

ADEQUACY OF THE LAW ON SEXUAL ABUSE
AGAINST CHILDREN IN MALAYSIA: COMPARATIVE
STUDY WITH THE LAW ON SEXUAL ABUSE
AGAINST CHILDREN IN INDIA

BY

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ABSTRACT

The coming into force of the Sexual offences Against Children Act 2017, commonly referred to as SOACA 2017, underscores the necessity for unique legislative strategies to address Child Sexual Abuse (CSA) in Malaysia. This further highlights the limitations of general criminal legislation, such as the Penal Code, to cater to the needs of vulnerable child victims in sexual abuse cases. The objective of this study is to analyse the adequacy of the existing legal framework of CSA under the jurisdiction of Malaysian law. Special emphasis was placed on SOACA 2017, the legal and procedural challenges of CSA cases in Malaysia, and the suggestion of pertinent reforms inspired by the Indian legislation, namely the Protection of Children from Sexual Offences Act 2012. The responsibilities of various bodies, including but not limited to the welfare department, Royal Malaysian Police (PDRM), Attorney General Chambers (AGC/DPP), and the Child Commissioner of Malaysia, were scrutinized through the lens of pertinent laws, among others the Child Act 2001, Evidence Act 1950, and other enabling laws. The research methodology combined both doctrinal and qualitative approaches, focusing primarily on conceptual literature and semi-structured interviews. Approximately 26 key stakeholders and professionals from diverse fields involved in CSA management, including but not limited to the judges, AGC, advocates & solicitors, PDRM, Department of Social Welfare, politicians, child commissioners, academicians, healthcare providers from the SCAN Team, and Non-Government Organizations were consulted. The results of this study are a synthesis of thematic analysis derived from semi-structured interviews, which were verified against the doctrinal study of extant literature. Principal findings of this research reveal that SOACA possesses certain distinguishing features that set it apart from other general provisions. For instance, for the first time, child grooming, production, distribution, and access to child pornographic materials are identified as offences in Malaysia. Conversely, fundamental weaknesses are present in the Act, which prompted the introduction of the proposed Amendment Bill 2023. These shortcomings include and are not limited to the absence of a definition or interpretation section, absence of supremacy clause, exclusion of specific offences such as penetrative assault, minimum imprisonment as punishment of the offences, no imprisonment for nonreporting of CSA cases, and lack of a compensation framework within the Act. Legal revisions were proposed, taking inspiration from the Indian legislation, with the goal of enhancing Malaysian law. These findings will be of paramount importance to child protection advocates, parliamentarians, and legal practitioners seeking a deeper understanding of the level of protection and handling of CSA cases under the legal frameworks of Malaysia and India.

خلاصة البحث

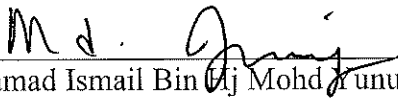
يؤكد دخول قانون الجرائم الجنسية ضد الأطفال لعام 2017، الذي يشار إليه عادةً باسم SOACA 2017، حيز التنفيذ، على ضرورة وضع استراتيجيات تشريعية فريدة لمعالجة الاعتداء الجنسي على الأطفال (CSA) في ماليزيا. ويسلط هذا البحث الضوء على أوجه قصور التشريعات الجنائية العامة، مثل قانون العقوبات، لتلبية احتياجات الأطفال الضعفاء من ضحايا الاعتداء الجنسي. فإن الهدف من هذه الدراسة هو تحليل مدى كفاية الصكوك القانونية الحالية بموجب قانون (CSA) وفقا للقانون الماليزي. وتم التركيز بشكل خاص على SOACA لعام 2017، والتحديات القانونية والإجرائية في قضايا CSA في ماليزيا، واقتراح الإصلاحات ذات الصلة المستوحاة من التشريع الهندي، أي قانون حماية الأطفال من الجرائم الجنسية لعام 2012. وقد تم فحص مسؤوليات الهيئات المختلفة، بما في ذلك على سبيل المثال لا الحصر، إدارة الرعاية الاجتماعية، والشرطة الملكية الماليزية (PDRM)، ومكتب المدعي العام (AGC/DPP)، ومفوض شؤون الأطفال في ماليزيا من خلال عدسة القوانين ذات الصلة من بين قوانين أخرى، وقانون عام 2001، وقانون الإثبات لعام 1950، والقوانين التمكينية الأخرى. جمعت منهجية هذا البحث بين الأسلوب المكتبي والنوعي، مع التركيز أساسا على الدراسات المفاهيمية والمقابلات شبه المنظمة. ما يقرب من ستة وعشرين من أصحاب المصلحة الرئيسيين والمهنيين من مجالات متنوعة المشاركين في إدارة CSA، بما في ذلك على سبيل المثال لا الحصر القضاة، AGC، المدافعين والمحامين، PDRM، ووزارة الرعاية الاجتماعية، والسياسيين، ومفوضي الأطفال، الأكاديميين، ومقدمي الرعاية الصحية من فريق SCAN، وتمت استشارة المنظمات غير الحكومية. فإن نتائج الدراسة هي توليفة من التحليل المواضيعي المستمدة من المقابلات شبه المنظمة، والتي تم التحقق منها مقابل الدراسة المكتبية للدراسات الموجودة. تكشف النتائج الرئيسية للبحث أن SOACA تمتلك بعض السمات المميزة التي تميزها عن الأحكام العامة الأخرى. لأول مرة على سبيل المثال، تم تحديد استمالة الأطفال وإنتاج وتوزيع والوصول إلى المواد الإباحية للأطفال كجرائم في ماليزيا. وفي المقابل، توجد نقاط ضعف أساسية في القانون، مما دفع إلى تقديم مشروع قانون التعديل المقترح لعام 2023. تشمل أوجه القصور هذه، على سبيل المثال لا الحصر، عدم وجود مادة التعريف أو مادة التفسير، وغياب بند السيادة، واستبعاد جرائم محددة مثل الاعتداء الاختراقي، والحد الأدنى من السجن كعقوبة على

الجرائم، وعدم فرض عقوبة السجن في حال عدم الإبلاغ عن حالات الاعتداء الجنسي على الأطفال، وغياب إطار لتعويض المتضررين ضمن القانون. وتم أيضا اقتراح تعديلات قانونية، مستوحاة من التشريع الهندي، بهدف تعزيز القانون الماليزي. ستكون هذه النتائج ذات أهمية قصوى لدعاة حماية الأطفال والبرلمانيين والممارسين القانونيين الذين يسعون إلى فهم أعمق لمستوى الحماية والتعامل مع قضايا CSA بموجب الأطر القانونية لماليزيا والهند.



APPROVAL PAGE

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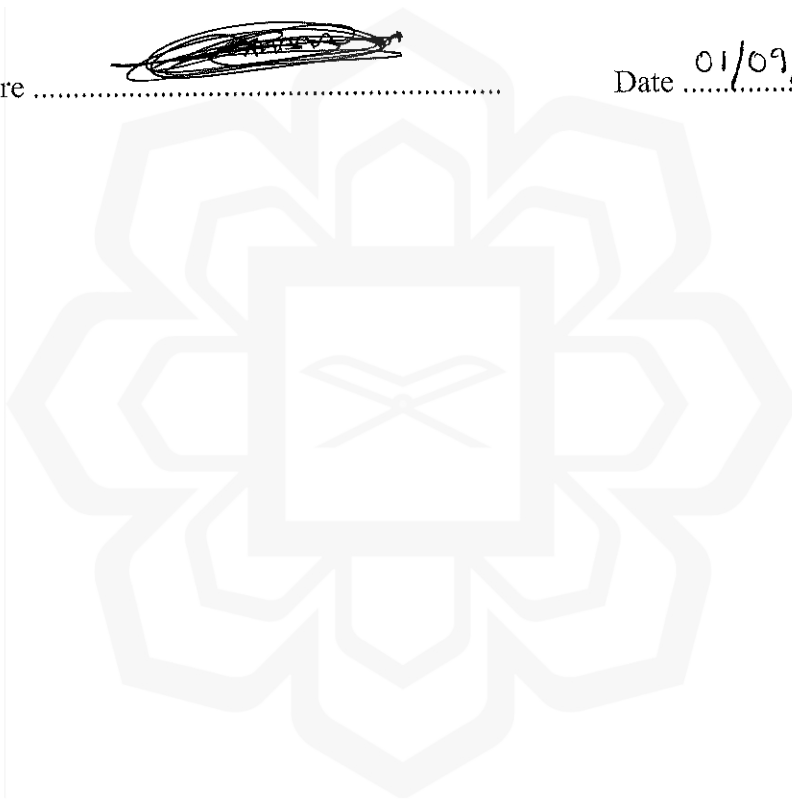
DECLARATION

I hereby declare that this dissertation is the result of my investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Firstly, it is my utmost pleasure to dedicate this work to my dear parents and family, who granted me the gift of their unwavering belief in my ability to accomplish this goal: thank you for your support and patience.

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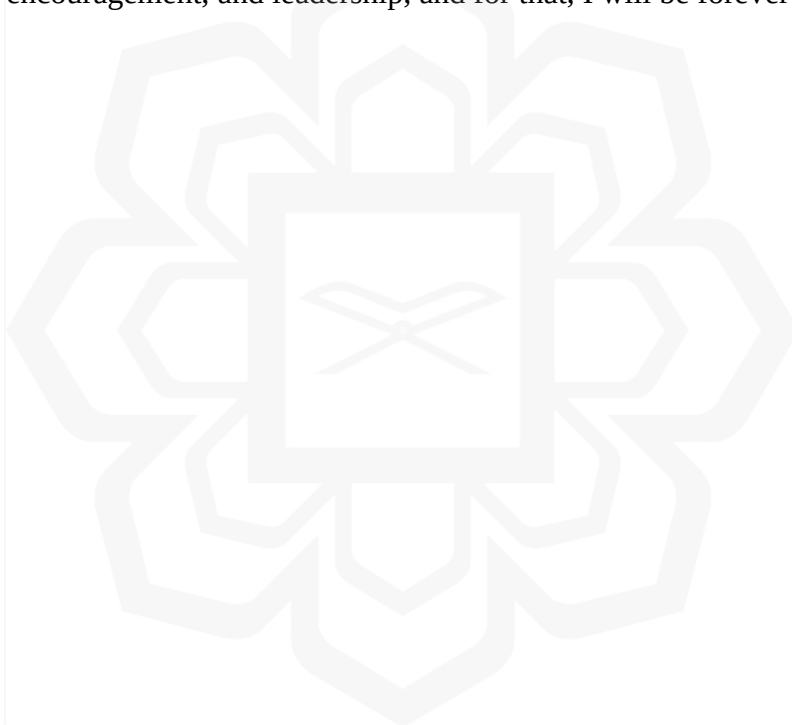


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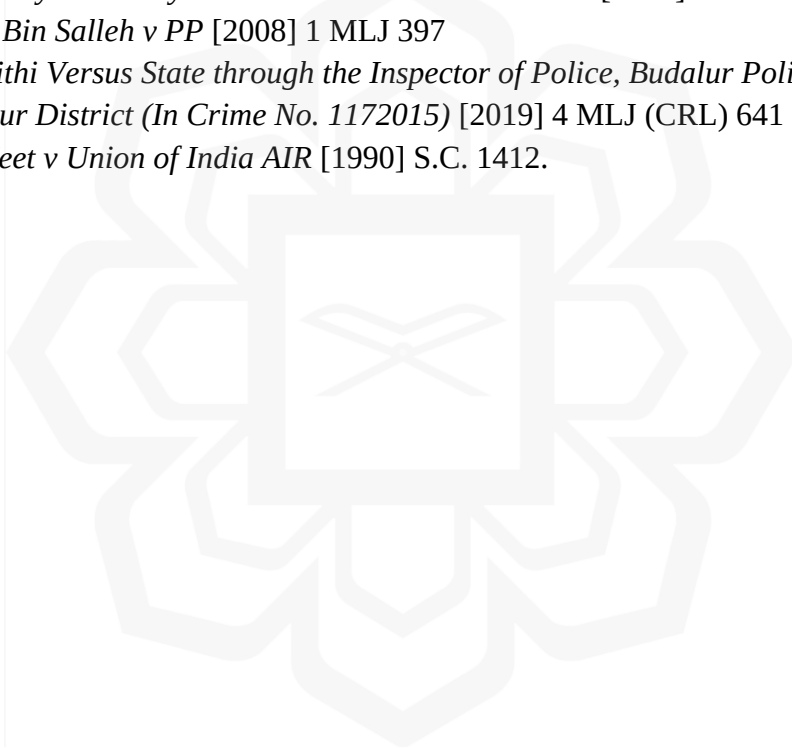
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Chan Kok Poh v Public Prosecutor [2022] 9 MLJ 755
Chao Chong & Ors v PP [1960] 1 MLJ 238
Cheong You Hoi v Pendakwa Raya [1999] MLJU 518
Directorate General, Doordarshan v Anand Patwardhan AIR [2006] SC 3346
Eera Through Dr. Manjula Krippendorf Versus State (Govt. of NCT of Delhi) and Another [2017] 3 MLJ (CRL) 452
In Re Alarming Rise in the Number of Reported Child Rape Incidents [2020] 1 MLJ (CRL) 524
Jacobeellis v Ohio [1964] 378 US 184
Janardhan v State of Andhra Pradesh [1999] (2) ALT (in) 434
K.Muthu Versus Staterep by the Inspector of Police, Police Crime No.64 of 2014 [2015] 3 MLJ (CRL) 429
Kamlesh Vaswani v Union of India [2014] 6 S.C.C 705 at 706.
Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590.
Kharudin v PP [1969] 1 M.L.J. 45
Lai Meng v Toh Chew Lian [2012] 8 MLJ 180
Lee Lai Ching v Lim Hooi Teik [2013] 4 MLJ 272
Mary Ellen McCormack [1874]
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641
Mohamed Hussain v the state of Puducherry U.T CrI.A.No.124 of 2021
Narender Kumar v State (NCT of Delhi) AIR [2012] SC [2012] Cri LJ 3033
Nasrul Annuar Bin Abd Samad v Public Prosecutor [2005] 1 MLJ 619
Nawal Dubey v Madan Gopal Kakkad [1992] SCR (2) 921, [1992] SCC (3) 204.
Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors [2012] 1 MLJ 832
Pendakwa Raya v Pesalah Kanak-Kanak 1 dan satu lagi [2023] MLJU 476
PP v Thomas Hee Kein Vun [2019] MLJU 1415
Public Prosecutor v Ku Hang Chua [1975] 2 MLJ 99
Public Prosecutor v Gurdial Singh a/l Pretum Singh [2012] 2 AMR 327
R v Chief Immigration Officer, Heathrow Airport ex p Salamat Bibi (1976) 3 All ER 843
R v Hopley [1860] EW Misc J73
Sabari @ Sabarinathan @ Sabarivasan Versus Inspector of Police, Belukurichi Police Station, Namakkal District and Others [2019] 3 MLJ (CRL) 110
Sakshi v Union of India [2004] AIR [2004] SC 3566.

Sankar Versus State of Tamil Nadu, Rep. by Inspector of Police, All Women Police Station, Panruti, Cuddalore District [2021] 2 MLJ (CRL) 36
Secretary to the Government of India [2017] (2) Crimes 455 (Gau).
Shatrughna Baban Meshram Versus State of Maharashtra [2021] 1 MLJ (CRL) 38
Sidek bin Ludan v PP [1995] 3 MLJ 178
State Rep. by The Inspector of Police, Keeranur and Another Versus Danish Patel and Another [2022] 2 MLJ (CRL) 305
State Rep. by The Inspector of Police, Keeranur and Another Versus Danish Patel and Another [2022] 2 MLJ (CRL) 305
State v Pankaj High Court of Delhi, Choudhary [2011] CRL. A. 813/2011
State v Thakur Prasad [1958] All LJ 578: A.I.R 1959 All 49
Suresh & Anr. v State of Haryana (Crl) [2012] 420
Suresh N. Bhusare & Ors v State of Maharashtra [1999] 1 SCC 220
Syed Afendy Ali bin Syed Abid Ali v Public Prosecutor [2021] 8 MLJ 643
Tajudin Bin Salleh v PP [2008] 1 MLJ 397
Udhyanithi Versus State through the Inspector of Police, Budalur Police Station, Thanjavur District (In Crime No. 1172015) [2019] 4 MLJ (CRL) 641
Vishal Jeet v Union of India AIR [1990] S.C. 1412.



LIST OF STATUTES

Age of Majority 1971 (Repealed)
Child Act 2001
Child Protection Act 1991 (Repealed)
Child Witness Evidence Act 2007
Children and Young Persons (Employment) Act 1996
Children and Young Persons Act 1933 (Repealed)
Children Care Centre Act 1984
Children Ordinance 1922
Children Ordinance 1939
Constitution of Malaysia 1963
Crimes Act 1900
Domestic Violence Act 1994
Evidence Act 1950
Evidence of Child Witness Act 2007
Federal Constitution of Malaysia 1957
Guardian of Infant Act 1961
Indian Penal Code 1860
Interpretation Acts 1948 and 1967
Juvenile Courts Act 1947 (Repealed)
Penal Code 1950
Oath and Affirmation Act 1949
Protection of Children from Sexual Offences Act 2012 (India)
Sexual Offences Against Children Act 2017
Sexual Offences Act 2003 (United Kingdom)
Sex Crimes Against Children Prevention Act of 1995 (United States)
Woman and Girl's Protection Act 1973 (Repealed)
Women and Girls (Appointment of Places of Safety) Act 1966
Sexual Offences Act 2009 (Scotland)

LIST OF ABBREVIATIONS

ADC	Adverse childhood experience
AGC	Attorney General's Chamber
CA	Child Act
CBI	Indian Central Bureau of Investigation
CCO	Crime compensation order
CDC	Center for Disease Control
CIC	Child Interview Centre
CID	Bukit Aman Criminal Investigations Unit
CPHCSA	Centre for the Prevention and Healing of Child Sexual Abuse
CPP	National Child Protection Policy
CPT / PPKK	Children Protection Team
CRY	Child Rights and You
CSA	Child Sexual Abuse
CSAM	Child sexual abuse materials
CSC	Child Sexual Crimes
CSE	Child Sexual Exploitation
CSO	Child Sexual Offences
CWC	Child Welfare Committee
CWT	Children Welfare Team
D11	Sexual and Child Investigation Division
D9	Special Investigation Division of the RMP
DNAA	Dismiss Not Amount To Acquittal
DSM-IV	Diagnostic and Statistical Manual for Mental Disorder IV
DVA	Domestic Violence Act
EA	Evidence Act

ECPAT	End Child Prostitution and Trafficking
EOCWA	Evidence of Child Witness Act
FBI	United States Federal Bureau of Investigation
FC	Federal Constitution
GIA	Guardianship of Infant Act 1961
IUM	International Islamic University Malaysia
ILKAP	Judiciary and Legal Training Institute
INTERPOL	International Police Criminal Organisation
IO	Investigative Officer
IP	internet protocol
IP	Investigation Paper
IPC	Indian Penal Code
JBG	Legal Aid Department
JC	Judicial Commissioner
JKM	Department of Social Welfare
KKM	Ministry of Health Malaysia
KPWKM	Ministry of Women, Family and Community Development
LPPKN	Lembaga Penduduk Dan Pembangunan Keluarga Negara
MICAC	Malaysia Internet Crime Against Children
MICAC	Malaysia Internet Crime Against Children
MIV	Malaysian ICT Volunteer
MKMM	Malaysian Council for Child Welfare
MPKK	Majlis Perwakilan Kanak-Kanak
NCCW	National Council for Child Welfare Malaysia
NCJRS	National Criminal Justice Reference Service
NCPCR	National Commission for the Protection of Child Rights
NCRB	National Crime Records Bureau

NGO	Non-Governmental Organisations
NIBRS	National Incident Based Reporting System
NRCB	National Crime Record Bureau
NURIN	National Urgent Response Information Network
NYSPCA	New York Society for Prevention to Animal
NYSPCC	New York Society for the Prevention of Cruelty to Children
OCSEA	Online child sexual exploitation and abuse
OJJDP	Office the Juvenile Justice and Delinquency Prevention
OKT	Accused person
OSCC	One-Stop Crisis Centre
PAKK	Children's Activity Centre
PBB	Pertubuhan Bangsa-Bangsa Bersatu
PC	Penal Code
PDRM	Royal Malaysian Police
PKPMP	Office of the Chief Registrar of the Federal Court
POCSO	Protection of Children from Sexual Offenses Act 2012
PSA	Penetrative Sexual Assault
PWD	Persons with disability
RCR 2005	Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police 2005
SCAN	Suspected Child Abuse and Neglect
SJPU	Special Juvenile Police Unit
SOACA	Sexual Offenses Against Children Act 2017
SOP	Standard operating procedure
SPCA	Society for the Prevention of Cruelty to Animals
SSI	Semi-structured interview
TA	Thematic Analysis

UAE	United Arab Emirate
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on Right of the Child
UNICEF	United Nations International Children’s Emergency Fund
VIS	Victim Impact Statement
VOC	Voice of the Children
WHO	World Health Organisation



CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Globally, child sexual abuse (CSA) has become a scourge and one of the main causes of mental and health problems among children. The consequences of these problems could endure with them until adulthood.¹ Like how food and water are important to human organisms, sexuality has been described as a bio-physiological process that is also essential to human organisms.² In 2013, it was projected that 400,000 out of 3.93 million babies born in the United States would become victims of CSA unless something was done to stop the trend. Other categories of sexual abuse in children include both natural, unnatural, and sexual perversions, subject to criminal law legislation for the protection of children.³

In 2019, a community study reported that 1 in 10 children in Malaysia, which amounts to 750,000 children, have been sexually abused. The study further indicated that 95 percent of the incidents involved a perpetrator previously acquainted with the victim.⁴ The role of the internet in enabling CSA has also been identified in Malaysian societies as a by-product of children's exposure to learning and other benefits of the internet.⁵

¹ Catherine Townsend and A. A. Rheingold, "Estimating a Child Sexual Abuse Prevalence Rate for Practitioners", *A Review of Child Sexual Abuse Prevalence Studies*, (2013): 3.

² Meredith E. Drench and Rita H. Losee, "Sexuality and Sexual Capacities of Elderly People", *Rehabilitation Nursing*, vol. 21, no. 3 (1996): 118–23.

³ Townsend and Rheingold, "Estimating,".

⁴ S. Indramalar, "One in 10 Malaysian Children Are Sexually Abused, Usually by Those They Trust | The Star," *The Star Newspaper*, 29 November, 2019, 1-2, <https://www.thestar.com.my/lifestyle/family/2019/11/29/betrayed-by-the-people-they-trust-the-most>.

⁵ Ibid.

Many nations have passed legislation to safeguard children and hold abusers accountable due to the depressing statistics of child abuse. In India, the Protection of Children from Sexual Offences Act 2012 (POCSO) was passed in 2012 due to this issue's growing hazard to society. In Malaysia, Section 2 of the Child Act 2001 defines “sexual abuse if a child is exploited for anyone’s sexual gratification including being made to take part in or observe any pornographic, obscene photography, recordings, films or performances.” The Penal Code, which is a replica of the Indian Penal Code, has been historically utilized to adjudicate instances of rape and child sexual abuse. However, it has been determined to be inadequate in addressing such matters. Consequently, specialized legislation has been enacted to address better and support child victims of sexual abuse.

In addition to the intricacies of consent, age, and penetration as provided in the Penal Code, child rape is considered to place a child in conflict with the law.⁶ Iyer explains that the framework for child victims of rape within the criminal justice system is flawed and highly likened to an adult in a similar situation. In other words, children are badly treated in the formal justice system without appropriate use of community and psychosocial intervention before, during, and after trial.⁷

However, no law can be implemented effectively and efficiently without the dedicated and coordinated efforts of the implementing agencies. A multidimensional approach is required in this regard. The onus lies with the state governments, police department, judicial system, and medical fraternity to implement the act in letter and spirit and to respond to these cases with urgency, empathy, and compassion. Despite

⁶ K J Aiyar, *Iyer’s the Protection of Children from Sexual Offences Act, 2012 (POCSO): As Amended by the Criminal Law (Amendment) Act, 2018 (Act No. 22 of 2018): With Retrospective Effect from 21.04.2018 Alongwith the Protection of Children from Sexual Offences Rules* (Delhi: Delhi Law House, 2019). 425.

⁷ Ibid.

the fact of underreporting CSA incidents, the decision in the reported and prosecuted cases is far below the societal expectations in most countries of the world.⁸

In Malaysia, legislation against CSA became a matter of urgency after the occurrence of the incident involving a British paedophile, Richard Huckle.⁹ He was found guilty of abusing up to 200 babies and children, mostly in Malaysia and India. Described as Britain's worst paedophile, a BBC Documentary revealed that he kept a diary of the acts he committed with children. With the level of sophistication involved in this case, it became necessary for the parliament to pass a strict law to protect children against sexual crime in Malaysia.¹⁰

The level of sophistication of paedophiles is reflected in the legislative language, which also asserts extraterritorial jurisdiction over Malaysian citizens implicated in Child Sexual Abuse (CSA) outside of Malaysia. The modus operandi of Richard Huckle has laid bare the tactics of using the clout of religion to commit sexual abuses in places of worship, including *tahfiz* centres.¹¹ However, the law seems not to be adequate as the first female Deputy Prime Minister, Dr. Wan Azizah has reignited the call to tighten laws to prevent CSA.¹²

As would be discussed, later in this study, it has been observed that the Penal Code appears insufficient to handle the prosecution of sexual offenses against children. Before the passing of separate legislation for CSA in Malaysia, the POCSO Act 2012

⁸ B Bottom, C Najdowski, and G Godman, *Child Victims, Child Offenders: Psychology and the Law*, (Guilford: The Guilford Press, 2009), 64-71.

⁹ Kalbana Perimbanayagam, "A Paedophile's Diary: Richard Huckle Kept Account of His Grotesque Acts," *New Straits Times*, 25 September, 2017, 1-2, <https://www.nst.com.my/news/nation/2017/09/284002/paedophiles-diary-richard-huckle-kept-account-his-grotesque-acts>.

¹⁰ *AskLegal.MY*, "5 Ways One New Law Is Protecting Malaysian Children from | AskLegal.My", <<https://asklegal.my/p/sexual-offences-children-abuse-assault-grooming-pornography-loop-hole>> (accessed 26 July, 2023).

¹¹ Perimbanayagam, K., "A Paedophile's,"

¹² *Malay Mail*, "DPM Seeks Tighter Child Abuse Laws", 12 June, 2018, 1-2, <https://www.malaymail.com/news/malaysia/2018/06/12/dpm-seeks-tighter-child-abuse-laws/1641053>.

was passed in India to effectively address the heinous crimes of CSA and the sexual exploitation of children.

According to Singh, since 1993, records from notifications at medical facilities were the source of early statistics on CSA in Malaysia.¹³ Nonetheless, these medical reports do not accurately represent the prevalence of Child Sexual Abuse (CSA) in Malaysia. Furthermore, this data does not delineate the various typologies associated with CSA. For many years, sociocultural limitations and silence have led to underreporting. The Women, Family, and Community Development Ministry revealed that the Child Registry database has only recorded 107 official cases, despite about 20,000 reported based on a survey.¹⁴

Between July 2012 and 2016, about 12,987 cases of CSA were reported to the police, while only 140 resulted in a conviction. Other statistics, as provided by Royal Malaysian Police, portray that between the years 2015 and 2016 alone, there were – 2,759 rape cases, 412 incest cases, 1,423 molestation cases, and 422 cases of unnatural sex involving children under the age of 18.¹⁵ On the 16th September 2018, the Deputy Minister for Women, Family, and Community Development disclosed that the government is making an effort to delist the statistic from the Official Secrets Act.¹⁶ As a result of the non-disclosure of statistics, it could be uncertain as to the actual

¹³ H. S. S. Amar Singh, Wong Woan Yiing, and Noor Khatijah Nurani, “Prevalence of Childhood Sexual Abuse among Malaysian Paramedical Students”, *Child Abuse & Neglect*, vol. 20, no. 6 (1996): 487–492.

¹⁴ Yiswaree Palansamy, “Despite over 20,000 Child Sexual Abuse Reports, Only 107 in Official Database,” 7 March, 2018, 1-2, <https://www.malaymail.com/news/malaysia/2018/03/07/despite-over-20000-child-sexual-abuse-reports-only-107-in-official-database/1592709>.

¹⁵ *AskLegal.MY*, “Rape and Sexual Assault: Rape Cases and Sexual Violence”, <<https://asklegal.my/p/rape-and-sexual-assault-rape-cases-and-sexual-violence-statistics-in-malaysia>> (accessed 24 August, 2023).

¹⁶ *Free Malaysia Today (FMT)*, “MP Wants Sexual Crimes Data Declassified”, 04 February, 2017, 1-2, <https://www.freemalaysiatoday.com/amp/category/nation/2017/02/04/mp-wants-sexual-crimes-data-declassified/>.

prevalence of sexual crime against children. YB Hannah Yeoh further emphasized the importance of statistics as follows:

We are dealing with a generation of cases swept under the carpet. These victims live among us, and when they grow up, they might end up as aggressors. So, we have to talk about counseling and intervention, which only can start with transparency in data and statistics.¹⁷

In 2017, ten months after Huckle was sentenced, Malaysia passed a law on sexual offences against children and set up a special court to deal with cases of child sexual abuse.¹⁸ The Sexual Offences against Children Act 2017 Act 792 (SOACA) was passed to criminalize child pornography, child-grooming, touching, and sexually assaulting children as a prelude to the sexual crime of a child under the age of 18 years. It also specifies punishments of up to 30 years imprisonment. Although SOACA is an improvement to the existing law on CSA, more is still required to ensure that CSA cases are prevented, prosecuted effectively and proper care for the victims. Despite all these, the number of CSA incidents is increasing, it is unclear whether the law has achieved the stated purpose or not.¹⁹

The research hypothesizes finds that the current Sexual Offences against Children Act in Malaysia lacks adequacy in effectively governing child sexual abuse due to gaps in implementation and enforcement, leading to challenges in prosecuting perpetrators and ensuring justice for victims. Additionally, the comparison between the legislative frameworks of the Sexual Offences Against Children Act 2017 in Malaysia

¹⁷ *The Star Online*, “Child Marriage and Sexual Abuse Cases Are Top Priority”, 16 September, 2018, 1-2, <https://www.thestar.com.my/news/nation/2018/09/16/child-marriage-and-sexual-abuse-cases-are-top-priority/>.

¹⁸ *New Straits Times*, “Malaysia Robbed of Justice by Richard Huckle’s Death”, 15 October, 2019, 1-2, <https://www.nst.com.my/news/nation/2019/10/530217/malaysia-robbed-justice-richard-huckles-death>.

¹⁹ Yarina Ahmad and SNFA Hamid, “Monster in the Family, Young Victims and Issues across Border: Future Outlook of Child Sexual Abuse in Malaysia,” *Journal of Critical Reviews*, vol. 7, no. 8 (2020): 1713–18.

and the Protection of Child Sexual Offences in India aims to identify areas where Malaysia's legislation can be strengthened or improved.

This can be evidenced from the statis reported in 01 January 2024, a recent report from Malaysia's Statistics Department reveals a concerning rise in child sexual crimes. In 2022, there were 1,621 reported cases, marking a 9.5% increase from 1,481 cases in 2021. The report indicates an increase across all categories except for sexual harassment and molestation cases, which decreased by 20.5% and 63.3% respectively.

Among the reported cases, rape showed the highest increase at 13.7%, with 1,277 cases recorded in 2022 compared to 1,123 in 2021. Incest ranked as the second-highest reported crime, with 235 cases in 2022 versus 222 in the previous year. Unnatural sex followed as the third-highest with 63 cases, up by one from the previous year.

However, molestation cases decreased from 30 in 2021 to 11 in 2022, while sexual harassment cases also saw a decline from 44 cases in 2021 to 35 cases in the following year. In terms of sexual crimes by state, Selangor recorded the highest sexual crimes involving victims 18 years and below, with a total of 338 cases in 2022, followed by Johor (150) and Kedah (149).

Experts emphasize the vulnerability of children in lower-income groups to abuse and stress the importance of addressing deficiencies in child protection laws. Dr. Haezreena Begum highlights the need for more open discussion about sexual education and greater compassion for victims. Yayasan Chow Kit founder Datuk Dr. Hartini Zainudin underscores the importance of trauma-informed approaches by NGOs in supporting victims.

Regarding the Sexual Crime Registry System (eDKK), there are differing opinions on whether it should be made public. While some argue for public accessibility

to protect children and the community, others emphasize the need to consider the rehabilitation and reintegration of offenders into society. Dr. Hartini stresses the importance of finding a balance between community protection and offender rehabilitation in discussions about the registry's availability.²⁰

The statistics provided illustrate a troubling increase in child sexual crimes in Malaysia, with rises in reported cases of rape, incest, and unnatural sex. For example, rape cases increased by 13.7%, reaching 1,277 reported cases in 2022 compared to 1,123 in 2021. Similarly, incest cases saw a 5.9% increase from 222 cases in the previous year to 235 cases in 2022. These figures underscore the urgent need to address the pervasive issue of child sexual abuse in the country.

Despite the existence of laws governing mandatory reporting of child abuse and sexual offences against children in Malaysia, enforcement appears to be relatively low. This gap between legislation and implementation raises concerns about the effectiveness of these legal frameworks, particularly Section 27, 28, and 29 of the Child Act 2001 and Section 19 of the Sexual Offences Against Children Act 2017, in protecting children from harm and ensuring perpetrators are held accountable.

Further, although certain offences under the Sexual Offences Against Children Act (SOACA) carry potential punishments of up to 30 years in prison, SOACA fails to stipulate a minimum term of imprisonment. This omission means that courts are not obligated to impose a specific period of imprisonment, leaving room for variability in sentencing. Researchers argue that this gap must be addressed to ensure more consistent and effective sentencing for perpetrators of child sexual abuse. This research propose the introduction of mandatory minimum terms of imprisonment for all SOACA

²⁰ Hani Shamira Shahrudin. "Child sexual crimes rise 9.5 per cent in Malaysia," *Sinar Daily*, 1 January, 2014, 1-2, <https://www.sinardaily.my/article/213786/focus/child-sexual-crimes-rise-95-per-cent-in-malaysia>.

offences. Such a measure could help alleviate the burden on courts in determining sentences and serve as an additional deterrent against child sexual offences.

Next, for procedural and operational adequacy, there is a need for adequate training and equipping law enforcement agencies and the legal system to handle cases of child sexual abuse (CSA) effectively. One proposed solution is the creation of a centralized statute specifically addressing child sexual crime investigations.

It can be seen that the lacuna under the law contributes to the prosecution of cases failing to be carried out successfully, resulting in perpetrators not being brought to justice. Without clear legal guidelines and mechanisms to address these emerging forms of child sexual abuse, offenders may exploit loopholes in the legal system, perpetuating a sense of impunity and emboldening further criminal behaviour.

The current status of sexual crime in Malaysia, particularly in terms of procedural guidelines, highlights several challenges and areas for improvement. Despite existing legislation such as the Sexual Offences Against Children Act 2017 (SOACA) and the Evidence of Child Witness Act 2007 aimed at protecting child victims and witnesses, there are significant gaps in implementation and enforcement. Reports indicate a disturbing rise in online sexual exploitation and abuse of children, with a significant increase in the number of IP addresses suspected of engaging in child sexual abuse material detected by the Royal Malaysia Police (RMP) over recent years. Additionally, the 2022 Disrupting Harm Study revealed alarming statistics, estimating that around 100,000 children aged 12 to 17 in Malaysia may experience online sexual exploitation or abuse annually.

Furthermore, there is evidence of a considerable number of sexual abuse cases involving children recorded by the RMP, indicating the prevalence of such crimes within the country. However, effective prosecution and conviction of perpetrators

remain a challenge, with few reported cases resulting in successful legal outcomes. Challenges faced by child victims within the criminal justice system include the absence of video live links in court proceedings, intimidation leading to withdrawal of complaints, and the need to provide testimony without adequate support. These obstacles underscore the urgent need for improved procedural guidelines and the effective implementation of existing laws to ensure that child victims receive the protection and support they deserve.

The proposed amendments to the Evidence of Child Witness Act 2007 and SOACA signal a positive step towards addressing some of these challenges. By fortifying legal protections, introducing new crimes, and providing compensation for victims, these amendments aim to strengthen the legal framework for addressing sexual crimes against children and supporting victims through the judicial process. However, their success will depend on comprehensive efforts from all sectors of society, including policymakers, law enforcement agencies, civil society, and the community, to ensure effective implementation and enforcement.

The current chapter emphasizes the importance of addressing deficiencies in the legal framework to effectively combat child sexual abuse. The intersection of rising crime statistics and gaps in the law underscores the critical need for comprehensive legislative reform. By enacting laws and provisions that comprehensively address the various forms of child sexual abuse, including emerging threats such as online grooming, Malaysia can strengthen its efforts to protect children and ensure that perpetrators are held accountable for their actions.

1.2 OBJECTIVES OF THE RESEARCH

The main objective of this study is to examine the legal framework of child sexual abuse, particularly under the Malaysian criminal justice system. The specific objectives are.

1. To examine the adequacy of the Sexual Offences against Children Act in governing child sexual abuse in Malaysia.
2. To compare the legislative reform on the Sexual Offences Against Children Act 2017 in Malaysia with the Protection of Child Sexual Offences in India.
3. To propose recommendation can be made that can be improve in child sexual abuse legislation in Malaysia.

1.3 STATEMENT OF PROBLEM

In addressing the challenge of child sexual offenses in Malaysia, legislative and judicial measures have been intensified, culminating in the SOACA. A preliminary examination of the legislative framework suggests that the drafters prioritized the criminalization of child grooming, the production, distribution, and access to child pornographic content, rather than child rape.²¹

It is imperative to acknowledge that while enacting laws such as the SOACA and the Child Act 2001 is significant, it may not represent the most formidable hurdle. The paramount challenge lies in ensuring that the substance and enforcement of such legislation effectively meet its avowed goal of safeguarding children from sexual abuse. If they fall short, legislative amendments should be contemplated in subsequent

²¹ Natasha Venner-Pack, "Law and Order," R.AGE, <<https://www.rage.com.my/law-and-order/>> (accessed 30 July, 2023).

deliberations. “Passing legislation is the easiest part because we have the majority in the House. But, without education, it will not solve this problem in the interior.”²²

The problem statement highlights that research objectives demonstrate the adequacy of the law, while pointing out that there are legal and procedural obstacles that make it insufficient in preventing or reducing instances of Child Sexual Abuse (CSA). This can be seen when the sentences meted out to date appear insufficient in deterring or curbing the populace from engaging in Child Sexual Abuse (CSA). Furthermore, they are far from reversing the rising trend of child assault. Recent judgments, with regard to sentencing, have demonstrated a tendency towards leniency for those convicted of child sexual offenses.

