under the First Amendment. It is a crime under the 18th United States Code, a federal law that prohibits the production, distribution, reception and possession of an image of child pornography under Section 2252 of the Code. Production of child pornography is made illegal under Section 2251 and this includes the act "to persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct for purposes of producing visual depictions of that conduct." Further, the federal law prosecutes any individual who attempts or conspires to commit a child pornography offense and those who knowingly produce, receive, transport, ship or distribute child pornography with the intent to import or transmit the visual depiction into the United States. The law also provides severe statutory penalties to any violation of the above law by fines or imprisonment between 5 years to 30 years, respectively. It also imposes life imprisonment for offense occurring in the following situations: (i) the images are violent, sadistic, or masochistic in nature, (ii) the minor was sexually abused, or (iii) the offender has prior convictions for child sexual exploitation.

Apart from the above, the US Congress has passed several laws specifically criminalising sexual exploitation of children:

1. Protection of Children Against Sexual Exploitation Act 1978 that criminalises live performance and visual depictions of children engaged or engaging in whatever form;
2. Child Protection Act 1984 that criminalises production or trafficking of non-commercial child pornography in whatever form;
3. Child Pornography and Obscenity Enforcement Act 1988 criminalise distribution and advertisement of child pornography through the use of computer;

In the case of *Osborne v Ohio* 495 U.S 103 (1990), the court criminalised the possession including private possession and private use of child pornography. The court held that private possession of child pornography was not protected under the First Amendment and that mere possession of child pornography should be illegal because paedophiles may use it to seduce new victims or convince children to submit to sexual violation and sexual solicitation or grooming of children.

Concerned with the availability and accessibility of the content online, the US has enacted the Children Internet Protection Act (CIPA) that imposes mandatory filtering and blocking of such pornographic, obscene and indecent materials in schools, libraries and educational establishment that receive federal funding for internet access.

Similar to the UK, the US also criminalises the processes involved in the production distribution and possession of child pornography in whatever form. The US law severely punishes those who seduce children to get involved in child pornography and any attempt to import into the country of any such visual depiction. As in the UK, there exist several laws that specifically address the criminalisation of child pornography in any manner and forms.

c. The Korean approach

In South Korea, the Act on Protection of Children and Juvenile from Sexual abuse criminalises production, import and export of obscene materials, sale, rental or distribution, as well as possession of child pornographic materials under Article 8. The provision criminalises distribution including possession of child and juvenile pornography and any violation shall be punished by imprisonment with prison labour for a specific period stated under the respective sub-provisions. For possession of child and juvenile pornography, the punishment is imprisonment with prison labour for not more than seven years.

Pornography and child pornography is considered as harmful materials and the Juvenile Protection Act protects children from harmful act, abuse and violence by regulating the distribution of harmful materials in print, broadcast and online media. Article 53(3) of the Telecommunication Business Act (TBA) regards child pornography as harmful and illegal online content; in order to

monitor this issue, the Act established the Information Communication Ethics Committee (ICEC) to operate a centre for reporting harmful online communication and make recommendation to the ISPs to remove the content. The Act gave power to ICEC to monitor Internet discussion and contacted system operators to get the information deleted. In 2001, the ICEC introduced the Internet Content Filtering Ordinance to filter Internet content which requires ISPS to filter access to a list of websites determined by the ICEC and requires Internet access facilities like libraries and *PC Bang*or Internet café to install filtering software to protect youth. ICEC also introduced Internet Content Media Rating system that provides criteria for indecent, as well as violence sites as measures, to prevent child pornography and cyber sexual violence. In 2008, the Korean Communication Standard Commission (KCSC) took over the role of ICEC and carried out further tasks of issuing warning to Internet users who attempted to access to any of such materials or content on the Internet. In addition to filtering and rating, the Act on Promotion of Communication Network Utilization and Data Protection (CNA) under Article 42 requires labelling of media materials harmful to juveniles as measure to protect children online. The Act imposed a duty on the Ministry of Information and Communication to develop appropriate measures to ensure development and dissemination of contents screening software, the development and dissemination of juvenile protection technology and develop education and publicity for juvenile protection. Pursuant to this, 'Nuri Cops' has been appointed among the public to clean up and patrol the Internet by deleting child pornographic images as one of the mechanism to protect children online.

