

Laws Relating to Child Sexual Abuse

1.1 Introduction

Child sexual abuse is a crime. Any person who commits such a crime can be prosecuted and, if found guilty, can be jailed and/or whipped and/or fined. The prosecution will be conducted by the Public Prosecutor or Deputy Public Prosecutor who represents the State. The offender will be represented by his/her own lawyer. The victim is the complainant who is required to give evidence in court as a witness. To reduce the trauma the victim is being subjected to, it is necessary for the victim to be provided with legal counseling and support before and during the trial. The services of a lawyer should be obtained to act on behalf of the victim during trial to protect the victim's interest (by holding a watching brief). This can be done with the help of Legal Advisory Centres, Legal Aid Bureaus or Non-Governmental Organizations which provide such services.

1.2 The Offences

The aim of criminal law is to punish and rehabilitate the offenders so that they will not commit the offences again. It should also deter others from committing such offences. Even though the victim will not get any monetary compensation from the prosecution, it should stop further abuse of the victim and prevent the abuser from abusing other children. It should be noted that Section 426(1)(b) of the Criminal Procedure Code allows a Court which convicts someone of any crime or offence to order that person to pay compensation to anyone injured by that crime or offence, but in reality this hardly ever happens.

The victim (through adults) can simultaneously institute civil proceedings against the abuser. The victim can claim for damages for expenses incurred (e.g. hospital treatment, alternative accommodation, traveling, etc.) and for pain and suffering. It is important to note that any institution (e.g. a church, school, or day-care centre) may be sued for damages if it can be proven that the institution was negligent in not taking any safety measures to prevent child sexual abuse or has contributed to any case of child sexual abuse in the institution.

Under the Child Act 2001, government officers can remove a child who has been abused or who is in need of care and protection, put the child under the care of some fit and proper person, foster family or welfare home and prosecute the offender for the offences defined in the Act.

Depending on the actual facts, a person who commits child sexual abuse can be prosecuted for any one or more of the following criminal offences:

1.3 Penal Code

1.3.1 Offences under the Code

Sections	Offences	Sentences
354	Assault or use of criminal force to a person with intent to outrage modesty	Maximum 10 years jail or fine or whipping or any two of such punishments
355	Assault or criminal force with intent to dishonour a person, otherwise than on grave provocation	Maximum 2 years jail or fine or both
372	Exploiting any person for purposes of prostitution	Maximum 15 years jail and with whipping and liable to fine
375 & 376	Rape which is sexual intercourse by a man with a woman who is not his wife and without her consent and statutory rape which is sexual intercourse by a man with a girl under 16 years of age even if the girl consented	Minimum 5 to 8 years jail and maximum 20 to 30 years jail, depending on the gravity of the offence, and liable to whipping (where death is caused, the sentence is much higher, ie a minimum of 15 years jail and maximum of 30 years jail, and liable to whipping)
376A & 376B	Incest – sexual intercourse with someone whom that person is not allowed to marry, whether under the law, religion, custom or usage (A girl under 16 years of age or a boy under 13 years of age is deemed to be unable to consent to incest)	Minimum 6 years jail and maximum 20 years jail and liable to whipping
377A & 377B	Carnal intercourse against the order of nature which is sexual connection with another person by introduction of the penis into the anus or mouth of the other person	Maximum 20 years jail and liable to whipping
377 C	Carnal intercourse against the order of nature without consent	Minimum 5 years jail and maximum 20 years jail and liable to whipping

377CA	<u>Sexual connection by object which is</u> the introduction of any object into the vagina or anus of the other person without the other person's consent (except where this is carried out for medical or law enforcement purposes)	Maximum 20 years jail and liable to whipping.
377 D	Outrages on decency	Maximum 2 years jail
377 E	Inciting a child under the age of 14 years to an act of gross indecency	Maximum 5 years jail and liable to whipping
509	Word or gesture intended to insult the modesty of any person	Maximum 5 years jail or fine or both

1.3.2 Attempts

Under Section 511 of the Penal Code, whoever attempts to commit an offence and in such an attempt does any act towards the commission of such offence shall be punished with such punishment as is provided for the offence provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.

1.4 THE CHILD ACT 2001

The Child Act 2001 ("the Act") came into force in 2001 and consolidates the law relating to the care, protection and rehabilitation of children. It seeks to safeguard the interests of children who are at risk. It replaces the Juvenile Courts Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991, all of which have now been repealed.

The Act provides for Child Protection Teams to be established throughout Malaysia, to coordinate services to families and children who are or may be in need of protection. Each team shall be made up of a medical officer and a senior police officer, both under the leadership of a Protector (a specially appointed Social Welfare Officer).

The Act also constitutes Courts for Children where Magistrates, assisted by up to 2 advisers of whom one shall be a woman, shall hear cases involving children. When deciding what kind of order to make in respect of children, the Courts shall hold the child's interests to be of paramount importance.

1.4.1 Child

Under the Act a “child” is a person under the age of 18 years, and in relation to criminal proceedings, refers to a person under 10 years of age, or to a person between the ages of 10 and 12 years who does not understand the nature and consequences of what he’s done.

1.4.2 Sexual Abuse

A child is deemed to have been sexually abused if the child took part in or was an observer of any activity of a sexual nature for the purposes of any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance; or is sexually exploited by any person for that person’s or another person’s sexual gratification.

