

**ADVANCING THE RIGHTS OF THE SEXUALLY EXPLOITED  
CHILDREN IN NEED OF PROTECTION AND REHABILITATION  
WITHIN THE LEGISLATIVE FRAMEWORK IN MALAYSIA:  
A SOCIO-LEGAL ANALYSIS**

**NAJWA BINTI ROSLI**

**FACULTY OF LAW  
UNIVERSITI MALAYA  
KUALA LUMPUR  
2019**

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**NAJWA BINTI ROSLI**

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# **ADVANCING THE RIGHTS OF THE SEXUALLY EXPLOITED CHILDREN IN NEED OF PROTECTION AND REHABILITATION WITHIN THE LEGISLATIVE FRAMEWORK IN MALAYSIA: A SOCIO-LEGAL ANALYSIS**

## **ABSTRACT**

Every child has the universally recognized right to be protected from any forms of sexual exploitation and sexual abuse by virtue of Article 34 of the UNCRC. The foundational aspect in protecting children against sexual exploitation is the establishment of a legal framework that fulfils international standards. This is crucial to ensure that the national legal framework is effective, as well as to facilitate international collaboration and to curtail forum shopping. Within the Malaysian legal framework, children who are exposed to or involved in sexual exploitation are categorized as ‘children in need of protection and rehabilitation’ under Part VI of the Child Act 2001 (CA 2001). Under the said provision, these children may be placed at the place of refuge as part of the protection procedures. Past research findings exhibit several controversial issues pertaining to the children’s rights at the places of refuge. The findings suggest that, more often than not, the children have not been treated with dignity and respect, inadequate education opportunity, and insufficient moral support. These are against their rights enshrined in the UNCRC. With the intent of advancing the rights of children in need of protection and rehabilitation in Malaysia, this thesis seeks to, (i) evaluate the overall legal framework concerning children in need of protection and rehabilitation in Malaysia particularly as to the extent of compliance to the UNCRC and other ratified international instruments; (ii) to investigate the realities on the implementation of child rights at the places of refuge; and (iii) propose legal and administrative reforms for the purpose of ensuring the fundamental rights of the children in need of protection and rehabilitation are effectively

safeguarded. This research has adopted mixed doctrinal and socio-legal approaches. Apart from conducting library research to examine legal literatures, empirical data was also collected to provide insights on the actual application of the law, particularly to assess the implementation of the children rights at the place of refuge. It is submitted that the current Malaysian legal framework largely meets with the international standards. However, there are three pertinent areas that requires attention and improvements, namely; (i) the non-availability of provision on the legal presumption that persons under the age of 18 years who are involved in prostitution shall always be the victims of sexual exploitation, (ii) the inadequacy of provision establishing extra-territorial jurisdiction, and (iii) the restricted access of the child victims to compensation. Furthermore, it is submitted that the children's rights are reasonably protected and implemented at the places of refuge run by the government. With the adoption of Regulations 2017, MS-ISO 9001: 2008 and Place of Refuge CMS, the measures to safeguard the well-being of the children are standardized in Malaysia. Nevertheless, the research found that there are certain rights and aspect which are less satisfactorily promoted and/ or requires improvements such as the right to freedom of expression, right to family support, right to skill and vocational trainings, and the promotion of self-worthiness and prevention of future sexual abuse or exploitation.

**Keywords:** child sexual exploitation – children in need of protection and rehabilitation – child prostitution – child pornography – child pregnant out of wedlock.

**MEMPERKASAKAN HAK-HAK KANAK-KANAK YANG MENJADI  
MANGSA EKSPLOITASI SEKSUAL YANG MEMERLUKAN PERLINDUNGAN  
DAN PEMULIHAN DALAM KERANGKA UNDANG-UNDANG DI  
MALAYSIA: SATU ANALISIS SOSIO UNDANG-UNDANG**

**ABSTRAK**

Setiap kanak-kanak mempunyai hak yang diiktiraf oleh masyarakat sejagat untuk dilindungi daripada sebarang bentuk eksploitasi seksual dan penderaan seksual seperti yang termaktub dalam Artikel 34 Konvensyen Hak Kanak-Kanak Pertubuhan Bangsa-Bangsa Bersatu (UNCRC). Aspek asas dalam melindungi kanak-kanak daripada eksploitasi seksual ialah penubuhan suatu kerangka undang-undang yang memenuhi standard antarabangsa. Ini sangat penting untuk memastikan bahawa kerangka undang-undang kebangsaan adalah berkesan, di samping dapat memudahkan kolaborasi antarabangsa serta membataskan amalan ‘memilih forum yang disenangi’ (*forum shopping*). Dalam kerangka undang-undang Malaysia, kanak-kanak yang terdedah kepada atau terlibat dengan eksploitasi seksual dikategorikan sebagai ‘kanak-kanak yang memerlukan perlindungan dan pemulihan’ di bawah Bahagian VI Akta Kanak-Kanak 2001 (AKK 2001). Di bawah Bahagian tersebut, kanak-kanak ini boleh ditempatkan di tempat perlindungan sebagai sebahagian daripada prosedur perlindungan. Hasil penyelidikan sebelum ini telah mendapati bahawa terdapat beberapa isu yang menimbulkan kontroversi berkenaan hak-hak kanak-kanak di tempat perlindungan yang memerlukan penyasatan lanjut. Hasil penyelidikan mendapati bahawa kanak-kanak di sana tidak dilayan secara bermaruah dan tidak dihormati, tidak mendapat peluang pendidikan yang mencukupi, tidak mendapat sokongan moral yang mencukupi dan sebagainya, dan ini melanggar hak-hak mereka yang termaktub di dalam UNCRC. Oleh itu, dalam memperkasakan hak-hak kanak-kanak yang memerlukan perlindungan dan

pemulihan, tesis ini bertujuan untuk (i) menilai kerangka undang-undang keseluruhan berkenaan kanak-kanak yang memerlukan perlindungan dan pemulihan di Malaysia terutamanya dari segi tahap pematuhan terhadap UNCRC dan instrumen antarabangsa lain yang telah diratifikasi; (ii) menyiasat keadaan sebenar pelaksanaan hak-hak kanak-kanak di tempat perlindungan; dan (iii) mencadangkan reformasi undang-undang dan pentadbiran dengan tujuan untuk memastikan hak-hak asasi kanak-kanak yang memerlukan perlindungan dan pemulihan dapat dilindungi dengan berkesan. Penyelidikan ini telah mengguna pakai pendekatan campuran doktrinal dan sosio undang-undang. Selain daripada menjalankan penyelidikan perpustakaan untuk meneliti literatur undang-undang, data empirikal juga dikumpul untuk mendapatkan pemahaman tentang aplikasi sebenar undang-undang, terutamanya untuk menilai pelaksanaan hak-hak kanak-kanak di tempat perlindungan. Didapati bahawa kerangka undang-undang yang sedia ada sebahagian besarnya mematuhi standard antarabangsa. Namun demikian, terdapat 3 aspek penting yang memerlukan perhatian dan penambahbaikan, iaitu (i) ketiadaan peruntukan anggapan undang-undang (*legal presumption*) bahawa sesiapa di bawah umur 18 tahun yang terlibat dalam pelacuran hendaklah sentiasa digolongkan sebagai mangsa eksploitasi seksual, (ii) kekurangan peruntukan yang memberikan bidang kuasa luar wilayah, dan (iii) akses yang terbatas bagi mangsa kanak-kanak untuk mendapatkan ganti rugi. Tambahan pula, didapati hak-hak kanak-kanak adalah dilindungi dan dilaksanakan dengan agak baik di tempat perlindungan rasmi. Dengan adanya Peraturan-peraturan 2017, MS-ISO 9001: 2008 dan Sistem Pengurusan Pelanggan Tempat Perlindungan (*Place of Refuge CMS*), langkah-langkah untuk melindungi kebajikan kanak-kanak di Malaysia dapat diseragamkan. Namun demikian, penyelidikan ini mendapati bahawa terdapat hak-hak dan aspek tertentu yang dipromosikan secara minimal dan/atau memerlukan penambahbaikan – hak kebebasan bersuara, hak menerima sokongan

keluarga, hak mendapatkan latihan kemahiran dan vokasional, dan penggalakan sikap menghargai diri serta pencegahan penderaan atau eksploitasi seksual pada masa hadapan.

**Kata kunci:** eksploitasi seksual kanak-kanak – kanak-kanak memerlukan perlindungan dan pemulihan – pelacuran kanak-kanak – pornografi kanak-kanak – kanak-kanak hamil luar nikah

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and this is a dedication for you”*

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## LIST OF ABBREVIATIONS

<b>ATIPSOM 2007</b>	Anti-Trafficking In Persons And Anti-Smuggling Of Migrants Act 2007 [Act 670]
<b>CA 2001</b>	Child Act 2001 [Act 611]
<b>CDO 1870</b>	Contagious Diseases Ordinance 1870
<b>CMA 1998</b>	Communications and Multimedia Act 1998 [Act 588]
<b>CPC</b>	Criminal Procedure Code [Act 593]
<b>CSA</b>	child sexual abuse
<b>CSE</b>	child sexual exploitation
<b>FCA 2002</b>	Film Censorship Act 2002 [Act 620]
<b>ICT</b>	Information Communications Technology
<b>JKM</b>	Social Welfare Department Malaysia ( <i>Jabatan Kebajikan Masyarakat</i> )
<b>OPSC</b>	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)
<b>PKM</b>	Social Welfare Assistants ( <i>Pembantu Kebajikan Masyarakat</i> )
<b>PPPA 1984</b>	Printing Presses and Publications Act 1984 [Act 301]
<b>Regulations 2017</b>	Child (Place of Refuge) Regulations 2017
<b>SECTT</b>	Sexual Exploitation of Children in Travel and Tourism
<b>SOAC 2017</b>	Sexual Offences Against Children Act 2017 [Act 792]
<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>UN Guidelines</b>	United Nations Guidelines for the Alternative Care of Children
<b>UN TIP Protocol</b>	Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime
<b>UNICEF</b>	United Nations Children's Fund
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>WGPA 1973</b>	Women and Girls Protection Act 1973 [Act No. 106 of 1973]

<b>WGPE 1914</b>	Women and Girls Protection Enactment 1914 (Federated Malay States) [Federated Malay States Enactment No. 2 of 1914]
<b>WGPO 1888</b>	Women and Girls Protection Ordinance 1888 (Straits Settlements)
<b>WGPO 1896</b>	Women and Girls Protection Ordinance 1896 (Straits Settlements) [Ordinance No. XVII of 1896]
<b>WGPO 1914</b>	Women and Girls Protection Ordinance 1914 (Straits Settlements) [Straits Settlements Ordinance No. 143 (Ordinance No. 24 of 1914)]
<b>WHO</b>	World Health Organization

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<b>Appendix E</b>	Child Respondent Consent Form

## LIST OF PUBLICATION

- Article 1** Rosli, N. & Dusuki, F.N (2018). The Historical Development of the Laws Relating to Child Sexual Exploitation Prior to the Passing of the UNCRC in 1989. *IJASS*, 8(11), 968-973
- Article 2** Rosli, N. & Dusuki, F.N (2019). Transnational Child Sexual Exploitation: Is the Current Legal Framework Adequate to Successfully Prosecute the Perpetrators? *The Law Review*. 31-47
- Article 3** Rosli, N., Zubaidi, N & Dusuki, F.N. (2019). Regulating the Protection and Rehabilitation of Victims of Internet Child Pornography in Malaysia. *Advances in Natural and Applied Sciences*, 450-469

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# CHAPTER 1

## INTRODUCTION

### 1.1 PREFACE

Children are our future. Every child has the right to a safe, happy and content childhood notwithstanding of their social origin, sex, religion, where and to whom they were born. This is the core principle enshrined in The United Nations Convention on the Rights of the Child (“the UNCRC”), the most widely adopted international human rights treaty of the time.<sup>1 2</sup> Malaysia too, is committed in providing the best protection and care for the children, who form nearly 30% of the population.<sup>3</sup> Since the ratification of the UNCRC in 1995,<sup>4</sup> Malaysia has taken various steps in executing its responsibilities and commitments under the Convention. This includes the enforcement of the Child Act 2001,<sup>5</sup> an Act which consolidated and subsequently repealed three previous Acts dealing with children namely, the Child Protection Act 1991<sup>6</sup> that focused on child abuse and neglect cases, the Juvenile Court Act 1947<sup>7</sup> that dealt with children in conflict with the law as well as the Juvenile Court procedures, and the Women and Girls Protection Act 1973<sup>8</sup> that provided the protection for the women and young girls involve in immoral activities.<sup>9</sup>

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<sup>1-1</sup> All United Nations member states, except for the United States and Somalia, have ratified the Convention

<sup>1-2</sup> Abdul Ghafur Hamid @ Khin Maung Sein, 'Muslim States And The Implementation Of The Convention On The Rights Of A Child : With Special Reference To Malaysia', in Marie-Luisa Frick and Andreas Th. Müller (eds), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (1st, Martinus Nijhoff, The Netherlands 2013) at page 290

<sup>1-3</sup> Department of Statistics Malaysia Official Portal, 'Children Statistics Publication, Malaysia, 2018', available at < <https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=RWsxR3RwRVhDRlJkK1BLalgrMGRlQT09> > retrieved on 31 August 2019

<sup>1-4</sup> The United Nations Treaty Collection, 'Convention on the Rights of a Child', available at < [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-11&chapter=4&lang=en) > retrieved on 31 March 2014

<sup>1-5</sup> Act 611

<sup>1-6</sup> Act 468

<sup>1-7</sup> Act 90

<sup>1-8</sup> Act 106

<sup>1-9</sup> Jal Zabdi Mohd Yusoff, 'Child Protection Laws In Malaysia: The Changing Trend', (The 6<sup>th</sup> International Malaysian Studies Conference (MSC6) : Engaging Malaysian Modernity 50 Years and Beyond, Sarawak, 5-7 August 2008), available at <<http://www.scribd.com/doc/35692898/Law-and-Child-Abuse>> accessed 1 April 2014

## 1.2 BACKGROUND OF THE STUDY

The abuse of children for sexual purposes remains severe globally. Although no precise figures are available on the extent of the phenomenon,<sup>10</sup> the United Nations Development Programme (UNDP) estimated that over 1.2 million children were involved in the commercial sex industry in the year 2000.<sup>11</sup> The United Nations Children's Fund (UNICEF) estimated in 2014 that about 120 million girls under the age of 18 have been subjected to forced sexual acts at some point of their lives.<sup>12</sup> Even though this statistic covers all categories of sexual abuse, including exploitative as well as non-exploitative forms, the number is irrefutably alarming and UNICEF acknowledges that sexual violence, including sexual exploitation, is one of the most disconcerting of children's rights violations.<sup>13</sup>

It is also estimated that 20% of all internet pornography involves children<sup>14</sup> and the number of such images had increased 1500% since 1988.<sup>15</sup> A total of 29,908 reports of child abuse material were lodged to the International Association of Internet Hotlines in 2011 with 71% of the reports involved prepubescent children.<sup>16</sup> Furthermore, 3,000 victims and 1,500 offenders from more than 40 countries have been identified by INTERPOL via the International Child Sexual Exploitation image database by early 2013.<sup>17</sup>

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<sup>1-10</sup> UN Human Rights Council, *Report Of The Special Rapporteur On The Sale Of Children, Child Prostitution And Child Pornography*, (A/HRC/25/48, 23 December 2013) available at: <<http://www.refworld.org/docid/52e0f6b34.html>> accessed 8 March 2016

<sup>1-11</sup> Jini L Roby, 'Women And Children In The Global Sex Trade: Toward More Effective Policy' (2005) International Social Work, 48(2) 136, at page 136

<sup>1-12</sup> UNICEF, 'Sexual Violence – Current Status And Progress', available at < [https://data.unicef.org/topic/child-protection/violence/sexual-violence/#\\_ednref1](https://data.unicef.org/topic/child-protection/violence/sexual-violence/#_ednref1)> assessed on 4<sup>th</sup> March 2017

<sup>1-13</sup> *ibid*

<sup>1-14</sup> Stephen T Holmes & Ronald M. Holmes, *Sex Crimes Patterns and Behavior*, (3<sup>rd</sup> ed, Sage Publication Inc, 2009), at page 172

<sup>1-15</sup> 'Child Pornography' (*Sold No More – Abolish Sex Trafficking*), available online at <<http://soldnomore.org/pornography-faq/>> accessed on 29 April 2016

<sup>1-16</sup> UN Human Rights Council, *supra* note 1-10, at page 5

<sup>1-17</sup> *ibid*



Tackling the issue of the abovementioned child sexual exploitation has been the central agenda of the international community since the 1980's.<sup>18</sup> Hence, it has been a universally recognized right of a child to be protected from any forms of sexual exploitation and sexual abuse by virtue of Article 34 of the UNCRC. The article specifically obliges the State Parties to prevent the engagement of a child in any unlawful sexual activities, prostitution and pornography.

Article 34 of the UNCRC is further strengthened with the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography ("the OPSC") that has entered into force on 18 January 2002.<sup>19</sup> State parties are obliged under the OPSC to prohibit the sale of children, child prostitution and child pornography.<sup>20</sup> Besides that, as a minimum standard, the Protocol requires state parties to criminalise and to impose appropriate penalties<sup>21</sup> for various offences such as the offering, delivering or accepting, a child for the purpose of sexual exploitation.<sup>22</sup>

Apart from banning child sexual exploitation and inflicting penalty to the offender, the State parties shall provide feasible measures for the social reintegration, physical and psychological recovery of the child victim.<sup>23</sup> The child must also be afforded the access to adequate procedures to seek compensation for damages from those legally responsible.<sup>24</sup>

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<sup>1-18</sup> Marta Santos Pais, 'The United Nations Legislative Framework For The Protection Of Children From Sexual Violence, Including Sexual Abuse And Exploitation', in *Protecting Children From Sexual Violence : A Comprehensive Approach* (Council of Europe Publishing, 2010); available at <<http://www.coe.int/t/dg3/children/1in5/Source/PublicationSexualViolence/SantosPais.pdf>> assessed on 6 April 2016; at page 46

<sup>1-19</sup> The Optional Protocol was adopted by resolution A/RES/54/263 at the 54<sup>th</sup> session of the General Assembly of the United Nations; refer United Nations, Treaty Series, vol. 2171, p. 227

<sup>1-20</sup> Article 1 OPSC

<sup>1-21</sup> Article 3(3); Further, according to Article 3(4) the liability of the offender may be a criminal, civil or administrative liability, subject to the national law provisions

<sup>1-22</sup> Article 3 (1) (a)(i)

<sup>1-23</sup> Article 9

<sup>1-24</sup> *ibid*

### ***Position in Malaysia***

In Malaysia, sexual related offence cases against children and by the children themselves are increasing every year. Apart from the common crimes like molest and rape cases, prostitution, immoral sexual activities, getting pregnant out of wedlock involving children are indubitably alarming. Up till June 2013, 141 underage girls were rescued from the promiscuous sexual activities and prostitution throughout Malaysia and over the past year, a total of 230 children were rescued and sent to a rehabilitation school.<sup>25</sup> The official statistics from the Ministry of Women, Family and Community Development shows that in 2016, there were a total of 242 cases of children in need of protection and rehabilitation.<sup>26</sup>

Part VI of the Child Act 2001 (“CA 2001”) lists provisions concerning the specific category of children categorised as “the children in need of protection and rehabilitation”. According to Section 38 of the CA 2001, a child is deemed to be in need of protection and rehabilitation if he:

- (i) is being induced to perform any sexual act;*
- (ii) is in any physical or social environment which may lead to the performance of any sexual act;*
- (iii) is living in or frequenting brothel or place of assignation; or*
- (iv) is habitually in the company of or under the control of brothel keeper or person who interested in prostitution;*

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<sup>1-25</sup> Hemaloshinee Vasudevan, ‘Sexual Problems Among Teens In Malaysia: A Case Study At Youth Rehabilitation Centre In Kuala Lumpur, Malaysia’(2013), Interdisciplinary Journal Of Contemporary Research In Business, Volume 5, No.4; at page 86

<sup>1-26</sup> Department of Social Welfare, ‘Children In Need Of Protection And Rehabilitation by type of cases and sex 2016’, available at <[http://www.data.gov.my/data/ms\\_MY/dataset/kanak-kanak-yg-memerlukan-perlindungan-dan-pemulihan-mengikut-jenis-dan-jantina](http://www.data.gov.my/data/ms_MY/dataset/kanak-kanak-yg-memerlukan-perlindungan-dan-pemulihan-mengikut-jenis-dan-jantina)> accessed on 5 June 2018

- (v) *has been brought into or is to be sent out of Malaysia either after being purchased for notwithstanding whether it is for the purpose of prostitution, sexual activities or other immoral purpose;*
- (vi) *has been brought into or is to be sent out of Malaysia by fraud, false representation or false pretence notwithstanding whether it is for the purpose of prostitution, sexual activities or other immoral purpose;*
- (vii) *has been procured either within or outside Malaysia for the purpose of being used, trained or disposed of as a prostitute;*
- (viii) *is being detained for the purpose of prostitution, sexual activities or other immoral purposes; or*
- (ix) *is being detained in transit before being sent outside Malaysia for the purpose of prostitution, sexual activities or other immoral purposes.*

In addition, section 41 of the CA 2001 provides that a child is in urgent need of protection and rehabilitation if he/she is:

- (i) *being threatened or intimidated for the purpose of prostitution, having sexual intercourse or any immoral purpose;*
- (ii) *to be confined, detained in contravention of Part IV the CA 2001;*
- (iii) *in a situation where an offence under Part IV of the CA 2001 is being or likely to be committed on him; or*
- (iv) *pregnant out of wedlock.*

The distinction between section 39 and 41 is that, if a child falls in the later section, he may be admitted to the place of refuge instantaneously without having sort to the procedure under section 40 that requires court order. Accordingly immediate protection is able to be accorded to the child in need of such urgent attention.

From the above categorisations, it could be deduced that Part VI of the CA 2001 is the main governing law in protecting the rights of the children against, and potentially exposed to sexual exploitation in Malaysia. It manifests Malaysia's commitment in fulfilling her obligation under Article 34 of the UNCRC, which she has duly ratified in February 1995. Besides that, it is argued that the said right is also part of the constitutional guarantee by virtue of Article 5(1) of the Malaysian Federal Constitution.<sup>27</sup> The protection against sexual exploitation is argued to be the integral part of the right to life. In the Court of Appeal case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*<sup>28</sup>, Gopal Sri Ram JCA (as he then was) has given a liberal interpretation to the expression of 'life' in Article 5(1) of the Federal Constitution:

*"I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life... It includes the right to live in a reasonably healthy and pollution free environment."* [at page 288].

The liberal interpretation has also been echoed in the Federal Court case of *Lee Kwan Woh v Public Prosecutor*<sup>29</sup>:

*"When art 5(1) is read prismatically and in the light of art 8(1), the concepts of 'life' and 'personal liberty' housed in the former are found to contain in them other rights. Thus, 'life' means more than mere animal existence and includes such rights as livelihood and the quality of life (see Tan Tek Seng's case). And 'personal liberty' includes other rights such as the right to travel abroad. See Loh Wai Kong v Government of Malaysia [1978] 2 MLJ 175, where Gunn Chit Tuan J said that 'personal liberty' includes 'liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires'"* [at page 314].

Although the cases did not involve any issues of child sexual exploitation, it is however submitted that the subject matter falls within the wide interpretation of 'life' that

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<sup>1-27</sup> Article 5(1) of the Federal Constitution provides: "No person shall be deprived of his life or personal liberty save in accordance with law."

<sup>1-28</sup> [1996] 1 MLJ 261

<sup>1-29</sup> [2009] 5 MLJ 301; also referred to in the recent Federal Court case of *Ketua Polis Negara & Ors v Nurasmira Maulat Bt Jaafar & Ors (Minors Bringing The Action Through Their Legal Mother Andnext Friend Abra Bt Sahul Hamid) And Other Appeals* [2018] 3 MLJ 184, at page 203-204

includes the 'rights as livelihood and the quality of life'. Hence the passing of the CA 2001 is also effectively manifest the government's effort to uphold constitutional rights of children.

An overview of Part VI of the Child Act discloses that apart from providing severe penalties for those found guilty of various offences in relation to child sexual exploitation, but more importantly, details the necessary procedures for the rescue and subsequent rehabilitation of victims. For the care, protection and rehabilitation of these children, any place, institution or centre may be established or appointed as a place of refuge in accordance to Section 55 of the CA 2001. The child victim of sexual exploitation may be placed at the place of refuge up to three years.

Interestingly, children who are pregnant out of wedlock, who may not in ordinary and many circumstances necessarily be victims of their own actions, are also deemed to be protected within the same heading. Pregnancy out of wedlock is generally viewed as a serious moral degradation issue in Malaysia which more often than not result in these girls being discriminated and potentially ostracised by their own family and the society. Owing to this, the law steps in to provide protective measures in terms of rescuing them from their predicaments and providing temporary shelter and support until their babies are delivered safely.

### **1.3 STATEMENT OF PROBLEM**

Malaysia became the state party to the UNCRC and the OPSC in the year 1995 and 2012 respectively. Therefore Malaysia has the responsibility to ensure that the national laws and policies are adequate and meet the international standards in protecting children against any forms of sexual exploitation. As mentioned above, the protection is not only

by way of eliminating and penalizing any act relating to child sexual exploitation, but also to provide the assistance to the child victim (whom is categorised as children in need of protection and rehabilitation under the CA 2001) for rehabilitation, social integration and compensation. This requires a comprehensive protection system that includes strong laws, effective enforcement, qualified and trained taskforce, appropriate child institution and services and others.

It is undeniable that the fundamental aspects of the above said protection system is the establishment of the legal framework that fulfils the international standards. Based on the reports submitted by Malaysia to the United Nations Committee on the Rights of the Child under Article 44 of the UNCRC in 2006,<sup>30</sup> the Committee recommended for Malaysia to conduct a national study on sexual exploitation of children with the aim to establish and implement appropriate measures that includes physical and psychological recovery and social reintegration of the child victims. In addition, the Committee addresses the inadequacy of the Malaysian legislation in relation to child pornography on the Internet.<sup>31</sup> Hence, it is essential to investigate and evaluate to what extent the current legal framework in Malaysia complies the international standards in protecting children's right against sexual exploitation.

Secondly, the CA 2001 provides that the child victim may be sent to place of refuge for the care, protection and rehabilitation. This means that the children will be temporarily unable to live with their families for their best interests. Under Article 20 of UNCRC,

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<sup>1-30</sup> United Nations, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention- Malaysia, CRC/C/MYS/1, 22 December 2006; available at <[https://www.unicef.org/malaysia/CRC\\_-\\_2006\\_-\\_Malaysia\\_1st\\_Report.pdf](https://www.unicef.org/malaysia/CRC_-_2006_-_Malaysia_1st_Report.pdf)> accessed on 15 June 2015. **It is pertinent to note that as at 19 September 2019, there is no periodic report updated in the UN Treaty Body Database** < [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=105](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=105)> accessed on 19 September 2019.

<sup>1-31</sup> United Nations, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention- Malaysia, Concluding Observation- Malaysia, CRC/C/MYS/CO/1, 2 February 2007; available at <[http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_MYS\\_CO\\_1.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_MYS_CO_1.pdf)> accessed on 15 June 2015; at page 22-23.

these children are entitled to special protection and assistance, especially to their fundamental rights such as the right to education, right to be treated with dignity and respect and the right to standard healthcare. Hence, it is equally important to assess whether the fundamental rights of the children are well protected while being institutionalized at the place of refuge.

## **1.4 LITERATURE REVIEW**

The literature review is divided into 3 parts. The first part (1.4.1) will scrutinize the theoretical arguments on “child rights” to establish the baseline of rights and its protection which this whole thesis seek to investigate and evaluate. The second part of the literature review (1.4.2) analyses the past research conducted on children in need of protection and rehabilitation in Malaysia. The outcome of the analysis will highlight the gap observed in the past research and is presented in part 1.4.3.

### **1.4.1 Child Rights**

The notion of “child rights” is rather controversial and have been theoretically debated since 1980s.<sup>32</sup> There is yet a consensus for the best validation on “child rights”.<sup>33</sup> The controversy stems from the fundamental question whether a child could be a right-holder.<sup>34</sup> This relates to the two prominent conceptual theories of ‘right’ - the “Will Theory” and the “Interest Theory”.<sup>35</sup>

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<sup>1-32</sup> Lucinda Ferguson, ‘Not Merely Rights For Children But Children’s Rights: The Theory Gap and The Assumption Of The Importance of Children’s Rights’ (2013) 21 International Journal of Children's Rights, 50-81, at page 50-51

<sup>1-33</sup> *ibid*

<sup>1-34</sup> Sarah Lugtig, ‘A Review of David Archard's Children: Rights and Childhood’ [1996] McGill Law Journal vol. 41 pp 893-906; at page 893; see also Mhairi Cowden, ‘Capacity, Claims And Children’s Rights’ [2012] Contemporary Political Theory Vol. 11, 4, pp 362–380; at page 363

<sup>1-35</sup> Rowan Cruft, ‘Rights: Beyond Interest Theory And Will Theory?’, [2004] Law and Philosophy 23: 347; at page 347

The “Will Theory” or also known as the “Choice Theory” emphasizes that right can only be held by beings who are capable of insisting and waiving their rights. It flows from the traditional liberal philosophy, where children are generally regarded as incompetent individuals.<sup>36</sup> Thomas Hobbes in *Leviathan* advocates that the inability of children to reason renders them lack of capacity to enter into social contract.<sup>37</sup> Similarly, Locke argued that children are excluded from the status of personhood and eventually precluded too from the entitlement to enjoy rights.<sup>38</sup> This is because Locke emphasizes on reasoning, reflection, and the autonomy of intellectual beings as the qualities of personhood.<sup>39</sup>

This traditional philosophy leads to the “Will Theory” advocated by H.L.A Hart (1982) and supported by scholars such as Montague (1980) and Steiner (1994).<sup>40</sup> According to Hart, right is where:

“..one individual being given by the law exclusive control, more or less extensive, over another person’s duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach of threatened breach of duty he may leave it “unenforced” or may “enforce” it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach give rise.”<sup>41</sup>

<sup>1-36</sup> Mhairi Cowden, ‘Capacity, Claims And Children’s Right’, [2012] Contemporary Political Theory Vol. 11, 4, 362–380; at page 365

<sup>1-37</sup> Thomas Hobbes, *Leviathan*, (first published in 1651, ebooks@Adelaide, 2016), available online at <<https://ebooks.adelaide.edu.au/h/hobbes/thomas/h681/complete.html>> accessed on 16 April 2017; see Chapter XVI - of Persons, Authors, and Things Personated where Hobbes stated that

*“Likewise children, fools, and madmen that have no use of reason may be personated by guardians, or curators, but can be no authors during that time of any action done by them, longer than (when they shall recover the use of reason) they shall judge the same reasonable. Yet during the folly he that hath right of governing them may give authority to the guardian.”*

<sup>1-38</sup> Jo Bridgeman, *Parental Responsibility, Young Children and Healthcare Law*, (Cambridge University Press, 2007); at pp 11-13

<sup>1-39</sup> *Ibid*, see also Anthony Krupp, *Reason’s Children: Childhood in Early Modern Philosophy*, (Associated University Presse, 2009); at pp 74-75; Mhairi Cowden, ‘Capacity, Claims And Children’s Right’, [2012] Contemporary Political Theory Vol. 11, 4, 362–380; at page 365

<sup>1-40</sup> George W. Rainbolt, ‘Rights Theory’, [2006] Philosophy Compass 1, ET 003, 1–11, at page 4

<sup>1-41</sup> HLA Hart, *The Concept of Law*, (Oxford University Press, 1982); at page 183-84



Hart's argument accentuates the "fullest measure of control" of a right holder to enforce or waive the duty, to take legal actions after the actual or the threat of breach of the duty, and to extinguish the obligation to pay compensation for violation of rights.<sup>42</sup> Hence, this theory effectively excludes the children's capability to be a right-holder due to the fact that children are lacking in the normative power to enforce or waive their rights.<sup>43</sup>

The competing theory is the "Interest Theory" propagated by Bentham (1987) and endorsed by scholars such as MacCormick (1982), Raz (1986) and Campbell (1992).<sup>44</sup> Under this theory, the moral capacity to act rationally nor the ability to exercise the choice in insisting or waiving their rights are not the prerequisite to be a right-holder.<sup>45</sup> Rights are any interests or needs that are considered basic and universal.<sup>46</sup> According to Joseph Raz (1984), an individual is said to have a right if his interest is sufficient to hold another to be subject to a duty.<sup>47</sup> In conferring an effective right, "it has to be motivated by a belief in the fact that someone's (the right-holder's) interest should be protected by the imposition of duties".<sup>48</sup> This right subsequently transformed into a legal right if it is endorsed by the society's legal and political frameworks.<sup>49</sup>

<sup>1-42</sup> Horacio Spector, 'Value Pluralism and the Two Concepts of Rights' [2009] RMM Vol. 0, Perspectives in Moral Science, ed. by M. Baumann & B. Lahno, 355–371; at page 359

<sup>1-43</sup> Ariel Zylberman, 'Kant's Juridical Idea of Human Rights' in Andreas Follesdal & Reidar Maliks (eds), *Kantian Theory and Human Rights* (Routledge, New York, 2013)

<sup>1-44</sup> George W. Rainbolt, 'Rights Theory', [2006] Philosophy Compass 1, ET 003, 1–11, at page 4

<sup>1-45</sup> Tom D. Campbell, 'The Rights Of The Minor: As Person, As Child, As Juvenile, As Future Adult' [1992], International Journal of Law, Policy and the Family, Volume 6, Issue 1, pp 1–23, at page 5-6

<sup>1-46</sup> Tali Gal, *Child Victims and Restorative Justice: A Needs-Rights Model*, (Oxford Scholarship Online: September 2011), DOI:10.1093/acprof:oso/9780199744718.003.0002, available online at <<https://openresearch-repository.anu.edu.au/bitstream/1885/47077/23/03chapter2.pdf>> accessed on 9 August 2018

<sup>1-47</sup> Joseph Raz, 'Legal Rights' [1984] Oxford Journal of Legal Studies, Vol. 4, No. 1 (Spring, 1984), pp. 1-21; at page 14

<sup>1-48</sup> *ibid*

<sup>1-49</sup> Sarah Te One, 'Defining rights: Children's rights in theory and in practice', (March 2011) He Kupu (The Word) Vol 2, Num 4, at page 44

Thus, this theory enables children to be recognized as a right-holder, provided that it must be shown that their interests are somehow could be reasonably “the basis for having rules which require others to behave in certain ways with respect to [the said] rules”.<sup>50</sup> From this basis, Eekelaar (1986) categorized 3 different interests of children:

- (i) Basic interests – this relates to the physical, emotional and intellectual care and is actuate at two levels which are first, at home where parents have a duty to provide care and second, it extends to the state level where the state has the duty to prevent and enforce the breach or neglect for the said care.<sup>51</sup>
- (ii) Developmental interests – this refers to the allocation of resources and equal opportunity for the children’s to their best advantage, for instance medical services and education.<sup>52</sup>
- (iii) Autonomy interests- this concerns the entitlement of the children to make their own choice or decision. However, Eekelaar acknowledges that this interest “can conflict not only with the child’s own basic or developmental interests, but also with the interests of the child’s parents”.<sup>53</sup>

Even though, as observed by Fortin (2009), there remain uncertainty whether Eekelaar’s threefold classification of interests can be correctly in describe as rights, it is apparent that the categorization was influenced by Freeman’s assertion on child rights.<sup>54</sup> Freeman (1983) advocates that children are capable of being right-holders and further suggests four categories of child rights:

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<sup>1-50</sup> Tom D. Campbell, *supra* note 1-45, at page 5-6

<sup>1-51</sup> John Eekelaar, ‘The Emergence of Children’s Rights’, [1986] Oxford Journal of Legal Studies, Vol. 6, No. 2 (Summer, 1986), 161-182, at pp 171-172; Sarah Te One, *supra* note 1-49

<sup>1-52</sup> John Eekelaar, *supra* note 1-51, at page 172-173; Sarah Te One, *supra* note 1-49

<sup>1-53</sup> John Eekelaar, *supra* note 1-51, at page 177; Sarah Te One, *supra* note 1-49

<sup>1-54</sup> Jane Fortin, *Children’s Rights and the Developing Law*, (Cambridge University Press, 2009) at page 17; Chris Barton & Gillian Douglas, *Law and Parenthood* (Cambridge University Press, 1995) at page 32

- (i) Rights to welfare – this denotes the children’s access to universal rights such as identity education and protection from harm.
- (ii) Rights to protection – this entails the protection of children against any form of ill-treatment or abuse
- (iii) The right to be treated like adults- this is in relation to social justice, nonetheless this is subject to continuous review. He argues that in some situations, the different treatment of an adult with children is necessary as the incapacity or immaturity of a child would prevent the children from making sound decision.
- (iv) Rights against parents- this is predominantly relates to self-determination. Freeman argued that parents, being the child’s representative, would have their views or decisions prevails, as long as it consistent with a neutral view of ‘primary social goods’ at the very least, or the decision is connected to more objective evaluations that can ascertain what is in the best interests of the child. In the event of contrary, “representativeness” of the parent ceased and the external intervention such as court is justified.<sup>55</sup>

The later model of children’s rights was proposed by Bevan (1989). Bevan divided children’s rights into two general categories:

- (i) Protective rights that results from a child’s vulnerability and dependence on others; and
- (ii) Assertive rights that comprise a claim to adult rights such as freedom of expression and conscience.<sup>56</sup>

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<sup>1-55</sup> Chris Barton & Gillian Douglas, *supra* note 1-54, at page 34; see also Powell, John, Uppal, Elaine, *Safeguarding Babies And Young Children: A Guide For Early Years Professionals: A Guide for Early Years Professionals*, (McGraw-Hill Education (UK), 2012), at page 42-43

<sup>1-56</sup> Deborah Rook, ‘Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law’, [2014] *International Journal of Law, Policy and The Family*, 28, 177–193, at page 188

The Bevan's model, according to Fortin (2009), has more practical relevance. Fortin went further remarking that the "protective rights" include the right to protection from ill-treatment and the right to state intervention to attain such protection. This is because children are inherently dependent and vulnerable, apart from the fact that they inexorably need of nurture, love and care. "Assertive rights" on the other hand is "usefully broad enough to include their claims to adult human rights such as the right to bodily integrity and to freedom of expression and thought, conscience and religion and to certain 'decision-making rights'".<sup>57</sup>

From the above analysis, it can be deduced that whilst many theorist accept that children can be right-holder, the friction remains on what kind of rights that the children have. However, agreeing to Tali Gal's (2011) proponent, these differences reflects that children hold a complex mix of welfare, human, liberal, and protection rights.<sup>58</sup> This multidimensional theories are articulated as the four guiding principles of the UNCRC – equality, the right to life, survival and development, best interest of a child and respecting children's view.<sup>59</sup> The global consensus on child rights now is manifested by the almost universal ratification of the UNCRC. However the attributes of such rights within global political and academic arenas presently are largely confined to the text of the convention.<sup>60</sup>

Tali Gal (2011) succinctly emphasizes that "the question each ratifying nation must then ask is not whether children (or child victims, in the context of this work) have rights,

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<sup>1-57</sup> Jane Fortin, *Children's Rights and the Developing Law*, (Cambridge University Press, 2009) at page 17

<sup>1-58</sup> Tali Gal, *supra* note 1-46, at page 47-48

<sup>1-59</sup> *ibid*; see also, UNICEF, 'The Convention on The Rights Of The Child Guiding Principles: General Requirements For All Rights', < [https://www.unicef.org/crc/files/Guiding\\_Principles.pdf](https://www.unicef.org/crc/files/Guiding_Principles.pdf) > accessed on 27 May 2016; Priscilla Alderson, *Young Children's Rights: Exploring Beliefs, Principles and Practice*, (Second Edition, Jessica Kingsley Publishers, 2008), at page 17

<sup>1-60</sup> Ann Quennerstedt, Carol Robinson & John I'Anson, 'The UNCRC: The Voice of Global Consensus on Children's Rights?' [2018] *Nordic Journal of Human Rights*, 36:1, 38-54, DOI: 10.1080/18918131.2018.1453589, at page 38

but instead how the Convention should best be implemented to meet these rights”. As strongly accentuate by Bentham and Raz, it is argued that the central aspect of the child rights implementation is the endorsement of such rights in the state legal framework.

To conclude this part, it is clear that children hold a complex mix of welfare, human, liberal, and protection rights. However in the context of sexual exploitation, the emphasis is placed on the children’s rights to protection and welfare as envisaged in the Article 34 of the UNCRC. Article 34 of the UNCRC is further supported with various international instruments such as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC), Worst Forms of Child Labour Convention, 1999 (No. 182), United Nations Convention against Transnational Organized Crime (Palermo Convention) and the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children. It can be summarized that these international instruments require state’s intervention to provide the protection against child sexual exploitation. The state has the responsibility to ensure its legal framework is efficacy in outlawing related activities as well as affording appropriate measures to assist the child victims for rehabilitation and reintegration with the society.

#### **1.4.2 Past research on children in need of protection and rehabilitation in Malaysia**

A number of researches in the various disciplines have been conducted on children in need of protection and rehabilitation. For the purpose of this review, the research are classified into the following topics:

a) *Child prostitution*

The principal researcher on child prostitution in Malaysia is Dr Lukman @ Zawawi Mohamad. In his doctoral thesis, he explored the nature of child prostitution in Malaysia and identifies the key characteristics of victimized children.<sup>61</sup>

Further in 2009, he conducted a mixed qualitative and quantitative research to study the prevalence of running away from home among prostituted children in Malaysia,<sup>62</sup> The participants were the girls who have been rescued from prostitution in two rehabilitation centres. It was discovered that the incidence of running away from home among them was enormous. The reasons were among others depression, peer influence, and family problems.

Dr Lukman also investigated the link between childhood abuse and the involvement of children in prostitution in Malaysia.<sup>63</sup> It was found that the incidences of childhood emotional, physical and sexual abuse among the participants were significant. More than 50% of the respondents were abused by their parents/ step parents.

His research in 2011 with 8 other authors further investigated the children's involvement in prostitution and to identify the reasons and/or individuals who had lured the children into such promiscuous activities<sup>64</sup>. It was found that the average age of the respondent's first involvement in prostitution was 15 years old as the consequence of

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<sup>1-61</sup> Lukman Z Mohamad, *Children in Prostitution: A study of young women in the rehabilitation centres in Malaysia* (2006), Doctoral thesis, Durham University, available at <<http://etheses.dur.ac.uk/2688/>> retrieved on 4 April 2014

<sup>1-62</sup> ZM Lukman, 'The Prevalence of Running Away from Home among Prostituted Children in Malaysia' (2009) 5 *Journal of Social Sciences* 157.

<sup>1-63</sup> ZM. Lukman, 'Childhood Abuse among Children Involved in Prostitution in Malaysia' (2009), *The Social Sciences*, 4: 567-572.

<sup>1-64</sup> ZM Lukman *et al*, 'Betrayal of Trust: The Involvement of Children in Prostitution' (2011), 19 *Pertanika Journal of Social Science and Humanities* 49.

been tricked by boyfriends, influenced by friends, forced by mother, persuaded by a relative or as the result of a personal choice.

A different research carried in 2011 studied the relation between dysfunctional family and the involvement of children in prostitution<sup>65</sup>. However the research concluded that dysfunctional family system does not directly effects the children to involve in prostitution.

*b) Child pornography*

Manique A. E. Cooray in her doctoral dissertation examines the adequacy of Malaysian law relating to child pornography on the internet.<sup>66</sup> In 2011, she concluded that our laws are yet to achieve the international standards as benchmarked by the international instruments. There are deficiencies in the Malaysian law in affording comprehensive protection against child pornography. These include:

1. the non-availability of statutory provision that provides the extensive definition of “child pornography”;
2. the non-mandatory Code of Conduct which leads to the difficulty in prosecuting those who involve in spreading the materials online; and
3. S.377E of the Penal Code may only implicate person who entice a child below 14 years old to act of gross indecency, and thus does not protect children age 15-18 years old.

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<sup>1-65</sup> ZM Lukman *et all* , ‘The Relation Between Dysfunctional Family and He Involvement of Children in Prostitution’ (2011), *World Applied Sciences Journal*, vol 12, no. SPL ISS., pp. 7-12

<sup>1-66</sup> Manique A. E. Cooray , *Child pornography on the internet: adequacy of the laws in Malaysia* (2011), Doctoral thesis, University of Malaya, Kuala Lumpur.

Similar conclusion was made by Dr Juriah Abdul Jalil in her article analysing the legal position in Malaysia in addressing and combating the use of ICT to commit crimes against children.<sup>67</sup> As there appeared to be no clear legal definition of “pornography”, “child pornography”, “obscenity” and “indecentcy” in our statutes then, it led to the difficulties in synchroning the application. Besides that, the processes and activities of creating, uploading, downloading, transmitting, posting, transferring, receiving, viewing and possessing of the pornographic content were yet to be classified as specific offences in Malaysia.<sup>68</sup>

Another article by Manique A. E. Cooray in 2014 further examined the relation between paedophile and child pornography.<sup>69</sup> The article analysed the ‘need’ of the sexual images of children to a paedophile which creates the demand of such material.

It is however important to note that relatively recently, the Parliament has passed the Sexual Offences Against Children Act 2017<sup>70</sup> that came into force on 10<sup>th</sup> July 2017<sup>71</sup> which addresses child pornography more specifically apart from other sexual offences against children such as sexual grooming.

*c) Child pregnancy out of wedlock.*

Statistics collated by the Ministry of Health show that cases of children being pregnant out of wedlock is substantial and on the rise.<sup>72</sup> Many clinical researches have been

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<sup>1-67</sup> Juriah Abdul Jalil, ‘Combating Child Pornography in Digital Era: Is Malaysian Law: Adequate to Meet the Digital Challenge?’(2015), *Pertanika Journal of Social Sciences & Humanities*, Oct 2015 Special Issue, Vol. 23, p137-152, at page 144

<sup>1-68</sup> *Ibid* ; at page 149

<sup>1-69</sup> Manique Cooray, ‘Child Pornography On The Internet And The Elusive World Of Paedophiles’, [2014] 5 *MLJ* xxxiv

<sup>1-70</sup> Act 792

<sup>1-71</sup> P.U. (B) 340/2017

<sup>1-72</sup> These statistics, although are not freely distributed to the public are shared during conferences and meetings in discussing the issue on teenage pregnancy.



conducted on the wider ambit in respect to teenage pregnancy in Malaysia although these studies may not be limited to children in particular, as according to section 2 of CA 2001, a “child” means persons below 18 years old. A review by Mohd Azri Mohd Suan, Adibah Hanim Ismail, and Haliza Ghazali observed that these researches are among others related to epidemiology, age at first marriage, adolescent fertility rate, unmarried childbearing, risk factors, maternal risks and neonatal outcome, future plan after delivery, and contraceptive use<sup>73</sup>. For instance, PS Tan *et al* investigates the common characteristics of pregnant adolescents residing in a government shelter home.<sup>74</sup>

A research was conducted at 14 tertiary hospitals in Malaysia to investigate the incidence of unwed pregnancies. It was found that between 2011 and 2012, there were 5200 cases of unwed pregnancies where the highest incidence was by female age 10-20 years old.<sup>75</sup> Among the factors that lead to sexual activity out of wedlock were the tensions in parent-child relationship, peer influence and the exposure of sexual content on the internet.<sup>76</sup> In addition, another research concluded that familial problems have caused the girls to trust their boyfriends more as they longing to be loved which eventually leads to sex and unwed pregnancy.<sup>77</sup> Similar findings were shown by Zakiah Jamaluddin in her

<sup>1-73</sup> Mohd Azri Mohd Suan, Adibah Hanim Ismail and Haliza Ghazali, ‘A review of teenage pregnancy research in Malaysia’ (2015), *The Medical Journal of Malaysia* 70(4):214-9, available at <<http://www.e-mjm.org/2015/v70n4/teenage-pregnancy.pdf>> retrieved on 27 April 2016

<sup>1-74</sup> Tan Pei Sun, Su Xu Vin, Kevin Tan Teck Meng, Hizlinda Tohid, Noor Azimah Muhammad, Khairani Omar, ‘A Study On Pregnant Adolescents Residing In A Government Home: Common Characteristics And Their Views On The Pregnancy’ (2012), *The official Journal of the Academy of Malaysian Family Physician*; Volume 7, Number 1, ISSN: 1985-207X (print), 1985-2274 (electronic)

<sup>1-75</sup> Ruhaizan, H.J., Ravichandran, Rozima, S., SD Karalasingam, SA Soelar, N Sa’at, N Baharum (2013). ‘Unwed mothers from 14 tertiary hospitals in Malaysia 2011-2012’, poster presented at 7th National Conference for Clinical Research 2013, 3-5 September 2013 Seri Pacific Hotel, Kuala Lumpur; available online <[http://www.acrm.org.my/nor/doc/poster/Unwed\\_pregnancy\\_Johor.pdf](http://www.acrm.org.my/nor/doc/poster/Unwed_pregnancy_Johor.pdf)> retrieved on 16 April 2016

<sup>1-76</sup> Khadijah Alavi, Salina Nen, Fauziah Ibrahim, Noremy Md. Akhir, Mohd Suhaimi Mohamad, Noorhasliza Mohd Nordin, ‘Hamil Luar Nikah Dalam Kalangan Remaja’ (2012), *Journal on Social Science and Humanities*, Volume 7, Number 1, April Special- 2012, pp131-140; available at <[http://pkukmweb.ukm.my/e-bangi/papers/2012%20specialissues/khadijah012\(b\).pdf](http://pkukmweb.ukm.my/e-bangi/papers/2012%20specialissues/khadijah012(b).pdf)> retrieved on 16 April 2016

<sup>1-77</sup> Salamatussaadah Abd. Ghadur & Nor Ba’yah Abdul Kadir, *Hubungan Romantik Dan Remaja Hamil Luar Nikah Di Pusat Pemulihan* (2009), *Journal on Social Science and Humanities*, Volume 4, Number 1, pp 106-113, available at <<http://journalarticle.ukm.my/4222/1/hasnah09.pdf>> retrieved on 16 April 2016

research pertaining to premarital pregnancy and abortion among adolescent.<sup>78</sup> Besides family problems, excessive freedom, drug abuse and rape were also the cause of the unwed pregnancy. Moreover, according to Khairani Omar *et all*, many adolescent mothers are psychologically immature and often practice unsafe sex resulting unplanned and unwanted pregnancies.<sup>79</sup>

Research by Firdous Mohamed and Sharifah Fauziah Hanim was designed to investigate the relationship between coping strategies and psychological profile unwed mothers.<sup>80</sup> Even though this research involves participant age 18 to 40 years old, an important finding is that there is lacking support from the rehabilitation centre that they are living in, and from people who are supposedly trained to care for them. The authors noted that the qualities of social support from the social centres are still questionable.

#### d) *Place of Refuge and Rehabilitation Programme*

In the CA 2001, any place, institution or centre may be established or appointed as a place of refuge in accordance with Section 55 for the care, protection and rehabilitation of the children.

Most of the research relating to the rehabilitation process focuses on the effectiveness of the program offered. For instance, Johari Talib evaluates the effectiveness of the

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<sup>1-78</sup> Zakariah Jamaluddin, 'Premarital Pregnancy and Abortion among Adolescent'(2013), *Advances in Natural and Applied Sciences*, 7(4) Special 2013, pp 366-368; available at <[http://www.academia.edu/9148373/Premarital\\_Pregnancy\\_and\\_Abortion\\_among\\_Adolescent](http://www.academia.edu/9148373/Premarital_Pregnancy_and_Abortion_among_Adolescent)> retrieved on 16 April 2016

<sup>1-79</sup> Khairani Omar, Suriati Hasim, Noor Azimah Muhammad, Aida Jaffar, Syahnaz Mohd Hashim, Harlina Halizah Siraj (2010), 'Adolescent pregnancy outcomes and risk factors in Malaysia', *International Journal of Gynecology and Obstetrics*, 2010 Dec;111(3), pp 220-223 ; available at <[https://www.researchgate.net/publication/46035157\\_Adolescent\\_pregnancy\\_outcomes\\_and\\_risk\\_factors\\_in\\_Malaysia](https://www.researchgate.net/publication/46035157_Adolescent_pregnancy_outcomes_and_risk_factors_in_Malaysia)> retrieved on 16 April 2014.

<sup>1-80</sup> Firdous Mohamed and Sharifah Fauziah Hanim, 'Liability of Unwed Mothers' (2014), *British Journal of Education, Society & Behavioural Science* 4 (1), 74-87; at page 83

rehabilitation programme at Taman Seri Puteri Rembau<sup>81</sup>; Azizi *et al* (2001) assesses the effectiveness of the rehabilitation process at Pusat Perlindungan Wanita & Gadis, Taman Seri Puteri Cheras, Jerantut, Rembau and Tunas Bakti Sungai Lereh Melaka<sup>82</sup>; Azizi *et al* (2010) further evaluate the effectiveness of the programmes conducted at Taman Seri Puteri Batu Gajah, Perak and Kompleks Dar-Assa'dah, Kuala Lumpur<sup>83</sup>.

