

UUMILC 2017
9TH UUM INTERNATIONAL LEGAL CONFERENCE

**THE ONLINE SOCIAL NETWORK ERA: ARE THE CHILDREN
PROTECTED IN MALAYSIA?**

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Abstract

The phenomenon of online social networking during the age of the web creates an era known as the 'Online Social Network Era'. Whilst the advantages of the online social network are numerous, the drawbacks of online social network are also worrying. The explosion of the use of online social networks creates avenues for cybercriminals to commit crimes online, due to the rise of information technology and Internet use, which results in the growth of the Internet society which includes the children. The children, who are in need of 'extra' protection, are among the community in the online social network, and they are exposed to the cybercrimes which may be committed against them. This article seeks to explore and analyse the position on the protection of the children in the online society; and the focus is in Malaysia while other jurisdictions are referred as source of critique. The position in Malaysia is looked into before the introduction of the Sexual Offences Against Children Act 2017. It is found that, in the Online Social Network Era, there are inadequate protections for children in the Malaysian legal framework before the introduction of the Act. The effectiveness of the Act which is already passed by the Parliament but yet to be enforced, is yet to be seen.

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Keywords: Online social network, child protection, cybercrimes, sexual grooming, cyber-bullying.



1. Introduction

Children are the group of people who need care and extra protection. With the advent of a new era which the authors coined as the 'Online Social Network Era', a greater extent of care and protection for the group is very much needed. It is as such that a specific legislation is enacted to protect the children. The United Nations has introduced the Convention on the Rights of the Child (CRC) in 1989 (Lundy, 2012) to make the world a better place to live for this group of people. After 25 years of its introduction, many countries have ratified the CRC and Malaysia is also one of the signatories which have ratified the CRC. The Child Act 2001 was introduced to provide the legal protection of the child in Malaysia, and the Sexual Offences Against Children Act 2017 is passed (Bernama, 2017b) and enforced in July 2017 (Bernama, 2017b). The legislation however, must cope with the new advancement of the cybercrimes.

2. Problem Statement

In the current 'digital society' through the widely used of online social network, the children are more vulnerable and expose to various online materials which includes but not limited to material relating terrorism, sexually explicit content and many other harmful content (Daud and Jalil, 2017). It is also not just about the content, but the rise of the Internet also open the path for the emergence of the online social network where, the OSN becomes avenues for cybercriminal to commit and 'assist' the commission of their traditional crimes like rape and murder. The OSN also creates great opportunities to the sexual predators and paedophiles to hunt for their victims (Joibi, 2016; Carson, 2015). Whilst there are many benefit and advantages of the online social network, the harm and dangers it poses to the children is worrisome (Kumaran, 2016). It is then important to look into the birth of online social network and its influence over the society, as well as the legal protection given to the children in the digital/online community.

Online Social Network (OSN) is widely used by Malaysian (Idrus and Hitam, 2014). According to the report by the Malaysian Communications and Multimedia Commission (MCMC), in 2012, there are 18.6 million internet users in Malaysia (Malaysian Communications and Multimedia Commission, 2013). Social networking is primarily used by the internet users where 84.2 percent of them used Facebook, followed by Twitter (14.3%), Google+ (2.6% and LinkedIn (2.4%). In other words, there are 15,600,00 Facebook users and they are, on average, spend five hours daily on the social networking sites (Mustafa, 2014). Besides, it is interesting to note that, out of the total number of internet users in Malaysia, there are 2.3 percent users who are under 15 years of age and 14.2 percent who are between 15-19 years old (Malaysian Communications and Multimedia Commission, 2013). This is representing around 16.5 percent of internet users in Malaysia or equivalent to 3.1 million young users. The question is whether this young people or children adequately protected in the online world?

The children in Malaysia are targeted by sexual predators through WeChat, Facebook, WhatsApp and Beetalk (Asyraf, 2016). There are reports of children being raped in Subang Jaya (Cheng, 2015), Kota Kinabalu (The Star, 2014) and Kuala Lumpur (Tariq, 2013), all being raped by their Facebook friends. The question is why the act prior to the crime of rape, that is, the communication prior to the crime of rape, between the underage victim and the criminal, is not monitored and being criminalised? This crime is also regarded as "online sexual grooming" which is criminalised in other parts of the world.