As seen above, the UK, the US and the South Korea have adopted legal mechanism to combat child pornography online and offline. Each country has domestic laws that criminalise all activities relating to the production, distribution and possession of child pornography in whatever form. The courts also play an important role in interpreting the laws and extending the application to criminalise possession of child pornography from offline to online. Apart from using criminal laws and laws protecting children to make child pornography a crime, content regulation is also used to protect children from this crime. Child pornography materials are considered illegal and thus filtering is required by the laws to protect children, as seen in the US and in the South Korea. In South Korea, rating and media labelling are introduced by the law as important protective measures that require the government and the industries to work in tandem to ensure children and juvenile are protected from any harm, abuse and violence both online and offline. In the UK, however, there is no specific statute imposing filtering, rating and labelling; the country nevertheless employs self-regulation and parental control as mechanism to protect children online.

d. Malaysia

In comparison with the above jurisdictions, Malaysia regards all pornography as illegal and thus does not have any specific law criminalising child pornography. The laws are scattered and govern all types of pornography under the category of obscene, indecent and offensive materials. The Printing Presses and Publications Act 1998 (PPPA), the Film Censorship Act 2002 (FCA) and Penal Code clearly prohibit obscene and offensive materials in relation to print medium and film, whereas indecent, obscene and offensive online contents are governed by the Communication and Multimedia Act 1998 (CMA) and Consumer Content Code (CCC). However, it is unfortunate that the Computer Crimes Act 1997 (CCA) does not address this particular issue since child pornography is considered as a computer crime against children online.

In relation to criminalising the activities involved in producing obscene films, Section 4 of the PPPA prohibits production or printing of obscene publication or documents from any printing press or machine. Sec 2 of the PPPA defines "publication" to include:

i. A document, newspaper, book and periodical;
ii. All written or printed matter and everything whether of a nature familiar to written or printed matter or not containing any visible representation;
iii. Anything which by its form, shape or in any manner is capable of suggesting words or ideas; and
iv. An audio recording.

The term "publication" only refers to what can be published rather than the process and activities involved in publication in contrast to the definition of "publication" under section 1(3) of UK Obscene Publication Act 1959 and the Criminal Justice and Public Order Act 1994 (UK), where the term 'publication' includes distributing, circulating, selling, transmission of a document and electronic file, image or data." As a result, the offence under PPPA focuses merely on production of obscene printed materials and does not include Internet publication.

Section 5 of the Film Censorship Act makes it an offence to possess, have in custody, control or ownership or circulate, exhibit, distribute, display, manufacture, produce, sell or hire any film or film publicity material which is obscene or otherwise against public decency. The provision imposes a fine between RM10,000 – RM50,000 or to imprisonment for a term not exceeding five years or both to those who are found guilty to commit such offence. The Act, however, limits its application to a film which is defined to "include original or duplicate of the whole or any part of a cinematograph film; and a video, diskette, laser disc, compact disc, hard disc and other record of a sequence of visual images, being a record capable of being used as a means of showing that sequence as a moving

picture, whether or not accompanied by sound." The focus is more on a film in its physical medium for censorship purposes rather than digital film on the Internet. The application of this Act to obscene materials on the Internet is further limited by the non-application provision under sub section 3 which states, "This Act shall not be construed as permitting the censorship of any film or film publicity material published, displayed, circulated, exhibited, distributed or transmitted over the Internet or over the intranet." Therefore, the Act has its limitation and does not specifically criminalise the activities relating to online child pornography and obscene materials online.