Abdul Hadi in his book entitled "Protecting Girls: Official Measures against underaged Girls rescued from Moral Danger" observed that the system and detention are generally punitive, although it is regarded as a measure to protect the children. This is because their freedom is deprived and often subjected to programmes of instruction such as cooking, which they may not enjoy.<sup>84</sup> The programmes conducted at the rehabilitation centres, commonly cooking, sewing and handicraft making, do not fulfil the needs of society and job placement but rather designed to transform the children into good housewives.<sup>85</sup> Furthermore, according to Azizi *et al* (2010), the co-curricular activities are less likely to improve discipline as it is confined to leisure activities only.<sup>86</sup> Cultural and social activities were found to be lacking<sup>87</sup> and their times with family were often too restricted.<sup>88</sup>

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<sup>1-81</sup> Johari Talib, "Satu Kajian Tentang Sejauhmanakah Keberkesanan Rancangan Pemulihan Di Taman Seri Puteri Rembau, Negeri Sembilan" *Dissertation (M.Ed.)* -- Fakulti Pendidikan, Universiti Malaya, 1985

<sup>1-82</sup> Azizi Yahaya, Yusof Boon, Mohd Anuar Abd Rahman and Abd Rahim Hamdan, 'Program Pemulihan Akhlak Wanita: Sejauhmanakah Keberkesanan Pusat Perlindungan Wanita Membantu Proses Pemulihan?', *Paper presented at Persidangan Kebangsaan Pendidikan Moral Dalam Dunia Globalisasi di Universiti Malaya*, 23-25 Mei 2001, available at < [http://eprints.utm.my/1561/2/um\\_akhlak\\_.pdf](http://eprints.utm.my/1561/2/um_akhlak_.pdf)> retrieved on 4 April 2014

<sup>1-83</sup> Azizi Yahaya, Sharin Hashim, and Jesmin Abd Wahab, (2010), 'Keberkesanan Program-Program Pemulihan Tingkah laku Di Taman Seri Putri Batu Gajah Dan Kompleks Dar-Assa'dah', pp. 1-16 Universiti Teknologi Malaysia Institutional Repository (Unpublished) available at < <http://eprints.utm.my/10617/>> retrieved on 6<sup>th</sup> April 2016.

<sup>1-84</sup> Abdul Hadi Z, *Protecting Girls: Official Measures against underaged Girls rescued from Moral Danger*. (University of Malaya Press, Kuala Lumpur, 1995).

<sup>1-85</sup> Lukman Z Mohamad, *supra* note 1-61, at page 265

<sup>1-86</sup> Azizi Yahya *et al* (2010), *supra* note 1-83

<sup>1-87</sup> Azizi Yahya *et al* (2001), *supra* note 1-82

<sup>1-88</sup> Nor Jana Saim, Mona Dufäker, Malin Eriksson & Mehdi Ghazinou, 'Listen to the Voices of Unwed Teenage Mothers in Malaysian Shelter Homes: An Explorative Study' (2013) *Global Journal of Health Science*; Vol. 5, No. 5

According to Lukman Zawawi, the regimented three year system resulted depression, tension, and sadness among the young women during the custody.<sup>89</sup> The girls experienced a sense of depersonalization and disconnection due to the ‘control’ and restriction of social intercourse. The generic day-to-day living conditions and routine had caused depersonalisation, while the physical and psychological isolation from their family, community, and culture had resulted disconnection.<sup>90</sup>

A study by Azlina Abdullah in 2010 further examines the social interaction between the staff and the girls at the rehabilitation centre.<sup>91</sup> According to her, these children have developed pseudo-family relationship and prone to be pretentious throughout the rehabilitation to avoid being punished.<sup>92</sup>

In another qualitative research on the daily experiences of the unwed teenage mothers at the shelter homes in Malaysia, Nor Jana Saim *et all* found that the girls are emotionally insecure to share their feelings or problems with the social worker in charge or the staff who was appointed as their guardian.<sup>93</sup> It was pointed out that some of the staff used derogatory names for them and their babies such as bitch, prostitute, and “anak haram”.<sup>94</sup> Another important finding relates to the children’s right to their babies and the option for adoption. There are instances whereby the children were not permitted to meet the adoptive families of their baby. They were also been deprived to sign the consent letter in front of the commissioner of oaths for intra-familial adoptions.<sup>95</sup>

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<sup>1-89</sup> Lukman Z Mohamad, *supra* note 1-61, at page 243

<sup>1-90</sup> *ibid*

<sup>1-91</sup> Azlina Abdullah, (2010), “Tema dan isu penyelidikan mengenai gejala sosial pada dekad pertama abad 21 di Malaysia.” *AKADEMIKA*, 78 pp. 3-14. ISSN 0126-5008.

<sup>1-92</sup> *ibid*

<sup>1-93</sup> Nor Jana Saim, Mona Dufåker, Malin Eriksson & Mehdi Ghazinou, *supra* note 1-88; at page 25

<sup>1-94</sup> *ibid*; at page 26-27

<sup>1-95</sup> *ibid* ; at page 22-23

### 1.4.3 The gaps observed in the research conducted in the past

Despite the existence of research done on the same subject matter in the past, the following observations are noted:

1. There is yet a study in determining and assessing the adequacy of the law in affording a comprehensive protection of children against all forms sexual exploitation in Malaysia. Although there were researches on the adequacy of laws of child pornography in Malaysia<sup>96</sup>, it does not cover all form of sexual exploitation as provided under article 34 of the UNCRC especially in terms of child prostitution. In addition, this thesis aims to critically assess the extent of compliance of Malaysian laws to the UNCRC and other international instruments in respect of child sexual exploitation.
2. There is a deficiency in exploring the development of laws on children in need of protection and rehabilitation. Child sex trade has occurred in British Malaya since 1880's. Part VI of CA 2001 was taken from the previous Women and Girls Protection Act 1973 that concerns the protection of women and girls against moral harm. Interestingly, the laws have originated from the law introduced by the British in the 1880's which initially endeavour to abolish child and women trafficking, whilst prostitution was only regulated since it was regarded as a 'necessary evil' due to the incongruence of sex ratio in the Malay Peninsula.<sup>97</sup> Hence, it is the aim of this thesis to explore the development of laws since 1880's.

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<sup>1-96</sup> See Manique A. E. Cooray, *supra* note 1-66; Juriah Abdul Jalil, *supra* note 1-67; Manique A. E. Cooray, *supra* note 1-69

<sup>1-97</sup> Tan Beng Hui, 'Protecting' Women: Legislation and Regulation of Women's Sexuality in Colonial Malaya, (2003), *Gender, Technology and Development* 7(1), no. 1, Mar. 2003, pp. 1-30, at page 6

3. As previously discussed, past research by Nor Jana Saim *et al*<sup>98</sup>, Azizi *et al*<sup>99</sup>, Azlina Abdullah<sup>100</sup>, Nor Firdous Mohamed and Sharifah Fauziah Hanim<sup>101</sup> and others have given us the insights on the happening at the place of refuge. The findings exhibit several controversial issues pertaining to the rights of the children at place of refuge which need further investigation. The findings suggest that the children have not been treated with dignity and respect, inadequate education opportunity, insufficient of moral support *et cetra* which against their rights enshrined in the UNCRC. This research aims to investigate further in the perspective of the implementation of child rights at the place of refuge. It seeks to explore the current state; whether there is improvement and how the place of refuge ensures the protection of children's fundamental rights and whether such rights are appropriately afforded and observed. Similar research have been conducted by Pathmanathan & Siti Hajar in 2010<sup>102</sup> and Pathmanathan *et al*<sup>103</sup> in 2015 on the implementation of children rights at Rumah Kanak-kanak in Malaysia, nonetheless it does not extend to the place of refuge of the children in need of protection and rehabilitation, understandably due to their intended scope of research.

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<sup>1-98</sup> See note 1-88

<sup>1-99</sup> See note 1-83 & 1-72

<sup>1-100</sup> See note 1-91

<sup>1-101</sup> See note 1-80

<sup>1-102</sup> Pathmanathan A/L R. Nalasamy & Siti Hajar Abu Bakar Ah, 'Implementasi Hak Kanak-kanak (CRC) Di Rumah Kanak-kanak: Dapatan Kajian Rintis', in Seminar Kebangsaan Undang-Undang Kanak-Kanak Ke-2, 02-03 Oct 2010, Kuala Lumpur; also in 'Diskusi Undang-undang Dan Kanak-kanak Di Malaysia, Dr. Mohamed Fadzil Che Din (Editor), 2010, Institut Sosial Malaysia, at page 121-137

<sup>1-103</sup> Pathmanathan R. Nalasami, Siti Hajar Abu Bakar, Jal Zabdi Yusoff, Haris Abd. Wahab, Noralina Omar and M. Rezaul Islam, 'Implementation of Child Rights in the Children's Homes in Malaysia', (2015) Asian Social Work and Policy Review, Volume 9, Issue 3, pp 232-244

## 1.5 RESEARCH OBJECTIVES

The objectives of this study are:

- i. To evaluate the laws concerning children in need of protection and rehabilitation in Malaysia particularly as to the extent of compliance to the UNCRC and other international instruments.
- ii. To assess the implementation of fundamental rights of the defined children at the places of refuge.
- iii. To propose legal and administrative reforms as means of ensuring the fundamental rights of the children in need of protection and rehabilitation are effectively safeguarded.

## 1.6 RESEARCH QUESTIONS

The research questions and their significance to this study are summarised in the following Table 1.1:

**Table 1.1: Research questions and its significance**

Research Question(s)	Significance
1 What child sexual exploitation is as enshrined in Article 34 of the UNCRC?	<ul style="list-style-type: none"><li>• Both “child sexual exploitation” (CSE) and “child sexual abuse” (CSA) appear in Article 34 of the UNCRC. Albeit interrelated, both terms have distinct features which delineate the scope of Article 34 and make it distinguishable with other provisions of the UNCRC.</li><li>• In addition, Article 34 has confined the scope into 3 main forms of CSE:<ol style="list-style-type: none"><li>(a) The inducement or coercion of a child to engage in any unlawful sexual activity</li><li>(b) The exploitative use of children in prostitution or other unlawful sexual practices</li><li>(c) The exploitative use of children in pornographic performances and materials</li></ol></li></ul>

Research Question(s)	Significance
	<ul style="list-style-type: none"> <li>A detailed analysis on all of the above terms would provide a useful understanding of the scope of Article 34 of UNCRC and the conceptual definition of sexual exploitation and its form. <b>The outcome is vital to whether domestic laws concurrent with the scope of Article 34 UNCRC.</b></li> </ul>
2 What are the minimum standards set by the UNCRC and the related international instrument to be adopted by the State Parties in their legal framework to protect children against sexual exploitation?	<ul style="list-style-type: none"> <li><b>The outcome of this exercise will establish the necessary yardsticks</b> in determining the extent of compliance to the international standards by the State Parties in regulating the protection of children against sexual exploitation.</li> <li><b>It will also provide premises for the evaluation of the Malaysian legal framework.</b></li> </ul>
3 How did the Malaysian laws develop in protecting children in need of protection and rehabilitation?	<ul style="list-style-type: none"> <li>The outcome is significant to understand the law in the local context.</li> </ul>
4 Does the current Malaysian legal framework comply with the minimum international standard set forth in the UNCRC and the related international instrument in protecting children in need of protection and rehabilitation?	<ul style="list-style-type: none"> <li><b>The outcome of this exercise will establish the extent of compliance to the international standards by Malaysia</b> in protecting the children in need of protection and rehabilitation. This is the foundational step in safeguarding the rights of children against sexual exploitation.</li> <li>Moreover, the outcome would be <b>the basis in proposing the necessary legal and administrative reforms.</b></li> </ul>
5 Whether the following fundamental rights of the children in need of protection and rehabilitation are observed and implemented at the places of refuge:	<ul style="list-style-type: none"> <li>The outcome is significant to establish: <ul style="list-style-type: none"> <li>a) the adequacy of the existing mechanisms to safeguard the fundamental rights of the children in need of protection and rehabilitation at the place of refuge</li> <li>b) whether the fundamental child rights are protected at the place of refuge.</li> </ul> </li> </ul>



Research Question(s)	Significance
<ul style="list-style-type: none"> <li>i. The right to be treated with dignity and respect;</li> <li>ii. The right to education;</li> <li>iii. The protection of their best interests;</li> <li>iv. The right to be integrated with society.</li> </ul>	<ul style="list-style-type: none"> <li>• The outcome would also be the basis in proposing the necessary legal and administrative reforms.</li> </ul>

## 1.7 RESEARCH METHODOLOGY

This research adopts mixed doctrinal and socio-legal approaches. According to Khadijah Mohamed, the combination of both methods in legal research will more appropriately encapsulate the legal dynamics of the legal phenomenon and facilitates the comprehension of legal problems or enforce.<sup>104</sup>

### 1.7.1 Doctrinal approach

Doctrinal approach is the most commonly applied method in legal research.<sup>105</sup> Doctrinal research place the importance on the discovery and development of legal doctrine by inquiring ‘what is the law?’ in contexts.<sup>106</sup> It would then formulate the legal doctrine through the analysis of legal rule.<sup>107</sup> Therefore this approach is the most appropriate method in discovering Research Question (1) – (4).

<sup>1-104</sup> Khadijah Mohamed, ‘Combining Methods in Legal Research’, (2016) *The Social Sciences*, 11(21): 5191-5198

<sup>1-105</sup> *ibid*

<sup>1-106</sup> Paul Chynoweth, ‘Legal Research’ in Andrew Knight & Les Ruddock (Ed), *Advanced Research Methods in the Built Environment*, (Wiley-Blackwell, 2008, United Kingdom); at page 29-30

<sup>1-107</sup> Paul Chynoweth, ‘Legal Research in the Built Environment: A Methodological Framework’, (2008), Conference Item available at < [http://usir.salford.ac.uk/12467/1/legal\\_research.pdf](http://usir.salford.ac.uk/12467/1/legal_research.pdf) > accessed on 13 June 2017

Fundamentally, the following aspects are critically analyse, namely:

- a. The definition of child sexual exploitation and the scope of Article 34 of the UNCRC;
- b. The minimum standards of protection delineated by the international instruments;
- c. The development of laws concerning the children in need of protection and rehabilitation in Malaysia; and
- d. The current legal and policy framework in protecting children from sexual exploitation.

These above mentioned aspects are vital in evaluating the extent to which our domestic legal framework reflect the principles and provisions of the UNCRC and the related international instruments. For this purpose, library research is conducted to examine the legal literatures from the primary and secondary sources which include but not limited to the statutes, case-law, extra-legal materials, books, articles, seminar papers and newspapers.

### **1.7.2 Socio-legal Approach**

Research Question 5 requires empirical data to be collated to provide insights on the actual application of the law. Therefore, social-legal approach that employs qualitative method is adopted for empirical legal analysis in evaluating whether the children rights are implemented at the place of refuge. This is parallel with Genn *et all* view on the significance of empirical legal research in revealing the practices or implementation of a legal provision.<sup>108</sup>

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<sup>1-108</sup> Khadijah Mohamed, *supra* note 1-104

There are three main target respondents:

- a. Children in need of protection and rehabilitation residing at the place of refuge established under section 55 of the CA 2001:
  - Taman Seri Puteri Batu Gajah
  - Taman Seri Puteri Kota Kinabalu
  - Taman Seri Puteri Kuching
  - Taman Seri Puteri Cheras
- b. The principal or the caregiver at the above institutions
- c. The representative from the Department of Social Welfare Malaysia as the main stakeholder for the protection of children in Malaysia.

The approval to conduct this research at the respective places of refuge was obtained from the Department of Social Welfare Malaysia on 10 August 2017 and the Department of Social Welfare Sarawak on 4 November 2017.

The detailed procedures on the overall data collection is provided in Chapter 5 of this thesis.

## **1.8 SCOPE & LIMITATION OF THE STUDY**

As seen in part 1.4.1, children have welfare, human, liberal, and protection rights. However in this thesis, the focus will be on the protection and welfare rights of children in need of protection and rehabilitation. It is also acknowledged that for the optimal implementation of the two rights, it requires an overall comprehensive protection system that includes strong laws, effective enforcement, qualified and trained taskforce, appropriate child institution and services and others. However, this thesis is limited to the

question on the establishment of effective legal framework and excludes the question on the status of enforcement, the effectiveness and the qualification of the taskforce, to name just a few.

For a comprehensive appraisal, this thesis also seeks to ascertain the adequacy of the existing mechanisms to safeguard the fundamental rights of the children in need of protection and rehabilitation at the place of refuge. Prior to the amendment of the CA in 2016, the placement of children at a designated place of refuge appeared to be the primary option for the court when it was satisfied that the children in question were in need of protection and rehabilitation based on the Protector's report. Despite the shift in the law that renders the place of refuge as the last recourse, the place of refuge remains relevant as an alternative method of care for children in need of protection and rehabilitation. Hence, to add weightage and increase the novelty of this thesis in advancing the rights of the said category of children, this research goes further to investigate the actualities at the place of refuge.

Place of refuge, as defined in section 55 of the CA 2001, refers to any place, institution or centre appointed by the Minister and is gazetted to be a place of refuge for the protection and rehabilitation of children. Hence, it may be of governmental semi-government, or private institutions. Nonetheless for this thesis, the focus will be on all Taman Seri Puteri in Malaysia, the government-run institutions established since the enforcement of Women and Girls Protection Act 1973.

It is pertinent to note that it is beyond the scope of this thesis to examine similar situations in institutions which are run by the non-government organisations. It is

emphasized that the examination of the government-run institutions are crucial as they are the ones recognised under the existing laws.

## **1.9 CHAPTER OUTLINE**

This thesis comprises of 6 chapters as outlined below:

- Chapter 1** Introduction
- Chapter 2** International legal framework on the protection of children from sexual exploitation: charting benchmarks and minimum standards for protection.
- Chapter 3** The development of the laws in relation to the protection of women and girls exposed to moral harm in Malaysia
- Chapter 4** A critical evaluation of the domestic law in respect to children in need of protection and rehabilitation: Are they in compliance to the international standards?
- Chapter 5** The implementation of child rights at the places of refuge in Malaysia
- Chapter 6** Conclusion & recommendations

## **1.10 SIGNIFICANCE/ CONTRIBUTION OF THE RESEARCH**

This research would provide information to fill the gap of knowledge on the state of our current laws and policies concerning the children who are in need of protection and rehabilitation; whether or not the laws meet the standard of the UNCRC and other related instruments. Secondly, the research would discover whether the fundamental rights of the children are effectively protected during rehabilitation programme. This is because rehabilitation programmes are crucial for the children's mental, emotional and physical recovery. The answers to these questions would be beneficial to improve our laws and policies for a better protection of the defined children. This research will also propose options to enable these children to have access to standard education, a solution to ensure

these children have the right to standard health care and to develop a standard of procedure / rules for the children and caregiver so as to promote the enhancement of quality of the service at the institution.

### **1.11 CONCLUSION**

Protecting the children's right and their best interests are vital for the development of every child, including those who are the victim of sexual exploitation. The present study will unveil any *lacuna* in the existing laws and policies and further propose for better solution to ensure the rights of the children in need of protection and rehabilitation in Malaysia are protected effectively and comprehensively.

## CHAPTER 2

# INTERNATIONAL LEGAL FRAMEWORK ON THE PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION: CHARTING BENCHMARKS AND MINIMUM STANDARDS FOR PROTECTION.

## 2.1 INTRODUCTION

The abuse of children for sexual purposes has a long-standing history. It evolved due to many factors such as disparity in gender, acceptable customary practices, misled religious beliefs, superstition and economic development.<sup>109</sup> For instance, pre-pubescent boys were in demand during the ancient Greece and Rome era as the consequence of pederasty<sup>110</sup> praxis.<sup>111</sup> Child prostitution was also institutionalised during ancient Rome and the business was taxable.<sup>112</sup> In the 18<sup>th</sup> to 19<sup>th</sup> century, particularly in London and France, it was believed that sexual intercourse with children could cure venereal disease and this led to increasing number of child rape cases.<sup>113</sup> Meanwhile in British Malaya, there was vigorous recruitment of women and girls for the sex industry in the 1800s.<sup>114</sup> Many girls were trafficked by mine operators and were forced to work as prostitutes in British Malaya.<sup>115</sup> They were either kidnapped, deceived to believe that there were jobs or education opportunities<sup>116</sup>, or initially sold due to poverty and extreme hunger.<sup>117</sup>

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<sup>2-109</sup> R. Barri Flowers, *The Victimization and Exploitation of Women and Children: A Study of Physical, Mental, And Sexual Maltreatment in the United States* (McFarland & Co, United States 1994), at page 54.

<sup>2-110</sup> Sexual activity involving a man and a boy

<sup>2-111</sup> Robin Grille, 'Childhood Through Ages' in *Parenting for a Peaceful World* (New Society Publishers, 2014) at page 34

<sup>2-112</sup> *ibid*, at page 35

<sup>2-113</sup> Erna Olafson & David L. Corwin, 'Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression' (1993) 17 *Child Abuse & Neglect* 7, at page 8

<sup>2-114</sup> Skymala Nagaraj and Siti Rohani Yahya, 'Prostitution in Malaysia' in Lin Leam Lim (Ed), *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia* (International Labour Organization, Geneva 1998), at page 69

<sup>2-115</sup> Tan Liok Ee, 'Locating Chinese Women in Malaysia History' in Abu Talib Ahmad (Ed), *New Terrains in Southeast Asian History*, (Ohio University Press, Ohio 2003), at page 360 ; see also Nagaraj & Yahya, *supra* note 2-6, at page 69

<sup>2-116</sup> Nagaraj & Yahya, *supra* note 2-6, at page 69

<sup>2-117</sup> Linda Bryder, 'Sex, Race, and Colonialism: An Historiographical Review', *The International History Review*, (Dec., 1998), Vol. 20, No. 4, pp. 806-822 , at page 811

Besides that, the depiction of children as sexual object could also be found in ancient work such as paintings<sup>118</sup> and writings.<sup>119</sup> Between 1757 and 1795, there was a famous publication entitled “Harris’s List of Covent Garden Ladies” largely circulated in London. The book described the attributes and specialities of Covent Garden prostitutes and oftentimes referred to them as the young girls.<sup>120</sup> The later advent of camera in the 1800s has brought the production of pornography and it became a worldwide commercial industry since the 1960s.<sup>121</sup>

As noted earlier in Chapter 1, globally, the abuse of children for sexual purposes remains severe. Although no precise figures are available on the extent of the phenomenon,<sup>122</sup> the number is irrefutably alarming and UNICEF acknowledges that sexual violence, including sexual exploitation, is one of the most disconcerting of children’s rights violations.<sup>123</sup>

Due to the severity of the matter, protecting the children against sexual exploitation and abuse has become an international agenda since the late 1800s. The international community has since created numerous dedicated legal instruments both domestic and international to address the concern. It is now universally established under Article 34 of the United Nations Convention on the Rights of the Child (UNCRC) that children have the rights to be protected against any form of sexual exploitation and sexual abuse.

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<sup>2-118</sup> Alisdair A. Gillespie, *Child Pornography: Law And Policy* (Routledge, 2011), at page 4 ; Susan J. Creighton, *Child Pornography: Images Of The Abuse Of Children*, NSPCC Information Briefings (November 2003), at page 1

<sup>2-119</sup> Richard Wortley & Stephen Smallbone, *Internet Child Pornography: Causes, Investigation, and Prevention* (ABC-CLIO, 2012), at page 10

<sup>2-120</sup> *ibid*

<sup>2-121</sup> Susan J. Creighton, *supra* note 2-10, at page 1

<sup>2-122</sup> UN Human Rights Council, *Report Of The Special Rapporteur On The Sale Of Children, Child Prostitution And Child Pornography*, (A/HRC/25/48, 23 December 2013) available at: <<http://www.refworld.org/docid/52e0f6b34.html>> accessed 8 March 2016

<sup>2-123</sup> UNICEF, ‘Sexual Violence – Current Status And Progress’, available at < [https://data.unicef.org/topic/child-protection/violence/sexual-violence/#\\_ednref1](https://data.unicef.org/topic/child-protection/violence/sexual-violence/#_ednref1)> accessed on 4<sup>th</sup> March 2017



The main objective of this chapter is to examine the legal framework and the minimum standards in addressing the issue on child sexual exploitation within the international domain. Accordingly, this chapter will first, briefly canvass the historical development of the laws relating to child sexual exploitation prior to the passing of UNCRC in 1989. Secondly, Article 34 of the UNCRC will be scrutinized to determine the scope of the provision. Thirdly, other related international instruments will be analysed with special attention to the provisions which require the state parties to provide legal measures in protecting children from sexual exploitation. The outcome of this exercise will establish the necessary yardsticks in determining the extent of compliance to the international standards by the State Parties in regulating the protection of children against sexual exploitation and abuse. Additionally, it will provide premises for the evaluation of the Malaysian legal framework compliance in Chapter 4 of this thesis.

As the category of “children in need of protection and rehabilitation” under the Malaysian Child Act 2001 is the main focus of this thesis, the latter part of this chapter will demonstrate the correlation between the said provision and Article 34 of the UNCRC.

## **2.2 EARLY LAWS BEFORE THE UNCRC**

The earliest legal response to address the issue of child sexual abuse and exploitation were appreciable from the enactment of age of consent law. By the end of the Middle Ages, the law against inappropriate sexual contact with children was enforced where sexual intercourse with a child who is under the age of consent to marry was made an offence notwithstanding the fact that the girl consented or failed to resist.<sup>124</sup> This initial law was introduced in the English Statute of Westminster 1 in 1275 where it was

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<sup>2-124</sup> Jon R Conte, *Critical Issues in Child Sexual Abuse: Historical, Legal, and Psychological Perspectives*, (Sage Publication, London, 2002) at page 28

prohibited to “ravish, nor take away by force” any girls under 12 years old (being the age of consent to marry).<sup>125</sup> Further in 1576, the Statute 18 Elizabeth made it felony for carnal knowledge of girl aged below 10 years old<sup>126</sup> and this offence was made punishable by death later in 1828.<sup>127</sup> This statute had also become the model for the early rape laws in America,<sup>128</sup> where 10 years old were the common age of consent in many states Code.<sup>129</sup>

The age of consent law was later developed in other parts of the world in late 18<sup>th</sup> century.<sup>130</sup> For instance, countries under the French Napoleonic Code 1791, the age of consent was eleven and was later increased to thirteen years old in 1863.<sup>131</sup>

Prostitution on the other hand, started to be regulated, not to control the sale of sex, but to control the spread of venereal diseases.<sup>132</sup> It started in France, where a simple administrative measures was taken since 1802 for all working class women, regardless of their professions, to undergo medical check-ups and it was later decreed in 1810 for compulsory check-ups and registration with its sole aim to combat venereal diseases.<sup>133</sup> Similarly in Netherland, medical examination were compulsory for sex workers under their Penal Code in 1811.<sup>134</sup> The French effort had encouraged similar calls over the

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<sup>2-125</sup> Stephen Robertson, ‘Age of Consent Laws’ (*Children and Youth in History*), Item #230, <<https://chnm.gmu.edu/cyh/case-studies/230>> accessed on 20 February 2017.

<sup>2-126</sup> *ibid*

<sup>2-127</sup> Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave MacMillan, New York, 2005), at page 63

<sup>2-128</sup> Jon R Conte, *supra* note 2-16, at page 29

<sup>2-129</sup> Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* (The University of Chicago Press Books, Chicago, 1996), at page 44; cited in ‘Age of Consent’ (*Discover The Truth*, 9 September 2013) <<https://discover-the-truth.com/2013/09/09/age-of-consent-in-european-american-history/>> accessed on 4 May 2017

<sup>2-130</sup> *ibid*

<sup>2-131</sup> Julie Peakman, *The Pleasure's All Mine: A History of Perverse Sex*, (Reaktion Books, 15 Oct 2013), at page 301

<sup>2-132</sup> Gail M Deady, ‘The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry’, (2011) 17 Washington and Lee Journal of Civil Rights and Social Justice 515, at page 522-524

<sup>2-133</sup> Yvonne Svanström, *Policing Public Women: The Regulation of Prostitution in Stockholm 1812-1880*, (Atlas Akademi, Stockholm, 2000), at page 74-78

<sup>2-134</sup> E. McCoy, *Has the Oldest Profession in the World Really Changed? A Short History of Dutch Prostitution and Government Regulation of Prostitution in the Netherlands*, paper presented at NEH Summer Seminar for School Teachers, The Dutch Republic and Britain National Endowment for the Humanities University of Massachusetts Dartmouth, 2013, at page 6-7

Europe, including England.<sup>135</sup> The Contagious Disease Act of England introduced in 1864 was enforced in army camps and naval ports, where sex workers were subject to compulsory registration and medical surveillance.<sup>136</sup> The regulation however was criticized on various grounds – pithily on gender inequality as only women were forced to undertake the examination regardless of whether they were prostitutes or otherwise, and not to mention the ground that the women were subjected to the painful and humiliating examination procedures.<sup>137</sup>

It was during this period when the “Maiden Tribute campaign” was highlighted in the Pall Mall Gazette, an evening newspaper founded in London. A series of articles have exposed the trade and prostitution involving children and it was argued that young girls were “too young, in fact, to understand the nature of the crime of which they are the unwilling victims”.<sup>138</sup> The campaign led to the passing of the Criminal Law Amendment Act 1885, which increased the age of consent for girls to sixteen years old in England. France and other European countries such as Spain, Denmark and Portugal which adopted the Napoleonic Code likewise raised the age of consent to between 13 and 16 years, from the initial age of 10 to 12 years old.<sup>139</sup> Similarly in Australian jurisdictions, the age of consent that was initially set to 14 years was increased to 16 years in late 1890s.<sup>140</sup>

Besides increasing the age of consent, the law shifted towards outlawing the procuring, detaining, or keeping a person, as well as managing a brothel or letting out premises for

<sup>2-135</sup> Patricia Ward D'Itri, *Cross Currents in the International Women's Movement, 1848-1948* (Popular Press, 1999), at page 29-30

<sup>2-136</sup> Claire Jones, 'Prostitution and the Contagious Diseases Acts 1864 1866 and 1869' (*HerStoria*, 5 July 2012 ) <<http://herstoria.com/prostitution-and-the-contagious-diseases-acts-1864-1866-and-1869>> accessed on 2 August 2017

<sup>2-137</sup> Helena Wojtczak, 'The Contagious Diseases Acts and The Campaign To Repeal Them' (*History of Women*, 2009) <<http://www.historyofwomen.org/cdacts.html>> accessed on 5 May 2017

<sup>2-138</sup> Sarah Beresford, "The Age of Consent and the Ending of Queer Theory" (2014) 3 *Laws* 759, available at <<http://www.mdpi.com/2075-471X/3/4/759>> accessed on 5 May 2017, at page 760-761

<sup>2-139</sup> Stephen Robertson, *supra* note 2-17

<sup>2-140</sup> Hayley Boxall, Adam M Tomison & Shann Hulme, 'Historical Review Of Sexual Offence And Child Sexual Abuse Legislation In Australia: 1788–2013', Australian Institute of Criminology Special Report (2014), at page 6

the purpose of prostitution. At this juncture, prostitution *per se* was not outlawed, nonetheless profiteering from and exploiting for prostitution were made otherwise. For example, Public Morality Acts and the Penal Code of Amsterdam was amended in 1911 to forbid any activity that leads to prostitution.<sup>141</sup> Similarly in New England, ordinances were passed addressing brothels, adultery, fornication and street walking as well as adultery were enforced, and sexual misconduct was punishable with fines.<sup>142</sup>

The booming prostitution business at this time had led to the increase in trafficking of women and girls. For instance, it was reported in the Dutch Parliament in 1906 that there were about 3,500 girls in Switzerland, 10,000 in Berlin and 2,100 in London had been saved from the recruiter.<sup>143</sup> These occurrences were then perceived as "white slave trade" in the late 19th century, as many innocent women and girls were taken by force and held in captive with threats to their lives by the commercial procurers.<sup>144</sup>

The white slave trade issue earned the attention of the international governments. The National Vigilance Association, a non-governmental body in England, have been actively campaigning for the enforcement and improvement of the laws for the repression of criminal vice and public immorality.<sup>145</sup> Their resolution 'to open definite measures for its mitigation – if possible its suppression' became the official governmental response to white slave trade malady.<sup>146</sup> The association hosted the first International Congress on

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<sup>2-141</sup> E. McCoy, *supra* note 2-26, at page 8

<sup>2-142</sup> Gail M Deady, 'The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry', (2011) 17 Washington and Lee Journal of Civil Rights and Social Justice 515, at page 522-524

<sup>2-143</sup> Marlou Schrover, 'History of Slavery, Human Smuggling and Trafficking 1860-2010', in Gerben Bruinsma (Ed), *Histories of Transnational Crime* (Springer, New York, 2015), at page 53

<sup>2-144</sup> Gail M Deady, *supra* note 2-34

<sup>2-145</sup> Jean Allain, 'White Slave Traffic in International Law', (2017) Journal Of Trafficking And Human Exploitation; Vol. 1, Nr. 1, 1-40, Paris Legal Publishers, at page 3-5

<sup>2-146</sup> *ibid*

the White Slave Trade in 1899.<sup>147</sup> The Congress furthered the desire for an agreement to be established between the governments to punish the person who were involved in procuring of women and girls by force, violence and other illegal means, to commence simultaneous investigations, and to enter treaties for extradition.<sup>148</sup>

It was later in 1904, that the International Agreement for the Suppression of the White Slave Traffic was adopted.<sup>149</sup> By virtue of this Agreement, the state parties were obliged to take measures to enable information exchange, victims' identification, and the employment agencies supervision.<sup>150</sup> Nonetheless, no law enforcement provisions were incorporated in this Agreement. As a result, the efforts to suppress white slave trafficking had been less effective. Consequently, the International Convention for The Suppression of The White Slave Traffic was adopted in 1910 to fill up the lacunae.<sup>151</sup> The state parties were urged to establish the law to suppress the act and to punish the offenders.<sup>152</sup>

Whilst the above instruments concentrate on the suppression of the white slave traffic, there was another related international instrument which specifically address child rights - the Declaration of the Rights of the Child that was adopted by the League of Nations in 1924. This instrument was later adopted in an extended form by the United Nations in 1959 that contains an express provision recognising the rights of the child to be protected against every form of exploitation.

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<sup>2-147</sup> Thomas Davies, *A New History of Transnational Civil Society*, (Oxford University Press, United Kingdom 2014), at page 60

<sup>2-148</sup> Jean Allain, *supra* note 2-37

<sup>2-149</sup> International Agreement For The Suppression Of The White Slave Traffic available at <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20VII/VII-8.en.pdf>> retrieved on 7 June 2016

<sup>2-150</sup> Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers, 2006), at page 14

<sup>2-151</sup> Jean Allain, *supra* note 2-37

<sup>2-152</sup> Article 1, the International Convention for The Suppression of The White Slave Traffic

## 2.3 THE UNCRC

The UNCRC comprises 54 articles encompassing all aspects of a child's life including civil, political, economic, social and cultural rights that all children are entitled to.<sup>153</sup> A “child” in this Convention generally refers to person below 18 years old, unless the law of the state provides otherwise lower age of majority.<sup>154</sup> Article 34 of the UNCRC seeks to protect children from any form of sexual exploitation and sexual abuse. The article specifically obliges the State Parties to prevent the engagement of a child in any unlawful sexual activities, prostitution and pornography.

The initial draft of this article in 1978 was to assert the right of every child to be protected against all form of neglect, cruelty, and exploitation as well as to protect them from any employment which would prejudice their development.<sup>155</sup> However, after a series of debates and proposals, tackling the issue of sexual exploitation specifically began to be the centre of consideration in the 1980s, where prostitution, pornography and child trafficking were the highlights leading to the enactment of the current Article 34, which reads:

*“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in*

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<sup>2-153</sup> UNICEF, ‘What makes the UNCRC so special?’ (*UN Convention on the Rights of the Child (UNCRC)*) <<https://www.unicef.org/what-we-do/un-convention-child-rights/>> accessed on 15 April 2017

<sup>2-154</sup> Article 1, the UNCRC

<sup>2-155</sup> “Article IX

1. *The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form*
2. *The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development” ;0*

United Nations, *Report of the Commission on Human Rights*, E/CN.4/1292, (New York 1978), available online <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G78/077/09/PDF/G7807709.pdf?OpenElement>> accessed on 15 March 2016

*particular take all appropriate national, bilateral and multilateral measures to prevent:*

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;*
- (c) The exploitative use of children in pornographic performances and materials.”*

### **2.3.1 Understanding child sexual abuse (CSA) and child sexual exploitation (CSE)**

In determining the scope of Article 34 of the UNCRC, it is important to first comprehend the terms child sexual abuse and child sexual exploitation. This is vital as these two terminologies, albeit interrelated, have distinct features which delineate the scope of Article 34 and make it distinguishable with other provisions of the UNCRC.

#### *(a) Child sexual abuse*

The term “child sexual abuse” (hereinafter referred to as CSA), as pointed by Haugaard, has never been clearly defined.<sup>156</sup> It has a broad term, from inappropriate touching of children to the extreme end of the spectrum - sexual intercourse.<sup>157</sup> The definition varies depending on the context of disciplines, social systems, professionals, research and *et cetera*.<sup>158</sup>

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<sup>2-156</sup> Cindy L. Miller-Perrin & Robin D. Perrin, *Child Maltreatment – An Introduction*, (3ed., SAGE Publications, 14 May 2012) at page 96-98

<sup>2-157</sup> American Humane, ‘Stop Child Abuse’, retrieved on 7 July 2017 from <<http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-sexual-abuse.html?referrer=https://www.google.com/>>

<sup>2-158</sup> Lorraine Green, ‘An Overwhelming Sense of Injustice? An Exploration of Child Sexual Abuse In Relation To the Concept of Justice’, (2006) 26 Critical Social Policy 74, at page 74; see also National Sexual Violence Resource Center, ‘Understanding child sexual abuse definitions and rates’ (2012); available online <

For instance, an often quoted definition of CSA was by Schechter and Roberge, where according to them, CSA is “the involvement of dependent, developmentally immature children and adolescents in sexual activities they do not truly comprehend to which they are unable to give informed consent, or that violate the social taboos of family roles”.<sup>159</sup> The United Nations Educational, Scientific and Cultural Organization (UNESCO) further provides that CSA refers to “the persuading or forcing of children (as determined by the legal age of majority) to engage in implicit or explicit sexual acts, alone or with another person of any age, of the same sex or the opposite sex”.<sup>160</sup>

Corresponding to the definition by Schechter and Roberge as well as UNESCO, the World Health Organization (WHO) provides that CSA violates the laws and social taboos within the society. It is when the children are involved in any sexual activities, in which they do not entirely understand the activities’ purposes and consequences due to their lack of maturity and knowledge. Children, in this case, are not able to rationally grant any consent for they are also not physically and mentally prepared. WHO further emphasizes that the abuse is evidenced by the fact that first, the sexual activities involve a child and an adult or another child who, by age or development, is in the role of being responsible, trustworthy, and powerful; and second, it is solely intended to satisfy or please the needs of abusers.<sup>161</sup>

Correspondingly, the United Nations held that CSA involves interactions between a child and an older adult, or another child, such as a stranger, sibling, or a person in an

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[http://www.nsvrc.org/sites/default/files/NSVRC\\_Publications\\_TalkingPoints\\_Understanding-Child-Sexual-Abuse-definitions-rates.pdf](http://www.nsvrc.org/sites/default/files/NSVRC_Publications_TalkingPoints_Understanding-Child-Sexual-Abuse-definitions-rates.pdf)> accessed on 12 May 2017.

<sup>2-159</sup> Jane Morgan & Lucia Zedner, *Child Victims: Crime, Impact, and Criminal Justice* (Clarendon Press, Oxford, 1992), at page 7

<sup>2-160</sup> UNESCO, *Background Document: Experts meeting on Sexual Abuse of Children, Child Pornography and Paedophilia on the Internet: An International Challenge* (Paris, 18-19 January 1999).

<sup>2-161</sup> Violence and Injury Prevention Team & World Health Organization, *Report of the Consultation on Child Abuse Prevention*, WHO/HSC/PVI/99 (World Health Organization, 2009), at page 15-16



authoritative position like a parent or caretaker. The child is used as an “object of gratification” or for an older child’s or adult’s sexual needs. The vicious interactions include force, trickery, bribes, threats, or pressure. In this sense, CSA could be physically, verbally, or emotionally abusive unto the children.<sup>162</sup>

From the above definitions, it can be summarized that CSA incorporates five essential components; firstly, it is in terms of the relationship where it includes extra-familial and interfamilial abuse. Secondly, CSA comprises of sexual experiences which include physical contact and/or non-contact actions. Thirdly, the child victim does not truly comprehend the nature and consequence of the sexual activities. Fourthly, the definition underlines the other’s exploitation of his authority, power and knowledge to achieve sexual ends; which could even be perpetrated by another children. Fifthly, CSA definitions accentuate the age or maturational advantage of the perpetrator over the victim.<sup>163</sup>

#### *(b) Child sexual exploitation*

Asquith and Turner suggest there are overlapping usage of both terms ‘sexual exploitation’ and ‘sexual abuse’, even though ‘exploitation’ may imply a lack of agency on the part of the victim.<sup>164</sup> Child sexual exploitation (hereinafter referred to as “CSE”) places an emphasis on the ‘benefit’ received by another party as a result of CSA. According to the WHO, ‘sexual abuse becomes sexual exploitation when a second party benefits – through making a profit or through a *quid pro quo* – through sexual activity

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<sup>2-162</sup> UNICEF, ‘Commercial Sexual Exploitation and sexual abuse of children in South East Asia’, available at < <https://www.unicef.org/rosa/commercial.pdf>> accessed on 15 May 2017, at page 9

<sup>2-163</sup> Cindy L. Miller-Perrin & Robin D. Perrin, *supra* note 2-48, at page 98-99

<sup>2-164</sup> Ethel Quayle, Lars Loof & Tink Palmer, *Child Pornography and Sexual Exploitation of Children Online*, a Thematic Paper written on behalf of ECPAT International as a contribution to the World Congress III against Sexual Exploitation of Children and Adolescents, Rio de Janeiro, Brazil on 25-28 November 2008, available at < [http://www.ecpat.org/wp-content/uploads/legacy/Thematic\\_Paper\\_ICTPsy\\_ENG.pdf](http://www.ecpat.org/wp-content/uploads/legacy/Thematic_Paper_ICTPsy_ENG.pdf)> accessed on 15 June 2017

involving a child'. The exploitation may be in a form of wage to the child directly in return for his sexual conduct; or in a manner where some other third parties would benefit from such promiscuous activity either economically, socially, politically, and others.<sup>165,166</sup>

The National Working Group for Sexually Exploited Children and Young People (NWG) further developed an extensive definition of CSE. According to them, sexual exploitation of children or minors under 18 involves exploitative situations, contexts, and relationships, where they are “rewarded or receive something in return” as a result of performing sexual activities. The rewards include food, accommodation, drugs, alcohol, cigarettes, affection, gifts, and money. Technology is one of the main platforms to exploit them in which they are persuaded to produce sensual images on the Internet or mobile phones for free. Individuals behind the exploitation usually have power of the children by virtue of their age, gender, intellect, physical strength and economic or other resources. In this case, the children seem to be vulnerable due to the acts of violence, coercion, intimidation, threats, among others, especially if they themselves lack of or have limitations in their social, economic, or emotional surroundings.<sup>167</sup>

Based on the above definitions, it can be comprehended that CSE is a subcategory of CSA. When CSA is perpetrated in exchange or to gain some benefit in any forms which is to be enjoyed by the child victim himself or other third parties, it falls within the definition of CSE. In this context, CSE would encompasses various forms of CSA including child pornography and child prostitution.

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<sup>2-165</sup> Action for the Rights of children, ‘Critical Issues Abuse and Exploitation’, available online at <<http://www.unhcr.org/3bb81aea4.pdf>> accessed on 8 March 2017

<sup>2-166</sup> United Nations, ‘Glossary on Sexual Exploitation and Abuse’, (5 October 2016)

<sup>2-167</sup> Department for Children, Schools and Families, ‘Safeguarding Children and Young People from Sexual Exploitation – Supplementary guidance to Working Together to Safeguard Children’, (HM Government, 2009), at page 9

### 2.3.2 The scope of Article 34 UNCRC

Despite the fact that the term “child sexual abuse” is expressly provided in Article 34, it is pertinent to note that not all kind of CSA are within the ambit of the provision. Apart from Article 34, Article 19 of the UNCRC is the most comprehensive provision on the protection of children from all forms of abuse and neglect. The Article expressly provides that the children have the right to be protected against all form of violence, mistreatment and abuse (including sexual abuse) while in care of parents, legal guardian or any person who has the care of the child such as schools and care homes. Therefore, CSA cases like child rape, incest, or other sexual abuse within the domain of family, teacher-student, and care giver-child context fall within the scope of Article 19.

On the other hand, Article 34 places greater prominence over the “exploitive” use of the children for sexual activities and the element “benefit” which would be acquired by the children himself or some third parties in return of such activities. This can be evidenced by the discussion during the drafting process whereby various submissions were referred to ‘sexual exploitation’ rather than ‘sexual abuse’.<sup>168</sup> Accordingly, Article 34 has confined the scope into 3 main forms of CSE which shall be discussed critically as follows:

(a) *The inducement or coercion of a child to engage in any unlawful sexual activity*

The term “unlawful sexual activity” contained in the Article 34 suggests that children are not totally barred from getting involved in sexual activities. It was reported that it was not the intention of the drafter to regulate the sexual life of a child.<sup>169</sup> However, this

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<sup>2-168</sup> Office of the United Nations High Commissioner for Human Rights, Legislative History of the Convention on The Rights Of The Child, Volume II, HR/PUB/07/1 (United Nations, New York & Geneva, 2007)

<sup>2-169</sup> *ibid* , at page 720

connotation must be put in a proper context, where the children are not in liberty to get involved in sexual activities as they are still subjected to the law on the age of consent.

As noted above, a child under the UNCRC refers to persons under the age of 18 years old. Nonetheless, in some states, the sexual emancipation of a person is reached earlier than 18 years old. For instance, the age of consent to sexual relation is 14 years old in Bulgaria<sup>170</sup>, Germany<sup>171</sup> and Austria<sup>172</sup>; 15 years old in Denmark<sup>173</sup>, France,<sup>174</sup> and Sweden<sup>175</sup>; 16 years old in Belgium<sup>176</sup>, England and Wales<sup>177</sup>, Spain<sup>178</sup> and Malaysia<sup>179</sup>; and 17 years old in Ireland<sup>180</sup>. Therefore, it is submitted that Article 34 of the UNCRC excludes the restriction nor the protection of consensual sexual activities of a child who has attained the age of consent in the respective countries.

On the other hand, sexual activities with a person under the age of consent, regardless of the victim's willingness (also prominently termed as "statutory rape"), is argued to fall within the subject of Article 34(a), though not to its entirety. This is because the statutory rape itself is within the definition of CSA and could be rightly put under the scope of Article 19 of the UNCRC. However Article 34(a) complements Article 19 by obligating the state parties to take necessary steps to avert the inducement or coercion of a child under the age of consent to engage in sexual activities.

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<sup>2-170</sup> Article 151 Criminal Code (Bulgaria)

<sup>2-171</sup> Article 176 Criminal Code (Germany)

<sup>2-172</sup> Section 206 Criminal Code (Austria)

<sup>2-173</sup> Section 222 Criminal Code (Denmark)

<sup>2-174</sup> Article 227-25 of the Penal Code (France)

<sup>2-175</sup> Section 4, Chapter 6 Penal Code (Sweden)

<sup>2-176</sup> Article 372 Criminal Code (Belgium)

<sup>2-177</sup> Section 9 Sexual Offences Act 2003 (UK)

<sup>2-178</sup> Article 183 Criminal Code (Spain)

<sup>2-179</sup> Section 375, Penal Code (Malaysia)

<sup>2-180</sup> Section 3 Criminal Law (Sexual Offences) Act 2006 (Ireland)

Besides that, it is argued here that Article 34(a) serves as a general clause providing protection against all forms of sexual exploitation - not limited to prostitution and pornography per se which are specified in Article 34(b) and (c) respectively. Any act that involve inducement, coercion, abuse of position and trust, and most importantly, the exploitation of vulnerable or dependent children shall be suppressed by virtue of Article 34(a).

Article 34(a) does not only seek to protect children that are already sexually exploited, but also to halt any form of activities that could initiate the exploitation. Hence, any act leading to CSE such as trafficking, procuring, and enticing are compelled to be outlawed by virtue of this provision.

*(b) The exploitative use of children in prostitution or other unlawful sexual practices*

The definition of ‘child prostitution’ was made clear in Article 2(b) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) (hereinafter referred to as “the OPSC”). The OPSC defines ‘child prostitution’ as ‘the use of a child in sexual activities for remuneration or any other form of consideration’.<sup>181</sup>

However, in Article 34(b) of the UNCRC, the terms “exploitive use of children in prostitution” raise an issue whether a distinction has to be made between a competent child (based on the age of consent) who voluntarily and consents to be involved in prostitution and those who are otherwise exploited. In other words, can a child who has

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<sup>2-181</sup> Article 2(b) OPSC

attained a competent age to have sex and is willing to engage in prostitution be excluded from the protection under Article 34(b) of the UNCRC?

The term ‘prostitution’ often implies that there is an element of choice,<sup>182</sup> where a person engages in sexual activities for gain, which may include basic necessities such as accommodation, food, clothing, safety, and others like drugs, money or transport in return.<sup>183</sup> Prostitution existed since ancient history as a result of *inter alia* poverty, homelessness, and lack of employment opportunity. For instance, it was observed that most medieval prostitutes were involved in the activity without force or coercion.<sup>184</sup> The prostitution activity had been tolerable for some women to support themselves in the absence of a husband who would provide for them sufficient sustenance.<sup>185</sup> It became a profession as a means to increase income; where women were then mostly working in factories and were lowly paid during the said period.<sup>186</sup> Similarly during the era where anti-white slave law was promulgated, many of the women were, in reality, willing participants in prostitution.<sup>187</sup> In fact, until now, prostitutes or sex work are deemed to be an accepted profession<sup>188</sup> and is perceived as a form of “liberatory, an expression of women’s right to sexual self-determination and equality”.<sup>189</sup>

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<sup>2-182</sup> Karen Elizabeth Walker, ‘Exploitation Of Children And Young People Through prostitution’ *Journal of Child Health Care*, (2002) Vol 6(3) 182–188, available at <<http://journals.sagepub.com/doi/pdf/10.1177/136749350200600304>> accessed on 1 September 2016, at page 182

<sup>2-183</sup> Anna Grant *et al*, *The Commercial Sexual Exploitation Of Children*, Paper presented at the Children and Crime: Victims and Offenders Conference convened by the Australian Institute of Criminology and held in Brisbane, 17-18 June 1999

<sup>2-184</sup> N. M. Heckel, ‘Sex, Society and Medieval Women’, (*University of Rochester River Campus Libraries*) <<https://www.library.rochester.edu/robbins/sex-society>> accessed on 4 April 2017

<sup>2-185</sup> *ibid*

<sup>2-186</sup> Ruth Mazo Karras. *Sexuality in Medieval Europe: Doing Unto Others* (Routledge, 2005)

<sup>2-187</sup> Gail M Deady, ‘The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry’, (2011) 17 *Washington and Lee Journal of Civil Rights and Social Justice* 515, at page 522-524

<sup>2-188</sup> Teela Sanders, DPhil, Senior Lecturer in Sociology at the University of Leeds, was quoted as having stated in the Mar. 8, 2007 Independent article “Against The Grain: ‘Sex Workers Must Be Protected’

<sup>2-189</sup> Tessa L. Dysart, ‘Child, Victim, or Prostitute? Justice through Immunity for Prostituted Children’, (Spring 2014) 1 *Duke Journal of Gender Law & Policy* 255-288; at page 258-259

In light of the above, can a person who is under 18 years old but has attained the age that is under the law deemed to be competent of giving consent for sex, exercise their choice to become a prostitute? There have been some propositions to clarify that paying for the service of this category of children for sex can be tolerated provided no third party profits from the income.<sup>190</sup> Further, it was successfully argued in the case of *Hodgson v Minnesota*<sup>191</sup> that adolescents hold the same mental capability and maturity as adults to make reproductive health decisions about birth control and abortion by the American Psychology Association.<sup>192</sup> Hence, could this decision be a basis to support the contention that children above the age of consent has the autonomy to engage in prostitution?

Edwards (1995) argued that children's sexual autonomy is not absolute and would keep changing, depending on their surroundings and their diet, therefore most children are unable to give consent in relation to prostitution. Child prostitutes mostly find themselves in a situation where "dissent" eventually becomes "assent" through submission, fear, or duress.<sup>193</sup> Among the reasons of their exploitation are due to ignorance, lack of experience, the need for attention, learning disabilities, and past abuse.<sup>194</sup> In cases as such, the children do not realize that they are actually being exploited by vicious adults. They usually display symptoms of "traumatic bonding", most commonly known as "Stockholm syndrome", which makes it difficult for them to detach themselves from the person responsible for their harm – creating a psychological paralysis.<sup>195</sup>

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<sup>2-190</sup> Ethel Quayle, Lars Loof & Tink Palmer, *supra* note 2-56

<sup>2-191</sup> 497 U.S. 417 (1990)

<sup>2-192</sup> Megan Annitto, 'Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors', (Fall 2011), Yale Law & Policy Review, Vol. 30, No. 1, at page 22-24

<sup>2-193</sup> Karen Elizabeth Walker, *supra* note 2-74, at page 185

<sup>2-194</sup> Megan Annitto, *supra* note 2-84, at page 14-15

<sup>2-195</sup> *ibid*

Hence, it is submitted that it was not the intention of the drafter to distinguish legitimate and illegitimate child prostitution based on the child's age. The international law affirms that a child does not have the capacity to give consent to her or his own sexual exploitation.<sup>196</sup> According to UNAIDS Terminology Guidelines 2015, children shall not be involved in sex work. They are considered to be victims of sexual exploitation should they engage in the said work.<sup>197</sup> Accordingly, persons under the age of 18 years who are involved in prostitution should constantly be regarded as victims of sexual exploitation notwithstanding any form of consent or willingness which existed on their part. This is further supported with the ILO Convention 182 that unequivocally classified the 'use of a child for prostitution' as a 'worst form of child labour'.<sup>198</sup>

*(c) The exploitative use of children in pornographic performances and materials*

Defining 'child pornography' is not a straightforward exercise. It is a complex subject matter which requires a multifarious scholarship involving the questions on moral, cultural, sexual, social, and religious beliefs standard of different societies in parts of the world. The degree of appropriateness or otherwise in the western culture differs to the eastern culture.