It is after the physical ‘touch’ either in the form of molest, indecent assault or rape, then the criminals being arrested in Malaysia. It is reported that paedophiles from the UK and US “groom” Malaysian kids online (Arif, 2016). In Australia, a man grooming children online and was charged with 145 child sex offences (The Star, 2015). Other countries like in the UK, USA and European countries protect the privacy of the children (Macenaite, 2016) and also criminalise the “online sexual grooming” (Gill & Harrison, 2015). What is the position in Malaysia? It is also reported that 30% of the children in Malaysia indicated that they have experience cyberbullying and 13% of them admitted being bullied almost every day on the Internet (Ministry of Education, CyberSecurity Malaysia and Digi, 2014).

3. Research Questions

The research questions are-

1. What are the laws governing online child protection in Malaysia before the introduction of Sexual Offences against Children Act 2017?
2. Are these laws adequate to protect children online?

4. Purpose of the Study

The purpose of the study are-

1. To examine the laws governing online child protection before the introduction of Sexual Offences Against Children Act 2017.
2. To analyse the adequacy of the law in protecting the children online

5. Research Methods

This article endeavours to examine the current phenomenon of OSN in Malaysia and the adequacy of the legal protection for the children. The main narrative of this research is founded on doctrinal research methods. Doctrinal research is a study of legal and practice doctrines and is largely documentary. According to Salter and Mason, doctrinal research methodology is a study that focuses on the cases, rules and principles. These cases, rules and principles comprise of substantive content of legal doctrine. Deploying a deductive form of legal reasoning from legal principles is a classic form of doctrinal research method (Salter and Mason, 2007). To put it simply, doctrinal research is a research which defines what the law in a particular area is. In doing so, the researcher collects and analyses the data from the primary and secondary sources (Dobinson and Johns, 2007). Then, the data is analysed and discussed.

6. Findings

6.1. Online Social Network

The emergence of the social network sites caters for different interests, needs and practices of users (Livingstone & Brake, 2010; Boyd and Ellison, 2010). The online social network such as Facebook and Twitter makes ‘socializing’ easier and instantaneous (Internet Society, 2014). While online social network sites aid social development among the young (Livingstone & Brake, 2010), they also provide

users with the sharing of links, photos and stories which help people to remain close and “to remain intimately connected with friends regardless of spatial distance” (Hinduja and Patchin, 2008). The first online social network site was launched in 1997, known as SixDegrees.com (Boyd & Ellison, 2010), although the report from Department for Communities and Local Government suggested that the trend began with the green and ecological network in 1987 which led to the formation of the Association of Progressive Communication in 1990 (Department for Communities and Local Government, 2008). SixDegrees.com was later closed in 2000 as it was regarded as an unsustainable business by its founder, although it attracted millions of users. Other social network sites were Live Journal, Asian Avenue, BlackPlanet, LunarStorm and MiGente. The next wave of social networks sites began in 2001 with the launching of Ryze.com, and Friendster being the most prominent which was launched in 2002. After this, Orkut, Bebo, Hi5, Facebook, Xanga, Yahoo!360, MySpace, and Twitter appeared (Boyd and Ellison, 2010). ComScore reported there was a global growth of online social networks in 2007 (Nicole, 2007). The online social networks such as MySpace, Facebook, Bebo, Hi5, Friendster, Orkut and Tagged attracted nearly 250 million users worldwide. These, however, do not include other online social networks like Flickr, Twitter, WAYN, YouTube and their like. Arrington (2008) informed that the users of online social networks, namely Facebook and MySpace, escalated to 115 million each month. Facebook in particular, is growing at a rate of 600,000 users each day and the company also reported that, as of December 2008, they had reached 140 million active users (Statista, 2018) and 1.86 billion active users in 2016 (Ingram, 2017). In Malaysia, there are currently almost 10 million users of Facebook, representing 37% of the entire population (Aruna, 2011). Consequently, this has led to the growth of online societies, to the extent where the online societies begin to require their own sets of legal systems (Linke & Zeffass, 2013; Lock, Cooke, Jackson, 2013).