Although India enacted its Child Sexual Abuse (CSA) legislation in 2012 and Malaysia followed suit in 2017, this research posits that an examination of evidentiary and procedural trends in CSA cases from both nations can provide valuable cross-country insights. The SOACA does not incorporate provisions pertaining to rape, a deviation from many other jurisdictions. Moreover, it does not explicitly acknowledge forms of penetration beyond vaginal, including oral and anal acts.²³ As a result, there are concerns about the effectiveness of SOACA in adequately protecting children from sexual offences. The absence of clear provisions for such heinous acts raises questions about the overall provisions of the Act in safeguarding children against sexual offenses.²⁴

²² The Star, “Child Marriage,”

²³ Manique Cooray, Siti Zaharah Jamaluddin, and Zulazhar Tahir, “Violence and Sexual Offences against Children in Malaysia: Searching for the Right Approach”, *International Journal of Business and Society*, vol. 21, no. S1 (2020): 152–64.

²⁴ Kirama Nasim Manbi Ushama and Juriyah Binti Abd Jalil, “Malaysia’s Legal Response to Tackling the Crime of Online Child Pornography”, *IIUMLJ*, vol. 28, no. 1 (2020): 165.

The offences recognized in SOACA include the production or direction of a child in the making of child pornography, the exchange of child pornography or selling a child such materials. Specifically, child grooming, follow-up meetings, including physical assaults and non-physical assaults, are also considered offences with a maximum imprisonment of between 20 to 30 years. One wonders why the legislation has not gone further to enact child rape as a separate offence in SOACA since the forerunners of child rape are already enacted.²⁵

1.3.1 Legal and procedural obstacle

In addressing the obstacles to protecting children from sexual offenses in Malaysia, both legal and procedural challenges emerge. Legally, the broad and imprecise nature of prescribed offenses under the Sexual Offences Against Children Act (SOACA) presents a significant hurdle. This makes it difficult to effectively enforce and interpret the law, particularly in cases involving statutory rape and other forms of child sexual abuse. Moreover, the absence of a minimum term of imprisonment for prescribed offenses undermines the deterrent effect of the legislation and leads to inconsistent sentencing practices. Hence, this calls for comprehensive legislative reform aimed at enhancing the specificity and efficacy of existing laws.

On the procedural aspect, challenges in enforcement and implementation arise due to deficiencies in investigation rigor, difficulties in obtaining evidence, and complexities in trial processes. Insufficient funding and capacity training for relevant authorities exacerbate these procedural obstacles, hampering efforts to effectively handle cases of child sexual abuse. For instance, inadequate training for investigative

²⁵ Nur Aina Abdullah and Sayed Sikandar Shah Haneef, “The Statutory Rape Law in Malaysia: An Analysis from Shariah Perspective”, *International Journal of Business, Economics and Law*, vol. 14, no. 5 (2017): 9–14.

teams may result in improper handling of evidence, jeopardizing the prosecution's case. Similarly, limited resources for child welfare teams may impede their ability to provide support and assistance to victims. Addressing these procedural challenges necessitates concerted efforts to strengthen enforcement and implementation mechanisms, including enhanced training programs and increased funding allocations for relevant agencies. Through a dual approach focusing on both legal reforms and procedural enhancements, Malaysia can better protect children from sexual offenses and ensure that perpetrators are held accountable for their actions. Our current legal framework for addressing child sexual abuse (CSA) in Malaysia is scattered across various pieces of legislation, resulting in a need for increased scope and clarity in procedural guidelines. While the primary legislation addressing CSA is the Sexual Offences Against Children Act (SOACA) 2017, other relevant laws such as the Child Act 2001, the Penal Code 1936, the Printing Presses and Publications Act 1984, the Film Censorship Act 2002, and the Communications and Multimedia Act 1998 are often referenced for additional context and specificity.

However, this fragmented approach to legislation poses challenges in terms of procedural consistency and clarity for all stakeholders involved. There is an urgent need to expand the scope of legislation to assist various institutions in CSA prevention and management. Drawing inspiration from frameworks such as the Protection of Children from Sexual Offences (POCSO) regulations, detailed recommendations are required to aid in the proper implementation of SOACA and provide clear direction to all stakeholders. A well-written and comprehensive rule book would serve as a roadmap, emphasizing areas of overlap and promoting smooth collaboration among the many experts entrusted with addressing CSA. Such a strategy would enhance the effectiveness

of efforts to combat this critical issue and ensure that the interests of child victims are prioritized throughout the legal process.

Hence, the law referred to in the discussion is the Sexual Offences Against Children Act (SOACA) 2017 in Malaysia. This legislation was enacted to address and combat sexual offenses perpetrated against children. The SOACA provides a legal framework for defining and prosecuting various forms of sexual abuse, exploitation, and grooming specifically targeting children. However, as highlighted in the discussion, the SOACA also faces challenges and deficiencies, including the lack of specificity in defining offenses, the absence of minimum punishments for certain crimes, and procedural hurdles in enforcement and implementation. These limitations underscore the need for ongoing legislative review and reform to strengthen the effectiveness of the SOACA in protecting children from sexual offenses and ensuring justice for victims.

1.3.2 The Obstacle in the Law Which Give Adverse Impact of the Child Sexual Abuse

The Sexual Offences Against Children Act (SOACA) 2017 in Malaysia encounters several significant obstacles that impede its effectiveness in addressing child sexual abuse. The adverse impact of child sexual abuse, as outlined, stems from various factors, including the absence of mandatory reporting requirements. Victims often face significant challenges in having their voices heard and accessing the support they need to heal and seek justice. Without mandatory reporting, cases of child sexual abuse may go unreported or inadequately addressed, allowing perpetrators to continue their harmful behavior with impunity.

Victims of child sexual abuse endure profound and far-reaching consequences, including long-lasting psychological trauma, physical injuries, and disruptions to their cognitive, emotional, and social development. These effects can have detrimental implications for their overall well-being, relationships, and future prospects.

Addressing these obstacles in the legal framework and ensuring comprehensive support and intervention for victims are essential steps in mitigating the adverse impact of child sexual abuse. Efforts to enhance the specificity and depth of legislation, establish minimum punishments, and clarify legal authority are crucial in combatting these crimes effectively. Additionally, prioritizing victim support services, mental health care, and prevention initiatives are vital in protecting vulnerable children and breaking the cycle of abuse.

1.3.3 Governing law on child sexual abuse

Prior to the implementation of the SOACA 2017, Malaysia had existing legislation aimed at protecting children from abuse and exploitation. These laws encompassed regulations against all forms of pornography, including but not limited to child pornography, which were illegal within the country. Consequently, statutes concerning obscenity, pornography, or indecency were utilized to apprehend individuals involved in the production, distribution, or possession of child pornography.²⁶

The existing legislations encompass the Child Act 2001 (Act 611), which prohibits the exploitation of children in child pornography by individuals responsible

²⁶ Juriah Abdul Jalil, "Combating Child Pornography in Digital Era: Is Malaysian Law Adequate to Meet the Digital Challenge", *Pertanika Journal of Social Science and Humanities*, vol. 23, (2015): 144-145. [http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JSSH%20Vol.%2023%20\(S\)%20Oct.%202015/11%20JSSH%20Vol%2023%20\(S\)%20Oct_%202015_pg137-152.pdf](http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JSSH%20Vol.%2023%20(S)%20Oct.%202015/11%20JSSH%20Vol%2023%20(S)%20Oct_%202015_pg137-152.pdf); UNICEF, *Child Protection in the Digital Age: National Response to Online Child Sexual Abuse and Exploitation in ASEAN Member States* (Bangkok: UNICEF EAPRO, 2016), 58.

for their care. Additionally, the Penal Code 1936 (Act 574), the Printing Presses and Publications Act 1984 (Act 301), and the Film Censorship Act 2002 (Act 620) prohibit obscenity in general. Furthermore, the Communications and Multimedia Act 1998 (Act 588) addresses obscenity in cyberspace. Under this act, the Malaysian Communications and Multimedia Content Code was adopted to establish guidelines for self-regulating content disseminated by the communications and multimedia industry. Among other provisions, this code prohibits the distribution of obscene content online, including child pornography.

Malaysia has taken significant strides in legislative advancement by enacting the SOCA 2017, aligning with international legal standards, particularly in penalizing child pornography activities. Additionally, amendments to the Child Act 2001, introduced through the Child (Amendment) Act 2016 (Act A1511), have resulted in stricter penalties for individuals convicted of child sexual offenses. These legislative measures signify Malaysia's commitment to combating child exploitation and aligning its legal framework with global norms and standards.²⁷

Reference will refer to the Child Act 2001 (Act 611) whenever necessary to provide clarity and specificity regarding the legal framework for protecting children from abuse and exploitation. This legislation, along with other relevant statutes such as the Penal Code 1936 (Act 574), the Printing Presses and Publications Act 1984 (Act 301), the Film Censorship Act 2002 (Act 620), and the Communications and Multimedia Act 1998 (Act 588), forms the foundation of Malaysia's efforts to safeguard children's welfare and rights. By referencing the Child Act, which specifically addresses the exploitation of children in various contexts, including child pornography, this ensure

²⁷ Ushama, K. N. M., and Jalil, J. B. A., "Malaysia's Legal Response to Tackling the Crime of Online Child Pornography", *IIUMLJ*, vol. 28, no. 1 (2020): 165.

a comprehensive understanding of the legal provisions and mechanisms in place to combat child sexual abuse and exploitation.

1.4 RESEARCH QUESTIONS

To achieve the study's objectives, this research seeks to answer the following pertinent questions:

1. How adequate is the Sexual Offences against Children Act in governing child sexual abuse in Malaysia?
2. What are the comparative legislative reform on the Sexual Offences Against Children Act 2017 in Malaysia with the Protection of Child Sexual Offences in India;
3. What are the recommendation can be made that can be improve in child sexual abuse legislation in Malaysia?

1.5 LITERATURE REVIEW

There is a plethora of literature on the prevalence, prevention, and prosecution of child sexual offenses around the globe. Despite being a taboo topic in public discourse, it has become a subject of interest due to its prevalence and the need to protect children. Malaysia and a few other countries have considered a separate legal regime under the criminal justice system to tackle this problem. Although the laws look good on paper, differences between the specific legislations in India and Malaysia are feasible. Additional consideration peculiar to CSA research is the Islamic law perspective on sexual abuse, rape, and other issues affecting children.

In this chapter, we comprehensively analyse scholarly literature addressing CSA from a Malaysian legal perspective. Our intent is to delve deep into multiple facets of

CSA, from its precise definition and underlying causes and risk factors to the intricacies of the legal framework surrounding CSA. A significant emphasis is laid on scrutinizing the adequacies and potential pitfalls of Malaysian law, especially in areas concerning evidence collection, legal procedures, and the complexities of prosecution.

CSA is a complex phenomenon that has garnered both empirical (i.e., the actual circumstances in which it occurs) and conceptual responses. Although the issues identified in this chapter are general across all jurisdictions, there is a need to explore the peculiarities in Malaysia. The following section identifies key issues that shape the research, policy, and practice responses to prevention.

1.5.1 Definition

Studies on CSA have been of interest to psychologists, lawyers, and medical and social scientists for time immemorial. Some of the issues of interest among law researchers are the causes of CSA, adequacy of existing law, the legal definition of specific sexual acts, elements of the offence, evidential issues, and court procedure.

According to David Finkelhor,²⁸ CSA was regarded as uncommon until the 1970s due to a lack of statistics and non-reporting. Although there are early studies on child sexual molestation, professionals began to be interested in studying the problem in the 1970s. In one of the earliest handbooks on Clinical intervention in child sexual crime, Suzanne Sgroi²⁹ defined CSA as the purview of power and dominant position of the adult or older perpetrator over a child who lacks emotional, maturational, and cognitive development of sexual act. According to David Finkelhor, CSA primarily

²⁸ Jeffrey A. Fagan and David Finkelhor, "Child Sexual Abuse: New Theory and Research", *The Journal of Criminal Law and Criminology* (1973-), vol. 77, no. 2 (1986): 477.

²⁹ Suzanne Sgroi, *Handbook of Clinical Intervention in Child Sexual Abuse* (The Free Press: Simon and Schuster, 1982), 9.

emerged in the field of science and criminology,³⁰ studies on sexual abuse in children have taken various dimensions in the 21st century. Roland C Summit observed that by 1983, CSA had become one of the main focuses of discussion in America's newspapers, magazines, and television features in America, and over 34 books had been written at that time.³¹ In the opinion of Summit, the explosion of information seems to have become damaging to the individual victim and society.³² Early writings originated in fields of clinical and social science such as sociology, epidemiology, and psychology.

Early literature finds it difficult to define the broad topic of child abuse and neglect. According to a broader definition, Augustine³³ attempted to define the wider spectrum of child abuse and neglect, which also include CSA as “...malnourishment, sexual abuse, failure to feed and clothe a child, beating a child, torturing a child, withholding medical care from a child, allowing a child to live in a deprived or depraved environment and helping a child stay out of school...”.

Ruth and Henry Kempe³⁴ were one of the earliest paediatricians who focussed on CSA among the spectrum of child abuse and neglect. In their book “The common secret: Sexual Abuse of Children and Adolescents,” they identified 9 types of sexual abuse which are incest, paedophilia, exhibitionism, molestation, sexual intercourse, rape, sexual sadism, child pornography and child prostitution.

Several definitions have been advanced on the meaning of CSA based on the various sectors involved in addressing CSA and neglect. On the abundance of

³⁰ David Finkelhor et al., *A Sourcebook on Child Sexual Abuse* Sage (Los Angeles CA: Sage Publications Sage CA, 1986): 11.

³¹ Roland C Summit, “The Child Sexual Abuse Accomodation Syndrome”, *Child Abuse & Neglect*, vol. 7, no. 2 (1983): 177–93.

³² Ibid.

³³ Augustine Paul, “Child Abuse: The New Law”, *Current Law Journal*, vol. 3, Current Law Journal (1991): 13-19

³⁴ Ruth Kempe and C Henry Kempe, “Assessing Family Pathology”, *Child Abuse and Neglect: The Family and the Community*. Ballinger Publishing (1976): 115–26.

definitions in the literature, Rellini and Meston³⁵ observed that the methodological difference in CSA research has led to several definitions. Lim et al.³⁶ observed the typologies and different names for CSA while highlighting the difficulty in providing a common definition. The paper followed the conceptual model and definitions developed by Mathews and Collin.³⁷ Other names found in the literature include child sexual assault, child sexual offences, child sexual victimization, child exploitation, adverse sexual experience, and unwanted sexual experience. According to Peter et al.³⁸, a broad categorization can be adopted in definitions of CSA into two i.e., *relationship-specific* and *activity-specific*. The former is focused on the perception of the victim, while the latter is based on the description of the abusive behaviour.

Frank W Putnam³⁹ explains CSA to include complex and non-complex sexual activities such as intercourse, attempted intercourse, oral-genital contact, fondling of genitals, directly or through clothing, and exposing children to sexual activities, including pornography and child prostitution.

Nasimah and Haydar⁴⁰ explored the Islamic perspective on the prevention of CSA. The authors relied on definitions based on the meaning of the word “child” in the United Nations Convention on the Rights of the Child 1989 and section 2 of the Malaysian Child Act 2001 in relation to age and attainment of criminal responsibility.

³⁵ Alessandra Rellini and Cindy Meston, “Sexual Function and Satisfaction in Adults Based on the Definition of Child Sexual Abuse”, *Journal of Sexual Medicine*, vol. 4, no. 5 (2007): 1312–21.

³⁶ Yeong Yeong Lim et al., “Typologies and psychological profiles of child sexual abusers: An extensive review”, *Children*, vol. 8, no. 5 (2021): 333.

³⁷ Ben Mathews and Delphine Collin-Vézina, “Child Sexual Abuse: Toward a Conceptual Model and Definition”, *Trauma, Violence, & Abuse*, vol. 20, no. 2 (2019): 131–48.

³⁸ Finkelhor et al., “A Sourcebook”.

³⁹ Frank W. Putnam, “Ten-Year Research Update Review: Child Sexual Abuse”, *Journal of the American Academy of Child and Adolescent Psychiatry*, vol. 42, no. 3 (2003): 269–78.

⁴⁰ Nasimah Hussin and Hanifah Haydar Ali Tajuddin, “An Islamic Perspective on Preventing Sexual Abuse Against Children”, *IIUM Law Journal*, vol. 29, no. S1 (2021): 153–76.

The paper further relied on the definition of child abuse according to the World Health Organisation (WHO).

The World Health Organisation (WHO) has argued for the need to provide a common operational definition to enable identification and enumeration. According to Svedin,⁴¹ CSA can be defined as “an act or situation with sexual meaning where an adult or younger person is using a child in purpose to satisfy his/her own sexual or other needs”. There is a recurring definition of sexual abuse as a mental disorder based on the Diagnostic and Statistical Manual for Mental Disorder IV (DSM-IV). Although DSM-IV is a good basis for treating abusers and victims, Jonzon⁴² observed that CSA is not always about trauma. The traumatic view of defining this phenomenon appears to undermine the law and legal processes toward prosecuting the abuser.

In a wider definition, World Health Organization defined CSA as:

The involvement of a child in sexual activity that he or she does not fully comprehend and is unable to give informed consent to, or for which the child is not developmentally prepared, or else violates the laws or social taboos of society.⁴³

While expanding the scope of the definition, Kloppen et.al⁴⁴ categorized CSA into three mainly penetrating abuse, contact abuse, and non-contact abuse. Gilbert identified penetrative abuse to include oral abuse while contact abuse involves sexual touching, and non-contact categories include exposure to an exhibition, filming, and other forms of sexual activity without physical contact.

⁴¹ C G Svedin, *Sexual Abuse of Children: Definitions and Prevalence*, translated from Swedish by the Socialstyrelsen (Stockholm: Socialstyrelsen The Swedish National Board (1999): 32-42.

⁴² Eva Jonzon, *Child Sexual Abuse: Disclosure, Social Support and Subjective Health in Adulthood* (Institutionen för folkhälsovetenskap/Department of Public Health Sciences, 2006), 3.

⁴³ World Health Organization, *Preventing Child Maltreatment: A Guide to Taking Action and Generating Evidence* (Canada & Germany: World Health Organization, 2006), 10.

⁴⁴ Kathrine Kloppen et al., “Prevalence of Child Sexual Abuse in the Nordic Countries: A Literature Review”, *Journal of Child Sexual Abuse*, vol. 25, no. 1 (2016): 37–55.

CSA research in Malaysia has been considered from a housing and planning perspective. Badaruddin⁴⁵ examined the link between housing and CSA. He emphasized that incest is particularly common among the underprivileged working class and an economically disadvantaged class of people. The paper concluded that social problems such as CSA are often a result of ineffective urban planning. The study, however, fails to provide collaborative recommendations for CSA beyond planning and land rights. Supporting the view of Badaruddin, Cheu⁴⁶ concluded that CSA is a sociological and planning problem that was occasioned by the erosion of traditional values rather than a legal problem.

The Sexual Offences Against Children Act (SOACA) 2017 of Malaysia provides a comprehensive definition of child sexual abuse within its legal framework. According to Section 2(1) of the Act, child sexual abuse encompasses various forms of sexual exploitation or misconduct involving individuals under the age of eighteen. This definition is further elaborated upon in the Act's provisions, which include offenses such as physical and non-physical sexual assault on a child, offenses relating to child pornography, and child grooming.

Specifically, Section 14 of the Act defines physical sexual assault on a child as any act involving physical contact of a sexual nature with a child for sexual purposes, while Section 15 addresses non-physical sexual assault, which includes verbal, visual, or gestural acts with sexual intentions towards a child. Moreover, Sections 4 to 7 of the Act outline offenses related to child pornography, prohibiting the production,

⁴⁵ Badaruddin Mohamed, "Planning for the Children of the Future: The Case of Malaysia" in *The Conference on Children and the City organised by [School of Housing, Building and Planning, Universiti Sains Malaysia, Penang, Malaysia]*, (Amman: Citeseer, December, 2002), 11–13.

⁴⁶ Hock-Tong Cheu, *Global Culture and Its Effect on the Malay Family and Community, Globalisation and Indigenous Culture* (Japan: Institute for Japanese Culture and Classics, Kokugakuin University, 2001): 1-2.

distribution, exchange, publication, or access to any material depicting children engaged in sexually explicit conduct. Additionally, Section 12 of the Act addresses child grooming, which involves communicating with a child with the intention of committing or facilitating the commission of sexual offenses against the child. These definitions and provisions within the SOACA 2017 aim to comprehensively address and combat child sexual abuse, providing a legal framework to prosecute offenders and protect children from exploitation and harm.

1.5.2 Causes of Child Sexual Abuse

Literature on the causes of CSA focused on risk factors, risk increases, vulnerabilities, and other characteristics that are likely to make a child susceptible to sexual abuse.

The WHO identified five risk factors vis-a-vis individual factors, relationship factors, community factors, societal factors, and protective factors.⁴⁷ The study discussed the factors as dependent on other factors using the ecological model for child maltreatment and sexual abuse. On a micro level, Nasimah and Haydar⁴⁸ identified the risk factors for child abuse victims' persons with physical and mental weakness, opportunism routine activities, and lifestyle.

In another study carried out in Malaysia, Wahid et al.,⁴⁹ focussed on predisposing factors, which were categorized into four sub-themes i.e., family structure, intrapersonal strength, social influence, and family socioeconomic status. The methodology in this paper helped to identify the factors from 30 participants who are victims of CSA. The

⁴⁷ Gavin Andrews et al., "Child Sexual Abuse", *Comparative Quantification of Health Risks: Global and Regional Burden of Disease Attributable to Selected Major Risk Factors*, vol. 2, no. 1 (2004): 1851–1940.

⁴⁸ Nasimah and Hanifah, "An Islamic Perspective," 153.

⁴⁹ Siti Nor Ain Wahid Satar et al., "Predisposing Factors and Impact of Child Victimization: A Qualitative Study", *International Journal of Environmental Research and Public Health*, vol. 18, no. 17 (2021): 9373.

paper emphasized the importance of psychiatric evaluation at the hospital to understand the sexual history of the victim, the relationship with the accused, and the type of abuse.

In a related study, Lim et al⁵⁰ affirmed that the contributing factors for sexual violence and abuse involving children include the effects of alcoholic drugs, pornography, and changes in culture. This study was carried out in Tanzania, which has similar demographics to Malaysian societies.

Nawal et. al⁵¹ examined the vulnerability of persons with disability (PWD) with reference to children with intellectual disability to sexual abuse in Malaysia. Such a disability has been recognized as a risk factor for CSA.

Further, child sexual abuse is a deeply troubling issue that can manifest in various forms, including online exploitation, as highlighted by the Sexual Offences Against Children Act (SOACA) 2017 in Malaysia. The prevalence of the internet has expanded the avenues through which children can be targeted, with perpetrators utilizing fake identities and online platforms to befriend and groom their victims. This method often involves exploiting shared interests and building trust with the child before coercing them into sexual activities or communication. The act of grooming, as defined by SOACA 2017, encompasses tactics aimed at manipulating children into providing sexual materials or meeting in person for sexual exploitation. Perpetrators may use tactics such as offering in-game rewards or promising access to popular cultural phenomena like K-pop to lure children into compromising situations. The amendments made to SOACA in July 2023 further strengthened legal protections against online sexual exploitation by introducing new offenses such as sexual performance by a child

⁵⁰ Lim et al., "Typologies,".

⁵¹ Nawal Nabilah Kamaludin et al., "Barriers and Concerns in Providing Sex Education among Children with Intellectual Disabilities: Experiences from Malay Mothers", *International Journal of Environmental Research and Public Health*, vol. 19, no. 3 (2022): 1070.

and sexual extortion of a child, commonly known as livestreaming and sextortion. These amendments provide clearer definitions and elements for law enforcement to investigate and prosecute offenders effectively. Additionally, the adoption of the term "child sexual abuse material" (CSAM) in place of "child pornography" broadens the scope of the law to encompass a wider range of exploitative material, aligning with international standards and emphasizing the seriousness of these crimes.

Despite these legal safeguards, under-reporting remains a significant challenge in combatting child sexual abuse. Many victims may not recognize the grooming process or feel comfortable coming forward due to shame or fear of repercussions. It is crucial to raise awareness about the tactics used by perpetrators and encourage reporting of any suspicious or harmful behavior. Failure to report sexual crimes against children is itself an offense under SOACA, underscoring the importance of community vigilance and action in safeguarding vulnerable youth from exploitation and harm⁵².

This research paper underscores the precarious situation of children who, due to various circumstances, do not possess the necessary skills and education to establish healthy sexual boundaries. Our findings emphasize that this deficiency places them at an increased vulnerability to Child Sexual Abuse (CSA). Through this study, we aim to shed light on the gravity of the situation and underscore the urgent need for targeted interventions, both preventative and educational, to ensure the safety and well-being of these children.

⁵² Ida Lim, "Protecting children in Malaysia: How they might fall prey to sexual crimes online (Part I)," *Malay Mail*, 29 January, 2024, 1-2, <https://www.malaymail.com/news/malaysia/2024/01/29/protecting-children-in-malaysia-how-they-might-fall-prey-to-sexual-crimes-online-part-i/113096> .

1.5.3 Issues Related to Child Sexual Abuse

In the area of research in this area, several issues (usually methodological) affect the conclusions about perpetration. These include definitional issues, lack of data, the distinction between the variation in the abuse and types of offenders, representativeness of the samples, and risk factors, among others.

On the first issue, different studies use broader or narrower definitions and measures (e.g., self-report measures compared to notifications of CSA made to statutory authorities that are investigated and substantiated).⁵³ Similarly, *lack of available data about the characteristics of CSA*—It is difficult to obtain an accurate picture of features such as the age of perpetrators; the age of victims; the incidence of intra-familial compared to extra-familial sexual abuse; the settings or locations in which abuse occurs; and the balance between young people who sexually abuse compared to adult offenders across the range of CSA types. In addition, *the distinction between paedophilia and child molestation*—Paedophilia is a psychiatric concept while child molestation is a socio-legal concept.⁵⁴ Another issue is the *Representativeness of research samples*—As has been well established, most CSA cases do not come to the attention of the justice system or result in a conviction.⁵⁵ Despite this issue, most research on child sex offenders is drawn from detected and convicted populations. The extent to which these populations are representative of undetected child sex offenders is unclear.

Collapsing types of sex offenders—The vast majority of research concerning child sex offenders tends to aggregate various categories of offenders.⁵⁶ Notably, many

⁵³ Bridgett A Besinger et al., “Caregiver Substance Abuse among Maltreated Children Placed in Out-of-Home Care”, *Child Welfare*, vol. 78, no. 2 (1999): 221–39.

⁵⁴ John B Murray, “Psychological Profile of Pedophiles and Child Molesters”, *The Journal of Psychology*, vol. 134, no. 2 (2000): 211–24.

⁵⁵ Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (Sydney: The National Child Sexual Assault Reform Committee, University of New South (2010), 492

⁵⁶ Lisa L Sample and Timothy M Bray, “Are Sex Offenders Different? An Examination of Rearrest Patterns”, *Criminal Justice Policy Review*, vol. 17, no. 1 (2006): 83–102.

studies conflate adult and child sex offenders or merge intra-familial and extra-familial offenders into a single analytical group. This conflation raises concerns about the potential for generalized conclusions, which might not account for the unique motivations, patterns, and risk factors associated with each type of offender. For a more accurate and tailored understanding of child sex offending, it is imperative that future research endeavours differentiate and evaluate these categories independently.

Assessment of perpetrator risk factors—Most risk factors are individual-level factors. There is limited research that looks at community- or social-level factors or how they interact with individual factors. In addition, compared to risk factors associated with child maltreatment more broadly, risk factors associated with CSA are not as well documented, nor do they appear to be as predictive as the risk factors associated with child maltreatment.⁵⁷

Distinction between adolescent- and adult-onset perpetration—In recent years, there's an emerging acknowledgment that adolescents play a notable role as perpetrators in Child Sexual Abuse (CSA) incidents. This demographic presents risk factors and therapeutic requirements that diverge from adult offenders. Yet, the academic and professional communities grapple with ambiguity regarding whether adolescents exhibiting sexually abusive behaviours constitute a distinct group, separate from those who commence such offenses in their adult years. This uncertainty not only muddies our understanding but also raises significant questions concerning the direction of

⁵⁷ Afridah Binti Abas, “Child Abuse in Malaysia: Legal Measures for the Prevention of the Crime and Protection of the Victim”, *International Journal of Social Sciences and Humanity Studies*, vol. 4, no. 2 (2012): 1–10.

preventative measures. It becomes paramount to discern the distinctiveness of these two cohorts to ensure that prevention strategies are appropriate and effective.⁵⁸

Social and Policy Issues

Compared to other forms of child abuse and neglect, sexual abuse and exploitation characteristically occurs in a range of relationships and settings within and beyond the family and is predominantly perpetrated by males. By contrast, neglect, emotional abuse, and physical abuse typically occur within the family, with mothers predominantly being the adult whom child protection authorities hold responsible.⁵⁹ In addition, CSA involves significant barriers to and delays in children's disclosures that sexual abuse is occurring, and indeed this may not come to light until the victims are adults; perpetrator tactics that normalize, conceal, or reframe sexually abusive interactions; adherence by the general public to myths about CSA; and public demonization of "child sex predators" when particular types of sexual abuse come to light. To this end, CSA reflects several of the common dynamics and issues associated with adult sexual assault.⁶⁰ More recently, the growing recognition that adolescents comprise a significant proportion of those engaging in sexually abusive behaviour adds a developmental consideration in prevention efforts. Meanwhile, the production and distribution of child exploitation material ("child pornography") has, to date, been located within a criminal justice and crime prevention framework.⁶¹

⁵⁸ Nadine McKillop, Susan Rayment-McHugh, and Richard Bojack, "Comparing the Onset of Child Sexual Abuse Perpetration from Adolescence into Adulthood: Are There Unique Risks, and What Does This Mean for Prevention?", *Child Abuse & Neglect*, vol. 107, no. 3 (2020): 104630.

⁵⁹ Alister Lamont, "Who Abuses Children?", *NCPC Resource Sheet*, (2011): 1–6.

⁶⁰ Quadara et al., *Conceptualising the prevention of child sexual abuse* (Melbourne: Australian Institute of Family Studies, 2015), 45.

⁶¹ Juriah, "Combating Child," 137–52.

As a social and policy issue, therefore, CSA crosses at least four domains—violence against women, family wellbeing and support, child protection, and criminal offending. The consequences of this can be not only different approaches to prevention but also a risk that CSA falls between the gaps of policy frameworks.⁶²

Some legal issues have been identified in the literature on child protection against sexual offences in Malaysia. Some of the issues are with respect to the language used in criminal enactment, jurisdictional issues, and procedure.⁶³

Mohamad Yunus et al.⁶⁴ discussed the phenomenon of paedophilia as one of the sexual offences in Malaysia. The paper highlighted the use of Gender-neutral pronouns for the offender in section 377D of the Malaysian Penal Code, but this paper has not explored the reason why non-neutral gender was used in the law regarding the child victim. Section 375(g) refers to victims as female and penetration with respect to the vagina. The penal code still considers penetration for the female gender only despite the high incidence of male child rape.

In a study by Norbani and Siti Zubaidah,⁶⁵ the jurisdictional conflict in dual jurisdictions such as Malaysia was discussed based on the prohibitions in Islamic law and the Malaysian Penal code concerning Incest. After rigorous deliberation and analysis, the study concludes with the recommendation that victims, to safeguard their interests and rights better, should lean towards seeking prosecution under the ambit of civil law. Such a stance is believed to offer a more comprehensive and effective redressal mechanism in addressing the complexities of incestuous offenses.

⁶² Assink et al., "Risk factors for child sexual abuse victimization: A meta-analytic review", *Psychological bulletin*, vol. 145, no. 5 (2019): 459.

⁶³ Sydney Moirangthem, Naveen C Kumar, and Suresh Bada Math, "Child Sexual Abuse: Issues & Concerns", *The Indian Journal of Medical Research*, vol. 142, no. 1 (2015): 1.

⁶⁴ Muhammad Ikhbal Mohamad Yunus et al., "Paedophilia and Sexual Crimes against Children in Malaysia", *The Law Review*, (2016): 530-542.

⁶⁵ Ismail Norbani , Mohamed Nazeri Siti Zubaidah, "Contesting Jurisdiction in Respect of In With Particular Reference to Malaysia", *LR*, (2010): 247–66.

Mohamad⁶⁶ examined the implementation of Shariah Law for the protection of children born out of wedlock in Malaysia. The paper finds that Islamic law provides for the protection of children in this circumstance, but the implementation has drawn criticism within and outside Malaysia. The paper noted that teenage pregnancies are the main cause of abuse for unborn babies. The paper did not explore the possibility of criminal legislation such as SOACA in addressing the protection of children in Malaysia.

Ahmad Zaki⁶⁷ examined the duty of caregivers and parents in reporting of all forms of child abuse. He noted that this duty, which has become statutory, was developed by Henry Kempe in the 1960s as an essential component of child protection. Referring to section 27 of the Child Act 2001, this duty is upon medical officers, family members, and childcare providers. Unfortunately, these designated persons are often the abusers. The paper further examines the importance of temporary custody and powers of court for children in Malaysia.

Procedural Issues

Numerous policies (including the National Framework for Protecting Australia's Children 2009–2020,⁶⁸ research studies and expert commentary have noted that statutory responses are not sufficient or sustainable and are often unable to prevent

⁶⁶ Mahamad Naser bin Disa, "An Evaluation of the Implementation of Sharī'ah Law of Malaysia in Protecting the Rights of a Child", *Al-Itqan: Journal of Islamic Sciences and Comparative Studies*, vol. 2, no. 1 (2018): 5–20.

⁶⁷ Engku Ahmad Zaki bin Engku Alwi, "Care and Protection against Child Abuse: With Special Reference to Malaysia Child Act 2001", *Asian Social Science*, vol. 8, no. 1 (2012): 202.

⁶⁸ Brian Babington, "National Framework for Protecting Australia's Children: Perspectives on Progress and Challenges", *Family Matters*, no. 89 (2011): 11–20.

future harm.⁶⁹ Economic analyses show that attempting to remedy the effects of child abuse is more costly than preventing it in the first place.⁷⁰

This issue was reflected in the researcher's consultations, with some stakeholders noting that in current practice, diverse activities and targets are being identified as "primary prevention." For example, some services consider the prevention of further offending by a perpetrator as being a form of primary prevention. There were many approaches being called primary prevention when they could more accurately be classified as secondary or tertiary prevention. The aims of primary prevention (such as "changing social norms") were also considered to be too vague, which may suggest that underlying determinants for CSA are not well identified.⁷¹ This makes it difficult to see how "upstream" prevention efforts connect with a reduction in victimization.

Another practical issue is the difficulty in addressing perpetration within the child protection system. Statutorily, child protection systems have generally been focused on the safety of the child and the presence of risk and harm.⁷² Some expert stakeholders observed that: it could be difficult, when thinking about prevention, for child protection systems as a whole to consider the tactics, strategies, and motivations of perpetrators; focusing on perpetration highlights the deeply gendered nature of CSA perpetration, which was sometimes interpreted by practitioners as implying that "all men are child molesters"⁷³; those working with mothers in contact with statutory child protection systems may not be aware of the ways in which their ability to protect is

⁶⁹ Antonia Quadara, "Child Sexual Abuse Prevention Strategies for Population-Level Change: Challenges and Future Directions" in *Re-Visioning Public Health Approaches for Protecting Children*, edited by B. Lonne, D. Scott, D. Higgins, and T.I. Herrenkohl (Cham: Springer, 2019), 145-63.

⁷⁰ Mikton Christopher and Butchart Alexander, "Child Maltreatment Prevention: A Systematic Review of Reviews", *Bulletin of the World Health Organization*, vol. 87, no. 5 (2009): 353-61.

⁷¹ Daniel J. Whitaker et al., "Risk Factors for the Perpetration of Child Sexual Abuse: A Review and Meta-Analysis", *Child Abuse and Neglect*, vol. 32, no. 5 (2008): 529-48.

⁷² Susan A Lentz and Robert H Chaires, "Sexual Assault Statutes Targeting Authority & Power Imbalances: A Step Forward in Rape Law Reform", *Freedom Center J.*, vol. 3, no. 1 (2011).

⁷³ Quadara et al., "Conceptualising the,".

reduced by father's/men's tactics (particularly in situations where family violence is present) ; and there is still a lingering focus on "stranger danger" in CSA prevention efforts, despite research showing that the vast majority of CSA victims already know the offender.

This is reflected in the literature, with the majority of research undertaken on child sex offenders and perpetration located within criminology, socio-legal studies, and the offender-treatment literature, and is rarely connected back to child maltreatment or child protection.⁷⁴

There have been attempts to discuss evidential and procedural issues in CSA cases in Malaysia. Cooray et al.⁷⁵ examined the right approach in sentencing policies for child pornography and other sexual crimes against children. The paper appears to be among the few which discussed the efficacy of the Sexual offence Against Children Act 2017 but has not addressed the weaknesses of the enactment. With reference to decided cases, the paper discussed the principles of sentencing and the possibility of harsher sentencing by considering literal interpretation, public interest, and the plea entered by the accused. Nasimah et.al⁷⁶ examined fines as a form of punishment and its potential benefit for child victims. The paper has not focussed solely on CSA but in a general context which can be a beginning for restorative or reformatory justice in CSA cases.

⁷⁴ Katrine Zeuthen and Marie Hagelskjær, "Prevention of Child Sexual Abuse: Analysis and Discussion of the Field", *Journal of Child Sexual Abuse*, vol. 22, no. 6 (2013): 742–60.

⁷⁵ Cooray, Jamaluddin, and Tahir, "Violence and Sexual,".

⁷⁶ Nasimah Hussin, Majdah Zawawi, and Ramizah Wan Muhammad, "Should Fines Also Benefit Victims? An Evaluation of Fines as a Form of Punishment in Malaysia with Special Reference to Islamic Law", *Intellectual Discourse*, vol. 25, no. 1 (June 30, 2017): 187–202.