What kind of content is considered as child pornography? The definition must not be too strict to include all naked or semi-naked child images; it ought to exclude innocent family pictures of a naked or semi-naked child and those images justifiably used in artistic or scientific contexts. However, images that fall outside the prior mentioned category,

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<sup>2-196</sup> Susanna Greijer & Jaap Doek, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, (ECPAT International, 2016), at page 32

<sup>2-197</sup> *UNAIDS Terminology Guidelines*, (2015), available at <[http://www.unaids.org/sites/default/files/media\\_asset/2015\\_terminology\\_guidelines\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/2015_terminology_guidelines_en.pdf)> accessed on 2 May 2016, at page 10

<sup>2-198</sup> Article 3(b) ILO Convention 182.



particularly which are made or held for sexualised purposes is undoubtedly considered as child pornography.<sup>199</sup> This includes the offensive depictions of gross acts of or against children like penetrative sexual intercourse or atrocious acts of brutality and bestiality.<sup>200</sup>

Hence, according to Maxwell Taylor, a Forensic and Legal psychologist, the materials could be categorized into (3) broad types:

(i) Erotica

The first category consists of materials which depicts complete or partial nudity, but lacks in actual or simulated sexual conduct<sup>201</sup> and there is no focus on the nude sexual parts of the child<sup>202</sup>. Pictures of children in underwear or swimsuits are among the examples. Although these materials are not strictly pornographic in nature, but they may function equally as to child pornography<sup>203</sup> if they are used for sexualisation.

(ii) Nudity

The second category consists of materials that contain nudity in some form. Even though nudity per se is not illegal, some of these materials could be implicitly sexually provocative. The more sexual materials in this category may fall within the ambit of child pornography. These materials are comparable to "softcore" pornography in adult pornography.

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<sup>2-199</sup> Thomas Crofts & Murray Lee, 'Sexting', *Children and Child Pornography*, (2015) *Sydney Law Review*, Volume 35: 85, available at < [https://sydney.edu.au/law/slr/slr\\_35/slr35\\_1/04\\_Crofts\\_Lee.pdf](https://sydney.edu.au/law/slr/slr_35/slr35_1/04_Crofts_Lee.pdf) > accessed on 2 May 2017, at page 88-89

<sup>2-200</sup> Anthony R Beech *et al*, 'The Internet and child sexual offending: A criminological review', (2008) *Aggression and Violent Behavior* 13, Elsevier Ltd, 216–228, at page 219

<sup>2-201</sup> Robert DeYoung, 'An Investigative Determination – Child Pornography or Child Erotica?', (1999) *The Journal of Computer Crime Investigation & Forensics*, Issue 7.3 <<https://www.forensicrecovery.com/PDF/Investigative-Determination-HTCN1.pdf>>

<sup>2-202</sup> Susanna Greijer & Jaap Doek, *supra* note 2-88; at page 42

<sup>2-203</sup> Ian O'Donnell and Claire Milner, *Child Pornography: Crime, Computers and Society*, (Routledge, 6 Dec 2012); at page 93

(iii) Sexually explicit materials

The third category is identified as materials that are sexually explicit, in which these materials focus on particular areas of children's bodies such as the genital or anal areas, or the portrayal of children engaging in real or simulated sexual actions. These materials will, in most jurisdictions, fall within the definition of child pornography and may be viewed as corresponding to the "hardcore" pornography associated with adult pornography.<sup>204</sup>

In terms of the definition contained in the international instruments, two elements are given emphasis – the explicit sexual activity of a child and the depiction of their sexual parts for sexual purposes. For instance, Article 2 OPSC defines it as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or representation of the sexual parts of a child for primarily sexual purposes”. Further in Article 9(2) of the Convention on Cybercrime (known as the “Budapest Convention”), it is provided that the material shall visually depicts the engagement of a minor or person appears to be a minor in sexually explicit conduct; or consists of “realistic images representing a minor engaged in sexually explicit conduct”. Also according to Article 20.2 of the Lanzarote Convention “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” are considered as child pornography.

From the above definitions, it can be summarized that first, child pornography materials are not restricted to photographs or video but may include audio, images or writing regardless of how it is produced. Secondly, as mentioned earlier, the materials

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<sup>2-204</sup> Rita Shackel, 'Regulation Of Child Pornography In The Electronic Age: The Role Of International Law', (1999) 3 Mac LR 143, available at <<http://www.austlii.edu.au/au/journals/MacarthurLawRw/1999/11.pdf>> accessed on 15 June 2017, at page 146

contain sexually explicit conduct of a child or sexual organs of a child predominantly for sexual purposes. This means the above-mentioned child erotica usually does not fall under the definition and continue to be lawful in many States.<sup>205</sup> Similarly, depiction of sexual organs of a child for other than sexual purposes (medical learning for example) is also excluded from being characterised as child pornography.

Therefore, it is clear that Article 34(c) places emphasis on the suppression of the engagement of children in pornography, i.e. prohibiting children to be involved or used in any kind of depiction of real or simulated explicit sexual pose or activities.

## **2.4 INTERNATIONAL LEGAL INSTRUMENTS IN PROTECTING CHILDREN FROM SEXUAL EXPLOITATION**

Apart from the UNCRC, numerous international instruments have been enforced to eradicate child sexual exploitation. These instruments obligate the state parties, among others, to take reasonable action to prevent and criminalize activities *vis-à-vis* the sexual exploitation of children as well as to afford protection for the victims.

It is worth mentioning that, firstly, the respective international instruments may not address sexual exploitation exclusively, but may be concomitant with other subject matters too. For instance, the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (hereinafter referred to as “the ILO Convention No.182”) addresses not only on sexual exploitation, but also involves other forms of child labour such as child soldier. Secondly, the instruments would postulate various actions to be effectuated which includes legislative measures,

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<sup>2-205</sup> Susanna Greijer & Jaap Doek, *supra* note 2-88, at page 38

international cooperation, public awareness, financial provisions, national policies and *et cetera*. Hence, for the purpose of this thesis, the following analysis would concentrate on provisions which are related to the issue of child sexual exploitation and specifically appraise the legislative measures required by the instruments.

As the outcome of this analysis would set a benchmark in assessing the adequacy of Malaysian law in protecting children against sexual exploitation in Chapter 4 of this thesis, the international instruments are confined to those which have been ratified by Malaysia. The essence of this international instrument are simplified in following table form (Table 2.1 at the next page) to ease comparisons and comprehension.

**Table 2.1: The international instruments relating to child sexual exploitation duly ratified by Malaysia.**

No.	Name of instrument	Abbreviation	Date of entry into force	Date of Malaysia's ratification	Notes
1.	The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.	OPSC	18 January 2002	12 April 2012	<ul style="list-style-type: none"> <li>The OPSC supplements the UNCRC by outlining the detailed requirements to be undertaken by the State Parties to eradicate child sexual exploitation and abuse.</li> <li>The OPSC contains 17 Articles addressing the trepidation on the significant rise of child trafficking for the purpose of sale, child prostitution, and child pornography worldwide.<sup>206</sup></li> </ul>
2.	The Convention concerning the Prohibition and Immediate Action for the	ILO Convention No.182	19 November 2000	10 November 2000	<ul style="list-style-type: none"> <li>The ILO Convention No 182 affirmed that child prostitution, child trafficking</li> </ul>

<sup>2-206</sup> Preamble of the OPSC

No.	Name of instrument	Abbreviation	Date of entry into force	Date of Malaysia's ratification	Notes
	Elimination of the Worst Forms of Child Labour				<p>and child pornography are the worst forms of child labour.<sup>207</sup></p> <ul style="list-style-type: none"> <li>• The above three subjects have been declared not to be condoned under all circumstances and the elimination has become the priority above all other forms of child labour</li> <li>• Unlike the previous child labour related Convention<sup>208</sup> that allows for progressive and flexible approach by the State parties, the ILO Convention No. 182 obliges the state parties to take prompt and effective actions in abolishing the worst forms of child</li> </ul>

<sup>2-207</sup> Article 2 of the ILO Convention No. 182

<sup>2-208</sup> The Minimum Age Convention 1973 (No. 138)

No.	Name of instrument	Abbreviation	Date of entry into force	Date of Malaysia's ratification	Notes
					labour without distinguishing the economic category of the state parties. <sup>209</sup>
3.	The Convention on the Elimination of all Forms of Discrimination Against Women	CEDAW	3 September 1981	5 July 1995	<ul style="list-style-type: none"> <li>• The CEDAW defines what constitutes discrimination against women and establishes the call for national action to end such discrimination.</li> <li>• One of the main agendas is to eliminate violence against women particularly on the issue of women trafficking for sex purposes. CEDAW emphasizes on the access to legal protections and</li> </ul>

<sup>2-209</sup> *Eliminating the worst forms of child labour - A practical guide to ILO Convention No., 182*, Handbook for parliamentarians No. 3, (International Labour Organization and Inter-Parliamentary Union, 2002), at page 20

No.	Name of instrument	Abbreviation	Date of entry into force	Date of Malaysia's ratification	Notes
					<p>education, and its foundation against discrimination.<sup>210</sup></p> <ul style="list-style-type: none"> <li>Although CEDAW mainly refers to 'women' but the scope includes all female persons at all stages of their lives.</li> </ul>
4.	The United Nations Convention against Transnational Organized Crime	UNTOC (Popularly known as "Palermo Convention")	29 September 2003	24 September 2004	<ul style="list-style-type: none"> <li>The first international legally binding instrument<sup>211</sup> 'promoting cooperation to prevent and combat transnational organized crime more effectively'.<sup>212</sup></li> <li>The apprehension of the international community on the threat of organized</li> </ul>

<sup>2-210</sup> Lies & Facts: CEDAW Women's Rights Treaty, retrieved on 7 May 2017 from < [ow.org/resource/lies-facts-cedaw-womens-rights-treaty](http://ow.org/resource/lies-facts-cedaw-womens-rights-treaty)>

<sup>2-211</sup> Jennifer L. Hesterman, 'Chapter 2 :Transnational Organized Crime: The Dark Side of Globalization' in *The Terrorist-Criminal Nexus: An Alliance of International Drug Cartels, Organized Crime, and Terror Groups* (CRC Press Taylors & Francis Group, Boca Rotun, 2013), at page 25

<sup>2-212</sup> Article 1



No.	Name of instrument	Abbreviation	Date of entry into force	Date of Malaysia's ratification	Notes
					<p>crime has driven the adoption of this convention as the crime has surpassed domestic sphere and thus requires international response.<sup>213</sup></p> <ul style="list-style-type: none"> <li>The Palermo Convention is further supported with 3 Protocols, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.</li> </ul>
5.	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	UN TIP Protocol	25 December 2003	26 February 2009	<ul style="list-style-type: none"> <li>Adopted as a universal instrument aimed to address all aspects of trafficking in persons, especially women and children.</li> </ul>

<sup>2-213</sup> Andre Standing, *Transnational Organized Crime and the Palermo Convention: A Reality Check* (International Peace Institute, December 2010), at page 1

No.	Name of instrument	Abbreviation	Date of entry into force	Date of Malaysia's ratification	Notes
					<ul style="list-style-type: none"> <li>The trafficking in persons cases are increasing despite being an international agenda for the past decade. This is owing to the fact it has developed into new forms of crimes - the transnational organised criminal activities which there are <i>lacunae</i> in the national law in combating these new forms of crime. Hence this Protocol sets the measures for the State parties to adopt in order to fill the said <i>lacunae</i>.<sup>214</sup></li> </ul>

<sup>2-214</sup> Natalia Ollus, 'The United Nations Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children: A Tool For Criminal Justice Personnel' (2002) 62 Resource Material Series 21, available at < [www.unafei.or.jp/english/pdf/RS\\_No62/No62\\_06VE\\_Ollus1.pdf](http://www.unafei.or.jp/english/pdf/RS_No62/No62_06VE_Ollus1.pdf)> at page 19-21

No.	Name of instrument	Abbreviation	Date of entry into force	Date of Malaysia's ratification	Notes
6.	The ASEAN Declaration Against Trafficking in Persons Particularly Women and Children	(hereinafter referred to as "ASEAN Declaration 2004")	29 November 2004 (date of adoption)	-	<ul style="list-style-type: none"> <li>• Reaffirms Ha Noi Declaration of 1998 and Ha Noi Plan of Action which is their commitment to intensify individual and collective efforts to address transnational crime, including the trafficking in persons.</li> <li>• The instrument affirms ASEAN's firm aspiration to eliminate trafficking and related crimes in line with Palermo Convention.<sup>215</sup></li> <li>• Signed in Laos and targets human trafficking specifically, stating the efforts to be taken in terms of identifying and arresting the traffickers,</li> </ul>

<sup>2-215</sup> Association Of Southeast Asian Nations (ASEAN), Asean Responses To Trafficking In Persons- Ending Impunity For Traffickers And Securing Justice For Victims, 2006; at page 2-4

No.	Name of instrument	Abbreviation	Date of entry into force	Date of Malaysia's ratification	Notes
					<p>and also the measures to be taken for the victims of trafficking.</p> <ul style="list-style-type: none"> <li>The instrument also stipulate the commitment to establish a regional focal network to prevent and combat trafficking in persons, particularly women and children, in the ASEAN region.<sup>216</sup></li> </ul>

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<sup>2-216</sup> Article 1 ASEAN Declaration 2004

The promulgation of aforementioned instruments signifies that the issue of child sexual exploitation is given significant attention by the international community. It is also clear that the child sexual exploitation is closely related to the crime of child trafficking. These international instruments accentuate 3 aspects that ought to be incorporated in the legislative framework for a comprehensive protection for the children against sexual exploitation:

*(i) Implicating certain acts as offences related to child sexual exploitation.*

The instruments have set forth certain acts relating to CSE to be made criminal offences under the state parties' national law. The provisions are summarized as follows:

**Table 2.2: The provisions that require certain acts relating to CSE be outlawed**

No	Name of instrument	Article	Provision
1.	OPSC	Article 3	<ul style="list-style-type: none"> <li>The following act(s) shall be fully covered under the criminal law: <ul style="list-style-type: none"> <li>Any means of offering, delivering or accepting, a child for the purpose of sexual exploitation;</li> <li>Offering, obtaining, procuring or providing child prostitution; and</li> <li>Producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography.</li> </ul> </li> <li>The above shall also made an offence if it is committed transnationally or on an individual or organized basis</li> <li>The attempt to commit any of the said acts, as well as complicity or</li> </ul>

No	Name of instrument	Article	Provision
		Article 4	<p>participation in any of the said acts shall also be made as criminal offences.</p> <ul style="list-style-type: none"> <li>The State parties shall take necessary measure to establish jurisdiction when: <ul style="list-style-type: none"> <li>The offences are committed in its territory or on board a ship or aircraft registered in that State.</li> <li>The alleged offender is a national of that State or a person who has his habitual residence in that State.</li> <li>When the victim is a national of that State</li> </ul> </li> </ul>
2.	ILO Convention No.182	Article 1, 3 & 7	<ul style="list-style-type: none"> <li>The State parties shall take appropriate measures (including penal sanctions) in prohibiting and eliminating the following worst forms of child labour : <ul style="list-style-type: none"> <li>All forms of slavery or practices similar to slavery, for instance the sale and trafficking of children</li> <li>The use, procuring or offering of a child for prostitution</li> <li>The use, procuring or offering of a child for the production of pornography or for pornographic performances</li> <li>The work which is likely to harm the health, safety or morals of children by considering the work's nature or the circumstances in which it is carried out</li> </ul> </li> </ul>

No	Name of instrument	Article	Provision
3.	CEDAW	Article 6	<ul style="list-style-type: none"> <li>The State parties shall take legislative measures to suppress all forms of trafficking in women and exploitation of prostitution of women.</li> </ul>
4.	UN TIP Protocol	Article 3 & 5	<ul style="list-style-type: none"> <li>The State parties shall take necessary steps to establish the following offence under the national laws: <ul style="list-style-type: none"> <li>“recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”.</li> <li>The “exploitation” includes prostitution and other forms of sexual exploitation.</li> </ul> </li> </ul>
6.	ASEAN Declaration		<ul style="list-style-type: none"> <li>The State parties undertake to effectuate coercive actions/measures against individual and/or syndicate engaged in trafficking in persons.</li> </ul>

*(ii) Provide social reintegration, physical and psychological recovery assistance to the victims.*

The efforts to eradicate child sexual exploitation shall not only focus in arresting and punishing the perpetrator. The welfare of the victims are worth similar attention. Various research show that the victims of sexual exploitation suffer various adverse effects such as trauma<sup>217</sup>, PTSD<sup>218</sup>, contagious diseases, mental problems, substance abuse, and many more<sup>219</sup>. Therefore, it is crucial to have a clear modus and resources to assist the child victims accessing rehabilitation programme. Henceforth, the international instruments obligate the state parties to take necessary action to provide social reintegration, physical and psychological recovery assistance to the victims. It is submitted here that this subject matter must be incorporated into the state parties' legal framework to warrant its implementation.

**Table 2.3: The provisions that require the assistance be afforded to the child victim**

No	Name of instrument		Provision
1.	OPSC	Article 9	<ul style="list-style-type: none"> <li>States Parties shall take all feasible measures to ensure appropriate assistance is given to the victims of such offences, including their full social reintegration and their full physical and psychological recovery</li> </ul>
2.	ILO Convention No.182	Article 7	<ul style="list-style-type: none"> <li>State parties shall take effective and <b>time-bound</b> measures to provide:</li> </ul>

<sup>2-217</sup> Kendra Nixon *et al*, 'The Everyday Occurrence Violence in the Lives of Girls Exploited Through Prostitution', (September 2002) Violence Against Women, Vol. 8 No. 9, 1016-1043.

<sup>2-218</sup> Hyunjung Choi *et al*, "Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse", (August 2009) Violence Against Women Volume 15 Number 8

<sup>2-219</sup> Jini L. Roby, 'Women and children in the global sex trade - Toward more effective policy', International Social Work 48(2): 136-147



No	Name of instrument		Provision
			<ul style="list-style-type: none"> <li>✚ the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour</li> <li>✚ appropriate rehabilitation and social integration</li> <li>✚ ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour</li> </ul>
5.	UN TIP Protocol	Article 6	<ul style="list-style-type: none"> <li>• State Party shall consider implementing measures to provide for <ul style="list-style-type: none"> <li>✚ the physical, psychological and social recovery of victims of trafficking in persons, in particular, the following provision: <ul style="list-style-type: none"> <li>(a) appropriate housing;</li> <li>(b) counselling and information, especially on their legal rights;</li> <li>(c) medical, psychological and material assistance; and</li> <li>(d) employment, educational and training opportunities.</li> </ul> </li> </ul> </li> <li>• In implementing the above, the age, gender and special needs of the children must be taken into account particularly on the care and education aspects.</li> </ul>
6.	ASEAN Declaration	Article 5	<ul style="list-style-type: none"> <li>• The state parties shall ensure that such victims are treated humanely and provided</li> </ul>

No	Name of instrument		Provision
			with such essential medical and other forms of assistance

*(c) Provide access to adequate procedures to seek compensation for damages from those legally responsible*

The third aspect that are required to be incorporated in the legal framework is the victim's access to adequate procedures to seek compensation for damages from those legally responsible. This is highlighted in the following provisions:

**Table 2.4: The provisions that require the victims shall be afforded the access to seek compensation**

No	Name of instrument		Provision
1.	OPSC	Article 9	<ul style="list-style-type: none"> <li>State parties shall ensure that all child victims of the offences have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.</li> </ul>
5.	UN TIP Protocol	Article 6	<ul style="list-style-type: none"> <li>State parties shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.</li> </ul>

## **2.5 THE BENCHMARKS AND THE MINIMUM STANDARDS OF PROTECTION**

From the above analysis in part 2.3 and 2.4, it is recognised that inaugurating a clear legal framework is one of the significant actions ought to be taken by the State Parties in providing and assuring a comprehensive protection for children against sexual exploitation. Thus, in ensuring that the domestic laws conforms to the international standards, the following criteria shall be observed:

- (a) The definition of CSE, including child prostitution, child pornography must be clearly demarcated in the legislation;
- (b) All acts that fall directly or are related to CSE must be outlawed;
- (c) Act(s) leading to the perpetration of CSE such as trafficking, enticing, procuring, transporting and others shall also be considered illegal;
- (d) The law shall address the issue on the transnational commission of the crime by establishing jurisdiction if :
  - (i) The crime is committed within its territory or on board a ship or aircraft registered in that State;
  - (ii) The alleged offender is a national of that State or a person who has his habitual residence in that State; and
  - (iii) The victim is a national of that State.
- (e) A clear modus of rescue of the children who are involved or prone to be involved in sexual exploitation must be provided;
- (f) The provision on the rights of the child victim to undergo rehabilitation and support programme must be incorporated in the legal framework; and
- (g) The access for the child victim to compensation must be expressly provided.

To ensure the effective implementation and compliance to this international standards, statutes, regulations and administrative protocols must be in place.

## **2.6 CHILDREN IN NEED OF PROTECTION AND REHABILITATION IN MALAYSIA**

As stated in Chapter 1, “children in need of protection and rehabilitation” is a special category under Part VI of the Malaysian Child Act 2001.<sup>220</sup> According to section 38 of the said Act, the following children are deemed under the law to be in need of protection and rehabilitation if they:

- (i) are being induced to perform sexual act;
- (ii) are in physical or social environment that may lead to the performance of sexual act;
- (iii) live in brothels or place of assignation;
- (iv) frequent brothels; or
- (v) are habitually in company or control of persons interested with prostitution.

In addition, the law gives special attention to children who are reasonably believed to be threatened, intimidated, or detained for the purpose of performing sexual act by categorising them as “children in urgent need of protection and rehabilitation” under section 41 of the Act. The Act distinguishes these children from those mentioned in section 38 in terms of the rescue procedures. The children defined in section 41 may be admitted to the place of refuge promptly without having to resort to the procedures enumerated in sections 39 and 40 of the Act.<sup>221</sup>

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<sup>2-220</sup> Act 611

<sup>2-221</sup> The details of this rescue procedures will be explained further in Chapter 4 (Part 4.6–Rescue and Support Procedures)

From the above analysis, it is argued that Part VI of the Child Act 2001 is the main governing Malaysian law in protecting the rights of the children against sexual exploitation. It manifests Malaysia's commitment in fulfilling her obligation under Article 34 of the UNCRC. Part VI of the Child Act not only provides the punitive provisions on offences relating to child sexual exploitation, but more importantly, details the procedures of rescue and rehabilitation.

Interestingly, children who are pregnant out of wedlock are also deemed to be protected within the same heading. Pregnancy out of wedlock is a serious moral issue in Malaysia resulting in these girls being discriminated and potentially ousted by their own family and the society. Due to these circumstances, the law allocate special protection in terms of providing temporary shelter. Furthermore, by taking the protective rather than the punitive approach, the incident of young unwed mothers abandoning their babies may be prevented.<sup>222</sup> Malaysia has a worrying figure of abandoned babies in the last 10 years.<sup>223</sup>

It is important to note that Part IV of the Child Act 2001 is not in fact the first and the only legislation in Malaysia that addresses child sexual exploitation. The laws are in essence derived from the previously repealed Women and Girls Protection Act 1973<sup>224</sup> which inherited many provisions administered by the British Malaya government in Malaysia's predecessor states. It is gratifying to note that significant amendments were recently made by the Child Amendment Act 2016 that came into force on 1 June 2017.

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<sup>2-222</sup> This point was presented by the Minister during the Parliamentary Debate on the Child Bill 1999 dated on 20 October 1999. See Hansard Malaysia, DR-20101999, available at < <http://www.parlimen.gov.my/files/hindex/pdf/DR-20101999.pdf#page=104&zoom=70&search=Akta Kanak-kanak> > accessed on 10 July 2017, at page 20

<sup>2-223</sup> 911 babies have been abandoned since 2010 to August 2018, however the statistics did not reveal whether the babies were from teenagers. In addition, 79,302 cases of child pregnancies were recorded between 2012 and 2016. See '911 babies dumped since 2010', *The Star* (23 October 2018), available at < <https://www.thestar.com.my/news/nation/2018/10/23/911-babies-dumped-since-2010-nearly-a-third-of-the-abandoned-infants-have-died-says-deputy-minister/> > accessed on 24 October 2018.

<sup>2-224</sup> Act 106

In addition, the Child Act 2001 is further supported by various other legislation such as the Penal Code<sup>225</sup>, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007<sup>226</sup> and the Sexual Offences against Children Act 2017<sup>227</sup> which establish a comprehensive legal framework in protecting the children against all forms of sexual exploitation in Malaysia.

## 2.7 CONCLUSION

The abuse of children for sexual purposes is not a new phenomenon. As this chapter has canvassed, the practice could be traced since the period of ancient Greek and Rome. The abuse of children for sexual purposes, especially prostitution, subsequently became an auspicious venture as there were high demand. This leads to another serious issue of child trafficking.<sup>228</sup> Hence in the early days, there was enactment of law domestically in certain jurisdiction such as Napoleon Code and England to control these activities.<sup>229</sup> Furthermore, with the advance of modern technology, these promiscuous activities expanded, with the sexual acts being depicted and recorded, and subsequently processed and transmitted online. Both pornography and prostitution have unfortunately expanded to become transnational crime.

In this chapter, it has been shown that the issue of child sexual exploitation has received international attention since the 1880s with the commencement of the First International Congress on the White Slave Trade hosted in 1899. By the subsequent adoption of the UNCRC in 1989, it is universally accepted that all children have rights to

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<sup>2-225</sup> Act 574

<sup>2-226</sup> Act 670

<sup>2-227</sup> Act 792

<sup>2-228</sup> See note 2-35 and 2-36

<sup>2-229</sup> See note 2-23

be protected against all forms of sexual exploitation and abuse. The state parties undertake to take feasible measures to effectuate the provisions of the Convention. Despite the terms sexual exploitation and abuse being used in Article 34, it places greater prominence over the “exploitive” (which connotes the element of benefit to be enjoyed either by the child himself or other third parties) use of children for sexual activities, rather than CSA such as child rape or molest which are covered under Article 19 of the UNCRC.<sup>230</sup>

It is also learnt that the provision of the UNCRC is further supported with various international instruments. These instruments, among others, have set the requirements for the State Parties to adhere to in establishing an expedient legal framework. The benchmarks that has been outlined in Part 2.5 shall be referred to in Chapter 4 of this thesis in determining whether the Malaysian law conforms to the international standards.

Apart from that, it has been presented that within the Malaysian context, children who are or susceptible to be sexually exploited is categorized as children in need of protection and rehabilitation under Part VI of the Child Act 2001. As argued in Part 2.5, the enforcement of the provision is the materialisation of Malaysia’s commitment in fulfilling the obligation under Article 34 of the UNCRC. Interestingly, many provisions in Part VI of the Child Act 2001 originated from the laws introduced by the British in the 1880s. Hence in the next chapter, the historical development of these laws will be explored and scrutinized for better understanding and appreciation of the law in local context.

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<sup>2-230</sup> Points argued in Part 2.3.1(b) and Part 2.3.2 of this Chapter.

## CHAPTER 3

# THE DEVELOPMENT OF THE LAWS IN RELATION TO THE PROTECTION OF WOMEN AND GIRLS EXPOSED TO MORAL HARM IN MALAYSIA

### 3.1 INTRODUCTION

The existing Malaysian laws on the protection of children against sexual exploitation originate from the laws introduced by the British in the 1870's. It is however important to note that the laws introduced then aimed to protect women and girls against moral harm, rather than to address child sexual exploitation exclusively.

Within the Malaysian context, sex related issues are commonly regarded as sensitive and even deemed to be taboo as the society possess a strong embrace toward eastern cultures and religious values.<sup>231</sup> Matters like extramarital pregnancies<sup>232</sup> and prostitutions<sup>233</sup> are abhorred and considered against morality in Malaysia. According to the dominant prevailing discourses, sex is to be enjoyed only within heteronormative institutions of the family by marriage.<sup>234</sup> Sex outside this margin is morally harmful,

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<sup>3-231</sup> Li Ping Wong, 'Qualitative Inquiry into Premarital Sexual Behaviours and Contraceptive Use among Multiethnic Young Women: Implications for Education and Future Research' (2012), PLoS ONE 7(12): e51745. doi:10.1371/journal.pone.0051745, available at <[http://umexpert.um.edu.my/file/publication/00007704\\_85634.pdf](http://umexpert.um.edu.my/file/publication/00007704_85634.pdf)> , accessed on 15 March 2015 ; see also Cecilia Ng, Maznah Mohamad and Tan Beng Hui, 'Querying the forbidden discourse - Sexuality, power and dominance in Malaysia', in *Feminism and the Women's Movement in Malaysia: An Unsung (R)Evolution*, (Milton Park, Abingdon, Oxon: Routledge, 2006) , at page 133-134

<sup>3-232</sup> Zurairi AR, 'Malaysia among world's most morally conservative countries, poll finds', published on Malaymail Online on 18 April 2014, available at: <<http://www.themalaymailonline.com/malaysia/article/malaysia-among-worlds-most-morally-conservative-countries-poll-finds>> accessed on 15 March 2015

<sup>3-233</sup> Skymala Nagaraj and Siti Rohani Yahya, 'Prostitution in Malaysia' in Lin Leam Lim (Ed), *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia*, (International Labour Organization, Geneva 1998), at page 90

<sup>3-234</sup> Erin O'Brien, Belinda J Carpenter, & Sharon L Hayes, 'Sex trafficking and moral harm : politicised understandings and depictions of the trafficked experience', (2013) Critical Criminology 21 (4), 401-415, available at :<<http://eprints.qut.edu.au/59292/7/59292.pdf>> accessed on 15 March 2015



especially in the case of prostitution, which is generally viewed as a deviant negative conduct<sup>235</sup> and demands legal control.<sup>236</sup>

The laws initially endeavoured to combat contagious diseases, whilst prostitution was only regulated since it was regarded as a ‘necessary evil’ due to the incongruence of the gender ratio in the Malay Peninsula.<sup>237</sup> Subsequently, the laws have developed to address the serious issues of children and women trafficking and sexual exploitation. Hence, this chapter seeks to explore the development of these laws in two phases, namely; the pre-independence era and post-independence era.

### 3.2 PRE-INDEPENDENCE LAW ON WOMEN AND GIRLS PROTECTION

With the attainment of Penang Island in 1786, Britain has established its colonial appearance in the Malay Peninsula. Later in 1824, the British acquired the sovereignty over Singapore, which was then part of Johor, as well as the sovereignty of Malacca from the Dutch. These three territories were combined to form the Colony of Straits Settlements, from where the British extended their power by establishing protectorates over the Malay Sultanates of the Malay peninsula.<sup>238</sup> As a result, significant progress was made in establishing law and order, including the laws related to sex among women and girls.<sup>239</sup>

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<sup>3-235</sup> As per Ramly Haji Ali, J, in the case of *Jupiters Limited (Trading as Conrad International Treasury Casino) v Lim Kin Tong* [2005] MLJU 534 – “It is recognized that gambling and prostitution are two twin vices that we should avoid and therefore, it cannot be good social behavior to indulge in them”

<sup>3-236</sup> Skymala Nagaraj and Siti Rohani Yahya, *supra* note 3-3, at page 90

<sup>3-237</sup> Tan Beng Hui, ‘Protecting’ Women: Legislation and Regulation of Women’s Sexuality in Colonial Malaya, (2003), *Gender, Technology and Development* 7(1), no. 1, Mar. 2003, pp. 1–30; at page 6

<sup>3-238</sup> BBC News, *Malaysia profile - Timeline - BBC News*, (2015) [online] available at <<http://www.bbc.com/news/world-asia-pacific-15391762>> accessed on 8 May 2015.

<sup>3-239</sup> Rizal Yaakop, ‘The British Legacy and the Development of Politics in Malaya’ (2014) *Global Journal of Human-Social science, History Archaeology & Anthropology*, Volume 14 Issue 1 Version 1.0, at page 58

### 3.2.1 Prostitution and contagious diseases in Malay Peninsula in 1800's

Policing sexual activities became the concern of the government due to the rise of prostitution. Prostitution is said to prosper in the nineteenth century as the consequence to the great disproportion between sexes in the Malay Peninsula.<sup>240</sup> This prodigious gender imbalance among the immigrant populations, particularly the Chinese and Indians, was caused by the development of the colonial economy.<sup>241</sup> The male labourers were recruited from China and India to work in the tin mines, estates, and seaports.<sup>242</sup> In the Straits Settlements itself, approximately 2/3 of the population was male.<sup>243</sup> For instance, in Singapore, 58 per cent of the overall male population were 20 to 40 years old whom can be categorized as “the sexually most active age group”.<sup>244</sup>

As majority immigrants in British Malaya and Straits Settlements were young unmarried males,<sup>245</sup> who had no opportunity to get married due to difficult lifestyle and financial constraint,<sup>246</sup> the prostitutes were highly in demand as the male immigrants “by nature in need of regular outlets for sex”.<sup>247</sup> This available pool of regulars led to the active recruitment of women and girls for the sex industry.<sup>248</sup> Many girls who were trafficked by the mine operators to work as prostitute in British Malaya<sup>249</sup> were initially

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<sup>3-240</sup> Cecilia Ng, Maznah Mohamad and Tan Beng Hui, *Feminism and the Women's Movement in Malaysia: An Unsung (R)Evolution*, (Milton Park, Abingdon, Oxon: Routledge, 2006) , at page 67-68

<sup>3-241</sup> Hiroshi Shimizu, ‘Karayuki-San And The Japanese Economic Advance Into British Malaya, 1870–1920’ (1997) *Asian Studies Review*, 20:3, 107-132, DOI: 10.1080/0314 7539708713130, at page 110-111

<sup>3-242</sup> Skymala Nagaraj and Siti Rohani Yahya, *supra* note 3-3, at page 68

<sup>3-243</sup> Lenore Manderson, ‘Colonial Desires: Sexuality, Race, and Gender in British Malaya’ (Jan., 1997) *Journal of the History of Sexuality*, Vol. 7, No. 3, pp. 372-388, at page 374

<sup>3-244</sup> Hiroshi Shimizu, *supra* note 3-11, at page 112.

<sup>3-245</sup> *ibid*

<sup>3-246</sup> Skymala Nagaraj and Siti Rohani Yahya, *supra* note 3-3, at page 69

<sup>3-247</sup> Lenore Manderson, *supra* note 3-13, at page 374.

<sup>3-248</sup> Skymala Nagaraj and Siti Rohani Yahya, *supra* note 3- 3, at page 69

<sup>3-249</sup> Tan Liok Ee, ‘Locating Chinese Women in Malaysia History’ in Abu Talib Ahmad (Ed), *New Terrains in Southeast Asian History*, (Ohio University Press, Ohio 2003), at page 360

sold in China by their families due to poverty and extreme hunger.<sup>250</sup> The Official estimates (based on police estimates) claimed that by mid-1890's there were approximately five to 5,000 women working as prostitutes in the Colonies and marginally increased thereafter. There were about 1,005 licenced prostitutes in 1885 in Singapore<sup>251</sup> which comprised of 90% Chinese, and the rest were Europeans, Malays, Japanese, Thai and Indians.<sup>252</sup> Meanwhile, in Perak, the Chinese Protectorate identified 1,038 prostitutes in 92 brothels by the end of 1894.<sup>253</sup> Also, it was recorded that there were 852 Japanese prostitutes and 113 were brothel keepers in the Straits Settlements in 1906.<sup>254</sup>

### 3.2.2 Contagious Diseases Ordinance 1870 [Ordinance No. XXIII of 1870]

The first written law introduced in relation to women and girls in British Malaya was the Contagious Diseases Ordinance 1870<sup>255</sup> (hereinafter referred to as “the CDO 1870”) in the Straits Settlements. This was the direct impact of the development of laws in England, where Contagious Diseases Act was enforced in 1864 to curb the spread of contagious diseases among the British army stationed at the seaport towns.<sup>256</sup> It started from the prevalent of syphilis at the Aldershot military camp in England, which was frequented by prostitutes.<sup>257</sup> As there was increasing number of men being infected, it became the concern of the government that the army would then unable to perform their

<sup>3-250</sup> Linda Bryder, ‘Sex, Race, and Colonialism: An Historiographical Review’ (Dec., 1998) *The International History Review*, Vol. 20, No. 4, pp. 806-822, at page 811

<sup>3-251</sup> Hiroshi Shimizu, *supra* note 3-11, at page 112

<sup>3-252</sup> *ibid* ; see also Skymala Nagaraj and Siti Rohani Yahya, *supra* note 3-3, at page 69

<sup>3-253</sup> Lenore Manderson, *supra* note 3-13, at page 375

<sup>3-254</sup> Hiroshi Shimizu, *supra* note 3-11, at page 107

<sup>3-255</sup> Ordinance No. XXIII of 1870

<sup>3-256</sup> Linda Bryder, *supra* note 3-20, pp. 806-822 at page 815

<sup>3-257</sup> *Report From the Select Committee on Contagious Diseases Act. 1866* (page 10) as been referred to by Katria Hiersche , ‘Prostitution and the Contagious Diseases Acts in 19th Century British Colonies’, Western Oregon University History Department, (2014), Paper 31, at page 1, available at <<http://digitalcommons.wou.edu/his/31>> accessed on 13 March 2015

military duties- protecting the civilians and enforcing British law.<sup>258</sup> This epidemic left no choice to the British government, but to enforce a law that authorized “the state authorities to identify, inspect, and detain, if necessary, any prostitute suspected of suffering from venereal disease and threatening to pass that disease on to the soldiers, sailors, and citizens of certain specified English and Irish cities”.<sup>259</sup> It also allows the Act to be applied in other states of British Colonies with modification to suit the specific needs and standards of that British Colonies.<sup>260</sup>

Similarly, in the Eastern Colonies, the rise and augmentation of prostitution as previously discussed had alarmed the British Colony Government in Malaya and the Straits Settlements. However, in the Straits Settlements, the CDO 1870 was introduced to regulate all prostitution activities with greater emphasis on the Chinese.<sup>261</sup> The actuality of prostitution among the Chinese was said to be inevitable because, apart from the gender disproportionality, the men were alleged to possess ‘loose morals’ and were untaught to restrain their desires.<sup>262</sup> Being young and away from home for the first time had caused them to seek sex services after landed in Malaya as a response to their newfound freedom.<sup>263</sup> Besides that, the authorities preferred the elongation of prostitution in order to suppress the male homosexual activities among the Chinese labours as evidenced in the recorded cases of sodomy in cooly *bangsals*.<sup>264</sup>

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<sup>3-258</sup> Katria Hiersche, ‘Prostitution and the Contagious Diseases Acts in 19th Century British Colonies’, Western Oregon University History Department, (2014), Paper 31, at page 7, available at <<http://digitalcommons.wou.edu/his/31>> accessed on 13 March 2015

<sup>3-259</sup> Philip Howell, ‘Prostitution And Racialised Sexuality: The Regulation Of Prostitution In Britain And The British Empire Before The Contagious Diseases Acts’ (2000) *Environment and Planning D: Society and Space*, volume 18, pages 321 -339, at page 322.

<sup>3-260</sup> *Ibid*, at page 324-325

<sup>3-261</sup> Cecilia Ng, Maznah Mohamad and Tan Beng Hui, *supra* note 3-10, at page 138

<sup>3-262</sup> *ibid*; see also Tan Beng Hui, ‘Protecting’ Women: Legislation and Regulation of Women’s Sexuality in Colonial Malaya, Gender, Technology and Development 7(1), Sage Publication, (New Delhi / Thousand Oaks/ London, 2003), at page 10

<sup>3-263</sup> Cecilia Ng, Maznah Mohamad and Tan Beng Hui, *supra* note 3-10, at page 138

<sup>3-264</sup> *Ibid*; see also Tan Beng Hui, ‘Protecting’ Women: Legislation and Regulation of Women’s Sexuality in Colonial Malaya, Gender, Technology and Development 7(1), Sage Publication, (New Delhi / Thousand Oaks/ London, 2003) at page 11-12

The CDO 1870 came into operation on the whole island of Singapore on 1<sup>st</sup> November 1872<sup>265</sup>. The CDO 1870 inaugurated a system to ghettoise infected prostitutes, to regulate prostitution activities and to curtail the spread of venereal disease.<sup>266</sup> The CDO 1870 was later fully enforced in other parts of the Straits Settlements by 1874; in the Island of Penang on 20<sup>th</sup> December 1872<sup>267</sup>, in the Municipal three miles radius of Malacca on 70<sup>th</sup> January 1873<sup>268</sup>, and in the Province of Wellesley (Seberang Perai) on 15<sup>th</sup> July 1874.<sup>269</sup>

Under the CDO 1870, the brothels were required to be registered and licensed.<sup>270</sup> It was also mandatory for the prostitutes to be registered in a designated list or she shall not be allowed to be at the brothel.<sup>271</sup> The brothel keeper has the responsibility to inform the visiting Surgeon and shall not allow the inmate to prostitute herself if the brothel keeper has a reasonable cause to believe that the said inmate has been infected by venereal disease.<sup>272</sup> At this time, the CDO 1870 permitted compulsory inspection of prostitutes by the Registering Officer.<sup>273</sup> If a prostitute is found to be suffering from gonorrhoea or syphilis, she could be taken into custody without warrant and be detained in the hospital<sup>274</sup> and treatment expenses incurred would be held as a debt of the brothel keeper due to the Crown.<sup>275</sup>

<sup>3-265</sup> Orders In Council In Government Gazettes of August 16, 1872 at page 409 and October 11, 1872 at page 707

<sup>3-266</sup> James Francis Warren, Prostitution and the Politics of Venereal Disease: Singapore 1970-98, (Sep 1990) *Journal of Southeast Asian Studies*, Vol.21, No.2, pp 360-83, at page 362

<sup>3-267</sup> Orders In Council In Government Gazettes of November 15, 1872, at page 973

<sup>3-268</sup> *ibid*, at page 974

<sup>3-269</sup> Orders In Council In Government Gazettes of July 11, 1872 at page 342

<sup>3-270</sup> Section 1, CDO (Ordinance No. XXIII of 1870)

<sup>3-271</sup> Section 4 & 5, CDO (Ordinance No. XXIII of 1870)

<sup>3-272</sup> Section 6, CDO (Ordinance No. XXIII of 1870)

<sup>3-273</sup> Section 8, CDO (Ordinance No. XXIII of 1870)

<sup>3-274</sup> Section 15, 16 & 17, CDO (Ordinance No. XXIII of 1870)

<sup>3-275</sup> Section 18, CDO (Ordinance No. XXIII of 1870)

Further, under Section 7 of the CDO 1870, if it has been proven that a person is infected with contagious disease in a brothel, the keeper may be punished up to \$50, while the inmate who caused such infections may be punished with a fine of not exceeding \$50 or imprisonment with or without hard labour for any period not exceeding three months or both. Likewise, any person who has infected the prostitutes in the brothel with the contagious disease may be held liable to the same punishment of the aforementioned infecting inmate.

Despite the laws implemented to control the contagious diseases, the CDO 1870 failed to regulate prostitution and control contagious diseases in Singapore efficaciously. The closing of the brothels and the absconding of the prostitutes were among the impediments in getting the prostitutes to attend the checkups.<sup>276</sup> Besides that, swapping an infected prostitute with a healthy one during examination, impersonation and frequent change of names and addresses were the strategies used to evade medical surveillance.<sup>277</sup>

In addressing the issue, the Chinese Protectorate established in the Straits Settlements in 1877<sup>278</sup> collaborated with the Registrar Department. The registration system was upgraded by photographing the prostitutes.<sup>279</sup> The prostitutes were also equipped with a ticket in Chinese Language to make them aware that they may apply to the Registrar or Colonial Surgeon to leave the brothel should they be ill-treated or wish to leave.<sup>280</sup>

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<sup>3-276</sup> James Francis Warren, *supra* note 3-36, at page 363-364

<sup>3-277</sup> *ibid*; at page 364

<sup>3-278</sup> The Protectorate was established with the function to administer the needs of the Chinese community in the British colonial territory – see The Chinese Protectorate, Singapore Infopedia, available at <[http://eresources.nlb.gov.sg/infopedia/articles/SIP\\_1346\\_2008-12-10.html](http://eresources.nlb.gov.sg/infopedia/articles/SIP_1346_2008-12-10.html)> accessed on 25 March 2015

<sup>3-279</sup> James Francis Warren, *supra* note 3-36 at page 365

<sup>3-280</sup> *ibid*

Subsequently in 1886, the English Contagious Disease Act was abolished. It was argued that the Contagious Diseases Acts was not to afford better health for women prostitutes, but rather exclusively made to protect the white men of the colonies from the consequences of venereal diseases.<sup>281</sup> It was also campaigned by several groups that the Act was promoting “sinning safe”<sup>282</sup> and endorsing immorality.<sup>283</sup> The Act was also condemned for discriminating women, where the law only punishes one gender, i.e the infected women, for something that was the consequence of two people having sexual relations<sup>284</sup>, besides being treated as criminals.<sup>285</sup>

Following the abolishment of the Contagious Disease Act in England, the Straits Settlements government was pressured by the British government to follow the suit notwithstanding the fact that officials in the Strait Settlements counter-argued that the CDO 1870 were still germane in the Colonies<sup>286</sup>. However the CDO 1870 of the Straits Settlement was later repealed in 1888.<sup>287</sup>

On 31 December 1887, under the instruction of the State Secretary, Singapore authority waived the registration fee and the compulsory medical examination requirement with the view to provide a free medical service to the unfortunate women

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<sup>3-281</sup> Katria Hiersche, *supra* note 3-28, at page 2-3

<sup>3-282</sup> James Francis Warren, *supra* note 3-36 at page 367

<sup>3-283</sup> Tan Beng Hui, ‘Protecting’ Women: Legislation and Regulation of Women’s Sexuality in Colonial Malaya, Gender, Technology and Development 7(1), Sage Publication, (New Delhi / Thousand Oaks/ London, 2003) at page 4

<sup>3-284</sup> Katria Hiersche *supra* note 3-28, at page 5

<sup>3-285</sup> James Francis Warren, *supra* note 3-36 at page 367

<sup>3-286</sup> Ooi Keat Gin, ‘Profiting from prostitution’, published on Malaysia History, available at < [http://www.malaysiahistory.net/index.php?option=com\\_content&view=article&id=92:profiting-from-prostitution&catid=40:women](http://www.malaysiahistory.net/index.php?option=com_content&view=article&id=92:profiting-from-prostitution&catid=40:women)>, accessed on 1 April 2015; see also James Francis Warren, *supra* note 3-36 at page 367

<sup>3-287</sup> *ibid*

who have been infected.<sup>288</sup> Nevertheless, it was a total failure, which results the intensified spread of venereal diseases.<sup>289</sup>

### **3.2.3 Prevention of Illegal Traffic of women and girls for the purpose of prostitution by the Chinese Protectorate**

Whilst the CDO was focusing on regulating prostitution activities to control the spread of contagious diseases, the Chinese Protectorate in Singapore, William Pickering, was of the opinion that the CDO should be amended to grant the Protectorate further powers to combat illegal trafficking of women and girls.<sup>290</sup> The Protectorate's objective was to disrupt the connexion between illegal traffic, brothel prostitution and secret societies.<sup>291</sup> This was because 80 percent of the young Chinese girls, who arrived in Singapore, have been forced into prostitution after being sold by family in China or kidnapped by the traffickers.<sup>292</sup> Pickering was adamant that should the power was not granted *via* the CDO, his office would continue "protecting women and children by [their] wits".<sup>293</sup>

One of the earliest steps conducted was the entry-point inspections of vessels that transported women entering the Colony.<sup>294</sup> As combating women and girls trafficking would inexorably involve international coordination, a collaboration was established between the Protectorate, the Chinese Government, the Hong Kong Administration and Protectorate, and the foreign shipping companies in Chinese Treaty Ports. Thorough

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<sup>3-288</sup> James Francis Warren, *supra* note 3-36, at page 370-371

<sup>3-289</sup> Tan Beng Hui, *supra* note 3-53, at page 8

<sup>3-290</sup> James Francis Warren, *supra* note 3-36, at page 366

<sup>3-291</sup> James Francis Warren, *Ah Ku and Karayuki-San: Prostitution in Singapore, 1870-1940*, (NUS Press, Singapore, 2003), at page 91

<sup>3-292</sup> Tan Liok Ee, *supra* note 3-19, at page 361; see also Tan Beng Hui, *supra* note 3-53, at page 15

<sup>3-293</sup> *ibid*

<sup>3-294</sup> Tan Beng Hui, *supra* note 3-53, at page 19



interrogation and temporary detention of the potential victims were held at the departure and arrival points.<sup>295</sup>

A system was later introduced between 1882 and 1887 whereby every woman and girls would be brought before the Protectorate on arrival. They will be questioned about their passage from China and that statement would later be compared to those forwarded by the Hong Kong Protectorate. The guardian and the women were required to visit the Protectorate periodically as evidence that they would not be sold and involve in any prostitution activities. A security was also imposed for the women's welfare.<sup>296</sup>

The Penal Code was amended too in 1882 to protect women of any age who were forced or seduced to involve in prostitution or "illicit intercourse".<sup>297</sup> The Chinese Protectorate in Singapore would also reject the entrance of any woman under 20 years old who came to the territory to serve as prostitutes.<sup>298</sup>

#### **3.2.4 Po Leung Kuk Homes**

The establishment of Po Leung Kuk Homes was part of the measures taken by the Chinese Protectorate to shelter women and girls victims. It was first founded in Hong Kong upon the success of the Hong Kong Chinese Petition to set up a refuge for victims of trafficking and forced prostitution. This followed by the establishment of similar

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<sup>3-295</sup> James Francis Warren, *supra* note 3-61, at page 92

<sup>3-296</sup> James Francis Warren, *supra* note 3-61, at page 92

<sup>3-297</sup> Skymala Nagaraj and Siti Rohani Yahya, *supra* note 3-3, at page 70; see also James Francis Warren *supra* note 3-61, at page 93

<sup>3-298</sup> *ibid*

institutions in colonies with high concentrations of Chinese people such as Singapore (1888), Penang (1889), Kuala Lumpur (1895), and Perak (1900).<sup>299</sup>

In Singapore, the Protectorate established Po Leung Kok Homes, with the support of prominent Chinese members of the community,<sup>300</sup> to protect the suspected victims of forced prostitution as well as the prostitutes who had fled from brothels. It was later opened out as a home for the unwanted, ill-treated or indigent girls.<sup>301</sup> In the case of abduction, the victim will be detained temporarily at the Home and would be sent back to their relatives in China thereafter at the expense of the government.<sup>302</sup>

### 3.2.5 Women and Girls Protection Ordinance 1888-1896

The heretofore discussed administrative practices of the Chinese Protectorate in protecting women and girls were later legislated in the Women and Girls Protection Ordinance 1888 (hereinafter referred to as “the WGPO 1888”). The Chinese Protectorates of the Straits Settlements were officially conferred with the powers to “protect” women and girls.<sup>303</sup> Even though the registration of brothels and inmates was not required under the WGPO 1888, the registration system was sustained and transferred to the office of the Protector. However, the Protector has no authority to compel licenced prostitutes to undergo regular medical examinations.<sup>304</sup>

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<sup>3-299</sup> Joanna Tan, ‘Singapore Poh Leung Kuk’, published on Singaporeinfopedia, Singapore Government, available at < [http://eresources.nlb.gov.sg/infopedia/articles/SIP\\_1175\\_2010-03-31.html](http://eresources.nlb.gov.sg/infopedia/articles/SIP_1175_2010-03-31.html)> accessed on 15 April 2015

<sup>3-300</sup> Peter Hodge, *Community Problems and Social Work in Southeast Asia – The Hong Kong and Singapore Experience*, (Hong Kong University Press, 1980), at page 13

<sup>3-301</sup> Tan Beng Hui, *supra* note 3-53, at page 20

<sup>3-302</sup> Peter Hodge, *supra* note 3-70, at page 13

<sup>3-303</sup> “Protector” in the Ordinance was defined in section 3 as “*Officer for the time being performing the duties of Protector of Chinese Immigrants, and includes the Officer performing the duties of Assistant Protector of Chinese Immigrants at any Settlement*”; see also Tan Beng Hui, *supra* note 3-53, at page 19

<sup>3-304</sup> James Francis Warren, *Ah Ku and Karayuki-San: Prostitution in Singapore, 1870-1940*, (NUS Press, 2003), at page 112

The WGPO 1888 underwent a series of amendments (1890, 1891, 1894 and 1896)<sup>305</sup> as the result of, as the colonial office declared, “extreme cleverness of the Chinese procurers, who have for years past succeeded in dodging the Ordinance for the Protection of Women and Girls both in Hong Kong and the Straits, necessitate an amendment of law every two or three years in order to frustrate their knavish tricks”.<sup>306</sup>

The WGPO 1896<sup>307</sup> stipulated various offences against women and girls, vary according to its nature and the age of the woman or girls whom the offence was inflicted to. The age of the victim became immaterial if the offence involved any kind of selling and buying of any woman or girls for the purpose of prostitution.<sup>308</sup> Similarly, it was an offence to detain any woman or girl at any place for the purpose of prostitution or any unlawful and immoral purpose.<sup>309</sup> On the other hand, any kind of procuring, importing, or harbouring of woman and girls, was an offence if it involved:

- a) Girls under 16 years old, regardless whether or not they were served as a prostitute or of known immoral character; or
- b) Any woman above 16 years old not being a common prostitute or of known immoral character<sup>310</sup>.