Apart from the PPPA and the Film Censorship Act, the Penal Code also makes it an offence to sell, distribute and circulate obscene books. Section 292 provides "whoever sells, lets to hire, distribute, publicly exhibit, circulate in whatever manner or for the purpose of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever", etc. shall be punished with imprisonment for a term which may extend to three years or with fine or with both." The words used in this provision refer to physical obscene materials rather than to online materials. Thus, in contrast to the law in the UK, the US and the South Korean, the Malaysian statutes, as seen above, do not specifically criminalise the production, offering, distributing and possessing of online child pornography.

In relation to online pornography, Sections 211 and 233 of the Communication and Multimedia Act 1998 make it an offence to provide, makes, create and initiate transmission of contents which are obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person. These provisions are of general application and do not specifically regulate child abused content as required under the OPSC.

Nevertheless, section 31 of the Child Act 2001 clearly prohibits sexual abuse of children, while section 43 makes it an offence to sell, buy, let for hire, obtain possession, detain, advertise of a child for the purposes of prostitution. These provisions, however, merely focus on physical abuse and exploitation that may require judicial activism from the court and prosecutor creativity to extend the application to an online environment.

Recent developments, however, have seen a new approach in addressing and combating the issue of online pornography or indecent images. Several of the above Acts that were used to govern print and film pornography have been applied to address online crimes in relation to posting, distributing and possessing of indecent photographs online and on website. In the case of *Tan Jye Yee & Anor v Pendakwa Raya* [2014] 6 MLJ 609, the appellant has been charged inter alia under section 5(1) of the Film Censorship Act 2002 for obscene publication in their Tumblr. The charge is

yet to be materialised since he has escaped to another jurisdiction. The provision also prohibits possession of obscene materials. In 2010, Shahrom Mahdi a security guard was charged under section 292 of the Penal Code for uploading pornographic pictures and disseminating them on six websites. He pleaded guilty to the charges and was convicted (Bernama, 2010). In 2013, Fila Syahida Zulkipli was charged under section 292 of the Penal Code by the Mukah Magistrates Court. She pleaded guilty to recording an obscene video of a 15-year-old girl using her mobile phone and was fined for producing the obscene video (The Borneopost.com, 2013).

The issue on adequacy of the Malaysian law to address child pornography has become a hot topic recently when a Malaysian student, Nur Fitri Azmeer Nordin, was charged and convicted in the UK court for possessing, making and distributing pornographic images of children. Observation indicated that what is lacking in our law is criminalising possession of indecent or obscene images. Even though Section 292 of the Penal Code and Section 5 of the Film Censorship Act do mention about possession of obscene materials, the provision may not be adequate to address the issue unless the law is specifically extended to include online child pornography materials and images. On this aspect, the case of Shahrom Mahdi and Fila Syahida should be used as a stepping stone to criminalise possession and production of online child pornography in Malaysia, as required by the OPSC.

Challenges in Defining Image to Suit Digital Environment

Another issue challenging the law on online pornography is the definition of child pornography 'image', particularly computer-generated image and manipulated photograph. A clear definition is important since it involves criminal prosecution. The position in the UK, the US and South Korea is further discussed below.

In the UK, the Coroners and Justice Act 2009 define 'image' to include pseudo photograph as solution to solve the issue involving 'publication' of the child abuse in that format. To this effect, the Protection of Children Act 1978 (which was amended by the Criminal Justice and Public Order Act 1996) defines pseudo-photograph as an image, whether made by computer graphics or otherwise howsoever, which appears to be a photograph. Section 7 of Act 1978 further explains that "if the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child…notwithstanding that some of the physical characteristics shown are those of an adult". The provision also indicates that "references to an indecent pseudo-photograph include – a copy of an indecent pseudo-photograph and a data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph." In general, the Act criminalises any images showing sexual abuse of children on the basis that photograph of that nature is a record of the abuse of an actual child.