Megaswary and Hashvini⁷⁷ examined the corroboration rules and intellectual capacity of child witnesses in prosecuting child sexual offences and abuses in Malaysia under Sexual offence against Children Act 2017. The paper highlighted ambiguities and uncertainties which may result from the application of the Act based on section 118 of the Evidence Act 1950 and Section 17 of Sexual offences against Children Act 2017. The paper amplified the principle established in the case of ***Sidek bin Ludan v Public Prosecutor*** wherein the court addressed the competency of a child witness.

In a similar vein, Aminuddin and Salleh⁷⁸ examined the extent of conformity between the local and international legislation in relation to evidence given by a child witness during a criminal trial. The focus of the paper was on the United Nations Convention on the Right of the Child (UNCRC), which has been ratified by Malaysia, the Child Act 2001, and the Evidence of Child Witness Act 2007. The paper examined cases involving child sexual assault and the procedure for taking evidence and courtroom environment. However, the 2010 paper has not considered the Sexual offences against Children Act 2017.

In a study carried out in Australia, Tanya and Rae-Ann⁷⁹ examined the admissibility of the Victim Impact Statement (VIS) made by the victims and its impact on sentencing. The paper provided a context for VIS in CSA victims with respect to inconsistent facts, inflammatory materials, prediction of future harm and effect on extended family or distress from extended cross-examination, inferred psychological

⁷⁷ Mageswary Siva Subramaniam and Hashvini Rekha Pachappan, “Corroboration Rules in Malaysia: A Brief Review On The Impact Of The Sexual Offences Against Children Act 2017”, *CLJ Bulletin*, vol. 1, (2019): 1–14.

⁷⁸ Aminuddin Mustaffa and Salleh Kamaliah, “Evidence by Child in Criminal Proceedings in Malaysian Courts: A Study on Post Ratification of Convention of Rights of Child”, *Malaysian Current Law Journal*, vol. 6, (2010): 1–27.

⁷⁹ Tanya Skvortsova and Rae-Ann Khazma, “Victim Impact Statement: Admissability of Victim Impact Statements in the ACT”, *Ethos: Official Publication of the Law Society of the Australian Capital Territory*, no. 245 (2017): 26–31.

harm, harm not suffered because of the offence, and others. The paper concluded that the court should approach such statements with a degree of flexibility.

The basics of child witnesses' interviews in CSA cases were the focus of Tan and Noor Aziah.⁸⁰ Focus on the Sexual and Child Investigation Division (known as D11) of the Royal Malaysia Police, the paper highlighted the implementation of was Evidence of Child Witness Act 2007 which provides that the statement of child worthiness should be video recorded. Noted in the paper is the fact that only 20 percent of such videos have been tendered in court. The study interviewed ten current and former officers of D11 who revealed understaffing and lack of logistical support are the main challenges of D11.

Ahmad et al.⁸¹ examined the position of child testimony in sexual offences. The article admitted the challenges of the admissibility of child witnesses due to the lapse of time and reliability of such testimony. However, in sexual offences against children, the victim is the main witness. A unique feature of the paper is the consideration of Islamic law and civil law based on an analysis of the Evidence of Child Witness Act 2007, Child Act 2001, and the Shariah Evidence Laws of states in Malaysia. The paper has not considered judicial decisions and pronouncements on such testimonies.

1.5.4 Adequacy of Existing Law on Child Sexual Abuse in Malaysia

Some studies have examined the adequacy of laws to prevent and punish child sexual offenders. Before the introduction of the Sexual Offences Against Children Act 2017 (SOACA), various legislations such as the Penal Code, Film Censorship Act 2002, and

⁸⁰ Tan Geok Mooi and Noor Aziah Mohd Awal, "Interviewing Child Witnesses of Child Sexual Abuse Cases", *International Journal of Asian Social Science*, vol. 8, no. 7 (2018): 354–366.

⁸¹ Asmida Ahmad, Mohd. Nasran Mohamad, and Mohd. Al Adib Samuri, "The Position of Child Testimony in Sexual Offences in Shariah and Civil Legislation in Malaysia", *Asia Proceedings of Social Sciences*, vol. 6, no. 3 (2020): 222–225.

Communications and Multimedia Act 1998 were utilized to investigate cases of child sexual grooming (CSG). However, the legal framework related to child sexual abuse (CSA) was limited, with only a few provisions addressing specific aspects such as prostitution and child trafficking for sexual exploitation under Section 43 of the Child Act 2001 and Sections 14 & 15 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, respectively. These laws were deemed inadequate as they required direct evidence of sexual assault before prosecution could be proposed by the police. For instance, in a case heard at the Sepang Session Court, an offender was only charged with statutory rape despite evidence showing that the offender had groomed the child through social media applications prior to committing the offence. This limitation highlights the need for legislative reforms to address gaps in the legal framework concerning CSA, particularly in cases involving child grooming and exploitation.⁸²

SOACA 2017 is part of the legal framework aimed at protecting children from sexual abuse. It recognizes the legal rights of CSA victims and provides measures for their protection and redress. Mazlifah Mansoor et al., 2022⁸³ mentions that the SOACA 2017 enhances the legal process for seeking justice in CSA cases by providing special measures for investigation and prosecution. SOACA 2017 mandates reporting of CSA cases and empowers authorities to take necessary actions. It criminalizes the failure to report CSA and ensures that investigations are carried out promptly and effectively.

⁸² Izmi Izdiharuddin Che Jamaludin Mahmud et al., “The Analysis of Child Sexual Grooming Offences in Malaysia”, *CRELDA Journal*, no. 7 (2023): 86

⁸³ Mansoor, M. et al., “Legal Literacy in Accessing Justice for Child Sexual Abuse”, *Malaysian Journal of Social Sciences and Humanities (MJSSH)*, vol. 7, no. 9 (2022): 1-7.

The study conducted by Mooi & Awal, 2018⁸⁴ discusses how the SOACA 2017 impacts police investigation of child abuse cases, highlighting its provisions for protecting children from various forms of sexual abuse. SOACA 2017 also complements other legal aid and support services available to CSA victims. It ensures that victims have access to legal assistance and representation throughout the legal process. According to Mazlifah Mansoor et al., 2022⁸⁵, the Legal Aid (Amendment) Act 2017 provides legal counsel as a companion to CSA victims, which is activated upon lodging a police report. This underscores the importance of SOACA 2017 in facilitating access to legal aid for CSA victims.

Despite the provisions of SOACA 2017, challenges such as underreporting and barriers to accessing justice persist. The study by Mazlifah Mansoor et al., 2022⁸⁶ identifies barriers to accessing justice in CSA cases, including inadequate legal literacy and societal pressure. It emphasizes the need for education and awareness to overcome these barriers and ensure effective implementation of SOACA 2017.

Dr Choong Pui Yee⁸⁷ emphasizes the pressing need to strengthen preventive measures against child sexual abuse (CSA) and online child sexual exploitation and abuse (OCSEA) in Malaysia. The statistics presented underscore a troubling rise in child sexual abuse (CSA) and online child sexual exploitation and abuse (OCSEA) in Malaysia. Reported cases of CSA have shown a steady increase, with figures climbing from 46 in 2015 to 146 in 2019. Moreover, the Royal Malaysia Police recorded a disturbingly high number of sexual crime cases against children, with 1,721 cases

⁸⁴ Tan, G. M., & Noor, A. M. A. "A Case Study of Police Investigation of Child Abuse Cases", *Malayan law Journal*, vol. 3, (2018): 1-8

⁸⁵ Mansoor et al., "Legal Literacy,".

⁸⁶ Ibid.

⁸⁷ Choong Pui Yee, "Strengthening Preventive Measures against Child Sexual Abuse in Malaysia," Penang Institute, <<https://penanginstitute.org/publications/issues/strengthening-preventive-measures-against-child-sexual-abuse-in-malaysia/>> (accessed July, 2024)

reported in just the first six months of 2020. Similarly, the Ministry of Women and Community Development noted 2,040 child abuse cases in the initial four months of 2021, with 30% involving physical and sexual abuse. However, these figures likely underestimate the true scale of the issue, as many cases of CSA remain unreported.

In the realm of online safety, Malaysia faces significant challenges as well. The nation boasts one of the world's highest proportions of digital natives, with nearly 75% of its youth falling into this category. Alarming, a 2014 National Survey Report revealed that a substantial portion of children lacked the knowledge to protect themselves online, with a significant majority admitting to experiencing various forms of online harassment. Additionally, the Internet Users Survey 2020 conducted by the Malaysian Communications and Multimedia Commission (MCMC) showed a staggering 155% increase in internet usage among children aged five to 17 since 2016.

These statistics paint a stark picture of the growing threat posed by CSA and OCSEA in Malaysia and underscores the challenges faced in addressing CSA among irregular status children and the prevalence of Malaysia as a destination for sex trafficking. Regarding OCSEA, Dr Choong also outlines the growing threat posed by online platforms and the lack of adequate preventive mechanisms. Despite existing laws such as the Sexual Offences Against Children Act 2017 (SOACA), it can be identified that the limitations and challenges in enforcement, emphasizing the need for more effective measures to combat CSA and OCSEA. Additionally, it proposes policy recommendations, including strengthening child-friendly reporting mechanisms, enhancing digital literacy, increasing awareness campaigns, involving adolescents in policy discussions, enlarging the child protection workforce, and providing appropriate training for law enforcement agencies. These recommendations aim to address gaps in

existing measures and improve protection for children against CSA and OCSEA in Malaysia.

Further, SOACA 2017 in Malaysia addresses the interconnected emerging crimes of sexting, grooming, and meeting with a comprehensive legal framework⁸⁸. Regarding sexting, the Act prohibits the sharing of sexually explicit content with minors, aiming to protect them from exploitation and abuse facilitated through digital communication channels. Section 12 of the Act specifically addresses "sexually communicates with a child," encompassing a wide range of online behaviors aimed at exploiting minors sexually. Furthermore, the Act provides defenses for certain types of communication, such as those for educational, scientific, or medical purposes, reflecting a balanced approach to regulating online interactions involving minors.

Concerning grooming, the Act recognizes the insidious nature of online predators who establish trust with minors to facilitate sexual abuse. Section 13 criminalizes communication with a child with the intent to commit or facilitate the commission of any offense under the Act or any offense listed in the schedule. This provision acknowledges the importance of early intervention to prevent serious sexual offenses against children and holds offenders accountable for their predatory behavior.

Moreover, the Act addresses physical meetings following grooming, recognizing the escalation of online grooming into real-world encounters. Section 14 criminalizes meetings with children with the intent to commit or facilitate sexual offenses, providing a robust legal framework to prosecute offenders who attempt to exploit minors physically.

⁸⁸ The Sexual Offences Against Children Act 2017: Flaws in the Law [2018] 5 MLJ cxx

While the SOACA of 2017 represents a significant step forward in combating online sexual exploitation of children, there may be areas for improvement. For example, clarity on the minimum age of offenders and explicit provisions regarding the communication's intent could enhance the Act's effectiveness.

Moreover, SOACA 2017 alignment with the Malaysian Communications and Multimedia Content Code provides a complementary framework for regulating online content involving minors. However, the subjective nature of terms such as "indecent" and "obscene" underscores the need for clear guidelines and standards to prevent arbitrary enforcement and ensure the protection of freedom of expression.

Hence, while the SOACA of 2017 represents a significant step forward in combating child pornography and online sexual exploitation of children in Malaysia, areas such as defining sexually explicit conduct, addressing nudity, and clarifying terms like sadistic or masochistic abuse may require further attention to enhance the Act's adequacy and effectiveness.

Next, the introduction of mandatory reporting laws concerning offences against children in Malaysia⁸⁹, as outlined in Section 19 of the Sexual Offences Against Children Act (SOACA) of 2017, represents a significant step forward in addressing child sexual exploitation and ensuring the protection of minors. By imposing a legal duty on all individuals to report information regarding the commission of sexual offences against children to the police, the law acknowledges the collective responsibility of society in safeguarding children's welfare. However, there are several considerations regarding the adequacy and effectiveness of this provision, first, the law should provide clear guidelines on who is obligated to report and under what

⁸⁹ Ibid.

circumstances. For example, there may be ambiguity regarding whether minors themselves are required to report instances of abuse. Clarifying the scope of reporting obligations ensures consistency and avoids confusion. Second, the law should specify the basis or threshold upon which individuals are required to make a report. Clear criteria, such as having knowledge or reasonable belief of a sexual offence, help individuals understand their obligations and reduce the risk of arbitrary enforcement.

Third, establishing a timeframe within which reports must be made enhances the effectiveness of law enforcement efforts. Immediate or prompt reporting can facilitate timely intervention and prevent further harm to victims. Fourth, providing immunity or protection from civil or criminal liability for individuals who report in good faith encourages reporting and prevents retaliation against whistleblowers. This safeguard is essential for fostering a culture of accountability and ensuring cooperation from the community. Fifth, recognizing that some individuals may face barriers or risks in reporting, such as fear of retribution or concern for personal safety, the law should allow for reasonable justifications for non-disclosure. This ensures that reporting obligations are balanced with considerations of individual safety and well-being. Overall, while the mandatory reporting provision in the SOACA of 2017 is a significant legislative measure, addressing these considerations can further enhance its effectiveness and ensure that it serves its intended purpose of protecting children from sexual exploitation.

Next, Sidhu and Shair⁹⁰ highlighted the introduction of a Victim Impact Statement or VIS as part of criminal procedure in Malaysian courts. The paper emphasized the extreme focus on two voices in criminal matters and the exclusion of

⁹⁰ B S Sidhu and M Shair Mohamed, "Third Voice in a Criminal Justice System: The Voice of the Victim through Victim Impact Statement", *Current Law Journal*, vol. 6, (2015): 1–12.

the third voice i.e., the victim and their families, which include child abusers. However, the author concluded that VISs were not incorporated into any child protection legislation, including the Child Act 2001, and there is no plausible reason for excluding child victims. The paper provided some guidance on the application of VIS for child victims and parents/guardians.

On the need for mandatory reporting and review capacity of child abuse cases in Malaysia, Bala, and Azlinda⁹¹ discussed the National Child Protection Policy (CPP) standard practice for all social workers, NGOs, and stakeholders in Malaysia. The paper emphasized the similarities in the policy along with UNCRC, the Child Act 2001 and Penal Code but not on the gaps in the existing law at that time.

Tan and Noor Aziah⁹² emphasized the need to strengthen the Evidence of Child Witness Act 2007 and the employment of more women who understand other dialects to assist in the video-recorded witness statement and interviews of CSA victims. Some of the issues affecting the application of the law relating to video recorded evidence of the child is insufficient against the accused, request by the complainant to withdraw the case and guilty plea by the accused.

The foregoing literature shows that there is a gap in studies showing the adequacy of law in relation to existing law i.e., the Sexual Offences Against Children Act 2017 (SOACA). In addition, the legislation which is intended to protect children is often left out in the literature due to its non-recognition of offenses such as rape, aggravated assault, and penetrative assault involving children.

⁹¹ Bala Raju Nikku and Azlinda Azman, "Breaking the Cycle of Child Abuse in Malaysia: Linking Mandatory Reporting, Service Delivery Monitoring and Review Capacity Mechanisms", *The Malaysian Journal of Social Administration*, vol. 10, no. 1 (2014): 64–85.

⁹² Mooi and Awal, "Interviewing Child,".

Frase argued that it is necessary to adopt comparative law methods to reform or assess the effectiveness of legislation in two countries.⁹³ Hence, this study intends to add to the literature in criminal justice jurisprudence, focusing on CSA in Malaysia and India.

The existing law in Malaysia has not provided for an adequate support system such as long-term help and prevention of re-victimization.⁹⁴ The author further posits that cooperative intervention and trust are required between law officers and helpful professionals in the prevention and not necessarily incarceration of offenders.⁹⁵ In summary, the SOACA 2017 represents a significant step forward in addressing child sexual abuse in Malaysia, but further efforts are required to ensure its effective implementation and to overcome existing challenges in accessing justice for CSA victims.

1.6 SIGNIFICANCE OF THE STUDY

This study is significant as it addresses a pressing societal issue affecting children who are the most vulnerable in society. The need for an effective law to protect children from sexual offences cannot be overemphasised. The current law though unique from the Penal Code, this study identified the gaps in the law on sexual offences against children in Malaysia. The Sexual Offences against Children Act 2017, or SOACA, was considered to be a landmark statute as it creates a special regime for child protection

⁹³ Richard S. Frase, "Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find out, and Why Should We Care?", *California Law Review*, vol. 78, no. 3 (1990): 539.

⁹⁴ Sheith Khidhir Bin Abu Bakar, "Child Sex Victims Need Long-Term Help, NGO Says," *Free Malaysia Today*, 22 February, 2018, 1-2, <https://www.freemalaysiatoday.com/category/nation/2018/02/22/child-sex-victims-need-long-term-help-ngo-says/>.

⁹⁵ Suzanne, "Handbook of clinical,".

against sexual predators. However, this study significantly examined the strength and weaknesses of the law.

Policymakers and members of parliament will be able to clearly understand the intricacies of existing laws and the essential amendments required for contemporary relevance and societal benefit. By bridging the gap between the detailed provisions of the law and the broader objectives of governance, these studies aim to drive forward legislative improvements that resonate with the evolving needs of legislative amendment of the current laws and values of our community.

Enforcement officers and the police will find this study significant in enhancing the understanding and efficacy of investigations into CSA cases. This research aims to shed light on the multifaceted challenges faced by enforcement officers and the police during such investigations. Through in-depth analysis and actionable insights, this research endeavours to provide valuable resources that can guide these professionals towards more effective and victim-centred investigative practices.

Similarly, the prosecution officer will be able to uphold the highest standards of judicial practice by operating meticulously within established guidelines and Standard Operating Procedures (SOPs) during trials.

Drawing from a comprehensive comparative analysis, this study underscores the paramount importance of establishing clear judicial precedents for Child Sexual Abuse (CSA) cases. By examining and integrating progressive reforms adopted by countries like India, the study seeks to enhance the depth, understanding, and effectiveness of the judiciary in addressing CSA, ensuring that justice is both swift and appropriate.

This research is dedicated to amplifying public understanding and awareness of the special Act on Child Sexual Abuse (CSA) in Malaysia. Recognizing the pivotal role that informed citizens play in safeguarding children's rights, the study delves into the

nuances of the Act, making it accessible and comprehensible to the general populace. Through this endeavour, we aim to foster a proactive community committed to preventing, reporting, and combating CSA.

Specifically, this study is important to lawyers, judges, prosecutors, the police, and parliamentarians on the challenges and adequacy of the existing law on the protection of children against sexual offences. In considering amendments, the output of this research will guide parliamentarians, lawyers in analysing their cases, and parents on the extent of legal protection against CSA in Malaysia. The study would be significant in advancing the knowledge of CSA in Malaysia.

1.7 SCOPE AND LIMITATION OF THE STUDY

This study seeks to comparatively consider the law on CSA and its effectiveness within the criminal justice system in Malaysia and India. Due to the interdisciplinary nature of the phenomenon of sexual crime and abuse, examine the role of legislation in the prevention, management, and prosecution of cases.

The nature of sexual abuse contemplated in this study is any sexual contact or non-contact activities involving a child as defined under the law in Malaysian or India. The study acknowledges that the offender in sexual offences against children may be a child. However, references made to offenders accused of sexual crime against children in this study contemplate where the victim is a child. This study will also cover aspects of Islamic legal jurisprudence on child sexual crime and some provisions which are deemed necessary to curb the menace.

This study does not intend to explore whether child marriage is prohibited under the Sexual Offences Against Children Act 2017. Other legislation affecting children will be discussed where necessary. Such legislations include Child Act 2001, Criminal

Procedure Code (Act 593), the Federal Constitution, Child Care Centre Act 1984, the Sexual Offences Against Children Act 2017, and the Penal Code (Act 574).

The main legislation concerning the protection of children from abuse and exploitation in Malaysia is the Sexual Offences Against Children Act (SOACA) 2017. This act serves as the primary legal framework for addressing child sexual abuse and related offenses. However, other relevant legislation, such as the Child Act 2001 (Act 611), the Penal Code 1936 (Act 574), the Printing Presses and Publications Act 1984 (Act 301), the Film Censorship Act 2002 (Act 620), and the Communications and Multimedia Act 1998 (Act 588), will be referred to whenever necessary to provide additional context and specificity. Reference to the Child Act will be made whenever necessary to clarify legal provisions related to the exploitation of children, including child pornography.

One of the constraints is that in the course of the data collection, the exercise is affected by the willingness of the participant of the interview, for instance, in getting the targeted participants, namely the victim and the family members of the victim, to consent for the interview exercise due to various personal concerns such as sensitivity owing to the nature of this research in which victim and the family members of the victim have not to be part of the participant of this research. Time limitations also crucially affect the effort of securing appointment sessions with high-value participants/participants, for instance, the serving judge, the Ministry of Women, Family and Community Development representative, senior police officers, and the deputy public prosecutors. Similarly, appointments for exclusive interview sessions with the participants are tedious and difficult since they are already occupied with their daily official duties. Nevertheless, the selection of the participants was meticulously

made to serve the ultimate purpose of the research and fuelled the finding with balanced, encompassing, and representative inputs from various angles of the law.

The researcher also finds that the research question at hand encompasses intricate and confidential concerns, particularly regarding the legal standing of the Participant. As a measure of discretion and in adherence to professional standards, the identity of the Participant has been withheld. Furthermore, while ensuring the privacy of all involved, only the professional designation of the participants will be elucidated in the outcomes of the interview.

Since the research is comparing Malaysia with India, the researcher also acknowledges that this research is also limited by resources for the inability to visit India and conduct more extensive research with subject matter experts in India due to financial and time constraints. However, despite this limitation, the research can still explore and analyze the theoretical aspects of India's legal framework through research conducted on academic journals, articles, and case studies. By examining the principles, methodologies, and outcomes of Indian legislation related to child protection and sexual offenses, the research can gain valuable insights and ideas for enhancing the current laws and policies. While direct observation and interaction may not be feasible, thorough research and analysis can still contribute to informed decision-making and the improvement of the research's legal framework.

Limitation of resources also occurs in the availability of Malaysian academic papers as the existing reference specifically discussing Act 792 is very limited. Regardless of that, the researcher manages to come across several high-quality academic papers in completing this research.

1.8 METHODOLOGY OF THE RESEARCH

This research will adopt doctrinal and non-doctrinal methods. The doctrinal method will be used to expound concepts such as CSA, its development management, and its prevalence. This is aimed at understanding the evolution, dimensions, and perspectives of CSA and its societal contexts. Semi-structured interviews of judicial officers, and investigations will be conducted. As part of the criminal justice system, the doctrinal method also seeks to examine the justifications for designing distinct legislation for CSA in certain countries, such as India and Malaysia, through the POCSO⁹⁶ and SOACA⁹⁷, respectively.

At the very outset, the methods applied by the researcher are based on conventional research methodology, which is based on theoretical legal research by adopting library-based research. The researcher relies on information available in libraries, archives, or other databases.⁹⁸ Theoretical legal research is employed for exploring, describing, explaining, examining, and analysing the facts, principles, provisions, concepts, theories, or the working of the law on CSA.⁹⁹ The library-based research involves the step-by-step process covering collection data on the historical and present legal frameworks on the legislations and CSA in Malaysia.

The written primary sources in this research are based on statutes relevant to the CSA and case-law reports covering both local and international. Special reference would also be made to other countries, such as but not limited to India and the United States. With the special law that has been newly enacted under SOACA, extrinsic references should be made to other countries' cases and legal writings who has already

⁹⁶ Protection of Children from Sexual Offences Act (POCSO 2012).

⁹⁷ Sexual Offences Against Children Act 2017.

⁹⁸ Anwarul Yaqin, "Legal Research and Writing", *Malayan Law Journal*, (2007): 9.

⁹⁹ Anwarul Yaqin, "Framing a Research Proposal: Some Essentials" (paper presentation, Seminar Kemantapan Akademik, Bangi, (2003).

long-established special laws on children in their country. The importance of studying the cases and the court's decision is that the law starts with legal statutes and ends with the court's decision that interprets them.¹⁰⁰ The outcome of the research is based on the analysis of the legal provision and decided cases.¹⁰¹

In the researcher's writing, data is collected from articles published in referred journals, publications, textbooks, International Declarations and Conventions on Child Sexual Crime law, and seminar papers relevant to the subject matter of the research. It is pertinent to note that this is pure legal research in which the research has been conducted based on qualitative research. From a broader perspective, it can be defined as a type of empirical research based on a social phenomenon or human problem, testing a theory consisting of variables that are measured based on the number of cases and analyzed with statistics in order to determine if the theory explains or predicts phenomena of interest.¹⁰²

1.8.1 Doctrinal Approach

There are various approaches applied by the researcher to achieve an understanding of the relevant concepts in CSA. These approaches include the historical approach, comparative approach, jurisprudential approach, and traditional legal approach. The doctrinal approach is mainly library-based or library research.

Library research is the most common method to collect data necessary for legal research. A substantial amount of information relating to this research was obtained

¹⁰⁰ Suzanne McKie, *Legal Research: How to Find and Understand the Law* (London: Routledge, 2012), 312

¹⁰¹ David Walker, *The Oxford Companion to Law* (London: Oxford, 1980), 1366

¹⁰² Kaya Yilmaz, "Comparison of Quantitative and Qualitative Research Traditions: Epistemological, Theoretical, and Methodological Differences", *European Journal of Education*, vol. 48, no. 2 (2013): 311–325.

from library visits. The researcher obtained data for analysis on the printed documents and records. The data is mainly from statutes, case-law reports, textbooks, articles from refereed journals, seminar papers, and public and international documents on the relevant subject matter, mainly at the library. Other relevant materials from newspaper cuttings and websites are also referred to.

The advantage of library research is it becomes a conscientious study of an issue, in this case, the CSA. This is also the most useful form of inquiry designed to discover answers to all the research questions.¹⁰³ This technique ensures the researcher gets the necessary data for thesis writing within the stipulated period. Since the data collected are the outcome of the work of others, the data collected are reliable data. A common disadvantage of Library data is the fact that these are mainly secondary sources.

Table 1.1 List of libraries visited by the researcher

1	International Islamic University Malaysia Library.
2	University Malaya Law Library
3	Law Faculty Library, University Kebangsaan Malaysia.
4	Universiti Utara Malaysia, Library, Sintok, Kedah, Malaysia.
5	National Library.

In this research, the researcher utilized secondary sources obtained from online databases, particularly focusing on the IIUM (International Islamic University Malaysia) online databases. These databases provide access to a wide range of scholarly

¹⁰³ Mark L Dantzker and Ronald D Hunter, *Research Methods for Criminology and Criminal Justice: A Primer* (United States of America: Jones & Bartlett Learning, 2006), 9.

materials, including academic journals, books, and other resources pertinent to the researcher's field of study.

a) HeinOnline

HeinOnline databases was used to research on the area of legal materials such as reported cases, statutes, government regulation, academic law reviews and commercially produced law journals with using the method of subject-specific databases for child sexual abuse materials.

b) JSTOR

Jstor database was used to research on the area of supporting research and teaching in the humanities, social sciences, and sciences. Where it would use methods of multidisciplinary and discipline-specific databases for child sexual abuse contents.

c) LawNet

LawNet database was used to research on the area of Malaysian Law using the method of the authoritative text of the Laws of Malaysia.

d) Lexis Advance Malaysia

Lexis Advance Malaysia was used to research on the area of both Malaysian and Indian Law, where this includes cases, statutes, analytical materials and briefs.

e) Oxford Journals

Oxford Journals was used to research law journals on child sexual assault in both Malaysia and India

f) ProQuest Dissertations and Theses

ProQuest Dissertations and Theses was used to research on the area of dissertations programs with using the method of subject specific databases for child sexual abuse

g) Wiley Online Library

Wiley Online Library was used to research on the area of law and criminology

h) CLJ

CLJ was used to research on the area of cases and law journals regarding POCSO and past child sexual assault in India

Historical approach

The primary approach discussed by the researcher is the historical approach. This approach is for the readers to understand the historical background of child sexual abuse legislation and to have a better grasp of the legal issues and the law that need to be comprehended in conducting the research. The description of the historical development of sexual abuse legislation in Malaysia provides an overview of how and why the law developed as such and what are the effects of the law's evolution to the society at large.¹⁰⁴ A legal research in order to be comprehensive is done systematically to ensure that the researcher achieves the research objectives.¹⁰⁵ The research also seeks to find an explanation on how society reacts to CSA.

Comparative Approach and Justification for Indian Law.

The second approach is the comparative approach. This approach is the best approach to analysing a legal system.¹⁰⁶ This approach seeks to compare Malaysia's law with those applicable in other countries. For the purpose of this study, the CSA law in India i.e., POCSO, will be compared with SOACA. The main objective of applying the comparative approach is to examine and benchmark the law in Malaysia with Indian Law.¹⁰⁷

There are several justifications for choosing Indian legislation in this research rather than other countries such as the United Kingdom, Australia, or other common law countries. The justifications are mainly based on similar legal history and criminal

¹⁰⁴ Anwarul, "Framing a Research,".

¹⁰⁵ Mahdi Zahraa, *Research Methods for Law Postgraduate Overseas Students* (Glasgow: Glasgow Caledonian University, 1998), 17.

¹⁰⁶ Pierre Lepaulle, "Function of Comparative Law", *Harv. L. Rev.*, vol. 35, (1921), 838.

¹⁰⁷ Jujun S Suriasumantri, *Ilmu Dalam Perspektif* (Jakarta: Yayasan Obor Indonesia, 1999), 170.

law enactments between Malaysia and India. They include the common law system, written law, the hierarchy of courts, punishment and evidence, and procedural laws.

Indian and Malaysian criminal law share several similarities, primarily due to the shared colonial history under British rule. This shared history has led to both nations inheriting aspects of the English Common Law system, which have since evolved in response to each nation's unique societal and political needs. Both countries rely heavily on precedents that have application persuasively in other jurisdictions. Unlike the UK, both countries have written constitutions and extensive penal codes, with India adhering to the Indian Penal Code (IPC) of 1860 and Malaysia to the Penal Code (Act 574), which are considered to be verbatim in several provisions. Their judicial systems are tiered, consisting of lower courts, intermediate appellate courts, and an apex court, with the highest court's decisions serving as binding precedents for lower courts. The punishments meted out in both countries can include imprisonment, fines, whipping, forfeiture of property, and in some cases, capital punishment. India follows the Criminal Procedure Code (CrPC), while Malaysia adheres to the Criminal Procedure Code (Act 593). Laws in both nations also govern the admissibility of evidence in court, with the Indian Evidence Act of 1872 mirroring the structure and content of the Malaysian Evidence Act of 1950. Both countries' criminal law systems have similar foundational principles, terminologies, and legal doctrines, reflecting their shared colonial heritage. However, while there are these similarities, it's essential to acknowledge the significant differences between the two systems, driven by the two countries' diverse cultural, religious, historical, and political backgrounds.

The Indian statute on CSA is the Protection of Children from Sexual Offenses (POCSO) Act, 2012. It is comprehensive legislation that deals with all aspects of CSA. The widespread cases of CSA that were being reported throughout India have prompted

the enactment of this law. The POCSO Act is a crucial piece of legislation that offers a solid framework for children's safety. The law has gone through several amendments and interpretations since its enactment in 2012.

Comprehensiveness and Stringent Approach

The choice of India as the focus stems from its comprehensive and stringent approach in dealing with child sexual abuse cases, exemplified by the handling of the case of **Sankar Versus State of Tamil Nadu, Rep. by Inspector of Police, All Women Police Station, Panruti, Cuddalore District [2021]**¹⁰⁸. In this matter, a thorough examination of evidence, both oral and documentary, led the Sessions Judge to conclude that the appellant had violated Section 6 of the POCSO Act. Consequently, the appellant received a 20-year prison sentence and a Rs. 2,00,000 fine, with an alternative of serving five years in state prison if the fine was not paid.

Minimum punishment

Further, India was also chosen as an example to illustrate the minimum sentencing standards outlined in the POCSO Act. This was evidenced in the case of **K. Muthu Mariappan v State rep by the Inspector of Police, Arumuganeri Police Station, Tuticorin District (2014)**¹⁰⁹, where it was established that despite any mitigating circumstances, courts are obligated to adhere to the provisions of Section 4 of the POCSO Act, which mandates a minimum punishment of seven years' imprisonment

¹⁰⁸ Sankar Versus State of Tamil Nadu, Rep. by Inspector of Police, All Women Police Station, Panruti, Cuddalore District [2021] 2 MLJ (CRL) 36.

¹⁰⁹ K.Muthu Versus Staterep by the Inspector of Police, Police Crime No.64 of 2014 [2015] 3 MLJ (CRL) 429.

along with a fine. Consequently, the Trial Court is bound to impose the stipulated punishment as per the statute.

However, in a more recent case in 2019, the court has imposed harsher punishment and this can be seen in the case of **In the case of Udhyanithi v State through the Inspector of Police, Budalur Police Station, Thanjavur District (2019)¹¹⁰**, it was determined that Section 6 of the POCSO Act mandates a minimum punishment for severe penetration-based sexual assault. Specifically, individuals found guilty of aggravated penetrative sexual assault are subject to a minimum sentence of ten years in prison, with the possibility of a life sentence, in addition to a fine.

This provision clearly stipulates that a minimum sentence of ten years' rigorous imprisonment, with the potential for life imprisonment, is appropriate for such offenses. Consequently, the Court is bound by this requirement and cannot impose a sentence shorter than ten years. As a result, the trial court's conviction was upheld, but the sentence was modified from life imprisonment to ten years of rigorous imprisonment. Additionally, a fine of Rs. 1,000 was imposed, with a default option of three months' simple imprisonment. Furthermore, the appellant was ordered to pay compensation of Rs. 2,00,000 to the victim girl, which would be deposited with the court and made available for withdrawal by the victim after she reaches 21 years of age.

Child Friendly

Furthermore, the conclusions drawn from this research align with India's efforts to implement a child-friendly legal process. As demonstrated in the case of **Eera Through**

¹¹⁰ Udhyanithi Versus State through the Inspector of Police, Budalur Police Station, Thanjavur District (In Crime No. 1172015) [2019] 4 MLJ (CRL) 641.

Dr. Manjula Krippendorf v State (Govt. of NCT of Delhi) and Another (2017)¹¹¹, the POCSO Act is designed to address crimes against minors, particularly those involving sexual assault, harassment, and abuse, by treating minors as a distinct class and affording them special protections. The primary objective is to safeguard the interests and well-being of children throughout the legal proceedings, thereby ensuring a process that is sensitive and accommodating to their needs. This approach distinctly differentiates between adults and children, emphasizing the importance of a child-friendly and supportive environment within the legal system.

Further, the necessity of ensuring a child-friendly legal process is underscored in the case of **Re Alarming Rise in the Number of Reported Child Rape Incidents (2020)**¹¹² where it emphasizes the importance of assigning Public Prosecutors specifically to POCSO cases, highlighting the critical need for these prosecutors to undergo specialized training in handling juvenile witnesses and victims. Understanding children's psychology and demonstrating compassion towards them is deemed essential, especially when they are compelled to recount traumatic experiences of sexual abuse.

The role of Public Prosecutors in POCSO cases is described as highly demanding, requiring meticulous attention to detail and tact. Thus, besides the appointment of special public prosecutors, there's an urgent requirement for comprehensive training programs to equip them with the necessary skills to address various legal and non-legal issues that may arise during proceedings. These issues may encompass psychological, health-related, or other aspects beyond typical legal matters.

To meet these needs, the President has mandated all states to appoint exclusive public prosecutors for courts dedicated to POCSO cases. Additionally, Chief Justices

¹¹¹ Eera Through Dr. Manjula Krippendorf Versus State (Govt. of NCT of Delhi) and Another [2017] 3 MLJ (CRL) 452.

¹¹² In Re Alarming Rise in the Number of Reported Child Rape Incidents [2020] 1 MLJ (CRL) 524.

are urged to establish specialized training programs covering legal procedures, child behavior, psychology, and health education at the Judicial Academy. Moreover, the Director of the National Judicial Academy is tasked with developing a training program for master trainers who will then impart training in state-specific judicial academies. While the National Judicial Academy may not be able to directly train every Special Public Prosecutor, they can organize expert trainers who can travel to provide instruction, ensuring consistency and quality across different regions.

Categorisation of Sex Offenders 2020

The rationale behind selecting India also includes its systematic categorization of sex offenders, aiding the prosecution in determining the category of offenses committed by perpetrators. As highlighted in the case of **State Rep. by The Inspector of Police, Keeranur and Another v Danish Patel and Another (2022)**¹¹³, the POCSO Act serves two primary objectives which are to punish individuals who perpetrate crimes against children and to shield minors from sexual offenses. The act categorizes five distinct types of sexual offenses against minors, listed below in descending order of severity:

- (i) Aggravated penetrative sexual assault,
- (ii) Penetrative sexual assault,
- (iii) Aggravated sexual assault,
- (iv) Sexual assault, and
- (v) Sexual harassment.

¹¹³ State Rep. by The Inspector of Police, Keeranur and Another Versus Danish Patel and Another [2022] 2 MLJ (CRL) 305.

This systematic classification assists in assessing the gravity of the offense committed and enables appropriate legal action to be taken against offenders based on the severity of their actions.

Strict Law Harsher Punishment and Additional provisions

Further, India has also implemented stringent laws and harsher punishments, along with additional provisions, to address the offense of child sexual abuse, which aids the researcher in the research findings. As exemplified in the case of **Shatrughna Baban Meshram v State of Maharashtra (2021)**¹¹⁴, each case is examined individually based on its unique factual circumstances. It was determined that while the death penalty might be an option, it should only be considered when a stricter or higher standard is met. In cases involving circumstantial evidence, such as in **Kalu Khan v State of Rajasthan**, an even higher or stricter standard is required to impose the death penalty. Therefore, any strategy employed in cases involving the death penalty must adhere to the guidelines provided, and the current issue must be assessed within the framework of those guidelines.

Funding

Moreover, the case of **Sabari @ Sabarinathan @ Sabarivasan v Inspector of Police, Belukurichi Police Station, Namakkal District and Others (2019)**¹¹⁵ underscores the significance of allocating funds effectively in addressing cases of child sexual abuse, providing a potential step for Malaysia to follow. In the case, it was noted that the Commission's inability to finance awareness campaigns related to the POCSO Act led

¹¹⁴ Shatrughna Baban Meshram Versus State of Maharashtra [2021] 1 MLJ (CRL) 38.