In addition, trafficking any girl under age of 10 into the Colony was also made an offence punishable with a maximum imprisonment of 6 months or a fine not exceeding \$200.<sup>311</sup>

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<sup>3-305</sup> These repealed Ordinances listed in the First Schedule of Women and Girls Protection Ordinance 1896

<sup>3-306</sup> Eric Tagliacozzo, *Secret Trades, Porous Borders – Smuggling and States Along a Southeast Asian Frontier 1865-1915*, (NUS Press, Singapore, 2007) at page 234 –citing CO 273/249, CO Jacket, Mr Cox, 16 Nov 1899

<sup>3-307</sup> Ordinance No. XVII of 1896

<sup>3-308</sup> Section 4(i), WGPO 1896 (Ordinance No. XVII of 1896) ; originally in 1888 Ordinance, only selling and buying of girl under 16 years old was an offence; see Tan Beng Hui *supra* note 3-53, at page 5; also in James Francis Warren, *supra* note 3-36, at page 370

<sup>3-309</sup> Section 4(iv) WGPO 1896 (Ordinance No. XVII of 1896)

<sup>3-310</sup> Section 4(ii)(iii)(iv) WGPO 1896 (Ordinance No. XVII of 1896)

<sup>3-311</sup> Section 5 WGPO 1896 (Ordinance No. XVII of 1896)

In terms of protection, if a Protector suspected that a woman or a girl being brought after having purchased or fraud, misrepresentation for immoral purpose, or emigration; or she has been purchased in the Colony in view of being trained as prostitute or been detained against will for immoral or emigration purposes; or she is unable or unwilling to disclose the true circumstances due to fear, ignorance or any other cause – the Protector may require the custodian or the person who has controls over the victim to provide a security in a reasonable amount, and the undertaking that the woman or girl shall:

- i. not leave the Settlement without the consent in writing from the Protector;
- ii. not to be trained or disposed as prostitute or for immoral purposes; and
- iii. be produced before the Protectorate as per his requirement.<sup>312</sup>

Furthermore, if the Protector is satisfied that a girl under 16 years old has been used or trained for immoral purposes, he may order her to be taken to the place of safety until the next order is issued, or until she reaches 19 years old or marries, whichever first occurs.<sup>313</sup> The Protector was also vested with the power to search any ship house, building or places where he has a reasonable cause to suspect that above instances may have occurred.<sup>314</sup>

There is no provision envisaged in the WGPO 1896 to prevent women from being prostitute out of own- will except for girls under the age of 16. The operation of brothels remained legal at this stage as the prostitution was regarded as “necessary evil” caused by the imbalanced sex ratio.<sup>315</sup> However, the WGPO 1896 allows a complaint of 3 or more householders for the annoyance of vicinity if any house in their immediate neighbourhood is used for prostitution lodging. The Magistrate may order the

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<sup>3-312</sup> Section 7 WGPO 1896 (Ordinance No. XVII of 1896)

<sup>3-313</sup> Section 8 WGPO 1896 (Ordinance No. XVII of 1896)

<sup>3-314</sup> Section 12 WGPO 1896 (Ordinance No. XVII of 1896)

<sup>3-315</sup> Tan Beng Hui, *supra* note 3-53, at page 6

discontinuation of such usage upon satisfied that the activity is indeed a source of annoyance.<sup>316</sup>

It is significant to note that the aim to combat women and girls traffic during this phase was unsatisfactorily achieved and faced several obstacles. There was a reported case that 2 Hainanese women had passed Hong Kong and Singapore custom without being discovered and were found in Johor.<sup>317</sup> Another case took place in 1898, where an Acehnese brothel keeper who bought girls age between 9 and 15 was found in a place known to be used for prostitution, nonetheless the case was dismissed on ground of technicalities.<sup>318</sup>

The women and girls were coached on how to respond to Protectorate questions. The tutoring took place on the boat and the victims were made to swear she should not divulge to authorities about herself. The victims were also threatened with “accidental death or murder at the hands of secret society”.<sup>319</sup>

The system was also abused by the Officials themselves for being sleazy at the port<sup>320</sup> and directly involved in smuggling women and girls.<sup>321</sup> There were also instances whereby the Protector Officers acting extra judiciously and free to decide whether the girl really leading to “immoral life”<sup>322</sup> for the purpose of protection under the WGPO.

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<sup>3-316</sup> Section 17 WGPO 1896 (Ordinance No. XVII of 1896)

<sup>3-317</sup> Eric Tagliacozzo, *supra* note 3-76, at page 233

<sup>3-318</sup> *ibid*

<sup>3-319</sup> James Francis Warren, *supra* note 3-74, at page 92-93

<sup>3-320</sup> James Francis Warren, *supra* note 3-74, at page 92

<sup>3-321</sup> Eric Tagliacozzo, at page *supra* note 3-76, 236

<sup>3-322</sup> Tan Beng Hui, *supra* note 3-53, at page 19- citing PLCSS 1896, P B301- whereby reported incident the Protector detained Japanese women against their will

### 3.2.6 Federated Malay States and State of North Borneo Legislations on women and girls protection

Prior to the Federation in December 1909, Perak, Selangor, Negeri Sembilan and Pahang had enacted respective state laws for the protection of women and girls through Order in Council. The laws passed were, among others, to regulate the management of brothels, the use of young prostitutes and controlling contagious diseases.<sup>323</sup> For instance, S.12 of Order No.1 of 1895 (Perak) sanctioned any girl under 16 years old whom being used or trained for immoral purposes may be detained in a place of safety until she attains the age of nineteen years old or marries, whichever first occurs.<sup>324</sup> In 1902, each state subsequently passed the Women and Girls Protection Enactment<sup>325</sup>.

Concurrently at the eastern Colony, the Women and Girls Protection Ordinance<sup>326</sup> was enforced in 1903 in the state of North Borneo, which was the British Protectorate since 1882.<sup>327</sup>

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<sup>3-323</sup> The Order in Council of the respective states were among others:-

**Perak** : Order No. 5 of 1887 (Contagious Diseases), Order No.2 of 1888 (Registration of Prostitute), Order 29 of 1889 (Removal of Prostitutes from Brothels), Order No.21 of 1893 (Registration of Brothels, Amendment), Order No. 1 of 1895 (Women and Girls' Protection), Order No. 3 of 1897 (Women and Girls' Protection, Amendment)

**Selangor** : Order No. XII of 1893 (Women and Girls' Protection), Order No. II 1895 (Women and Girls' Protection, Amendment)

**Negeri Sembilan** : Order September 21, 1893 (Protection of Women and Children)

<sup>3-324</sup> Cited in Abd Hadi Zakaria, *Protecting Girls: Official Measures Against Underaged Girls Rescued From Moral Danger*, Universiti of Malaya Press, (Kuala Lumpur, 1995) at page 50

<sup>3-325</sup> Perak Encatment No. 7 of 1902, Selangor Enactment No. 8 of 1902, Negeri Sembilan Enactment No. 9 of 1902, Pahang Enactment No. 5 of 1902

<sup>3-326</sup> Ordinance No 4 of 1903

<sup>3-327</sup> The British Empire: South East Asia- Malaya available at < <http://www.britishempire.co.uk/maproom/malaya.htm>> accessed on 15/5/2015

### 3.2.7 Women and Girls Protection Enactment / Ordinance 1914

In 1914, the Women and Girls Protection Enactment<sup>328</sup> (hereinafter referred to as “the WGPE 1914”) was enforced in the Federated Malay States repealing the former respective state laws on the protection of women and girls.<sup>329</sup> The provisions in WGPE 1914 were *mutatis mutandis* with the Straits Settlements’ Women and Girls Protection Ordinance 1914<sup>330</sup> (hereinafter referred to as “the WGPO 1914”).

Both the WGPE 1914 and the WGPO 1914 were aimed to enhance the protection of women and girls. The age of the victim, who is deemed to be protected notwithstanding whether knowingly a prostitute or of immoral character, of the offences of procuring, and harbouring of women and girls, was increased from 16 to 20 years old.<sup>331</sup> In addition, procuring<sup>332</sup> or of having the knowledge of that procuring<sup>333</sup>, any woman by threats or intimidation for having carnal connection, were made an offence regardless of the victim’s age.

The punishment for the offences against women and girls were also increased from one year to two years imprisonment<sup>334</sup>, and for certain offences<sup>335</sup>, the male offender may be whipped in addition to the terms of imprisonment imposed.<sup>336</sup>

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<sup>3-328</sup> Federated Malay States Enactment No. 2 of 1914

<sup>3-329</sup> The repealed state laws were enumerated in Schedule 1 of the FMS Women and Girls Protection Enactment 1914 – Perak Enactment No. 7 of 1902, Selangor Enactment No.8 of 1902, Negeri Sembilan Enactment No. 9 of 1902 and Pahang Enactment No. 5 of 1902

<sup>3-330</sup> Straits Settlement Ordinance No. 143 (Ordinance No. 24 of 1914)- is the new Ordinance repealing the previous WGPO of 1896 ; see Abd Hadi Zakaria, *supra* note 3-94, at page 50

<sup>3-331</sup> Section 3(b)&(e) of both WGPE 1914 and WGPO 1914

<sup>3-332</sup> Section 3(c) of both WGPE 1914 and WGPO 1914

<sup>3-333</sup> Section 3(f) of both WGPE 1914 and WGPO 1914

<sup>3-334</sup> Section 3 of both WGPE 1914 and WGPO 1914

<sup>3-335</sup> The offences are among others disposing, procuring, bringing into the Colonies by deceitful means of any women and girls for immoral purposes.

<sup>3-336</sup> Section 3(2) of both WGPE 1914 and WGPO 1914

A provision on contagious diseases was also included in the new legislations. A brothel keeper who permits any inmates who is suffering from any contagious diseases may be held liable to an offence punishable with one year imprisonment, fine of \$500 or both.<sup>337</sup>

In terms of protection, the WGPE 1914 has a special provision whereby the Protector may furnish any prostitute found in the brothel a Protection ticket in English and Chinese language.<sup>338</sup> It is the duty of the brothel keeper to ensure that the ticket is carefully well-kept and not destroyed by the inmates. However in the event of loss and destroy, the prostitute may apply a new ticket from the Protector.<sup>339</sup> The Protector also supplied all brothel keepers a notice which shall be placed in a visible position in the hall of the brothel that reads:

*“Women and girls! If any of you have been kidnapped, purchased, seduced, deceived, or pledged for money; or may have been forced to swear before entering the brothel that you will act as prostitutes for a certain term of years- understand clearly that anyone who has committed any of these offences against you, and is detaining you in a brothel against your wishes, is breaking the law and will, if detected, be punished. If therefore you have any grievance, do not be afraid to tell the Protector on his visit of inspection or come in person to this office or go to the police station and report the matter at any time you please. If you want to leave the brothel, and follow a protector, the Government will certainly let you do what you like and will not allow you to be detained against your will. All persons residing in the Federated Malay States are free agents and cannot be kept under the restraint of others. Be all of you then be watchful! Be not deceived by anyone! Observe this notice! [Office of Protector / date]”<sup>340</sup>*

Failure to place the notice is an offence punishable with fine not exceeding \$100 or 6 months imprisonment.<sup>341</sup>

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<sup>3-337</sup> Section 6 WGPO 1914, Section 8 WGPE 1914

<sup>3-338</sup> Section 5(i) WGPE 1914

<sup>3-339</sup> Section 5(ii) WGPE 1914

<sup>3-340</sup> Section 7 and schedule III of WGPE 1914

<sup>3-341</sup> *ibid*



The original grounds of women and girls to be placed in a place of safety in the WGPO 1896<sup>342</sup> were retained with further improvement. A new proviso was included which allows the removal of girl who is habitually in the company of prostitutes or brothel keeper or procurer or person employed living in brothels or person directly interested in the business carried in brothels.<sup>343</sup>

Further, a new provision was included to empower the Protector with the consent of the Government to detain in a place of safety of any woman and girl whom:

- i. her lawful guardian requests in writing for the girl to be detained in the place of safety;
- ii. the Protector considers that she needs to be protected and her lawful guardian cannot be found; or
- iii. the Protector may certify that she has been ill-treated and need protection.<sup>344</sup>

In terms of detention period, if the girl is above 16 years old at the time she was received at the place of safety, the detention must not exceed 2 months.<sup>345</sup> If she is under 16 years old, she may only be detained until she is 19 years old or marries, whichever occurs first.<sup>346</sup>

The WGPE 1914 and the WGPO 1914 were later repealed and replaced with the new the WGPE 1931 and the WGPO 1930 respectively. The new legislation retained the

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<sup>3-342</sup> See note 3-82 and 3-83

<sup>3-343</sup> Section 8 WGPO 1914, Section 11 WGPE 1914

<sup>3-344</sup> Section 13 WGPE, Section 10 WGPO

<sup>3-345</sup> Section S.11(2) WGPO, Section 13(ii) WGPE

<sup>3-346</sup> Section 11(3) WGPO, Section 13(iii) WGPE

earlier provisions; nonetheless the age limit for the girls who were sent to the place of refuge was increased to 18 years old instead of 16 years old.<sup>347</sup>

Another category of women and girls that may be sent to the place of safety was added that is, “the woman or girl whom the Protector has reasonable cause to suspect to be a *Mui-Tsai* and need of protection”.<sup>348</sup> *Mui Tsai*, which means ‘little sister’ in Cantonese, was a practice originated from South China where girls were acquired since young by a family to be the household servants and would be married off by the same family when they reached adulthood<sup>349</sup>. This practice had spread to Malaya under the influence of the Chinese immigrants.<sup>350</sup> Unfortunately, this practice was exposed to abuse. With the closure of brothels, the procurer had used *Mui-Tsai* system to supply prostitutes.<sup>351</sup>

A remarkable change in the law was the abolishment of brothels.<sup>352</sup> Any person who manages or assists in the management of a brothel, being a tenant, lessee, occupier, or charge of the premises used as a brothel, or being the owner of that premise with the knowledge that it is used as brothels – shall be liable to imprisonment not exceeding three months, or a fine not exceeding \$500 or both.<sup>353</sup> For the second and subsequent conviction of the offence, the offender may be imprisoned not exceeding 12 months or fine of \$1000, or both.<sup>354</sup>

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<sup>3-347</sup> Section 15(2) of WGPE 1931 and Section 15(ii) of WGPO 1930; see also Abd Hadi Zakaria, *supra* note 3-94, at page 52

<sup>3-348</sup> Section 16 (i)(d) WGPE 1931 and Section 16(1)(d) WGPO 1930

<sup>3-349</sup> Karen Yuen, *Theorizing The Chinese: The Mui Tsai Controversy And Constructions Of Transnational Chineseness In Hong Kong And British Malaya*, (December, 2004) *New Zealand Journal of Asian Studies* 6, 2: 95-110, at page 97

<sup>3-350</sup> Report on Commission of Mui tsai, 1937, CO 825/23/3, referred to by Karen Yuen, *supra* note 3-125, at page 101

<sup>3-351</sup> Abd Hadi Zakaria, *supra* note 3-94, at page 53

<sup>3-352</sup> Section 7 WGPE 1931, Section 8 WGPO 1930; see Abd Hadi Zakaria, *supra* note 3- 94, page 53; also Skymala Nagaraj and Siti Rohani Yahya, *supra* note 3-3, at page 71

<sup>3-353</sup> Section 8 WGPO 1931

<sup>3-354</sup> *ibid*

The improvements in this 1931 legislations were incorporated to conform to the international standard.<sup>355</sup> This was due to the political pressure from the British Social Hygiene Council in late 1920's and the commitment to the League of Nation in suppressing women and children trafficking as well as condemning prostitution.<sup>356</sup> Nevertheless, prostitution *per se*, was not yet made an offence in both the WGPE 1931 and the WGPO 1930.

### 3.3 POST- INDEPENDENCE LAW ON WOMEN AND GIRLS PROTECTION

In 1946, when British dissolved the Straits Settlements,<sup>357</sup> Singapore became a distinct colony, while Malacca and Penang were united with the federated and unfederated Malay states and formed the Federation of Malaya in 1948 and gained independence on 31 August 1957. Subsequently, Malaysia was formed by virtue of Malaysia Agreement where it was agreed that the British government would surrender its sovereignty over its colonies- Sabah, Sarawak and Singapore, to be merged with the Federation of Malaya.<sup>358</sup> Unfortunately, due to political and racial concerns, Singapore withdrew from Malaysia in 1965.<sup>359</sup>

Both the WGPE 1931 and the WGPO 1930 remained in force until the implementation of Malaysia's Women and Girl Protection Act 1973.

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<sup>3-355</sup> Ann Wee, 'The Women's Charter, 1961: Where We Were Coming From and How We Got There', in Theresa W. Devasahayam (Ed), *Singapore Women's Charter: Roles, Responsibilities, and Rights in Marriage*, (Institute of Southeast Asian Studies, 2011), at page 59

<sup>3-356</sup> Lenore Manderson, *supra* note 3-13, at page 386

<sup>3-357</sup> 'History of Malaysia', available at < <http://www.kiat.net/malaysia/history.html> > accessed on 5 May 2015

<sup>3-358</sup> Malaysia Ministry of Information, Communications and Culture, 'History- The Formation of Malaysia', <<http://www.malaysiamerdeka.gov.my/v2/en/history/the-formation-of-malaysia>> accessed on 5 May 2015

<sup>3-359</sup> 'Timeline : Malaysia 's history', published on AlJazeera website on 1 May 2013, available at <<http://www.aljazeera.com/indepth/spotlight/malaysiaelections/2013/04/201342882836970501.html>> accessed on 5 May 2015

### 3.3.1 Women and Girls Protection (Appointment of Places of Safety) Act 1966

[Act No. 3 of 1966]

Women and Girls Protection (Appointment of Places of Safety) Act 1966<sup>360</sup> was enforced on 27<sup>th</sup> January 1966 in the states of Malaya. This Act empowered the Minister to appoint any place, by way of notification in the *Gazette*, to be a place of safety for the purpose of the WGPE in each Malay State<sup>361</sup>. One of the places of refuge was Taman Seri Puteri, Cheras which was established in January 1967.

Subsequently, the Women and Girls Protection (Places of Safety) Rules 1971, a subsidiary legislation, was enforced on 5<sup>th</sup> February 1971 where it applies to the *Gazetted* place of safety under the 1966 Act. The rules contained various provisions that regulate the affair of the place of safety, which includes the procedures of admission, the responsibility of the superintendent and staff, the care of the residents, and the punishment rules.

Under the Rule, a female person may be detained only when such detention is authorised either by way of detention order or removal order in the case where the detainee was to be removed from another place of safety.<sup>362</sup> A search shall be conducted on admission by a woman officer for the purpose of discovery of any concealed article.<sup>363</sup> All money, clothing or other belongings which are not allowed shall be retained in the custody of the Superintendent.

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<sup>3-360</sup> Act No. 3 of 1966

<sup>3-361</sup> The respective state laws are: "(a) in the States of Selangor, Perak, Negeri Sembilan, Pahang, Terengganu and Kelantan under the Women and Girls Protection Enactment of the Federated Malay States; (b) in the State of Johore under the Women and Girls Protection Enactment of the State of Johore; (c) in the State of Kedah under the Women and Girls Protection Enactment of the State of Kedah; (d) in the State of Perlis under the Women and Girls Protection Enactment of the State of Perlis; (e) in the States of Penang and Malacca under the Women and Girls Protection Ordinance of the Straits Settlements" as per enumerated in Rule 1(2) of Women and Girls Protection (Place of Safety) Rules 1971

<sup>3-362</sup> Rule 24 Women and Girls Protection (Place of Safety) Rules 1971

<sup>3-363</sup> Rules 25,26,27 Women and Girls Protection (Place of Safety) Rules 1971

The rules required the residents be allowed with adequate provisions for free time and recreation.<sup>364</sup> Besides that, home leave may be granted by the State Social Welfare Officer not exceeding 7 days in any one calendar year.<sup>365</sup> However the leave cannot be granted in the first 6 months of detention unless it is with the consent of the Director.<sup>366</sup>

For the purpose of disciplining, rewards and privileges system may be instigated.<sup>367</sup>

Conversely, the punishments that might be inflicted were restricted to the following:

- “ i. *Forfeiture of rewards or privileges (including pocket money) or temporary loss of recreation.*
- ii. *The extra task of the nature suitable for the woman or girl, but not of such nature or duration as to be injurious to health.*
- iii. *Separation from other women or girls. Provided that this punishment shall only be used subject to the following conditions:*
  - a. *The room used for the purpose shall be accessible to light and be airy and kept lighted after dark.*
  - b. *Some form of occupation shall be given.*
  - c. *Means of communication with a member of the staff shall be provided and such woman or girl shall be visited by a member of the staff at intervals of not less than three hours. Provisions shall be made for the serving of meals and necessities to the woman or girl so separated.*
  - d. *If the separation is to be continued for more than twenty-four hours the written consent of the State Social Welfare Officer shall be obtained.”<sup>368</sup>*

The rules also afforded the aftercare for the women and girls after being discharged from the place of safety, where adequate arrangements of suitable employment must be made for them.<sup>369</sup>

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<sup>3-364</sup> Rule 43(1) Women and Girls Protection (Place of Safety) Rules 1971

<sup>3-365</sup> Rule 43(2),(3) Women and Girls Protection (Place of Safety) Rules 1971

<sup>3-366</sup> Rule 43(2) Women and Girls Protection (Place of Safety) Rules 1971

<sup>3-367</sup> Rule 47 Women and Girls Protection (Place of Safety) Rules 1971

<sup>3-368</sup> Rule 47 Women and Girls Protection (Place of Safety) Rules 1971

<sup>3-369</sup> Rule 51 Women and Girls Protection (Place of Safety) Rules 1971

### 3.3.2 The Women and Girls Protection Act 1973 [Act 106]

The Women and Girls Protection Act 1973 (hereinafter referred to as “the WGPA”)<sup>370</sup> came into force throughout Malaysia in 1981.<sup>371</sup> WGPA mostly retained the provisions of the previous statutes on protection of women and girls since 1888<sup>372</sup>. Under the new Act, the protection of women and girls fall under the powers of the Social Welfare Department.<sup>373</sup> There were four categories of women and girls that could be removed to the place of refuge as illustrated by Chart 3.1 in the following page:-

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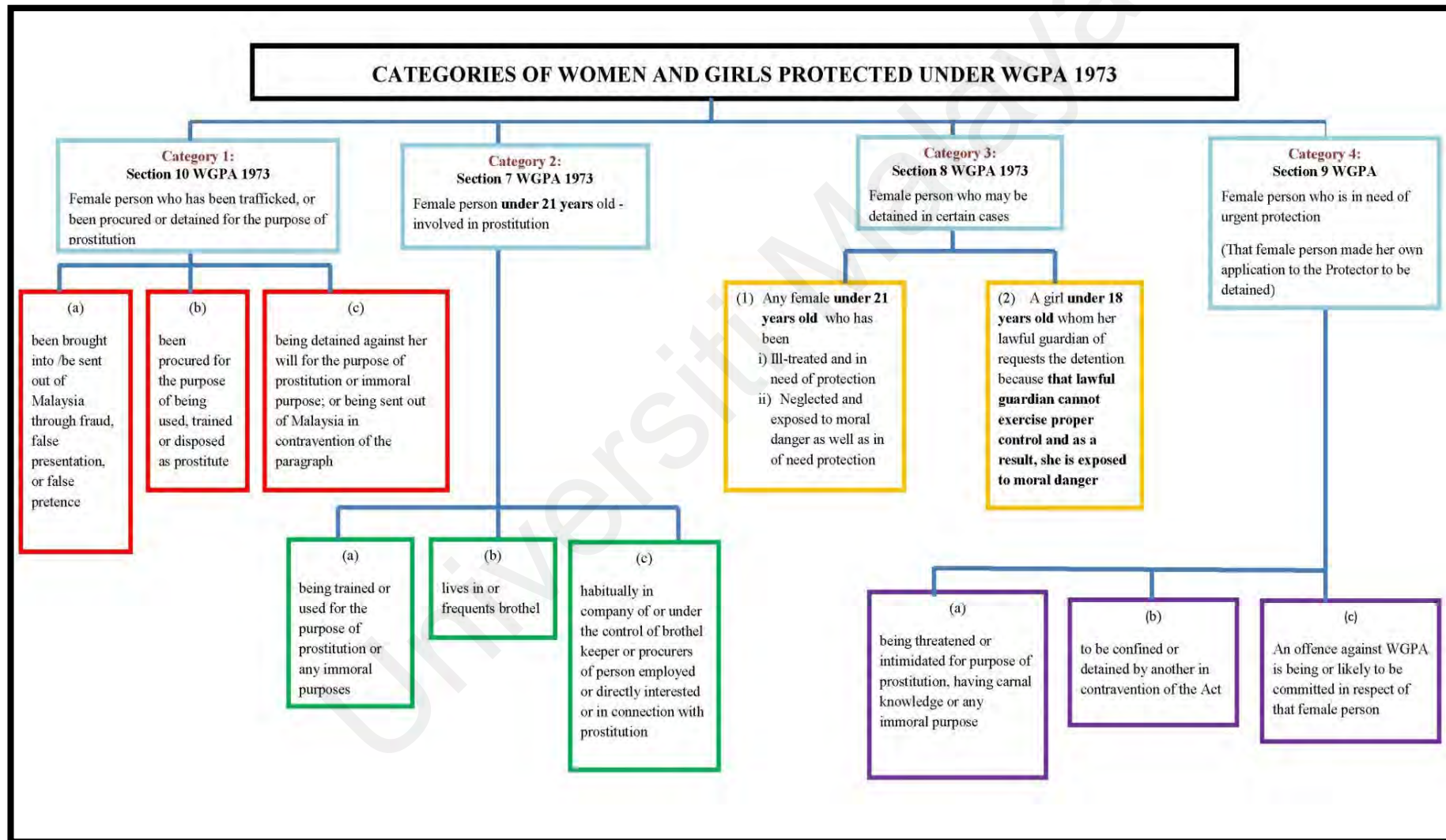
<sup>3-370</sup> Act No. 106 of 1973

<sup>3-371</sup> Enforced in West Malaysia on 1<sup>st</sup> September 1973, in Sabah on 1<sup>st</sup> July 1981 and in Sarawak on 1<sup>st</sup> March 1981

<sup>3-372</sup> Abd Hadi Zakaria, *supra* note 3-94, at page 56

<sup>373</sup> Section 2 WGPA ( Act 106)

Chart 3.1: The categories of women and girls protected under the WPGA 1973



Rescuing women and girls under the first three categories involved multiple layers of action.<sup>374</sup> Firstly, the female person will be disengaged from the incriminating moral vice environs and be temporarily detained in the place of safety.<sup>375</sup> As every person in Malaysia has the right to personal liberty under Article 5 (1) of the Federal Constitution, the rescued female must, within 24 hours thereafter, be produced before the Magistrate. The Magistrate would subsequently consider and decide whether the case falls under the circumstances where the female person is ought to be protected and temporarily detained. If it is affirmative, the court shall issue an interim order of detention at the place of refuge pending the Protector's enquiry report.<sup>376</sup>

The Protector on the other hand, is obliged to conduct an enquiry to the female person and must later submit a full report of the enquiry to the Court within 1 month of the date of admission to the place of refuge.<sup>377</sup> The Magistrate shall consequently examine and deliberate the enquiry report; if it is satisfied that the female person is in need of protection, the court may order the following:

- (a) The female person to be detained in a place of refuge for a period of 3 years.  
[The detention may be reduced by the Board of Visitors but the girl must not be released within 12 months of the admission];
- (b) \*The girl to be under the care of a fit and proper person, whether a relative or not, who is willing and whom the court considers to be fit and proper person for a period not exceeding 3 years;

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<sup>3-374</sup> Abd Hadi Zakaria, *supra* note 3-94, at page 59

<sup>3-375</sup> Section 10(1), Section 7(1), Section 8(1) of WGPA 1973 (Act 106)

<sup>3-376</sup> Section 10(2), Section 7(2), Section 8(1), of WGPA 1973 (Act 106)

<sup>3-377</sup> Section 10(2) & Section 8(3) of WGPA 1973 (Act 106)



- (c) \*The parent or the guardian to enter into a bond to exercise proper care for a specified period not exceeding 3 years from the date of the Order; or
- (d) The girl to be under the supervision of a Social Welfare Officer for a period not exceeding 3 years.<sup>378</sup>

[ \*(b) and (c) above are not applicable to women and girls under category 1 ]

(a) *Category 1: Female person who has been trafficked, being procured of detained for the purpose of prostitution*

Protection under section 10 of the WGPA can besought if any female :

- (a) has been brought into or to be sent out of Malaysia, and the custody of that female has been acquired through fraud, false presentation, or false pretence, whether or not for the purpose of prostitution;
- (b) has been procured for the purpose of being used, trained or disposed as a prostitute;
- (c) being detained against her will for the purpose of prostitution or immoral purposes; or being sent out of Malaysia in contravention of this paragraph.

This provision was inherited from previous Acts<sup>379</sup> with further improvements. Firstly, unlike in the previous Acts, which only protects those who have been brought by false pretence *et cetera*- specifically for the purpose of prostitution, the protection in the WGPA is wider to cover all cases of any female person who has been brought into or to be sent out of Malaysia through fraud, false presentation, or false pretence notwithstanding of its purpose. Secondly, in the previous Acts, the protection given for cases under this category was only in the form of security executed by the person who

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<sup>3-378</sup> Section 8(4) WGPA 1973 (Act 106)

<sup>3-379</sup> Section 7 WGPO 1914, Section 9(ii) WGPE 1914 & Section 13 WGPO 1931

has the custody or control of the rescued female person. Nonetheless, in the W GPA, that female person may be removed to the place of refuge for a period not exceeding 3 years or be put under the supervision of a Social Welfare Officer<sup>380</sup>.

*(b) Category 2: Female under 21 years old involved in prostitution.*

Section 7 of the W GPA specified that any female below 21 years old who is being trained or used for the purpose of prostitution or any immoral purposes, living in or frequenting brothel, or is habitually in company of or under the control of brothel keeper or any person in connection with prostitution may be protected and be removed to the place of refuge. The age requirement has been increased to 21 years old, in contrast to the previous Act, which only protects girls under 18 years old involved in prostitution.<sup>381</sup>

*(c) Category 3: Female person who may be detained in certain cases*

W GPA provided that the following persons may be detained after an enquiry be made and it is satisfied that:

- (a) Any female under 21 years old has been ill treated ;
- (b) Any female under 21 years old has been neglected and exposed to moral danger; or
- (c) Any female under 18 years old whom the guardian requests in writing to the Magistrate for the detention on the ground that the lawful guardian cannot exercise proper control and as a result she is exposed to moral danger.

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<sup>3-380</sup> Section 10 W GPA 1973

<sup>3-381</sup> Section 15 W GPO 1931

This provision is more stringent compared to the one in the WGPO 1931<sup>382</sup>. Each element must be proved thoroughly. This can be illustrated with the case of *Re Fauzilah bte Asmara & Imelia Hariza bte Isnin*.<sup>383</sup> In this case, the appellant, both aged 19 years old, who worked as guest relations officers in a karaoke lounge were arrested at the said lounge and be brought before the Magistrate's Court on January 15, 2001. The appeal was made against the decision of the Magistrate detaining them. It was argued by the respondent that they are exposed to moral danger since they were working in a karaoke lounge as guest relations officers. The court held that, for the detention made under Section 8 (1) of WGPA, there must be a clear assertion of the true facts:-

- (a) ill-treatment, or
- (b) neglect and exposure to moral danger

The court further held that a prove of ill treatment is sufficient to attract section 8(1), nonetheless, if it is a case of neglect, it must also be proved that as a result of the neglecting, the victim is also exposed to moral danger. In addition, a mere possibility of ill treatment or neglect and exposure to moral danger would not justify such detention.

In this case, there was no proof of ill-treatment or the assertion that the appellants were under any such threat or compulsion or they were held against their wishes in the karaoke lounge. The court was also of the opinion that claiming "karaoke lounges generally are places of immoral activities would be sailing into the realm of prejudgment and prejudice, and cannot be supported." Therefore, the court set aside the decision of the Magistrate and ordered the appellants be released promptly.

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<sup>3-382</sup> Section 16 WGPO 1931

<sup>3-383</sup> [2001] 3 AMR 3677

*(d) Category 4: Female person who is in need of urgent protection*

This is a new category inserted in WPGA 1973 via section 9, whereby any female is deemed to be in need of urgent protection and may be detained instantaneously. This category was not provided for in any of the previous legislations. A female person may apply in writing to the Protector if she is:

- (a) being threatened or intimidated for purpose of - prostitution, having carnal knowledge or immoral purposes;
- (b) to be confined or detained by another in contravention of the Act; and
- (c) aware that an offence against this Act is being or likely to be committed.

Thus, the Protector may admit and permit her to reside at the place of refuge so long as he is satisfied that such female person is in need of urgent protection under the section.

*(e) New Offences under the WPGA 1973*

Whilst many of the offences enumerated in the previous the WGPO 1931<sup>384</sup> sustained, new offences were also introduced in the WPGA 1973, that include:

- (a) Offering any female person for the purpose of prostitution by means of advertisement or notice displayed in any place;<sup>385</sup>
- (b) Acting as an intermediary on behalf of other or exercise control or influence of the movements of another as to show that the person is aiding or abetting or controlling the prostitution;<sup>386</sup>

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<sup>3-384</sup> Section 4 WGPO 1931

<sup>3-385</sup> Section S. 16(j) WPGA 1973 (Act 106)

<sup>3-386</sup> Section 16(k) WPGA (Act 106)

- (c) Having a carnal connection with any girl under the age of 16 (previously 15) years old except by way of marriage;<sup>387</sup>
- (d) Keeping, managing or assisting in the management of an association, institution, club or place of public resort where the premises of such entity are used as a place of assignation with his knowledge or belief;<sup>388</sup> or
- (e) Resorting, soliciting or importunes in any place of public for the purpose of prostitution or any immoral purposes.<sup>389</sup>

### **3.3.3 Women and Girls Protection (Places of Refuge) Rules 1982 [P.U.(A) 391 /1982]**

The well known place of refuge established under WGPA is Taman Seri Puteri. The residents would undergo rehabilitation programmes such as character building, behaviour modification, living skills training, value orientation, and religious education<sup>390</sup>. All Taman Seri Puteri were subjected to the Women and Girls Protection (Places of Refuge) Rules 1982 that came into operation on 30<sup>th</sup> December 1982 repealing the 1967 Rules. Several improvements have been adapted for the best interest of the residents on the following matters:

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<sup>3-387</sup> Section 16(l) WGPA (Act 106)

<sup>3-388</sup> Section 20 WGPA (Act 106)

<sup>3-389</sup> Section 22 WGPA (Act 106)

<sup>3-390</sup> Mohamad, Lukman Z, *Children in Prostitution: A study of young women in the rehabilitation centres in Malaysia*, Doctoral thesis, Durham University, (2006) available at <<http://etheses.dur.ac.uk/2688/>> accessed on 4 April 2015, at page 108

*(a) Medical facilities*

Under the new Rules, each place of refuge must be equipped with medical facilities and sickbay<sup>391</sup> with visiting Medical Officer. Medical treatment for the residents must also be provided, including the access to the hospital so requires.<sup>392</sup>

*(b) Welfare of the residents*

The new Rules provide varieties of privileges that can be awarded, for example, leave of absence from a place of refuge, appointment of prefects, and the consideration of discharge.<sup>393</sup> Besides that, residents are allowed to retain earnings from the approved employment for training purposes and savings account shall be opened for that purpose.<sup>394</sup> The residents, however, must not be employed in such a way that will deprive their recreation and leisure time.<sup>395</sup> The allowable home leave was also extended from 7 days to 14 days.<sup>396</sup> Residents are encouraged to write to the parents, guardian or at least nearest relative at least once a month under the Rules.<sup>397</sup>

*(c) Disciplining*

Corporal punishment may be imposed for the purpose of disciplining with strict conditions - it may be inflicted on hands only and must be done by the Principal and no others. Likewise, any punishment imposed must not be humiliating or involve any physical contact such as striking, punching, slapping, cuffing, shaking, or any kind of physical violence.<sup>398</sup>

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<sup>391</sup> Rule 27 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>392</sup> Rule 30 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>393</sup> Rule 39 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>394</sup> Rule 41 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>395</sup> Rule 42 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>396</sup> Rule 44 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>397</sup> Rule 45 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>3-398</sup> Rule 63 Women and Girls Protection (Places of Refuge) Rules 1982

*(d) Post-Detention*

Upon leaving the place of refuge, the resident must be provided with sufficient clothes, and a reasonable sum of money for travelling and sustenance.<sup>399</sup> The residents were also subject to supervision after the discharge.<sup>400</sup>

### **3.3.4 The Child Act 2001 [Act 611] (prior to the amendments in 2016)**

The WPGA 1973 was amalgamated with two other Acts, namely, the Juvenile Courts Act 1947<sup>401</sup> and the Child Protection Act 1991<sup>402</sup> and subsequently repealed by the Child Act 2001.<sup>403</sup> The main aim of the new legislation is to “amend and consolidate the existing laws relating to the care, protection and rehabilitation of children and to introduce new and better provisions so that children are given the protection and assistance they require”.<sup>404</sup>

As the Child Act 2001 (hereinafter referred to as “CA 2001”) is the manifestation of Malaysia’s commitments towards the UNCRC, the provisions were drafted in view of the fundamental principles of the CRC, that are; warranting the best interests of the child as the paramount consideration, observing the right to life, survival and development, non-discrimination and upholding the views of the child.<sup>405</sup>

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<sup>3-399</sup> Rule 66 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>3-400</sup> Rule 67 Women and Girls Protection (Places of Refuge) Rules 1982

<sup>3-401</sup> Act 90

<sup>3-402</sup> Act 468

<sup>3-403</sup> Act 611

<sup>3-404</sup> Preamble, the Child Act Bill.

<sup>3-405</sup> Committee On The Rights Of The Child, ‘Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention Initial Report Of States Parties Due In 1997- Malaysia’, United Nations, 20 December 2006 at page 21

The prior provisions of WPGA 1973 are detailed in Part VI of CA 2001 under the subject of “children in need of protection and rehabilitation”. Despite the notable changes to the law which broaden the protection to include the male children, the age requirement has been decreased to 18 years old instead of 21 years old. This is because a “child” is generally defined in CA 2001 as a person under the age of 18 years old<sup>406</sup>, retaining the definition indicated in Child Protection Act 1991<sup>407</sup>.

The interpretation of “children in need of protection and rehabilitation” in section 38 of CA 2001 is primarily taken from section 7 of the WPGA 1973 that is a child who lives in or frequents brothel or place of assignation, or who is habitually in the company of or under the control of brothel keeper or person who interested in prostitution. A new depiction is also included whereby 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” is deemed to be protected and rehabilitated.

The procedure of removal to the place of refuge is akin to WPGA 1973, with some modifications to accommodate the interests of children. This includes the requirement to be produced before the Court of Children, within 24 hours of removal to the place of refuge after a Protector or police officer satisfied on reasonable ground that a child is in need of protection and rehabilitation.<sup>408</sup> Conversely, if it is impossible for the child to be brought before the Court for Children within 24 hours, the child may be brought before the Magistrate who may direct the child to be temporarily positioned at the place of refuge

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<sup>3-406</sup> Section 2 CA 2001 (Act 611) except in relation to criminal proceedings, child means a person who has attained the age of criminal responsibility as prescribed in section 8 of the penal Code [Act 574]

<sup>3-407</sup> Rojanah Kahar and Najibah Mohd Zin, (2011), ‘Child Related Policy And Legislative Reforms In Malaysia’ International Journal of Social Policy and Society, 8. pp. 6-36, at page 21

<sup>3-408</sup> Section 39(1) & (2) CA 2001 (Act 611)



until the child can be brought before the Court for Children.<sup>409</sup> If the Court for Children is satisfied that the case fall within section 38 of CA 2001, the child may be ordered to be temporarily placed at the place of refuge until further enquiry is conducted.<sup>410</sup> Otherwise, the child shall be returned to the care and custody of his parent or guardian.<sup>411</sup>

The Protector shall subsequently conduct an enquiry to the child and submit the report to the Court for Children not later than a month from the date where the child is admitted to place of refuge.<sup>412</sup> Upon satisfaction that the children is in need of protection and rehabilitation after appraising the enquiry report, the Court for Children may order:

- (a) the child to be detained in place of refuge for a period of 3 years. [The detention may be reduced by the Board of Visitors but the child must not be released within 12 months of the admission- section 40(6)];
- (b) the child to be under the care of person, whether a relative or not, who is willing and whom the court considers to be fit and proper person for a period not exceeding 3 years;
- (c) the parent or the guardian to enter into a bond to exercise proper care for specified period not exceeding 3 years from the date of order ; or
- (d) the child to be under the supervision of a Social Welfare Officer for a period not exceeding 3 years<sup>413</sup>

In addition, under section 40 (7) of CA 2001, if the Court orders the child to be detained at the place of refuge, it shall also order the parent or guardian of the child to execute a

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<sup>3-409</sup> Section 39(3) CA 2001 (Act 611)

<sup>3-410</sup> Section 39(4) CA 2001 (Act 611)

<sup>3-411</sup> Section 39(5) CA 2001 (Act 611)

<sup>3-412</sup> Section 40(1) & (2) CA 2001 (Act 611)

<sup>3-413</sup> Section 40(3) CA 2001 (Act 611)

bond with conditions which may include regular visits to the place of refuge. Likewise, if the Court orders the child to be under the supervision of a Social Welfare Officer, the parent or guardian of the child shall be ordered to execute a bond with conditions, for instance, the child must remain indoors in a prescribed time. The insertion of this provision highlights the important role of parents and guardian in children's welfare and development,<sup>414</sup> and that the law requires parents or guardian to be involved with process of rehabilitation. Failure to comply with the conditions of the bond is an offence punishable with a fine not exceeding RM10,000.<sup>415</sup>

The CA 2001 also inserts a new provision on a child who is pregnant outside of wedlock. It is added to the category of children who are deemed under the law in need of urgent protection<sup>416</sup> and may be admitted directly to the place of refuge. She may reside at the place of refuge so long as the Protector is satisfied that the child is in urgent need of protection.<sup>417</sup> Moreover, apart from the offences incorporated from WPGA 1973, a new offence is included where any person who engages or hires, for any valuable consideration, a child to provide services for that person's sexual gratification shall be punished with a fine not exceeding RM50,000 and imprisonment for a term of not less than three years but not more than fifteen years and whipping of not more than six strokes.<sup>418</sup>

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<sup>3-414</sup> Also enumerated in the preamble of CA 2001 - "*Acknowledging the family as the fundamental group in society which provides the natural environment for the growth, support and well-being of all its members, particularly children, so that they may develop in an environment of peace, happiness, love and understanding in order to attain the full confidence, dignity and worth of the human person*"

<sup>3-415</sup> Section 40(8) CA 2001

<sup>3-416</sup> Other Children who are also categorized as "in need of urgent protection" are the children being threatened or intimidated for purpose of prostitution, having carnal knowledge or immoral purpose; children who are to be confined or detained by another in contravention of the Act; or the children which an offence against this Act is being or likely to be committed against him. This provisions are taken from section 9 WPGA 1973

<sup>3-417</sup> Section 41 CA 2001

<sup>3-418</sup> Section 43 (1) (j) CA 2001 (Act 611)

The following is the data from the Department of Social Welfare Malaysia on children in need of protection and rehabilitation according to states in 2013 to 2016<sup>419</sup>:

**Table 3.1: Children in need of protection and rehabilitation according to states in 2013 to 2016**

<i>STATE / YEAR</i>	<i>2013</i>	<i>2014</i>	<i>2015</i>	<i>2016</i>	<i>Total 2013-2016 (according to State)</i>
<i>Johor</i>	25	27	17	35	104
<i>Kedah</i>	36	42	38	59	175
<i>Kelantan</i>	12	7	15	4	38
<i>Melaka</i>	1	6	8	4	19
<i>Negeri Sembilan</i>	8	9	14	8	39
<i>Pahang</i>	16	5	4	10	35
<i>Perak</i>	21	16	21	23	81
<i>Perlis</i>	0	0	0	1	1
<i>Pulau Pinang</i>	12	6	8	10	36
<i>Sabah</i>	46	27	34	41	148
<i>Sarawak</i>	22	22	10	6	60
<i>Selangor</i>	32	45	35	34	146
<i>Terengganu</i>	15	21	19	7	62
<i>W.P Kuala Lumpur</i>	0	0	1	0	1
<i>W.P Labuan</i>	0	0	0	0	0
<b><i>TOTAL by year)</i></b>	<b>246</b>	<b>232</b>	<b>224</b>	<b>242</b>	<b>No. of Children 2013-2017 945</b>

(source: Department of Social Welfare Malaysia<sup>420</sup>)

From the total of 945 above, there were 11 boys who have been rescued under the category of children in need of protection and rehabilitation since 2013 to 2016.

<sup>3-419</sup> As at 19 September 2019, there is no available data for the year 2017 to 2019 published by the Social Welfare Department in their official statistics database. < [http://www.jkm.gov.my/jkm/index.php?r=portal/full2&id=U0dpTUVpRXlyYUIFVFFLUmVnUVJUdz09&menu\\_id=R3FNa05sRjVTWUc5dy80VEUxU2VNQT09](http://www.jkm.gov.my/jkm/index.php?r=portal/full2&id=U0dpTUVpRXlyYUIFVFFLUmVnUVJUdz09&menu_id=R3FNa05sRjVTWUc5dy80VEUxU2VNQT09)> accessed on 19 September 2019.

<sup>3-420</sup> Department of Social Welfare Malaysia Statistics, available online < [http://www.jkm.gov.my/file/file/Statistic\\_2013/BHG\\_B\\_2-PERLINDUNGAN\\_DAN\\_PEMU.pdf](http://www.jkm.gov.my/file/file/Statistic_2013/BHG_B_2-PERLINDUNGAN_DAN_PEMU.pdf)> for 2013;

<<http://www.jkm.gov.my/jkm/uploads/files/pdf/Buku%20JKM%202014.pdf>> for 2014;

<<http://www.jkm.gov.my/jkm/uploads/files/penerbitan/Buku%20JKM%202015%E2%80%A2Final.pdf>> for 2015

<<http://www.jkm.gov.my/jkm/uploads/files/penerbitan/Buku%20statistik%202016.pdf>>

all accessed on 5 May 2017

### **3.3.5 The Child (Amendment) Act 2016 [Act A1511]**

After long processes of reviews and consultations with the relevant stakeholders, the Child (Amendment) Act 2016<sup>421</sup>, subsequently passed by the Parliament and came into force on 1 January 2017. A significant development can be seen in the new section 7A, where Child Welfare Teams are established for the coordination of locally-based services to children who are or are suspected of being in need of protection and rehabilitation, as well as to their families. There is no substantial amendment in terms of enquiry procedure, save for the order that may be made by the Court of Children. The amendment emphasises greater parental responsibilities towards children and the necessity to place a child in a family-based care.

According to the new section 40, it is desirable for the child, upon satisfaction of the Court of Children that he/she is in need of protection and rehabilitation, to be put under the care of parents and guardian first, rather than to place him/her at a place of refuge as the last option. Besides, the Court of Children may order the parents or guardian of the child to attend interactive workshops; or if the child is placed in an institution, that the parents or guardian to consult the teacher once a month, to ensure the safety and well-being of the child. Failure to comply with the order is an offence punishable with a fine not exceeding RM 5,000.

### **3.3.6 The Penal Code [Act 574]**

As noted above, the CA 2001 covers the protection for children who are exposed to moral harm under 18 years old. But the question now is, what about the protection for women and girls above the age whom were initially protected under WPGA 1973?

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<sup>3-421</sup> Act A1511

To address the question above, a reference can be made to the Penal Code. The current protections are by way of implicating persons who exploits, solicits or importunes for the purpose of prostitution as well as suppressing brothel under the Penal Code. Before the amendment in 2001, the law incriminates any kind of transaction for the purpose of prostitution, whether by deceitful means or otherwise, of any minor or women.<sup>422</sup>

Consequently, via Act 1131, the Penal Code was amended and came into force on 1<sup>st</sup> August 2002, to substitute the provision of section 372<sup>423</sup> to the new provision on “exploiting any person for the purposes of prostitution”. The new section 372 set forth the kind of exploitation that includes selling, hiring, harbouring, advertising et cetera for the purpose of prostitution amounting to an offence punishable with imprisonment up to 15 years, whipping and shall also be liable to fine<sup>424</sup>. This section is *mutatis mutandis* with section 43 of CA 2001 and section 16 of WPGA 1973.

The Penal Code was also amended to include new sections namely; section 372A which provides the offence for any person who is living on or trading in prostitution punishable with imprisonment up to 15 years with whipping and fine,<sup>425</sup> and section 372B which specifies the offence of soliciting or importuning prostitution that is punishable with imprisonment not exceeding a year or with fine or both.<sup>426</sup> These sections were adopted from section 19 and 22 of WPGA 1973, with higher sentences.

In addition, section 373 of the Penal Code was replaced with the provision on the suppression of brothels which reads;

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<sup>3-422</sup> Section 372, 373 and Section 373A of the Penal Code

<sup>3-423</sup> Previously, Section 372 was on the offence of selling a minor for the purpose of prostitution

<sup>3-424</sup> Section 2 Act A1131

<sup>3-425</sup> Section 3 Act A1131

<sup>3-426</sup> Section 3 Act A1131

***“Suppression of brothels.***

*373 (1) Whoever—*

*(a) keeps, manages or assists in the management of a brothel;*

*(b) being the owner of any place or the agent of such owner, or being the occupier of any place, lets the place or any part thereof with the knowledge that such place or part is to be used as a brothel or permits such place or part to be used as a brothel or is wilfully a party to the continued use of such place or part as a brothel,*

*shall be punished with imprisonment which may extend to fifteen years, and shall also be liable to fine.*

*(2) In this section, "brothel" means any place occupied or used by any two or more persons whether at the same time or at different times for purposes of prostitution”*

### **3.3.7 Anti-Trafficking In Persons And Anti-Smuggling Of Migrants Act 2007**

**[Act 670]**

Being a prevailing destination amidst the traffickers, Malaysia has become a source and transit country for women and children trafficking due to the strategic location by land and sea in Southeast Asia.<sup>427</sup> There are reported cases on Malaysians being trafficked internally and abroad to various countries including Singapore, China, Taiwan, Japan<sup>428</sup>, Canada, and Australia for commercial sexual exploitation.<sup>429</sup> Also, a significant number of young foreign women are recruited for work in Malaysia but afterwards been forced into the sex industry.<sup>430</sup> The victims are among others from China, Cambodia, India, Indonesia, Laos, Myanmar, Colombia, Ecuador, the Philippines, Thailand, and

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<sup>3-427</sup> Sheila Devi Michael, ‘Human Trafficking In Malaysia: Trends And Challenges’, Proceeding of the Global Conference on Business, Economics and Social Sciences 2013 (e-ISBN 978-967- 12022-0-3) 25-26 June 2013, Kuala Lumpur. Organized by: WorldResearchConference.com

<sup>3-428</sup> US Department of States, ‘Trafficking in Persons Report 2011- Malaysia’, at page 244 available at < <http://www.humantrafficking.org/uploads/publications/CountryNarratives-J-M.pdf>> accessed on 2 May 2015

<sup>3-429</sup> ECPAT , ‘Sex Trafficking Of Children In Malaysia (campaign book)’, available at <[http://www.ecpat.net/sites/default/files/Factsheet\\_Malaysia.pdf](http://www.ecpat.net/sites/default/files/Factsheet_Malaysia.pdf)> accessed on 2 May 2015

<sup>3-430</sup> US Department of States, *supra* note 3-197, at page 243

Vietnam.<sup>431</sup> The following Table 3.2 illustrates the number of human trafficking cases handled by various enforcement agencies from year 2012 to 2017:

**Table 3.2: Statistics on human trafficking in person cases by various enforcement agencies year 2012-2017**

ENFORCEMENT AGENCY / YEAR		2012	2013	2014	2015	2016	2017
1	Royal Malaysian Police	140	82	147	128	386	166
2	Immigration Department	43	10	14	23	22	7
4	Malaysian Maritime Enforcement Agency	9	8	19	6	11	5
5	Department Of Labour	10	1	8	6	2	0
	Total (According To Year)	202	101	188	163	421	178

(Source : Ministry of Home Affairs Statistics<sup>432</sup>)

According to the statistics by the Royal Malaysia Police, from 2008 up to 31 December 2012, majority human trafficking cases were for the purpose of sexual exploitation<sup>433</sup>:

**Table 3.3: Statistics on exploitation and smuggling of immigrants**

NO	OFFENCES	TOTAL
	Exploitation	
	1.1. Sex	346
	1.2. Force labour	171
	1.3. Slavery	0
	1.4. Transfer of human organ	0
	Other offences	
	2.1 Smuggling of immigrants	26
	2.2 Visa exploitation	32
	2.3 Selling baby / infant	37
	TOTAL	612

(Source : Royal Malaysia Police<sup>434</sup>)

<sup>3-431</sup> ECPAT, *supra* note 3-198

<sup>3-432</sup> Ministry of Home Affairs Statistics on Trafficking In Person Cases by Various Enforcement Agencies Year 2012-2017, available online at <[http://www.data.gov.my/data/ms\\_MY/dataset/statistik-tindakan-oleh-agensi-agensi-penguatkuasaan-berdasarkan-akta-anti-pemerdagangan-orang](http://www.data.gov.my/data/ms_MY/dataset/statistik-tindakan-oleh-agensi-agensi-penguatkuasaan-berdasarkan-akta-anti-pemerdagangan-orang)> accessed on 19 September 2019

<sup>3-433</sup> Supt. P.R Gunarajan a/l /Ramayal, 'Organised Crime: Government Initiatives, Laws and Investigation of Human Trafficking in Person and Smuggling of Migrants in Malaysia', Paper presented at International Conference on Trafficking organized by World Youth Foundation, Malacca, (2013, September); Unfortunately based on my research, there is no available data for the recent years (2012-2019).

<sup>3-434</sup> *ibid*

In combating human trafficking, Malaysia has enforced Anti-Trafficking In Persons And Anti-Smuggling Of Migrants Act 2007<sup>435</sup> (hereinafter referred to as “the ATIPSOM 2007”). The ATIPSOM was introduced to provide a comprehensive legal apparatus to eradicate trafficking in persons in 3 approaches; the prevention of trafficking, the prosecution of traffickers, and the protection of victims.

Offences of trafficking in persons for the purpose of exploitation are dealt under section 13, 14 and 15 of the ATIPSOM. It is important to note that ‘exploitation’ under the ATIPSOM is defined as “all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs”.<sup>436</sup> Section 12 enunciates the offence of trafficking in persons who are not children for the purpose of exploitation which is punishable with imprisonment not exceeding 15 years and a fine. A heavier punishment is imposed for the offences of trafficking of the aforesaid persons by any kind of threat, force, abuse of power et cetera<sup>437</sup> and trafficking children for the purpose of exploitation<sup>438</sup> that is the imprisonment of minimum three years but not exceeding than 20 years and a possible fine.