The increase of the use of the Internet and online social networks is not without its drawbacks. As remarked by a judge in the US case of Fair Housing Council of San Fernando Valley; *The Fair Housing Council of San Diego v Roommates.com, LLC* (2007) 89 F.3d 921 “...the Internet has opened new channels of communication and self-expression...Countless individuals use message boards, date matching sites, interactive social networks, blog hosting services and video sharing websites to make themselves and their ideas visible to the world. While such intermediaries enable the user-driven digital age, they also create new legal problems.” Globally, social networking sites also acted as infection hotbeds used to distribute malware (Illmer, 2016). According to a report from MessageLabs Intelligence, cyber criminals created fictitious accounts on social networking sites which were then used to post malicious links. These malicious links led to a phishing site which would be visited by legitimate users. According to a Symantec report, until January 2009, the social networking sites continue to be popular premises for cyber criminals with a view to luring potential victims (Asyraf, 2016). Undoubtedly, the popularity of the OSN helps to integrate borderless social interaction to the online community, but it also becomes the hotbed for cybercriminals to use it to commit various types of cybercrimes.

6.2. Types of Cybercrimes

Briefly, the types of cybercrimes are highlighted. Wall, (2007) classified cybercrime into computer integrity crimes, computer content crimes and computer assisted crimes. Most of the crimes and sexual

offences against children online involve the computer content crimes category, for instance, child pornography. It was revealed that 95 countries around the world do not have laws addressing child pornography and in those which have the laws, many of them are inadequate. The US is said to have a comprehensive law on the matter, and the UK is considered substantially in compliance with international law criteria (International Centre for Missing & Exploited Children, 2006). The US and UK are among the 30 signatories to the Council of Europe's 'Convention on Cybercrime' in 2001 in Budapest (Edgar-Neville, 2007). However, Malaysia is one of the countries which do not have specific laws to govern child pornography (International Centre for Missing & Exploited Children, 2006). In Malaysia, sexually explicit material, pornography and child pornography are dealt with under the Penal Code and the Communications and Multimedia Act 1998 and the Sexual Offences Against Children Act 2017 is still in its infancy.

6.3. Online Social Network – Malaysia vs. Other Countries

In Malaysia, Facebook and other similar social networking sites has become the target of criminals (Saieed, 2017; Azhar, 2009). CyberSecurity Malaysia, a public agency created to look after Malaysian cyberspace, warns of the risk of using online social networks such as Friendster and Facebook (Devi, 2009). Cyber-stalking cases in Malaysia are on the rise, with 68 cases reported in 2007, 72 reported cases in 2008 and 151 reported cases in 2009 where online social networks were used to attack the victims (Mokhtar, 2009). In one of the reports, a woman in Malaysia fall prey to a cyber-stalker from India (Vijian, 2011). The OSN has also been used to recruit Malaysians as drug mules (Bernama, 2011a). Other similar abuses of the medium were perpetrated to commit crime, such as fraud (Bernama, 2011b), the operation of fake online stores, the impersonation of a prince, stealing the identity of users, blackmailing and death threats, harassment and even the theft of money from users (Aruna, 2011) and making racial and religiously sensitive remarks (Abas and Majawat, 2010).

In other countries, the online social networks are also notorious places for sexual predators (William-Thomas, 2009). Federal Bureau of Investigation (FBI) reported that Internet is a place of child predators and paedophiles and the threat is growing (FBI, 2011). In the 2000 report by the Crimes Against Children Research Centre, it showed that 65% of sexual solicitations of youths occurred in chatrooms. Underage persons are the vulnerable victims to the sexual predators who always portray themselves as 'friends'. This is due to the fact that online social networks are forums where complete strangers are able to meet (Fire et al., 2014; Heidemann et al., 2012). For example, in Malaysia, most victims of sexual harassment and sexual violence are women (The Star, 2018). It was also reported in Malaysia that a serial rapist, a taxi driver aged 54 years old, created a false Facebook account under a woman's name to identify, contact and lure his victims. In another case, a boy was charged for raping a girl whom he met through Facebook (Aruna, 2011).