With such definition, any act of producing, publishing or publication, disseminating and possessing of such indecent pseudo-photograph of a child or child abused materials is a crime under the Act.

In relation to the term 'publication', the Obscene Publication Act 1959 defines the term 'publication' to include distributing, circulating, selling, letting, giving, lending, showing, playing, projecting or broadcasting of such image. Thus, publication of an indecent or obscene image involving a child in whatever form is an offence under this Act. The definition of publication is further defined under the Criminal Justice Act and Public Order 1996 to include data stored electronically and transmission of that data. Thus, any such acts and processes involving child abused images including computer generated child pornography or pseudo-photographs are criminalised.

In the US, images of child pornography are not protected under the First Amendment rights. Section 2256 of Title 18, United States Code, defines child pornography as any visual depiction of sexually explicit conduct involving a minor (someone under 18 years of age). The term "visual depictions" include photographs, videos, digital or computer generated images indistinguishable from an actual minor and images created, adapted, or modified, but appear to depict an identifiable, actual minor. In addition, undeveloped film, undeveloped videotape and electronically stored data that can be converted into visual images of child pornography are also deemed illegal visual depictions under the federal law. As a result, the US Child Pornography Protection Act 1996 was amended to further extend the definition of child pornography to include 'virtual image' i.e. image of a minor that was created through the use of technology, pseudo photograph or depiction of image 'appeared' to be a minor. The Act also defines 'sexually explicit' to include 'actual or simulated visual depictions which convey the impression that they contain sexually explicit depictions of minors'. These two amendments facilitate and expedite the prosecution of such cases in court and ease the burden of proving whether the pornographic image in question depicted an actual act or real victim.

In South Korea, Article 2 of the Act on Protection of Children and Juvenile from Sexual Abuse defines the term "child or juvenile pornography" as the depiction of children or juveniles doing an act specified in subparagraph 4 or engaging in any other sexual act in the form of film, video, game software, or picture or image displayed on computers and other communication media. In 2011, the National Assembly revised the above Act to cover 'creations of persons who can be perceived as minors in sexual situations'. The law was revised after the occurrence of a series of high profile cases of child rape and murder. Nevertheless, the law was criticised as it has the effect of treating imaginary acts of sexual contact with a child as the same as authentic sexual abuse where the actor may face a minimum of five years sentence and be registered as sex offender.

There is no specific definition of child pornography by any Act in Malaysia but the Content Code regards child pornography as obscene contents that include "depiction of any part of the body of a minor in what might be reasonably considered a sexual context and any written material or visual and/or audio representation that reflects sexual activity, whether explicit or not with a minor is strictly prohibited." The Content Code prohibits any form of child pornography. The Child Act 2001 regarded child pornography as sexual abuse, an offence under Section 17 of the Child Act. The Act recognises that a child who is sexually abused if he has taken part, whether as a participant or an observer, in any activity which is sexual in nature for the purposes of (i) any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance, or (ii) sexual exploitation by any person for that person's or another person's sexual gratification is a child in need of care and protection. A child who is being induced to perform any sexual act, or is in any physical or social environment, which may lead to the performance of such act should be protected and be out into rehabilitation. Section 31 of the same Act makes it an offence to those who, being a person having the care of a child sexually abuses the child or causes or permits him or her to be so, abused and could be liable to a fine not exceeding RM20,000 or to imprisonment for a term not exceeding ten years or both. Apart from the Child Act, the Penal Code particularly section 292 also criminalised child pornography within the ambits of obscenity laws. The law thus needs to be stretched out to cover online child pornography. In contrast, the law in the UK, the US and South Korea provide reasonably clear definitions of child pornography and extend the definitions to cover online pornography and make prosecution of this heinous crime more effective.