In addition, profiting from the exploitation of trafficked persons is made a serious offence punishable with imprisonment for a term not exceeding fifteen years, and shall also be liable to a fine of not less than RM500,000 but not exceeding RM1,000,000. Following that, the offender shall also be liable to the forfeiture of the profits.<sup>439</sup> A new offence is created under Section 15A where any person who brings in transit a trafficked

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<sup>3-435</sup> Act 670

<sup>3-436</sup> Section 2 ATIPSOM 2007 (Act 670)

<sup>3-437</sup> Section S.13 ATIPSOM 2007 (Act 670)

<sup>3-438</sup> Section 14 ATIPSOM 2007 (Act 670)

<sup>3-439</sup> Section 15 ATIPSOM 2007 (Act 670)



person through Malaysia by land, sea or air, or otherwise arranges or facilitates for such act, shall be punished with imprisonment not exceeding seven years and fine upon conviction.<sup>440</sup>

The rescue and protection procedures under the ATIPSOM 2007 are generally similar to the procedure enumerated in the W GPA 1973 and the CA 2001. Any person whom the enforcement officer reasonably suspects to be a trafficked person, may be taken to a temporary custody and be produced before the Magistrate within 24 hours to obtain an interim protection order. The suspected trafficked person shall be placed at the place of refuge for 14 days for investigation and enquiry.<sup>441</sup> Currently, there are five places of refuge established under section 42 of the ATIPSOM 2007 and operated by the Ministry of Women, Family and Community Development. Three places for the women victims - in Kuala Lumpur, Johor and Kota Kinabalu; one for the children victims – in Negeri Sembilan; and one for the male victims – in Melaka.<sup>442</sup>

If it is satisfied that the person is a trafficked person and in need of care and protection after having read the report produced by the Protection Officer and the Enforcement Officer,<sup>443</sup> the magistrate may order the following:

- i. that trafficked person be placed in a place of refuge for a period not exceeding two years from the date of the order if the person is a citizen or permanent resident of Malaysia; or

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<sup>3-440</sup> Enforced on 15 November 2010 via Act A1385

<sup>3-441</sup> Section 44(2) ATIPSOM 2007 (Act 670)

<sup>3-442</sup> US Department of States, 'Trafficking in Persons Report 2014- Malaysia', available at < <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226770.htm>> accessed on 5 May 2015

<sup>3-443</sup> Section 51 (2) ATIPSOM 2007 (Act 670)

- ii. that trafficked person be placed in a place of refuge for a period not exceeding three months from the date of the order, and thereafter to release him to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63 if the person is a foreign national.<sup>444</sup>

In the event where the Magistrate is not satisfied that the person is a trafficked person within the ambit of the Act, he may order the person to be released if the person being a citizen or permanent resident of Malaysia; or to be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63 if that person is a foreign national.<sup>445</sup>

### **3.3.8 The Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559]**

Another important law is the Syariah Law where it applies to the Muslims. As this belongs to state matters, different states would have different provisions on prostitution. For instance, in the Federal Territories, the relevant law is the Syariah Criminal Offences (Federal Territories) Act 1997<sup>446</sup>. According to section 21 of the Act, prostituting is an offence punishable with a fine not exceeding RM5,000, or imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof. The Act also provides that any men who “(a) prostitutes his wife or a female child under his care; or (b) causes or allows his wife or a female child under his care to prostitute herself, shall be guilty of an offence and shall on conviction be liable to a fine

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<sup>3-444</sup> Section 51(3) (a) ATIPSOM 2007 (Act 670)

<sup>3-445</sup> Section 51(3)(b) ATIPSOM 2007 (Act 670)

<sup>3-446</sup> Act 559

not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof’.<sup>447</sup>

In addition, any Muslim man who seeks for prostitution, and involve carnal knowledge may also be charged under section 23(1) for performing sexual intercourse out of wedlock and may be punished on conviction of fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination, thereof.<sup>448</sup> The women on the other hand, who perform that sexual intercourse out of wedlock voluntarily, may also be punished with the same punishment<sup>449</sup>. Besides that, an act preparatory to sexual intercourse out of wedlock is also made an offence punishable with a fine not exceeding RM3,000 or imprisonment for a term not exceeding two years or to both.<sup>450</sup>

### **3.3.9 Laws relating to pornography.**

Pornography is generally outlawed in Malaysia and the provisions are scattered in various Acts which most of the them do not expressly mention “pornography” but rather relate to obscene materials or otherwise against public decency.<sup>451</sup> Prior to the passing of the Sexual Offences against Children Act 2017, the laws did not differentiate between adult and child pornography.

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<sup>3-447</sup> Section 21 (2) Act 559

<sup>3-448</sup> Section S.23(1) Act 559

<sup>3-449</sup> Section 23(2) Act 559

<sup>3-450</sup> Section 24 Act 559

<sup>3-451</sup> Juriah Abdul Jalil, ‘Combating Child Pornography in Digital Era: Is Malaysian Law Adequate to Meet the Digital Challenge?’ [2015] *Pertanika J. Soc. Sci. & Hum.* 23 (S): 137 – 152; at page 144

The laws concerning pornography in general could be found in the Printing Presses and Publications Act 1984<sup>452</sup> (hereinafter referred to “the PPPA 1984”) and section 292 of the Penal Code. Whilst section 4 of the PPPA 1984 prohibits the production or publication of obscene or otherwise against public decency material by printing press or machine, section 292 of the Penal Code covers more general provision of sale, distribution, public exhibition, *etc* of obscene book, pamphlet, paper, drawing, painting and likewise.<sup>453</sup> In addition, a reference could also be made to section 5 of the Film Censorship Act 2002<sup>454</sup> (hereinafter referred to as “the FCA 2002”) that prohibits the possession, ownership, production and dissemination of obscene or otherwise against public decency film.<sup>455</sup> The three aforementioned legislations however does not effectively outlawed internet pornography due to the limitation of the Acts itself.<sup>456</sup> For instance, the PPPA 1984 emphasizes on the publication by printing press. Furthermore its definition of “publication” in section 2 only refers to document, newspaper, printed materials and audio recording. The Penal Code similarly limited to physical materials like book, drawing, *etc*. The FCA 2002 likewise expressly exclude its application to any film over the internet or intranets by virtue of section 3 of the Act.

For internet pornography, section 211 Communications and Multimedia Act 1998<sup>457</sup> (hereinafter referred to as the “CMA 1998”) prohibits both content applications service provider and person using such service to provide indecent or obscene content. Section 233 additionally prohibits the improper use of network facilities to make and initiate the

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<sup>3-452</sup> Act 301

<sup>3-453</sup> The offence under section 4 of the PPPA 1984 is punishable with imprisonment for a term not exceeding three years or to a fine not exceeding RM20,000 or both upon conviction. For the offence under section 292 of the Penal Code, it is punishable with imprisonment for a term which may extend to three years or with fine or both upon conviction.

<sup>3-454</sup> Act 620

<sup>3-455</sup> The offence is punishable with fine of not less than RM10,000 and not more than RM50,000 or imprisonment for a term not exceeding five years or both upon conviction.

<sup>3-456</sup> Juriah Abdul Jalil, *supra* note 3-220; see also Ahmad Masum, ‘Freedom of Speech and the Internet — A Case Study of Malaysia’, [2009] 3 MLJ xxxiv

<sup>3-457</sup> Act 588

transmission of obscene or indecent communication. The said offences are punishable with fine not exceeding RM50,000 or imprisonment for a term not exceeding one year or both. A further fine of RM1,000 shall be imposed for every day during which the offence is continued after conviction.

Apart from legislations, the Content Code, an industry self-regulation guidelines, was framed by virtue of Section 94 of the CMA 1998. The Content Code prohibits ISPs, Internet content hosts, online content developers, online content aggregators and link providers to provide illegal content including those of indecent and obscene.<sup>458</sup> Nonetheless, the compliance of the Content Code by the industry is on voluntary basis.

### **3.3.10 Sexual Offences against Children Act 2017 [Act 792]**

The Sexual Offences against Children Act 2017 (hereinafter referred to “the SOAC 2017”); came into force on 7 April 2017 is another milestone in affording protection for children against moral harm. Besides safeguarding the children’s interest, the enforcement would provide effective deterrence measures. Unlike other legislation, the SOAC 2017 directly addresses child pornography, sexual grooming and also physical and non-physical sexual assault against children.

Under the new laws, heavy punishment is imposed to the producer of child pornography, where upon conviction he/she could be punished with imprisonment of not more than 30 years and caning of not less than 6 strokes.<sup>459</sup> The use or causing a child to be used in the making of child pornography is also made a separate offence punishable

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<sup>3-458</sup> Mahyuddin Daud & Juriah Abd Jalil, ‘Protecting Children against Exposure to Content Risks Online in Malaysia: Lessons from Australia’ [2017] *Malaysian Journal of Communication*, 33(1) 2017: 115-126

<sup>3-459</sup> Section 5 SOAC 2017

with imprisonment of not more than 20 years and caning of not less than 5 strokes.<sup>460</sup> It is important to note that under the new laws, the acts of publishing, exchanging, distributing, having possession and even accessing child pornography are outlawed.<sup>461</sup> Similarly, child sexual grooming are also outlawed and thus empowers prompt intervention before more serious sexual offences against children are committed.<sup>462</sup>

### 3.4 CONCLUSION

This chapter has critically examined the development of the laws in relation to the protection of women and girls exposed to moral harm in Malaysia since 1880's. Protecting women and girls from moral harm and from becoming victims of sex exploitation in Malaysia has a long-standing history over the centuries. Prostitution burgeoned in the British Malaya and the Straits Settlements in the 1880's as a result of economic development in the colonies. The importation of male labourers from China and India had caused prodigious gender imbalance in the states; thus, sex services were highly sought-after. Moreover, the financial constraints and arduous living were among the obstacles towards their pursuit for marriage. Consequently, the relentless spread of venereal diseases, such as gonorrhoea and syphilis, had compelled the government to introduce the CDO in the Straits Settlements. It is submitted that at this point, the law adopted a "Regulationist Approach" whereby prostitution and brothels remain lawful but regulated. It was infeasible to eliminate prostitution entirely at this juncture as the government considered prostitution as 'necessary evil'. Under the CDO, brothels must be registered and prostitutes were subjected to medical surveillance.

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<sup>3-460</sup> Section 7 SOAC 2017

<sup>3-461</sup> Section 8-10 SOAC 2017

<sup>3-462</sup> Section 12-14 SOAC 2017

Apart from the above, trafficking of women and girls was another grave concern. The high demand for prostitutes had driven certain parties to take advantage by procuring and trafficking women and girls using deceitful means. There had been reported cases where Chinese women and girls were brought from China *via* Hong Kong and Siam to Malaya and Singapore for the purpose of prostitution.<sup>463</sup> Besides, Singapore became the transit port for women and girls en route to Burma, Indonesia, Thailand and India.<sup>464</sup> To hamper this, administrative measures were instigated, such as the entry-point inspection and investigation, as well as the international collaboration with the Chinese Government and the Hong Kong Administration. It is also significant to note that a place of refuge - the Po Leung Kuk Home, had been established since 1888 to shelter victims. These actions were later formalised in the Strait Settlements' WGPO 1888 as well as in the Orders in Council of the respective Malay States. The laws at this point in time emphasised on three matters; namely, incriminating any kind of procurement and trafficking of women and girls, rescuing victims, and regulating prostitution.

A series of amendments to the WGPO and WGPB from 1888 to 1936 proves that the laws progressed to afford better protection for women and girls. Moreover, the laws were made to conform to international standards as the British and its dominions became the parties to two important treaties namely; the International Convention for the Suppression of the Traffic in Women and Children 1921, and the International Convention for the Suppression of the Traffic in Women of Full Age 1933. Also in the early 19th century, the movement against prostitution expanded globally.<sup>465</sup> Prostitution was contended as a

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<sup>3-463</sup> Daniel Gorman, *Empire, Internationalism, and the Campaign against the Traffic in Women and Children in the 1920s*, (2008) *Twentieth Century British History*, 19(2), 186-216. doi:10.1093/tcbh/hwm030; at page 201-202

<sup>3-464</sup> Christine B.N. Chin, *Cosmopolitan Sex Workers: Women And Migration In A Global City*. (Oxford: Oxford Univ. Press, 2015)

<sup>3-465</sup> Daniel Gorman, *supra* note 3-232

“legalised slavery” by reformists.<sup>466</sup> This campaign was well received in Singapore and Malaya too which prompted the laws to transform into an “Abolitionist System” by outlawing brothels and incriminating all prostitution-related activities starting from 1930.

Presently, Malaysia is striving to fulfil her obligation under the UNCRC in giving the best protection for children in Malaysia. This can be manifested by among others the steps taken in firming the legal framework in addressing child sexual exploitation. As can be seen in this chapter, Part IV of the CA 2001 is taken from the previous laws with further enhancement from time to time to suit the best interest of children who are deemed in need of protection and rehabilitation. For instance, the latest Child (Amendment) Act 2016 improves from the earlier provisions where currently, if the Court is satisfied that a child is in need of protection and rehabilitation, it must primarily consider for the child to remain in the care of his parents or other close family members, unless that would jeopardise the best interest of the child. Placing him at a place of refuge shall be the last resort. The law stresses the importance of family engagement in supporting a child’s development and care-giving in accordance to the spirit of the UNCRC.

It is equally important to note that, in addressing child sexual exploitation holistically, apart from the said Part VI of the CA 2001, the legal framework is further strengthened with other legislations. For instance, the Anti-Trafficking In Persons and Anti-Smuggling Of Migrants Act 2007 [*Act 670*] provides a comprehensive legal apparatus to eradicate trafficking in persons in 3 approaches; the prevention of trafficking, the prosecution of traffickers, and the protection of victims. This certainly strengthens the laws on child trafficking for the purpose of exploitation.

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<sup>3-466</sup> Reanda, L. ‘Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action. *Human Rights Quarterly*’(1991) 13(2), 202. doi:10.2307/762660



In addition, the passing of the Sexual Offences against Children Act 2017 [*Act 792*], the laws are further strengthened by outlawing child pornography and sexual grooming which are the elements of child sexual exploitation as enunciated by Article 34 of the UNCRC. With advanced technology in communication, children particularly are vulnerable to sexual cyber-predators. As most sexual exploitation cases usually start with sexual grooming, the new legislation is significant for early deterrence.

In the next Chapter 4, the above discussed present domestic laws, particularly relating to children sexual exploitation, will be critically evaluated in determining whether the laws are in compliance with international standards.

## **CHAPTER 4**

### **A CRITICAL EVALUATION OF THE DOMESTIC LAW IN RESPECT TO CHILDREN IN NEED OF PROTECTION AND REHABILITATION: ARE THEY IN COMPLIANCE TO THE INTERNATIONAL STANDARDS?**

#### **4.1 INTRODUCTION**

The findings in Chapter 3 showed that the laws in Malaysia relating to child sexual exploitation (CSE) are not contained in a single document but are found in a number of statutes. The main reference would be the Child Act 2001 (the “CA 2001”) and is further supported with the Sexual Offences against Children Act 2017 (the “SOAC 2017”) and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (the “ATIPSOM 2007”). In this chapter, the related provisions will be critically appraised to determine whether the laws conform to international standards. This exercise is crucial to ensure that the domestic laws provide clear, comprehensive and responsive legal framework in addressing child sexual exploitation. Such legal framework is required as the fundamental strategy in advancing the protection and welfare rights of children in need of protection and rehabilitation in Malaysia.

The evaluation of these current laws are premised upon international benchmarks which are concluded in Chapter 2, emphasising on the following aspects:

1. Clear definitions of CSE, including child prostitution and child pornography, are demarcated in the legislation;
2. All acts that fall directly or related to CSE are outlawed;
3. Any act leading to the perpetration of CSE such as grooming, trafficking, and transporting, are criminalised;

4. The issue on the transnational commission of the crime is addressed by establishing clear jurisdiction;
5. Clear rescue mode for the children who are involved or are prone to be involved in sexual exploitation is provided;
6. The provisions relating to the rights of the child victim to undergo rehabilitation and support programme are incorporated; and
7. The child victims are afforded the access to claim compensation.

To strengthen the evaluation, the law relating to the above specific aspects in selected jurisdictions will be analysed and compared to the Malaysian provisions. The purpose is to identify the strengths and the gaps in the current Malaysian legal framework. The jurisdictions are selected based on their strength or weakness highlighted in the following global report:

- i. *Strengthening Law Addressing Child Sexual Exploitation* by ECPAT International (2008)
- ii. *Child Pornography: Model Legislation & Global Review* (7<sup>th</sup> Edition) by International Centre for Missing & Exploited Children, (2013)
- iii. *Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review* by International Centre for Missing & Exploited Children (2017)
- iv. *Protecting Children from Cybercrime- Legislative Responses in Asia to Fight Child Pornography, Online Grooming, and Cyberbullying*, by The World Bank and the International Centre for Missing & Exploited Children (2015).

The outcome of this chapter will provide the basis and recommendations for legal reform.

## 4.2 DEMARCATING A CLEAR DEFINITION OF CSA AND CSE IN THE LEGAL FRAMEWORK

As scrutinised earlier in Chapter 2, child sexual abuse (CSA) and child sexual exploitation (CSE) may overlap, however both are distinct in nature and involve different actions and intercessions to exterminate the crime. Moreover, under the CSE genus, there are child prostitution and child pornography. It is vital for these terms to be clearly defined and consistent with the international definition, so as to establish a firm and efficient legal framework, facilitate the international collaboration; and curtail forum shopping.<sup>467</sup>

### 4.2.1 Definition of a child

Malaysian statutes relating to child sexual exploitation adopts the international definition of a child, who is a person below 18 years old. This is stated in section 2 of the CA 2001, SOAC 2017 and ATIPSOM 2007 respectively.

Section 2 of the CA 2001 further points an exception of the definition in relation to criminal proceedings. It provides that the age of criminal responsibility of a child is subject to section 82 of the Penal Code. Under the said section 82, a person who is below 10 years old is deemed under the law as *doli incapax* i.e. incapable of committing a crime and hence cannot be criminally responsible in whatever circumstances. In addition, section 83 of the Penal Code provides that a child above 10 but below 12 years old is also deemed to be incapable of being criminally responsible if it can be proven that he has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct when committing the offence. These exceptions even so do not affect the compliance to the international definition of CSE.

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<sup>4-467</sup> Catherine Beaulieu, *Strengthening Law Addressing Child Sexual Exploitation* (ECPAT International, 2008) at page 53

#### 4.2.2 Definition of child sexual abuse (CSA) and child sexual exploitation (CSE)

The laws in Malaysia does not provide an explicit distinct definition of CSA and CSE in the statutes. The only expressed definition of CSA could be traced in section 17 of the CA 2001, which reads:

- “(1) A child is in need of care and protection if—*
- (a) the child has been or there is substantial risk that the child will be... sexually abused, by his parent or guardian or a relative;*
  - (b) the child has been or there is substantial risk that the child will be sexually abused but his parent or guardian knowing of such injury or abuse or risk, has not protected or is unlikely to protect the child from such injury or abuse;*
- ...*
- (2) For the purposes of this Part, a child is—*
- (c) 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”*

It is pertinent to point that section 17 of the CA 2001 is not a specific provision on CSA, but the section concerns on “children in need of care and protection”, a category of children envisaged in Part V of the CA 2001. This category of children includes those who have been or at risk of being physically or emotionally abused, or neglected within the intra-familial setting. This category will enable protective interventions to take place in the event of transgressions.

Narrowing to the discussion on CSA, the provision envisages that CSA takes place when a child participates in a sexual activity for the purpose of pornographic, obscene or indecent material or performance; or for the purpose of sexual exploitation for the exploiter or other person’s sexual gratification. Remarkably, the provision also emphasises that allowing a child to witness a sexual activity is also considered as sexual

abuse. It is submitted that this definition of CSA is consistent with Article 19 of the UNCRC that emphasises the rights of children to be protected against abuse and neglect.

As seen above, CSE is also expressed in section 17, specifically in subsection (2)(c)(ii) of the CA 2001. The term however is not characteristically defined in any parts of the CA 2001 or other related statutes. CSE under the Malaysian law yet could be explained in the specific offences of child prostitution and child pornography which shall be critically evaluated in the following subheadings 4.2.3 and 4.2.4.

#### **4.2.3 Definition of child prostitution.**

Section 2 of the CA 2001 provides that “prostitution” means “*the act of a person offering that person’s body for sexual gratification for hire whether in money or in kind; and “prostitute” shall be construed accordingly*”. Hence child prostitution would mean an act where a person under 18 years old offering his or her body for other person’s sexual gratification in return for gain including in the form of monetary or its kind. This is aligned with the internationally recognised definition of child prostitution as laid down in Article 2(b) of the OPSC.<sup>468</sup> It is not confined to sexual intercourse alone, instead it provides extensive coverage to include all kinds of sexual acts like masturbation and oral sex. Besides that, the consideration can be in various forms and is not limited to monetary consideration alone.

Another important aspect in defining child prostitution is the legal presumption that persons under the age of 18 years who are involved in prostitution shall always be the victims of sexual exploitation notwithstanding any form of consent or willingness

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<sup>4-468</sup> Article 2(b) OPSC provides that “*Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration*”; the detailed discussion on the definition of “child prostitution” is in Chapter 2.3.2(b) of this thesis.

existing on their part. As emphasised in Chapter 2.3.2 (b), the international law affirms that a child does not have the capacity to give consent to her or his own sexual exploitation.<sup>469</sup>

Despite the fact that children involved in prostitution would be regarded as “children in need of protection and rehabilitation” in Part VI of the CA 2001, there is yet a clear provision in any Acts that preclude these victims from being prosecuted, especially for children of 16 years old and above, who are deemed to have attained the age of sexual consent,<sup>470</sup> and the consent or willingness to involve in prostitution was in fact existed on their part. This concern was also raised by the UNICEF in 2015.<sup>471</sup>

The said children may be charged for soliciting or importuning prostitution under section 372B of the Penal Code. The term “solicits” and “importunes” contained in the said section 372B could be interpreted literally as to accost someone, with or without urging, and offer one's or someone else's services as a prostitute.<sup>472</sup> This means that the offence could be firstly committed by a person (as a customer) who accosts for someone else's service, or secondly is committed by a person who offers his own service, for prostitution. This is in contrast with other jurisdictions like in the United Kingdom and Sweden, where “soliciting” only refers to the first point.

In the United Kingdom, the position is clearly illustrated in section 51A(1) of the Sexual Offences Act 2003 that reads, “[I]t is an offence for a person in a street or public

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<sup>4-469</sup> See Chapter 2.3.2 (b), note 2-87 to 2-97

<sup>4-470</sup> by virtue of section 375 (g) of the Penal Code [Act 574]

<sup>4-471</sup> UNICEF, *Analysis of Domestic Laws related to Violence against Children: Malaysia* (June 2015), available at <[https://www.unicef.org/eapro/Country\\_fact\\_sheet\\_Malaysia-final\\_09Jul15.pdf](https://www.unicef.org/eapro/Country_fact_sheet_Malaysia-final_09Jul15.pdf)> accessed on 1 March 2018; at page 4

<sup>4-472</sup> the literal interpretation of the word “solicit” and “importune” via Oxford Dictionary <<https://en.oxforddictionaries.com/definition/solicit>> and FindLaw dictionary <<https://dictionary.findlaw.com/definition/importune.html>>; both accessed on 1 May 2018

*place to solicit another (B) for the purpose of obtaining B's sexual services as a prostitute”.*

Similarly, in Sweden, prostitutes cannot be charged for soliciting or offering sex in exchange of payment as provided in the Act Prohibiting the Purchase of Sexual Services 1998 but rather criminalises persons who pay for casual sexual relations. This Act was later repealed. However the provision is replaced to Section 11, Chapter 6 of the Swedish Penal Code.<sup>473</sup>

In addition, if the child is a Muslim, he or she may be charged under the respective states' Syariah Criminal Offences Enactments for prostitution.<sup>474</sup> Under the Malaysian Syariah Legal System, only children who have not attained *baligh*, that is the age of puberty, are exempted from criminal liability.<sup>475</sup> There is no consistent definition of *baligh* in the respective states' Syariah criminal laws<sup>476</sup>, it is either:

- a. *baligh* in general term, when a child has physically and mentally fully grown or developed;<sup>477</sup>
- b. when a child has attained the age of twelve years *qamariah*;<sup>478</sup>

<sup>4-473</sup> see Government Offices of Sweden, 'Legislation on the purchase of sexual services', available at < <https://www.government.se/articles/2011/03/legislation-on-the-purchase-of-sexual-services/>> retrieved on 1 April 2018; Karen Hindle, Laura Barnett & Lyne Casavant, 'Prostitution: A Review of Legislation in Selected Countries', PRB 03-29, Parliament of Canada (2008), available at < <https://lop.parl.ca/content/lop/ResearchPublications/prb0329-e.pdf>> accessed on 3 April 2018, at page 19-22

<sup>4-474</sup> For instance, prostitution is an offence under section 21 of the Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559], section 23 of the Syariah Criminal Offences (Selangor) Enactment 1995 [Enactment No. 9 Of 1995]; section 21 of the Syariah Criminal Offences (Johor) Enactment 1997 [Enactment No. 4 Of 1997]; section 19 of Syariah Criminal Code (Kedah) Enactment 1988 [Enactment No. 9 Of 1988], section 72 of the Syariah Criminal Offences (Sabah) Enactment 1995 [Enactment No. 3 Of 1995]; section 75 of the Syariah Offences Enactment (Malacca) 1991 [Enactment No.6 of 1991]; section 69 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 [Enactment No. 4 of 1992]

<sup>4-475</sup> Section 51 of the Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559], section 43 of the Syariah Criminal Offences (Selangor) Enactment 1995 [Enactment No. 9 Of 1995]; section 51 of the Syariah Criminal Offences (Johor) Enactment 1997 [Enactment No. 4 Of 1997]; section 19 of Syariah Criminal Code (Kedah) Enactment 1988 [Enactment No. 9 Of 1988], section 10 of the Syariah Criminal Offences (Sabah) Enactment 1995 [Enactment No. 3 Of 1995]

<sup>4-476</sup> Wafaa' Yusof & Anita Abdul Rahim, 'The Age of Criminal Responsibility from the Perspective of Malaysian Shariah Law' [2014] Asian Social Science; Vol. 10, No. 10; at page 97

<sup>4-477</sup> Section 2 of the Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559], section 2 of the Syariah Criminal Offences (Selangor) Enactment 1995 [Enactment No. 9 Of 1995]; section 2 of the Syariah Criminal Offences (Johor) Enactment 1997 [Enactment No. 4 Of 1997]

<sup>4-478</sup> Section 2 Syariah Criminal (Negeri Sembilan) Enactment 1992 [Enactment No. 4 of 1992]



- c. when a child is older than fifteen years;<sup>479</sup> or
- d. when a child is older than ten years old.<sup>480</sup>

The Syariah Criminal Procedure Enactments would reserve the punishments upon conviction for youthful offenders,<sup>481</sup> where they may be discharged after due admonition or the court may impose bond of good behaviour in place of fine or imprisonment.<sup>482</sup>

Hence, without a clear precluding provision, if a child is above the age of consent under the civil law, and/ or a Muslim who is *baligh* under the Syariah law, whom voluntarily involve in prostitution, faces the possibility of being charged under the aforementioned Act and Enactments.

In light of the above, it is recommended that the respective Act and State Enactments be amended to expressly exclude the criminalisation of children involving in prostitution. A reference could be made to section 23(3) of the New Zealand's Prostitution Reform Act 2003 that provides "*no person under 18 years of age may be charged as a party to an offence committed on or with that person against this section* [in relation to the offence to breach prohibitions on use in prostitution of persons under 18 years]".

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<sup>4-479</sup> Section 10 Syariah Offences Enactment (Malacca) 1991 [Enactment No.6 of 1991]

<sup>4-480</sup> Section 10 of the Syariah Criminal Offences (Sabah) Enactment 1995 [Enactment No. 3 Of 1995]

<sup>4-481</sup> "Youthful offender" refers to offender above the age of ten and below the age of sixteen years; see section 2 (Interpretation provision) of the Syariah Criminal Procedure of the respective states.

<sup>4-482</sup> Section 128 of the Syariah Criminal Procedure (Federal Territories) Act 1997 [Act 560]; section 128 of the Syariah Criminal Procedure (Selangor) Enactment 2003 [Enactment No. 3 Of 2003]; section 128 Syariah Criminal Procedure Code (Johor) Enactment 1997 [Enactment No. 3 Of 1997], section 128 of the Syariah Criminal Procedure (Sabah) Enactment 2004 [Enactment No. 9 Of 2004], section 132 Syariah Criminal Procedure (Negeri Sembilan) Enactment 2003 [Enactment No. 13 Of 2003], section 128 of the Syariah Criminal Procedure (State Of Malacca) Enactment 2002 [Enactment No. 9 Of 2002]

#### 4.2.4 Definition of child pornography.

The SOAC 2017 has adopted a clear definition on “child pornography”. Section 4 of the Act stipulates three main elements of a “child pornography”:

(i) *‘Depiction’*

Section 4 covers a broad scope of depictions that includes visual, audio, written or combination thereof. These depictions could be developed by any means including but not limited to electronic, mechanical, digital, optical or magnetic means, or even manually crafted, or the combination thereof.

(ii) *‘Representation’*

Technically, child pornography involves the representation of a real child engaged in sexual explicit conduct. Section 4(a) nonetheless extends its definition to include the representation of any person appearing to be a child and realistic or graphic images of a child or person appearing to be a child engaged in sexually explicit conduct.

(iii) *‘Sexual explicit conduct’*

Section 4(b) further defines ‘sexual explicit conduct’ that include the actual or simulated sexual intercourse, lewd acts, bestiality, masturbation, sadistic or masochistic abuse in sexual context, exhibition of genital, buttock, breast pubic area or anus for sexual purposes, and the use of any object for lewd acts.

It is submitted that the SOAC 2017's definition of "child pornography", apart from being comprehensive and extensive, conforms to the definition set in various related international treaties such as the OPSC, the Convention on Cybercrime (known as the "Budapest Convention"), and the Lanzarote Convention.<sup>483</sup>

Besides that, section 4 of the SOAC 2017 addresses the unavailability of specific child pornography definition in other related legislation such as the Communications and Multimedia Act 1998,<sup>484</sup> Film Censorship Act 2002,<sup>485</sup> Printing Presses and Publications Act 1998,<sup>486</sup> and Penal Code<sup>487</sup> that prohibit obscene and offensive materials.<sup>488</sup>

#### **4.3 OUTLAWING ALL ACTS THAT FALL DIRECTLY OR RELATED TO THE PERPETRATION OF CSE**

Given the fact that CSE is a serious violation of children's rights, the states are obliged by the international instruments to outlaw all acts that fall directly, or related to the perpetration of the CSE.<sup>489</sup> Criminal justice is a powerful mechanism in upholding the children's rights to protection by banning CSE, implicating and punishing the perpetrators, as well as deterring the commission of the crime. The analysis on the

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<sup>4-483</sup> Critical examination on the definition of 'child pornography' has been elaborated in Chapter 2, Part 2.3.2 (c). Although Malaysia is not a state party of both the Budapest Convention and Lanzarote Convention, but the definition of child pornography in both instruments is a good reference. Article 9(2) of the Budapest Convention provides that child pornography material shall visually depicts the engagement of a minor or person appears to be a minor in sexually explicit conduct; or consists of "*realistic images representing a minor engaged in sexually explicit conduct*". Article 20.2 of the Lanzarote Convention further provides that "*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*" are considered as child pornography.

<sup>4-484</sup> Act 588

<sup>4-485</sup> Act 620

<sup>4-486</sup> Act 301

<sup>4-487</sup> Act 574

<sup>4-488</sup> Juriah Abdul Jalil, 'Combating Child Pornography in Digital Era: Is Malaysian Law Adequate to Meet the Digital Challenge?' [2015] *Pertanika J. Soc. Sci. & Hum.* 23 (S): 137 – 152; at page 144

<sup>4-489</sup> See Chapter 2.4(i) of this thesis for the discussion on the related international instruments pertaining to the state's obligation to outlaw CSE.

sufficiency of the Malaysian laws in outlawing the aforesaid acts are divided into the following subheadings 4.3.1 and 4.3.2:

#### 4.3.1 Offences related to child prostitution.

As a reference point, Article 3 of the OPSC obligates the State Parties to, at the very minimum, criminalised the acts of offering, obtaining, procuring and providing a child for prostitution. The acts are different in nature and are distinguished as follows<sup>490</sup>:

**Table 4.1: The distinction of “offering”, “obtaining”, “procuring” and “providing” child prostitution (adopted from “*Strengthening Law Addressing Child Sexual Exploitation*”, ECPAT International, 2008)**

Term	Interpretation
Offering	<i>To ask someone if they would like a child for sex; to advertise the availability of children as sexual partners. An offer may occur in a range of ways, including verbally or via newspapers, internet, mobile phone or any other form of communication.</i>
Obtaining	<i>The prohibition on obtaining a child for prostitution targets the client of a prostituted child. It refers to the transaction by which a person acquires the sexual services of a child. Where a person has attempted to involve a child in sexual activities for remuneration, but has not yet engaged in any sexual activity, this should also trigger criminal responsibility.</i>
Procuring	<i>To arrange for a child victim to be made available to a customer, for example by ‘buying’ a child for someone, or arranging for a child to be brought to a particular place for them. This activity is commonly referred to as ‘pimping’.</i>
Providing	<i>To make a child available to someone who so requests. This would include a parent or a relative who sells a child for the purposes of prostitution or sells the child to a brothel owner who provides a customer with access to a child. Owners, occupiers, managers or anyone else who knowingly or recklessly permit premises to be used for child prostitution should be treated as providers.</i>

<sup>4-490</sup> The distinction and explanation are adopted from ECPAT Report; see Catherine Beaulieu, *supra* note 4-1, at page 61 of the report.

In addition, the OPSC and other international instruments require for the above acts to be criminalised whether it is committed domestically, transnationally, or on an individual or organisational basis.<sup>491</sup> Corresponding to these requirements, Malaysia has enacted the laws as follows:

**Table 4.2: Offences related to child prostitution in Child Act 2001**

Subject	Section	Provision / offence	Notes
Selling & buying a child	s.43(1)(a) CA 2001	<ul style="list-style-type: none"> <li>▪ sells, lets for hire or otherwise disposes of a child; or</li> <li>▪ buys or hires or otherwise obtains possession of a child;</li> </ul> <p>with the intent or having the knowledge that the child is to be employed or used for the purpose of prostitution</p>	<ul style="list-style-type: none"> <li>▪ All the acts are outlawed regardless whether the prostitution is going to take place in Malaysia or overseas</li> <li>▪ Punishable with fine not exceeding RM50,000 to imprisonment for a term not exceeding 15 years or both</li> </ul>
Procuring	s.43(1)(b) CA 2001	<ul style="list-style-type: none"> <li>▪ procures a child for the purpose of prostitution</li> </ul>	<ul style="list-style-type: none"> <li>▪ All the said acts are made offence regardless whether the prostitution is going to take place in Malaysia or overseas</li> <li>▪ Punishable with fine not exceeding RM50,000 to imprisonment for a term not exceeding 15 years or both</li> </ul>
	s.43(1)(c) CA 2001	<ul style="list-style-type: none"> <li>▪ brings a child into Malaysia by or under any false pretence, false representation, or fraudulent or deceitful means; or</li> <li>▪ takes out a child outside Malaysia by or under any false pretence, false representation, or fraudulent or deceitful means;</li> </ul>	

<sup>4-491</sup> Article 3 of the OPSC; UN TIP Protocol

Subject	Section	Provision / offence	Notes
		with intent or having knowledge that the child is to be employed or used for purposes of prostitution	
	s.43(1)(d) CA 2001	<ul style="list-style-type: none"> <li>brings into Malaysia, receives or harbours a child knowing or having reason to believe that the child has been procured for purposes of prostitution and with the intent to aid such purpose</li> </ul>	
Having knowledge	s.43(1)(e) CA 2001	<ul style="list-style-type: none"> <li>knowing or having reason to believe that the child has been brought into Malaysia for the purposes of prostitution</li> </ul>	The offence is punishable with fine not exceeding RM50,000 to imprisonment for a term not exceeding 15 years or both
Detaining	s.43(1)(f) CA 2001	<ul style="list-style-type: none"> <li>detains a child in a brothel against the child's will</li> </ul>	Both offences are punishable with fine not exceeding RM50,000 to imprisonment for a term not exceeding 15 years or both
	s.43(1)(g) CA 2001	<ul style="list-style-type: none"> <li>detains a child in any place against the child's will with the intent that the child is to be employed or used for purposes of prostitution</li> </ul>	
Offering	s.43(1)(h) CA 2001	<ul style="list-style-type: none"> <li>offers a child for purposes of prostitution by means of any advertisement or other notice published in any manner or displayed in any place.</li> </ul>	The offence is punishable with fine not exceeding RM50,000 to imprisonment for a term not exceeding 15 years or both

Subject	Section	Provision / offence	Notes
Providing	s.43(1)(i) CA 2001	<ul style="list-style-type: none"> <li>acts as an intermediary on behalf of a child prostitution</li> <li>exercises control or influence over the movements of a child in such a manner as to show that the person is aiding or abetting or controlling the prostitution of that child.</li> </ul>	<ul style="list-style-type: none"> <li>Punishable with fine not exceeding RM50,000 and imprisonment for a minimum term of not less than 3 years and a maximum term of 15 years and shall (mandatory) be whipped for a maximum of 6 strokes.</li> </ul>
Engaging	s.43(1)(j) CA 2001	<ul style="list-style-type: none"> <li>engages or hires, for any valuable consideration, a child to provide services for that person's sexual gratification</li> </ul>	<ul style="list-style-type: none"> <li>Punishable with fine not exceeding RM50,000 and imprisonment for a minimum term of not less than 3 years and a maximum term of 15 years and shall (mandatory) be whipped for a maximum of 6 strokes</li> </ul>

Based on the above analysis, it is established that Malaysia does not only criminalise, at the very least, the four related acts related to child prostitution imposed by the OPSC but sets a stricter positions. Firstly, the law bans the transaction of sale, hire or disposal of a child with the intent or knowledge that it would be for the purpose of prostitution under section 43(1)(a) of the CA 2001. It has become a global concern since 1900's to date where children have been sold, mainly due to poverty, which exposed these vulnerable children to exploitation including prostitution.<sup>492</sup> For instance, it is reported that there were instances where children in Vietnam were initially sold to brothels and

<sup>4-492</sup> United Nations, *Global Report On Trafficking In Persons* (2016) available at <[https://www.unodc.org/documents/data-and-analysis/glotip/2016\\_Global\\_Report\\_on\\_Trafficking\\_in\\_Persons.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf)>, accessed on 1 May 2018; Yvonne Rafferty, 'Children for Sale: Child Trafficking in Southeast Asia' [2007] Child Abuse Review Vol. 16: 401-422

subsequently sent to other countries, including Malaysia, for prostitution.<sup>493</sup> Hence, section 43(1)(a) aims to tackle one of the initial sources or roots of the crime. The provision does not only criminalises a person who sells, lets for hire or disposes the child, but also the counterparty who buys, hires or receives the child. This is to be differentiated from section 43(1)(j) of the CA 2001 where the latter tackles the “customer”; whereas the former may not necessarily be a customer but merely involved in the transaction of selling and buying of the child victim.

It is worth highlighting section 43(1)(j) which signifies that child prostitution is absolutely outlawed in Malaysia, regardless of the consent from the child who is capable thereof, in line with the spirit of the UNCRC and the ILO Convention.

Secondly, Malaysia criminalises persons who may not be directly involved in child prostitution but merely have the knowledge or reason to believe that the children have been procured or been disposed of for the purpose of prostitution and yet fail to take any action under the sections 43(1)(d) and 43(1)(e) of the CA 2001.

Thirdly, detaining a child in a brothel against his will is an offence under section 43(1)(f) of the CA, notwithstanding the fact that the child is not to be used for prostitution. This provision is a proactive measure to protect children from the insalubrious environ and the risk of being abused or exploited.

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<sup>4-493</sup> ECPAT International, *The Commercial Sexual Exploitation Of Children In East And South-East Asia: Developments, Progress, Challenges and Recommended Strategies for Civil Society*, (2014), available at <[http://www.ecpat.org/wp-content/uploads/2016/04/CSEC-Overview\\_SouthEastAsia.pdf](http://www.ecpat.org/wp-content/uploads/2016/04/CSEC-Overview_SouthEastAsia.pdf)> accessed on 4 May 2018; at page 17



Fourthly, the law provides additional punishment to a maximum of ten strokes of whipping in addition to the initial punishment if an offender is convicted of the second and subsequent offences of section 43 of the CA 2001.

### 4.3.2 Outlawing child pornography

In affording comprehensive protection, the international instruments such as the OPSC obligate State Parties to criminalise all acts related to child pornography industry, from its production to the sale and possession of the material.<sup>494</sup> In line with this requirement, the SOAC 2017 does not only outlaw the related act as commanded, but it provides a higher standard of protection by criminalising the acts of the preparation to produce or direct and accessing child pornography. The details of the offences related to child pornography in the SOAC 2017 are summarised in Table 4.3:

**Table 4.3: Offences related to child pornography in the SOAC 2017**

Subject	Section	Provision / offence	Notes
Production	S.5 SOAC 2017	(i) Makes; (ii) Produces; (iii) Directs the making or production of; ...child pornography  (iv) Participates, engages or is involved in (i),(ii),(iii)	The offence is punishable with imprisonment not exceeding 30 years <b>and</b> whipping not less than 6 strokes.
Pre-production	S.6 SOAC 2017	Prepares to make, produce or direct child pornography	The offence is punishable with imprisonment not exceeding 10 years <b>and</b> whipping

<sup>494</sup> Article 3(1)(ii)(c) of the OPSC

Subject	Section	Provision / offence	Notes
Causing a child to be used	S.7 SOAC 2017	Uses a child or causes a child to be used in: (i) the preparation to make or produce; (ii) the preparation to direct the making or production of; (iii) the making or producing ...child pornography	The offence is punishable with imprisonment not exceeding 20 years <b>and</b> whipping not less than 5 strokes
Publication & distribution	S.8 SOAC 2017	(i) exchanges (ii) publishes (iii) reproduces (iv) sells (v) lets for hire (vi) distributes (vii) exhibits (viii) advertises (ix) transmits (x) promotes (xi) imports (xii) conveys (xiii) offers or make available (xiv) obtains (xv) collects (xvi) seeks ...child pornography in any manner  (xvii) participates; or (xviii) receives profits ...any business that relate to child pornography	The offence is punishable with imprisonment not exceeding 15 years <b>and</b> whipping not less than 3 strokes
Offers child pornographic material to a child	S.9 SOAC 2017	(i) sells (ii) lets for hire (iii) distributes (iv) exhibits (v) advertises (vi) transmits	Imprisonment not exceeding 15 years <b>and</b> whipping not less than 5 strokes

Subject	Section	Provision / offence	Notes
		(vii) promotes (viii) conveys (ix) offers or make available ...child pornography to a child	
Access & possession	S.10 SOAC 2017	(i) Accesess; (ii) has in possession or control; ...any child pornography	Imprisonment not exceeding 5 years or to a fine not exceeding RM10,000 or both

As can be seen in Table 4.3, the SOAC 2017 imposes a higher sentence if a person is found guilty for selling, exhibits, or make available child pornography to a child under section 9. Furthermore, apart from addressing the production, dissemination and the sale of child pornography, the SOAC 2017 specifically outlaws the access and having in possession or control of child pornography. This signifies that Malaysia does not only aim to combat child pornography that is intended for commercial purposes but include private purposes.

It is an alarming fact that Malaysia has the highest number of IP addresses uploading and downloading child pornography materials in Southeast Asia.<sup>495</sup> Although there is yet a study on the correlation of increasing number of child sexual abuse offenders<sup>496</sup> and the possession of these materials in Malaysia, it is reasonable to draw such inference. A study

<sup>4-495</sup> 'Malaysia tops in South-East Asia for online child pornography', *The Star Online* (30 January 2018), available at < <https://www.thestar.com.my/news/nation/2018/01/30/malaysia-tops-in-southeast-for-online-child-pornography/#Xl6yb5m4ZCP0sEoE.99>> accessed on 19 June 2018;

<sup>4-496</sup> see Jamhirah Abdullah et al, 'Underreporting of Child Abuse Cases in Malaysia: Society's Role in Prevention of Child Abuse' [2017] *World Applied Sciences Journal* 35 (11): 2507-2512, at page 2508; Kamles Kumar, 'Sex abuse against children up, over 5,000 cases now', *Malay Mail online*, (3 April 2017) available at < <https://www.malaymail.com/s/1348287/minister-child-sexual-abuse-cases-increasing>> accessed on 3 May 2018; Bernama, 'Child sex abuse cases on the rise in Malaysia's Sabah', *The Straits Times* (1 October 2017), available at < <https://www.straitstimes.com/asia/se-asia/child-sex-abuse-cases-on-the-rise-in-malaysias-sabah>> accessed on 3 May 2018

in the United States showed that 40% of the persons arrested for possessing child pornography were “dual offenders”, who were also sexually victimised children.<sup>497</sup>

Therefore, criminalising the act of accessing and possessing child pornography materials is essential to eradicate the booming of the industry and to deter further incidents of sexual abuse.<sup>498</sup> Further, Justice Gallant in the Canadian case of *R v Steadman*,<sup>499</sup> has well articulated the justifications for outlawing the possession of child pornography:

*“Child pornography promotes cognitive distortions. It fuels fantasies that incite offenders to offend. It is used for grooming and seducing victims. Children are abused in the production of child pornography. Child pornography is inherently harmful to children and society. That type of pornography by its very existence violates the dignity and rights of children. Harmful attitudes are reinforced by such pornography. Possession of child pornography reinforces the erroneous belief that sexual activity with children is acceptable. It fuels paedophiles fantasies which constitutes the motivating force behind their sexually deviant behaviour”*<sup>500</sup>

Another jurisdiction that pursues the same action is the United Kingdom. Section 1 of the Protection of Children Act 1978<sup>501</sup> and section 160 of the Criminal Justice Act 1988<sup>502</sup> outlaw the possession of indecent photographs of children. In 2015, a Malaysian was convicted by the Southwark Crown Court, London after the accused pleaded guilty to 13 charges of possessing and making indecent photographs and videos of children with the intent to distribute the materials.<sup>503</sup> He was found to be in possession of over 30,000

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<sup>4-497</sup> International Centre for Missing & Exploited Children, *Child Pornography: Model Legislation & Global Review*, 7<sup>th</sup> Edition (2013); at page 2-3

<sup>4-498</sup> *ibid*

<sup>4-499</sup> *R. v. Steadman*, [2001] A.J. No. 1563 (Canada)

<sup>4-500</sup> The judgment was referred to in Catherine Beaulieu, *supra* note 4-1, at page 82 of the report

<sup>4-501</sup> 1978 Chapter 37

<sup>4-502</sup> 1988 Chapter 33

<sup>4-503</sup> Shazwan Mustafa Kamal, ‘UK jail time for kiddie porn convict cut to nine months after ‘considerations’, MARA claims’, *Malay Mail* (6 May 2015) < <https://www.malaymail.com/s/891259/uk-jail-time-for-kiddie-porn-convict-cut-to-9-months-after-considerations-m> > accessed on 9 March 2018

videos and photographs of child pornography when the British authorities raided his home.<sup>504</sup>

With comprehensive definition of child pornography in section 4 of the SOAC, supported by the extensive coverage of offences, it is submitted that it has filled the *lacunae* in the legal framework to provide effective protection for children against child pornography.

#### **4.4 OUTLAWING ANY ACT LEADING TO THE PERPETRATION OF CSE SUCH AS GROOMING, TRAFFICKING, AND TRANSPORTING**

##### **4.4.1 Child Sexual Grooming**

From the critically discussed definition of CSE in Chapter 2 of this thesis, it can be deduced that the exploiter possesses the power and control over the children as a result of their age, intellect, physical strength or social status.<sup>505</sup> In many cases, the child victims are groomed as the preparation for the later abuse or exploitation.

There is no universally accepted definition of ‘grooming’,<sup>506</sup> however, reference could be made to the often-cited definition by Craven, Brown & Gilchrist (2007):

*“[Grooming is] a process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining the child’s compliance and maintaining the child’s secrecy to avoid disclosure. This process serves to strengthen the*

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<sup>4-504</sup> Kamles Kumar, ‘UK police confirm five-year sentence for Malaysian jailed for child porn’, *Malay Mail*, (6 May 2015) <<https://www.malaymail.com/s/891475/uk-police-confirm-five-year-sentence-for-malaysian-jailed-for-child-porn-co>> accessed on 9 March 2018

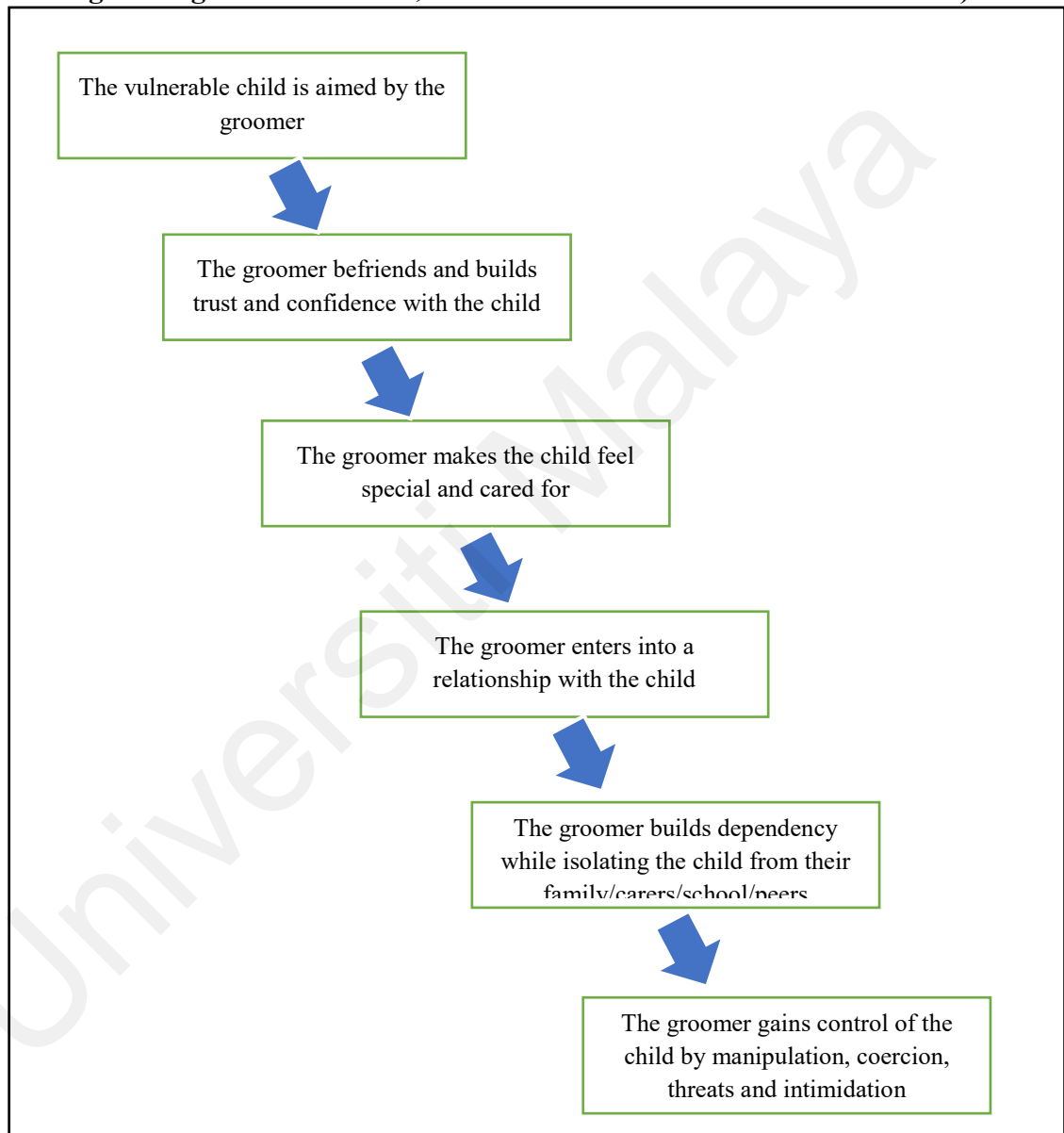
<sup>4-505</sup> See Chapter 2.3.2 (b)

<sup>4-506</sup> Aisha K Gill, Karen Harrison, ‘Child Grooming and Sexual Exploitation: Are South Asian Men the UK Media’s New Folk Devils?’, [2015] *International Journal for Crime, Justice and Social Democracy*, IJCJ & SD 2015 4(2): 34-49, referring to A Gillespie, ‘Grooming’: Definitions and the law’ [2004] 7124:154 *New Law Journal* 586.

*offender's abusive pattern, as it may be used as a means of justifying or denying their actions.*"<sup>507</sup>

The grooming process involves recruiting, engaging, controlling and subsequently exploiting is illustrated in the following chart:

**Chart 4.1: Sexual grooming process (adapted form Northamptonshire Safeguarding Children Board, *What is CSE and What You Need to Know*)<sup>508</sup>**



<sup>4-507</sup> Cited in Georgia M. Winters and Elizabeth L. Jeglic, 'Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters, Deviant Behavior' [2017] VOL. 38, NO. 6, 724–733; O'Leary, P, Koh, E, & Dare, A, 'Grooming and child sexual abuse in institutional contexts,' Royal Commission into Institutional Responses to Child Sexual Abuse, [Sydney, 2017].