¹¹⁵ Sabari @ Sabarinathan @ Sabarivasan Versus Inspector of Police, Belukurichi Police Station, Namakkal District and Others [2019] 3 MLJ (CRL) 110.

to a significant shortage of resources. Consequently, the court instructed the relevant authorities to ensure sufficient funding allocation and approval of staff positions to fortify the Commission. Recognizing that the protection of children is paramount for future generations' well-being, the court emphasized the necessity for the government to provide adequate manpower and financial resources to strengthen the Commission, ensure children's safety, and facilitate efficient implementation of the POCSO Act. Therefore, Malaysia can potentially adopt similar measures to prioritize funding and resource allocation towards initiatives aimed at combating child sexual abuse, safeguarding children's rights, and promoting public awareness of relevant laws and support services.

Conclusion

In conclusion, the reasoning of choosing India is in line with researcher's recommendations in Chapter 6 of the thesis where this is stemmed from the analysis of various cases, including those cited, regarding the handling of child sexual abuse cases.

The researcher has proposed legislative amendments, drawing from insights such as those found in **Sabari @ Sabarinathan @ Sabarivasan v Inspector of Police (supra)**, which underscored the importance of adequate funding and resources for implementing laws like the POCSO Act. Capacity building within relevant agencies, as suggested by cases like **Shatrughna Baban Meshram v State of Maharashtra (supra)**, might have been emphasized to ensure law enforcement officers and prosecutors are equipped with the necessary skills and knowledge. Recommendations may have also focused on awareness and education initiatives, akin to those advocated in **In Re Alarming Rise in the Number of Reported Child Rape Incidents (supra)**, to raise public awareness about child sexual abuse and relevant legal protections.

Furthermore, the researcher likely stressed the need for adequate resource allocation, as evidenced by cases like **Sabari @ Sabarinathan @ Sabarivasan v Inspector of Police (supra)**, advocating for increased funding for victim support services and bolstering the capacity of governmental agencies and non-profit organizations dedicated to combating child sexual abuse.

Further, it is important to note that the Protection of Children from Sexual Offences (POCSO) Act, 2012, stands as a comprehensive legislative measure designed to address all facets of Child Sexual Abuse (CSA) in India. Enacted in response to the alarming prevalence of CSA cases across the country, this law serves as a crucial framework for safeguarding children. Since it has been enacted, the POCSO Act has undergone various amendments and interpretations to enhance its effectiveness.

Despite its enactment, the reported cases of child sexual abuse have remained significant, with approximately 150,000 cases reported by 2019. However, the efficacy of India's efforts in reducing such cases can be assessed through judicial rulings. Notable initiatives undertaken in recent years include endeavours to combat cybercrime against women and children, along with the establishment of fast-track courts to expedite legal proceedings.

Additionally, the 2019 amendment to the Protection of Children from Sexual Offences Bill introduced stricter penalties for sexual offenses perpetrated against minors, signalling a concerted effort to address this grave societal issue.

The recent amendment to the Protection of Children from Sexual Offences (POCSO) Act in 2019 has had a notable impact on judicial rulings, as evidenced by the case of **State Rep. by The Inspector of Police, Keeranur and Another v Danish**

Patel and Another (2022)¹¹⁶. This amendment introduced stricter penalties for sexual offenses committed against minors, reflecting the Indian government's commitment to combatting child sexual abuse effectively. In light of this amendment, the court in the mentioned case imposed a sentence of Rigorous Imprisonment for 20 years. This signifies a significant departure from previous sentencing practices and underscores the judiciary's response to the heightened severity of such crimes. By imposing a more severe punishment, the court sends a strong message regarding the gravity of offenses against children and emphasizes the importance of prioritizing their safety and well-being. Additionally, this judgment reflects the evolving legal landscape surrounding child sexual abuse in India, with amendments to legislation playing a crucial role in shaping judicial outcomes and ensuring justice for victims.

Overall, the 2019 amendment to the POCSO Act has had a tangible impact on court judgments, leading to harsher sentences for offenders and demonstrating the government's commitment to protecting vulnerable children from harm.

Jurisprudential and philosophical approach

The third approach is the jurisprudential or philosophical approach. This approach ensures that the research will maintain the necessary standard as required from a PhD thesis. The philosophical approach helps us to appreciate better the legal theories and their application to legislative analysis. The appropriateness of a particular legal provision is also based on the philosophy governing a particular subject matter of law. In this research, the researcher examines whether or not the existing law corresponds

¹¹⁶ State Rep. by The Inspector of Police, Keeranur and Another Versus Danish Patel and Another [2022] 2 MLJ (CRL) 305.

with the philosophy governing child sexual abuse and people who are involved in the said offences.

Traditional Legal Approach

The fourth approach is the traditional legal approach. Traditional legal approach, which is also known as pure legalistic analysis. The researcher analyses the information based on the relevant statutory provisions and case laws pertaining to the CSA. It is a line-by-line analysis of the relevant provisions provided, among others but not limited to the Federal Constitution, the Penal Code, the Child Act 1992, the Sexual Offences Against Children Act 2017, and the Criminal Procedure Code.

1.8.2 Qualitative Research

The study intends to examine the legal framework of child sexual abuse legislation governing child sexual criminals and the extent the legal provisions are applied by the main authorities, relevant institutions, and the judiciary. The research employed a qualitative approach that is important and highly rewarding as it engages us with things that matter in ways that matter.¹¹⁷ The distinction between qualitative research and quantitative research is the distinction between non-numerical and numerical data.¹¹⁸

Most qualitative-style researchers examine qualitative-type data.¹¹⁹ The researcher employed this approach because of its various advantages. It enabled the study to explore the greater detailed information that seemed to convey a greater

¹¹⁷ Jennifer Mason, "Qualitative Researching", *Qualitative Researching*, vol. 00, no. 00 (2017): 138

¹¹⁸ Michael G Maxfield and Earl R Babbie, *Research Methods for Criminal Justice and Criminology* (Cengage Learning, 2014). 131

¹¹⁹ W L Neuman, "Social Research Methods: Qualitative and Quantitative Approaches., 5th Edn.(Allyn & Bacon: Boston)," 2003.

richness of meaning than quantitative data.¹²⁰ In undertaking this comprehensive research, the researcher engaged directly with relevant enforcement bodies, obtaining firsthand insights into the application of the legal provisions. This immersive approach not only highlighted the challenges these entities face in enforcing the law but also provided invaluable perspectives on the potential weaknesses of existing legal provisions. Rooted in these findings, the research seeks to propose informed, pragmatic solutions to enhance the efficacy and applicability of the law.

The qualitative research approach constructs social reality and provides meaning to the cultural meaning.¹²¹ It allows the researcher to study the selected issues in depth, detail, and openness. It focuses on interactive processes and events.¹²² Qualitative research helps the researcher to focus on an individual's lived experience, understand the relevant processes and explain poorly understood phenomena.¹²³

The disadvantages of qualitative research are that certain information may not be measured properly as they are not quantifiable, there may be issues of reliability and validity as that researcher may have her own bias and perception and the research area is very limited.¹²⁴ Qualitative research is also more difficult to be analyzed as the researcher may have misinterpreted the data collected.¹²⁵

For this research, the researcher collected the data by applying two important methods of field research data collection and in-depth interviews. Field research is very important in conducting qualitative research, especially if the researcher wants to gather

¹²⁰ Maxfield and Babbie, "Research Methods,".

¹²¹ Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 5th ed. (United Kingdom: Allyn & Bacon: Boston), 488

¹²² Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (India: SAGE Publications inc, 1990), 227.

¹²³ 219

¹²⁴ Neuman, "Social Research,".

¹²⁵ Maxfield and Babbie, "Research Methods,".

data through firsthand observation of the subject matter of research.¹²⁶ Field research is important to observe the people studied communicate in their natural settings.¹²⁷ This research applies two data collection methods: library research and semi-structured interviews.

Qualitative research is grounded in assumptions, a particular worldview, and often employs theoretical frameworks to investigate research problems centered on understanding the meanings individuals or groups attribute to social or human issues. Qualitative researchers adopt an emergent approach to inquiry, collecting data in natural settings that are sensitive to the people and environments being studied. Data analysis in qualitative research is typically inductive, focusing on identifying patterns or themes within the collected data. The final written report or presentation of qualitative research includes the voices of participants, emphasizes the reflexivity of the researcher, and provides a comprehensive description and interpretation of the problem. Moreover, qualitative research often contributes to extending existing literature or advocating for actionable changes based on its findings¹²⁸.

Qualitative research is positioned within the broader discourse surrounding philosophical, paradigmatic, and interpretive frameworks that researchers apply to their studies. While this is a multifaceted area, the aim is to provide a foundational understanding. Fundamental philosophical assumptions encompass ontology, epistemology, axiology, rhetoric, and methodology, all of which shape qualitative studies. Researchers adopt particular philosophical stances on these assumptions when

¹²⁶ Saodah Wok, "Field Observation in Human Science Research" in *Towards Developing an Integrated Research Method in Human Sciences*, edited by Mohd. Yusof Hussain (Kuala Lumpur: IIUM Press, 2006), 105

¹²⁷ Ibid.

¹²⁸ Creswell, J. W., and Poth, C. N., *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage Publications, 2016), 322

embarking on qualitative inquiries. Additionally, researchers bring their paradigms or worldviews to their research endeavors, often aligning with postpositivist, constructivist, advocacy/participatory, or pragmatist perspectives. These overarching worldviews inform the interpretive or theoretical stances researchers adopt, influencing the individuals studied, the questions explored, approaches to data collection and analysis, writing styles, evaluation methods, and the utilization of findings for societal change or advancing social justice. Various interpretive stances, such as postmodernism, feminist research, critical theory, critical race theory, queer theory, and disability theory, are commonly employed in qualitative research, each shaping the research process and outcomes.

While quantitative data and robust identification strategies are typically favored for identifying causal effects, qualitative evidence can play a crucial complementary role in research¹²⁹. Firstly, methods such as case studies and process tracing offer insights into causal mechanisms that quantitative analyses might overlook¹³⁰. These qualitative approaches allow researchers to explore in-depth the underlying dynamics and intricacies of causal relationships. Additionally, qualitative evidence can help test assumptions that quantitative methods often rely on but cannot directly assess. For instance, while regressions assume certain conditions regarding measurement, confounding variables, and post-treatment bias, qualitative evidence can inform the validity of these assumptions by providing nuanced insights into the context of the study¹³¹. Furthermore, qualitative methods like process tracing align with formal models

¹²⁹ Seawright, J., *Multi-Method Social Science: Combining Qualitative and Quantitative Tools*, (Cambridge: Cambridge University Press, 2016), Trampusch, C. and B. Palier, “Between x and y: How Process Tracing Contributes to Opening the Black Box of Causality”, *New Political Economy*, vol. 21, no. 5 (2016): 437–454.

¹³⁰ Seawright, “Multi-Method.”

¹³¹ Lorentzen, P., M. T. Fravel and J. Paine, “Qualitative Investigation of Theoretical Models: The Value of Process Tracing”, *Journal of Theoretical Politics*, vol. 29, no. 3 (2017): 467–491.

by focusing on understanding causal mechanisms. They offer empirical evidence to support or challenge the assumptions and implications of formal models, thereby enhancing their applicability and accuracy in explaining real-world phenomena. Importantly, qualitative evidence serves as a means to assess whether critical assumptions of models accurately reflect reality and contribute to a deeper understanding of complex social phenomena¹³².

In summary, integrating qualitative evidence into research on institutions and institutional change can provide valuable insights into causal mechanisms, enhance the testing of theories, and enrich our understanding of social phenomena. While not necessary for all research questions, qualitative evidence holds significant potential, particularly in studying institutions and their evolution¹³³.

Data Correction

Data quality poses a significant challenge in data management, as database systems primarily focus on handling large volumes of data. However, real-life data often exhibit various imperfections, including inconsistency, duplication, inaccuracy, incompleteness, and staleness. Inconsistency arises from conflicting or contradictory information within the dataset, while duplication results in identical or highly similar data entries across multiple records. Inaccuracy stems from errors during data entry, outdated information, or errors introduced during processing. Incomplete data lacks necessary attributes for comprehensive analysis, and staleness refers to outdated

¹³² Rodrik, D., *Economics Rules: The Rights and Wrongs of the Dismal Science* (Oxford: WW Norton & Company, 2015), 15.

¹³³ Ibid.; Seawright, “Multi-Method,”; Trampusch and Palier, “Between x and y,”; Lorentzen, P., M. T. Fravel and J. Paine, “Qualitative Investigation,”.

information¹³⁴. Addressing these challenges requires data cleaning, validation, and enhancement processes, including data profiling, cleansing, validation, and governance.

Hence, when dealing with data collected from channels susceptible to disturbances, ensuring data quality becomes paramount, especially when the primary goal is to assimilate and understand the data. Imperfections can stem from various sources, including transmission and bandwidth limitations, sensor device malfunctions, irregularities in sampling, and transcription errors. Moreover, the processes of data collection, analysis, and storage are often resource-intensive and time-consuming, rendering data recollection highly undesirable and sometimes impractical. This becomes particularly challenging when dealing with historical or time-sensitive data or when the instruments used for data collection are prohibitively expensive to repair or replace. Consequently, rather than discarding corrupted data, it is imperative to monitor and enhance its quality and integrity by rectifying imperfections to the extent possible.

An illustrative example of addressing data imperfections is akin to using a spell-checker. In the context of data mining and knowledge discovery, where large and complex datasets are amassed at a rapid pace, a proactive approach to correcting errors is essential. While conventional spell-checkers flag potential typos and offer suggestions for replacements, a fully automated and intelligent process is necessary in data-related endeavors. With the influx of data facilitated by advancements in sensor technology and data archiving initiatives, manual examination of all data points to ensure integrity becomes infeasible. Even with semi-automated flagging processes, manually inspecting data and determining the appropriateness of suggested corrections can be challenging, akin to proofreading a document in a language one is not fluent in.

¹³⁴ Fan, W., & Geerts, F., *Foundations of Data Quality Management* (Poland: Springer Nature, 2022), pg 188

An ideal solution involves the development of a more sophisticated spell-checker equivalent for data, capable of automating the correction process while considering contextual and semantic information within the dataset. Such an advancement necessitates novel techniques for repairing data imperfections. Among these techniques is a method called polishing, which is being explored by the author and colleagues as a means to address data imperfections. In this context, the comparison of polishing with alternative approaches to handling data imperfections becomes essential, particularly focusing on evaluating and validating data correction mechanisms¹³⁵.

1.8.3 Semi-Structured Interview

For this research, the researcher interviewed five main relevant bodies involved in the administration of CSA in Malaysia, namely the Attorney General's Chamber, Health Care Professional, Child Commissioner, Ministry of Women Family and Community Development, Royal Malaysia Police. Other important participants/participants also include Legal practitioners involved in sexual abuse prosecution and representatives of advocacy groups. The interview could give an insight into proposals, reviews, and suggestions for any necessary reform to the child sexual abuse policies and legislation. The objective of the interview is to find out the Ministry's view and stand on the legal provisions governing the CSA. The interviews are to find out the legal provisions relevant to CSA, the extent the child sexual offender applies the legal provisions, and the problems faced by the judiciary and the Royal Malaysia Police in applying the law

¹³⁵ C.M. Teng, "Correcting Noisy Data" in *Proc. 16th Int'l Conf. Machine Learning organised by Hybrid Artificial Intelligent Systems. HAIS 2013. Lecture Notes in Computer Science()*, vol 8073. Springer, Berlin, Heidelberg: Morgan Kaufmann, (1999), 239–248.

on CSA. The researcher also needs to get the views of the psychiatric hospitals on how to improve the existing child sexual abuse legislation better.

The analytical categories and instruments for semi-structured interviews, typical of qualitative research, are crafted in response to the data collected. Unlike structured interviews, where topics are predetermined, semi-structured interviews allow for open questioning, necessitating an analytical approach that adapts to the richness of the material gathered. There exists a variety of analytical techniques for interpreting qualitative interview data. In this context, an analytical strategy is proposed that accommodates open theoretical understanding while acknowledging pre-assumptions and theoretical traditions. This approach, termed as "theory-oriented approaches," acknowledges the importance of theoretical frameworks while allowing for flexibility in interpretation. The analytical strategy presented here aims to integrate various analytical techniques suitable for analyzing semi-structured interviews. It encourages researchers to develop their own modes of analysis tailored to their specific research context and objectives. By embracing this approach, researchers can effectively interpret and derive meaningful insights from their qualitative interview data.

The semi-structured interview is an effective way of collecting data as the researcher has personal communication with the relevant people and gets detailed information from them.¹³⁶ The interviews enable the researcher to meet face-to-face and establish contact between the researcher and the participants. The meeting enables researchers to clarify any misunderstanding or confusion that may arise on any matters relevant to the research.¹³⁷ The advantage of a face-to-face interview is that it has the highest response rate and permits the longest questionnaires. The interviewer also has

¹³⁶ Mohd Darbi Hashim, "Legal Research Methodology" (paper presentation, Seminar Kemantapan Akademik, Bangi, August, 2003).

¹³⁷ Maxfield and Babbie, Research Methods,".

the opportunity to observe the surroundings, apply the use of non-verbal communication, ask all types of questions, even if they are complex, and can use extensive probes.¹³⁸ The disadvantages are the travelling and personal high cost of conducting interviews. There may also be interviewer bias that may affect the analysis of the data.¹³⁹

The respondents that was chosen are from Attorney General's Chamber, Health Care Professional, Child Commissioner, Ministry of Women Family and Community Development, Royal Malaysia Police.

The Legal Approach

In the aspect of legal approach, the researcher selected respondents from the Representative of the Ministry of Women, Family and Community Development, who play a direct role in addressing issues concerning various vulnerable groups, including children, the disabled, senior citizens, the destitute, NGOs, and disaster victims. Additionally, two respondents chosen were public prosecutors and investigators, possessing the necessary legal expertise and skills to address problems related to child sexual abuse. Lastly, to offer comprehensive insights and solutions, the researcher engaged three legal practitioners representing the Bar, three serving judges representing the Judiciary, and a Minister of Law from the Prime Minister's Department. These respondents collectively provide a diverse range of perspectives and expertise in addressing the legal aspects of child sexual assault, ensuring a well-rounded approach to understanding and resolving such issues.

¹³⁸ Neuman, "Social Research Methods,".

¹³⁹ Ibid.

Practical Approach

In the practical approach, the researcher engaged three respondents representing the SCAN Team, consisting of a medical doctor, physician, and paediatrician. These representatives offer valuable insights into the practical aspects of addressing child sexual assault, bringing expertise from the medical field to complement legal and social perspectives.

Furthermore, three respondents from non-governmental organizations were chosen to provide additional perspectives on practical approaches to combating child sexual abuse. These organizations offer alternative viewpoints distinct from governmental bodies, potentially offering innovative solutions and strategies to address the issue effectively.

Lastly, to gain insights into governmental efforts and challenges in addressing child sexual abuse, the researcher selected four representatives from the Ministry of Women, Family, and Community Development. These respondents can provide valuable information on government initiatives, policies, and obstacles encountered in addressing the problem of child sexual assault, facilitating a comprehensive understanding of the practical aspects involved in tackling this issue.

Academic Approach

In the academic approach, the researcher enlisted two representatives from the legal academia. These individuals play a crucial role in offering fresh perspectives and insights into addressing the problem of child sexual assault. Their involvement provides a valuable academic lens through which to examine the complexities of child sexual assault cases, including legal loopholes, challenges in prosecution, and gaps in legislation. By drawing on their scholarly research and analysis, these representatives

can contribute innovative ideas and approaches to improving legal frameworks, enhancing victim support services, and strengthening enforcement mechanisms.

Enforcement Approach

In the enforcement approach, the researcher has chosen four respondents to provide insights and expertise from the law enforcement perspective. These respondents include three Senior Police Officers and one crime analyst, with a representative from D11, Royal Malaysian Police. Their involvement is integral in gaining a hands-on understanding of the processes and challenges involved in resolving the issue of child sexual assault.

As Senior Police Officers, these respondents bring extensive experience and knowledge in investigating and prosecuting criminal offenses, including cases of child sexual assault. Additionally, the crime analyst offers a unique perspective by providing data-driven insights into patterns and trends related to child sexual assault.

The involvement of these enforcement professionals allows for a comprehensive understanding of the challenges and opportunities in combating child sexual assault from a law enforcement perspective. Their insights can inform policy development, training programs, and collaborative efforts with other stakeholders to enhance prevention, detection, and response to cases of child sexual abuse. Overall, their hands-on experience and expertise play a crucial role in shaping effective enforcement strategies and interventions to protect children from harm.

Thus, based on the research questions and objectives of this study and the nature of CSA research, the interview was adopted for data collection. It has been observed

that the interview is the most common method of collecting data,¹⁴⁰ the semi-structured interview (SSI) format has been found to be easier and more flexible for eliciting more responses from the participants in qualitative research. According to Bugher et al., "the person-to-person interview is best for obtaining in-depth opinions. Evidence from thousands of surveys over the years reveals that people are remarkably honest and frank when asked their opinions within a properly structured context".¹⁴¹

Interview is an important method of collecting data in a focus group or from individuals. The responses are often similar in general but specific based on the scope and role of the participant. Traditionally, interviews are conducted involving researchers physically posing questions to the participants face to face interactions.¹⁴² Many of the participants in this study opted for computer-mediated SSI¹⁴³ through MS Teams, Zoom, and WhatsApp due to the difficulties occasioned by Covid-19. This study has not differentiated between SSI conducted face-to-face or computer mediated. Specifically, SSI permits the expansion of specific questions through a follow-up or example to the participants.¹⁴⁴

In this study, the interview questions i.e. Appendix I shows a list of general questions which were varied when administered to each participant. However, the questions are linked with one or more research questions. In coming up with the questions for the interview and follow-up questions, the study considered the relevance of the research question. Most of the questions begin with "how" and "why" in order to

¹⁴⁰ Lisa Gibbs et al., "What Have Sampling and Data Collection Got to Do with Good Qualitative Research?", *Australian and New Zealand Journal of Public Health*, vol. 31, no. 6 (2007): 540–44.

¹⁴¹ Wilmer Bugher et al., *Polling Attitudes of Community on Education: Manual* (New Jersey: Phi Delta Kappa, 1999), 294.

¹⁴² Robert P Gephart Jr, "Qualitative Research and the Academy of Management Journal", *Academy of Management Journal*, vol. 47, no. 4 (2004): 105-10.

¹⁴³ Jessica Clark Newman et al., "The Differential Effects of Face-to-Face and Computer Interview Modes", *American Journal of Public Health*, vol. 92, no. 2 (2002): 294–97.

¹⁴⁴ Christine Dearnley, "A Reflection on the Use of Semi-Structured Interviews", *Nurse Researcher*, vol. 13, no. 1 (2005): 19-28.

understand the phenomenon of CSA in relation to the preconceived themes and research questions. The interview questions are similar across all participants as it focuses on the role, collaborative efforts, adequacy, and challenges of CSA laws in Malaysia. The question also probed the reforms needed to improve the law.

Conducting the interview in English was well received by all the participants due to the language of the law and enforcement in Malaysia. Therefore, there was no need for translation of the question or the transcripts.

Procedures for Interview

To conduct an interview for a non-clinical trial study in accordance with the guidelines provided by the IIUM Research Ethics Committee (IREC)¹⁴⁵, the researcher will need to follow the steps as mentioned below.

1. Develop a detailed interview protocol outlining the purpose of the interview, questions to be asked, and any specific instructions for the interviewer. Ensure that the protocol aligns with the objectives of your research study and adheres to ethical standards.
2. Before conducting any interviews, obtain informed consent from all participants. Provide them with an information sheet explaining the purpose of the study, what participation entails, confidentiality measures, and their rights as participants. Also, provide a consent form for participants to sign indicating their voluntary participation.

¹⁴⁵ IIUM Research Ethics Committee, “Initial Review Categories, Workflow and Timeline”, <https://research.iium.edu.my/irec/?page_id=328> (accessed 17 May, 2024).

3. Emphasize the importance of confidentiality to participants and assure them that their responses will be anonymized and kept confidential. Avoid recording any identifying information during the interview process.
4. Schedule interviews with participants at mutually convenient times and locations. Conduct the interviews in a private and comfortable setting to encourage open and honest communication. Follow the interview protocol closely, but allow flexibility for participants to elaborate on their responses.
5. Take detailed notes during the interviews, capturing key points and participant responses. Ensure accuracy and clarity in recording the data. Avoid using participants' names or any other identifying information in your notes.
6. After the interview, provide participants with an opportunity to ask questions or seek clarification on any aspects of the study. Thank them for their participation and reiterate the confidentiality of their responses.
7. Finally, report the findings of the interviews in your research study, ensuring that participant responses are accurately represented and anonymized to protect confidentiality. Follow any reporting guidelines specified by the IREC and ensure compliance with ethical standards.

Process of the Conducted Interview

Face-to-Face Meeting:	• P1: A representative from the Ministry of Women, Family, and Community Development participated in a face-to-face meeting where interview questions are given beforehand and the interviewee's
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	responses were provided verbally during the meeting. • P15: A representative from a non-governmental organization engaged in a face-to-face meeting. Questions were emailed beforehand, and responses were provided during the meeting. • P16, P17, P18 and P19: Representatives from the Ministry of Women, Family, and Community Development participated in face-to-face meetings. Questions were emailed beforehand, and responses were provided during the meeting.
Email Correspondence:	• P2: A public prosecutor and investigator provided responses via email. • P3: Another public prosecutor and investigator responded to questions via email but engaged in a Zoom meeting to discuss the topics further. • P4 to P7: Representatives from the SCAN Team and legal practitioners answered questions via email. • P10 to P12: Senior Police Officers responded to questions via email. • P14: A public prosecutor and investigator answered questions via email but provided additional responses through a phone call.

	• P20: A representative from a non-governmental organization provided responses via email. • P21: A representative from the legal academia participated in an interview, with questions being emailed beforehand. • P24: A serving judge, representing the Judiciary, responded to questions via email. • P25: Another serving judge provided answers via email and engaged in additional communication through a phone call.
Zoom Meeting:	• P13: A crime analyst and representative of a non-governmental organization answered questions via email but engaged in a Zoom meeting for further discussion. • P22: The Children's Commissioner responded to questions via email and participated in a Zoom meeting for further discussion.
Google Meet (GMeet):	• P26: The Minister of Law in the Prime Minister's Department answered questions via email and engaged in a Google Meet session for additional discussion.

During the course of the interviews, a mix of face-to-face and online interactions were employed to gather information from various stakeholders. Face-to-face meetings,

which allow for direct interaction and potentially deeper insights, were conducted with a total of 8 participants. These meetings provided an opportunity for more spontaneous exchanges and nuanced discussions. Conversely, online interviews, conducted either via email or through video conferencing platforms like Zoom or Google Meet, were utilized for 18 interviews.

Online interviews offered the advantage of convenience and flexibility, enabling participation from individuals located in different geographic locations without the need for physical presence. For some participants, particularly those with busy schedules or who were situated in distant regions, online interviews proved to be a practical and efficient way to share their insights. Additionally, conducting interviews remotely allowed for the collection of detailed responses while accommodating the preferences and constraints of the participants.

Individual interviews, whether conducted in person or online, aim to capture the spontaneity of traditional interviews while adapting to computer-mediated communication (CMC) environments. Comparing face-to-face and online interviewing reveals various logistical, budgetary, ethical, recruitment, design, and moderating issues. Logistically, technology plays a significant role, with online interviews requiring participants to have access to appropriate devices and software. Budgetary considerations include equipment or platform fees, travel expenses, and transcript costs, which can differ between face-to-face and online modes. Ethically, researchers must address potential selection bias arising from the digital divide and ensure participant comfort with technology.

Face-to-face interviews offer the advantage of personal interaction and may be more suitable for participants less familiar with technology. However, they incur travel expenses and logistical challenges. In contrast, online interviews provide flexibility,

eliminate travel costs, and accommodate participants' preferences for remote participation. Still, it requires careful consideration of technology barriers and potential bias.

Ultimately, the choice between face-to-face and online interviewing depends on the research goals, participant preferences, and logistical constraints¹⁴⁶

In both face-to-face and online interviews, it is essential to prioritize participant privacy and confidentiality. Therefore, as a standard practice, interviews are not recorded to safeguard the privacy of participants and maintain the confidentiality of their responses. This approach helps create a safe environment for participants to share their perspectives openly without concerns about their responses being recorded or shared beyond the research context. By emphasizing privacy matters and refraining from recording interviews, researchers uphold ethical principles and respect the rights and preferences of participants.

During the interview process, a structured approach was employed to comprehensively explore various aspects of the topic under study. This involved categorizing interviewees based on their affiliation or role, gender identity, geographic location, and specific details about their state of affiliation. Additionally, detailed information about the interviewees, including their organizational affiliation and specific roles and objectives within the context of the topic being discussed, was gathered. Questions were tailored to elicit insights into interagency collaboration efforts, the adequacy of existing laws or regulations, challenges encountered during implementation, and suggestions for improvement.

¹⁴⁶ Lobe, B., Morgan, D. L., and Hoffman, K., "A Systematic Comparison of In-person and Video-based Online Interviewing", *International Journal of Qualitative Methods*, vol. 21, (2022): 7.

These categories helped ensure that a wide range of relevant topics were covered during the discussions. By structuring the interview process in this manner, a comprehensive understanding of the subject matter was achieved, incorporating diverse perspectives from different sectors and geographic regions.

The list of questions are as follows:

1. Participant Category:
 - a. Gender
 - b. State and Location
 - c. Description of respondent
2. Name and Office of Respondents:
 - a. Roles and Objective of respondent
3. Interagency Collaboration:
 - a. To what extent do you perceive interagency collaboration in addressing child sexual abuse?
4. Adequacy of the Law:
 - a. How adequate do you find the existing laws in Malaysia regarding child sexual abuse?
5. Challenges in the Implementation:
 - a. What are the main challenges you encounter in implementing laws related to child sexual abuse?
6. Improvement to the Law:
 - a. What recommendations would you propose to improve legislation concerning child sexual abuse?

Data Collection Process

Data collection, as the term implies, involves gathering information or data relevant to a particular subject area for critical evaluation and analysis. It is a fundamental step in research that enables researchers to address research questions, test hypotheses, and draw conclusions based on the results obtained. Regardless of the field of study, data collection is essential and follows a standardized process. The approach to data collection may vary depending on the specific requirements of the research. Different methods and techniques may be employed to gather the necessary information effectively. Planning, diligence, logical reasoning, patience, and meticulous record-keeping are integral aspects of successful data collection. In essence, data collection encompasses the collection, measurement, and analysis of accurate insights using validated techniques. It is a systematic process aimed at obtaining reliable information to support research objectives¹⁴⁷.

The questionnaire method, pioneered by Sir Francis Galton, is a research approach where researchers craft a series of questions and prompts to collect information from respondents. These questions can be either open-ended, allowing respondents to provide their own answers, or closed-ended, where respondents choose from a set of predefined options.

In designing a questionnaire, it's crucial for the questions to flow logically from one to the next. Sensitive inquiries, such as those regarding income or personal habits, should be positioned towards the end of the questionnaire to establish trust. Researchers should avoid double-barrelled questions, which combine multiple inquiries into one, to

¹⁴⁷ Kishore, P., "Methods of Data Collection in Legal Research", *Supremo Amicus*, vol. 28, (2022): 379.

ensure clarity and accuracy in responses. Several key considerations contribute to the effectiveness of a questionnaire:

1. Purpose: Each question should serve a clear purpose aligned with the research objectives.
2. Objectivity: Questions should be specific and necessary for testing hypotheses or exploring defined objectives.
3. Language: The wording of questions should be precise and easily understood to minimize misinterpretation.
4. Design: The questionnaire layout should facilitate comprehensive responses and ease of completion.
5. Avoid Leading Questions: Questions should remain neutral and avoid influencing respondents' answers.
6. Reliability and Validation: Researchers must rely on valid sources and use measurement tools to validate responses.

By adhering to these principles, researchers can develop well-structured questionnaires that yield reliable and insightful data for their research endeavors.

1.8.4 Thematic Analysis (TA)

According to Braun and Clarke,¹⁴⁸ thematic analysis is intended to identify, analyse and interpret patterns of meaning i.e., themes within qualitative data such as transcripts of SSI. In the context of this study, the objective of Thematic analysis is closely examining the transcripts for the purpose of identifying emerging themes and their frequency i.e., how often they appear in the discussion.

¹⁴⁸ Clarke Virginia and Braun Victoria, "Using Thematic Analysis in Psychology", *Qualitative Research in Psychology*, vol. 3, no. 2 (2006): 77–101.

In the analysis of the transcript, Braun and Clarke’s six-step techniques were adopted. The table below shows a detailed description of the techniques.

Table 1.2 Steps in Thematic Analysis and Coding

Steps	Description of the Process for this study
1. Familiarisation with data,	i. Transcription using manual and MTeams auto transcription feature. Including clean up; ii. Re-reading the data and initial ideas.
2. Generating initial codes	i. Coding initial features of the data; ii. Collation of prominent code across all participants.
3. Searching for themes	i. Check alignment of code with pre-conceived themes; ii. Gather specific data relevant to each potential theme..
4. Reviewing themes	i. Modify, review, and develop primary themes; ii. align the specific quotations to each theme by “cut and paste”.
5. Defining and naming the themes	Generate clear names and definitions for the themes and sub-themes.
6. Report writing	The synthesis of the themes with compelling extracts and quotes relating to the research question and the literature.

Since its development, TA has been applied to several fields and disciplines, including law and social sciences.¹⁴⁹ Specifically, a previous study on civilian perception of non-physical encounters with law enforcement adopted thematic analysis.¹⁵⁰ It is important to note that TA is not intended to summarise the data content and could be inductive or deductive. In a deductive approach, the analyses are based on preconceived data or themes derived from the research question, which are applied to the transcript.¹⁵¹ On the other hand, an inductive approach may be adopted to explore new phenomena or areas which were previously unstudied, and no predetermined data exist. This approach could help to develop new theories in fluid areas.

The purpose of coding is to reduce the interview transcript into small bits of meaningful data which give direction to relevant themes in the interview transcripts. As a core part of qualitative research, this step is a decision-making process necessary before the analysis.¹⁵² There are two main types of coding in qualitative research i.e., inductive coding and deductive coding. However, the coding development was done in accordance with five types of codes identified in Vaismoradi et. Al.¹⁵³ The coding scheme focused on conceptual coding, relationship coding, participant perspective coding, participant characteristic coding, and setting coding. Certain themes re-occur across participants during the thematic analysis and coding of the transcript.

¹⁴⁹ Kalliopi Michalakopoulou et al., “Barriers and Opportunities to Innovation for Legal Service Firms: A Thematic Analysis-Based Contextualization”, *Production Planning and Control*, vol. 34, no. 7 (2023): 604–22.

¹⁵⁰ Travonne Edwards et al., “Civilian Perceptions of Police: A Thematic Analysis of Non-Physical Encounters with Law Enforcement”, *Journal of Human Behavior in the Social Environment*, vol. 27, (2022): 1–13.

¹⁵¹ Theophilus Azungah, “Qualitative Research: Deductive and Inductive Approaches to Data Analysis”, *Qualitative Research Journal*, vol.18, no. 4 (2018): 383–400.

¹⁵² Judith A Holton, “The Coding Process and Its Challenges”, *The Sage Handbook of Grounded Theory*, vol. 3, no. 1 (2007): 265–89.

¹⁵³ Mojtaba Vaismoradi et al., “Theme Development in Qualitative Content Analysis and Thematic Analysis”, *Journal of Nursing Education and Practice*, vol. 6, no. 5 (2016): 104.

1.8.5 Reliability and Validity

In order for the data collected to be reliable, the researcher needs to be honest, accurate, mature, moderately intelligent, and responsible.¹⁵⁴ The reliability of field data addresses the question of whether or not the researcher's observations about matters relevant to the research are consistent?¹⁵⁵ There are several factors that may affect the validity and reliability of the data collected. However, the researcher found that the information gathered from each participant was not much different from one another. This showed the information gathered is commonly true.

Validity pertains to the integrity and application of the methods employed and the accuracy with which the findings represent the data, while reliability involves the consistency of the analytical procedures used. Additionally, validity also encompasses how easily the results can be reproduced. In this research, qualitative research credibility is ensured through descriptive interpretation, validity checks, and theoretical triangulation, which involves being transparent about the research process and outcomes. In terms of validity, the researcher assessed the precision of a test's results. As for reliability, the researcher ensured the consistency of responses across multiple sets of data through detailed field notes and the use of recording devices to transcribe digital files.¹⁵⁶

The researcher also found that the problems faced by the legal enforcement in handling the CSA may be slightly different from one legal field to another. This is due to the differences in facilities available at each hospital and the number of CSA they handle.

¹⁵⁴ Neuman, "Social Research Methods,".

¹⁵⁵ Whitaker et al., "Risk Factors,".

¹⁵⁶ Noble, Helen, and Joanna Smith, "Issues of validity and reliability in qualitative research." *Evidence-based nursing*, vol. 18, no. 2 (2015): 34-35.

1.9 STRUCTURE OF THE RESEARCH

This study seeks to examine the adequacy of the current legal framework for CSA and crimes in Malaysia based on the principal legislation, i.e., Sexual Offences Against Children Act 2017. The research is structured into several chapters, with the skeletal plan in chapter one. The chapter includes the background of the study, the objectives, the literature review, the methodology of the research and a clear statement of the problems necessitating the dissertation. The synopsis of existing literature on the subjects is analyzed in relation to the scope and limitations of the research.

The conceptual basis for this study is contained in chapter two, which discusses the concept of CSA, definitions, typology, and its dimensions. The chapter examined the history of CSA from the 16th century until the present, its causes, and risk factors based on the postulations in previous literature. This chapter is necessary to establish the origin of CSA in current societies and the recognition in several fields of knowledge as well as international measures to protect children through the United Nations (UN) and the position under Islamic Law.

Having established a clear idea about the concept of CSA, chapter three explores the legal and institutional framework for Child protection and CSA in Malaysia. The legal history of the relevant enactments was divided into three phases from pre-independence to until 2017, along with the amendments and repeals made by the parliament. In relation to the laws, relevant institutions involved in child protection were also examined. They include JKM, PDRM, Suspected Child Abuse and Neglect (SCAN Team), Child Interview Centre (CIC), and Court for Children, among others. The purpose of this chapter is to identify the strength and weaknesses of child protection laws and institutions in general and SOACA in particular.