FINDINGS

From the above discussions, this article highlights the following findings on the adequacy of Malaysian laws to combat online child pornography. Firstly, the processes and activities involving making, producing, disseminating, selling of pornographic materials in the offline world are criminalised, as seen in Section 292 of the Penal Code and Section 5 (1) of the Films Censorship Act but the CMA, particularly section 211, limits the processes and activities only to the term 'provide'. Therefore, it does not criminalise the processes and activities of creating, uploading, downloading, transmitting, posting, transferring, receiving, viewing and possessing of the prohibited materials, as it is clearly provided in the laws in the UK, the US and South Korea. This could be due to the focus of the Act which is 'content of the communication' and 'use of multimedia'. Nevertheless, it is argued that pornography constitutes illegal online contents and producing and posting of such contents may constitute abuse particularly

when peer-to-peer communication is involved. Peer-to-peer communication has been identified as one of the modus operandi for the mushrooming of child pornography. Thus, even though the CMA defines 'communication' as any means, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form of any combination of those forms, it alone does not make each process or activity as stated above a crime.

Secondly, there is no clear legal definition on the terms pornography, child pornography, obscenity and indecency provided by the statutes. This may lead to difficulty to synchronise the application of the laws to cover all forms of pornography. Although the Content Code provides definition of the above terms, it is only used as a reference or a guideline for self-regulatory mechanism by online content providers. It does not have the binding effect and does not cover individuals involved in creating, producing, disseminating, viewing and possession of the materials. The Content Code limits its application to IASP that has agreed to be bound by it and does not apply to all Internet users.

Third, the non-censorship policy over Internet under the CMA, the Bill of Guarantee and the Film Censorship Act 2001 has the effect of allowing access to pornographic materials and websites. Such offensive materials and website are accessible to youth, especially in the absence of mechanism to filter access to online contents, parental guidance and control mechanism, as well as lack of self-resilience among the youth. This non-censorship policy could be seen as the root to all evils that could endanger the well-being and positive development of children in Malaysia. In this regard, filtering mechanism at school should be imposed as practiced in the three jurisdictions.

In relation to online contents, the CMA makes it an offence to provide indecent, obscene and offensive contents with the 'intent to annoy, abuse, threaten or harass any person'. The provision seems to indicate that in the absence of the above elements, providing such contents may not be illegal. This is not consistent with the requirement for physical content under the Film Censorship Act and the Penal Code. Finally, prosecuting cases under the CMA for online pornography will strengthen the applicability of the law through judicial interpretation and through this manner, the law could adapt to the advance in technology and the technical process. Most of the cases brought at the lower court were unreported even though the courts have relied and extended the application of the Penal Code and Film Censorship Act to cover online matters. In the UK, for example, the courts have, in several cases, extended the interpretation of 'photograph' to include computerised images and pseudo/virtual photographs. Thus, any database consisting of such images is caught under the UK Protection of Children Act 1978, UK Obscene Publication Act 1959 and UK Criminal Justice and Public Act 1988.

CONCLUSION

ICT crimes against children are on the rise; thus, appropriate laws are needed to protect children from being the victims. In Malaysia, the existing laws are still far reaching to meet the challenges of ICT facilitated crimes against children. In particular, the laws governing pornography should be clear and adequately comprehensive to cover both online and offline pornography and the laws should form an integrated system that criminalises child pornography. In this regards, the Penal Code, CMA and CCA should specifically criminalise online child pornography in line with the requirement of OPSC. Further, the Child Act 2001, being the main Act to protect children, needs to integrate physical and online abuse offences together to give full protection for children in this digital era. In order to curb distribution of child abused materials through file sharing, prohibition should cover peer to peer sharing, emailing and social networking. In addition, collaboration with the Banks is also important to eliminate the demands towards pornography, especially child pornography. The courts, particularly the higher courts, should be given the opportunity to further interpret the application, terminology and forms under the various statutes governing pornography, obscene, indecent and offensive materials. Lastly, the Malaysian Content Code should be made mandatory or alternatively be made as mandatory reference in relation to issues involving pornography, obscene, indecent and offensive materials.

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