Online social networks have also established their notoriety in the UK. In Glasgow, a man aged 31 befriended a 13 year old girl in an Internet chat room, after telling her that he was 19. He pleaded guilty to lewd and libidinous behaviour with the girl (BBC, 2014). On Merseyside, a man met a girl using a fake Facebook identity, and raped and murdered her (Yardley & Wilson, 2015; Carron, 2015; Robbins, 2012). In the USA, Facebook "stalkers" murdered model (Duthiers, 2012), while many others like Nikki

Rasmussen, Nicole Cable, Phoebe Prince, Maxine Nunez, to name a few, were “murdered” via Facebook (Yardley & Wilson, 2015; Carangelo, 2015).

An online social network hoax led to the suicide of a teenage girl in 2006 (El Asam & Samara, 2016; Kowalski et al., 2012). A thirteen year old called Megan Meir met a teenage boy “Josh” through the online social network MySpace, who later turned out to be the collective creation of 47 year old Lori Drew, her teenage daughter and her employee Ashley Grills. Megan committed suicide after an exchange of hostile messages with “Josh”. The statement “the world would be a better place without you” was the last message sent before Megan was later found hanged in her closet (El Asam & Samara, 2016). It is also admitted that online social networks are tools for cyber-bullying and harassment (Tomczyk, 2017; Kowalski et al., 2012). In Malaysia, a 17 year old school girl committed suicide after lamenting on her Facebook page of a failed relationship and broken promises. Her remarks drew taunts and provocations from her online friends. Her online friends even asked her to go ahead with the suicide plan (Carvalho et.al, 2011). In the US, Ryan Patrick Halligan committed suicide after being cyber-bullied by his peers over a period of months (Kowalski et al., 2012; Grant, 2012).

As such, it can be seen from the above that that there is no report or cases on online sexual grooming in Malaysia yet, and the Sexual Offences Against Children Act 2017, though already been enforced, is yet to be tested. While the emergence of IT, the Internet and the use of networking has created the rise of new crimes and new avenues to commit crime, the law on the protection of child against the offence of online sexual grooming is still lacking before the introduction of the 2017 Act. For example, as mentioned at the cases above, all of the accused used OSN to contact and communicated with their victim prior to the offence of rape. The children/victims were lured by the accused by using Facebook or other social networking site (Cheng, 2015). Sadly, it is after the ‘physical contact’ that the offence committed, but not been criminalised at the earlier stage i.e. during the process of luring the children or the ‘grooming’ process. Besides, the paedophiles and online child pornography are dealt with the Penal Code, Communications and Multimedia Act 1998 and Child Act 2001 before the introduction of the 2017 Act.

6.4. England & Wales Legislation on Online Children Protection

In England and Wales, there is the Protection of Children Act 1978, an act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs. It is the main piece of legislation governing the offences of child pornography. Although there is no definition of ‘child pornography’ per se in the Act, the ‘making’ of such pornographic images involving children has also been criminalized by virtue of section 46 of the Sexual Offences Act 2003 (Akdeniz, 2008), where ‘making’ includes not merely the display of image on the screen, but also the retention or storage of the image in store, on hard disk or any other storage devices (Sundt, 2006). In *R v Bowden* [1999] All ER (D) 1246, the appellant downloaded paedophilic pictures from the Internet, and either printed them out or stored them on disks. The pictures existed only as data for the appellant’s own use. The Court of Appeal held that to download or print out images from the Internet was sufficient ‘to make’ the images as required by the legislation. This is because downloading or printing the images within the jurisdiction is ‘creating’ new material. In *R v*

Peter John Barber [2009] EWCA Crim 774 CA, the police seized from the accused and found in his computer, digital versatile disks and compact disks upon which were indecent photographs and pseudo photographs of a child. He was charged and found guilty of offences for distribution of an indecent photograph or pseudo-photograph of a child, nine offences of making an indecent photograph or pseudo-photograph of a child and one offence of possession of an indecent photograph or pseudo-photograph of a child. Although there is no direct harm to the children in the creation of pseudo-photographs, the criminalisation of the act was not for the photographs themselves, but the process of making them. The difficulties in distinguishing between real indecent photographs of children and pseudo-photographs added to the concern (Akdeniz, 2008).