<sup>4-508</sup> Northamptonshire Safeguarding Children Board, 'What is CSE and What You Need to Know', available at <<http://www.northamptonshirescb.org.uk/assets/files/78/Chapter-1-What-is-CSE-and-What-you-need-to-know.pdf>> accessed on 25 June 2018

Successful grooming embroils skilful manipulation of the child and the community in order to make sexual abuse and exploitation easier and undetected.<sup>509</sup> Children may not be even aware that they are being groomed for future sexual abuse and exploitation.<sup>510</sup> In addition, the Internet now has become a useful tool for online sexual grooming.<sup>511</sup> The increasing population of the children and the availability of the easy access to information and communication technologies (ICT) have amplified the risk of children being exposed to the sexual predators.<sup>512</sup>

In addressing this terrifying phenomenon, Malaysia has recently enacted the following provisions in the SOAC 2017 (see Table 4.4 on the next page):

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<sup>4-509</sup> Georgia M. Winters & Elizabeth L. Jeglic, 'Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters' [2017] *Deviant Behavior*, 38:6, 724-733, at page 724 - referring to Carla Van Dam, *Identifying child molesters: preventing child sexual abuse by recognizing the patterns of the offenders*, (Haworth Maltreatment and Trauma Press, Binghamton, New York, 2001)

<sup>4-510</sup> International Centre for Missing & Exploited Children, *Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review* (2017); at page ii

<sup>4-511</sup> Elaine Chase and June Statham, 'Commercial and Sexual Exploitation of Children and Young People in the UK—A Review', [2005] *Child Abuse Review* Vol. 14: 4–25

<sup>4-512</sup> International Centre for Missing & Exploited Children., *supra* note 4-44, at page 1 of the report

**Table 4.4: Offences related to child sexual grooming in the SOAC 2017**

Subject	Section	Offence	Notes
Sexual communication	s.11 SOAC	<ul style="list-style-type: none"><li>Sexually communicates with a child;</li><li>Encourages a child to sexually communicate</li></ul>	<ul style="list-style-type: none"><li>Sexually communicate denotes the communication that is wholly or partly relates to sexual activity or any reasonable person would consider that communication to be sexual</li><li>This however excludes the communication for education, scientific or medical purposes</li><li>The offence is punishable with imprisonment not exceeding 3 years</li></ul>
Sexual grooming	s.12 SOAC	<ul style="list-style-type: none"><li>Communicates with a child to commit or facilitate sexual offences</li></ul>	<ul style="list-style-type: none"><li>The offence is punishable with imprisonment not exceeding 5 years and mandatory whipping</li></ul>
Meeting following grooming	s.13 SOAC	<ul style="list-style-type: none"><li>After communicating with the children, travels to meet the child with the intention to commit or facilitate sexual offences</li></ul>	<ul style="list-style-type: none"><li>The offence is punishable with imprisonment not exceeding 10 years and mandatory whipping</li></ul>

Based on the above analysis, it is gratifying to note that the Malaysian legal framework appears to address child sexual grooming comprehensively. Acknowledging that grooming involves different process and stages, section 12 of the SOAC 2017 is enacted broadly to fit those segments. The communication could be in any forms and platforms, online or offline. Moreover, meeting following grooming is also made a separate offence in section 13 of the SOAC 2017. The strength of sections 12 and 13 of the SOAC 2017 can be illustrated by comparing with the Canadian Law.



Section 172.1(1) of the Canadian Criminal Code bans the luring of a child by any forms of communication for the purpose of facilitating the commission of sexual offence. In 2016, Sean Palylyk was convicted for several sexual offences including online luring under section 172.1(1) of the Canadian Criminal Code.<sup>513</sup> Sean Palylyk was reported to have met the child victim online in 2013. The chats were speedily turned to sexual and both Sean and the victim exchanges their nude pictures. They met two years later when the victim was 15 years old and had sex on numerous occasions.<sup>514</sup> Sean was sentenced to five years imprisonment for the offences of sexual interference, luring a child, and possession of child pornography.

The above case illustrates that, Canada provides one provision for sexual grooming that only refers to communication to facilitate sexual offences. Should a similar case of Sean Palylyk happen in Malaysia, the offender could be charged on both section 12 of the SOAC 2017 for grooming and section 13 of the SOAC 2017 for meeting following grooming, apart from other provisions concerning sexual abuse. Therefore, the punishment would be more severe and serves as stronger deterrent.

Besides that, the SOAC 2017 imposes stricter position by criminalising sexual communication by virtue of section 11. Sexual communication is in fact sexual harassment but not amounting to sexual abuse since it does not involve any physical contact with the victims. It also may not be for the purpose of or facilitating subsequent sexual abuse and exploitation. Contrasting with the position in the United Kingdom, Malaysia is proactive by forbidding any person to sexually communicate with the persons

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<sup>4-513</sup> This case was highlighted in International Centre for Missing & Exploited Children., *supra* note 4-44, at page 13 of the report; see also Janice Johnson, 'Predator' who used teenage girl 'like an object' gets five-year sentence', CBC News, 11 April 2016 < <https://www.cbc.ca/news/canada/edmonton/predator-who-used-teenage-girl-like-an-object-gets-five-year-sentence-1.3530937> > accessed on 1 May 2018

<sup>4-514</sup> Tony Blais, 'Edmonton-area 'hungry predator' given prison sentence for sex with teen girl he lured online', *Edmonton Sun* (11 April 2016) < <https://edmontonsun.com/2016/04/11/edmonton-area-hungry-predator-given-prison-sentence-for-sex-with-teen-girl-he-lured-online/wcm/3d7494db-044a-4a3c-81e3-894fb419461a> > accessed on 1 May 2018

below 18 years old regardless whether the communication is for the purpose of sexual gratification. Section 11(3) of the SOAC 2017 however excludes its applicability to communication that involves sexual theme for the purposes of education, scientific or medical.

In the United Kingdom, the new insertion of section 15A of the Sexual Offences Act 2003<sup>515</sup> interdicts sexual communication of an adult with a child below 16 years old to obtain immediate or gradual sexual gratification.<sup>516</sup> Thus the law excludes firstly, the sexual communication between the young person (below 16 years old) themselves, and secondly between an adult with children above 16 years old. Here, the differences may stem from the fact that Malaysia has a strong encirclement of religion and Asian cultures that children cannot engage with sex before marriage, and to talk about sex itself is considered a taboo.

#### **4.4.2 Child Trafficking for the purpose of sexual exploitation**

In addition to section 43 of the CA 2001, the ATIPSOM 2007 strengthens the laws on child trafficking for the purpose of exploitation. Section 5 of the ATIPSOM 2007 emphasises that the provisions are to be construed as an addition to other laws and in the event of conflict, the ATIPSOM 2007 prevails.

“Trafficking in persons” is defined in section 2 of the ATIPSOM 2007 as “*recruiting, transporting, transferring, harbouring, providing or receiving of a person for the purpose of exploitation*”. Further, the same section refers “exploitation” as “*all forms of sexual*”

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<sup>515</sup> The insertion is by virtue of Section 67 of the Serious Crimes Act 2015 (UK), 2005 Chapter 9

<sup>516</sup> Legislation.uk, *Serious Crime Act 2015 Explanatory Notes*, <<http://www.legislation.gov.uk/ukpga/2015/9/notes/division/3/5/2/2>> accessed on 6 May 2018

*exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs*". It is submitted that this definition concurs with the definition of trafficking in persons in the UN TIP Protocol.<sup>517</sup> It is worth highlighting that Article 3(a) of the UN TIP emphasises the element of threat, use of force, coercion, abduction, fraud, deception, and abuse of power or position to obtain the consent or having control over a person for the purpose of exploitation. However, the ATIPSOM 2007 provides a higher degree of protection by criminalising both the acts of trafficking a person with or without the element of threat, use of force *et cetera* as separate offences.<sup>518</sup> If the traffic in persons is coupled with the element of threat, use of force, *et cetera*, it is punishable with higher sentence.<sup>519</sup>

In terms of trafficking of a child, Article 3(c) of the UN TIP Protocol specifically exclude the elements of threat, use of force, coercion, *et cetera*, and likewise section 14 of the ATIPSOM is enacted conforming to the requirement.<sup>520</sup> The crime of trafficking a child in the said section is punishable with imprisonment for a term not less than three years but not exceeding 20 years, and shall also liable to fine. Notwithstanding the non-requirement of the element of threat, use of force, coercion, *et cetera* in section 14, the crux of the provision lies on "the purpose of trafficking". To warrant a successful prosecution under the said section, the trafficking must be for the purpose "exploitation" as defined in section 2.

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<sup>4-517</sup> Article 3(a) of the UN TIP Protocol defines "trafficking in persons" as "*the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*"

<sup>4-518</sup> Section 12 of the ATIPSOM 2007 criminalizes traffic in persons without the element of threat, use of force, etc. The offence is punishable with imprisonment not exceeding 15 years and shall also be liable to fine.

<sup>4-519</sup> Section 13 of the ATIPSOM 2007 criminalizes traffic in persons by means of threat, use of force, etc. The offence is punishable with imprisonment not less than 3 years but not more than 20 years and shall also liable to fine. This provision is in consonance with UN TIP Protocol.

<sup>4-520</sup> Article 3(c) of the UN TIP Protocol provides "*the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth*"

In many cases, the accused were acquitted as this fundamental element of the offence was not established. For instance, in the case of *Siti Rashidah bt Razali & Ors v Public Prosecutor*<sup>521</sup>, four accused were charged in the Sessions Court under section 12 and 14 of the ATIPSOM 2007. All the victims were Myanmar nationals without any valid pass or travelling document to enter Malaysia and three of them were children. The conviction for the two counts of offence were struck out on appeal as there was no evidence that the victims were or to be exploited. Based on the testimony of the victims, they came to Malaysia for job opportunities and were employed in building construction. Further, the child victims followed their father who were working in Kuala Lumpur and had never been involved in prostitution or force labour and so forth. There was no restriction of movements of all victims. The fact that the accused provided them shelter, food, and drink is inadequate to fulfil the elements of section 12 and 14 of the Acts. Nonetheless in this case, the judge has substituted the conviction to the offence under section 51(d) of the Immigration Act 1959/63 for harbouring illegal immigrants.

Also, in another case of *Ng Yu Wah v Public Prosecutor*<sup>522</sup>, the accused was initially convicted by the Sessions Court under section 14 of the ATIPSOM 2007 for trafficking a child of aged two months old. However, the conviction was quashed on appeal on the ground that the charge has been badly framed in which the expression ‘for the purpose of exploitation’ was totally omitted. In this case the accused was involved in an adoption and the purchase of the baby victim in contravention to section 4 of the Adoption Act 1952 or section 48 of the CA 2001. The court was of the opinion that the non-conformity with the adoption procedures set under section 4 of the Adoption Act cannot be said to have fall within the definition of ‘exploitation’. Furthermore, the learned judge was of

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<sup>4-521</sup> *Siti Rashidah bt Razali & Ors v PP* [2011] 6 MLJ 417

<sup>4-522</sup> *Ng Yu Wah v Public Prosecutor* [2012] 9 MLJ 325

the opinion that section 14 of the ATIPSOM 2007 required the prosecution to state the mode of the exploitation. The accused need to be informed precisely and with accuracy of the charge against her.

In contrast, the conviction of the accused in the case of *Choong Loke Kian & Anor v Public Prosecutor*<sup>523</sup> under section 14 of the ATIPSOM 2007 was sustained by the High Court of Penang. The ground of appeal was among others that the charge did not specify the mode of trafficking (whether it was harbouring, transporting, *et cetera*) and the form of exploitation (whether it is for prostitution, forced labour, *et cetera*) by citing the case of *Siti Rashidah*<sup>524</sup>. The court however distinguished *Siti Rashidah*'s and the present case. The former involved insufficient facts to establish exploitation while in the present case, the acts of the appellant were not merely harbouring of the illegal immigrants. It was exploitation as the victim was brought from Thailand, tricked and forced to offer sexual service in Penang.

From the above cases, it can be concluded that for a successful conviction under section 14 of the ATIPSOM, the element of exploitation must be established. Nonetheless, in the absence of such element, the perpetrator could not escape the liability as he could be convicted for other offences in other legislation, for instance section 43 of the CA 2001.<sup>525</sup>

Apart from trafficking of a child for the purpose of exploitation, the ATIPSOM 2007 criminalises the following acts:

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<sup>4-523</sup> *Choong Loke Kian & Anor v Public Prosecutor* [2012] MLJU 221

<sup>4-524</sup> *supra* note 4- 55

<sup>4-525</sup> By the application of section 5 of the ATIPSOM, where the provisions of the Act is in addition to other legislation; see also Zuraini Abdul Hamid, 'The Effectiveness Of Anti-Human Trafficking Laws In Malaysia: With Reference To Australia', [2016] 6 MLJ xciii

**Table 4.5: Offences relating trafficking of persons in the ATIPSOM 2007**

Subject	Section	Offence	Notes
Profiting	Section 15 ATIPSOM 2007	<ul style="list-style-type: none"> <li>Profiting from the exploitation of a trafficked person</li> </ul>	The offence is punishable with imprisonment up to 15 years and fine of minimum RM500,000 up to RM1,000,000 and shall also be liable to forfeiture of the profits from the offence
Trafficking in transit	Section 15A ATIPSOM 2007	<ul style="list-style-type: none"> <li>Bringing in transit a trafficked person through Malaysia by land, sea or air, or otherwise arranges or facilitates such act</li> </ul>	The offence is punishable with imprisonment up to 7 years and shall also be liable to fine
Recruiting	Section 18 ATIPSOM 2007	<ul style="list-style-type: none"> <li>Knowingly recruits, or agrees to recruit, another person to participate in the trafficking</li> </ul>	The offence is punishable with imprisonment up to 10 years and shall also be liable to fine
Providing facilities	Section 19 ATIPSOM 2007	<ul style="list-style-type: none"> <li>A person being:               <ol style="list-style-type: none"> <li>Owner, occupier, lessee, or person in charge knowingly permits a meeting to be held in the premises;</li> <li>Owner, occupier, lessee, or person in charge of any equipment or facility knowingly permits the equipment to be used for recording, conferencing or meeting via technology for the purpose of committing an offence under ATIPSOM 2007</li> </ol> </li> </ul>	The offence is punishable with imprisonment up to 10 years and shall also be liable to fine
Providing service	Section 20 ATIPSOM 2007	<ul style="list-style-type: none"> <li>Providing either directly or indirectly financial services or facilities:</li> </ul>	<ul style="list-style-type: none"> <li>“financial services or facilities” include the services or facilities offered by lawyers or</li> </ul>

Subject	Section	Offence	Notes
		a) Intending or having reasonable ground to believe that it will be used or facilitate wholly or partly the trafficking b) Knowing or having reasonable ground to believe that such facilities is to benefit persons involve in the act of the trafficking	accountants acting as nominees or agents for their clients <ul style="list-style-type: none"> <li>The offence is punishable with imprisonment up to 10 years and shall also be liable to fine</li> </ul>
Harbouring offender	Section 22	<ul style="list-style-type: none"> <li>Harbouring; or</li> <li>Preventing, hindering or interfering with the arrest of person</li> </ul> <p>knowing or having reason to believe that such person has committed or is planning or is likely to commit an act of trafficking</p>	<ul style="list-style-type: none"> <li>“harbour” means supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension</li> <li>The offence is punishable with imprisonment up to 10 years and shall also be liable to fine</li> </ul>
Obligation of master of conveyance	Section 23 ATIPSOM 2007	<p>The owner, operator or master of conveyance who</p> a) knowingly permits or has reasonable grounds to believe that such conveyance is used for the purpose of bringing a person into a receiving country without travel documents b) knowingly permits or has reasonable grounds to believe that such conveyance is being used for the purpose of	<ul style="list-style-type: none"> <li>If it is committed by an individual, it is punishable with a fine not exceeding RM250,000 or to imprisonment for a term not exceeding five years or both; or</li> <li>If it is committed by a corporate body, it is punishable with a minimum fine of</li> </ul>

Subject	Section	Offence	Notes
		committing an act of trafficking	RM50,000 up to RM500,000 <ul style="list-style-type: none"> <li>The owner, operator or master of conveyance may raise statutory defence of section 23(3) ATIPSOM 2017</li> </ul>
Intentional omission	Section 24	Intentionally omits to give any information after knowing or having reason to believe, that any offence under ATIPSOM 2007 has been or will be committed	The offence is punishable with fine not exceeding RM250,000, or imprisonment not exceeding 5 years, or both

As analysed above, ATIPSOM 2007 addresses the different levels of modus and involvement in trafficking. Any act that facilitates the commission of trafficking including the offering of financial assistance, supplying shelter, food or ammunition, providing premises for meetings and others are interdicted. It is submitted that the provisions conform to the requirement of Article 3 and 5 of the UN TIP Protocol.

#### 4.5 ESTABLISHING JURISDICTION IN ORDER TO ADDRESS THE ISSUE ON THE TRANSNATIONAL COMMISSION OF THE CRIME

Generally, if a child sexual abuse or exploitation takes place at a given State, that State would have the jurisdiction to prosecute the offender irrespective of the offender's or the victim's nationality under the territorial principle.<sup>526</sup> This is a universal recognised

<sup>4-526</sup> Kritsana Pimonsaengsuriya, *Extraterritorial Laws: Why They Are Not Really Working And How They Can Be Strengthened*, (ECPAT International, September 2008); at page 5



principle in establishing criminal jurisdiction and is attributed to a state's sovereignty:

*"It is an essential attribute of the sovereignty of this realm, as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising these limits"*<sup>527</sup>

Nonetheless, the proliferation of the telecommunication technology, cloud computing and hi-tech encryption, along with countless low-cost travelling offers and demands for consumers, have fuelled the mounting problem of transnational child sexual exploitation.<sup>528</sup> It provides greater opportunities for child sex offenders to communicate anonymously, produce and disseminate CSA images, and to engage in online sexual communication with children in other jurisdictions without leaving their homes. Even worse, some sexual offenders plan and eventually travel to commit sexual abuse or exploitation in other jurisdictions.<sup>529</sup>

In effect, Article 3(2) of the Palermo Convention provides the criteria of a transnational crime, where the crime is committed in;

- (a) more than one State;
- (b) one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) one State but has substantial effects in another State.

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<sup>4-527</sup> As per Lord Mac Millan in the case of *Compania Naviera Vascongado v S.S Cristina (The Cristina)* [1938] AC 485; referred to by Abdul Ghafur Hamid @ Khin Maung Sein in *Public International Law: A Practical Approach*, (2<sup>nd</sup> Edition Pearson Education, 2007), at page 145-146.

<sup>4-528</sup> Angela Hawke and Alison Raphae, *The Global Study Report on Sexual Exploitation of Children in Travel and Tourism*, (ECPAT International jointly with Defence for Children-ECPAT Netherlands, May 2016).

<sup>4-529</sup> Deanna Davy, *Regional Overview: The Sexual Exploitation of Children in Southeast Asia*, (ECPAT International, 2017) <[http://www.ecpat.org/wp-content/uploads/2018/02/Regional-Overview\\_Southeast-Asia.pdf](http://www.ecpat.org/wp-content/uploads/2018/02/Regional-Overview_Southeast-Asia.pdf)> accessed on 1 April 2017

Based on the above criteria, transnational child sexual exploitation could be in the following modes:

- (i) Child trafficking for the purpose of sexual exploitation - children may be brought into or outside or in transit of Malaysia for prostitution or other sexual activities;
- (ii) Online CSE - the offender uses Information Communication Technology (ICT) and/or the Internet to facilitate the sexual grooming and exploitation from different jurisdictions;<sup>530</sup> or
- (iii) Sexual Exploitation of Children in Travel and Tourism (SECTT) - the abuse or exploitation of children, mainly in developing countries by people who travel there.<sup>531</sup> This also include the instances where the sex offenders abuse simplified visa conditions for employment in other countries such as in schools as a means of accessing children.<sup>532</sup>

The sophisticated modus of exploitation involving multiple acts in different states or jurisdictions undoubtedly poses challenges for the law enforcement agencies. This could be as the result of inconsistent or the non-availability of law criminalising the related acts at the jurisdiction where it was committed. This follows with the challenge in determining the actual place of commission of crime in the cyber world and establishing the proper forum to conduct the trial. These impediments allow the perpetrator to escape liability and remain free to victimise. Therefore, the national laws ought to address these issues to ensure that the transnational commission of the CSE is eradicated effectively.

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<sup>4-530</sup> ECPAT, *Ending Online Child Sexual Exploitation*, (2016) < <http://www.ecpat.org/issues-we-work-on/ending-sexual-exploitation-of-children-online/>> accessed on 4 April 2018

<sup>4-531</sup> Interpol, 'Crimes against children', < <https://www.interpol.int/Crime-areas/Crimes-against-children/Crimes-against-children>> accessed on 4 April 2018

<sup>4-532</sup> Deanna Davy, *supra* note 4-63

It is submitted that the Malaysian laws in combating transnational child trafficking for sexual purposes are relatively adequate to address the transnational issue. As appraised in Part 4.4.2 of this chapter, the ATIPSOM 2017 does not only criminalise the act of trafficking children into and out of Malaysia in section 14 of the Act, but for bringing in transit a trafficked person through Malaysia by land, sea or air under section 15A. Furthermore, any act that facilitate the commission of trafficking is effectively outlawed. However, there are issues concerning online CSE and SECTT that will be underlined in the following subheadings 4.5.1 and 4.5.2.

#### **4.5.1 Online child sexual exploitation**

The cyber world has no definite territorial boundary, resulting the complexity in its criminal enforcement.<sup>533</sup> There are cases where the perpetrator commits online CSE targeting the child victims in other jurisdiction. The central issue here is, where was the offence committed? Is it at the perpetrator's or the victim's location? The crime committed in the cyber world ought to be distinguished with the crime committed physically. In physical crimes, the place where the crime was committed would ordinarily be the same of the victim.<sup>534</sup> Nonetheless for cyber-crimes, the place where the crime is initiated remains the chief component for acquiring jurisdiction.<sup>535</sup> It is submitted that the SOAC 2017 significantly tackles the crime if it is committed or initiated within the Malaysian territory.

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<sup>4-533</sup> Adel Azzam Saqf Al Hait, 'Jurisdiction in Cybercrimes: A Comparative Study', [2014] Journal of Law, Policy and Globalization, Vol.22, 75-84.

<sup>4-534</sup> Susan W. Brenner<sup>1</sup> & Bert-Jaap Koops, 'Approaches to Cybercrime Jurisdiction', [2004] 4 J. High Tech. L. 1, Journal Of High Technology Law, at page 17

<sup>4-535</sup> Kim Soukieh, 'Cybercrime – The Shifting Doctrine of Jurisdiction' [2011] 10(1) Canberra Law Review 221; at page 226;

However, the matter is more complex when the crime originates from a foreign jurisdiction, targeting children in Malaysia, and that jurisdiction does not outlaw the pertinent act. This intricacy can be illustrated with the following hypothetical examples:

### ***Scenario 1***

*A, a British adult in Liverpool, United Kingdom successfully persuaded B who is a 15 year-old girl in Malaysia to perform live sexual acts via webcam for A's sexual gratification.*

In the above example, the United Kingdom would have the primary jurisdiction to prosecute the perpetrator and the possible charge would be under section 15A of the Sexual Offences Act 2003 for sexual communication with a child. There is no issue on the chances for the perpetrator to evade his liability as his conduct is outlawed at the place where it was committed.

### ***Scenario 2***

*A, a Thai adult who resides in Thailand contacted B who is a 15 years old girl in Malaysia via online chat platform. The communication that was first leisure in nature turns sexual when A and B started exchanging obscene materials including child pornography.*

In the above example, Thailand would have the primary jurisdiction to prosecute the perpetrator. Regrettably, Thailand has no legislation that outlaws sexual communication with children and the act of exhibiting pornography to a child.<sup>536</sup>

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<sup>4-536</sup> The World Bank and the International Centre for Missing & Exploited Children, *Protecting Children from Cybercrime-Legislative Responses in Asia to Fight Child Pornography, Online Grooming, and Cyberbullying* (2015, International Bank for Reconstruction and Development/The World Bank) at page 269-280; see also International Centre for Missing & Exploited Children, *Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review* (2017, The Koons Family Institute on International Law & Policy) at page 55

### *Scenario 3*

*A, a Malaysian currently studying in Japan contacted B who is a 15 years old girl in Malaysia via online gaming chatroom. A and B subsequently exchanged their phone numbers, and this has led to regular conversations via WhatsApp and telephone over five months period. It was only after three months of communicating, the conversations started to involve sexual communication and both A and B agreed to meet in Malaysia during A's semester break for sexual intercourse.*

In the above example, Japan would have the primary jurisdiction to prosecute the perpetrator. Nonetheless Japan has no specific legislation outlawing sexual grooming and sexual communication.<sup>537</sup> In Japan, the law specifically prohibits the utilisation of online dating service to solicit a child for sexual intercourse or acts under Article 6 of the Law to Regulate Solicitation of Children through Matching Business *via* the Internet Sites 2003.<sup>538</sup> Nonetheless it is argued that the legislation is inapplicable to the scenario as A did not use online dating service to solicit B.

The three hypothetical examples involve child victims in Malaysia. All of the acts, exhibiting child pornography materials, sexual communication and sexual grooming to/of a child are offences under sections 9, 11 and 12 of the SOAC 2017 respectively. To protect the child victim and not to allow the perpetrator remains unpunished and free to victimize, Malaysia may assert jurisdiction by establishing extra-territorial jurisdiction in its legislation. This would enable the perpetrator to be tried in Malaysia for the offences under the SOAC 2017. The extra-territorial principle and the position of Malaysia

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<sup>4-537</sup> The World Bank and the International Centre for Missing & Exploited Children, *supra* note 4-70, at page 156-169 of the report; see also International Centre for Missing & Exploited Children, *supra* note 4-70, at page 47 of the report.

<sup>4-538</sup> The offence is punishable under Article 11 of the Act with a fine of not more than one million yen.

legislation in that respect will be critically analysed in Part 4.5.3.

#### 4.5.2 Sexual Exploitation of Children in Travel and Tourism (SECTT)

Sexual Exploitation of Children in Travel and Tourism (SECTT) is a form of transnational child sexual exploitation where a person travels to another country in order to have sexual contact with children.<sup>539</sup> SECTT also includes the “opportunistic use of prostituted children while traveling on business or for other purposes”.<sup>540</sup>

The high incidence of child sex tourism could be linked to the inadequacy of laws, ineffective law enforcement, corruption, and limited resources at the country of destination, where the exploitation takes place.<sup>541</sup> Hence the offender archetypally travels to countries with the prior-mentioned deficiencies to victimise.<sup>542</sup>

The latest report on the Global Study on Sexual Exploitation of Children in Travel and Tourism suggests that children in Malaysia are not immune to the threat of sexual exploitation by travellers.<sup>543</sup> In protecting children in Malaysia against this threat, it is submitted that the Malaysian laws have been firmed up with the provisions of the CA 2001 and the SOAC 2017 as signified above.

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<sup>4-539</sup> ECPAT, *Combatting Child Sex Tourism: Questions & Answers* (2008); see also Melissa Curley & Elizabeth Stanley, ‘Extraterritorial Jurisdiction, Criminal Law and Transnational Crime: Insights from the Application of Australia’s Child Sex Tourism Offences’ [2016] *Bond Law Review*, Volume 28, page 169-197; at page 171

<sup>4-540</sup> Ronald B Flowers, *Sex Crimes: Perpetrators, Predators, Prostitutes, and Victims*, (Charles C Thomas Publisher, 2006); at page 147.

<sup>4-541</sup> Naomi L. Svensson, ‘Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws’, [2016] *Bond Law Review*, Volume 28, page 169-197; at page 171

<sup>4-542</sup> Ronald B Flowers, *supra* note 4-74

<sup>4-543</sup> Mei Mei Chu, ‘Budget travel enabling more child sex offenders to move around, say experts’, *The Star Online* (27 March 2018) available at <<https://www.thestar.com.my/news/nation/2018/03/27/budget-travel-enabling-more-child-sex-offenders-to-move-around-say-experts/#L5HQxuG2WCTpDSH0.99>> accessed on 1 May 2018

However, another grave concern is the fact that there are child sex tourists from Malaysia.<sup>544</sup> The National Coalition for the Elimination of Commercial Sexual Exploitation of Children (Indonesia) reported that more than 3000 tourists from Singapore and Malaysia visited Batam, Indonesia in 2009 for sex services weekly. The said sex service predictably includes the service from children that constituted 30% of the estimated 5,000 to 6,000 sex workers in Batam.<sup>545</sup>

Given the fact that the perpetrator may evade their liability at the visited jurisdiction, the international instruments highly recommend the State Parties to strengthen their legal framework by establishing extraterritorial jurisdiction over the offences relating to child sexual abuse and exploitation. Through extraterritorial jurisdiction, the prosecution of the offender is possible under the offender's national law, even though the crime was committed abroad.<sup>546</sup>

#### 4.5.3 Extraterritorial jurisdiction in respect of transnational CSE

The establishment of extraterritorial jurisdiction is recognised by the international law and does not offend the state's sovereignty rule. This is affirmed in the case of *S.S.*

*"Lotus"*:

*"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law (allowing exercising jurisdiction outside its own territory)...The territoriality of criminal law...is not an absolute principle*

<sup>4-544</sup> Soo Wern Jun, 'Malaysia found lacking plan to prevent child sex tourism', FMT News, (29 March 2018), available at <<http://www.freemalaysiatoday.com/category/nation/2018/03/29/malaysia-found-lacking-plan-to-prevent-child-sex-tourism/>> accessed on 1 May 2018

<sup>4-545</sup> Anneka Farrington, *The Southeast Asia regional desk review on Sexual Exploitation of Children in Travel and Tourism*, (ECPAT International jointly with Defence for Children-ECPAT Netherlands, May 2016); at page 28

<sup>4-546</sup> Kritsana Pimonsaengsuriya, *supra* note 4-60

*of international law and by no means coincides with territorial sovereignty.”*<sup>547</sup>

In establishing extraterritorial jurisdiction, various principles of the international law may be adopted. For instance, Spain initially has adopted the universality principle.<sup>548</sup> Under this principle, no direct connection such as the nationality of the offender or victim, the place where the crime was committed, or the effect to the state, is required to establish jurisdiction to try the offender of child sexual abuse and exploitation. According to Article 23 of the Organic Act No. 11/1999,<sup>549</sup> the Spanish courts have the jurisdiction over the crimes related to the prostitution or corruption of minors committed by Spanish nationals or foreigners outside the national territory. However, the latest amendment to the Act (Organic Act No. 1/2014)<sup>550</sup> requires the following:

- (a) The alleged perpetrator is present in Spain;
- (b) there are victims of Spanish nationality; or
- (c) that there is some relevant link with Spain; and
- (d) no other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes.<sup>551</sup>

Many other states on the other hand adopt nationality principle in formulating extraterritorial provision. Under this principle, a state may exercise its jurisdiction over its national for crimes committed outside its territory.<sup>552</sup> For example, in Canada, by virtue of section 7 (4.1) of the Criminal Code, any Canadian citizen or permanent resident

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<sup>4-547</sup> Permanent Court of International Justice, Series A, No. 10, 7 September 1927, The case of S.S. “Lotus”, pp. 18-20

<sup>4-548</sup> Catherine Beaulieu, *supra* note 4-1; at page 110 of the report

<sup>4-549</sup> Organic Act No. 11/1999 of 30 April (Official Gazette No. 104 of 1 May 1999).

<sup>4-550</sup> Organic Act No. 1/2014 of 13 March (Official Gazette No. 63 of 14 March 2014)

<sup>4-551</sup> Article 23 (4) Organic Act No. 1/2014; see also Ministry of Foreign Affairs and Cooperation, Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction”, Office of the Under-Secretary of Foreign Affairs and Cooperation, International Law Division, Madrid, 22 February 2016, <[http://www.un.org/en/ga/sixth/71/universal\\_jurisdiction/spain\\_e.pdf](http://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf)> accessed on 4 April 2018

<sup>4-552</sup> Abdul Ghafur Hamid @ Khin Maung Sein, *supra* note 4-61; at page 149



who commits an act or omission relating to sexual offences against children is deemed to have committed that act or omission in Canada.

Similarly, in the United Kingdom, section 72 of the Sexual Offences Act 2003 deems a British citizen or UK resident to have committing sexual offences against a child under 16 (or, in Northern Ireland, under 17) in England and Wales and Northern Ireland despite it was committed overseas. However, it is important to highlight that the provision requires double criminality; that the act done does not only amount to a sexual offence listed in Schedule 2 of the Act, but must also constitute to an offence in the country where it was committed irrespective of the different description of the offence in both countries.<sup>553</sup> An instance of the successful application of this provision in convicting child sexual offender is the case of Richard Huckle that had become the national uproar in 2016.

Richard Huckle was convicted in London for 71 sexual offences that involved among others Malaysian child victims. Huckle's unlawful activities were first discovered by the Australian police during an investigation of other suspects.<sup>554</sup> He has made available the images and videos of his rapes and assaults on young children from Malaysia, Vietnam, and Cambodia, together with a paedophile manual on how to abuse victims and evade detection in an encrypted web network with paedophiles around the world.<sup>555</sup> He was apprehended by the Britain's National Crime Agency during his return to the United Kingdom for the Christmas holiday in 2014.<sup>556</sup> 20,000 of indecent images of children,

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<sup>4-553</sup> The National Archives, *Sexual Offences Act 2003 Explanatory Notes*, available online at <<http://www.legislation.gov.uk/ukpga/2003/42/notes>> accessed on 24 April 2018

<sup>4-554</sup> 'How British paedophile Huckle was caught', *The Star Online* (2 June 2016), <<https://www.thestar.com.my/news/nation/2016/06/02/how-british-paedophile-was-caught/#eGbclu3TyDMFLIUx.99>> retrieved on 5 May 2018

<sup>4-555</sup> 'Briton Richard Huckle Jailed for Malaysia Sex Abuse', *BBC News* (2016, June 6). <<http://www.bbc.co.uk/news/uk-36458472>> retrieved on 5 May 2018

<sup>4-556</sup> 'How British paedophile Huckle was caught', *supra* note 4-88

including those of which showing him committing child rape, were discovered on his computer during his arrest at Gatwick Airport.<sup>557</sup>

In fact, the SOAC 2017 was enacted in response to this horrifying event. The Malaysian Prime Minister has announced the establishment of a special task force headed by the *de facto* Minister of Law on August 2016 to review and propose stronger laws to protect children from sexual predators, resulting the passing of the Act.<sup>558</sup>

Apart from the nationality principle, the Article 4(2)(b) of the OPSC recommends for the State Parties to establish jurisdiction over the CSE offences when the victim is a national of that State. This is also known as the passive personality principle where a foreigner can be tried and punished for crimes committed abroad in the jurisdiction that affects its nationality.<sup>559</sup> It is however important to note that the application the passive nationality principle is rather controversial.<sup>560</sup> As propounded by Judge Moore in his dissenting judgment in the *S.S “Lotus”* case, it is a well settled principle that a person who is in a foreign country falls under the exclusive dominion of the local law.<sup>561</sup> Nonetheless, it is submitted that the application of this principle is useful to circumvent CSE and it is indeed a State’s interest and responsibility to protect its nationals.<sup>562</sup>

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4-557 ‘Huckle gets 22 life sentences’, *The Star Online*, (7 June 2016), <<https://www.thestar.com.my/news/nation/2016/06/07/huckle-gets-22-life-sentences-punishments-to-run-concurrently-after-he-pleads-guilty-to-71-counts-of/>> retrieved on 5 May 2018

4-558 ‘Malaysia set for new legislation on sexual crimes against children’, *Channel NewsAsia*, (4 October 2016), <<https://www.channelnewsasia.com/news/asia/malaysia-set-for-new-legislation-on-sexual-crimes-against-childr-7740906>> retrieved on 5 May 2018

4-559 Abdul Ghafur Hamid @ Khin Maung Sein, *supra* note 4-61; at page 156

4-560 Danielle Ireland-Piper, ‘Extraterritorial Criminal Jurisdiction: Does The Long Arm Of The Law Undermine The Rule Of Law?’ [2012] *Melbourne journal of international law*, 13(1), 1-36; at page 13-15; see also Abdul Ghafur Hamid @ Khin Maung Sein, *supra* note 4-61; at page 156

4-561 “an inhabitant of a great commercial city ... may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes ... this ... is at variance not only with the principle of exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country ... falls under the dominion of the local law” per Judge Moor in *S.S “Lotus”*, referred to and cited in Danielle Ireland-Piper, *supra* note 4-94, at page 13

4-562 Eric Talbot Jensen, ‘Exercising Passive Personality Jurisdiction over Combatants: A Theory in Need of a Political Solution’, [2008] 42 *The International Lawyer*. 1107, at page 1118; Alisdair A. Gillespie, *Cybercrime: Key Issues and Debates*, (Routledge, 2015), 22-26; Amy Fraley, ‘Child Sex Tourism Legislation Under the PROTECT Act: Does It Really Protect?’ [2012] *St. John's Law Review*, Vol. 79: Iss. 2, Article 7, at page 464;

An example on the application of the passive personality principle is in the German Criminal Code. Inducing a child to engage in sexual activities, making sexual communication and presenting a child with pornographic materials are criminalised in section 176 of the German Criminal Code<sup>563</sup>. Further, section 7(1) of the German Criminal Code provides that its criminal law shall apply, to offences committed abroad against a German. However, it requires double criminality and the accused is not subject to any criminal jurisdiction.

The provision on Malaysian extraterritorial jurisdiction is envisaged in section 3 of the SOAC 2017. This provision adopts nationality principle. However, unlike Canada and the United Kingdom that establish their jurisdiction when the offence is committed by their citizen as well as residents abroad, Malaysia's extraterritorial provision is only applicable to its citizen.

The extraterritorial offences are not only confined to those provided in the SOAC 2017, but also the following offences in other Malaysian statutes:

**Table: 4.6: The applicability of extraterritorial provision in SOAC 2017 over other Laws of Malaysia**

No.	Act & Provision
1.	<p><b>The Penal Code [Act 574]</b></p> <ul style="list-style-type: none"> <li>Section 354      Assault or use of criminal force to a person with intent to outrage modesty</li> <li>Section 372      Exploiting any person for purposes of prostitution</li> <li>Section 372B      Soliciting for purpose of prostitution</li> <li>Section 376      Rape</li> <li>Section 376A      Incest</li> <li>Section 377A      Carnal intercourse against the order of nature</li> </ul>

<sup>4-563</sup> The offence is punishable with three months to five years imprisonment

No.	Act & Provision	
	<ul style="list-style-type: none"> <li>Section 377C Committing carnal intercourse against the order of nature without consent, <i>etc.</i></li> <li>Section 377CA Sexual connection by object</li> <li>Section 377D Outrages on decency</li> <li>Section 377E Inciting a child to an act of gross indecency</li> <li>Section 509 Word or gesture intended to insult the modesty of a person</li> </ul>	
2.	<b>Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670]</b> <ul style="list-style-type: none"> <li>Section 14 Offence of trafficking in children</li> <li>Section 15 Offence of profiting from exploitation of a trafficked person</li> </ul>	
3.	<b>Child Act 2001 [Act 611]</b> <ul style="list-style-type: none"> <li>Section 31 Ill-treatment, neglect, abandonment or exposure of children</li> <li>Section 43 Offences relating to children in need of protection and rehabilitation</li> </ul>	
4.	<b>Communications and Multimedia Act 1998 [Act 588]</b> <ul style="list-style-type: none"> <li>Section 211 Prohibition on provision of offensive content</li> <li>Section 233 Improper use of network facilities or network service, <i>etc.</i></li> </ul>	
5.	<b>Film Censorship Act 2002 [Act 620]</b> <ul style="list-style-type: none"> <li>Section 5 Obscene film</li> </ul>	

The merit of section 5 of the SOAC 2017 is the non-requirement of double criminality. This may be useful for a simpler enforcement but nevertheless subject to the law on extradition, the effectiveness of international cooperation, and the accessibility to the witness and evidence. With this provision, it is submitted that instances like the hypothetical scenario 3 in Part 4.5.1 could be confronted.

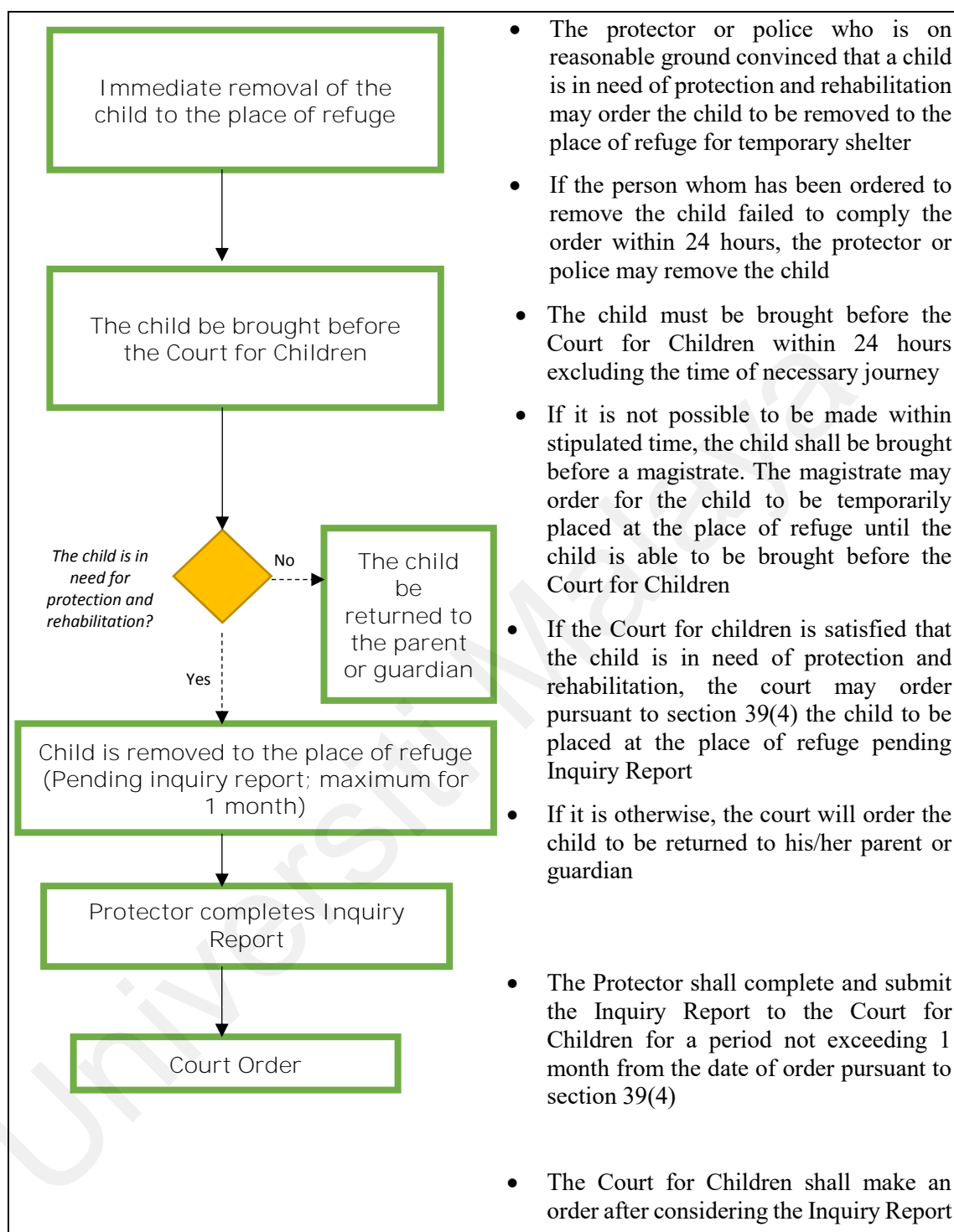
However, section 5 of the SOAC 2017 emphasises on the nationality of the offender. It does not address the issue if the victim is our nationals, and the foreign perpetrator is taking advantage of the inadequacy of the law where the crime is committed as illustrated in the hypothetical scenario 2 in Part 4.5.1. Hence it is highly recommended that the

legislature would consider adopting passive personality principle at least, if not universal principle to establish extra-territorial jurisdiction. This is to ensure a comprehensive protection to our children against transnational CSE.

#### **4.6 RESCUE AND SUPPORT PROCEDURES**

In this part, the fifth and the sixth aspects set by the international instruments concerning the rescue and support provision of the child victims is analysed collectively. The provisions on the child victims rescue procedures are provided in section 39 to 40 of the CA 2001. The rescue procedures begin when any Protector or police, on reasonable grounds convinced that a child is in need of protection and rehabilitation, whom shall then take the following action (see Table 4.7 on the next page):

**Table 4.7: Rescue procedures under section 39 to 40 of the CA 2001**



The latest amendments concerning the power of the Court for Children in relation to a child in need of protection and rehabilitation are in line with the aspiration of the UNCRC in emphasising on the family-based care. With due regards to the best interests of the child, the court may order pursuant to section 40 of the CA 2001 of the following:

- (i) Requiring the parent or guardian of the child to execute a bond for a period not exceeding 3 years and any conditions for the proper care and custody of the child;
- (ii) Place the child in the care of a person for, whether a relative or not, who is willing, fit and proper person as considered by the court for a period not exceeding 3 years;
- (iii) Place the child under the supervision of the Social Welfare Officer for a period not exceeding 3 years;
- (iv) Placing the child at a centre for a period not exceeding 3 years; or
- (v) Place the child at the place of refuge for a period not exceeding 3 years from his/her admission under the order pursuant to section 39(4).

It is submitted that the intervention and rescue measures are clearly provided. The latest amendment to the CA 2001 in 2016 reinforces parental responsibilities towards children and realises the right of children not to be deprived of family-based care unnecessarily.

For that reason, section 40 of the CA 2001 puts the option to place the children in alternative care as the last recourse. Despite that, in certain circumstances, placing the victims in children institution is necessary for their best interests, for instance, in cases where the victim becomes pregnant as the result of the abuse. As pregnancy out of wedlock is stigmatised in the eyes of the society, the victims are potentially discriminated and ousted by their own family and the society.

Even though the victims of sexual exploitation generally may be rescued according to the above procedures, however special attention should be given to the child pornography

victims. There exists intricacy in categorising them into the apt groups; whether they ought to be protected and rescued as “children in need of care and protection” or “children in need of protection and rehabilitation” under the CA 2001. Both categories are governed by different provisions comprising different rescue procedures and children institution.

To begin with, it is judicious to categorize the child pornography victims as “children in need of care and protection” under Part V of the CA 2001 considering that the term “pornography” is explicitly provided in section 17(2). It stipulates that a child is sexually abused if, *inter alia*, the child has taken part as a participant or an observer in any sexual activities for the purpose of pornography. Even so, to qualify the protection under the said category, the victims must be those whom have been sexually abused within family, guardian and relative settings. Section 17(1) confines the protection to the children:

- (i) who have been sexually abused by his/her parent, guardian or relative;
- (ii) who are in a substantial risk of being abused by his/her parent, guardian or relative;
- (iii) whom the parent, guardian or relative have the knowledge that the children have been sexually abused but has not or unlikely to protect them against the harm;
- or
- (iv) whom the parent, guardian or relative have the knowledge that the children are in a substantial risk of being sexually abused but has not or unlikely to protect them against the harm.

The provision thus effectively excludes the protection to children who have been sexually abused or are at risk of sexual abuse by other person than his/her parent, guardian or relative of whom have no knowledge of the abuse. Auspiciously, the *lacunae* could be cured by invoking the protection under part VI of the CA 2001. Hence the aforementioned



victims could be categorised as “children in need of protection and rehabilitation” as they qualify within the definition provided in section 38(a), that is “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”.

The following table compares the rescue procedures and the related children institution of both categories:

**Table 4.8: Comparison of the rescue procedures and related child institution in Part V and Part VI of the CA 2001**

No.		Part V Children in need of care and protection	Part VI Children in need of protection and rehabilitation
1.	Rescue procedures	<p>Rescue initiated by:</p> <div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 2px; text-align: center;">The Protector</div> <div style="border: 1px solid black; padding: 2px; text-align: center;">Police Officer</div> <div style="border: 1px solid black; padding: 2px; text-align: center;">Assistant Protector</div> </div> <p style="text-align: center;">↓</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> s.18 The child is brought to and held in temporary custody of the Protector </div> <p style="text-align: center;">↓</p> <div style="display: flex; justify-content: space-between;"> <div style="border: 1px solid black; padding: 5px; text-align: center;"> s.19 The child is brought before Court for Children or Magistrate within 24 hours </div> <div style="border: 1px dashed black; padding: 5px; text-align: center;"> s.20 The child be sent for medical examination or treatment </div> </div> <p style="text-align: center;">↓</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> s.25 The Court for Children issues order. </div>	<p>Rescue initiated by:</p> <div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 2px; text-align: center;">The Protector</div> <div style="border: 1px solid black; padding: 2px; text-align: center;">Police Officer</div> </div> <p style="text-align: center;">↓</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> s.39 (1) The child is brought immediately to the place of refuge </div> <p style="text-align: center;">↓</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> s.39 (2) The child is brought before Court for Children or Magistrate within 24 hours </div> <p style="text-align: center;">↓</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> s.39 (4) The Court for Children order the child to be placed at place of refuge if it is satisfied the child is in need of protection and rehabilitation </div> <p style="text-align: center;">↓</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> s.39A The Protector prepares and submit the Inquiry Report within 1 month from the date of the court's order under s.39 (4) </div> <p style="text-align: center;">↓</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> s.40 The Court for Children considers the Inquiry Report and issues order </div>

No.		Part V Children in need of care and protection	Part VI Children in need of protection and rehabilitation
2.	Power of the court	<b>Section 30</b> The Court for Children may order: <ol style="list-style-type: none"> <li>the parent or guardian to execute a bond to exercise proper care and guardianship for a period specified by the Court</li> <li>placing the child in the custody of a fit and proper person for a period specified by the Court</li> <li>placing the child in the care, custody and control of a foster parent found to be suitable for a period of 2 years or until he attains the age of 18 years old, whichever shorter</li> <li>placing the child in a centre for a period of three years from the date of the order or until he attains the age of 18 years old, whichever shorter</li> <li>placing the child in a place of safety for a period of three years from the date of the order or until he attains the age of 18 years old, whichever shorter</li> </ol>	<b>Section 40</b> After deliberating the Inquiry Report, the Court for Children may order: <ol style="list-style-type: none"> <li>requiring the parent or guardian of the child to execute a bond, with or without sureties for period not exceeding three years for the proper care and guardianship of the child;</li> <li>placing the child for a period not exceeding three years in care of a fit and proper person;</li> <li>placing the child under the supervision of a Social Welfare Officer for a period not exceeding three years;</li> <li>placing the child in a centre for a period not exceeding three years; or</li> <li>placing the child in a place of refuge for a period of three years</li> </ol>
3.	Children Institution	<ul style="list-style-type: none"> <li>Centre established under section 53A</li> <li>Place of safety under section 54</li> </ul>	<ul style="list-style-type: none"> <li>Centre established under section 53A</li> <li>Place of safety under section 55</li> </ul>

As pointed earlier, there are distinct children institutions established for the two different categories of children. For “children in need of care and protection”, they may be sent to the place of safety established under section 54 of the CA 2001. This institution is established not only to shelter child sexual abuse victims *per se*, but also other children enlisted in section 17 of the CA 2001 such as abandoned and street children. Therefore,

the facilities and programmes may not be thoroughly suitable and effective for the full physical and psychological recovery of child pornography victims. It is submitted that the place of refuge established under section 55 for “children in need of protection and rehabilitation” is the better institution. This is because the institution is established and equipped with programmes specifically designed for children who are the victims for sexual exploitation. Accordingly, child pornography victims, irrespective whether the abuse was within familial or guardian domain, they ought to be categorised as “children in need of protection and rehabilitation”. To ensure the consistent and efficient enforcement, it is proposed that a specific regulation or administrative protocol is designed to that effect.

As for the child victims who are not Malaysian citizens or permanent residents, the rescue procedures are governed in section 44 of the ATIPSOM 2007. The victims may be placed at a place of refuge established under section 42 of the ATIPSOM 2007 for a period not exceeding three months from the date of the court order, and thereafter be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63 for their return to the country of origin.

#### **4.7 THE ACCESS FOR THE CHILD VICTIM TO CLAIM COMPENSATION**

The rights of a crime victim who have suffered harm, including physical or mental injury, emotional anguish and economic loss to legal remedy is recognised under the International Law. The remedy encompasses many different forms like restitution, compensation and other necessary assistance.<sup>564</sup> As noted earlier, the right of child victims

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<sup>4-564</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/34

who have been sexually abused and exploited to claim for compensation is enshrined in Article 9 of the OPSC.

In the Malaysian context, the provision relating the access of child victim(s) to compensation is silent in the SOAC 2017 and the CA 2001, however, a reference can be made to section 426(1A) of the Criminal Procedure Code (hereinafter referred to as “the CPC”).<sup>565</sup> According to the section, a victim of a convicted crime may be compensated for the injury resulting from the offence committed. The said injury includes the victim’s personal injury, damage to his/her character, and the loss of income or property. The compensation can only be awarded by the court before which the offender is convicted. In quantifying the compensation, the court shall, as guided in section 426(1C), consider various factors such as the nature of the offence, the expenses incurred by the victim, and the ability of the convicted accused to pay.