In the quest for reformation and addressing the weaknesses of the current law, chapter four focuses on benchmarking with the CSA law passed in India i.e., the Protection of Children from Sexual Offences Act 2012 (POCSO). Before going into details of the Act, attempts were made to justify the selection of India for the purpose of benchmarking. The chapter examined the genesis of POCSO based on the gaps in the Indian Penal Code with respect to CSA cases and the recommendation of the Indian Law Commission. Some of the offences which were created are discussed along with the corresponding punishment, including procedures for medical examination. The second part of the chapter creates a comparison between Indian POCSO and Malaysia's SOACA.

Chapter five contains the result, discussion, and findings of the interview of participants. This is a synthesis of transcribed responses from semi-structured interviews conducted with relevant stakeholders such as judges, the Royal Commissioner of Police (Police), Attorney General Chambers of Malaysia (AGC), and health professionals involved in the prevention and management of CSA in Malaysia. As a qualitative chapter, the discussion is supported by quotes from the anonymized participants based on the interview questions.

Based on the findings of doctrinal and empirical approaches, the sixth chapter concludes with specific policy and practical recommendations for the effective prevention and management of CSA in Malaysia. The chapter also highlights specific findings of the research and makes particular recommendations for the amendments and the use of operation guidelines for all stakeholders for prevention, reporting, and management of CSA cases. Areas of further study are also identified in order to serve as a springboard for multidisciplinary research and extend the frontier of knowledge.

CHAPTER TWO

CHILD SEXUAL ABUSE: A CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

Child Sexual Abuse (CSA)¹ and other forms of sexual crime toward children have become pervasive in most societies and cultures worldwide. It could be thought of as a new phenomenon, but studies have shown that rather than being new, it may have existed since the existence of human society. From societal denial and silence, this chapter explores the concepts, typology, social construct, and different approaches to understanding sexual abuse involving children.

Despite recognising that CSA is a problem in several societies and the agreement among researchers and professionals that it needs to be resolved, its conceptualisation appears to lack consensus among experts. Walker² argued that a proper conceptualisation of the problem would impact the priority of issues and response around the problem. This problem of conceptualisation has led to several acronyms and names for sexual abuse involving children. Few among the terms include Child Sexual Exploitation (CSE),³ Child Sexual Offences (CSO),⁴ Child Sexual Crimes (CSC)⁵ and Child Sexual Abuse (CSA).⁶ For the purpose of this study, CSA has been

¹ Ray Wyre, "Paedophile Characteristics and Patterns of Behaviour: Developing and Using a Typology" in *Home Truths about Child Sexual Abuse*, edited by Catherine Itzin (London & New York: Routledge, 2005), 69–89.

² Garthine Walker, "Rereading Rape and Sexual Violence in Early Modern England", *Gender & History*, vol. 10, no. 1 (1998): 1–25.

³ Liz Kelly and Kairika Karsna, *Measuring the Scale and Changing Nature of Child Sexual Abuse and Child Sexual Exploitation: Scoping Report* (London: Centre of expertise on child sexual abuse, 2017), 4.

⁴ Stephen W Smallbone and Richard K Wortley, "Child Sexual Abuse: Offender Characteristics and Modus Operandi," *Australian Institute of Criminology Canberra*, vol. 193, (2001): 1.

⁵ Delores D Stroud, Sonja L Martens, and Julia Barker, "Criminal Investigation of Child Sexual Abuse: A Comparison of Cases Referred to the Prosecutor to Those Not Referred", *Child Abuse & Neglect*, vol. 24, no. 5 (2000): 689–700.

⁶ Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (Sydney: The National Child Sexual Assault Reform Committee, University of New South Wales, 2010), pg no.

adopted to replace the similar terms mentioned above. This chapter focuses on existing definitions of CSA and the diverse insights from historical perspective towards tackling the problem.

The history of CSA is also examined to trace the legal recognition of CSA as a crime in different societies. While the history of crimes is often not the concern of criminal law, criminologists and social scientists see a direct link between the perception of a crime in the past and to shape criminal justice policies in the present.⁷ Other nuances on the historical aspect of crime is the cultural representation of a particular crime, its control and public reaction towards the accused and victim.⁸ This further extends to the argument of whether laws to protect children against sexual abuse have been influenced positively or negatively by cultural norms, history, and yearnings of the people. As a result of evolution which often occurs to the nature, punishment, and societal perception of all crimes and offenses, it is necessary to examine the concept of CSA and its development in human history. This chapter shall explore the types of CSA, theories on causation, and risk factors. It further looks at issues in societal response and legal recognition as a crime.

This chapter recognizes that sexual offences were a taboo subject and have a rare history in Malaysia. Therefore, this chapter explores the development of CSA globally with some focus on Malaysia and India, as reported in academic literature. The major types of sexual abuse involving children were also discussed vis-à-vis contact and non-contact sexual abuse, including child pornography, child grooming, rape, and paedophilia, among others. It also explores the definition of CSA from various

⁷ Paul Knepper and Anja Johansen, *The Oxford Handbook of the History of Crime and Criminal Justice* (United States: Oxford University Press, 2016), 2.

⁸ Clara Rigoni, "Crime, Diversity, Culture, and Cultural Defense," in *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Max Planck Institute For Foreign and International Criminal Law: 2018).

disciplines, such as social welfare, health professionals, and law enforcement. A detailed discussion of risk factors for CSA victims and perpetrators was also identified from existing literature. The chapter concludes on the international legal framework, Islamic law position, and the need for an integrated approach to preventing, prosecuting, and rehabilitating child victims and perpetrators of sexual abuse.

2.2 CHILD SEXUAL ABUSE: A HISTORICAL OVERVIEW

Early historical records, documents, and literature on CSA are attributable to the United States, followed by Europe and United Kingdom.⁹ Tracing the history of sexual abuse can help to understand the evolution of laws in this problematic area. Researchers have raised concerns about the history of sexual abuse, the controversy over age, and whether or not the victim is a child or an adult. Early history involves the unholy role of the medical field, political debates, denial, and the explanation of child genital disease without considering sexual abuse. The history covers the 16th century, 19th century until the 21st century.

2.2.1 16th Century

In medieval England, children were often viewed as the property of their parents or guardians, and CSA was not recognized as a distinct offence.¹⁰ In fact, in some cases, children were considered to be complicit in the abuse they suffered, especially if they were deemed to be sexually mature. Not much have been reported in literature regarding CSA before the 16th century. Based on reports and available literature, the history of

⁹ Erna Olafson, David L Corwin, and Roland C Summit, "Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression," *Child Abuse & Neglect*, vol. 17, no. 1 (1993): 7–24.

¹⁰ Adrian Bingham et al., "Historical Child Sexual Abuse in England and Wales: The Role of Historians," *History of Education*, vol. 45, no. 4 (2016): 411–29.

CSA can be traced only to the British colony and the United States, among slave owners and child laborers in the colonial plantations. As a result, some researchers have averred that any attempt to unravel the history of CSA will only explore modern history, which was recorded in the early 19th century.¹¹ This is because until the 1800s, the English common law considered children as the property of their fathers, and women as the property of their husbands for which he has the right to deal with anyhow and slavery was considered as international customary law.¹²

At the same time, slavery and sexual abuses towards slave was carried on in the United Kingdom and American colonies until the 16th and 17th centuries as the idea of human property supported slavery and child abuse during this period. Honeyman¹³ traced the relationship between child labour and sexual abuse in Industrial England. The high incidence of child labour made it difficult to report master - servant relation which involves abuses and corporal punishment. As observed in the works of McIntosh¹⁴ who applauded the role of children in coal mines. He described the role of “Boys in the Pits” while referring to them as very ambitious to participate in the industrial revolution. The government and academics often defend child labour and sexual abuse that comes with it. In parts of the UK and US, slave breeding was encouraged to keep the supply of labour in farm estates and industrial complexes.¹⁵ The basis for continued CSA under this period was the proprietary right which was granted to parents and slave masters over young persons during this era. This practice continued in the British empire until

¹¹ Olafson, Corwin, and Summit, “Modern History,”.

¹² Barbara Bennett Woodhouse, “From Property to Personhood: A Child-Centered Perspective on Parents’ Rights”, *Geo. J. on Fighting Poverty*, vol. 5, no. 2 (1997): 313.

¹³ Katrina Honeyman, *Childhood and Child Labour in Industrial England: Diversity and Agency, 1750–1914* (London and New York: Routledge, 2016), 24.

¹⁴ Robert McIntosh, *Boys in the Pits: Child Labour in Coal Mines* (Montreal: McGill-Queen’s Press-MQUP, 2000), 278.

¹⁵ Jack Trammell, “The American Slave Coast: A History Of The Slave-Breeding Industry”, *Civil War Book Review*, vol. 18, no. 4 (2016): 19.

1807 when slavery was abolished while slaves held by the colonial corporations such as the East India Company were not freed until 1838. These slaves were recorded to include children who were also subjected to some form of abuse.¹⁶

2.2.2 19th Century

In a more specific case of sexual abuse, one of the earliest records in literature was reported in 1819 when General Sir Eyre Coote, a hero of Napoleonic wars, was caught in the act by a housemaster in a compromising situation with one of the students at Eton College for Boys near Windsor in Berkshire, England.¹⁷ Based on this incident, it was reported that the general was stripped of his knighthood by Prince Regent. This is a rather isolated case where the instrumentality of the law was not applied. Still, the power of the English Royals to deal with sexual abuse is a moral issue that requires no judicial intervention.

During the era of Queen Victoria, there was increased sympathy for child victims of sexual abuse as adults came to view children as innocent. The rise of CSA litigation was observed in Victorian England (1837 -1901) although with a low conviction rate. In the UK, the cyclical history of CSA saw a decline in 1885 due to the increased use of formal legal remedies, abolition of death penalty for rape in 1841, increase in the age of consent for girls to thirteen in 1875 and sixteen in 1885. This period also witnessed the increase in juvenile prostitution in London.¹⁸

During this Victorian era, the issue of CSA began to gain more attention, and laws were introduced to protect children. The first law specifically targeting CSA was

¹⁶ David M Pomfret, "Child Slavery' in British and French Far-Eastern Colonies 1880–1945", *Past and Present*, vol. 201, no. 1 (2008): 175–213.

¹⁷ Alisdare Hickson, *The Poisoned Bowl: Sex, Repression and the Public School System* (London: Trans-Atlantic Publications, 1995), 145.

¹⁸ William Thomas Stead, *The Maiden Tribute of Modern Babylon* (Scotland: Good Press, 2020), pg no.

the Criminal Law Amendment Act of 1885, which raised the age of consent from thirteen to sixteen years and made certain forms of sexual activity with minors illegal.¹⁹

The enforcement of such laws have been poor due to non-reporting associated with the abuse and the need to protect the child from societal stigma. The generational change in how society perceives, reports, treats and prosecutes child molestation is an attestation to the evolution of man and professional effort toward solving social problems. The scenario at that time shows that CSA existed and was considered a serious crime as far back as centuries but under-reported in the society. Barry²⁰, therefore, considers the history of CSA from 1880 until World War 1 and the 1960s. The first period featured public awareness, rare academic and health research on sexual abuse of young people and rare criminal prosecution of CSA cases. The community's perception regarding CSA was the assumption that it is very rare in the ordinary loving family and only occurred among the lowest socio-economic strata. The idea of the abuser as a family member is rarely acknowledged, while the stranger loitering in the toilet is the public toilet, and dark walkways were thought to be a risk factor.²¹ The 19th century witnessed the emergence of child-centred jurisprudence with a growing awareness of internationalisation of children rights.²²

In the United States, Child Abuse and Neglect occurred long before the 1870s; however, the case of Mary Ellen Wilson, -a 9-year-old girl, was the first attempt to report child abuse to the authorities.²³ The outcome of this case impacted positively, the

¹⁹ Julia Laite, "The Crusade Begins: The Criminal Law Amendment Act and London's 'Brothels' before the First World War" in *Common Prostitutes and Ordinary Citizens*, edited by Julia Laite (London: Palgrave Macmillan, 2012), 54-69.

²⁰ Barry M Coldrey, "The Sexual Abuse of Children: The Historical Perspective", *Studies: An Irish Quarterly Review*, vol. 85, no. 340 (1996): 370–80.

²¹ Ibid.

²² Ellen Marrus and Laura Oren, "Feminist Jurisprudence and Child-Centered Jurisprudence: Historical Origins and Current Developments", *Hous. L. Rev.*, vol. 46, no. 2 (2009): 671. .

²³ Sallie A Watkins, "The Mary Ellen Myth: Correcting Child Welfare History", *Social Work*, vol. 35, no. 6 (1990): 500–503.

law on CSA. It was found that there was no law to protect the child who was beaten and subjected to physical abuse daily by her foster mother, whom she called Mama.

Although there seem to be few cases in Massachusetts in the 1670s and Tennessee in 1840, Mary Ellen's case was a landmark for several reasons. Among the reasons are: that it took the intervention of the Society for the Prevention of Cruelty to Animals (SPCA) to intervene in bringing Ellen's case to court. Secondly, this case followed the theory that a child was a member of the animal kingdom and therefore was covered under the laws to protect animals. Thirdly, this case established the landmark and legislative history for Child abuse legislation in the West and worldwide.²⁴

In the 1870s, physical abuse of children led to several efforts towards putting a human face on child abuse, prompting reformers and activism for protecting children suffering from all forms of abuse. In 1874, the case known as "Little Mary Ellen" was reported by Etta Wheeler to an animal rights group i.e., New York Society for Prevention to Animal (NYSPCA) which led to the establishment of the New York Society for the Prevention of Cruelty to Children (NYSPCC).²⁵ The fact was that Mary's father passed away in 1862 during the Cold Harbor Second Battle of the American Civil War in Virginia, and her mother was working shift to earn \$2 a week; thus the young girl was sent to an orphanage on Blackwells Island. She was thereafter adopted by a couple - Thomas and Mary McCormack, who lived at West 41st Street, Manhattan, New York. To be awarded guardianship, Thomas had lied that the girl was their illegitimate child. When Thomas died a few years after the adoption, his wife married another man named Conolly. The girl was subjected to servitude that was far

²⁴ Maria Scannapieco and Kelli Connell-Carrick, *Understanding Child Maltreatment: An Ecological and Developmental Perspective* (New York: Oxford University Press, 2005), 8.

²⁵ Eric A Shelman and Stephen Lazoritz, *The Mary Ellen Wilson Child Abuse Case and the Beginning of Children's Rights in 19th Century America* (United Kingdom: McFarland, 2005), 246.

above her age. She was also kept like a prisoner in the flat without permission to step outside the house.

After a series of physical abuses by her adoptive mother, the severe abuses attracted the attention of neighbours, who filed a complaint to the Department of Public Charities and Correction. The department is responsible for the administration of charities, insane asylums, hospitals, jails and orphanages in the area.²⁶ The frequent cries heard between the flat walls attracted the neighbours.

This occurred during an era when parents or foster parents could not be held liable for physically abusing their child, however damaging or painful the punishment was. It has been alleged that there were no laws to protect children from any sort of abuse during this period in the United States. Therefore, NYSPCA intervened and brought the case to court. The basis for the intervention was on the theory that the child was a member of the animal kingdom and, therefore, was covered under the laws that provided protection for animals.²⁷

This was considered the first successfully prosecuted case of child abuse in America which catalysed legislative reform to tackle child abuse by parents or guardians. Neighbours reported that they had not seen the child play with other children but had heard her cries. Due to the absence of legislation on Child Abuse, children were covered under the law, which provided protection for animals.

By 1874, the case was heard in court as the first child abuse case in American court. The judge granted the petition for Mary to be removed from McCormacks care and placed in a loving home. This decision and the involvement of NYSPCA is significant as the NYSPCC was established in 1875 to prevent all forms of child abuse

²⁶ Howard Markel, "1874 Case of Mary Ellen McCormack Shined First Light on Child Abuse," *The New York Times*, 14 December, 2009, 1-2.

²⁷ Watkins, "The Mary Ellen,".

including sexual abuse. The organisation was noted as the first entity in the world devoted to child protection.²⁸

2.2.3 Early 20th Century

Despite the awareness by child protection organisations such as the NSPCC, CSA was still largely hidden and misunderstood in the 20th century and many abusers were unpunished. However, the awareness of CSA changed from acts committed by deranged strangers in public toilets and dark alleys to incidences common among family circles or adults known to the child.

This development was due to the findings of the medical field in the UK. Specifically in the year 1929, the medical literature published in *The Lancet* medical journal reported high incidence of gonorrhoea vulvo-vaginitis among girls between the age of 6 and 10 years old. Carol²⁹ was interested in the explanation of the gonorrhoea as a prevalent disease and not associated with CSA by an adult. Infact, the editor of *The Lancet* was reported to have said that the carriers of gonorrhoea were infected by towels.

This period also witnessed little or no media coverage of sexual abuse cases, sexuality topics or at most such discussion is imprecise, vague and euphemistic. Allegations of sexual abuse by child victims were treated with disdain as there is more tendency not to believe a minor. In some cases, a minor who dares to stand by sexual abuse allegation is considered immoral.³⁰ This is also reflected in the court procedures and judicial practices in CSA cases, which tend to re-victimize child victims. The

²⁸ John E B Myers, “A Short History of Child Protection in America”, *Family Law Quarterly*, vol. 42, no. 3 (2008): 449–63.

²⁹ Carol Smart, “Reconsidering the Recent History of Child Sexual Abuse, 1910–1960”, *Journal of Social Policy*, vol. 29, no. 1 (2000): 55–71.

³⁰ Edward H Weiss and Regina F Berg, “Child Psychiatry and Law: Child Victims of Sexual Assault: Impact of Court Procedures”, *Journal of the American Academy of Child Psychiatry*, vol. 21, no. 5 (1982): 513–18.

phenomenon of ‘stranger danger’ became a rarity in investigations and reports on CSA and child molestation. In addition, media coverage on the topic became widespread, and frankness was brought to sexuality discourse. Additionally, young children's claims or allegations were accepted as practically true and believed.

Carol³¹ acknowledged that the awareness of CSA in the United Kingdom began in the 1980s after increased public concern from survivor of incest and the second wave of women movement. This led to the implementation of the Punishment of Incest Act 1908. Another important stage in the history of CSA is the era of increased professional interest in the incidence. Medical and mental health professionals are the leaders in this stage due to the need to investigate adult mental health challenges. As far back as the middle of the nineteenth century, there has been considerable professional interest in sexual abuse involving children. Joseph Tardieu³² in Paris and Sigmund Freud³³ in Vienna are reported to have addressed topics such as incest, rape and child abuse of young children between the 1860s and 1890s. The account by Sigmund Freud was based on stories narrated by his wealthy female clients with hysterical illnesses resulting from their sexual abuse as children. That sexual abuse was a common feature of respectable middle-class family was a fair astonishment for Freud. To this extent, he wrote a letter to Wilhelm Fleiss and suggested that the motto of psychoanalysis from that time should be:” what have they done to you, poor child?”. In further investigating the cause of mental illness among adults, Freud addressed the Psychoanalytic Society that sexual experiences in childhood were the major cause of neurotic behaviours in adults. Based

³¹ Carol Smart, "Reconsidering The Recent History of Child Sexual Abuse, 1910–1960", *Journal of Social Policy*, vol. 29, no. 1 (2000): 55-71.

³² A Tardieu, "A Medico-Legal Study of the Seives and Ill Treatments Conducted on Children", *Ann Hyg Publ Med Leg*, vol. 13, (1860): 361–98.

³³ F. A. Whitlock, "The Aetiology of Hysteria", *Acta Psychiatrica Scandinavica*, vol. 43, no. 2 (1967): 144–62.

on this, Freud's Seduction theory was rejected by members of the Psychoanalytic Society.

Using the natural history approach, Nigel suggests that a social problem such as CSA could only emerge and gain identification when society asserts the need to "do something about it".³⁴ Being a social problem, CSA and other forms of abuse are not recent occurrences, but its awareness as a social problem is based on sequences of events and unique history. In line with this, Becker said: "every social problem has a history and develops through a series of stages, each stage reflecting a change in who defines the problem, the kind of definition it is given, and the resulting actions taken to solve the problem".³⁵

It can thus be concluded that sexual abuse against children has an obscure and secret history among all cultures and societies. Although the well-being of children has been considered important as a societal norm, when sexual abuse occurs, secrecy comes to play as part of protecting the family and the child.³⁶ In the United States and England, there are specific high-profile cases involving sexual and physical abuse of children.

Examples of such cases are the 1987 Child Abuse scandal in Cleveland, South of England. The crisis which culminated in the report of Lord Justice Butler-Sloss inquiry into sexual abuse of 125 children from 57 families in the area. Many of the children were diagnosed with anal dilation while there was no one held responsible for the abuse. According to Bacon³⁷, Cleveland was "a defining moment in realising that the unthinkable did happen to children".

³⁴ Nigel Parton, "The Natural History of Child Abuse: A Study in Social Problem Definition", *The British Journal of Social Work*, vol. 9, no. 4 (1979): 431–51.

³⁵ Becker Howard, "Whose Side Are We On?", *Social Problems*, vol. 14, no. 3 (1967): 239–47.

³⁶ Carol A Plummer, "The History of Child Sexual Abuse Prevention: A Practitioner's Perspective", *Journal of Child Sexual Abuse*, vol. 7, no. 4 (1999): 77–95.

³⁷ Heather Bacon and Sue Richardson, "Child Sexual Abuse and the Continuum of Victim Disclosure: Professionals Working with Children in Cleveland in 1987" in *Home Truths about Child Sexual Abuse*, edited by Catherine Itzin, (United Kingdom & United States of America: Routledge, 2005), 255–96.

These cases are known to mark the prominence of CSA activism in the modern criminal justice system. In addition, they also marked a turning point in the legislative and judicial history in prosecuting abuses of sexual nature as it affects children.

2.2.4 21st Century

A common feature of CSA in the twenty-first century is the internationalisation of child protection. International recognition of Child Abuse and protection through Global framework and the United Nations.

The international concern for the well-being of children is the main feature of the 21st century. Culminating from the acceptability of the term “human rights” as an international terminology, the right of a child soon became one of the elements of universal human rights.³⁸ Following this is the passing of child labour laws in the United States which seek to regulate the condition of work for children without any scope for sexual abuse.

Although several high-profile CSA cases were unresolved, the trial of Albert Fish in 1955 received widespread media coverage. This case involved paedophilia, child death and cannibalism.³⁹ The accused was convicted and executed for his crimes. Although this case brought CSA to the public discuss, the cannibalism and death of victim compounded the case.

Before Albert’s case, there was the 1948 Kinsey Report which studied human sexuality in American societies and appears to have set standards for sex research around the world. The report revealed data from paedophile informants for which

³⁸ Cynthia Price Cohen, “Developing Jurisprudence of the Rights of the Child, The...”, *Thomas L. Rev.*, vol. 6, (1993): 1.

³⁹ Ed. Schwartz, and Barbara K., *Handbook of Sex Offender Treatment* (New Jersey: Civic Research Institute, 2011): v.

Kinsey was accused of not turning them to the authorities.⁴⁰ This report debunked the idea that children were not sexual beings and exposed the fact that there are sexual contacts between adults and children in America. The report pushed reforms for laws and policies for the protection of children.

Another feature of the 20th century is the publication of “The Battered Child Syndrome” in the 1962 issue of *Journal of the American Medical Association (JAMA)*. Although focussed on physically abused and neglected children, it helped to highlight responsibility of medical professionals to report sexual abuse and other abuse cases to the authorities.⁴¹ Child abuse prevention centres began to surface in states in the US providing advocacy, counselling and education for victims and families. This did not avert several child abuse scandals in the United States. Notable among them is the Franklin scandal involving the wealthy and influential people in paedophile rings around Omaha, Nebraska. Prominent Republican fundraiser, Lawrence King Jr. was alleged to have been involved. The scandal has been riddled with conspiracy, cover-ups and lack of closure.⁴²

As part of the internationalisation of child rights, the United Nations declared 1979 as the International Year of the Child, ten years after the Convention on the Right of the Child was adopted on 20th November 1989. It must be noted that several countries including Egypt contributed to the drafting of the Convention and the Egyptian representative was complemented for the establishment of the National

⁴⁰ Vern L Bullough, “Alfred Kinsey and the Kinsey Report: Historical Overview and Lasting Contributions”, *The Journal of Sex Research*, vol. 35, no. 2 (1998): 127-131.

⁴¹ C Henry Kempe et al., “The Battered-Child Syndrome”, *Jama*, vol. 181, no. 1 (1962): 17–24.

⁴² Nick Bryant, “The Franklin Scandal: The Cover-Up of Child Abuse and Its Analogues to Dissociative Identity Disorder”, *Global Perspectives on Dissociative Disorders: Individual and Societal Oppression*, (United Kingdom, Taylor & Francis, 2016): 155.

Commission on Childhood and Motherhood. The reports of states such as Egypt featured issues related to sexual abuse and drug use among children and young people.

It must be noted that the emergence of a globalised framework for children's rights i.e., the United Nations Convention on the Rights of the Child (UNCRC) was due to the recognition of rights of children in some parts of the world.⁴³ This global framework had snowballed into national legislation on the protection of children from all forms of neglect and abuse. Several jurisdictions began to consider specific legislation and the concept of the “best interest of the child” became popularised in legal and health discourse.

According to the UN Convention on the Rights of the Child (1989), a child is defined as any human being under the age of 18, unless national laws stipulate an earlier age of majority. This definition, outlined in Article 1 of the convention, serves as a foundational principle for recognizing and safeguarding the rights of children worldwide.

The Malaysian government has affirmed its commitment to the legal protection of children, having acceded to the United Nations Convention on the Rights of the Child (CRC) in 1995. As a signatory to the CRC, Malaysia is bound to fulfill its obligations under the convention, including submitting periodic reports to the UN CRC Committee every five years to review its progress in implementing the CRC's provisions. However, Malaysia has only submitted one state report thus far. In response to this, a coalition of child rights non-governmental organizations (NGOs) in Malaysia collaborated to produce status reports assessing the country's progress in meeting its CRC obligations. The Status Report on Child Rights in Malaysia 2018, authored by the Child Rights

⁴³ Michelle Cutland, “Child Abuse and Its Legislation: The Global Picture”, *Archives of Disease in Childhood*, vol. 97, no. 8 (2012): 679–84..

Coalition Malaysia, represents the third such report prepared by civil society, aimed at evaluating Malaysia's efforts towards fulfilling its commitments under the CRC.

In Malaysia, treaties signed by the executive hold international binding force; however, for these treaties to become enforceable within the country's legal framework and courts, they require incorporation by the national legislature. This principle is highlighted in the case of **R v Chief Immigration Officer, Heathrow Airport ex p Salamat Bibi (1976)**.⁴⁴

Despite the articulation of children's rights in both international instruments like the CRC and domestic laws in Malaysia, the reality often falls short, particularly concerning children's access to justice. According to a study by the Child's Rights International Network (CRIN), Malaysia ranked 130th out of 197 countries surveyed in terms of the effectiveness of its legal system in guaranteeing children's right to access justice, scoring only 41.2%.⁴⁵

The discrepancy between the articulation of children's rights in international instruments such as the Convention on the Rights of the Child (CRC) and their implementation within domestic laws in Malaysia underscores a critical issue pertinent to this thesis. While international treaties and domestic legislation ostensibly aim to uphold and protect children's rights, the reality often falls short, particularly concerning children's access to justice in Malaysia.

Despite the ratification of international treaties and the enactment of domestic laws ostensibly safeguarding children's rights, the practical implementation and enforcement of these rights within Malaysia frequently do not meet the standards

⁴⁴ 3 All ER 843

⁴⁵ Jennifer Gomez, "M'sia ranks No 130 on children's access to justice globally," *The Edge Malaysia*, 16 February, 2016, 1-2, <https://theedgemaalaysia.com/article/m%E2%80%99sia-ranks-no-130-children%E2%80%99s-access-justice-globally>

outlined in international agreements. This discrepancy raises significant questions about the effectiveness of existing legal frameworks and mechanisms in ensuring the fulfillment of children's rights in Malaysia.

Moreover, the gap between policy intentions and practical outcomes has tangible implications for children's access to justice in the Malaysian context. Barriers such as limited awareness of rights, inadequate legal assistance, systemic biases, and socio-economic disparities often hinder children from effectively exercising their rights and seeking redress for violations.

Hence, exploring this disconnect between policy and practice is essential for gaining a comprehensive understanding of the state of children's rights and access to justice in Malaysia. Additionally, by highlighting the challenges faced by children in accessing justice, this research seeks to inform policy recommendations and advocacy efforts aimed at bridging the gap between legal frameworks and the lived realities of children in Malaysia.

The children's right to protection against maltreatment within their homes, as enshrined in the UN Convention on the Rights of the Child (CRC), and the corresponding obligations of states parties in translating these rights into practice are well included in the CRC. Children's rights under the CRC encompass three main categories: protection rights, provision rights, and participation rights⁴⁶. However, it's essential to recognize that children's rights are interconnected and should not be viewed in isolation. Two key articles within the CRC obligate states parties to establish child protection systems. Article 19 grants children the right to protection from physical and mental violence, neglect, sexual abuse, and exploitation, while Article 3, paragraph 2,

⁴⁶ Hammarberg, T., "The UN convention on the rights of the child—And how to make it work", *Human Rights Quarterly*, vol. 12, no. 1 (1990): 97–105.

ensures children's access to necessary protection and care for their well-being. Additionally, Article 37 (a) prohibits torture and other cruel, inhuman, or degrading treatment or punishment. However, Article 19 is considered the core provision for addressing and eliminating all forms of violence against children as enshrined in Geneva Convention No. 13, para. 7 a.

The Committee on the Rights of the Child (CRC) provides comprehensive guidance on implementing the Convention on the Rights of the Child through its general comments, which address the gaps between law and reality by offering detailed recommendations for states. Key articles such as Articles 2, 3, 6, and 12 are considered foundational and are often referred to as "umbrella articles" because they underpin the entire Convention and must be read together to understand their collective impact on children's rights.

Article 2: Non-Discrimination is crucial for ensuring that all children have equal access to their rights without discrimination based on any ground, including race, sex, disability, or social origin. This principle is detailed in General Comment No. 7 (2005) on Implementing Child Rights in Early Childhood, which urges states to take all necessary measures to prevent discrimination and ensure that inclusive policies are in place to address the needs of marginalized groups. Article 3: Best Interests of the Child mandates that the best interests of the child must be a primary consideration in all actions concerning children. General Comment No. 14 (2013) elaborates on this by providing detailed guidance on assessing and determining the best interests of the child. It emphasizes a rights-based approach that considers the child's views, needs, and individual circumstances. This principle is interlinked with Article 2 as it ensures that every decision made prioritizes the child's well-being, promoting fairness and justice.

Article 6: Right to Life, Survival, and Development highlights the state's obligation to ensure the holistic development of children. General Comment No. 5 (2003) stresses the importance of creating environments that support the survival and development of the child, addressing issues such as health, education, and an adequate standard of living. This article is interlinked with Articles 2 and 3, as non-discrimination and the best interests of the child principles must be integrated into policies and practices that support children's development.

Article 12: Right to be Heard ensures that children have the right to express their views freely in all matters affecting them and that these views are given due weight according to the child's age and maturity. General Comment No. 12 (2009) provides guidance on facilitating meaningful participation of children in decision-making processes. It recognizes that respecting children's views is fundamental to their dignity and autonomy, interlinking with Articles 2 and 3 by ensuring that all children, without discrimination, have a say in decisions impacting their lives and that their best interests are considered based on their input.

These general comments collectively reinforce a comprehensive approach to protecting and promoting children's rights. Non-discrimination ensures equal access to opportunities and resources (Article 2), the best interests of the child guide all decisions and actions affecting children (Article 3), the right to life, survival, and development emphasizes state obligations to support all aspects of a child's growth and well-being (Article 6), and the right to be heard ensures that children are active participants in decisions that affect their lives (Article 12).

The United Nations Committee on the Rights of the Child's General Comment No. 13 (2011) focuses on the right of the child to freedom from all forms of violence, as stipulated in Article 19 of the Convention on the Rights of the Child in which this

obligates States parties to take all appropriate measures to protect children from physical or mental violence, injury, abuse, neglect, maltreatment, and exploitation, including sexual abuse. The rationale behind this general comment is the alarming extent and intensity of violence against children, necessitating stronger measures to eliminate practices that jeopardize children's development and societal peace.

The document emphasizes several fundamental assumptions: no violence against children is justifiable; all forms of violence are preventable; a child rights-based approach is needed, focusing on the dignity and human rights of the child; the rule of law applies fully to children; children's rights to be heard and have their views respected must be upheld; and primary prevention of violence is crucial. Violence is broadly defined to include all forms of physical or mental violence, injury, abuse, neglect, negligent treatment, maltreatment, and exploitation. States have a duty to prevent violence, protect victims, investigate incidents, punish perpetrators, and provide access to redress.

The general comment aims to guide States in understanding their obligations under Article 19, outlining necessary legislative, judicial, administrative, social, and educational measures, promoting a holistic approach to child rights and protection, and developing a coordinated framework for eliminating violence. Despite numerous initiatives, existing efforts are insufficient, as many legal frameworks fail to prohibit all forms of violence against children, and enforcement is often inadequate. Addressing and eliminating violence is a human rights imperative, crucial for societal development and the holistic development of children. The human, social, and economic costs of violence are enormous and unacceptable.

In the legal analysis of Article 19, it emphasizes that all forms of violence are unacceptable, requiring States to establish clear legal definitions and standards. Various

forms of violence include neglect, mental and physical violence, sexual abuse, torture, and harmful practices, with specific forms of violence faced by children with disabilities. A holistic child protection system necessitates comprehensive measures across prevention, identification, reporting, referral, investigation, treatment, and follow-up. Effective procedures are essential for enforcement, quality control, and accountability.

A child rights approach should be established, focusing on the dignity, life, development, participation, and non-discrimination of the child. States must ensure protection from violence for all children without discrimination (Article 2), and the best interests of the child must be upheld in all measures (Article 3). Protection from violence is essential for children's holistic development (Article 6), and children's views must be respected in all protection processes (Article 12). The document recommends a national coordinating framework for measures to protect children from violence, recognizing that different countries have varied starting points. This framework should provide a common reference for state and civil society actors, promoting flexibility and creativity while building on existing strengths and addressing gaps⁴⁷.

While the CRC recognizes the primary role of the family in a child's upbringing, it also emphasizes the need to protect children from violence, abuse, and neglect. The Convention acknowledges that separation from parents may be necessary for the child's best interests, emphasizing a child rights approach to child care and protection. In this approach, the child is viewed as a rights holder, not merely a beneficiary of adult benevolence as stated in Geneva Convention No. 13, para. 72 a.

⁴⁷ General comment No. 13 (2011) The right of the child to freedom from all forms of violence

The Committee on the Rights of the Child is tasked with monitoring states parties' compliance with the CRC. This independent body evaluates country reports, receives additional information from various sources, and engages in a dialogue with country delegations to produce concluding observations with recommendations. Additionally, the Committee has developed general comments to provide guidance on interpreting and implementing the CRC. Since 2014, it also handles individual complaints under the 3rd Optional Protocol to the Convention.

The Committee on the Rights of the Child (CRC) has provides a comprehensive guidance on the implementation of the Convention on the Rights of the Child through its general comments, which address the gaps between law and reality by offering detailed recommendations for states. For instance, General Comment No. 21 (2017) focuses on children in street situations, advising states to develop holistic, child-rights-based national strategies that address both prevention and response. This comment states the importance of ensuring that children in street situations receive the necessary care and protection, recognizing that these children experience a broad spectrum of rights violations⁴⁸.

Moreover, General Comment No. 26 (2023) addresses the urgent need to protect children's rights in the context of environmental degradation and climate change. It underscores the state's obligation to mitigate environmental harm and ensure children's rights to a clean, healthy, and sustainable environment. This comment emerged from extensive consultations with children and stakeholders, reflecting the global recognition of the environmental crisis as a significant threat to children's rights⁴⁹.

⁴⁸ United Nations, "General comment No. 21 (2017) on children in street situations", <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-21-2017-children-street>> (accessed 08 May, 2024).

⁴⁹ United Nations, "General comment No. 26 (2023) on children's rights and the environment with a special focus on climate change", <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-26-2023-children-rights-environment>> (accessed 08 May, 2024).

Additionally, General Comment No. 25 (2021) discusses children's rights in the digital environment, providing states with guidance on safeguarding children's online privacy, safety, and access to information. It also highlights the importance of facilitating children's participation in the digital space, acknowledging the unique challenges and opportunities that the digital environment presents for the protection and realization of children's rights⁵⁰.

Furthermore, General Comment No. 24 (2019) on children's rights in the child justice system emphasizes the need for states to ensure that children are treated with dignity and their rights protected throughout judicial processes. This comment replaces the earlier General Comment No. 10, reflecting updated international standards and insights into child development, advocating for a justice system that is sensitive to the specific needs and rights of children⁵¹.

From the above general comments from the CRC, this shows the crucial areas where discrepancies often exist between legislative frameworks and the actual implementation of children's rights. By adhering to the detailed recommendations provided in these comments, states can bridge these gaps effectively. For Malaysia, incorporating these guidelines into domestic law will enhance the protection and realization of children's rights, addressing issues from environmental challenges to digital safety and justice system reforms. Thus, the rights outlined in the UN Convention on the Rights of the Child (CRC) play a crucial role in shaping the child protection

recommendations/crcgc26-general-comment-no-26-2023-childrens-rights> (accessed 12 April, 2024); *United Nations Committee on the Rights of the Child (CRC)*, "Launch of general comment No. 26 on children's rights and the environment with a special focus on climate change", <https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/Programme_Launch_GC26_EN.pdf#:~:text=URL%3A%20https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Fhrbodies%2Fcrc%2Fgcomments%2Fgc26%2F2023%2FProgramme_Launch_GC26_EN.pdf%0AVisible%3A%200%25%20> (accessed 10 June, 2024).

⁵⁰ *United Nations Human Rights*, "Committee on the Rights of the Child", <<https://www.ohchr.org/en/treaty-bodies/crc>> (accessed 04 June, 2024).

⁵¹ Ibid.

system in Malaysia. These rights provide a legal framework for safeguarding children from maltreatment, ensuring their well-being, and promoting their holistic development. In Malaysia, as in other countries, the CRC serves as a guiding document for policymakers, legislators, and practitioners involved in child protection efforts.