Another piece of legislation which is intended for the prevention and the protection of children from harm from other sexual acts in England and Wales is the Sexual Offences Act 2003. Specifically, section 15(1) of the Act provides for the offence of 'sexual grooming', whereby a person having met or communicated with a person under the age of 16 on at least two earlier occasions, he does intentionally meet the underage person; or travels with the intention of meeting the underage person in any part of the world. 'Communicated' with the underage may be by any means, which includes online communications such as email, Internet or social network sites such as Facebook. An example is the case of R v CB [2010] EWCA Crim 3009 (CA), where the accused was found guilty of sexual grooming, contrary to section 15(1) of the Sexual Offences Act 2003. The accused began communication with girls aged 14 and 15 through social networking site Facebook, before he met the victims. In Malaysia, before the introduction of the 2017 Act, the online sexual grooming was not an offence.

With regards to online harassment and cyberstalking, these offences are governed by the Protection from Harassment Act 1997 in England and Wales. Again, although the Act does not specifically mention the 'medium' by which the offence is committed; it also covers online harassment and cyberstalking. Currently, there no specific provision for the protection from sexual harassment in Malaysia, but section 509 of the Penal Code is used to govern the offence, although the provision is more likely to deal with the physical aspects of sexual harassment.

6.5. Malaysian Legislation on Online Children Protection Prior 2017 Act

6.5.1. Child Act 2001

Malaysia introduced Child Act 2001 to repeal the Child Protection Act 1991, the Juvenile Courts Act 1947 and the Women and Girls Protection Act 1973. The new Act provides a more comprehensive provisions relating to the care, protection and rehabilitation of children and to provide for matters connected therewith. The 2001 Act provides the meaning of "child" as a person under the age of eighteen. The child is regarded to be in need of care and protection if there is a substantial risk of injury upon him either physically, emotionally or sexually abused by the parent or the guardian of the child, or that the parent or the guardian knowing that there is substantial risk of such injury or abused but has not protecting the child. Section 17(2) provides the meaning of sexually abused which is clearly refers to abuse in the physical world rather than online abuse. Then, the child is considered to be in need of protection and rehabilitation if the child if the child is induced to perform sexual or is in any physical or social environment which may lead the child to perform the act.

Furthermore, the offences relating to welfare and protection of the child under Part V, Chapter 3 of the Act also reflects the offences that are committed in the physical world rather than online world. The provisions criminalised any person having the care of the children abuses, neglects, abandons or expose the child to physical or emotional injury or sexually abused or permit the child to be sexually abused; leaving child without reasonable supervision. For instance, parent who bring their children to a shopping mall but then leaving the child wandering around without reasonable supervision and the child fall off the escalator, may be charged under this provision, but what if leaving a child without reasonable supervision in the virtual or online world?

Part VI Chapter 2 of the Act provides for the offences against the child. It is an offence to any person who exploiting, procuring, employing, harbouring the child for the purpose of prostitution either in or outside Malaysia; or any attempt to do these offences.

Thus, the Act 2001 is mainly taking 'physical world' approach of the offences rather than online or digital world. Besides, the offence of online sexual grooming is not governed by any provisions under the Act 2001. Unless and until the harm, injury or abuse already takes place or inflicted upon the child, the offences are yet to be committed. The current provision attempt of these offences as provided under section 43(1)(k) may be used for the offences of online sexual grooming, however, it is difficult to prove the proximity test that the attempt is very close to the commission of actual crime.

6.5.2. Penal Code

Another main piece of legislation that governs criminal law in Malaysia is Penal Code. It criminalises all offences against human body (including the child). The offences against the child may be specifically referred to the offence of sale of obscene objects to young person, statutory rape, incest and inciting child to an act of gross decency. Again, the Penal Code is more 'physical' rather than 'online or digital' in its nature.