1.4.3 Children in Need of Care and Protection

Under Section 17 of the Act and in relation to child sexual abuse, a child would be deemed to need care and protection if, among other things:-

- (a) the child has been or is under substantial risk of being physically or emotionally injured, or sexually abused by his /her parent, guardian or family member;
- (b) the child has been or is under substantial risk of being physically or emotionally injured, or sexually abused AND the child’s parent or guardian, knowing about this, has not protected or is unlikely to protect the child from such injury or abuse;
- (c) the child is or may have been the victim of any of the offences in the First Schedule of the Act (including kidnapping, rape, sodomy (under carnal intercourse against the order of nature) and causing hurt) and his parent or guardian has committed or is suspected to have committed the offence, or has not protected or is unlikely to protect the child from such offence; or
- (d) the child lives in the same household as either the victim or the offender in (c) above and appears to be in danger of a similar offence, and his parent or guardian has committed or may have committed the offence or is unable or unwilling to protect the child from such offence.

1.4.4 Children in Need of Protection and Rehabilitation

Under Section 38 of the Act a child would be deemed to need protection and rehabilitation if the child is being induced to perform any sexual act or is in any physical or social environment which may lead to the performance of such an act, lives in or frequents a brothel, or is habitually in the company or control of brothel-keepers or persons involved in prostitution.

1.4.5 Temporary Custody and Medical Examination or Treatment

(a) Any Protector or police officer who is satisfied on reasonable grounds that a child is in need of care and protection may take the child into temporary custody provided that this is in the child's best interests.

(b) If in the opinion of the Protector or police officer the child needs medical examination or treatment, he or she may either take the child to a medical officer or direct the child's caregiver to do so. The Protector or police officer may also authorise the child's hospitalization and any medical, surgical or psychiatric treatment needed if there is immediate risk to the health of the child.

1.4.6 Production before a Court for Children

(a) Subject to the Act's provisions on children in need of medical treatment or examination, every child who is taken into temporary custody by a Protector or police officer must be brought before a Court for Children ("the Court") within twenty-four hours. If this is not possible, the child must be brought before a Magistrate who may direct that the child be placed in a place of safety or in the care of a fit and proper person until the child can be brought before a Court for Children.

(b) If the Court is satisfied that a child needs protection and rehabilitation, the Court may order the child to be detained in a place of refuge until the report of an inquiry into the child's circumstances has been submitted by the Protector to the Court.

(c) After considering the report, the Court may:-

- (i) order the child to be detained in a place of refuge for a period of 3 years;
- (ii) place the child in the care of a fit and proper person appointed by the Court;
- (iii) order the child's parent or guardian to execute a bond to exercise proper care and guardianship of the child; or
- (iv) place the child under the supervision of a Court-appointed Social Welfare officer under conditions approved by the Court for a maximum period of 3 years

1.4.7 Child in Urgent Need of Protection

(a) Any child who is in urgent need of protection may apply to the Protector to be put in a place of refuge. The Protector would need to be satisfied that there are reasonable grounds to believe, among others, that the child is being threatened or intimidated for the purpose of prostitution or having sexual intercourse with another for an immoral purpose, the child is being confined or detained, an offence is being or likely to be committed against the child, or, if the child is female, that she is pregnant out of wedlock.

(b) Any child in urgent need of care and protection may also apply under this section to the person in charge of any place of refuge, who may also receive the child into the place of refuge.

1.4.8 Restriction on Media Publication and Reporting

(a) Under Section 15, any mass media report regarding:

- (i) any step taken against a child who is or is said to be involved in any criminal act or omission be it at the pre-trial, trial or post-trial stage;
- (ii) any child in need of care and protection who has been taken into custody;
- (iii) any child victim or suspected child victim; or
- (iv) any proceedings regarding any child in need of protection and rehabilitation,

shall not reveal the name, address or educational institution, or include any particulars calculated to lead to the identification of that child.

(b) A picture of any such child or of any other person, place or thing which may lead to the identification of that child may not be published in any newspaper or magazine or transmitted through any electronic medium.

(c) Any person who contravenes these provisions may be fined up to RM10,000 or sentenced to a maximum of five years imprisonment, or both.

1.4.9 Duties of Medical Officers, Family Members and Child Care Providers

(a) If:-

- (i) a medical officer or registered medical practitioner examining or treating a child;
- (ii) any member of a child's family; or
- (iii) a child's child care provider

believes on reasonable grounds that the child is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or that the child has been sexually abused, he shall immediately inform a Protector.

(b) A medical officer, registered medical practitioner or caregiver who fails to do so may be liable to a fine of up to RM5,000 or up to two years' imprisonment, or both.

(c) A family member who fails to comply with this section is liable to a bond on conditions to be determined by the Court. If the family member fails to comply with any of the conditions of the bond, he or she is liable to a fine of up to RM5,000 or up to two years' imprisonment or both.

1.4.10 Some Offences Under the Act

Under Section 31,

(a) any person having the care of a child

- (i) who abuses, neglects, abandons or exposes the child in a manner likely to cause him physical or emotional injury or causes or permits him to be so abused, neglected, abandoned or exposed; or
- (ii) who sexually abuses the child or causes or permits him to be so abused,

commits an offence and shall be liable to a fine of up to RM20,000-00 or up to ten years' imprisonment or both, and may be required to execute a bond of good behaviour subject to conditions approved by the Court.

(b) Under Section 33, any person who, being a parent or guardian or person having the care of a child, leaves that child

- (i) without providing reasonably for the child's supervision and care;
- (ii) for a period which is unreasonable having regard to the circumstances; or
- (iii) under conditions which are unreasonable having regard to the circumstances,

commits an offence and shall be liable to a fine of up to RM5,000-00 or up to two years' imprisonment, or both.

(c) Under Section 43, any person who buys, sells, hires, lets for hire, or otherwise disposes, obtains possession of, procures, receives, harbours, traffics or detains a child for the purpose of prostitution shall be liable to a fine of up to RM50,000 or up to fifteen years' imprisonment, or both, and may also under certain circumstances be subject to whipping of not more than six strokes.