The CRC emphasizes the importance of protecting children from all forms of violence, abuse, and exploitation, whether perpetrated within their homes or elsewhere. It underscores the obligation of states parties, including Malaysia, to establish robust child protection systems that prioritize children's rights to safety, security, and well-being. Additionally, the CRC advocates for a child rights approach, which views children not as passive recipients of care but as active rights holders entitled to dignity, respect, and participation in decisions affecting their lives.

The Committee on the Rights of the Child provides several general comments that emphasize the importance of protecting children and their rights comprehensively. One of the most significant general comments in this regard is General Comment No. 13 (2011) on the Right of the Child to Freedom from All Forms of Violence that is dedicated to the prevention of all forms of violence against children and underscores the comprehensive measures that states must implement to protect children from violence. The general comment elaborates on the various forms of violence from which children must be protected, including physical, mental, sexual abuse, neglect, and exploitation. States are obligated to implement legislative, administrative, social, and educational measures to prevent violence against children. This includes creating child-friendly reporting mechanisms, ensuring effective legal frameworks, and providing support services for child victims of violence. Further, states should adopt comprehensive preventive strategies, including public education campaigns, training for professionals working with children, and the development of safe environments that

minimize risks of violence. The importance of involving children in the development and implementation of policies and programs aimed at preventing violence is highlighted. Children should be empowered to participate in processes that affect their lives.

General Comment No. 13 emphasizes that violence against children is a severe violation of their rights and negatively impacts their development and well-being. The protection of children from violence is essential to fulfilling the broader objectives of the Convention on the Rights of the Child, which include ensuring the survival, development, and participation of children in society.

General Comment No. 8 (2006) on the Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment where this general comment focuses on the necessity of prohibiting all forms of corporal punishment and promoting positive, non-violent forms of discipline. General Comment No. 12 (2009) on the Right of the Child to be Heard underscores the importance of children's participation in all matters affecting them. General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration elaborates on the concept of the best interests of the child, providing detailed guidance on how this principle should be applied in all actions concerning children.

Scholarly remarks on the general comments

On November 20, 1989, the international community made a historic commitment to children by adopting the United Nations (UN) Convention on the Rights of the Child (CRC). This landmark treaty, ratified by 196 countries, recognized children as individual claimants of rights and defined a child as any human under eighteen. Before

the CRC, child rights were seen as a private family matter rather than a societal responsibility. The CRC established that childhood is a protected period where children must be able to live with an identity, grow, develop, enjoy good health, learn, play, express themselves, participate, and be protected by their guardians or parents in a dignified manner. This change allowed child protection agencies to highlight the issue of child abuse and hold caregivers accountable.

The International Society for Prevention of Child Abuse and Neglect (ISPCAN) played a crucial role in developing the CRC. Since its inception in 1977, ISPCAN has integrated child rights into its vision and mission to support professionals working to end child abuse and neglect. The concept of mandatory reporting of child abuse started in the US after ISPCAN's founder, Henry Kempe, published an article on battered child syndrome in 1962. Today, many countries have implemented some form of reporting requirements, with the USA, Canada, and Australia having the most comprehensive laws.

The 30th anniversary of the CRC offers a moment to reflect on significant advancements in ending violence against children and celebrate regional and international improvements. This milestone also serves as a reminder to uphold children's rights, the CRC, and its optional protocols, which are fundamental for peace and protection within societies. Enhanced data collection, increased political will, and supportive public policies are crucial to achieving the Sustainable Development Goals by 2030. ISPCAN's efforts, including providing preventative tools, professional training, expert consultation, data collection tools, advocacy, and guidance, have contributed to healthier global conditions for children.

Emerging challenges such as pandemics, climate disasters, and armed conflicts further complicate the CRC's implementation. ISPCAN has addressed these issues

through its journal, congresses, and professional networks. Persistent issues like behavioral norms, societal violence, and social determinants of health continue to hinder child protection. This special issue of "Child Abuse and Neglect - The International Journal" celebrates 30 years of the CRC and 45 years of ISPCAN's work in preventing child abuse and neglect. Significant advancements have been made in addressing child maltreatment through knowledge building, professional empowerment, and capacity building. Advocacy for a child-rights-based approach has led to greater success in research, treatment, and prevention programs, especially in lower and middle-income countries. Despite progress, alarming statistics remind us that child abuse and neglect are still prevalent and entirely preventable⁵².

The UN Committee on the Rights of the Child established General Comment 13 (GC13) in April 2011 to address the persistently high rates of violence against children globally despite advances made under the Convention on the Rights of the Child (CRC). GC13 provides detailed interpretations and guidelines to supplement the legal language of CRC Article 19, aimed at protecting children from all forms of violence. This initiative seeks to enhance policy implementation for all children, particularly the most vulnerable, by establishing measurable indicators such as structure, process, and outcomes, coupled with improved technical information, expertise, and assistance. GC13 leverages 22 years of knowledge and experience since the CRC's adoption to promote best practices and technical resources for states and professionals involved in child protection. GC13 emerged from a comprehensive consultation process involving professionals, government and NGO representatives, and experts from various regions. It emphasizes the need for prevention through government support for families,

⁵² Muhammad, T., and Tummala, P., "The progress in child protection 30 years after the CRC and the impact of ISPCAN", *Child Abuse & Neglect*, vol. 119, Pt. 1 (2021): 105134-105134.

ensuring they can provide adequate care, protection, and an appropriate standard of living for their children⁵³.

One key priority of GC13 is to improve data on child maltreatment, which often underestimates the reality of violence against children. GC13 advocates for community-based surveillance to collect detailed information from various sources, thereby establishing the true scope of the problem and informing strategies and solutions. This approach is critical for developing scientifically credible estimates of violence against children in all its forms. GC13 clarifies the rights of all children to protection from violence, regardless of their marital or emancipated status, and defines the state's responsibility as the de facto caregiver when primary caregivers are absent. This clarification ensures that children who marry or are otherwise emancipated still receive the protections guaranteed by the CRC. The state is also responsible for children without primary caregivers, including those in street situations, migrating, or unaccompanied.

Violence against children, as defined by GC13, includes physical, mental, and emotional harm, neglect, and exploitation. The document highlights the prevalence of corporal punishment and the need for positive, non-violent forms of discipline. Despite progress, many children still suffer from violence, necessitating continued efforts to provide parent and caregiver support, information, and education on alternatives to violence. GC13 acknowledges the needs of particularly vulnerable children, such as those from marginalized, minority, and immigrant communities, those with disabilities, and those in institutional care. It calls for measures to end harmful cultural practices, like female genital mutilation, and emphasizes the state's role in ensuring the rights and protection of all children.

⁵³ Svevo-Cianci, K. A. et al., "The new UN CRC General Comment 13: "The Right of The Child to Freedom From All Forms of Violence"—Changing how the world conceptualizes child protection", *Child abuse & neglect*, vol. 35, no.12 (2011):979-989.

GC13 provides guidance for states to establish a National Coordinating Framework (NCF) to integrate child protection efforts across all related ministries and institutions. This integration is essential for effective child protection but challenging due to deeply rooted social and cultural attitudes toward violence. States must allocate adequate resources, including financial, technical, and human resources, to fulfill their obligations under the CRC. GC13 promotes children's participation and agency, emphasizing their right to be heard and involved in decisions affecting them. It advocates for partnerships between children, families, communities, and professionals to create a supportive environment for child protection. This approach recognizes children as proactive agents of change, not merely victims, and stresses the importance of their involvement in developing protection strategies.

It can be seen that GC13 offers a renewed opportunity to address the complex issue of child protection with a holistic, prevention-based approach. It aims to create an integrated system that supports children, families, and communities, emphasizing evidence-based practices and accountability. By developing and disseminating technical resources, training professionals, and advocating for child rights, GC13 seeks to enhance global child protection efforts and ensure positive outcomes for all children⁵⁴.

Further, the Special Representative on Violence Against Children, established in 2009, advocates for the prevention and elimination of violence against children. A global survey conducted in 2013 identified major risk factors and positive developments, such as increased policies and legal bans on violence. The 2030 Agenda for Sustainable Development, adopted in 2015, includes explicit targets to end violence

⁵⁴ Ibid.

against children and promotes a safe, non-violent environment for all children. Implementing the CRC is complex due to diverse motivations and theories driving child protection efforts, including ethics of care, ecological approaches, and human rights perspectives. The article addresses concerns about the Western liberal tradition of human rights and potential conflicts between children's rights and parental authority, particularly in contexts of domestic violence. The authors argue for a balanced, relational approach to children's rights, recognizing the role of parents while ensuring children's protection⁵⁵.

Advocacy and litigation are crucial aspects of a rights-based approach to child protection. The CRC provides a legal framework for advocacy and litigation efforts to enhance child protection. The Convention's monitoring process and concluding observations by the CRC Committee play a crucial role in shaping national policies and legal reforms. In policy design, a rights-based approach requires policies that ensure children's participation in decision-making processes and respect their views. This approach emphasizes prevention strategies and comprehensive measures to protect children from violence. Moving from a welfare model to a rights-based approach in service delivery involves recognizing children as active participants in their protection and care. This includes providing confidential counseling and support services without parental consent when necessary for the child's well-being. Rights-based research methodologies involve children in the design, implementation, and evaluation of research projects. Ethical research practices must respect children's rights to protection and participation, contributing to more effective child protection strategies. The next decade poses significant challenges for child protection, particularly for children

⁵⁵ Tobin, J., and Cashmore, J. "Thirty Years of The CRC: Child Protection Progress, Challenges and Opportunities", *Child abuse & neglect*, vol. 110, no. 1 (2020): 104436.

affected by natural disasters, armed conflict, and poverty. The CRC offers a global platform to address these challenges, but collaboration between rights-based and other complementary approaches is essential. This indeed calls for ongoing dialogue and multidisciplinary efforts to realize the CRC's vision of a world free from violence for children⁵⁶.

General Comments and Sexual Offences Against Children

In relation to the Sexual Offences Against Children Act 2017 (SOACA 2017) in Malaysia, the principles and provisions outlined in the CRC are highly relevant. SOACA 2017 is a significant legislative measure aimed at combating sexual offenses against children and enhancing child protection in Malaysia. The Act reflects Malaysia's commitment to upholding children's rights, particularly their right to protection from sexual abuse and exploitation.

The Sexual Offences Against Children Act 2017 (SOACA) in Malaysia represents a critical legislative measure aimed at combating sexual offences against children and enhancing child protection. The general comments from the Committee on the Rights of the Child (CRC) has provide essential guidance that aligns with various sections of SOACA 2017.

General Comment No. 13 (2011) on the Right of the Child to Freedom from All Forms of Violence emphasizes the state's obligation to protect children from all forms of physical or mental violence, injury, abuse, neglect, maltreatment, or exploitation, including sexual abuse. This guidance is directly relevant to Section 12 of SOACA 2017, which addresses the offense of sexual grooming. This section recognizes the preparatory actions taken by offenders to commit sexual abuse against children,

⁵⁶ Ibid.

reflecting the preventive measures urged by General Comment No. 13. Additionally, Section 13 deals with meeting a child following sexual grooming, further supporting early intervention to prevent potential abuse.

The integration of the principles and recommendations from these general comments, will make SOACA 2017 to be further strengthened to provide comprehensive protection for children. These general comments from the Committee on the Rights of the Child provide a robust framework for interpreting and implementing SOACA 2017.

By aligning with the CRC's principles and objectives, SOACA 2017 reinforces Malaysia's obligations under international law to protect children from harm and ensure their well-being. The Act provides legal mechanisms for prosecuting perpetrators of sexual offenses against children, offering support services to victims, and promoting prevention and awareness-raising efforts. In this way, SOACA 2017 contributes to strengthening the child protection system in Malaysia and advancing the realization of children's rights as enshrined in the CRC.

Although Malaysia enacted the Child Act in 2001 as part of its commitment to the CRC, the CRC has not been fully incorporated into Malaysian law, rendering it non-enforceable in court. This gap highlights a disconnect between Malaysia's legal framework and its obligations under international law.

Moreover, child-friendly facilities within the court system are not widely available in Malaysia. Additionally, in cases other than sexual crimes, a child's testimony alone is typically insufficient to secure a conviction. This limitation further underscores the challenges children face in accessing justice and seeking redress for rights violations. Overall, while Malaysia has taken steps to address children's rights

through legislation such as the Child Act, there remain significant gaps and obstacles in ensuring effective access to justice for children.

Based on the identified gaps in Malaysia's legal framework and practice regarding children's access to justice, the research has made findings aimed at addressing these shortcomings comprehensively. One significant finding pertains to the corroboration requirement for child witnesses' testimony, which often hinders their ability to seek justice. To overcome this obstacle, the research recommends revising legal procedures to allow for greater weight to be placed on a child's testimony, especially in cases where corroborating evidence may be scarce or difficult to obtain. This approach aligns with international best practices and recognizes the unique challenges faced by child witnesses.

Furthermore, the research emphasizes the importance of making courts more child-friendly to create a conducive environment for children to participate in legal proceedings comfortably and effectively. This includes advocating for the establishment of child-friendly facilities within courtrooms, such as designated waiting areas and support services tailored to children's needs. Additionally, the research suggests implementing specialized training programs for judges, lawyers, and court staff to enhance their understanding of child development, trauma-informed approaches, and child-sensitive communication techniques.

The extension of child rights legislation in this era include the prioritisation of child's right, state ownership of the child welfare, criminalization of CSA, mandatory reporting, severe penalties and age of consent review.⁵⁷ Modern child legislation also

⁵⁷ Leigh Goodmark, "From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases", *W. Va. L. Rev.*, vol. 102, no. 2 (1999): 237.

provides for child-care giving, education, rehabilitation and civic engagement, civil remedies and compensation, prevention and awareness programs.⁵⁸

The Sexual Offences Against Children Act 2017 (SOACA) in Malaysia represents a significant legislative measure designed to combat sexual offences against children, provide legal mechanisms for prosecuting perpetrators, offer support services to victims, and promote prevention and awareness-raising. The Human Rights Commission of Malaysia (SUHAKAM) and the Committee on the Rights of the Child (CRC) from the Office of the United Nations High Commissioner for Human Rights (OHCHR) have provided valuable input and recommendations to enhance the effectiveness of such legislation.

The Human Rights Commission of Malaysia (SUHAKAM) regularly publishes reports that provide in-depth analyses of human rights issues within the country, including child sexual abuse. These reports are instrumental in highlighting gaps and proposing improvements in the legal and support systems. The SUHAKAM report has emphasizes the need for effective legal frameworks to prosecute offenders. It advocates for specialized training for law enforcement and judicial officers to handle cases of child sexual abuse with sensitivity and efficiency. Additionally, the report calls for legislative reforms to enhance existing laws, ensuring comprehensive coverage of all forms of child sexual exploitation and guaranteeing swift and severe penalties for perpetrators.

Comprehensive support services for victims are crucial. The SUHAKAM report recommends the establishment of child protection units and specialized shelters to provide immediate and long-term support. Preventive measures are equally vital to reduce the incidence of child sexual abuse. The report advocates for implementing

⁵⁸ Annette Ruth Appell, “The Pre-Political Child of Child-Centered Jurisprudence”, *Hous. L. Rev.*, vol. 46, no. 3 (2009): 703.

educational programs in schools and communities to raise awareness about the dangers and signs of child sexual abuse. It also recommends collaborating with non-governmental organizations to conduct community outreach and support programs.

On the other hand, The General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence by the OHCHR provides an authoritative interpretation of the Convention on the Rights of the Child (CRC). This document emphasizes the need for comprehensive legal measures to protect children from all forms of violence, including sexual abuse. It urges state parties to criminalize all forms of sexual exploitation and abuse against children and ensure child-sensitive judicial processes that prioritize the best interests of the child, minimizing trauma and ensuring justice. Holistic support services for child victims are a key focus of the General Comment. It advocates for providing comprehensive health, psychological, and social services to help children recover from abuse and reintegrate into society. The document also recommends establishing safe spaces and rehabilitation programs where children feel secure and supported during their recovery process. Preventive measures are essential to protect children from abuse. The General Comment emphasizes the need for public education campaigns to raise awareness about child sexual abuse and how to prevent it. It also calls for professional training to educate those working with children on recognizing and responding to signs of abuse.

Next, the Sexual Offences Against Children Act 2017 is a landmark legislation in Malaysia, addressing various aspects of child sexual abuse with precision. The Act provides clear definitions of offences, including grooming, child pornography, and physical sexual assault, ensuring comprehensive coverage of all potential abuses. It outlines stringent provisions for prosecuting offenders, criminalizing a wide range of sexual activities involving children, and introducing child-friendly procedures such as

video testimony to protect the child's dignity during legal proceedings. Mandated support services for victims are a critical component of the Act. It ensures that victims receive necessary medical care, psychological counseling, and social support. The Act also calls for the establishment of child protection teams to coordinate services and support, creating a comprehensive care network for victims. Proactive measures to prevent child sexual abuse are also included in the Act. It mandates public education campaigns to educate the public about the dangers and signs of child sexual abuse and encourages educational institutions to implement safety and awareness programs for children.

Thus, the SUHAKAM report, the General Comment from the Committee on the Rights of the Child, and the Sexual Offences Against Children Act together form a robust framework for addressing child sexual abuse. This integrated approach ensures effective prosecution through robust legal frameworks and child-friendly judicial processes. This also ensures extensive support for victims, providing comprehensive services to aid recovery and reintegration. The combined efforts outlined in the SUHAKAM report, the General Comment from the Committee on the Rights of the Child, and the Sexual Offences Against Children Act demonstrate and collectively form a comprehensive approach to combat child sexual abuse, ensuring justice, support, and prevention.

2.2.5 Conceptual Framework

The conceptual framework underpinning this thesis encompasses several key concepts. Firstly, it involves an exploration of children's rights as delineated in international instruments like the UN Convention on the Rights of the Child (CRC) and domestic laws in Malaysia, considering various dimensions such as protection, provision, and

participation rights. Secondly, it entails an examination of access to justice for children, encompassing factors like legal awareness, affordability, accessibility, effectiveness, and procedural fairness within the justice system, while also identifying barriers hindering children's access to justice in Malaysia. Additionally, the framework scrutinizes the existing legal and policy frameworks related to children's rights and access to justice in Malaysia, evaluating their adequacy, effectiveness, and implementation gaps. Furthermore, it emphasizes child-centered approaches, advocating for the active participation of children in legal proceedings and policy development, and integrating their voices and perspectives into research, advocacy, and policy-making. Lastly, the framework draws on interdisciplinary perspectives from fields such as law, psychology, sociology, social work, and human rights studies, to provide a comprehensive understanding of the research topic.

In 2017, Malaysia took significant strides in strengthening its legal framework to combat sexual offences against children. These efforts were part of a broader movement to align national laws with international standards, particularly those outlined in the United Nations Convention on the Rights of the Child (UNCRC). In response to increasing concerns about child sexual abuse, Malaysia introduced the Sexual Offences Against Children Act 2017.

The UNCRC serves as a comprehensive framework for the protection and promotion of children's rights globally. Several articles within the UNCRC are particularly relevant to the issue of sexual offences against children are Article 2 - Non-discrimination that ensures that all children are protected from discrimination, including those based on sex, race, or other statuses. This principle underlines the necessity of equal protection under the law for all children against sexual offences.

The UNCRC sets universal standards for the rights and treatment of children. By incorporating these standards, countries ensure consistency in child protection laws and practices across the globe. The articles and general comments of the UNCRC cover a wide range of child rights, from protection against abuse and exploitation to the right to education, health, and participation. Incorporating these comprehensive guidelines ensures a holistic approach to child protection, addressing multiple aspects of a child's life and well-being⁵⁹. The general comments provided by the UNCRC Committee are based on extensive research and best practices. These comments offer detailed guidance on implementing the articles effectively.

Countries that ratify the UNCRC are legally obligated to incorporate its provisions into their national laws. This creates a system of accountability, where governments are required to report on their progress and be scrutinized by the international community. This accountability helps ensure that countries remain committed to improving the situation of children.

Articles such as Article 12 (respect for the views of the child) emphasize the importance of children's participation in decisions affecting them. Incorporating such principles ensures that children are not only protected but also empowered to have a say in matters that impact their lives, fostering their development into active, informed citizens. The general comments provide practical guidance on how to interpret and implement the articles of the UNCRC. This includes recommendations on legislation, policy-making, and practical measures to protect children's rights. These comments help countries translate the broad principles of the UNCRC into concrete actions. The UNCRC emphasizes the protection of vulnerable groups, such as children with

⁵⁹ Convention on the Rights of the Child at United Nations General Assembly (20 November, 1989).

disabilities, children from minority backgrounds, and those affected by conflict. By incorporating the UNCRC, countries can ensure that their policies are inclusive and address the specific needs of these groups, promoting equality and non-discrimination.

One of the core principles of the UNCRC is the best interests of the child (Article 3). This principle requires that the child's best interests be a primary consideration in all actions concerning them. Incorporating this principle into national frameworks ensures that policies and practices always prioritize the welfare and development of children.

Malaysia's incorporation of UNCRC principles into its 2017 Sexual Offences Against Children Act is a practical example of how these guidelines can enhance national legislation.

Incorporating the articles and general comments from the UNCRC into national laws and policies is essential for ensuring the comprehensive protection and promotion of children's rights. As an example, Article 19 specifically mandates that children should be protected from all forms of physical or mental violence, injury, abuse, neglect, maltreatment, or exploitation, including sexual abuse. This article forms the foundation of legal protections against child sexual offences.

General Comment No. 13 (2011) elaborates on Article 19, providing detailed guidance on preventing violence against children, including sexual abuse. It emphasizes the importance of a comprehensive legislative framework, preventive measures, and the provision of support services for child victims.

Article 3 - Best Interests of the Child that mandates that the best interests of the child must be a primary consideration in all actions concerning children.

Article 6 - Right to Life, Survival, and Development that ensures every child's inherent right to life and the state's obligation to ensure the child's survival and

development. This article underscores the importance of safeguarding children from sexual abuse as a means of protecting their development.

Article 12 - Respect for the Views of the Child guarantees that children capable of forming their own views have the right to express those views freely in all matters affecting them. This provision highlights the importance of considering children's testimonies and perspectives in legal proceedings.

Further, Conceptual Framework Based on Article 19 of the UNCRC⁶⁰ consists of two paragraphs outlining the definition of violence, the stakeholders involved, and the measures for the protection of children and their rights. Below is a conceptual framework based on these elements. Paragraph 1 of Article 19 - Protection from all forms of violence : "States Parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child." Paragraph 2 of Article 19 states that "Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Definition of Violence is stated in Article 19, Paragraph 1 in which the forms of violence outlined include physical violence, mental violence, injury, abuse, neglect, negligent treatment, maltreatment, exploitation, and sexual abuse. This violence occurs

⁶⁰ Article 19 - Protection from all forms of violence

while the child is in the care of parents, legal guardians, or any other caregivers. The primary recipients of protection measures are children. Parents and legal guardians are the primary caregivers responsible for the child's welfare, while caregivers include any other individuals who have the care of the child. State parties, or governments, are responsible for implementing protective measures. Educational institutions, such as schools and educators, are involved in prevention and awareness. Health and social services professionals provide support and intervention, and the judiciary is involved in the enforcement of protective measures and addressing violations.

Next, the Protection of Child outlined in Article 19, Paragraph 2 in which the protection measures include preventive actions such as legislative and administrative measures, social and educational programs. Support services include social programs providing necessary support for children and caregivers. There are mechanisms for identifying and reporting instances of maltreatment, and procedures for referring and investigating reported cases. Treatment and follow-up include support and rehabilitation for victims, with follow-up to ensure ongoing protection. Judicial involvement includes legal actions and enforcement of laws protecting children. Lastly, for the Rights of the Child, it is enshrined in Article 19, Paragraph 1 and 2 where children have the right to protection from all forms of violence, abuse, and exploitation. They also have the right to support, which includes access to social programs and services for recovery and reintegration. The right to justice ensures legal protection and recourse in cases of violence and abuse. The right to participation, linked to Article 12, ensures that children can be involved in decisions affecting their protection and welfare.

This can also be supported by some of the scholars such as Freeman in 2017 in which he emphasizes that child protection measures should always prioritize the child's well-being and interests, which is closely related to Article 19. He discusses the

importance of integrating the child's best interests into all educational policies and practices, arguing that educational institutions play a crucial role in the early identification and prevention of child maltreatment⁶¹.

Next, Pinheiro in 2006 highlights the importance of legislative and administrative measures in preventing violence and protecting children, aligning with Article 19. Pinheiro underscores that effective child protection requires robust legal frameworks and coordinated efforts across various sectors, including health, education, and social services. He also points out that data collection and research are vital for understanding the prevalence and nature of violence against children, which can inform better policy-making and resource allocation⁶².

Next, Jones., et al in 2012 addresses the heightened risk of violence against children with disabilities, supporting the need for inclusive protective measures as emphasized in Article 19. Jones., et al found that children with disabilities are at significantly higher risk of experiencing violence than their non-disabled peers. The study calls for tailored interventions that address the specific vulnerabilities of children with disabilities and ensure their full inclusion in all protective measures⁶³.

This conceptual framework provides a comprehensive view of the elements involved in protecting children from violence as outlined in Article 19 of the UNCRC. It includes definitions, stakeholders, protective measures, and the rights of the child, ensuring a holistic approach to child protection.

⁶¹ Freeman, M. D., and Alen, A., *Article 3: The Best Interests of The Child* (Vol. 3) (Leiden: Martinus Nijhoff, 2007), 67.

⁶² Pinheiro, P. S., *Violence Against Children* (Geneva: ATAR Roto Presse SA, 2006), 1-26.

⁶³ Jones, L. et al., "Prevalence and Risk of Violence Against Children With Disabilities: A Systematic Review and Meta-analysis of Observational Studies", *The Lancet*, vol. 380, no.9845 (2012): 899-907.

2.2.5.1 The theories and conceptual framework outlined in the UN Convention on the Rights of the Child (CRC) and the application for both Malaysia and India

The theories and conceptual framework outlined in the UN Convention on the Rights of the Child (CRC) hold significant relevance for both Malaysia and India on various fronts. Firstly, as signatories to the CRC, both countries are persuasively binding by its principles and standards, making the theories embedded in the convention crucial for understanding their legal obligations and responsibilities towards children's rights. Secondly, the CRC serves as a guiding framework for policy development in both Malaysia and India, enabling the formulation of initiatives that align with international standards and best practices for promoting children's well-being. Moreover, the CRC serves as a powerful advocacy tool, helping raise awareness about children's rights and garner support for initiatives aimed at addressing key issues affecting children in both countries.

Furthermore, the theories and principles enshrined in the CRC inform judicial and legislative interpretation, ensuring that decisions and actions taken by courts and legislative bodies are consistent with international standards concerning children's rights. Lastly, the CRC facilitates capacity building efforts by providing a framework for professional development initiatives aimed at enhancing the knowledge and skills of stakeholders working in the field of children's rights in Malaysia and India.

India ratified the Convention on the Rights of the Child (CRC) in 1992, demonstrating its commitment to upholding the rights of children. Similarly, Malaysia acceded to the CRC in 1995, signifying its dedication to safeguarding children's rights as well. Over the years, both countries have enacted numerous laws and implemented policies aimed at protecting and promoting the well-being of children.

In India, various legislative measures have been introduced to address issues related to child rights, including the Juvenile Justice (Care and Protection of Children) Act, 2015, the Protection of Children from Sexual Offences (POCSO) Act, 2012, and the Right of Children to Free and Compulsory Education Act, 2009. These laws provide a comprehensive legal framework for safeguarding children's rights, ensuring their protection from exploitation, abuse, and discrimination.

The conceptual and theoretical framework outlined in the UN Convention on the Rights of the Child (CRC) significantly informs the legal provisions and framework in India, playing a pivotal role in shaping legislative changes and policy development concerning children's rights. The CRC serves as a guiding framework that influences the formulation of laws and policies aimed at safeguarding children's rights and promoting their well-being in India. Firstly, as a signatory to the CRC, India is bound by its principles and standards, which are integrated into its legal framework. The theories embedded in the convention, such as the best interests of the child, non-discrimination, and the right to survival, development, protection, and participation, serve as foundational principles that underpin the development and interpretation of laws related to child rights in India.

For example, legislative measures such as the Juvenile Justice (Care and Protection of Children) Act, 2015, and the Protection of Children from Sexual Offences (POCSO) Act, 2012, reflect the principles enshrined in the CRC. These laws aim to protect children from exploitation, abuse, and violence, ensuring their rights to safety, dignity, and well-being. The CRC's emphasis on children's participation is also evident in India's legal framework, as seen in provisions for child-friendly procedures in legal proceedings and mechanisms for ensuring children's voices are heard in matters affecting them. Moreover, the CRC serves as a benchmark for evaluating the adequacy

and effectiveness of existing laws and policies related to children's rights in India. It provides a framework for assessing compliance with international standards and identifying areas for improvement in legislation and implementation. The CRC's monitoring mechanisms, such as reporting obligations and reviews by the Committee on the Rights of the Child, encourage accountability and transparency in ensuring children's rights are upheld.

Furthermore, the CRC serves as a catalyst for advocacy and awareness-raising efforts in India, mobilizing stakeholders to prioritize children's rights and address key issues affecting them. Civil society organizations, child rights activists, and policymakers often reference the CRC in their advocacy campaigns and initiatives, leveraging its principles to advocate for policy reforms and legislative changes that better protect children's rights. Overall, the conceptual and theoretical framework outlined in the CRC significantly informs and shapes the legal provisions and framework concerning children's rights in India.

Similarly, Malaysia has enacted legislation such as the Child Act 2001, which aims to protect children from neglect, abuse, and exploitation. Additionally, Malaysia has implemented various policies and programs to promote children's welfare, including initiatives to enhance access to education, healthcare, and social services.

In Malaysia, the Sexual Offences Against Children Act 2017 (SOACA 2017) represents a significant legislative development aimed at addressing issues related to child sexual abuse and exploitation. The conceptual and theoretical framework outlined in the UN Convention on the Rights of the Child (CRC) serves as a fundamental basis for understanding and informing the provisions of SOACA 2017, reflecting Malaysia's commitment to upholding children's rights and protecting them from harm. Firstly, as a signatory to the CRC, Malaysia is bound by its principles and standards, which are

integrated into its legal framework. The CRC's emphasis on the best interests of the child, non-discrimination, and the right to protection from violence and exploitation underpin the provisions of SOACA 2017. The Act aims to protect children from sexual abuse and exploitation, ensuring their rights to safety, dignity, and well-being.

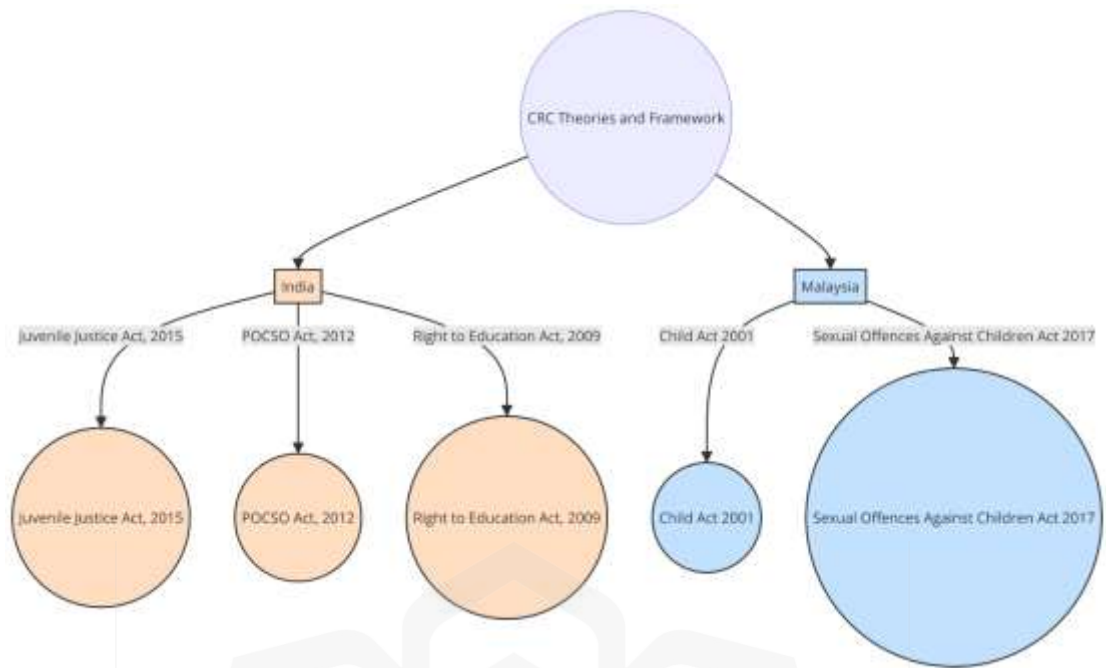
Secondly, the CRC serves as a guiding framework for policy development and legislative changes in Malaysia, enabling the formulation of initiatives that align with international standards and best practices for promoting children's rights. SOACA 2017 reflects Malaysia's commitment to enacting specialized legislation specifically targeting sexual offences against children, demonstrating the country's efforts to address the unique vulnerabilities and needs of child victims.

Moreover, the CRC serves as a powerful advocacy tool in Malaysia, helping raise awareness about children's rights and garner support for initiatives aimed at combating child sexual abuse and exploitation. Civil society organizations, child rights advocates, and policymakers often reference the CRC in their advocacy efforts, leveraging its principles to advocate for stronger legal protections and support services for child victims.

Furthermore, the CRC's emphasis on children's participation is reflected in SOACA 2017 through provisions for child-friendly procedures in legal proceedings and mechanisms for ensuring children's voices are heard in matters affecting them. The Act incorporates measures to facilitate the reporting of sexual offences by children and ensure their participation in investigative and judicial processes, in line with the CRC's principles of empowerment and participation. Thus, it can be seen that the conceptual and theoretical framework outlined in the CRC significantly informs and shapes the provisions of SOACA 2017 in Malaysia.

Both India and Malaysia have drawn upon the theoretical and conceptual framework outlined in the UN Convention on the Rights of the Child (1989) to guide their policies and practices concerning children's rights. The CRC sets forth a comprehensive set of principles and standards for ensuring children's rights to survival, development, protection, and participation. By adhering to the principles outlined in the CRC, both countries have demonstrated their commitment to advancing children's rights and creating a conducive environment for their growth and development.

Hence, based on the theoretical and conceptual framework surrounding the protection of children's rights, with a focal point on the UN Convention on the Rights of the Child (CRC). This framework is crucial for comprehending and tackling issues surrounding child sexual abuse (CSA) and the enforcement of legislation like the Sexual Offences Against Children Act 2017 (SOACA 2017) in Malaysia. The CRC serves as a cornerstone document articulating children's entitlements, including their right to protection from all forms of violence, exploitation, and abuse. SOACA 2017, aligned with the principles of the CRC, aims to safeguard children's rights to safety, dignity, and well-being, while ensuring accountability for perpetrators of sexual offences against children. Additionally, by emphasizing a child-centered approach, SOACA 2017 incorporates measures to uphold the voices and interests of child victims throughout legal proceedings, reflecting the CRC's emphasis on prioritizing children's best interests and active participation in decisions affecting them.



Moreover, the CRC underscores the importance of preventive measures and intervention strategies in addressing CSA, a principle that SOACA 2017 complements by establishing mechanisms for prevention, detection, and prosecution of sexual offences against children. By embracing the principles laid out in the CRC, Malaysia demonstrates its dedication to shielding children from sexual abuse and exploitation, while striving to promote their rights to safety, dignity, and well-being.

2.3 DEFINITIONS AND DIMENSIONS OF CSA

CSA was a cause of nomenclature disagreement in early literature. Originally included in the child abuse and neglect spectrum, which covers sexual and non-sexual abuses. According to Carol,⁶⁴ CSA only became a separate field of interest in the early 1980s.

Child Molestation or sexual abuse has been the subject of different definitions. Several elements have contributed to what constitutes sexual abuse during childhood.

⁶⁴ Smart, "Reconsidering the recent," 55-71.

Such features include the age difference between the perpetrator and the victim, the definition of childhood, and the nature of the abuse involved. While some researchers have fixed the child's age to 18, others refer to ages far below 18.⁶⁵ The effect of cultural and community standards on defining what constitutes sexual abuse seems unending in academic and legal discourse.

Several definitions have been advanced to provide legal recognition for who is a child and actions which amount to abuse. The challenge of forming a common consensus and acceptable definition on CSA inhibits the prosecution, treatment, and advocacy against CSA.⁶⁶ These and many other definitional problems have affected the evolution of CSA and involve minors. In addition, it has continued to undermine research in this area across disciplines while definitions offered in the statutes serve as the basic underpinnings for the prosecution of offenders. In unravelling whether a child has been abused sexually, it becomes important to revisit available definitions of a “child” or what constitutes sexual abuse in the circumstance.

2.3.1 Legal Practitioners Definition

In an attempt to define CSA, Paris et al⁶⁷ identify the discrepancies in the legal definitions, which differ from state to state based on United States Law.

A definition of CSA, which appears to cover all examples of sexual behaviours, is given as follows:

⁶⁵ Noemí Pereda et al., “The International Epidemiology of Child Sexual Abuse: A Continuation of Finkelhor (1994)”, *Child Abuse & Neglect*, vol. 33, no. 6 (2009): 331–42.

⁶⁶ Gail Elizabeth Wyatt, “Child Sexual Abuse and Its Effects on Sexual Functioning”, *Annual Review of Sex Research*, vol. 2, no. 1 (1991): 249–66; Gail Elizabeth Wyatt and Stefanie Doyle Peters, “Issues in the Definition of Child Sexual Abuse in Prevalence Research”, *Child Abuse & Neglect*, vol. 10, no. 2 (1986): 231–40.

⁶⁷ Paris Goodyear-Brown, *Handbook of Child Sexual Abuse: Identification, Assessment, and Treatment* (New Jersey: John Wiley & Sons, 2011), 3.

an act of sexual behaviour, e.g. exposure of genitals, masturbation of the child's genitals, mutual masturbation, auto masturbation in the presence of the child, fondling of the developing secondary sexual characteristics of the child, rubbing of the penis on the child (dry intercourse), attempted intercourse, oral-genital contact (either cunnilingus or fellatio), vaginal or anal intercourse...⁶⁸

In the above definition, Gregory provided a context for incest. He added that the sexual acts mentioned would be incestuous if the act occurs “between a father/stepfather and his daughter/step/daughter that was unwanted by the child or in which the age difference between the child and the abuser was greater than five years”.