Even though section 426 of the CPC offers the avenues for victims to claim compensation, the application of this section is occasionally reported.<sup>566</sup> Moreover, the application of this section raises the following concerns. First, the compensation is not guaranteed as it must be preceded with the conviction of the perpetrator and the application by the prosecutor to the court.<sup>567</sup> On this point, the practice in the United States may serve as an example. By virtue of § 2259 of 18 U.S. Code, it is mandatory for the court to issue the order of restitution that directs the offender to pay the full amount of losses suffered by the child sexual exploitation and abuse victim(s). The amount shall include the expenses on medical services relating to physical, psychiatric, or psychological care, physical and occupational therapy or rehabilitation, transportation,

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<sup>4-565</sup> Act 593

<sup>4-566</sup> Izawati Wook, ‘Compensation Order Provision by Criminal Courts in Malaysia and the United Kingdom’, [2010] 2 MLJ ii

<sup>4-567</sup> section 426 (1A) CPC

child care expenses, as well as other costs and losses incurred resulting from the offence.<sup>568</sup> Besides that, in contrast to section 426 (1C) of the CPC, the ability of the offender to pay is irrelevant and could not be the ground of refusing the award.<sup>569</sup>

Secondly, as mentioned earlier, section 426(1A) of the CPC requires the conviction of the offender and furthermore, the court may hold another inquiry in determining the amount of compensation as provided in section 426 (1D) of the CPC. The implication of this lengthy procedure is that the child victim may be called again at the inquiry stage to testify. It has been highlighted by the Committee on the Rights of the Child that repeated interviews may post traumatic effects resulting the refusal of the victims to cooperate or despair at some point during the process.<sup>570</sup> This was also observed by ECPAT Belgium and ECPAT Germany in their report to ECPAT International in “Access to Justice and Right to Remedies for Child Victims of Sexual Exploitation” Research Project.<sup>571</sup>

The possible solution to the aforementioned implication is by establishing the access to the State fund where the procedures are purely administrative. For example, the establishment of the Criminal Injuries Compensation Scheme in England, Scotland and Wales, the Victims Assistant Scheme in New South Wales Australia, and the Criminal and Law Enforcement Injuries Compensation Scheme (CLEIC) in Hong Kong. Moreover, the State fund would be the best alternative in assuring the financial assistance for the victims to undergo physical and mental rehabilitation services in the event where compensation by perpetrator is infeasible.<sup>572</sup>

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<sup>4-568</sup> § 2259 (B)(3), 18 U.S. Code

<sup>4-569</sup> § 2259 (B)(4), 18 U.S. Code

<sup>4-570</sup> ECPAT International, *Barriers to Compensation for Child Victims of Sexual Exploitation*, (2018, Bangkok); at page 30-34

<sup>4-571</sup> *ibid*, at page 34

<sup>4-572</sup> *ibid*, at page 16-18, 27-28

## 4.8 CONCLUSION

The succeeding table summarises the findings and recommendations based on the analysis made in this chapter. The degree of compliance to the international standards for the seven main aspects (see Part 4.1 (1)) is indicated according to following code<sup>573</sup>:

1	Full compliance to the international standards and requires no legal reform
2	Partial compliance to the international standards and requires legal amendments or law reviews
3	Non-compliance to the international standards and requires legal reform

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<sup>573</sup> The code is adopted from UNICEF style of reporting on legislative review in determining whether a certain domestic laws conforms to international standards. See UNICEF, 'Analysis of Domestic Laws related to Violence against Children – Vietnam', available online at <[https://www.unicef.org/Country\\_fact\\_sheet\\_Vietnam\\_-\\_final\\_09Jul15.pdf](https://www.unicef.org/Country_fact_sheet_Vietnam_-_final_09Jul15.pdf)> accessed on 7 August 2018

**Table 4.9: Summary of findings & recommendations (Chapter 4)**

Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
<b>1. Demarcating clear definition on:</b> <ul style="list-style-type: none"> <li>• Child Sexual Abuse (CSA)</li> <li>• Child Sexual Exploitation (CSE)</li> <li>• Child Prostitution</li> <li>• Child Pornography</li> </ul>	√  √  √	   √		<p>1. Even though CSE is not explicitly defined in any of the legislations, but it could be explained in the related offences such as child prostitution and child pornography.</p> <p>2. The definition of “child prostitution” and “child pornography” provided in the legislations are in conformity to the international instruments’ definition.</p> <p>3. A concern which is also raised by the UNICEF in 2015 is pertaining to the legal presumption that persons under the age of 18 years who are involved in prostitution shall always be the victims of sexual exploitation.</p> <p>No express provision to this regard exposes the child who has attained the age of sexual consent (above 16 years old) and consented to involve in prostitution to the risk of being prosecuted under section 372B of the Penal Code. Additionally, if the child is a Muslim, he could be also prosecuted under the respective state’s Syariah Criminal Code.</p>

Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
				<p><b>Recommendation:</b></p> <p>1. The respective Act and State Enactments be amended to expressly exclude the criminalisation of children involving in prostitution.</p> <p>A reference could be made to section 23(3) of the New Zealand's Prostitution Reform Act 2003.</p>
<p><b>2. Outlawing all acts that fall directly or related to, and any act leading to the perpetration CSE</b></p> <ul style="list-style-type: none"> <li>Offering, obtaining, procuring and providing child prostitution</li> <li>Producing, disseminating and selling child pornography</li> </ul>	<p>√</p> <p>√</p>			<p>1. Section 43(1)(j) of the CA 2001 signifies that child prostitution is absolutely outlawed in Malaysia, regardless the consent of the child who are capable thereof, in line with the spirit of the UNCRC and the ILO Convention.</p> <p>2. Malaysia does not only criminalises, at the very least, the four related acts related to child prostitution imposed by the OPSC, but sets a stricter position by criminalising:</p> <ul style="list-style-type: none"> <li>transaction of sale, hire or disposal of a child with the intent or knowledge that it would be for the purpose of prostitution;</li> <li>non-direct involvement in child prostitution i.e. merely having the knowledge or reason to believe that the children has been</li> </ul>



Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
				<p>procured or been disposed of for the purpose of prostitution and yet fail to take any action under section;</p> <ul style="list-style-type: none"> <li>Detention of a child in a brothel against his will notwithstanding the fact that the child is not to be used for prostitution.</li> </ul> <p>3. The SOAC 2017 imposes higher sentence if a person is found guilty for selling, exhibits, or make available child pornography <b>to a child</b>.</p> <p>4. The SOAC 2017 specifically outlaws the access and having a possession or control of child pornography.</p>
<p><b>3. Outlawing any act leading to the perpetration of CSE such as grooming, trafficking, and transporting</b></p> <ul style="list-style-type: none"> <li>Child sexual grooming</li> </ul>	√			<p>1. Malaysian laws addresses child sexual grooming expansively.</p> <p>2. Section 12 of the SOAC 2017 is enacted broadly to fit the different process and stages of grooming.</p> <p>3. Meeting following grooming is also made a separate offence in section 13 of the SOAC 2017.</p>

Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
<ul style="list-style-type: none"> <li>Child Trafficking for the purpose of sexual exploitation</li> </ul>	√			<p>4. The SOAC 2017 imposes stricter position by criminalising sexual communication in section 11 of the SOAC 2017.</p> <p>5. The ATIPSOM 2007 strengthen the laws on child trafficking for the purpose of exploitation.</p> <p>6. The definition of “traffic in persons” that include the act of recruiting, transporting, transferring, harbouring, providing or receiving of a person concurs with the definition in the UN TIP Protocol.</p> <p>7. The ATIPSOM 2007 addresses the different levels of modus and involvement in trafficking. Any act that facilitates the commission of trafficking are interdicted concurrent with Article 3 and 5 of the UN TIP.</p>
<p><b>4. Establishing jurisdiction in order to address the issue on the transnational commission of the crime</b></p>		√		<p>1. The provision on extraterritorial of Malaysian jurisdiction is envisaged in section 3 of the SOAC 2017. This provision adopts nationality principle and is applicable if the sexual offences is committed by Malaysian citizen abroad.</p>

Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
				<p>2. The non-requirement of double criminality is useful for a simpler enforcement but nevertheless subject to the law on extradition, the effectiveness of international cooperation, and the accessibility to the witness and evidence.</p> <p><b>Recommendation:</b></p> <p>1. It is highly recommended that the legislature would consider adopting passive personality principle at least, if not universal principle to establish extra-territorial jurisdiction. This is to ensure a comprehensive protection to child victims against transnational CSE and in consonance with Article 4(2)(b) of the OPSC.</p>
<p><b>5. Clear modus of rescue of the children who involve or prone to involve in sexual exploitation &amp;</b></p>		√		<p>1. The intervention and rescue measures are clearly and effectively provided.</p>

Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
6. The provisions relating to the rights of the child victim to undergo rehabilitation and support programme are incorporated		√		<p>2. The latest amendment concerning the power of the Court for Children in relation to a child in need of protection and rehabilitation concurs with the aspiration of the UNCRC in recognising the family-based care.</p> <p>It reinforces parental responsibilities towards children and realises the right of children not to be deprived of family-based care unnecessarily.</p> <p>3. There exists intricacy in categorising child pornography victims into the apt groups- whether under Part V or Part VI of the CA 2001.</p> <p>4. Child victims who are not being Malaysian citizens or permanent resident, the rescue procedures are governed in section 44 of the ATIPSOM 2007.</p> <p>5. The victims may be placed at a place of refuge established under section 42 of the ATIPSOM 2007 for a period not exceeding three months from the date of the court order, and thereafter be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63 for their return to the country of origin.</p>

Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
				<p><b>Recommendations:</b></p> <ol style="list-style-type: none"> <li>1. Child pornography victims, irrespective whether the abuse was within familial or guardian domain, they ought to be categorised as “children in need of protection and rehabilitation”, qualifies the protection under Part VI of the CA 2001.</li> <li>2. To ensure the consistent and efficient enforcement, it is proposed that a specific regulation or administrative protocol is designed to that effect.</li> </ol>
<b>7. The access for the child victim to claim compensation</b>			√	<ol style="list-style-type: none"> <li>1. The provision relating the access of child victim(s) to compensation is silent in the SOAC 2017 and the CA 2001.</li> <li>2. It is possible to rely section 426 (1A) of the Criminal Procedure Code in claiming compensation, nonetheless: <ul style="list-style-type: none"> <li>• The compensation is not guaranteed as it must be preceded with the conviction of the perpetrator and the application by the prosecutor to the court;</li> </ul> </li> </ol>

Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
				<ul style="list-style-type: none"> <li>• The ability of the offender to pay is taken into account in awarding the compensation; and</li> <li>• The court may hold another inquiry in determining the amount of compensation.</li> </ul> <p>It has been highlighted by the Committee on the Rights of the Child that repeated interviews may post traumatic effects resulting the refusal of the victims to cooperate or despair at some point during the process.</p> <p><b>Recommendations:</b></p> <ol style="list-style-type: none"> <li>1. Establishing the access to the State fund where the procedures are purely administrative.</li> <li>2. The State fund would be the best alternative in assuring financial assistance for the victims to undergo physical and mental rehabilitation services in the event where compensation by perpetrator is infeasible.</li> </ol>

Aspect	Level of Fulfilment			Findings & Recommendations
	1	2	3	
				<p>3. Reference could be made to:</p> <ul style="list-style-type: none"> <li>• the Criminal Injuries Compensation Scheme in England, Scotland and Wales;</li> <li>• the Victims Assistant Scheme in New South Wales Australia; and</li> <li>• the Criminal and Law Enforcement Injuries Compensation Scheme (CLEIC) in Hong Kong.</li> </ul>

It is submitted that the current Malaysian legal framework largely complies with the international standards. However special attention should be given to 3 concerns. Firstly, the non-availability of provision on the legal presumption that persons under the age of 18 years who are involved in prostitution shall always be the victims of sexual exploitation. Having such a provision would protect the child victims who face the risk of being charged, convicted and sentenced, when in actual fact they were victimised and exploited. Secondly it is highly recommended for the legislature to consider adopting passive personality principle at least, if not universal principle, in establishing extra-territorial jurisdiction. This is to ensure the comprehensiveness of protection to our children against transnational CSE. Thirdly is pertaining to the access of the child victims to compensation. The existing provision, section 426(1A) of the Criminal Procedure Code, may not be suitable in the case of CSE victims due to the lengthy process. Hence, it is recommended for the government to consider establishing specific funds and measures to ensure the victims are properly compensated.

As stated in Part 4.6 above, a child who is in need of protection and rehabilitation may be sent to place of refuge as part of the rescue measures. This means that the children will be temporarily placed in alternative care. Correspondingly, the fundamental rights of children in alternative care such as right to education, right to be treated with dignity and respect et cetera must be equally protected. Chapter 5 that follows will further assess the implementation of the child rights at the place of refuge.



## CHAPTER 5

### THE IMPLEMENTATION OF CHILD RIGHTS AT PLACES OF REFUGE IN MALAYSIA

#### 5.1 INTRODUCTION

It was stated in Chapter 4 that children in need of protection and rehabilitation may be placed at a place of refuge either pursuant to a court order under section 39 of the Child Act 2001, or instantaneously admitted for children who are deemed to be in urgent need of protection under section 41 of the Child Act 2001 (hereinafter referred to as “the CA 2001”). There are four official places of refuge pursuant to section 55 throughout Malaysia:

- i. Taman Seri Puteri Batu Gajah, Perak;
- ii. Taman Seri Puteri Cheras, Selangor;
- iii. Taman Seri Puteri Kota Kinabalu, Sabah; and
- iv. Taman Seri Puteri Kuching, Sarawak.

Before the amendment of the CA 2001 in 2016 (which came into force in January 2017), the placement of children at a designated place of refuge appeared to be the primary option for the court when it was satisfied that the children in question were in need of protection and rehabilitation based on the Protector’s report. In recognition of the fact that family is important in every child’s development, section 40 of the CA 2001 was amended accordingly. The amended provision prioritises family-based care and thus the placement of a child at a place of refuge shall be the last resort and must be made in the best interest of the child. This emphasis shift is in concordance with Article 9 of the UNCRC and Clause 14 of the United Nations Guidelines for the Alternative Care of Children (hereinafter referred to as “the UN Guidelines”).<sup>574</sup>

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<sup>5-574</sup> Article 9 of the UNCRC provides:

As earlier discussed in Chapter 3, sex outside of marriage and pregnancy out of wedlock are generally regarded as taboos within Malaysian society. This perception is rooted in strong religious and eastern cultural values. Any person, including a child who is involved in such activities is potentially vulnerable to stigmatization, neglect and even being disowned by their own families. Therefore, despite the shift in the law that renders the place of refuge as the last recourse, it is submitted that due to this prevailing attitude and perception within the society, the place of refuge remains relevant as an alternative method of care for children in need of protection and rehabilitation, especially for children who are pregnant out of wedlock. The place refuge has become the temporary shelter for children who are pregnant out of wedlock since March 2001<sup>575</sup> whereby they can be admitted instantaneously and be discharged after their babies are delivered.

The official statistics of Social Welfare Department showed that the number of children admitted to Taman Seri Puteri throughout Malaysia has been declining since 2013.<sup>576</sup>

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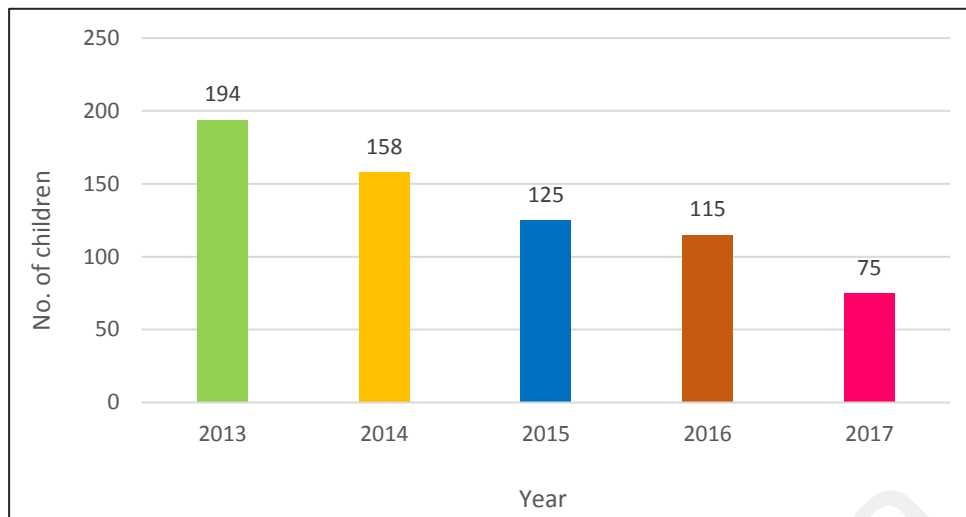
*"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child..."*

Clause 14 of the UNCRC provides:

*"14. Removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration. Removal decisions should be regularly reviewed and the child's return to parental care, once the original causes of removal have been resolved or have disappeared, should be in the best interests of the child, in keeping with the assessment foreseen in paragraph 49 below"*

<sup>5-575</sup> This is affected by the insertion of a new provision in the Child Act 2001 where children who are pregnant out of wedlock is added to the category of children who are deemed under the law in need of urgent protection- see Part 3.3.4 (Chapter 3) of this thesis for detailed discussion on the development of laws

<sup>5-576</sup> Social Welfare Department, 'Statistik Jabatan Kebajikan Masyarakat', retrieved from <  
[http://www.jkm.gov.my/jkm/uploads/files/pdf/laporan\\_statistik/statistic\\_2013/BHG\\_C-INSTITUSI.pdf](http://www.jkm.gov.my/jkm/uploads/files/pdf/laporan_statistik/statistic_2013/BHG_C-INSTITUSI.pdf)> for 2013;  
<http://www.jkm.gov.my/jkm/uploads/files/pdf/Buku%20JKM%202014.pdf>> for 2014; <  
<http://www.jkm.gov.my/jkm/uploads/files/penerbitan/Buku%20JKM%202015%E2%80%A2Final.pdf>> for 2015; <  
<http://www.jkm.gov.my/jkm/uploads/files/penerbitan/Buku%20statistik%202016.pdf>> for 2016; all retrieved on 2 March 2019, see also Department of Statistics Malaysia, Children Statistics 2018, (Department of Statistics, November 2018)



**Chart 5.1 Number of children admitted to Taman Seri Puteri according to Year**

The decline is due to a number of factors. Apart from the development in the policy and law that emphasises family based care rather than institutionalisation, it is argued that the declining number of admission is as such due to the existence of private shelters, especially for pregnant teenagers.<sup>577</sup>

Be as it may, it is to be noted that total number of children in need of protection and rehabilitation remain substantial as illustrated in Table 3.1 of Chapter 3 of this thesis. This is because not all children in need of protection and rehabilitation will be sent to the place of refuge. As discussed in Part 4.6 of this thesis, section 40 of the CA 2001 allows the court to order the parents to execute bond for proper care of the child, order the child to be in the proper care and custody of a fit and proper person, or order the child to be placed under the supervision of the Social Welfare Officer.

<sup>577</sup> There is no official data on the numbers of the said private shelter homes in Malaysia. However based on newspaper reports and online information, there are many shelters run by the NGOs, or semi-government institutions established throughout Malaysia. These institutions do protect not only children but any person who is pregnant out of wedlock. For instance - Raudhatus Sakinah, a private-run institution which have five branches in Selangor, Pulau Pinang, Kelantan, Johor and Melaka (see: <http://www.raudhatussakinah.com.my/2018/01/10/236/>); Rumah Puteri Arafiah, runned by Pertubuhan Kebajikan dan Amal Wanita Selangor, an NGO, in Selangor (see <https://selangorkini.my/2013/12/rumah-puteri-arafiah-rawatan-buat-perempuan-mangsa/>), Pusat Perlindungan Pertubuhan Kebajikan Nur Hati, a shelter not only to protect teenage who are pregnant, but also elderly and orphan in Kuala Lumpur (<https://www.bharian.com.my/wanita/lain-lain/2019/02/528205/saya-hamil-anak-luar-nikah>); Rose Virginie Good Shepherd Center, a shelter for women and girls in crisis situated in Ipoh, Perak (<https://www.hati.my/rose-virginie-good-shepherd-centre-ipoh/>); and Seri Murni Crisis Centre located in Kota Kinabalu, Sabah (<https://goodshepherd.my/pusat-jagaan-seri-murni-0>).

Given that Taman Seri Puteri is established as a government-run alternative care centre, it is pertinent to ensure the children's rights are safeguarded throughout the institutionalization as provided in Clause 16 of the UN Guidelines. Hence, this chapter seeks to investigate whether the following fundamental rights of children in need of protection and rehabilitation are upheld at the place of refuge:

- i. The right to be treated with dignity and respect;
- ii. The right to education;
- iii. The protection of the best interests of a child at the place of refuge; and
- iv. The right to be integrated with society.

The outcome of this research is vital to determine whether the designated place of refuge optimally safeguards the children's fundamental rights.

## **5.2 METHODOLOGY**

The methodology employed in this research has been briefly explained in Chapter 1. As stated earlier, a social-legal approach that employs a mixed quantitative and qualitative method is adopted for the empirical legal analysis in evaluating whether children's rights are implemented at the place of refuge.

### **5.2.1 Respondents**

There are 3 main target respondents:

- b. Children in need of protection and rehabilitation residing at the place of refuge established under section 55 of the CA 2001:
  - Taman Seri Puteri Batu Gajah
  - Taman Seri Puteri Kota Kinabalu

- Taman Seri Puteri Kuching
  - Taman Seri Puteri Cheras
- d. The principals or the caregivers at the above institutions
- e. The representative(s) from the Department of Social Welfare Malaysia as the main stakeholders for the protection of children in Malaysia.

### **5.2.2 Approval**

The approval to conduct this research at the place of refuge was obtained from the Department of Social Welfare Malaysia on 10 August 2017 and the Department of Social Welfare Sarawak on 4 November 2017 (see Appendices 1 and 2).

### **5.2.3 Designing interview questions**

The data was collected by way of semi-structured interviews on the abovementioned children. The child respondents were asked the same series of questions, comprising of mostly closed-ended questions (Yes / No / Not sure) and a few open-ended questions to allow the children to express and share their experiences and thoughts.

The semi-structured interview technique was chosen in consideration of the fact that this research involves children. This technique allows some flexibility for the researcher to approach the children in a less formal and friendlier setting. More importantly, it gives room for the researcher /interviewer to rephrase questions to suit the child respondent's level of understanding without deviating from the main themes of the research. In addition, this technique is useful for the researcher / interviewer to go beyond the pre-set questions to acquire more detailed information when necessary.

The interview questions were developed based on the UN Guidelines, with emphasis on the following themes:

- i. The implementation of the right to be treated with dignity and respect;
- ii. The implementation of the right to education;
- iii. The protection of the best interests of a child at place of refuge; and
- iv. The implementation of the right to be integrated with society.

Besides that, part of the questions was adapted from questionnaires applied in previous studies on the implementation of child rights at children's institutions in Malaysia:

- i. *Implementasi Hak Kanak-kanak (CRC) Di Rumah Kanak-kanak: Dapatan Kajian Rintis* by Pathmanathan A/L R. Nalasamy & Siti Hajar Abu Bakar,<sup>578</sup> and
- ii. *Implementation of Child Rights in Children's Homes in Malaysia* by Pathmanathan *et al.*<sup>579</sup>

To enhance the validity of the questions, the following experts were consulted for their advice and recommendations:

- i. Professor Dr Najibah Mohd Zin from Ahmad Ibrahim Kulliyyah of Law, International Islamic University Malaysia – an expert in Family and Child Law, on both civil and Syariah perspectives; and
- ii. Dr Saroja A/P Dhanapal, from Faculty of Law, University of Malaya – an expert in Research Methodology.

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<sup>5-578</sup> Pathmanathan A/L R. Nalasamy & Siti Hajar Abu Bakar Ah, 'Implementasi Hak Kanak-kanak (CRC) Di Rumah Kanak-kanak: Dapatan Kajian Rintis', in Seminar Kebangsaan Undang-Undang Kanak-Kanak Ke-2, 02-03 Oct 2010, Kuala Lumpur; also in 'Diskusi Undang-undang Dan Kanak-kanak Di Malaysia, Dr. Mohamed Fadzil Che Din (Editor), 2010, Institut Sosial Malaysia, at page 121-137

<sup>5-579</sup> Pathmanathan R. Nalasami, Siti Hajar Abu Bakar, Jal Zabdi Yusoff, Haris Abd. Wahab, Noralina Omar and M. Rezaul Islam, 'Implementation of Child Rights in the Children's Homes in Malaysia', (2015) Asian Social Work and Policy Review, Volume 9, Issue 3, pp 232–244

The interview questions were prepared in Bahasa Malaysia as it is the main medium of instruction at the places of refuge (see Appendix 4). The questions were also referred to during the discussion with the principal or the caregiver at the above institutions and the representative from the Department of Social Welfare Malaysia.

#### 5.2.4 Data collection method (in chronological order)

*(a) To acquire initial information on the number of children presently placed at Taman Seri Puteri.*

Upon obtaining approval from the Department of Social Welfare Malaysia on 10 August 2017, a survey form (see Appendix 3) was circulated to all four Taman Seri Puteri establishments *via* e-mail. The purpose of the survey was to ascertain the number of children, according to the classification provided under Part VI of the CA 2001, presently residing at the place of refuge. This step was essential to determine the sample size to be adopted in the research. The process took place from 4<sup>th</sup> October 2017 to 20<sup>th</sup> October 2017.

The following shows the initial feedback:

**Table 5.1: The number of potential child respondents based on the institutions' initial feedback**

Item	Classification	No. of girls			
		TSP Cheras	TSP Batu Gajah	TSP Kota Kinabalu	TSP Kuching
1.	<b>Section 38(a)</b> The child is induced to perform any sexual act, or is in any physical or social environment which may lead to the performance of such act.	-	1	-	-
2.	<b>Section 38 (b)</b> The child lives in or frequents any brothel or place of assignation.	-	-	-	-

Item	Classification	No. of girls			
		TSP Cheras	TSP Batu Gajah	TSP Kota Kinabalu	TSP Kuching
3.	<b>Section 38 (c)</b> The child is habitually in the company or under the control of brothel-keepers or procurers or persons employed or directly interested in the business carried on in brothels or in connection with prostitution	-	-	-	-
4.	<b>Section 38(d)</b> The child has been brought into or is to be sent out of Malaysia and the custody of the child has been acquired either— i. after having been purchased; or ii. by fraud, false representation or false pretence, whether or not for the purposes of prostitution or for having sexual intercourse with another or for immoral purposes	-	-	-	-
5.	<b>Section 38(e)</b> The child has been procured either within or outside Malaysia for the purpose of being used, trained or disposed of as a prostitute	-	-	-	-
6.	<b>Section 38(f)</b> is being detained against his will— i. for the purposes of prostitution or for having sexual intercourse with another or for immoral purposes; or ii. for the purposes of being sent out of Malaysia for prostitution or for having sexual intercourse with another or for immoral purposes	-	-	-	-
7.	<b>Section 41(2)(a)</b> The child is being threatened or intimidated for purposes of prostitution or for purposes of having sexual intercourse with another or for any immoral purpose.	1	2	-	3
8.	<b>Section 41(2)(b)</b> the child is to be confined or detained by another in contravention of Part VI of the CA 2001	-	-	-	-
9.	<b>Section 41(2)(c)</b> The child is being or likely to be the victim of an offence against Part VI of the CA 2001	-	-	-	-



Item	Classification	No. of girls			
		TSP Cheras	TSP Batu Gajah	TSP Kota Kinabalu	TSP Kuching
10	<b>Section 41(2)(d)</b> The child is pregnant out of wedlock	7	8	1	2
	<b>Total (in respective institution)</b>	8	11	1	5
	<b>TOTAL POTENTIAL RESPONDENTS</b>	25			

As shown in the above table, the potential respondents were 25. Hence, no sampling technique was adopted and thus, all children under the category of being in need of protection and rehabilitation residing at Taman Seri Puteri were invited to participate in the interview. However, when the research was conducted, there was a slight change to the figures as there were new admission of children and similarly, the release of former residents.

*(b) Discussion session with the representative from the Department of Social Welfare Malaysia.*

The first respondent in this research was the representative from the Social Welfare Department Malaysia (*Jabatan Kebajikan Masyarakat*) (hereinafter referred to as “JKM”). JKM is one of the government agencies currently under the Ministry of Women, Family and Community Development. JKM has a vital role in social development that includes prevention and rehabilitation services on social issues.

All Taman Seri Puteri establishments fall within the authority of JKM and are specifically supervised by the Children Division of JKM. A discussion session was held at JKM headquarters in Putrajaya on 30 October 2017, focusing on the current related policies and regulations which govern the places of refuge, as well as the measures taken by JKM to safeguard the rights of children who are in need of protection and rehabilitation

while being institutionalised. The information was vital for the purpose of data triangulation. The data would give an overview of the policies framework that would be the baseline in determining whether the children's rights are implemented at the place of refuge.

*(c) Data collection at Taman Seri Puteri.*

i. Preliminary

Initially, the principal and/ or officer in charge of all Taman Seri Puteri establishments were contacted *via* email and phone to inform them of the details of the research and the available dates for data collection. The agreed dates were as follows:

No.	Place of refuge	Date
1	Taman Seri Puteri Batu Gajah, Perak	22 November 2017
2	Taman Seri Puteri Kuching, Sarawak	24 November 2017
3	Taman Seri Puteri Kota Kinabalu, Sabah	30 November 2017
4	Taman Seri Puteri Cheras, Selangor	6 December 2017

ii. Discussion with the Principal / officer in charge

Discussions were held with the Principal or officer in charge of each institution to capture a better understanding of the institution's general administration, the children's daily programmes and activities, and most importantly what measures are taken to ensure the rights and welfare of the children are optimally safeguarded. The input would strengthen the findings in ascertaining whether the children's rights are protected while being institutionalised.

iii. Interview session with the children in need of protection and rehabilitation

Prior to each of the interview sessions, a briefing session was conducted for all potential respondents to clarify the following:

- a. The purpose of the study and the importance of their participation;
- b. That their participation was on a voluntary basis;
- c. The assurance that their identity will be protected and remain strictly confidential; and
- d. That they have the right to withdraw their consent to be interviewed at any time before, during or after the interview.

At the end of the briefing session, the children were given the opportunity to raise any enquiries and were also given the choice whether or not to participate in the interview. All 24 children in need of protection and rehabilitation who were residing at Taman Seri Puteri agreed to participate. Their consent was recorded in the consent form (see Appendix 5).

The face-to-face interview was subsequently conducted by myself. Each child was called individually and each session took approximately 20 to 30 minutes. The interview was conducted in an informal ambience to ensure that the children were comfortable and relaxed. It was vital to ensure that the surroundings would not affect the children from sharing their experience freely. In order to protect the children's identities and confidentiality, pseudonym was used for each respondent.

### **5.2.5 Data Management and Analysis**

The respondents' answers were recorded in writing. Besides that, the interview sessions were also voice-recorded with the consent of the officer in-charge as well as the participants.

All data were securely filed to protect the respondents' confidentiality. The data collected were analysed by using Microsoft Excel to provide a numerical percentage.

### **5.2.6 Validating findings and recommendations**

Findings and recommendations were subsequently made based on the analysed data. To further validate and ensure the viability of the recommendations, four subject matter experts from different practice areas were consulted in July 2019. This is essential to gauge holistic standpoints on the feasibility of the suggested measures for the best interest of children in need of protection and rehabilitation. The four subject matter experts are:

- (i) Professor Dr Najibah Mohd Zin from Ahmad Ibrahim Kulliyah of Law, International Islamic University Malaysia – an expert in Family and Child Law, on both civil and Syariah perspectives. She is also the Chairman of the Board of Directors of Raudhatus Sakinah, a private place of refuge for children who are pregnant out of wedlock.
- (ii) Mr. Syed Azmi Alhabshi, a social activist. He is also currently the Chairman of the Kuala Lumpur and Putrajaya Child Protection Team, a member of the Board of Visitors Taman Seri Puteri Cheras, the Advisor for Rumah Bonda, Kuala Lumpur- a transit home for teenage who are pregnant out of wedlock and a recently appointed advisor for the Court for Children.

- (iii) A representative from the Policy and International Relations Division (Children Unit), Department of Social Welfare. She has a total of 27 years of experience in the children welfare system.
- (iv) A senior officer from the Policy Division, Ministry of Women, Family & Community Development. He has served the Ministry for more than 10 years.

## **5.3 RESULTS AND DISCUSSIONS**

### **5.3.1. Guideline and Policies**

All places of refuge established under section 55 of the CA 2001 are subject to the Child (Place of Refuge) Regulations 2017 (hereinafter referred to as “the Regulations 2017”) that came into operation on 1<sup>st</sup> October 2017. This subsidiary legislation, established by virtue of sections 82 and 128 of the CA 2001, governs the administration of place of refuge. The Regulations 2017 contain in detail, among other things, the functions of the Board of Visitors, duties of the Principal and most importantly the provisions relating to the care and welfare of the children in the institution.

Previously, the governing rules were the Women and Girls Protection (Place of Refuge) Rules 1982. Various improvements have been made in the Regulations 2017 to ensure that the rights of children are further protected and conform to international standards. This includes the removal of the provisions on corporal punishment. Formerly, the 1982 Rules allowed for corporal punishment to be inflicted pursuant to Rule 60. Even then the infliction of such punishment must be the last resort and only if it is deemed necessary. The punishment was also subject to the following restrictions:

- i. Only to be inflicted on the hands with a light cane approved by the Director General;

- ii. It shall not exceed three strokes on the palm of each hand;
- iii. Not to be inflicted on children with any physical or mental disability except with the approval of the medical officer;
- iv. Shall only be inflicted by the Principal or, during his absence, by a member of the staff appointed to exercise the duties of the Principal;
- v. It must not be inflicted in the presence of other residents; and
- vi. To be recorded in the punishment book.

The Regulations 2017 is further supported by the MS-ISO 9001:2008 and the Place of Refuge Client Management System (hereinafter referred to as Place of Refuge CMS). However, as these two documents are classified as restricted documents, request for privileged access was denied. The information on the content of these documents was gathered from the discussions with the representative of JKM and the principal or officers in charge at the respective Taman Seri Puteri. In addition, starting from 2016, all children's institutions in Malaysia including the place of refuge established under section 55 of the CA 2001 are subject to an annual audit. These institutions are assessed on the implementation of the MS-ISO 9001:2008 and their respective Client Management System. Indeed this is a positive step for monitoring purposes and to ensure consistency in the implementation of process and procedures in the best interests of the children.

Furthermore, it was also found that prior to the 2016 amendment of the CA 2001, Taman Seri Puteri did not only shelter children in need of protection and rehabilitation but also children who are beyond their parent's or guardian's control.<sup>580</sup> These children

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<sup>580</sup> "Beyond control" situations here are related to being sexually incorrigible. Section 46 of the CA 2001 provides that children beyond control may also be placed in probation hostels approved schools (Sekolah Tunas Bakti (Asrama Akhlak), or other private homes called "centre" (Pusat); see Shariffah Nuridah Aishah Syed Nong and Jal Zabdi Mohd Yusof, 'Rehabilitation of Children Beyond Control in Malaysia: Towards Deinstitutionalization' (2019) *International Journal of Academic Research in Business and Social Sciences*, 9(3), 449–459.

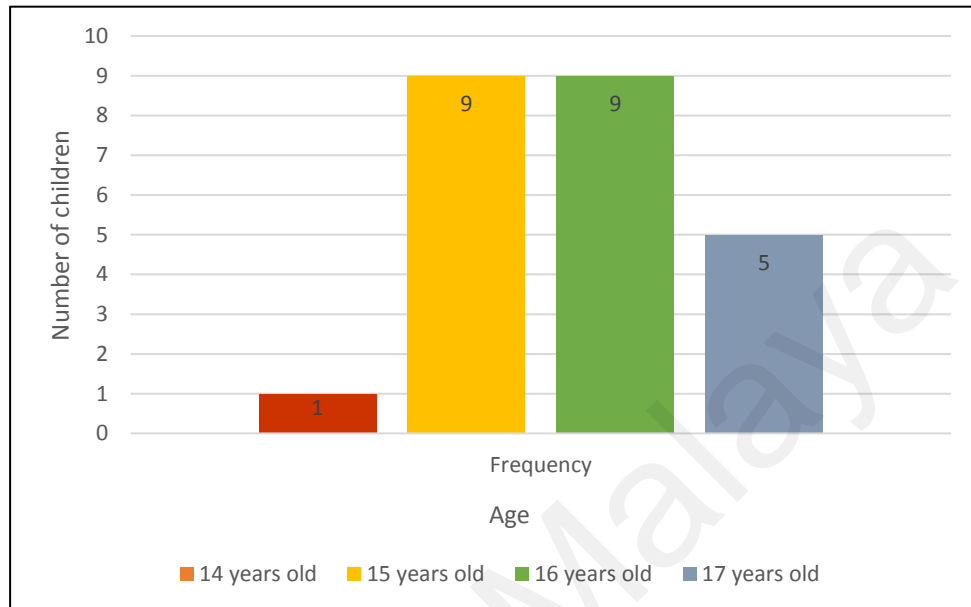
were, upon written request by their parents or guardians, institutionalized pursuant to a court order under section 46 of the CA 2001 for a maximum period of 3 years due to the inability of their parents or guardians to exercise proper control over them. After the amendment and administrative restructure in 2017, Taman Seri Puteri now exclusively shelters children in need of protection and rehabilitation. It is submitted that this is also another factor of the declination number of admissions in 2017 as tabled in Part 5.1 (see Chart 5.1- Number of children admitted to the place of refuge according to year) above. Nonetheless, at the time when this research was conducted, there were still few children beyond control residing at the place of refuge as they were completing their remaining terms as prescribed in the court orders.

In the following analysis (Parts 5.3.3 to 5.3.7), the Regulations 2017 will be critically examined to determine:

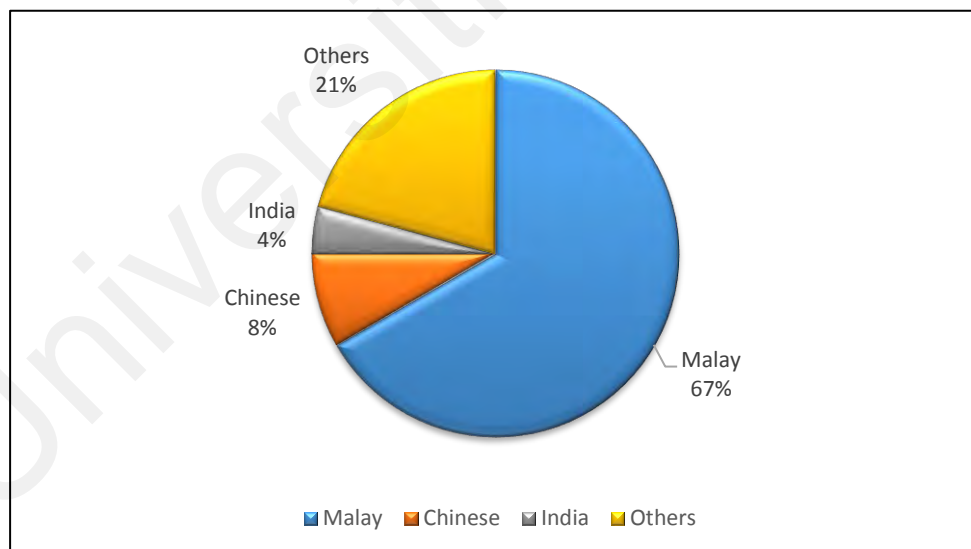
- i. Whether the Regulations 2017 meet the minimum requirements set in the UN Guidelines;
- ii. Whether the provisions are implemented in view of respecting the relevant fundamental children's rights while being institutionalised.

### 5.3.2 Respondents' Demographic Profiles

The following charts depict the child respondents' demographic profiles background:



**Chart 5.2: Respondents' Age**

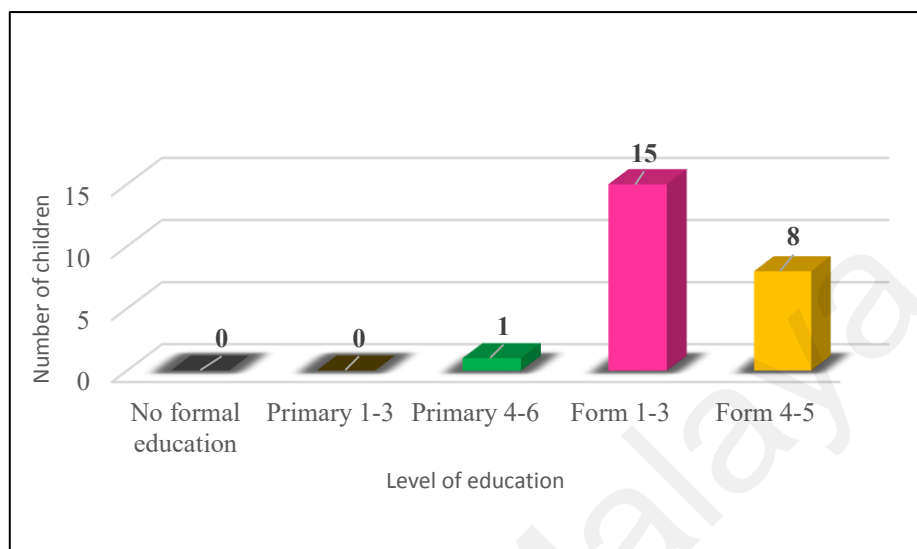


**Chart 5.3: Respondents' Race**

As can be seen in Chart 5.2, the youngest respondent was 14 years old (1 respondent). The majority of the respondents were 15 to 16 years old (18 respondents) and the eldest was 17 years old (5 respondents). Further, as illustrated in Chart 5.3, the majority (16) of



the respondents are Malay (66.7%), two Chinese (8.3%), one Indian (4.2%) and the remaining five (20.8%) are from other races which are Melanau, Iban and Kadazan.



**Chart 5.4: Respondent's Educational Background**

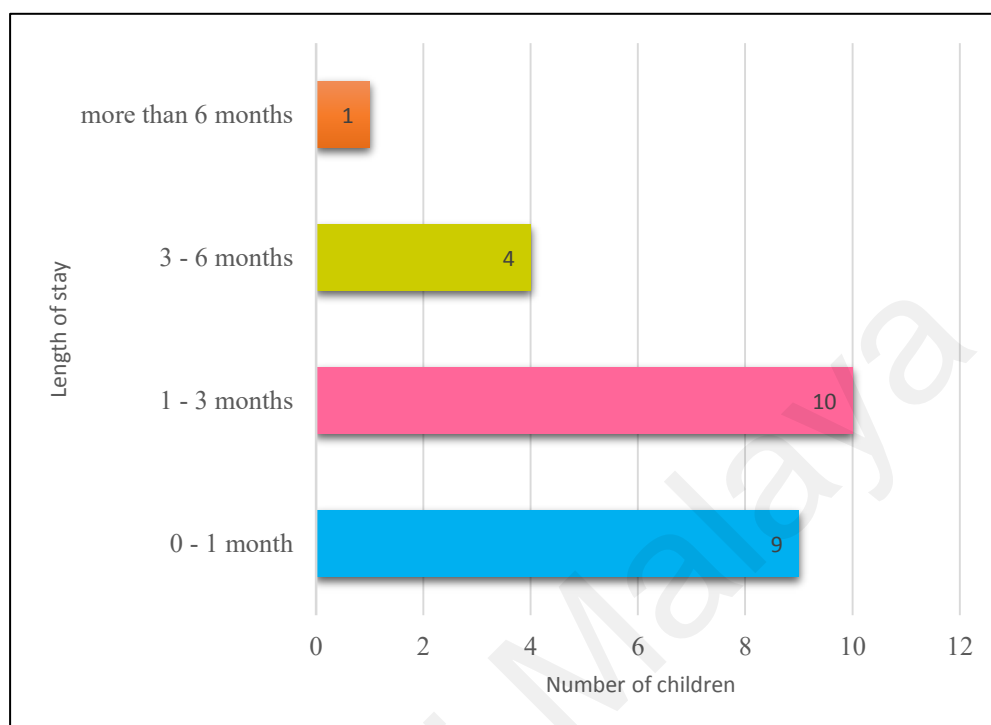
In terms of educational background, almost all of the children were still attending school prior to their placement at Taman Seri Puteri. However, there was one respondent stopped attending school after Primary Five due to poverty. Based on the interview with both officer in charge and the child respondent, it was found that the respondent, after quitting school, has subsequently involved in prostitution with the encouragement of her relative to support herself and her family.<sup>581</sup> Similarly, another respondent aged 16 years old was forced to work after school at a night club by her mother to pay off debts.<sup>582</sup>

These instances show that poverty increases the vulnerability of children to sexual exploitation. This is also worsened by the family encouragement in order to earn a living.

<sup>5-581</sup> The respondent's case was under Section 41(2)(a) of the CA 2001, where she has been threatened or intimidated for purposes of prostitution or for purposes of having sexual intercourse with another or for any immoral purpose. She was in the care of the relatives since young age. It is unfortunate that she was also sexually abused by the relatives.

<sup>5-582</sup> When the interview was conducted, the child respondent has just been admitted for a week. Her case was under Section 38(a) of the CA 2001, where she was in a social environment which may lead to the performance of sexual activities. (The child is induced to perform any sexual act, or is in any physical or social environment which may lead to the performance of such act).

It is submitted that these two factors (poverty and family encouragement) are the known factors of child sexual exploitation as reported by the United Nations.<sup>583</sup>

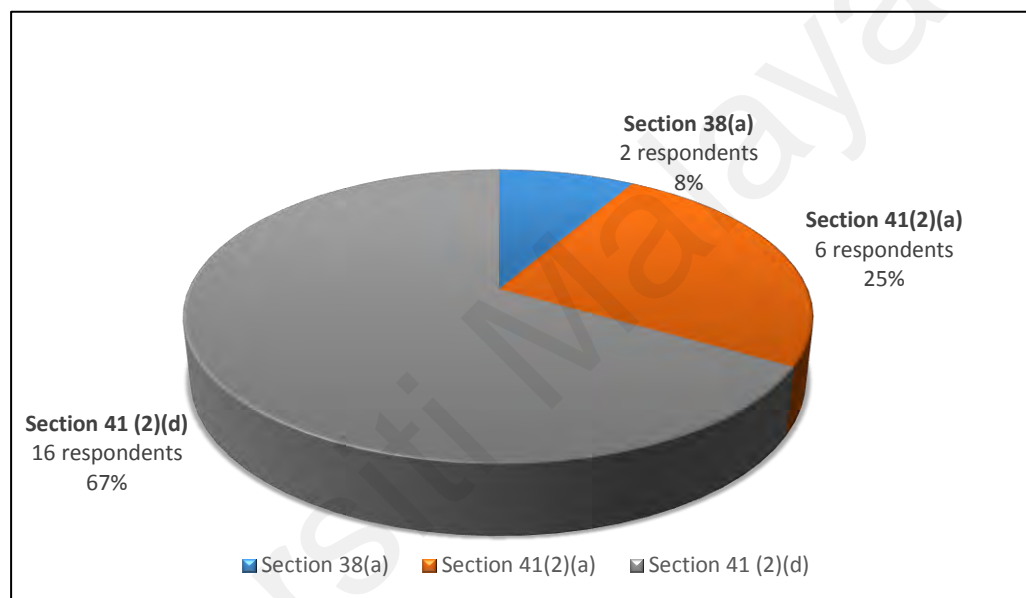


**Chart 5.5: Length of Stay since Placement**

Chart 5.5 illustrates the length of stay since placement. Nine of the respondents were relatively new at the place of refuge and have been institutionalized for less than a month. 10 respondents have been institutionalized for less than 3 months, four respondents have been institutionalized for less than six months and only one respondent has been institutionalized more than 6 months. The differences in terms of length of stay since placement can be appreciated from the fact that there are two ways of admission to the place of refuge as briefly mentioned earlier in Part 5.1 of this Chapter. The first way is pursuant to court order - when the court is satisfied that the child fall within the classification under section 38 of the CA 2001, the court may order for the child to be

<sup>5-583</sup> See United Nations Children's Fund (UNICEF), *A child is a child: Protecting children on the move from violence, abuse and exploitation*, (UNICEF, May 2017); Special Rapporteur on the sale of children, child prostitution and child pornography, *25 Years Of Fighting The Sale And Sexual Exploitation Of Children: Addressing New Challenges*, (United Nations, n.d), retrieved from <<https://www.ohchr.org/Documents/Issues/Children/SR/25YearsMandate.pdf>> on 3 December 2018

placed here up to 3 years.<sup>584</sup> The second way is the instantaneous admission if the child is in urgent need of protection and rehabilitation as defined in section 41 of the CA 2001. In this case, the child is permitted to reside in the place of refuge so long as the Protector is satisfied that the child is in urgent need of protection. Having said that, for children who are pregnant are usually temporarily placed here and will be discharged and returned to their family after giving birth to their babies. The following chart further depicts the respondents according to cases:



**Chart 5.6 Respondents According to Category**

The majority of 16 respondents (67%) were children who fell pregnant out of wedlock under section 41(1) (d) of the CA 2001. Six respondents (25%) were children who were instantaneously admitted to Taman Seri Puteri because they were threatened or intimidated for purposes of prostitution or for purposes of having sexual intercourse with another or for any immoral purpose under section 41(1) (a). There were only two respondents (8%) who were admitted following a court order because they were induced

<sup>5-584</sup> Section 40 (1)(e) of the latest Child Act 2001. Previously, prior to the 2016 amendment, it was section 40(3)(a)

to perform any sexual act, or were in any physical or social environment which may have led to the performance of such act under section 38(a) of the CA 2001.

It is worth highlighting that the yearly official statistics on number of children admitted to Taman Seri Puteri published by the JKM did not specify the number of children for each cases under section 39 and 40 of the CA 2001 respectively (whether they are pregnant out of wedlock / induced to perform any sexual act / living in brothel / et cetra). However from the discussion with the representative of JKM and the officer in charge at the respective Taman Seri Puteri, it is found that majority of children in need of protection and rehabilitation that have been admitted each year are those who are pregnant out of wedlock and not those who have been or potentially being sexually exploited. Furthermore, based on the interview with the child respondents, it was found that despite in most cases the children were pregnant in consequence of their involvement in voluntary sexual activities, there were children whom were pregnant as the result of sexual abuse by their family members or guardian.

The following discussions are the findings on the implementation of children's rights at the places of refuge.

### 5.3.3 The right to be treated with dignity and respect

The UNCRC recognizes the right of every child to be treated with dignity and respect. This includes their right to not be stigmatized and the right to be involved in decisions that affect them. This overlaps with other rights, namely, the right to express their feelings or opinions and the right to make their own choice as provided for in Article 12 of UNCRC. The implementation of these rights are investigated under the following themes:

#### *(a) Right to be respected.*

Children, wherever they are, must be treated with respect at all times. Clause 13 of the UN Guidelines requires that children in alternative care must be effectively protected from any kind of abuse, neglect and exploitation, whether on the part of care providers, peers or third parties. The implementation of these rights is captured in the following Table 5.2:

**Table 5.2: The implementation of the right to be treated respected**

Questionnaire	Yes	%	No	%	Not Sure	%
1 Have you ever been rebuked by the warden / caregiver / staff?	4	16.7%	20	83.3%	0	0.0%
2 Whilst being here, have you ever been beaten / battered by the warden / caregiver / staff?	1	4.2%	23	95.8%	0	0.0%
3 Whilst being here, have you ever been insulted by the warden / caregiver / staff?	0	0.0%	24	100%	0	0.0%
4 Whilst being here, have you ever been insulted by a fellow trainee?	0	0.0%	24	100%	0	0.0%
5 Whilst being here, have you ever been beaten / battered/ bullied by a fellow trainee?	3	12.5%	21	87.5%	0	0.0%

Based on the interview with the children, four respondents (16.7%) have voiced that they had the experience of being rebuked by the caregiver at the place of refuge. One of the said four child respondents stated that she had the experience of being 'tweaked' by a staff member for leaving the dorm without permission. She was also once beaten by a staff member with a clothes' hanger. She admitted that she deserved it as it was her fault for misbehaving and the lash was not severe. Even though this was a remote case (since the majority (95.8%) of the child respondents had no experience of being beaten), it must be noted that punishment of misbehaviour must at all times avoid body contact. If it involves a serious disciplinary matter, the case must be referred to the Disciplinary and Intervention Advisory Committee in accordance with Rule 38 of the 2017 Regulations. Further, the punishment must be confined to those specified in Rule 39, that are the suspension of privileges, the imposition of additional work or the isolation of the child from other residents.

It is worth highlighting that all respondents (100%) had never experienced being insulted by the warden, caregiver, and staff members or even by a fellow trainee at the institution. This is a good indicator that the children are not being discriminated or stigmatized at the places of refuge. Nonetheless, three respondents (12.5%) reported that they had the experience of being assaulted by a fellow trainee. Two of the said respondents indicated that they were quarrelling and it later led to kicking and punching. The other respondent stated that she had an experience of being assaulted by one of the children beyond control. According to these respondents, the children beyond control were always rough, either while interacting or doing activities together. These incidences had led to the new policy that took effect in early 2017 where children beyond control are no longer sent to Taman Seri Puteri, but will be placed in another child institution instead. However as mentioned earlier, when the research was conducted, there were a small

number of children beyond control completing their remaining terms at Taman Seri Puteri.<sup>585</sup>

*(b) Conflict resolution mechanisms*

Clause 99 of the UN Guidelines provides that children in alternative care must have access to a known, effective and impartial mechanism to allow them to notify complaints or concerns regarding their treatment at the institution. Based on interviews with the officers in charge at the respective institutions, it was confirmed that the children have access to lodge complaints for any matters concerning their well-being at the institution to any of the Social Welfare Assistants (*Pembantu Kebajikan Masyarakat*; hereinafter referred to as “the PKM”), the counsellor, or to the principal. It is the standard procedure provided in the Place of Refuge CMS that every child, upon admission, will be introduced to the Principal, the PKMs, the staff members, and the members of Board of Visitors. The principal and the counsellor will hold a one-on-one session during the early days of admission to explain, *inter alia*, the reason for them being institutionalized as well as the programmes, facilities and privileges offered at the institution. The children will also receive a thorough explanation on the rules and regulations, the complaint mechanism, and the disciplinary action procedures.

It is the practice at all four institutions that the children are divided into groups and each group will be assigned with one PKM. The PKM functions as the main guardian and caregiver of the children at the institution. The PKMs are regarded as family members, and are usually referred to as “*ibu*” (mother) or “*kakak*” (elder sister). Hence, the children

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<sup>5-585</sup> The number of children beyond control in the respective place of refuge when the study was conducted: 20 children in Taman Seri Puteri Batu Gajah, 4 children in Taman Seri Puteri Kuching, 16 children in Taman Seri Puteri Kota Kinabalu.

are open to share or notify any issues to the PKM. It was indeed attested by many of the children that they trust and can rely on their “*ibu*” or “*kakak*”.

However, for serious disciplinary issues such as acts of violence, possession or consumption of prohibited substances or leaving the institution without approval, the matter will be brought before the Disciplinary and Intervention Advisory Committee established under Rule 34 of the Regulations 2017. This Committee consists of:

- i. The Principal;
- ii. A psychology officer;
- iii. Three staff;
- iv. Two representatives among the children at the institution; and
- v. Any person whom the Principal deems fit.

Even though the procedures for the disciplinary proceedings are not specified in the Regulations 2017, it is however provided in the Place of Refuge CMS. It is important to note that the procedures allow the children who are being subject to the disciplinary proceeding to be represented and the procedures guarantee impartiality and the right of the children to be heard.

In terms of its implementation, it was found that all child respondents that were interviewed had no experience of being subjected to disciplinary proceedings. Also, it is worth highlighting that there are a number of children who had never experienced making any complaints. Hence, this explains the reason why there are several “not sure” responses in this section. This is understandable, as indicated in Chart 5.5 above, since there are a number of children who were relatively new (i.e. admitted less than a month) at the institution, at the time the interviews were conducted.