6.5.3. Communication and Multimedia Act 1998

With regard to cybercrime offences which protect the child online, but not specifically for children, the law that governs the offences is the Communication and Multimedia Act 1998 (CAMA). The provision of section 233 of the CAMA 1998 is 'all encompassing' provision (including protecting the child) to deal with pornography, child pornography, hate speech, offensive remarks, online harassment, cyberstalking and many other online offences which include offences committed through online social networks. Despite the fact that the provision is compatible in dealing with most of the computer content crimes in general, Malaysia still lacks detailed provision to deal with 'specific' problems of child protection online. For example, the provision to deal with pseudo-photographs of children is lacking. Thus, in Malaysia, cases like *R v Bowden* [1999] All ER (D) 1246 or *R v Peter John Barber* [2009] EWCA Crim 774 (CA) are criminalised by the general provision of section 233 of the CAMA for improper use of network facilities or network service, i.e., 'knowingly initiates the transmission of, any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person'. Looking at the mens rea of the said provision, the paedophilic pictures from the Internet, printed or stored on disks, are

well beyond the ambit of the provision if the accused can prove that the pictures existed only as data for his own use (as in the case of Bowden). Thus, any pornographic material, either paedophilic or extreme, are outside the scope of the provision as long as the materials are for personal use, and are not used with intent to annoy others or for any commercial purpose.

Moreover, the offence of 'sexual grooming' is also not covered by the laws. The traditional laws like the Penal Code or the Child Act 2001 only cover 'acts' or 'crimes' after the 'sexual grooming' occurs, as in offences relating to child molestation or abuse, statutory rape of the underage, or even murder. There is no provision in Malaysia similar to section 15(1) of the Sexual Offences Act 2003. Therefore, in the case such as *R v CB* [2010] EWCA Crim 3009 (CA), the police in Malaysia can only take action after any offence or physical harm has been committed against the child, but not before, even if the accused has communicated with and actually met the child prior to that offence. With the spread of online social networking where anonymity and use of pseudonym is extremely common, the lack of legal protection for children in Malaysia against sexual grooming should be a major concern.

There are also traditional laws apart from the CAMA 1998 which cover the protection of children. An offence of sexually abusing a child, is defined when the child has taken part in any activity which is sexual in nature for the purposes of any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance. However, the provision is general and does not mention whether the act may have been committed online or offline.

Other computer content crimes are covered by sections 233 and 112 of the CAMA 1998, to deal with online harassment, hate speech and cyber-bullying. These sections may be used to protect the children in general from harassment, hate speech/sedition and cyberbullying.

As such, it is observed that the laws relating to crime in Malaysia, prior to the 2017 Act, do not specifically mention offences that may be committed online. However, with the introduction of 2017 Act, the matter should have been resolved, although, the effectiveness of the 2017 in handling the matters is yet to be tested.

7. Conclusion

Based on the discussion, it is revealed that, prior to the 2017, the offences of child pornographic content, pseudo-photographs of children, online harassment, cyberbullying and online grooming were not specifically tackled by any legislation in Malaysia except by the law which are more 'physical' in nature. Even under the CAMA 1998, child pornography offences came under 'improper use of network facilities' and the mens rea of the provision governing the offence was 'with intent to annoy others or for any commercial purpose'. Thus, any pornographic materials, either paedophilic or extreme, were outside the scope of the provision if it is retained only for personal use.

Also, this article underlined the importance of criminalising the offence of 'sexual grooming'. The traditional laws like the Penal Code or the Child Act 2001 only cover 'acts' or 'crimes' after the 'sexual grooming' occurs, as in offences relating to child molestation or abuse, statutory rape of the underage, or even murder. There is no provision in Malaysia similar to section 15(1) of the Sexual Offences Act 2003. Therefore, in the case such as *R v CB*, the police in Malaysia can only take action after any offence or physical harm has been committed against the child, but not before, even if the accused has

communicated with and actually met the child prior to that offence. With the spread of online social networking where anonymity and use of pseudonym is extremely common, the lack of legal protection for children in Malaysia against sexual grooming should be a major concern. It is hoped that the introduction and the enforcement of the Sexual Offences Against Children Act 2017 will resolve the problem and enhance the protection for children in Malaysia.

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