A criticism of the definition could be found in focus on male perpetrators and the exclusion of mothers/stepmothers. While Shelton⁶⁹ defined incest as “overt sexual intercourse between members of a group who are not permitted by their society to marry”.

N. Pereda et al,⁷⁰ argued that the age difference between the perpetrator and the victim is a simple method of identifying CSA cases. However, this argument may be negated by political and cultural definitions, which also affect the methodological difference in reported studies on the epidemiology of CSA. Other early researchers defined CSA briefly as “any sexual activity involving a child in whom the child is unable or unwilling to give consent”.⁷¹ The common denominator in CSA is the lack of consent which makes the action an offence. However, the victim's age can also validate or invalidate consent when given. Literature and some statutes refer to the age of

⁶⁸ Gregory J Paveza, “Risk Factors in Father-Daughter Child Sexual Abuse: A Case-Control Study”, *Journal of Interpersonal Violence*, vol. 3, no. 3 (1988): 290–306.

⁶⁹ William R Shelton, “A Study of Incest”, *International Journal of Offender Therapy and Comparative Criminology*, vol. 19, no. 2 (1975): 139–53.

⁷⁰ Pereda et al., “The International Epidemiology,”.

⁷¹ Fagan and Finkelhor, “Child Sexual Abuse,”.

eighteen years as the age of consent; however, other states in the United States, such as Tennessee, provide 13 years as the minimum age of consent.⁷²

Professional interests have influenced the definition of CSA based on the history of the problem and approaches to solving it. The factors include dynamism of morals, organisational and professional interest in the problem and the public perception of the problem. From the perspective of the definers and their dominant ideology, three dominant professions and disciplines have given a discipline focussed approach to CSA.

2.3.2 Health Professionals

Health professionals consider CSA a disease epidemic rather than a law enforcement problem. Mercy⁷³ described it as a disease that can have far-reaching consequences on the victim as a child and adult. Some of the symptoms are identified as follows:

dramatic mood swings, erratic behaviour, and even severe conduct disorders among those exposed; a disease that breeds distrust of adults and undermines the possibility of experiencing normal sexual relationships; a disease that breeds distrust of adults and undermines the possibility of experiencing normal sexual relationships; a disease that can have profound implications for an individual's future health by increasing the risk of problems such as substance abuse, sexually transmitted diseases, and suicidal behaviour”⁷⁴

2.3.3 Social Welfare Definition

The epidemiological perspective supports the classification of CSA as a public health problem with the deployment of primary preventive measures such as the measures to prevent youth violence, firearms injuries, suicide and among others. The above

⁷² Kate Sutherland, "From Jailbird to Jailbait: Age of Consent Laws and The Construction of Teenage Sexualities", *Wm. & Mary J. Women & L.*, vol. 9, no. 2 (2002): 313.

⁷³ James A Mercy, "Having New Eyes: Viewing Child Sexual Abuse as a Public Health Problem", *Sexual Abuse*, vol. 11, no. 4 (1999): 317–21.

⁷⁴ Ibid.

definition seems closely knitted with social and behavioural studies as it focuses on future conduct and affliction, which may affect potential relationships of victims in their adult life.⁷⁵ According to the US Center for Disease Control (CDC), federal and state child protective services received an estimated 3.4 million cases of child abuse and neglect due to the fact that about 1 in 4 girls and 1 in 13 boys in the United States experience child sexual abuse.⁷⁶

Similarly, a 2017 study has found some correlation between childhood maltreatment and major health diseases such as stroke, coronary heart disease, type-2 diabetes, and high blood pressure.⁷⁷ The known risk factors for these diseases are unhealthy lifestyles and exposure to adverse environmental conditions. Until recently, the previously known health impacts of CSA are an array of mental and physical health problems which may affect the lifespan of the victim until adulthood.⁷⁸ Studies on adverse childhood experience (ACE) shows the relationship between childhood abuse and mental health.⁷⁹ It has been known to contribute to the mental health of adults and possess the ability to disrupt normative developmental processes. Little is known about the health impact of CSA and its relationship to cardiovascular disease and diabetes mellitus.

⁷⁵ Sonia Dargan et al., “Association between Child Sexual Abuse and Infectious Disease Diagnoses”, *Child Abuse & Neglect*, vol. 97, (2019): 104142.

⁷⁶ U.S. Centers for Disease Control and Prevention, “About Child Sexual Abuse”, <<https://www.cdc.gov/violenceprevention/childsexualabuse/fastfact.html#:~:Text=Although%20estimates%20vary%20across%20studies,States%20experience%20child%20sexual%20abuse.>> (accessed 18 May, 2024).

⁷⁷ Vincent J. Felitti and Robert F. Anda, “The Relationship of Adverse Childhood Experiences to Adult Medical Disease, Psychiatric Disorders, and Sexual Behavior: Implications for Healthcare” in *The Impact of Early Life Trauma on Health and Disease: The Hidden Epidemic*, edited by Lanius, R.A., Vermetten, E., and Pain, C. (United Kingdom: Cambridge University Press, 2010), 77-87.

⁷⁸ Jack P. Shonkoff, W. Thomas Boyce, and Bruce S. McEwen, “Neuroscience, Molecular Biology, and the Childhood Roots of Health Disparities: Building a New Framework for Health Promotion and Disease Prevention”, *JAMA*, vol. 301, no. 21 (2009): 2252–59.

⁷⁹ Felitti and Anda, “The relationship of Adverse,”.

Concerning children, paedophilia in medical parlance is a mental illness affecting the perpetrator. More specifically, it is classified as one of the approximately 30 paraphilias recognised in medicine.⁸⁰ Paraphilia is a syndrome in which abnormal sexual desires and extreme erotic imagery and activity are atypical of ordinary males or females. It can be simply explained as recurrent sexual perversion or sexual deviation.⁸¹ However, medical treatment alone has been shown to perpetuate trauma in child victims,⁸² hence the need for collaboration between social welfare professionals and law enforcement. Intervention programmes for CSA victims are often ignored or excluded from legislation on sexual abuse against children. There is a widely held assumption that CSA victims have a higher risk of becoming sexual abusers.⁸³ This assumption has some methodological, clinical and public policy limitations.

In legal parlance, paedophilia is defined as child molestation or abuse synonymous with crime irrespective of the involvement of injury or threat and attracts criminal sanction. This contrasts with the definition and perspectives among health and social welfare professionals discussed above. The focus on law enforcement definitions and approaches to tackle CSA has been criticised for the inadequate attention given to CSA. While sexual abuse prevention is paramount, law enforcement primarily focuses on the persecution of offenders rather than medical treatment in line with professional health recommendation.

⁸⁰ John Money and J D Weinrich, "Juvenile, Pedophile, Heterophile: Hermeneutics of Science, Medicine and Law in Two Outcome Studies", *Med. & L.*, vol. 2, no. 1 (1983): 39.

⁸¹ Anita Jeanette Sarbo, "Childhood Molestation: Adult Personality Correlates and Predictors of Trauma", *Dissertation Abstracts International*, vol. 45, no. 1 (1985): 3960.

⁸² Leroy G Schultz and Preston Jones Jr, "Sexual Abuse of Children: Issues for Social Service and Health Professionals", *Child Welfare*, vol. 62, no. 2 (1983): 99–108.

⁸³ Cathy Spatz Widom and Christina Massey, "A Prospective Examination of Whether Childhood Sexual Abuse Predicts Subsequent Sexual Offending", *JAMA Pediatrics*, vol. 169, no. 1 (2015): e143357–e143357.

However, recent studies have shown the need for an integrative definition and response to deliver preventive, protective and prosecutorial treatment of sexual abuse in both victim and perpetrator.

The scope of child abuse has changed from time to time. Undoubtedly, the advent of the internet has added more variations to CSA involving children and adults. Beyond physical activities such as kissing, fondling, touching, rape, and other physical and sexual abuses, CSA also includes non-contact activities such as exhibitionism and sexual propositions to children from a distance or through the internet.

Philip and Shamim (2006) elaborated that the road to the disclosure of CSA in child victims could be long and stressful.⁸⁴ Child victims could find it difficult to disclose their experiences during investigation and treatment. Children under preverbal age are more vulnerable, and clinical intervention could reveal more than what the victim can disclose. Such interventions can have negative and positive effects on the victim. It has been observed that there is a need for a proper disclosure framework depending on the victim's age. The framework could include no disclosure, partial disclosure, direct disclosure, purposeful disclosure, indirect disclosure, and spontaneous disclosure.⁸⁵

In preverbal children's cases, disclosure could negatively affect them and make them more vulnerable. Accordingly, interventions can move children from no disclosure to spontaneous disclosure. Heather⁸⁶ advocates for support from a carer who is not an abuser. This can go a long way in achieving disclosure.

⁸⁴ Philip Gilligan and Shamim Akhtar, "Cultural Barriers to the Disclosure of Child Sexual Abuse in Asian Communities: Listening to What Women Say", *British Journal of Social Work*, vol. 36, no. 8 (2006): 1361–77.

⁸⁵ Bacon and Richardson, "Child Sexual Abuse,".

⁸⁶ Ibid.

2.4 TYPES OF CHILD SEXUAL ABUSE

The classification of CSA into different subdivisions has not been uniform among researchers. Classification becomes essential in diagnosis and treatment, although overlap and crossover are common factors. Catherine Itzin explored the conceptual connections between paedophilia and other forms of CSA such as incest, child pornography and child prostitution.⁸⁷

Beyond specific types, certain classifications based on the relationship with the victim or focus on the sex offender, i.e., intrafamilial and extrafamilial CSA other.⁸⁸ These broad typologies emphasise the relationship or remoteness between the abuser and the child such as contact and non-contact sexual abuses toward children. It also relies on the recurring factor in CSA cases where the abuser is usually someone well known by the victim. The discussion will also highlight the legal recognition for each type of CSA in Malaysian law.

2.4.1 Rape

The meaning of rape is subject to statute. In Malaysia, it is considered a heinous offence under section 375⁸⁹ (Penal Code) and a crime specifically targeted at women. “Rape remains a gender-specific offence and is limited to one very specific form of sexual contact, namely, penetration of the vagina with the penis.”⁹⁰ Under the Malaysian Penal Code, rape is a crime exclusively committed by a man against a woman and it can

⁸⁷ Catherine Itzin, “Incest, Paedophilia, Pornography and Prostitution: Making Familial Males More Visible as the Abusers”, *Child Abuse Review: Journal of the British Association for the Study and Prevention of Child Abuse and Neglect*, vol. 10, no. 1 (2001): 35–48.

⁸⁸ Russell, “The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children”, *Child Abuse & Neglect*, vol. 7, no. 2, (1983): 133-146.

⁸⁹ Malaysia Penal Code year (Act 574).

⁹⁰ Stanley Yeo, Neil Morgan, and Wing Cheong Chan, “Criminal Law in Malaysia and Singapore”, (Malaysia: LexisNexis, 2018), 73.

plainly be understood from the wording of the section 375 itself and the concept will be unpacked further in the following discussions.

From the reading of section 375, it can be concluded that rape is an act of sexual intercourse with a woman under the circumstances under descriptions (a), (b), (c), (d), (e), (f), (g) of the same section. Thus, the prosecution must prove beyond reasonable doubt that any of the descriptions is successfully fulfilled in order for the sexual intercourse can be constituted as rape.

Section 375 spells out that in order for rape to take place, the element of sexual intercourse is vital and sexual intercourse only occurs if the prosecution successfully proved that there is an act of penetration by the accused.⁹¹ The concept of penetration is best illustrated in the judgment of High Court in the case of ***Cheong You Hoi v Pendakwa Raya***⁹², when discussing the element of penetration, the court held that it is not necessary for the prosecution to prove anything more than penetration on the reason that it is sufficient to prove the act of penetration has occurred even though no ejaculation occurs. It can be safely surmised that this is the view of the Malaysian courts.⁹³

Further to the element of penetration, it must be proven that the circumstances of rape must be penetration by a man's penis and not some other objects. This requirement is best explained in the case of ***Nasrul Annuar Bin Abd Samad v Public Prosecutor***⁹⁴ where the High Court in this case has allowed the appeal made by the accused by quashing the conviction and sentence made by the lower court on the ground that there was no solid and credible evidence to show that the accused had penetrated

⁹¹ Explanation to section 375, Malaysia Penal Code

⁹² [1999] MLJU 518

⁹³ LexisNexis, "LexRead," <<https://www.lexread.lexisnexis.com/product/offences-against-persons-property>> (accessed July 27, 2023).

⁹⁴ [2005] 1 MLJ 619.

the private part of the victim using his penis. In this case, the penetration was entirely a presumption.⁹⁵

Even though there is sexual intercourse, it shall not constitute rape unless the sexual intercourse is committed in the absence of consent or against the woman's will. For better illustration of what is meant by 'against her will, we may lend the explanation of the High Court in the case of *PP v Ku Hang Chua*,⁹⁶ where the court held that injuries resulted from the struggle on the part of the victim resisting and fighting off the act of raping by the accused were evident that the sexual intercourse was against the will of the victim.

If the concept of “against her will” can be quite straightforwardly digested, the concept of ‘consent’ in rape cases requires in-depth deliberation of the facts for each case. In discussing ‘consent’, one must be careful with the concept of ‘submission’ and ‘consent’ on the grounds that both concepts seem similar but bear a gaping difference. For instance, at the outset, a woman may look consenting when she is being submissive since there is no evidence of struggle or resistance to the act of sexual intercourse committed by a man, nonetheless, after thorough deliberation of facts by the court, what seems to be consent is mere submission and not amounting to consent, and thus, the offence of rape is completed.⁹⁷

In learning the demarcation of consent and submission, it is best to seek assistance from the case of *Augustine Foong Boo Jang v Public Prosecutor*⁹⁸ where the court decided as follows:

⁹⁵ Lexis Nexis.

⁹⁶ [1975] 2 MLJ 99.

⁹⁷ Yeo, Morgan, and Chan, “Criminal Law,”.

⁹⁸ [1990] 1 MLJ 225.

There is a fundamental difference between consent and submission. Consent always imports submission; submission does not necessarily import consent.

Reference as to the definition can also be made to the definitions stated in Ratanlal & Dhirajlal's Law of Crimes as below:

Consent denotes an active will in the mind of the person to prevent the doing of the act complained of. A woman is said to consent only if she is freely agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of aggravating circumstances, then the offender shall be punished with imprisonment for a term of not less than ten years and not more than thirty years and shall also be punished with whipping.⁹⁹

In order for the aggravating factors to be applicable, the rape must involve physical violence in addition to the hurt and pain suffered as a result of the rape itself.¹⁰⁰ Free and untrammelled right to forbid or withhold what is being consented so it is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred by the former.”

Rape is punishable under section 376.¹⁰¹ Technically, the punishment for rape can be categorised into non-aggravated and aggravated cases¹⁰² For the non-aggravated cases, upon conviction, the accused shall be imprisoned for a term which may extend to twenty years and shall be punished with whipping by virtue of section 376(1).¹⁰³

As for the aggravated cases, section 376(2)¹⁰⁴ empowers Malaysian court to pass heavier sentences than the punishment set out under section 376(1) on the offender. However, such additional power to pass enhanced punishment is subject to the

⁹⁹ Yeo, Morgan, and Chan, “Criminal Law,” 380–81; Lee Chong Fook Che Audah Hassan, *Offences Against Persons and Property* (Petaling Jaya: LexisNexis, 2009), 92.

¹⁰⁰ Yeo, Morgan, and Chan, “Criminal Law,” 381.

¹⁰¹ Malaysia Penal Code 1976 (Act 574).

¹⁰² Yeo, Morgan, and Chan, “Criminal Law,” 380–81.

¹⁰³ Malaysia Penal Code 1976 (Act 574).

¹⁰⁴ Ibid.

aggravating circumstances specified in section 376(2) (a) until (g) as well as, (3) and (4) of the Penal Code.

2.4.2 Incest

Considered among the categories of family violence, incest has been defined as any form of sexual behaviour or activity occurring between family member or close relatives. According to Sanders, Incest is a sexual deviance in modern culture.¹⁰⁵ It is a kind of intra-familial CSA due to the close relationship between the abuser and the abused child. Other complexities of incest include: father-daughter, mother-son, sister-sister, sister-brother etc. Ancient cultures in Europe have practised endogamy through marriage of close relatives. This practice have been synonymous to incest where formal marriage is not performed.¹⁰⁶ Although it is often considered that father, uncle, brother, or other male relations are the perpetrators, literature has reported the incidence of female perpetrators such as mothers, stepmothers, aunts and sisters as the abuser.¹⁰⁷ The gender of the abuser is increasingly diffused between male and female abusers. Incest could be consensual or non-consensual and highly under reported in some communities as they are often handled as a internal family matter.¹⁰⁸

Based on data collected from 425 cases of incest behaviour, Bagley¹⁰⁹ identified five types of incest mainly i) functional, ii) accidental or disorganised, iii) pathological, iv) object fixation and v) psychopathic. The classification helped to draw a conclusion

¹⁰⁵ Sander L Gilman, "Sibling Incest, Madness, and the "Jews"", *Jewish Social Studies*, vol. 4, no. 2 (1998): 157–79.

¹⁰⁶ Alvin A Rosenfeld, "Endogamic Incest and the Victim-Perpetrator Model", *American Journal of Diseases of Children*, vol. 133, no. 4 (1979): 406–10.

¹⁰⁷ Baris Sancak, Ilker Tasdemir, and Oguz Karamustafalioglu, "Mother–Daughter Incest: A Brief Review of Literature and Case Report", *Journal of Forensic Sciences*, vol. 66, no. 5 (2021): 2054–59.

¹⁰⁸ Judith L Alpert, "Retrospective Treatment of Incest Victims: Suggested Analytic Attitudes", *Psychoanalytic Review*, vol. 78, no. 3 (1991): 425.

¹⁰⁹ Christopher Bagley, "Incest Behavior and Incest Taboo", *Social Problems*, vol. 16, no. 4 (1969): 505–19.

on theories of normative and deviant aspect of incest prohibition. Functional incest involves some degree of acceptance within the family and micro societies. This normally occurs in societies with low education level, farming communities where incest was the norm or morally sanctioned by the family. Such families view themselves as a micro society. Examples of this occur in small Swedish communities where the wife often gives consent to incestuous relationships between father and daughter or mother and son. The second type is accidental or disorganised incest¹¹⁰ which is a feature of disorganised societies such as postwar Germany. Such communities are overcrowded, and the relationship is all nuclear relationships such as father-daughter, brother-sister and mother-son. This type is unsanctioned by the society unlike functional incest.

In pathological incest,¹¹¹ one or both participant exhibits mental defects and unable to internalise moral rules of incest. Example presented by Capiro is a psychotic father who continued incest with his two daughters for 4 years and neither girls disclosed to the other nor their mother. The fourth type of Incest is through object fixation which occurs where the strongest motivation for the dominant partner is a human object. Such an object could be a young girl thus the father grows up to admire his own daughter through “object fixation”.¹¹² In rare cases, the mother takes her son as the most desirable partner instead of the father. Stekel gave an example of a woman whose first orgasm was with a young boy. She later turns towards her son in an incestuous relationship.

¹¹⁰ Naomi Cahn, “Accidental Incest: Drawing the Line-or the Curtain-for Reproductive Technology”, *Harv. JL & Gender*, vol. 32, no. 437 (2009): 59.

¹¹¹ Judith Herman, "Father-daughter incest", *Professional Psychology*, vol. 12, no. 1 (1981): 76.

¹¹² Wilhelm Stekel, *Sadism and Masochism-The Psychology of Hatred and Cruelty-Vol. II.* (vol. 2) (India: Read Books Ltd, 2013), 213.

The fifth category is psychopathic incest which includes a dominant partner who is of normal mental health and intelligence. He/she has a sexual partner but still seduces his/her child against the norm of the society. The categorisation could present a challenge for the treatment, prosecution and management of incest cases. It also shows the cycle of incest and sexual abuse which can emerge from childhood to adulthood from victim to abuser.

However, the modern characteristics of incest perpetrators have been examined in several studies to include higher sexual offences than they had been arrested for, exceedingly early onset of sexual behaviour, onset of had additional DSM-III psychiatric disorders, and reported previous sexual victimization.¹¹³

2.4.3 Paedophilia

According to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), paedophilia is a paedophilic disorder with intense sexual urges toward children below the age of consent.¹¹⁴ The term 'paedophilia' is derived from paedophile which means child love. This is used to describe sexual attraction or psychosexual disorder affecting adults male or female towards a child or prepubescent age. This is often confused with sexual attraction to teenagers or post pubertal children which is known as hebephilia. Knowledge of paedophilia clarifies the behaviours of abusers and assisting in treating the victims. Other variations include the situation where men abuse boys or have an exclusive attraction towards boys, i.e., homosexual paedophilia or man-boy love. Ray

¹¹³ Judith V Becker et al., "Characteristics of Adolescent Incest Sexual Perpetrators: Preliminary Findings", *Journal of Family Violence*, vol. 1, (1986): 85–97.

¹¹⁴ DSMTF American Psychiatric Association and American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (vol. 5) (Washington DC: American psychiatric association Washington, DC, 2013), 53.

Wyre observed that paedophiles are heterosexual without preference for the gender of the child victim.¹¹⁵

According to Journal of Medical Ethics, CSA and paedophilia are two different things which may not co-exist in the same legal and psychological contexts.¹¹⁶ The former is any form of contact with a child while the latter is a psychiatry disorder involving primary or exclusive attraction to prepubescent children. This distinction may be immaterial where there exists legislation that criminalises paedophilia hence it becomes both a psychological disorder and a crime altogether. Paedophile desires which are not carried out are not considered a crime or sexual abuse as long as the person under this form of the disorder may be able to control his attraction to children.

Furthermore, the need to identify paedophilia as a disorder enables the person to be properly treated. In social work, a paedophile is likely to feel comfortable discussing his disorder with a worker.¹¹⁷ The worker can help with treatment by considering the previous history and motives to make the paedophile aware of his actions.

From a legal standpoint, recognising the distinction between paedophilia and sexual abuse could affect the prosecution of sexual offences against children. However, the term paedophile is used in law enforcement parlance to refer to persons who are sexually attracted to prepubescent children. The mere thought of attraction toward children is not sufficient proof of any crime. From the foregoing, it seems apparent that the difference between CSA and paedophilia goes beyond mere semantics as

¹¹⁵ Ray Wyre, "Paedophile Characteristics and Patterns of Behaviour: Developing and Using a Typology" in *Home Truths about Child Sexual Abuse*, edited by Catherine Itzin, (London: Routledge, 2005), 69–89.

¹¹⁶ Jaclyn M D Nobrega, "Pedophilia in Youth: Most Beneficial Treatment and Prevention of Child Sexual Exploitation", *Adèle Grosse and Nicolette Roman*, vol. 29, no. 4 (2016): 40.

¹¹⁷ Ibid.

paedophilia cannot be equated to a crime such as sexual contact which is punishable under criminal enactment.

2.4.4 Child Pornography

It was reported in literature that child pornography dates to ancient Greece and Rome but was not considered a social problem until the late 19th century.¹¹⁸ The phenomenon of child pornography was not known to law until the 1970s when England and Wales, the United States and other countries began to consider laws on the subject matter. Child pornography “is a type of sexual exploitation involving the use of children in pornographic materials or performances. It includes photographs, visual and audio representations and writing and can be distributed through magazines, books, drawings, movies, videotapes, mobile phones and computer disks or files”.¹¹⁹

Any visual depiction or computer-generated image that shows a child engaging or involved willingly or unwillingly in explicit conduct has been considered to be child pornography. Recent definitions in many jurisdictions have included any form of sexual exploitation of a child while consent is not a required element.

Technological advancement and the internet have created several methods of child pornography which previously were not known to the law.¹²⁰ As a result, this act has become blurred with cyberlaw regulations and online protection of children against sexual activities of predators. Taylor and Ethel discussed child pornography as an internet crime.¹²¹ The elements of defining child pornography under the law was

¹¹⁸ Lynn Hunt, *The Invention of Pornography, 1500–1800: Obscenity and the Origins of Modernity* (New York: MIT Press, 1993), 49.

¹¹⁹ Afrooz Kaviani Johnson, “International Child Sex Tourism: Enhancing the Legal Response in South East Asia”, *The International Journal of Children’s Rights*, vol. 19, no. 1 (2011): 55–79.

¹²⁰ Patrick W Galbraith, “Lolicon: The Reality of ‘Virtual Child Pornography’ in Japan”, *Image & Narrative*, vol. 12, no. 1 (2011): 83–119.

¹²¹ Taylor M Quayle Ethel, “Child Pornography: An Internet Crime”, *Tilburg: Researchgate Publication*, (United Kingdom, Taylor & Francis, 2003): 1–12.

identified by Gillespie¹²² to include the meaning of a child, acts that constitute pornography and materials covered by the law.

The meaning of a child has been subject of reference in academic and legal circles despite the lack of certainty as to what material can be considered obscene. The statement also shows the difficulty in defining obscene material in the context of pornography. Similarly, the ease or creativity in sexual depiction and variations does not assist law enforcement in the definition of child pornography.

What material constitutes pornography and obscenity has been the subject of dynamics of history. US Supreme Court Justice Stewart stated that he could not necessarily define obscene material but “I know it when I see it”.¹²³ Previous definitions have considered the possibility of violence by the adult towards the child based on the prominence in certain cultural landscapes. This notwithstanding, child pornography often involves coercion, exploitation, grooming, use of force, threats and deception.

According to law enforcement officials and academic research, child pornography can be classified into several categories based on the age of the child, the gender of the child, and the type of sexual activity depicted. The National Criminal Justice Reference Service (NCJRS)¹²⁴ identified categories of child pornography based on the nature of activities and materials involved. The first category include hard core, sexually explicit or bizarre pornographic activities such as oral genital, anal-genital, oral-anal and other kinds of sexual intercourse with children as subjects. The second category involves simulated sexually explicit activities involving children who are

¹²² Alisdair A Gillespie, “Defining Child Pornography: Challenges for the Law”, *Child & Fam. LQ*, vol. 22, (2010): 200.

¹²³ *Jacobellis v Ohio*, “378 US 184, 84 S,” *Ct* 1676 (1964): 12.

¹²⁴ Shirley O’Brien and Shirley O’Brien, *Child Pornography* (Iowa: Kendall/Hunt Publishing Company, 1983), 23-34.

likely unable to understand the implication of sex or are incapable of erection. The third category include nudist and magazine materials, slides, photographs displaying children in a sexual and erotic manner.

Another categorisation adopted by the US National Incident Based Reporting System (NIBRS)¹²⁵ identifies patterns of child pornography based on age of the child and the materials involved. Under the Office the Juvenile Justice and Delinquency Prevention (OJJDP), it categories child pornography to include: child exploitations pornography, juvenile victim pornography and pornography with juvenile involvement.

The first category of Child pornography is that which depicts children engaged in real or simulated explicit sexual activities or depicts parts of a child's body in a sexual way. One or several children may be involved, and they may be involved in sexual acts alone, with other children or with adults, who may or may not be visible. The Special Rapporteur at the UN Human Right Council held on 13th July 2009 reports increasing use of 'highly repugnant images' involving very degrading and/or violent sexual activity.¹²⁶

Research published in *The Police Journal* classifies pornographic evidential materials from a law enforcement perspective. They include materials "depicting clothed children which suggest sexual interest in children", or shows naked children and suggest sexual interest in children and the last category of the obscene material are those which depicts children in explicit sexual acts.¹²⁷

¹²⁵ David Finkelhor and Richard Ormrod, "Child Pornography: Patterns From NIBRS", *Juvenile Justice Bulletin*, (2004): 1-8.

¹²⁶ Najat M'jid, "Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography", *Najat Maalla M'jid. Human Rights Council Nineteenth Session Agenda Item*, vol. 3, (2015): 1-24.

¹²⁷ Max Taylor, Gemma Holland, and Ethel Quayle, "Typology of Paedophile Picture Collections", *The Police Journal*, vol. 74, no. 2 (2001): 97-107.

Child erotica, which consists of images of children posing half-dressed/naked or naked and sexualises the child. virtual pornography, which is the production of ‘morphed’ or artificially blended images of children involved in sexual activities.¹²⁸ While children are not as directly involved in this form of pornography, the realism of the morphed images causes harm as it creates the illusion that children are actually directly involved. Pseudo-infantile pornography or initiation pornography, in which models are recorded or photographed in child-like poses, sometimes staged with props, to reinforce the impression of youth.

Child grooming and unwanted touching are considered by experts as sub-categories of child pornography.

2.5 CAUSES OF CHILD SEXUAL ABUSE

There are various psychological and criminological theories that attempt to explain CSA perpetration. The majority of research has up until now been undertaken with incarcerated populations of child molesters, and therefore these theories may present with a selection bias. If we consider a social-ecological model for CSA prevention, it is clear that the individual perpetrator is part of a much larger set of relationships than the one between themselves and their victim. As such, risk factors for CSA perpetration may exist at a broader, societal level; for example, in the portrayal of children and women in advertising or the hyper-sexualisation of children. The levels within the social-ecological model are the individual, family, community, organisations/institutions, and society.

¹²⁸ Kincaid, James R., “Producing Erotic Children” in *Human, All Too Human*, edited by Diana Fuss (Place: Routledge, 2013), 203-19.

This section describes three key etymological theories used to explain why CSA occurs—Finkelhor’s Four Preconditions Model, Ward’s Pathways Model, and the situational crime prevention model, which is based on the rational choice theory for crime perpetration. Both the Four Preconditions and the situational crime prevention models insist on looking beyond the individual to other external factors that could be or are influencing their actions: for Finkelhor’s model, it is societal factors that influence perpetration, and for the situational crime prevention model, it is a situation, organisation or institution’s settings that can create opportunity.

2.5.1 Finkelhor’s Four Preconditions Model

Finkelhor’s Four Preconditions Model¹²⁹ has been widely used for understanding CSA offenders. It was the first to move beyond the notion that CSA only occurs as father–daughter incest or when men who are strangers molest a multitude of children. The four preconditions are: i) motivation to sexually abuse; ii) overcoming internal inhibitors (for example, concern that their thoughts and behaviours are wrong); iii) overcoming external inhibitors (for example, finding a child in their vicinity whom they can sexually abuse); and iv) overcoming the resistance of the child.

According to this theory, *all* these preconditions need to be met in order for CSA perpetration to be possible and to occur. Similarly, Finkelhor¹³⁰ argued that there are three components to the motivation to sexually abuse: i) sexual contact with the child satisfies an emotional need; ii) the child is a source of sexual arousal; iii) alternative sexual partners are not available.

¹²⁹ Fagan and Finkelhor, “Child Sexual Abuse,”.

¹³⁰ Ibid.

However, these are not preconditions and they don't necessarily have to occur or can overlap with one another. Regarding overcoming internal inhibitors, this precondition is crucial, as without it the perpetrator will not commit any acts of abuse, as they may be inhibited by social taboos or fear of hurting the child.

The third and fourth preconditions move the explanation for offending beyond the perpetrator to account for their external environment. External inhibitors can include if there are bystanders around to protect the child (e.g., the child's mother, other family members, teachers, etc.), or if the environment is not conducive to abusing a child. The resistance of a child is the final barrier to committing the act; if the child is emotionally insecure, needy or without a support network then the child molester can break through a child's barrier more easily than if the child is more resilient to their advances. Finkelhor¹³¹ noted that these preconditions not only operate on an individual level but on a more sociological level. Social factors and characteristics can act as motivators or inhibitors to CSA perpetration. Table 2.1 outlines how the preconditions work in relation to individual and social/cultural factors.

Table 2.1 Preconditions for sexual abuse and individual and social/cultural factors

Preconditions	Individual Factors	Social/Cultural Factors
Motivation to sexually abuse.	● Arrested emotional development. ● Need to feel powerful and controlling. ● Re-enactment of childhood trauma to undo hurt. ● Biological abnormality. ● Fear of adult women. ● Traumatic sexual experience with adult.	● The masculine requirement is to be dominant and powerful in sexual relationships. ● The erotic portrayal of children in advertising. ● Male tendency to sexualise all emotional needs. ● Repressive norms about masturbation and extramarital sex.

¹³¹ Ibid.

	● Inadequate social skills. ● Marital problems.	
Overcoming internal inhibitors	● Alcohol. ● Psychosis. ● Impulse disorder. ● Senility. ● Failure of incest inhibition mechanism in family dynamics.	● Social toleration of sexual interest in children. ● Weak criminal sanctions against offenders. ● Ideology of patriarchal prerogatives for fathers. ● Social tolerance of deviance committed while intoxicated. ● Child pornography. ● Male inability to identify with needs of children
Overcoming external inhibitors	● Mother is absent or ill. ● Mother is not close to or protective of the child. ● Mother is dominated or abused by father. ● Social isolation of a family. ● Unusual opportunities to be alone with a child. ● Lack of supervision of the child. ● Unusual sleeping or rooming conditions	● Lack of social supports for mothers. ● Barriers to women's equality. ● Erosion of social networks. ● Ideology of family sanctity
Overcoming the resistance of the child	● The child is emotionally insecure or deprived. ● The child lacks knowledge about sexual abuse. ● The situation of unusual trust between child and offender. ● Coercion.	● No availability of sex education for children. ● Social powerlessness of children.

Finkelhor's model demonstrates the importance of looking beyond the individual victim or perpetrator when assessing where primary prevention programs should be introduced and how other seemingly unconnected societal pressures and gaps can lead to an environment where a child can be sexually victimised.

2.5.2 Ward's Pathways Model

The work of Ward and Siegert¹³² is regarded among researchers as being very instructive for investigating the individual's role in committing CSA. Their theory often uses apparently normalised interactions to gain both trust and access to victims. The Pathways Model is a psychological theory that suggests that certain pathways are the key to CSA perpetration. These pathways stem from "clusters" of problems that are found in the psychology of adults who sexually offend children. These clusters are difficulties in identifying and controlling emotional states; social isolation, loneliness and dissatisfaction; offence-supportive cognitions (e.g., belief that everyone sexually abuses children and that children enjoy the abuse); and deviant sexual fantasies.

There can be more than one cluster apparent in any one individual. Clusters are different from the pathways in that they are clinical phenomena that are found among abusers, whereas the pathways are associated with different psychological and behavioural profiles.¹³³ There can be an overlap between the various pathways. The five aetiological pathways that were identified are discussed in Table 2.2.

Table 2.2 Pathways and Developmental trajectories in Ward's Model

Pathway	Development trajectory
Multiple Dysfunctional Mechanisms	Distorted sexual scripts. Idealised relationships Dysfunctional ideas about children's sexuality Deviant sexual arousal Heightened self-esteem based on perceived legitimacy of actions
Deviant Sexual Scripts and	Distorted sexual scripts plus dysfunctional relationship schema.

¹³² Tony Ward and Richard J Siegert, "Toward a Comprehensive Theory of Child Sexual Abuse: A Theory Knitting Perspective", *Psychology, Crime and Law*, vol. 8, no. 4 (2002): 319–511.

¹³³ Tony Ward, Devon Polaschek, and Anthony R Beech, *Theories of Sexual Offending* (Germany: John Wiley & Sons, 2006), 68.

Relationship Schema	Sex/intimacy confusion Vulnerability in seeking sexual activity. Relationships perceived in sexual terms. Relationships are unsatisfying, short-term and with periods of rejection
Intimacy Deficits	Normal sexual scripts Insecure attachments, which lead to problems in adult relationships. Maladaptive strategies to avoid unsuccessful adult relationships. Intimacy deficits and feelings of loneliness Substitutes child as a surrogate
Emotional Dysregulation	Normal sexual scripts Emotional regulation problems Unidentified emotional structures Early established link between sex and emotional wellbeing Sex used as soothing strategy. Unable to mobilise social supports when stressed. High anger and emotional dysregulation. Child used to satisfy sexual need and punish partner.
Antisocial Cognitions	Normal sexual scripts. Pro-criminal attitudes and beliefs. Antisocial tendencies. Patriarchal attitudes and sense of superiority. Disregard of social norms, especially children and sex Exploits opportunity to self-gratify

Source ¹³⁴

The Pathways Model makes it clear that it aims to explain adult perpetrators' behaviour, not problem sexual behaviours or sexually abusive behaviours that may be exhibited by children who sexually abuse other children. Ward and Siegert¹³⁵ argued that the Multiple Dysfunctional Mechanisms pathway is exhibited by "pure" paedophiles; that is, those who can be diagnosed with paedophilia. Perpetrators with the

¹³⁴ Ibid.

¹³⁵ Ward and Siegert, "Toward a Comprehensive,".

Deviant Sexual Scripts and Relationships Schema are those who may have a possible history of CSA themselves.

As Ward et al.¹³⁶ noted, “in the pathways model situational triggers are hypothesised to interact with the various predispositions of individuals to sexually abuse children. The nature of the situational triggers will vary according to the particular profile of causes underlying each individual’s offence trajectory or pathway”.

2.5.3 Rational Choice Theories and Situational Crime Prevention Model

Rational choice theory is a sociological model used to understand social and economic behaviour.¹³⁷ While it was initially modelled to explain the economic behaviours of individuals in the 1980s and 1990s it has been used to explain involvement with crime. Criminologists have used rational choice theory to argue that criminals are logical and will find ways to have their needs for money, sex or excitement met. Broadly speaking, the rational choice theory posits that individuals will rationalise the commitment of a crime (i.e., undertake a cost-benefit analysis) and will commit it if the benefit of the crime outweighs the consequences, and if there is little or no chance of being caught.

Routine activity theory, which holds that if there is an appropriate victim, a motivated criminal, and no authoritative figure to prevent the crime from happening, then the crime will be committed, is similar to the rational choice theory.¹³⁸ The idea that the environment in which potential offender finds themselves has just as much of a role in the crime being committed as the individual's psychology is closely related to routine activity theory.

¹³⁶ Ward, Polaschek, and Beech, "Theories of Sexual Offending,".

¹³⁷ Bacon and Richardson, "Child Sexual Abuse,".

¹³⁸ Fernando Miró, "Routine Activity Theory," *The Encyclopedia of Theoretical Criminology* (J.M. Miller, 2014).

Arising out of rational choice theory and routine activity theory is the situational crime prevention model.¹³⁹ Researchers have focused on this model as having a great deal of potential for preventing sexual abuse. In theory, situational crime prevention is more efficient than other prevention models because the target is the situation, not the individual's motivation.