**Table 5.3: The implementation of effective conflict resolution mechanism**

Questionnaire		Yes	%	No	%	Not Sure	%
6	If you have problems / quarrels among your fellow trainees, can you complain to the Principal, Counsellor, Warden and others?	21	87.5%	2	8.3%	1	4.2%
7	If you have problems / quarrels with warden / caregiver / staff, can you complain to the Principal or Counsellor?	17	70.8%	1	4.2%	6	25.0%
8	Is there a specific procedure to make a complaint?	9	37.5%	11	45.8%	4	16.7%
9	Do you feel afraid to make a complaint if you have a problem?	8	33.3%	15	62.5%	1	4.2%
10	If a complaint has been made, will the administration take immediate action to resolve the problem?	19	79.2%	0	0.0%	5	20.8%
11	Does the administration listen to the complaint and explanation from conflicting / quarrelling / arguing /problematic parties before taking any action?	17	70.8%	1	4.2%	6	25.0%
12	Does the administration clearly state the cause and reason for the action taken?	17	70.8%	0	0.0%	7	29.2%
13	Are you satisfied with the action taken by the administration after a complaint is made?	13	54.2%	2	8.3%	9	37.5%

As shown in Table 5.3 above, the majority of the respondents (87.5%) agreed that they can make a complaint should they have problems with their fellow trainees. Nonetheless, only 70.8% of the respondents agreed that they can make complaints if they have problems with the caregiver or staff at the institution. The children were asked whether there are specific procedures to make complaints and their answers were divided. Nine respondents (37.3%) answered yes, while 11 respondents (45.8%) answered no. Even so, when we asked further, the children answered positively that that they can easily make a complaint to their respective PKMs or counsellor. It is however important to note that

33.3% of the respondents expressed that they were afraid of making complaints, mainly due to the fear of getting scolded.

From the children's responses, it is also clear that the administration takes instantaneous action to resolve the problems and both conflicting parties will be heard. On a positive note, the children are well informed of all the actions taken in resolving the conflict.

It is interesting to note that even though 54.2% respondents said they were satisfied with the actions taken, there were two respondents (8.3%) who felt otherwise. The said two respondents were dissatisfied because in most situations, the "One for All" concept of punishment was applied. Hence, they felt it was unfair for them to be punished for an action which was not committed by them.

#### *(c) Freedom of opinion and expression*

Freedom of opinion and expression for children is a new concept in international law. This right is a challenge to most countries and has yet to be properly fulfilled owing to the fact that listening to children is not a widespread or even culturally acceptable act. The extent of the implementation of this right at the Place of Refuge is shown in the following Table 5.4:

**Table 5.4: The implementation of the freedom of opinion and expression**

Questionnaire		Yes	%	No	%	Not Sure	%
14	Are you allowed to express your opinion on day-to-day activities in this institution?	12	50.0%	7	29.2%	5	20.8%
15	Are you allowed to express your opinion on the rules and regulations of this institution?	6	25.0%	14	58.3%	4	16.7%
16	Are you able to share your opinion openly in this institution?	10	41.7%	9	37.5%	5	20.8%
17	Is your opinion heard and seriously considered by the administration of the institution?	14	58.3%	1	4.2%	9	37.5%

From the above figures, it can be deduced that the freedom of expression is still restricted at the place of refuge. Only half of the respondents (50%) agreed that they can express their opinion in terms of their daily activities. It is more restricted when it comes to the rules and regulations at the institution, where only 6 respondents (25%) agreed that that they can give their opinion on that matter. In addition, only 10 respondents (41.7%) agreed that they can share their opinion openly at the institution and 14 respondents (58.3%) agreed that their opinions were being heard. It appears that the right to participation is rather limited in both approach and practices. It is submitted that the limitation is as such is owing to cultural inhibitions and less encouragement given to the children to voice up their opinions.

#### **5.3.4 The right to education.**

Despite being institutionalized, every child has the right to education. Rule 20 of the Regulations 2017 provides that every child in a place of refuge must be afforded with:

- a. primary or secondary education;
- b. technical or vocational training;

- c. living skills training; and
- d. moral and spiritual programmes.

In addition to the above, Rule 20 also requires the Principal to ensure the availability of special classes or tuition, resource centre facilities, transportation and other necessary arrangements in providing primary or secondary education. It is submitted that this provision is in line with Clause 85 of the UN Guidelines.

In terms of its implementation, the following are the findings:

*(a) The right to school*

Generally, children at the institution are allowed to attend public school while being placed at the institution. The institutions provide the necessary arrangements such as registration and transportation. Nevertheless, this is subject to the following considerations:

- (a) the safety of the children
- (b) the discipline record of the children
- (c) the condition of the children; whether being pregnant or otherwise.
- (d) the duration of placement

It is found that all of the child respondents in this research were not attending school during the institutionalisation period. This is because firstly, as depicted in Chart 5.6 above, the majority of the respondents were at least 5 months pregnant. Their condition may not be convenient for attending school, apart from the potential harm of being stigmatized. Besides that, their placement at the place of refuge is relatively short, that is until they deliver their babies. Hence, the usual practice is that the children will be granted the postponement of their studies with liberty to continue school after parturition. The second reason for their not attending school is safety. Based on our interview with the

officer in-charge at the respective institutions, even if the child is not pregnant, they are temporarily deprived from attending school due to disciplinary and safety issues. There were reported cases that the children had attempted to abscond. Also, there was one case where the child was being threatened by their family or a third party.

**Table 5.5: The implementation of the right to school**

Questionnaire		Yes	%	No	%	Not Sure	%
18	Are you allowed to attend school whilst being in this institution?	2	8.3%	20	83.3%	2	8.3%
19	Do you receive any academic training (example: tuition) in this institution?	6	25.0%	15	62.5%	3	12.5%
20	Are you allowed to sit for major school exams such as i. Primary School Achievement Test (UPSR) i. Form 3 Assessment (PT3), i. Malaysian Certificate of Education (SPM) v. Malaysian Higher School Certificate (STPM) v. Malaysian Higher Certificate of Religious Education (STAM)?	13	54.2%	3	12.5%	8	33.3%
21	Do you want to continue school?	17	70.8%	6	25.0%	1	4.2%

Even though the children are not allowed to attend public school, it was found that for eligible children, they were highly encouraged to sit for major examinations such as the Malaysian Certificate of Education (SPM) as independent candidates. The institution will arrange for tuition, especially for the core subjects. As seen in the above table, 6 children (25%) admitted that they received training as preparation for major examinations.

17 child respondents (70.8%) expressed their feelings and hope to continue school upon their release. However, 6 of them (25.0%) were not interested in school, but were more inclined to work.

*(b) The right to skill and vocational training*

Unlike the prior mentioned restrictions on attending school, the skill and vocational training are open for all regardless of their category and conditions. In all institutions, vocational training such as sewing, gardening, and cooking are provided.

**Table 5.6: The implementation of the right to skill and vocational training.**

Questionnaire		Yes	%	No	%	Not Sure	%
22	Are there vocational / skills training programs in this institutions?	23	95.8%	0	0.0%	1	4.2%
23	Are you satisfied with the vocational / skills training programs in this institution?	22	91.7%	0	0.0%	2	8.3%

It was found that majority of the children are satisfied and expressed their excitement for the training. Two of the institutions even offered proper training from Vocational Institutions, which, upon completion, will grant proper certification which the children may use for furthering studies, seek for jobs or to set up businesses on their own. One of the institutions even provided extra computer and music classes with proper instruments and equipment. It is submitted that skill and vocational trainings are essential in enhancing mastery of practical skills to the children. As previously stated, there is a number of children who were not interested to continue mainstream academic schooling. Hence these vocational trainings are one of the platforms to prepare them with skills that are potentially useful for them to earn a living later.

### **5.3.5 Promoting the best interests of a child at the place of refuge**

Under this theme, the protection of the children's general welfare is investigated. It focuses on the implementation of the children's rights to healthcare, to access information and mass media, to enjoy leisure and play time, as well as their rights to privacy. These

rights are crucial for the children's development as articulated in Articles 16, 17, 24 and 31 of the UNCRC.

*(a) The right to healthcare*

Rule 9 of the Regulations 2017 provides that, while being institutionalised, the children shall be sent for regular medical or dental check-ups. In addition, if further treatment so requires, the Principal shall make arrangements for the children be sent to the hospital. It is submitted that this is in line with Clause 84 of the UN Guidelines.

This study found that clinics with nurses are placed at all Taman Seri Puteri institutions. In addition, as provided in the Place of Refuge CMS, medical check-ups will usually be done when the children are first admitted, upon returning from holiday and upon release. Besides that, children who are pregnant will be referred to the nearest government clinics or hospitals for antenatal health services. As illustrated by Table 5.6 below, the majority of the children (95.8%) acknowledged that they had received the necessary healthcare services and were satisfied with the facility.

**Table 5.6: The implementation of the right to healthcare**

Questionnaire		Yes	%	No	%	Not Sure	%
24.	Are there healthcare services provided by the institution?	23	95.8%	0	0.0%	1	4.2%
25.	Are you allowed to receive the necessary treatment?	23	95.8%	0	0.0%	1	4.2%
26	Are you satisfied with the healthcare services provided?	23	95.8%	0	0.0%	1	4.2%

*(b) The right to information and the right to play and leisure*

The provision relating to the right to access information and mass media is not expressly mentioned in the Regulations 2017. Notwithstanding the absence of such provision, as enumerated in Table 5.7 below, this study found that the right is well-implemented. All children (100%) admitted that they had access to information and mass media. They are allowed to obtain current information *via* television, radio, magazines, newspaper and books. Nonetheless, for safety purposes, surfing the internet is not allowed at the institution and access to television and radio is restricted to specific times, such as during weekends or in the evenings on weekdays. It is also worth highlighting that each Taman Seri Puteri is equipped with a library.

**Table 5.7: The implementation of the right to information and right to play and leisure.**

Questionnaire		Yes	%	No	%	Not Sure	%
27	Are you allowed to get current information and news?	24	100.0%	0	0.0%	0	0.0%
28	Are you given enough time for play & leisure?	21	87.5%	3	12.5%	0	0.0%
29	Are you satisfied with the play & leisure activities in this institution?	22	91.7%	2	8.3%	0	0.0%

Further, Rule 20 (5) of the Regulations 2017 requires the Principal to ensure the children's participation in recreational activities. Such activities shall be incorporated in their daily timetable without compromising their resting hours. Moreover, for leisure and play, Rule 26 of the Regulations 2017 obliges the Principal to encourage the children to be involved in recreational activities including organized games and excursions. It is submitted that these provisions are in line with Clause 86 of the UN Guidelines.

In terms of its implementation, all Taman Seri Puteri allocate play and leisure time every evening and over the weekend. Based on the interview, the children expressed their happiness with the activities held such as sports like netball and badminton, as well as



playing indoor games like Monopoly and *Saidina*. Interestingly, one of the institutions provides a gymnasium for fitness activities. In addition, two of the institutions actively provide leisure activities and excursions outside the institution such as swimming, karaoke, cinema day out and others.

In spite of the existing provisions for play and leisure time, there were three respondents (12.5%) who were of the opinion that the time for play and leisure should be expanded. Two respondents (8.3%) expressed their dissatisfaction on the leisure and play activities organized at the institution. One of the said respondents was an athlete in school and she was of the opinion that the sports activities at the institution were limited and should be extended to include various other outdoor games. The other respondent was of the view that more time should be allocated for watching television.

*(c) The right to nutritious food and diet*

Proper sufficient diet and nutrition are vital for children's development. Rule 32 of the Regulations 2017 ensures that children, while being placed at a place of refuge, are provided with nutritious food based on a dietary scale recommended by the medical officer or dietician. This rule is parallel with Clause 83 of the UN Guidelines.

Based on our interviews with the officer in charge at every institution, it is found that both Rule 32 of the Regulations 2017 and Clause 83 of the UN Guidelines are implemented accordingly. In deciding the menu, the children will be consulted periodically first for their preferences. The suggested menu will be subsequently submitted to a dietician or medical officer for review and to the General Director of Social Welfare for approval thereafter.

**Table 5.8: The implementation of the right to nutritious food and diet**

Questionnaire		Yes	%	No	%	Not Sure	%
30	Is the food provided in this institution nutritious?	22	91.7%	1	4.2%	1	4.2%
31	Are you satisfied with the food provided in this institution?	19	79.2%	5	20.8%	0	0.0%

Even though the procedures are adequately followed in accordance to Rule 32 of Regulations 2017, there were issues in terms of meal preparation. Five child respondents (20.8%) disagreed that the food was nutritious. Four out of the said five respondents were from the same institution and voiced that the food was oily and may not be suitable for their diet. Meanwhile, the other respondent who expressed her dissatisfaction said that she does not enjoy proper meals primarily due to her nausea and loss of appetite problems during pregnancy.

*(d) The right to privacy and their general well-being*

A child's right to privacy is protected under Article 16 of the UNCRC. Clause 89 of the UN Guidelines further sets the minimum requirements on promoting privacy that includes setting-up a private space, providing appropriate facilities for hygiene and sanitary needs and affording secure and accessible storage space for personal possessions.

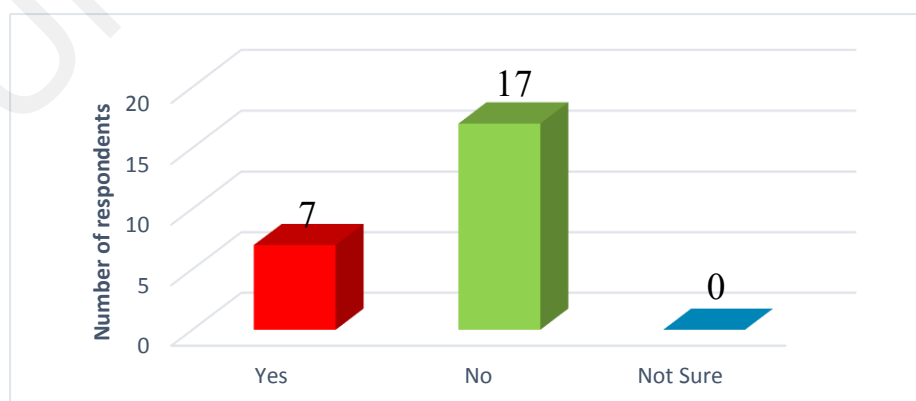
Based on our observations and discussions with the institutions' officer in charge, the facilities provided indeed met the minimum requirements. Each child was given individual beds, pillows, toiletries and lockers to keep their personal belongings. The dormitory system is adopted in Taman Seri Puteri, consisting of two to eight people in a dorm. The majority of the child respondents (91.7%) were satisfied with these facilities.

However, in terms of personal time and space to be spent alone, there is much restriction in the institution. Based on the figures in Table 5.9 below, more than half of the child respondents (54.2%) reported that they were not given time and space for privacy. All activities are done in a group and are observed by an adult at all times. The administrators of the institution confirmed that privacy in terms of the right to be alone is restricted for safety purposes. It was reported that there were instances whereby the children tried to hurt themselves and attempted to abort their pregnancies. It is for this reason that the children must be under surveillance at all times.

**Table 5.9: The implementation of rights to privacy**

Questionnaire		Yes	%	No	%	Not Sure	%
32	Are you given your own private space?	10	41.7%	13	54.2%	1	4.2%
33	Are you satisfied with the facilities provided in this institution?	22	91.7%	2	8.3%	0	0.0%
34	Are you happy while being in this institution?	7	29.2%	17	70.8%	0	0.0%
35	Do you feel safe to be in this institution?	21	87.5%	3	12.5%	0	0.0%

At the end of the interview on this theme, the children were asked about their feelings. It is important to highlight that 70.8% of the respondents expressed their unhappiness to be in the institution:



**Chart 5.7: The child respondents' answers to the question "Are you happy while being in this institution?"**

The children expressed their unhappiness as they missed their families and friends. The children were asked further whether are there any other reasons, particularly on the routine or relationship with friends, guardian or any people at the institution that would make them unhappy. All respondents answered positively that they are content with the friends, staff and the environments at the institution.

The children were also asked whether they felt safe at the institution. Despite the majority of the child respondents (87.5%) giving a positive answer, three of the children voiced their concern on their safety. As highlighted at 5.3.1, the institution shelters both children in need of protection and rehabilitation as well children beyond control. The children are mixed for all activities and placed in the same dormitory. It was reported that they felt unsafe because the children beyond control are more aggressive and harsh.

#### **5.3.6 The access to assistance for full social integration.**

Another vital aspect of providing care is the child's right to be given the opportunity to maintain contact with their parents or other persons close to the child. Rule 28 of the Regulations 2017 provides that the institution shall encourage communication between the children with their parents, guardians, relatives or friends at least once a month *via* the means of communication provided by the Principal. Further, Rule 29 of the Regulations 2017 provides that the children shall be allowed to receive visits from their parents, guardian or relatives, unless such visit is undesirous in the opinion of the Principal. It is submitted that both Rules 28 and 29 are in conformity with Clause 81 of the UN Guidelines. However it is observed that in practice, visits are rare due to logistic obstacles.

The implementation of the above Rules is encapsulated in Table 5.10 below:

**Table 5.10: The implementation of the right to stay in contact with parent or person close to him**

Questionnaire		Yes	%	No	%	Not Sure	%
36	Are you able to contact your family whilst being in the institution?	21	87.5%	2	8.3%	1	4.2%
37	Is your family allowed to visit you during your training in the institution?	23	95.8%	1	4.2%	0	0.0%
38	Is there a program organised to strengthen your relationship with your family?	0	0.0%	20	83.3%	4	16.7%
39	Is there a program organised for the trainee to integrate with the community?	20	83.3%	2	8.3%	2	8.3%

As detailed above, the majority of the child respondents (87.5%) asserted that they are able to contact their family or person close to them while being at the institution. The two respondents (8.3%) who were not allowed to contact or be contacted were the victims of sexual exploitation by their own parent or guardian. Based on the interview with the respective institution officers, the restriction was imposed to protect their safety. There were attempts by the parent or guardian to coax the children to retract their police report, jeopardizing the safety of the child as well as the smooth-running of the police investigation and/ or court trial. This would also explain the reason why 1 child respondent (4.2%) was not allowed to receive visits from her family while being protected at the institution.

It is however important to note that, the means of communication provided by the institution differs from one to another. Three out of four institutions allowed direct communication *via* telephone during a specified time. Nevertheless, one of the institutions only allows communication through a third person i.e. the caregiver at the institution. It is for the caregiver to pass the message from the children to their families, relatives or friends and vice versa.

In terms of receiving visits from families and friends, two out of four institutions restricted the meetings to once a month; and one of the said institutions limits the meetings to be for 30 minutes only. The majority of the child respondents expressed their sadness of not being able to contact with the family.

On the other hand, the two other institutions have no time restriction for the children to contact or receive visitors. These two institutions highly encourage parents' involvement throughout the institutionalization. Apart from personally requesting the parents or guardian to visit, these two institutions took further initiative by organizing several events which would help to improve the relationship between the children and their parents such as sports day and festive celebrations. Unfortunately, it was reported that most of the children's parents refused to participate or did not turn up due to various reasons including logistic issues. This is strong justification why all child respondents unanimously answered there was no such programme ever conducted.

It is important to highlight that section 40(7) of the CA 2001 empower the courts to order the parents or guardian to make regular visits and contravening the provision is an offence punishable with a fine of RM10,000. Nonetheless, the law seemingly does not comprehensively cover instances where the children are admitted without court's order. As previously highlighted, the majority of the children at the institution are pregnant out of wedlock and were institutionalised without a court order. Hence, there is a *lacuna* in the provision that can compel the parents or guardian of this category of children for regular visits. Nonetheless, it is acknowledged that parents or guardians may face practical difficulties in fulfilment of this responsibility due to various reasons such as financial constraints and distance. Therefore, it is urged for the policy maker to provide appropriate facilities leveraging on technologies that can connect the family and the children.

It is commendable that all institutions actively organize programmes both inside and outside the institution involving the society. This certainly helps the children for social integration. The activities include volunteer work at old folks' homes, refurbishing Committee Halls (*Balai Raya*), special tutorial sessions by make-up artists and others. These activities would also improve their living, communication and interaction skills. In addition, there are often programmes conducted by volunteers from universities and others held at the institution from time to time.

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## 5.4 FINDINGS SUMMARY

**Table 5.1 Summary findings**

Child Rights	UNCRC	UN Guidelines	Domestic Regulations	Key Findings
<b>Right to be treated with dignity and respect</b> <ul style="list-style-type: none"> <li>Right to be respected</li> </ul>		Clause 13		<ul style="list-style-type: none"> <li>There were instances whereby the children were rebuked by the caregiver at the institution</li> <li>1 respondent reported her experience of being tweaked and beaten (lightly) with a clothing hanger</li> <li>There were cases of children who were assaulted by a fellow trainee</li> </ul>
<ul style="list-style-type: none"> <li>Conflict resolution mechanisms</li> </ul>		Clause 99	<ul style="list-style-type: none"> <li>Rules 36-38 of the Regulations 2017</li> <li>Place of Refuge CMS</li> <li>MS-ISO 9001:2008</li> </ul>	<ul style="list-style-type: none"> <li>There are conflict resolution mechanisms set in the Regulations 2017, CMS and MS-ISO 9001:2008 concurrently that ensures the impartiality and the right of a child to be heard and represented.</li> <li>For serious disciplinary cases, the matter will be brought before the Disciplinary and Intervention Advisory Committee.</li> <li>Children are made known of the formal and informal procedures of making complaints.</li> <li>Children have access to an adult whom they trust to complain.</li> <li>The institution took instantaneous action in resolving conflict.</li> <li>“One for All” concept of punishment is applied, where there are children who voiced their dissatisfaction regarding this method.</li> <li>No corporal punishment is allowed.</li> </ul>



Child Rights	UNCRC	UN Guidelines	Domestic Regulations	Key Findings
<ul style="list-style-type: none"> <li>Freedom of opinion &amp; expression</li> </ul>	Article 12			<ul style="list-style-type: none"> <li>Majority of the respondents were of the opinion that they can express their opinion regarding their daily activities, rules and regulations and others but restricted.</li> </ul>
<b>Right to education</b> <ul style="list-style-type: none"> <li>The right to school</li> </ul>		Clause 85	Rules 20 of the Regulations 2017	<ul style="list-style-type: none"> <li>Generally, the children are allowed to attend public school and the institutions provide the necessary arrangements such as transportation. However, this is subject to considerations such as safety, discipline record, and condition of the children.</li> <li>All respondents are not attending school due to their physical conditions and for safety reasons.</li> <li>The usual practice is that the children will be given temporary postponement of study with liberty to continue after parturition.</li> <li>For eligible children, they are allowed to sit for major examinations as independent candidates and the institutions d provide / arrange for private tuition in the institution.</li> </ul>
<ul style="list-style-type: none"> <li>The right to skill and vocational training</li> </ul>			Rule 20 of the Regulations 2017	<ul style="list-style-type: none"> <li>Skill and vocational training are provided at all four institutions.</li> <li>2 of the institutions offer proper training from vocational institution that grants proper certification to the children.</li> <li>1 institution provides extra skill class – music and computer classes.</li> </ul>

Child Rights	UNCRC	UN Guidelines	Domestic Regulations	Key Findings
<b>Promoting the best interests of a child</b> <ul style="list-style-type: none"> <li>Right to healthcare</li> </ul>	Article 24	Clause 84	<ul style="list-style-type: none"> <li>Rule 9 of the Regulations 2017</li> <li>Place of Refuge CMS</li> </ul>	<ul style="list-style-type: none"> <li>Clinics and nurses are placed at all Taman Seri Puteri.</li> <li>Children are sent for medical check-ups regularly.</li> <li>For pregnant children, they are referred to the nearest government clinics or hospitals for antenatal health services.</li> </ul>
<ul style="list-style-type: none"> <li>Right to information</li> </ul>	Article 17	-	-	<ul style="list-style-type: none"> <li>Children have access to information and mass media via television, radio, magazines, newspaper and books.</li> <li>Nonetheless, surfing internet is not allowed for safety purposes.</li> <li>All Taman Seri Puteri institutions have a library.</li> </ul>
<ul style="list-style-type: none"> <li>Right to play and leisure</li> </ul>	Article 31	Clause 86	Rules 20(5) & 26 of the Regulations 2017	<ul style="list-style-type: none"> <li>All Taman Seri Puteri allocate play and leisure time every evening and during weekends.</li> <li>One of the institutions provides a gymnasium for fitness activities.</li> <li>Two institutions actively provide activities and excursions outside the institution.</li> </ul>
<ul style="list-style-type: none"> <li>Right to nutritious food and diet</li> </ul>	Article 24	Clause 83	Rule 32 of the Regulations 2017	<ul style="list-style-type: none"> <li>Children will be consulted periodically for their preferences.</li> <li>The suggested menu will be reviewed by a dietician or medical officer for Director General's approval.</li> </ul>

Child Rights	UNCRC	UN Guidelines	Domestic Regulations	Key Findings
				<ul style="list-style-type: none"> <li>There were issues on meal preparation- 5 child respondents from the same institution voiced that the food was oily.</li> </ul>
<ul style="list-style-type: none"> <li>Right to privacy and their general well being</li> </ul>	Article 16	Clause 89		<ul style="list-style-type: none"> <li>Each child is given individual beds, pillows, toiletries and lockers.</li> <li>Dormitory system is adopted with 2-8 children per dorm.</li> <li>Majority of the children are satisfied with the facilities.</li> <li>Personal time and space are restricted for safety purposes as there were cases of children attempting to abort their pregnancies or hurt themselves.</li> <li>Majority of the children expressed their unhappiness in the institution as they miss their family and friends.</li> <li>There are children who voiced that they felt unsafe because of the children beyond control being aggressive and harsh.</li> </ul>
<b>Right to full social integration</b> <ul style="list-style-type: none"> <li>Right to stay in contact with family</li> </ul>		Clause 81	Rules 28-29 of the Regulations 2017	<ul style="list-style-type: none"> <li>Children generally are allowed to stay in contact with family while being institutionalised unless it is in their best interest not to contact or be contacted.</li> <li>Nonetheless, the means of communication differs from one institution to another.</li> <li>One of the institutions disallows direct telephone communication and it must be through a 3<sup>rd</sup> person i.e. the care giver at the institution.</li> </ul>

Child Rights	UNCRC	UN Guidelines	Domestic Regulations	Key Findings
<ul style="list-style-type: none"> <li>The access to assistance for full social integration</li> </ul>				<ul style="list-style-type: none"> <li>All institutions allow the children to be visited. However, one of the institutions restricts the time of visiting to only 30 minutes and it must be only from family members and no others.</li> <li>Two institutions took initiative to encourage parents' involvement by organizing special events like sports day and festive celebrations. However, it was reported that most of the parents did not cooperate.</li> <li>All institutions actively organize programmes both inside and outside the institution involving the society.</li> <li>The activities include volunteer work at old folks' homes, refurbishing Committee Halls (<i>Balai Raya</i>), special tutorial sessions by make-up artists and others. These activities would also improve their living, communication and interaction skills.</li> <li>There are often programmes conducted by volunteers from universities and others held at the institution from time to time.</li> </ul>

## 5.5 CONCLUSIONS AND RECOMMENDATIONS

An overall conclusion can be drawn that the rights of the children in need of protection and rehabilitation at the place of refuge are reasonably protected and implemented. With the Regulations 2017, MS-ISO 9001: 2008 and Place of Refuge CMS, the measures to safeguard the well-being of the children are standardized in Malaysia. The provisions in the documents are in consonance with international standards, particularly the UN Guidelines. In addition, the implementation of the provisions is also monitored by a yearly audit from JKM.

Nonetheless, to further ensure the rights of the children are protected optimally and comprehensively, this research proposes the following recommendations:

### 1. Parental involvement

It is important to include parental involvement during the period of institutionalization. As noted above at 5.3.6, there is a lacuna of the provision that can compel the parents or guardian of children who have been admitted at the place of refuge without a court order. It is highly recommended that this provision be included in the CA 2001. As contended by Professor Dr. Najibah Mohd Zin, this step is essential, not only to raise the awareness, but also to enforce parental responsibilities.

Besides that, more programmes that involve parents and children should be frequently held at the institution. As reported at part 5.3.6, there are such programmes at present, but limited to sports day and festive celebrations such as Hari Raya Aidilfitri. Despite that, based on the interview with the officers at the place of refuge, many parents did not turn up. Hence, apart from having an enforcement provision, the policymakers may also consider providing assistance

for parents or guardians who may have difficulties in terms of transportation or logistics and others. It is affirmed by the representative of Policy and International Relations Division (Children Unit) that there is no policy on financial or logistics support at present. However, the said recommendation is feasible based on the practice of certain place of refuge, with the support of its Board of Visitors. The example of which is Taman Seri Puteri Cheras. According to Mr Syed Azmi Alhabshi, parents with financial difficulties are given allowances for their visitation.

## **2. Setting the minimum means of communication between children-parent**

Rule 28 of the Regulations 2017 only sets the minimum frequency for such communication (at least once a month). However, the means of communication provided is to be determined by the Principal. As shown in 5.3.6, there is one institution that restricts direct communication between the parent and child and it must be through the caregiver. Besides that, the same institution would also restrict the visit to 30 minutes per session. Hence, this aspect should be given attention, and improvement is desired.

It is acknowledged that the restrictions are necessary to avoid the interruptions and distractions as highlighted by the representative of Policy and International Relations Division (Children Unit) and concurred by Professor Dr. Najibah Mohd Zin. This is because there are structured programmes and activities scheduled for the children during the institutionalization.

Nevertheless, it submitted that the children, at the very least, must be accorded with time and space to communicate with their parents directly once a week. In addition, alternative communication mediums such as Skype, Google Hangouts,

and WhatsApp videos may be utilized in lieu of family visit. Besides that, the government may consider to utilise the office of the Social Welfare Department in each district as a centre for the parents to connect with their children online. For instance, in Thailand, their Juvenile Training Centres are equipped with communication facilities for the children to utilise. Likewise, if the parents do not have the means to travel, having logistic difficulties or other circumstances that hinder their ability to physically visit their children at the institutions, they may go to the nearest police station and use the communication facilities.<sup>586</sup>

### **3. Encourage children to express their feelings and opinions**

As noted at 5.3.3 above, a number of respondents expressed that they were afraid of making complaints, mainly due to the fear of getting scolded. Even though the majority of the respondents were of the opinion that they can express their opinion regarding their daily activities, rules and regulation and others, nonetheless it is quite restricted. This is understandable owing to cultural inhibitions and less encouragement given to the children to voice up their opinions. Therefore, it is recommended for activities and modules may be introduced to encourage the children to express their feelings and opinions respectfully.

It is acknowledged that there are activities or programmes that have been arranged at the place of refuge to boost up the children's confidence to express themselves. However, as shared by Mr Syed Azmi Alhabshi, the opportunities to express their feelings are generally limited. Module alone is insufficient. It is important to provide the overall environment to be more convivial. Hence, optimum trainings for the caregivers are also desired. The caregivers must be equipped with the

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<sup>586</sup> Farah Nini Dusuki, "Juvenile Justice In Malaysia: Current Challenges and Future Directions", Regional Conference on Juvenile Justice, Bangkok, 12-15 June 2012. (Invited Speaker)

necessary knowledge and skills to inspire, excite and educate the children to be more confident and able to express themselves. A supportive environment to the children must be facilitated to improve their self-esteem.

The representative of Policy Division, Ministry of Women, Family & Community Development highlighted that the Ministry is in the midst of reforming and improving the overall child protection system and advocacy. One of the main aims is to ensure that all personnel dealing with children have the right qualifications with adequate exposure and trainings. This includes the proposal to impose competency assessment.

#### **4. Promoting certified vocational trainings.**

It is acknowledged that skill and vocational training are provided in all place of refuge for all residents regardless of their category and conditions. However as noted in 5.3.4(b), only 2 of the institutions provides vocational trainings in collaboration with vocational institutions that offer accredited courses.

It is recommended for this best practice is extended to all Taman Seri Puteri. It is admitted that the vocational courses take time in order to obtain certification of completion and for some children, they are placed only temporarily at the institution for a short period of time. Therefore, it is proposed for these children to be supported and encouraged to complete the vocational course after being discharged. This will be an added value to their self-achievement, apart from being advantageous as part of their qualification.



**5. Promoting self-worthiness and preventing future sexual abuse or exploitation.**

In part 5.3.2, it can be seen that there are cases where the children were dragged into prostitution by their family members or relatives. In addition, there were also instances of pregnancy as the result of sexual abuse. Therefore, it is crucial to boost the children's self-love and to be taught on their rights against sexual abuse or exploitation. The overall programme at the place refuge lacks this crucial component. Educational and practical module are highly recommended to be implemented at the place of refuge to educate the children on their sexual health, self-worthiness and their rights not to be touched inappropriately. In this module too, the children will be exposed on how to respond to the potentially dangerous situations and the mechanism to report and seek help.

Even so, Mr Syed Azmi emphasized that the module must be child-friendly, attractive and interactive. This is because it is challenging to gauge the interest of the children. In his experience, many modules taught at the place of refuge are instructional and didactic. Children are easily distracted and lose interest especially during the activities from the existing modules which are repetitive and confined to classroom setting. Furthermore, according to Professor Dr. Najibah Mohd Zin, it is best if the module is designed with holistic approach that includes various aspects such as religious values, child rights, psychology, and social skills.

## 6. Board of Visitors

Apart from supervising the overall administration and the well-being of the children at the place of refuge, the Board of Visitors has the function to provide fund for activities or programmes to improve the children's physical, cognitive, mental and psychosocial development.<sup>587</sup>

Pursuant to section 82 of the CA 2001 and Rule 5 of the Regulations 2017, the Minister may appoint a Board of Visitors consisting of seven to fifteen members for each of place of refuge. Even though the CA 2001 and Regulations 2017 are silent on the qualifications of the member of the Board of Visitors, it is submitted that it is crucial to ensure that the appointed members must possess the essential enthusiasm, passion and empathy. This is because the Board of Visitors plays an important role in ensuring the effectiveness and robustness of the programme offered at the place of refuge. Therefore, the criteria of appointment could be based on, among others, their experience or involvement in social welfare or service.

For instance, in Taman Seri Puteri Cheras, the Board of Visitors takes proactive measures in providing allowances for parents in need for their visitation. Besides that, there are many activities organized in conjunction with many external parties such as the public universities and personalities not only to make the institutionalization more meaningful for the children, but also to support social integration. Similarly in Taman Seri Puteri Kuching, with the initiatives of their Board of Visitors, the place of refuge provides extra skill classes such as computer skills, grooming and music, together with necessary facilities and space.

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<sup>5-587</sup> This function are provided in Regulation 3 of the Regulation 2013

## CHAPTER 6

### CONCLUSION & RECOMMENDATIONS

#### 6.1 SUMMARY

Child sexual exploitation has become the central agenda of the international community since the 1980's. Every child now has the universally recognized right to be protected from any forms of sexual exploitation and sexual abuse by virtue of Article 34 of the UNCRC. Malaysia too, is committed in protecting and promoting such right. In fact, the laws have been in place since 1880's and continue to develop to confront the advanced tactic commonly used by the sex predators and exploiter. In the current legal framework, children who are exposed to or involved in sexual exploitation are categorized as 'children in need of protection and rehabilitation' under Part VI of the Child Act 2001 ("the CA 2001").

In protecting and promoting the children's rights against sexual exploitation, it requires a comprehensive protection system that includes strong laws, effective enforcement, qualified and trained taskforce, appropriate child institution and services, and others. However the foundational aspect of the said protection system is the establishment of the legal framework that fulfils the international standards. This is crucial to ensure that the national legal framework is firm and efficient as well as to facilitate the international collaboration and to curtail forum shopping.

When this research first began in October 2014, it was apparent that there was a substantial gap in the Malaysian legal framework concerning child sexual exploitation. The absence of laws to tackle the related crime such as sexual grooming, child pornography, as well as the specific extra-territorial provision have increased the children

exposure to the vulnerability of sexual exploitation. Further, the case of Richard Huckle<sup>588</sup> which became the public outrage in 2016 became the impetus for the government to legislate more effective laws to combat all forms of child sexual exploitation. Gratifyingly, substantial law reforms took place in 2016 and 2017. However the relevancy of this research is unaffected by the implications of the reform as it has yet to be determined whether the reformed laws and the legal framework are complying with the international standards.

Under Part VI of the CA 2001, these children may be placed at the place of refuge as part of the protection procedures. Past research findings exhibit several controversial issues pertaining to the rights of the children at place of refuge which need further investigation. The findings suggest that the children have not been treated with dignity and respect, inadequate education opportunity, insufficient of moral support *et cetera* which against their rights enshrined in the UNCRC. Hence, this research goes further to investigate the realities on the actual implementation of child rights at the place of refuge.

Based on the above overview, this research was conducted to achieve the following objectives:

- i. To evaluate the laws concerning children in need of protection and rehabilitation in Malaysia particularly as to the extent of compliance to the UNCRC and other international instruments.
- ii. To assess the implementation of fundamental rights of these children at the place of refuge.

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<sup>6-588</sup> Further elaboration on the case is in Part 4.5.3 at page 375 of this thesis

- iii. To propose legal and administrative reforms for the purpose of ensuring the fundamental rights of the children in need of protection and rehabilitation are effectively safeguarded.

## 6.2 KEY FINDINGS

In achieving the three research objectives mentioned in Chapter 1, this research has adopted mixed doctrinal and socio-legal approaches. Apart from conducting library research to examine both legal and non-legal literatures, empirical data was also collected to provide insights on the actual application of the law, particularly to assess the implementation of the children rights at the places of refuge.

The key findings are as follows:

- i. The evaluation of the laws concerning children in need of protection and rehabilitation on the extent of compliance to the UNCRC and other international instruments.**

In evaluating whether the current Malaysian legal framework complies the international standards, the benchmark is based on the minimum standards set by the UNCRC and other international instruments duly ratified by Malaysia.<sup>589</sup> This has been established in Chapter 2 of this thesis.

There are 7 aspects that need to be addressed in the national legal framework to conform to the international standards:

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<sup>589</sup> The list and the relevant information on the said international instruments are tabulated in Table 2.1 of this thesis.

- (e) The definition of CSE, including child prostitution, and child pornography must be clearly demarcated in the legislation;
- (f) All acts that fall directly or are related to CSE must be outlawed;
- (g) Act(s) leading to the perpetration of CSE such as trafficking, enticing, procuring, transporting and others shall also be considered illegal;
- (h) The law shall address the issue on the transnational commission of the crime by establishing jurisdiction if :
  - (iv) the crime is committed within its territory or on board a ship or aircraft registered in that State;
  - (v) the alleged offender is a national of that State or a person who has his habitual residence in that State; and
  - (vi) the victim is a national of that State.
- (h) A clear modus of rescue of the children who are involved or prone to be involved in sexual exploitation must be provided;
- (i) The provision on the rights of the child victim to undergo rehabilitation and support programme must be incorporated in the legal framework; and
- (j) The access for the child victim to compensation must be expressly provided.

Before delving into the critical evaluation on the extent of compliance to the international standards, it is necessary to understand and appreciate the law within Malaysia's legal context. This was done in Chapter 3 where the development of the laws concerning children in need of protection and rehabilitation have been critically canvassed. It is found that the existing Malaysian laws on the protection of children against sexual exploitation originate from the laws introduced by the British in the 1870's. It is however important to note that the laws introduced then aimed to protect

women and girls against moral harm,<sup>590</sup> rather than to exclusively address child sexual exploitation. Initially, prostitution was regulated as the government considered it as ‘necessary evil’. Brothels must be registered and prostitutes were subjected to medical surveillance under the Contagious Diseases Ordinance 1870. It was reported that the high demand for prostitutes had subsequently driven certain parties to take advantage by procuring and trafficking women and girls using deceitful means. This had led to the passing of the Women and Girls Protection Ordinance 1888 (WGPO 1888). The WGPO 1888 went through series of amendments for better protection for women and girls and the prostitution was finally outlawed in 1930.

The laws continue to develop during the post-independence era. The Women and Girls Protection 1973 (WGPA 1973) was enforced in 1981, placing the protection under the powers of the Social Welfare Department. The legislation mostly retained the provisions in the earlier legislation and protects women and girls against moral harm until they are 21 years old. However the WGPA 1973 was subsequently consolidated in part with two other Acts into the current Child Act 2001 (CA 2001). The prior relevant provisions of WGPA 1973 are now under Part VI of CA 2001 under the subject of “children in need of protection and rehabilitation”. Notable changes to the law were made including to extend the protection to include boys, and decreasing the age requirement from 21 years old to 18 years old in conformity with the definition of ‘child’ in the UNCRC. In addition to that, the CA 2001 also includes a child who is pregnant outside of wedlock under the category of children in urgent need of protection and rehabilitation.

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<sup>6-590</sup> As highlighted in Part 3.1 of this thesis, sex related issues are commonly regarded as sensitive and even deemed to be taboo as the society possess a strong embrace toward eastern cultures and religious values. Matters like extramarital pregnancies and prostitutions are abhorred and considered against morality in the local setting.

Apart from the CA 2001, significant legislations have come into force to strengthen the laws in addressing child sexual exploitation such as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM), Sexual Offences against Children Act 2017 (SOAC 2017) and the Penal Code.

These laws have been examined and analysed in Chapter 4. It is worthy to note that the current Malaysian legal framework largely meets with the international standards.<sup>591</sup> All of the seven aspects mentioned above are provided substantively. Nonetheless, special attention should be given to first, the non-availability of provision on the legal presumption that persons under the age of 18 years who are involved in prostitution shall always be the victims of sexual exploitation. Having such a provision would protect the child victims who face the risk of being charged, convicted and sentenced, when in actual fact they were victimised and exploited.

Secondly, it is in terms of the provision establishing extra-territorial jurisdiction. As elaborated in Part 4.5 in Chapter 4 of this thesis, the proliferation of the telecommunication technology, cloud computing and hi-tech encryption, along with countless low-cost travelling offers and demands for consumers, have fuelled the mounting problem of transnational child sexual exploitation. The sophisticated modus of exploitation involving multiple acts in different states or jurisdictions undoubtedly poses challenges for the law enforcement agencies. This follows with the challenge in determining the actual place of commission of crime in the cyber world and establishing the proper forum to conduct the trial. Hence, the extra-territorial provision is essential to enable the Malaysian court to assert jurisdiction even if the crime which is targeted to children in Malaysia is committed abroad. Currently, the provision on extraterritorial of

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<sup>6-591</sup> The summary of the evaluation is provided in Table 4.9 of Chapter 4 of this thesis.



Malaysian jurisdiction is envisaged in section 3 of the SOAC 2017. This provision adopts nationality principle and is applicable if the sexual offences is committed by Malaysian citizen abroad. However, this may be inadequate to address the situation where the child victim is our national, and the foreign perpetrator is taking advantage of the inadequacy of the law where the crime is committed to escape from the enforcement.<sup>592</sup>

Thirdly, it relates to the child victim's access to compensation. There is neither any specific provision on this in the CA 2001 nor the SOAC 2017. At this juncture, section 426(1A) of the Criminal Procedure Code (CPC) may be referred to. It is a general provision for any victim of a convicted crime to claim compensation for the injury resulting from the offence committed. However, it is submitted that section 426(1A) of the CPC appears rather unsuitable in the case of CSE victims due to the lengthy process involved. Under the section, it requires first, the conviction of the perpetrator followed by another inquiry by the court to determine the amount of compensation. This does not augur well with the child's best interests. The implication of this lengthy procedure is that the child victim may be called again at the inquiry stage to testify. It has been highlighted by the Committee on the Rights of the Child that repeated interviews may post traumatic effects resulting the refusal of the victims to cooperate or despair at some point during the process.

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<sup>6-592</sup> This is illustrated in hypothetical scenario 2 in part 4.5.1 in Chapter 4 of this thesis.

ii. **The assessment on the implementation of fundamental rights of the children at the place of refuge.**

As stated earlier, children in need of protection and rehabilitation may be placed at the place of refuge as part of the protection procedures. Taman Seri Puteri is established throughout Malaysia and it is the official place of refuge under section 55 of the CA 2001. According to Clause 16 of the UN Guidelines, it is the state's responsibility to ensure that the children's rights to alternative care are safeguarded. The practical implementation of the fundamental rights of children in need of protection and rehabilitation at the place of refuge as illustrated by Chart 6.1 are assessed in Chapter.



**Chart 6.1: The rights of children in alternative care**

A social-legal approach that employs a mixed quantitative and qualitative method was adopted for the empirical legal analysis in evaluating whether the children's fundamental rights are implemented. The respondents for this empirical study were:

1. All children in need of protection and rehabilitation residing at Taman Seri Puteri throughout Malaysia;
2. The principals or caregivers at the above institutions
3. The representative(s) from the Department of Social Welfare Malaysia as the main stakeholder for the protection of children in Malaysia.

There are four Taman Seri Puteri institutions at present located in Perak, Selangor, Sabah and Sarawak respectively. It was also found that prior to the 2016 amendment of the CA 2001, Taman Seri Puteri does not only shelter children in need of protection and rehabilitation but also children who are beyond their parent's or guardian's control. These children are, upon written request by their parents or guardians, institutionalized pursuant to a court order under section 46 of the CA 2001 for a maximum period of 3 years due to the inability of their parents or guardians to exercise proper control over them. After the CA 2001 amendment in 2016 and administrative restructure in 2017, Taman Seri Puteri now exclusively shelters children in need of protection and rehabilitation. Accordingly, for the purpose of this research, children beyond control who were at the place of refuge at the time enquiry were excluded. There were a total 24 child respondents participated in the interview. These were all the children residing at Taman Seri Puteri at that point of time.

It is submitted that, based on the fundamental rights stated in Chart 6.1, the rights of children are reasonably protected and implemented at the place of refuge. With the adoption of Regulations 2017, MS-ISO 9001: 2008 and Place of Refuge CMS, the

measures to safeguard the well-being of the children are standardized in Malaysia. The provisions in the documents are in tandem with international standards, particularly the UN Guidelines. It is worth highlighting that the implementation of the provisions is also monitored by a yearly audit from the Social Welfare Department. These are worthy initiatives which not be given due acknowledgement. Be that as it may, the research found that there are certain right should be observed and given due emphasis, the research found that the following rights are minimally promoted and/ or requires improvements:

### **1. Right to freedom of expression**

Majority of the respondents were of the opinion that they have restricted right in expressing their opinion regarding their daily activities, rules and regulations and others. As noted in Part 5.3.3 of this thesis, a number of respondents have expressed that they were afraid of making complaints, mainly due to the fear of getting scolded. This is hardly surprising due to general cultural inhibitions where less encouragement and opportunity are given to children to voice out their opinions.

### **2. Right to stay in contact with family / family support.**

Rule 28 of the 2017 Regulations only sets the minimum frequency for such communication (at least once a month) whereas the means for such communication is to be determined by the Principal of the respective institution. It is found that three out of four institutions allowed direct communication via telephone during a specified time. The other institution only allows communication through a third person namely, the caregiver at the institution. It is for the caregiver to pass the message from the children to their families, relatives or friends and vice versa.

Besides that, two out of four institutions restricted the meetings to once a month; and one of the said institutions limits the meetings for 30 minutes only. On the other hand, the two other institutions have no time restriction for the children to contact or receive visitors. Hence, this aspect should be given attention, and improvement is desired so as not to restrict the children to stay in contact with the family members. In fact, the majority of the child respondents in this research have expressed their sadness of not being able to be in more frequent contact with the family.<sup>593</sup>

Apart from communication with parents, parental involvement during the period of institutionalization is equally important. There is a lacuna of the provision that can compel the parents or guardian of children who have been admitted at the place of refuge without a court order for regular visits. Whilst it is acknowledged that parents or guardians may face practical difficulties in fulfilment of this responsibility due to various reasons such as financial constraints and distance, the authorities ought to explore using appropriate facilities leveraging on technologies that can connect the family and the children more effectively.

### **3. Right to skill and vocational trainings**

Generally, the children are allowed to attend public school and the institutions provide necessary arrangements to facilitate attendance such as registration and transportation. However, this allowance is subject to considerations such as safety, discipline record, and condition of the children. Alternatively, various vocational trainings are offered for all children at the place of refuge. It is found that two of the institutions provide vocational

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<sup>6-593</sup> See Part 5.3.6 of this thesis.

trainings in collaboration with vocational institutions that offer accredited courses. This is a best practice that could be extended to all places of refuge. Having certificates to the acquired skills will be an added value to the children and will assist in the process of social reintegration later.

#### **4. Promoting self-worthiness and preventing future sexual abuse or exploitation.**

It was found that there are cases where the children were dragged into prostitution by their family members or relatives. In addition, there were also instances of resulting from sexual abuse.<sup>594</sup> It is crucial to boost the children's self-esteem and to be taught on their rights against sexual abuse or exploitation. With effective therapeutic intervention, these children would have higher prospects of recovery from their traumatizing experiences. It is submitted that the overall programme at the place refuge lacks this crucial component.

### **6.3 RECOMMENDATIONS**

The third objective of this research is to propose legal and administrative reforms to ensure that the fundamental rights of the children in need of protection and rehabilitation are effectively safeguarded. As noted above, when this research started in October 2014, there was a substantial gap in the Malaysian legal framework in addressing child sexual exploitation which required significant revisions and reforms. Fortunately, in 2016, substantive legal reforms have taken place resulting from the Child (Amendment) Act 2016 which amended the relevant provisions of the CA 2001 and the SOAC 2017 which significantly introduce specific sexual offences against children and brought significant changes in respect to criminal procedure and evidence relating to

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<sup>6-594</sup> See Part 5.3.6 of this thesis

those offences. To enhance the efficacy of the overall legal framework, the following are recommended:

**i. A clear provision to preclude children involved in prostitution from being prosecuted**

It is recommended for a provision to be expressly stated in the CA 2001 that raise legal presumption for persons under the age of 18 years who are involved in prostitution shall always be the victims of sexual exploitation notwithstanding any form of consent or willingness existing on their part. A reference could be made to section 23(3) of the New Zealand's Prostitution Reform Act 2003 that provides "*no person under 18 years of age may be charged as a party to an offence committed on or with that person against this section [in relation to the offence to breach prohibitions on use in prostitution of persons under 18 years]*".

**ii. The provision to establish extra-territorial jurisdiction for cases involving sexual exploitation**

It is highly recommended for legislative reform to consider passive personality principle at least, if not universal principle to establish extra-territorial jurisdiction. This is to ensure a comprehensive protection to our children against transnational CSE. Reference could be made to the Spanish Act (Organic Act No. 1/2014) where the national court may assert its jurisdiction to try the crimes related to the prostitution or corruption of minors committed by Spanish nationals or foreigners outside the national territory. The law requires the following:

- (a) The alleged perpetrator is present in Spain;
- (b) there are victims of Spanish nationality; or

- (c) that there is some relevant link with Spain; and
- (d) no other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes.

### **iii. Enabling a direct access for the child victim of sexual exploitation to claim compensation**

As the available procedure (section 426(1A) of the CPC) may be unsuitable and impractical for the child victims, it is recommended for the policy maker to establish an alternative access whereby the procedures are purely administrative. A reference could be made to the establishment of the Criminal Injuries Compensation Scheme in England, Scotland and Wales, the Victims Assistant Scheme in New South Wales Australia, and the Criminal and Law Enforcement Injuries Compensation Scheme (CLEIC) in Hong Kong. Moreover, the State fund would be the best alternative in assuring the financial assistance for the victims to undergo physical and mental rehabilitation services in the event where compensation by perpetrator is infeasible.

### **iv. Promoting freedom of expression to children in need of protection and rehabilitation at the place of refuge**

It is recommended for activities and modules may be introduced to encourage the children to express their feelings and opinions respectfully and freely. Optimum trainings for the caregivers are also desired. The caregivers must be equipped with the necessary knowledge and skills to inspire, excite and educate the children to be more confident and able to express themselves. A supportive environment to the children must be facilitated to improve their self-esteem.



#### **v. Promoting parental involvement during institutionalization**

Befitting the underlying philosophy of the CA 2001 for family empowerment, it is recommended for the CA 2001 to incorporate a provision empowering the courts to compel the parents or guardian of children who have been admitted at the place of refuge without a court order for regular visit. This is consistent with the power provided section 40(7) of the CA 2001 to compel the same for the parents or guardian of the children who have been admitted to the place of refuge via court order. Besides that, more programmes that involve parents and children should be frequently held at the institution.

The policymakers may also consider providing assistance for parents or guardians who may face practical difficulties such as financial constraints and distance in fulfilment of their responsibility to be actively involved during the institutionalization. It is urged for the policy maker to provide appropriate facilities leveraging on technologies that can connect the family and the children. Alternative communication mediums such as Skype, Google Hangouts, and WhatsApp videos may be utilized in lieu of family visit.

#### **vi. Promoting certified vocational training**

It is recommended for all Taman Seri Puteri to provide vocational trainings in collaboration with vocational institutions that offer accredited courses. It is admitted that the vocational courses take time in order to obtain certification of completion and for some children, they are placed only temporarily at the institution for a short period of time. Therefore, it is proposed for these children to be supported and encouraged to complete the vocational course after being discharged.

## **vii. Promoting self-worthiness and preventing future sexual abuse or exploitation**

Educational and practical module are highly recommended to be implemented at the place of refuge to educate the children on their sexual health, self-worthiness and their rights not to be touched inappropriately. In this module too, the children will be exposed on how to respond to the potentially dangerous situations and the mechanism to report and seek help. This is essential to prevent future sexual abuse or exploitation

## **6.4 CONCLUDING REMARKS**

Based on the evaluations and analyses made in this thesis, it must be reiterated that the legal framework concerning child sexual exploitation has progressed to conform to international standards. Similarly, there are initiatives taken to ensure that the rights of children at the place of refuge is protected and implemented. However this research is limited to the evaluation on the legal framework. An effective protection system requires consistent and vigorous enforcement as well as qualified and trained taskforce. Hence it is recommended for future research to be conducted in these aspects to ascertain any practical impediments and challenges in providing a holistic and effective protection system.

In addition, this research focuses on the protection of children's rights at Taman Seri Puteri, the official place of refuge. The new insertion of section 53A in the CA 2001 empowers the Minister to approve any centre to be a place for the care, protection and rehabilitation of children. This means children in need of protection and rehabilitation may be sent to the approved private institutions. Hence, it is recommended for further similar research to be extended to these private institutions. This is to ensure the

application of the related rules are consistently applied throughout the system. It goes without saying that this will also safeguard fundamental rights of the children while being institutionalized.

Another important aspect worth exploring is the protection of the children post-institutionalization. Section 55A was inserted in 2016 (came into force 2017) empower the court to issue an order for the children in need of protection and rehabilitation to be under the supervision of the Protector or such other person as the Child Welfare Team may appoint for a period of one year. There has yet any official reports and statistics published by the JKM on this matter. It is worth to explore the progress on the welfare of the children to ascertain their general wellbeing and the prevalence of re-victimization.

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