As Kaufman et al¹⁴⁰ noted, it is not enough to have work involving children, if the environment facilitates the sexual abuse of children; for example, by having areas such as gym change rooms isolated from the rest of the school, or having lockable classrooms to which only one teacher has the keys and access.

2.6 RISK FACTORS IN CSA

In the field of epidemiology, the term “risk factor” refers to a factor that is associated with a given outcome. However, a risk factor is not necessarily a cause. The term “risk factor” includes replacement for underlying causes where the causes are not apparent.¹⁴¹ In the context of CSA, risk factors are determinants of whether a child is susceptible to sexual abuse either as a victim or perpetrator is pertinent for treatment and prevention purposes. In the context of sexual abuse, risk factors have been defined as conditions, situations or characteristics associated with an individual or his or her environment that increase the likelihood of the individual becoming a perpetrator or victim.¹⁴²

¹³⁹ Farrell, G. (2017). Situational crime prevention and its discontents: Rational choice and harm reduction versus ‘cultural criminology’. In *Crime Opportunity Theories* (pp. 343-369). Routledge.

¹⁴⁰ Keith L. Kaufman et al., “Prevention Is Better than Cure: The Value of Situational Prevention in Organisations” in *Creating Safer Organisations: Practical Steps to Prevent the Abuse of Children by Those Working with Them*, edited by Marcus Erooga (United Kingdom: Wiley, 2012), 140–69.

¹⁴¹ Richard I Shader, “Risk Factors versus Causes”, *Journal of Clinical Psychopharmacology*, vol. 39, no. 4 (2019): 293-294.

¹⁴² Eryl A. Davies and Alyson C. Jones, “Risk Factors in Child Sexual Abuse”, *Journal of Forensic and Legal Medicine*, vol. 20, no. 3 (2013): 140–51.

These refer to conditions which may place children in vulnerable situation as victims and perpetrators of sexual abuse. The study of CSA risk factors may not be common among law enforcement and judicial officers, but these factors are of special interest to child welfare and social work professionals in order to plan preventive intervention.¹⁴³ On the other hand, law enforcement focuses on punitive intervention for perpetrators with less emphasis on preventive and rehabilitative measures. Early studies by Finkelhor point to indicators in family structure such as: *child not living with biological parents; absent mother or employed mother, parent's unhappy marriage; poor relationship with the parents or punitive discipline or child abuse; the presence of a stepfather.*¹⁴⁴ Broad categorisations of the risk factors include dysfunctional family factor,¹⁴⁵ individual factors, community factors and societal factors. The more risk factors in any environment, the higher the chances of an individual to become a perpetrator or victim.¹⁴⁶

2.6.1 Dysfunctional Family Structure

This factor is also known as relationship factors due to its embedded nature with the family structure. The structure of the family of the victim or perpetrator is an important risk factor in CSA. Such members of a dysfunctional family structure are referred to as High-risk children.¹⁴⁷ This means that children who belong in structurally dysfunctional families are more likely to be involved in CSA as either victims or perpetrators.¹⁴⁸ The

¹⁴³ Whitaker et al., "Risk Factors,".

¹⁴⁴ David Finkelhor and Larry Baron, "High-Risk Children", *A Sourcebook on Child Sexual Abuse*, (India: SAGE Publications, 1986): 43–71.

¹⁴⁵ Guy Pelletier and Lee C Handy, "Family Dysfunction and the Psychological Impact of Child Sexual Abuse", *The Canadian Journal of Psychiatry*, vol. 31, no. 5 (1986): 407–12.

¹⁴⁶ Whitaker et al., "Risk Factors,".

¹⁴⁷ Finkelhor and Baron, "High-Risk Children," 60–88.

¹⁴⁸ John Briere and Diana M Elliott, "Sexual Abuse, Family Environment, and Psychological Symptoms: On the Validity of Statistical Control", *Journal of Consulting and Clinical Psychology*, vol. 61, no.2 (1993): 284-288.

dysfunction in the family environment and other family characteristics include parental divorce, separation, poverty, low-income level, inadequate housing and family history etc.¹⁴⁹

In a study by ZM Lukman et.al.,¹⁵⁰ 63 participants who were prostitute between the ages of 13 and 18 years old were profiled. Many of them had dysfunctional family structures during childhood. Some of the factors identified is divorce which made the children not to live with both parents, death of one of the parents or where both parents had died, and the children were left to survive under the guardianship of grandparents or other family relations.¹⁵¹ The study also revealed the number of abusers and the nature of abuse of the participants during childhood. The nature of abuse ranged from physical abuse, emotional abuse, and actual sexual abuse. This further gives evidence that sexual abuse rarely occurs without emotional and physical abuse.

The feeling of bondage which results from dysfunctional family structure could further place the child victim in a vulnerable situation. A child victim mentioned that after the abuse she felt like “living in a jailhouse” in the place she called home and started to consider running away.¹⁵²

Poverty or low-income level is an essential feature of poor family structure. As a result of low income, families who live together within an inadequate housing facility are more likely to report incest. Sibling incest, father-daughter incest, or father-son incest has been attributed to blurred sexual boundaries, provocative play, and teasing

¹⁴⁹ Pamela C Alexander and Shirley L Lupfer, “Family Characteristics and Long-Term Consequences Associated with Sexual Abuse”, *Archives of Sexual Behavior*, vol. 16, (1987): 235–45.

¹⁵⁰ Z M Lukman et al., “Betrayal of Trust: The Involvement of Children in Prostitution”, *Pertanika Journal of Social Sciences & Humanities*, vol. 19 (2011): 49-56.

¹⁵¹ Vincent J Felitti et al., “Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study”, *American Journal of Preventive Medicine*, vol. 14, no. 4 (1998): 774–866.

¹⁵² Z. M. Lukman, “Childhood Abuse among Children Involved in Prostitution in Malaysia”, *Social Sciences*, vol. 4, no. 6 (2009): 567–72.

circumstances that exist in low-income households.¹⁵³ Where the family realise the need to separate lodgement for male and female, this could be impossible due to poverty and low income.

Kenneth concludes that there is a high risk of CSA in homes with an unstable environment where there is a lack of control over youth activities. Focussing on rape, the author identified the need to improve rape prevention efforts through an assessment of social, situational, and personal factors within the family structure.¹⁵⁴ In other words, family protective factor is essential to prevent CSA from happening.

2.6.2 Individual Factors

Certain individual characteristics are attributable to likelihood of being a victim of CSA. Factual and empirical evidence shows that being female and being a child makes children susceptible to sexual abuse.¹⁵⁵ Other individual factors are past experience of sexual abuse and being a special need child put the child in a weaker position as a victim. In addition, past experience could render a child to become a sexual addict while a special need who is handicapped, possesses an intellectual disability or chronic illness is vulnerable to sexual abuse.¹⁵⁶

The family factor is correlated to the development of individual factors which could lead to changes in the abnormal brain structure.¹⁵⁷ Paraphilia or paedophilia which

¹⁵³ Patricia Beezley Mrazek and Arnon Bentovim, "Incest and the Dysfunctional Family System" in *Sexually Abused Children and Their Families*, edited by C. H. Kempe & P. B. Mrazek, (Netherlands: Elsevier, 1987), 167–68.

¹⁵⁴ Kenneth J Gruber and Robert J Jones, "Identifying Determinants of Risk of Sexual Victimization of Youth: A Multivariate Approach", *Child Abuse & Neglect*, vol. 7, no. 1 (1983): 17–24.

¹⁵⁵ S Simsek, E C Fettahoglu, and E Ozatalay, "Post-Traumatic Stress Disorder in Children Who Were Sexually Abused and in Their Parents", *Dicle Medical Journal*, vol. 38(3) (2011): 318–24.

¹⁵⁶ R Balogh et al., "Sexual Abuse in Children and Adolescents with Intellectual Disability", *Journal of Intellectual Disability Research*, vol. 45, no. 3 (2001): 194–201.

¹⁵⁷ Robert F Anda et al., "The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology", *European Archives of Psychiatry and Clinical Neuroscience*, vol. 256, (2006): 174–86.

is the exhibition of atypical sexual perversion is a common indication of individual factors in the perpetrator. On the other hand, a child could become addicted to sexual fantasies after repeated abuse which could also be a manifestation of individual factors.

Individual factors such as age are a major index in intrafamilial and extrafamilial sexual abuse in children of 6 to 11 and 12 to 17 respectively.¹⁵⁸ In contrast to single victimisation, children who have individual poly-victimisation are also considered to have a high individual factor for being a perpetrator of CSA on other children. According to Finkelhor, this is a largely neglected component of CSA cases which was addressed through the use of victim registration and prevention programs.¹⁵⁹ Also related to individual factors, is revenge.

2.6.3 Societal Factors

There are certain social factors that place children at high risk of being a victim of sexual assault. Societal factors challenge hyper-sexualization of young people in a society, perception and history of denial of CSA in a society, non-acknowledgement that CSA occurs, societal norms regarding gender roles or gender equality, rape culture and ideology of male sexual entitlement, weak legal sanctions against CSA, uncertainty in legal processes and social norms that support sexual abuse.

Franziska et al¹⁶⁰ identified societal factors prevalent in certain societies in Africa as risk factors for CSA. The factors include acceptance and tradition of harsh punishment for child accusers, patriarchal families and male dominance or sexual

¹⁵⁸ Finkelhor and Baron, "High-Risk Children,".

¹⁵⁹ David Finkelhor, Richard K Ormrod, and Heather A Turner, "Poly-Victimization: A Neglected Component in Child Victimization", *Child Abuse & Neglect*, vol. 31, no. 1 (2007): 7–26.

¹⁶⁰ Franziska Meinck et al., "Risk and Protective Factors for Physical and Sexual Abuse of Children and Adolescents in Africa: A Review and Implications for Practice", *Trauma, Violence, & Abuse*, vol. 16, no. 1 (2015): 81–107.

gratification. Another study on social attitudes in South Africa suggests the tolerance of male sexual gratification and cultures of sexual coercion.¹⁶¹ Such societies with a rape culture also report a high incidence of gender-based violence and an increased HIV prevalence rate. Societal factors are closely knitted with community factors which will be described below.

2.6.4 Community Factors

Community factor refers to characteristics and structure in a community that creates a high risk for CSA. Some of the factors in this category include cultural tolerance of sexual abuse and weak sanctions by community and state institutions, the absence of recreational facilities, and the lack of segregation in workplaces, public spaces, and schools. Other factors include social isolation, neighbourhood violence and a crime against children.¹⁶²

2.6.5 Preventive and Protective Factors for Child Sexual Abuse

Protective and preventive factors can be likened to mechanisms or frameworks that can decrease the likelihood of sexual abuse against children. In other words, these behaviours or conditions that can reduce or buffer against the risk of perpetration of sexual violence.¹⁶³ There are two widely known preventive factors for CSA. They are offender management and education programs commonly known as sexual abuse

¹⁶¹ Amanda Gouws, “# EndRapeCulture Campaign in South Africa: Resisting Sexual Violence through Protest and the Politics of Experience”, *Politikon*, vol. 45, no. 1 (2018): 3–15.

¹⁶² Janina Neutze et al., “Predictors of Child Pornography Offenses and Child Sexual Abuse in a Community Sample of Pedophiles and Hebephiles”, *Sexual Abuse: Journal of Research and Treatment*, vol. 23, no. 2 (2011): 212–42.

¹⁶³ Olusimbo K Ige and Olufunmilayo I Fawole, “Preventing Child Sexual Abuse: Parents’ Perceptions and Practices in Urban Nigeria”, *Journal of Child Sexual Abuse*, vol. 20, no. 6 (2011): 695–707.

prevention programs.¹⁶⁴ These programs largely consider local and community settings in the design and implementation of the programs. Studies show that preventive factors could be rooted in culture and community relations in any given society.¹⁶⁵ The risk factors discussed above can be reduced where the protective and preventive factors are taken into consideration at the individual, societal and community levels to cushion the risk factors for potential child victims and child perpetrators.

Most prevention programs largely focus on the victims of CSA. Although this is important, more important is primary prevention which avoids initial occurrence. Primary prevention could involve an intentional audience who are mainly individuals in the community as well as parents. Individuals must be targeted for prevention programs, particularly in societies supportive or passive of the incidence of sexual violence.¹⁶⁶ Similarly, it has been found that parental knowledge and belief about sexual abuse could influence the child's prevention knowledge and self-protection practices.¹⁶⁷

Family factors such as conflict and parental separation which put children in vulnerable situations for sexual abuse and violence should be resolved with the use of reasoning. In the realm of family law, the "best interest of the child" is ensured in the resolution of family conflict. This helps the child to perform well in the emotional health

¹⁶⁴ Delphine Collin-Vézina, Isabelle Daigneault, and Martine Hébert, "Lessons Learned from Child Sexual Abuse Research: Prevalence, Outcomes, and Preventive Strategies", *Child and Adolescent Psychiatry and Mental Health*, vol. 7, no. 1 (2013): 1–9.

¹⁶⁵ Carol A Plummer and Wambui Njuguna, "Cultural Protective and Risk Factors: Professional Perspectives about Child Sexual Abuse in Kenya", *Child Abuse & Neglect*, vol. 33, no. 8 (2009): 524–32.

¹⁶⁶ Ige and Fawole, "Preventing Child Sexual,".

¹⁶⁷ Jing Qi Chen and Da Guang Chen, "Awareness of Child Sexual Abuse Prevention Education among Parents of Grade 3 Elementary School Pupils in Fuxin City, China", *Health Education Research*, vol. 20, no. 5 (2005): 540–47.

and connectedness academic achievement, empathy and concern for how one's actions affect others.¹⁶⁸

2.7 INTERNATIONAL FRAMEWORK FOR PROTECTION OF CHILDREN FROM SEXUAL ABUSE

Having realised that CSA is a global phenomenon with different prevalent rates across the world, efforts have been made to provide an international framework for protection of children against all forms of abuse. This section discusses the international framework and complementary regional instrument for protection of children from sexual abuse.

The literal interpretation of CSA is given by the United Nations International Children's Emergency Fund (UNICEF) and the World Health Organization (WHO). Both organisations defined CSA as "is the involvement of a child in sexual activity that he or she is involved in child sexual activities that he or she does not understand well, and that he or she cannot consent to knowingly or that violates the law or social taboos of the society."¹⁶⁹ Such sexual abuse includes the act of groping, raping, sexual grooming and arousing a child by unreasonable soliciting, exposing private parts of the body or displaying parts of the body or displaying pornographic materials."

2.7.1 The United Nations Convention on Right of the Child (UNCRC)

Premised on the Universal Declaration of Human Rights (UDHR), the United Nations Convention on Right of the Child (UNCRC) is the primary international human right

¹⁶⁸ C. Thresa Yancey, Karen Z. Naufel, and David J. Hansen, "The Relationship of Personal, Family, and Abuse-Specific Factors to Children's Clinical Presentation Following Childhood Sexual Abuse", *Journal of Family Violence*, vol. 28, no. 1 (2013): 31–42.

¹⁶⁹ World Health Organization, *Child Sexual Abuse: A Silent Health Emergency* (Africa: World Health Organization Regional Office for Africa, 2004), 1.

treaty which upholds the civil, political, economic, social, health and cultural rights of all minors below the age of 18 years.¹⁷⁰ In 1989, the UNCRC became the most important international instrument agreed upon by international organization and countries to give children some internationally recognisable rights include protection from sexual abuse.¹⁷¹ According to Ghafur¹⁷², the UNCRC is the most widely adopted international human right treaty in modern times with almost all Muslim states ratifying the instrument. In 1990, the Organisation of Islamic Countries (OIC) agreed on the Cairo Declaration of Human Rights in Islam which has some similarities with the UNCRC.¹⁷³

Enforcing international law and recognizing it without its incorporation into national statutes involves several mechanisms and principles. As discussed by Prof. Ghafur, international treaties and conventions bind ratifying countries to adhere to their stipulations, enforced through bodies like the United Nations and the International Court of Justice (ICJ). Customary international law, consisting of widely accepted practices, is enforceable through diplomatic channels, international courts, and sometimes national courts¹⁷⁴. Organizations such as the United Nations Security Council (UNSC) and the World Trade Organization (WTO) also play crucial roles in enforcement through sanctions and dispute resolution¹⁷⁵. In terms of recognition, the theories of monism and dualism explain how international law can be integrated into

¹⁷⁰ Jacqueline Bhabha, “The Child—What Sort of Human?”, *PMLA*, vol. 121, no. 5 (2006): 1526–35.

¹⁷¹ Beate Goldschmidt-Gjerløw, “Children’s Rights and Teachers’ Responsibilities: Reproducing or Transforming the Cultural Taboo on Child Sexual Abuse?”, vol. 2, no. 1 (2019): 8 .

¹⁷² Abdul Ghafur Hamid and Khin Maung Sein, “Muslim States and the Implementation of the Convention on the Rights of the Child: With Special Reference to Malaysia” in *Islam and International Law*, edited by Abdul Ghafur Hamid and Khin Maung Sein (Netherland: Brill Nijhoff, 2013), 290–308.

¹⁷³ Abdullah Al-Ahsan, “Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC’s Cairo Declaration of Human Rights”, *Journal of Law and Religion*, vol. 24, no. 2 (2008): 569–97.

¹⁷⁴ Hamid, A. G., and Sein, K. M., “Judicial application of international law in Malaysia: An analysis”, *APYIHL*, vol. 1, no. 196 (2005): 196.

¹⁷⁵ Reisman, W. M., and Stevick, D. L., “The applicability of international law standards to United Nations economic sanctions programmes”, *European Journal of International Law*, vol. 1, no. 9 (1998): 86-141.

national legal systems. In monist systems, international law becomes part of national law upon ratification, while in dualist systems, it requires explicit incorporation through legislation¹⁷⁶. Even in dualist systems, national courts can reference international law principles when interpreting domestic laws. Recognition can also occur through consistent state practice and the belief in legal obligation (*opinio juris*), executive orders, legislation reflecting international law, advisory opinions, and soft law instruments such as non-binding agreements and resolutions¹⁷⁷.

Incorporating the United Nations Convention on the Rights of the Child (UNCRC) into Malaysian law is a critical step toward ensuring the protection and promotion of children's rights within the country. Malaysia ratified the UNCRC in 1995, in which this shows Malaysia's commitment to align domestic laws with international standards. However, effective incorporation requires a systematic approach involving legislative amendments, institutional support, and public awareness.

However, in regard to Malaysia and international human rights instruments, Malaysia is only a party to two conventions which are Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child.

Steps that can be taken in integrating international human rights principles into domestic law is also through the amendment of the act. The first step in this process is a thorough review of existing laws to identify inconsistencies with the UNCRC. Key legislation, such as the Child Act 2001, needs to be examined and amended where necessary to fully incorporate UNCRC principles. This involves the process of gap analysis in which it identified areas where Malaysian law falls short of UNCRC

¹⁷⁶ Kelsen, H., *General theory of law and state* (United Kingdom: Routledge, 2017), 42.

¹⁷⁷ Shaw, M. N. *International law* (Cambridge: Cambridge university press, 2017), 84-90.

standards. This could include provisions related to child protection, education, health, and participation in legal proceedings. After analysing the identified areas, the next step is to propose new laws or amendments that explicitly integrate the articles of the UNCRC.

Once the legislative drafts are prepared, they must go through the parliamentary process which are first the bill presentation where the proposed bills are presented to the Malaysian Parliament for debate and approval. This legislative process includes multiple readings, committee reviews, and revisions. Lastly, after passing through Parliament, the bills receive Royal Assent, making them part of Malaysian law.

Recent studies emphasize the importance of systematic incorporation and supportive frameworks. A comparative review¹⁷⁸ has discussed how different countries have incorporated the UNCRC, categorizing approaches into direct incorporation (making the CRC part of domestic law) and indirect incorporation (creating legal obligations that encourage incorporation).

Thus, incorporating the UNCRC into Malaysian law is not merely about legislative changes but also about creating an environment where children's rights are actively promoted and protected. This involves setting up monitoring bodies, ensuring judicial and administrative systems are child-friendly, and fostering a culture of respect for children's rights at all societal levels. It is also evident to look into decided cases in Malaysia such the case of *Pendakwa Raya v Pesalah Kanak-Kanak 1 dan satu lagi*¹⁷⁹ that involves the death of a six-year-old child studying at a Tahfiz School in Pahang. Two minors (PKK1 and PKK2) were charged with the murder of the deceased. The

¹⁷⁸ Lundy, L., Kilkelly, U., and Byrne, B. "Incorporation of the United Nations Convention on the Rights of the Child in law: A comparative review", *The International Journal of Children's Rights*, vol. 21, no.3 (2013): 442-463.

¹⁷⁹ [2023] MLJU 476.

incident occurred on November 7, 2019, within the school's dormitory. Witnesses, including another child, testified about the events leading to the death, detailing physical assaults by PKK1 and PKK2. In this case, the court examined whether the video-recorded testimony of a child witness was constitutional and whether the High Court had jurisdiction to decide on constitutional issues. The court ruled that it did have jurisdiction and that the video testimony was constitutional. The prosecution needed to establish a *prima facie* case of murder under Section 300 of the Penal Code, which the court found was not sufficiently proven. However, it was determined that a *prima facie* case under Section 304(a) for culpable homicide not amounting to murder was established.

The court sentenced PKK1 and PKK2 to three years at Henry Gurney School and mandated monthly visits from their parents. The judgment emphasized the importance of considering the best interests of the child, balancing public interest, and the need for a rehabilitative approach.

Next, the case of *Lee Lai Ching v Lim Hooi Teik*¹⁸⁰, where the court examined whether it could compel a person to undergo a DNA test to determine paternity and if such an order would serve the best interests of the child as in this case, the plaintiff requested a court order for the defendant to undergo DNA testing to confirm paternity. The defendant denied paternity and refused to undergo DNA testing, citing **Peter James Binsted v Juvencia Autor Partosa** [2000] 2 MLJ 569, which held that a person could not be compelled to undergo such testing under Malaysian law. This case further relied on the United Nations Convention on the Rights of the Child (CRC), particularly Article 3(1), which emphasizes the best interests of the child and asserted that the child has a

¹⁸⁰ [2013] 4 MLJ 272.

right to know their biological father as part of equal protection under the law (Federal Constitution Article 8(1) & (2)).

Based on the court's findings, the court prioritized the best interests of the child as the primary consideration and determined that ordering a DNA test does not constitute 'hurt' under the Penal Code, as the intention is not to cause harm but to ascertain paternity. The court has also examined practices in jurisdictions like the USA, Canada, UK, France, Germany, Israel, and China, where courts can order paternity tests in the child's best interests.

The court has also referenced the incorporation of CRC principles into Malaysian law, as demonstrated in cases such as **Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors** [2012] 1 MLJ 832. The court further ordered the defendant to undergo DNA testing to determine the child's paternity and the court has highlighted the need to adapt to modern advancements and not be constrained by outdated legal precedents.

Further, in the case of **Lai Meng v Toh Chew Lian**¹⁸¹, the key issues are whether the application was filed under the proper mode, whether the court had jurisdiction to grant access to the putative father of an illegitimate child and whether access should be granted in this case. In this case, the plaintiff and defendant, both married to others, had an intimate relationship beginning in 2002. The child was born out of this relationship in April 2009. The plaintiff had been financially supporting the child and was seeking access to the child after being denied by the defendant in February 2011.

Based on the court's findings, the application under Order 84 of the Rules of the High Court 1980 (RHC) was inappropriate as there was no pending action or proceeding

¹⁸¹ [2012] 8 MLJ 180.

making the child a ward of the court. The plaintiff did not cite the Guardianship of Infants Act 1961 (GIA), making the application technically incorrect. The court had jurisdiction under section 24(d) of the Courts of Judicature Act 1964 (CJA) to decide on guardianship and access matters concerning infants, including illegitimate children. Under section 27 of the Civil Law Act 1956 (CLA), the court should administer the law relating to the custody and control of infants as it would have been in England in 1956.

The court emphasized the natural mother's full legal rights over an illegitimate child, with the putative father having no inherent legal rights. The court must consider the mother's wishes and the welfare and best interests of the child. Public policy considerations suggest not granting blanket access rights to putative fathers to avoid setting a precedent that could open floodgates for similar claims.

Hence, the plaintiff's application for access to the child was dismissed, respecting the defendant's wish to have a clean break and raise the child independently.

The court highlighted the acrimonious relationship between the parties and the fact that the plaintiff had not legitimized the child through marriage. The decision emphasized that each case should be decided on its own merits, and the welfare and best interests of the child are paramount.

Next, the case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors*¹⁸² has highlighted the key issues of whether the revocation of the plaintiff's appointment amounted to gender discrimination, whether a declaration was the proper form of relief and whether the court could refer to CEDAW in interpreting Article 8(2) of the Federal. In this case, the plaintiff was appointed as a GSTT and received a placement memo. During a briefing, it was revealed that she was pregnant, leading to the withdrawal of

¹⁸² [2012] 1 MLJ 832.

her placement memo by the defendants. The plaintiff claimed this revocation was solely based on her pregnancy and amounted to gender discrimination under Article 8(2) of the Federal Constitution. She sought a declaration that the defendants' actions were unconstitutional and unlawful, and also claimed damages.

The court held that a declaration was a proper form of relief under Section 41 of the Specific Relief Act 1950, as the plaintiff sought to assert her right to a legal status and also claimed damages. The court referred to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), to which Malaysia is a party. Articles 1 and 11 of CEDAW highlight that discrimination based on pregnancy is a form of gender discrimination. It was determined that the word "gender" in Article 8(2) of the Federal Constitution should be interpreted in line with CEDAW to prevent discrimination against women. Therefore, the plaintiff's dismissal on the basis of her pregnancy was a form of gender discrimination.

The defendants argued that the discrimination was justified by the principle of reasonable classification and was a policy decision. However, the court found this principle did not apply to Article 8(2) of the Federal Constitution, which explicitly prohibits gender discrimination. The argument of policy consideration was deemed an afterthought, as it was not incorporated in the circular or raised during the interview process.

The court concluded that the revocation of the plaintiff's appointment due to her pregnancy violated Article 8(2) of the Federal Constitution, constituting gender discrimination. As this was a public interest case, the court allowed the plaintiff's application but made no order as to costs.

The analysis of key Malaysian cases involving children's rights and gender discrimination highlights the significant role of international law in shaping domestic

legal decisions. In **Pendakwa Raya v Pesalah Kanak-Kanak 1 dan satu lagi**, the court balanced public interest and child welfare, emphasizing a rehabilitative approach in sentencing minors charged with culpable homicide. **The case of Lee Lai Ching v Lim Hooi Teik** demonstrated the court's prioritization of the child's best interests by ordering a DNA test to determine paternity, aligning with the United Nations Convention on the Rights of the Child (CRC). **Lai Meng v Toh Chew Lian** [2012] 8 MLJ 180 underscored the natural mother's full legal rights over an illegitimate child and highlighted public policy considerations against granting blanket access rights to putative fathers, emphasizing the child's welfare as paramount.

In **Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors** [2012] 1 MLJ 83, the court identified the revocation of the plaintiff's employment due to pregnancy as gender discrimination under Article 8(2) of the Federal Constitution, referencing the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). The integration of CEDAW and CRC principles into Malaysian law in these cases underscores the judiciary's commitment to aligning domestic legal frameworks with international human rights standards. This approach not only enhances legal protections for vulnerable groups but also ensures that Malaysian jurisprudence remains in harmony with global conventions, advancing justice and equality in the legal system.

There are general and specific provisions in the convention which relate to protection of children against sexual abuses. Article 1 of the Convention specifies that all people under the age of 18 are considered as requiring protection under the convention while Article 4 mandates the government to make sure that the rights of children are respected. Article 11 has a premonition of child trafficking which is inherent part of cross border CSA. Therefore, it prohibits taking of children and young people away from their own against their will. The scope of Article 19 is on the violence

against children which is often a precursor to sexual abuse involving child victims. As part of enabling and supporting welfare and childcare centres, Article 20 provides for the right to special protection for a child where living with own family becomes dangerous or impossible. Incestuous rape and sexual abuse victims are able to leverage on this provision to seek protection under government shelters.

Specifically, Article 34, which mandates member states to protect children from all forms of sexual exploitation. This includes unwanted touch, groping, rape and other contact or non-contact sexual abuses. The following provision specifically mentions abduction, selling and trafficking of young persons for whatever purposes. Article 35 highlighted these actions which is directly related to sexual abuse of young persons and children.

The role of UNCRC in strengthening National laws on the protection of children and their rights depends on the membership of the country through ratification and reservation. In line with the policy of the government of Malaysia that no child should be subjected to any form of abuse and neglect.¹⁸³ Malaysia ratified UNCRC in 1995 with eight reservations which were based on domestic law and national policies. In its 2004 Round Table Discussion, the Human Rights Commission of Malaysia recommended the review or total withdrawal of the reservation.¹⁸⁴ Other recommendations include the setting up of a task force to ensure that domestic laws are in line with obligations under the CRC.

¹⁸³ Afridah Binti Abas, "Child Abuse in Malaysia: Legal Measures for the Prevention of the Crime and Protection of the Victim", *International Journal of Social Sciences and Humanity Studies*, vol. 4, no. 2 (2012): 1–10.

¹⁸⁴ The Raoul Wallenberg Institute Compilation of Human Rights Instrument, "Convention on the Rights of the Child" in *The Raoul Wallenberg Institute Compilation of Human Rights Instruments*, edited by Melander G, Melander G and Alfredsson G, (Netherlands: Brill, 2021), 261–84.

Malaysia is obliged to submit status reports on the implementation of the convention as part of its reporting obligation to the UN every five years. According to Child Right Coalition Malaysia, which published its own Status Report on Child Rights in Malaysia in 2018, the government has only published one report since 1995. Despite the non-reporting, attempts have been made to improve domestic laws on rights of the child. The provision of Children's Court, passing of the Child Act 2001 among others are some of the alignments of CRC to national laws for the protection of child including the Sexual offence against Children Act 2017.

Specifically, the convention has been the basis for provisions in the Child Act 2001, such as sexual offenders register, family financial protection in incestuous abuse, interim care and protection, special detention for child offenders and training of court officers on child justice system.¹⁸⁵

2.7.2 The Luxembourg Guidelines

The Luxembourg Guidelines refers to the "Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse" that was adopted by the Interagency Working Group in Luxembourg on 28 January 2016.¹⁸⁶ the optional protocol, the Lanzarote Convention, and the Budapest Convention all cover acts that go beyond the production of CSA material, including, among the constituent elements of the crime, acts such as offering, making available, distributing, transmitting, procuring, and possessing CSA material, independent of the time elapsed since the production of such

¹⁸⁵ Abas, "Child Abuse in Malaysia,".

¹⁸⁶ ECPAT International. *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*. (2021). Retrieved from <https://ecpat.org/wp-content/uploads/2021/05/Terminology-guidelines-396922-EN-1.pdf>

material.¹⁸⁷ The term "child pornography" is gradually being replaced with the phrase "child sexual abuse material".¹⁸⁸ This change in nomenclature stems from the claim that sexualized imagery of children or other forms of depiction of children should not be referred to as "pornography," but rather as a representation of CSA.¹⁸⁹

Adults participating in consensual sexual behaviours that are distributed which are often legally to the general public for their sexual enjoyment are referred to as pornography. The term "pornography" is being criticised in reference to children since it is becoming more and more commonplace and may inadvertently or not help to downgrade the seriousness of, trivialise, or even legitimise what is truly sexual abuse and/or exploitation of children.¹⁹⁰ Furthermore, the phrase "child pornography" runs the danger of insinuating that the activities are done with the child's consent and constitute acceptable sexual content, just like the terms "child prostitution" and "child prostitute".

In light of the criticisms, the European Parliament explicitly stated that it "is essential to use the correct terminology for crimes against children, including the description of images of sexual abuse of children, and to use the appropriate term "CSA material" rather than "child pornography" in its Resolution on Child Sexual Abuse Online of March 11, 2015.¹⁹¹

The law enforcement community has generally taken this stance in recent years, and it has taken the initiative to define "child pornography" as forensic evidence of CSA or exploitation. Thus, law enforcement agencies throughout the world, including Europol and INTERPOL, frequently avoid using the word "child pornography" in

¹⁸⁷ Council European, "Convention on Cybercrime", *Current*, vol. 33, no. 185 (2001): 6–8; A. D. Tiuliandin, "For the Protection of Children", *Meditsinskaia Sestra*, vol. 38, no. 11 (1979), 7-9.

¹⁸⁸ S Malby et al., *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children* (Vienna: United Nations Office on Drugs and Crime, 2015), 18.

¹⁸⁹ Danijela Frangež et al., "The Importance of Terminology Related to Child Sexual Exploitation", *Journal of Criminal Investigation and Criminology*, vol. 66, no. 4 (2015), 291–99.

¹⁹⁰ Ibid.

¹⁹¹ **Council of Europe.** "Doc. 2015/2564(RSP), Paragraph 12." *Convention on Cybercrime*, 2015.

instead of "child sexual abuse material" or "child sexual exploitation material." According to this definition, "child pornography" might include content that goes beyond depicting an act of sexual abuse against a child, whereas "child sexual abuse material" might cover a more limited range of behaviours. In this situation, the phrase "child sexual exploitation material" exerts special significance since it covers anything that exploits children by sexualizing them even when it does not overtly show such abuse¹⁹².

Therefore, "child sexual abuse material" refers to a subcategory of "child sexual exploitation material" that involves real abuse or focuses on the child's anal or genital region. Both phrases apply to content that illustrates, records, or both behaviours that are sexually abusive and exploitative of children.

In these important guidelines, policymakers, professional associations and child rights defenders find a crucial resource to provide precision in terminology, enhance accuracy in the development of monitoring tools, and gain conceptual clarity to mobilise efforts for the safeguard of children's freedom from sexual violence across regions," said Marta Santos Pais, the Special Representative to the UN Secretary General on Violence against Children and a key member of the Working Group on the Guidelines for Monitoring and Reporting on Violence against Children. Terminology is crucial in the fight against child sexual exploitation and abuse as it affects the efficacy of actions, according to Maud de Boer-Buquicchio, the UN Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography. The UN Special Rapporteur stated that the Luxembourg Guidelines "will contribute not only to the protection of children but also to ending the impunity for these heinous crimes." Over the course of 18 months,

¹⁹² Frangež et al., "The Importance of Terminology,".

under the tutelage of ECPAT, the Interagency Working Group discussed language for sexual abuse and sexual exploitation in child protection, bringing together experts and international actors in child protection.¹⁹³ The Interagency Working Group is composed of representatives from the following organisations which are African Committee of Experts on the Rights and Welfare of the Child, Child Rights Connect, Council of Europe Secretariat, ECPAT, Europol, INHOPE - The International Association of Internet Hotlines, Instituto Interamericano del niño, la niña y adolescentes (OEA), International Centre for Missing and Exploited Children, International Labour Organization, International Telecommunication Organisation, INTERPOL, Office of the United Nations High Commissioner for Human Rights, Plan International, Save the Children International, United Nations Committee on the Rights of the Child, United Nations Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, United Nations Special Representative of the Secretary General on Violence against Children, United Nations Children's Fund (UNICEF). The IWG also counted with two academic institutions, the London School of Hygiene and Tropical Medicine and the University of Bedfordshire, The International Centre: Researching child sexual exploitation, violence and trafficking, as well as the Oak Foundation as observers to project.¹⁹⁴

2.8 CHILD SEXUAL ABUSE: AN ISLAMIC PERSPECTIVE

Islamic law is arguably an international law which is applicable to Muslim states and individuals. Several studies have examined the impact of Islamic law on the protection

¹⁹³ Andrea Varrella, "Terminology Considerations on Trafficking of Children for Sexual Purposes Based on the Luxembourg Guidelines", *Journal of Human Rights and Peace Studies*, vol. 5, no. 1 (2019): 47.

¹⁹⁴ *International Labour Organization*, "Luxembourg Guidelines' on Terminology: A Step Forward in the Fight against Sexual Exploitation and Sexual Abuse of Children", <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_490738/lang--en/index.htm> (accessed July 27, 2023)

of children against sexual abuse with reference to the practice in Muslim countries including Malaysia.¹⁹⁵ Similarly, there appears to be some convergence in the protection of children against sexual abuse under the international human right convention and Islamic law with some divergence in areas such as Female Genital Mutilation and others.¹⁹⁶ This section examines the Islamic law position on CSA.

The protection of children from all kinds of abuses is a right recognised in Islam, However, like every other right, the shariah places this right below the right of Allah. For example, while child marriage is considered generally acceptable under the shariah, the international human rights law considers this as a form of child abuse.¹⁹⁷ This is the basis of misunderstanding the general notion of human rights in conventional law and Islamic law among liberal universalists. The liberal-universalist approach appears to discountenance the rights of the Law-Giver i.e., Allah. On the other hand, there is “honour ideology” which is allegedly based on customary practice among some Muslims. This ideology discourages reporting of CSA as it affects the honour of the family in the society.¹⁹⁸

As a country with dual jurisdiction comprising Shariah and common law, Malaysia applies some of the shariah provisions to protect children from sexual abuse include imposition of moral policing rules to prevent *Khalwat* and fornication (*zina*).

¹⁹⁵ Steven Granich et al., “Addressing the Issue of Child Sexual Abuse in Pakistan: A Conceptual Analysis”, *International Social Work*, vol. 66, no. 3 (2023): 715–25.

¹⁹⁶ Najwa Syazwani Aqilah binti Abd Hamid and Shahrul Mizan bin Ismail, “Islamic Practice And Human Rights Approach To Female Genital Mutilation: An Overview”, vol. 1, xxvi, (2021): 8.

¹⁹⁷ Mahamad Naser bin Disa, “An Evaluation of The Implementation of Shari’ah Law of Malaysia in Protecting the Rights of a Child”, *Al-Itqan: Journal of Islamic Sciences and Comparative Studies*, vol. 2, no. 2 (2018): 5–20.

¹⁹⁷ Ibid.

¹⁹⁸ Mariya Ali, “Child Sexual Abuse: Can the Doctrines of Al-Maqasid Al-Shariah and Maslahah Assist in Challenging the Honour Ideology?”, *The International Journal of Human Rights*, vol. 18, no. 4–5 (2014): 508–26.

Before we explore the child right against CSA, it is crucial to comprehend the rights that Islam has guaranteed to children. Even before it is born, a child possesses rights that were divinely ordained and tied to them. Having moral parents is the first of those. Men and women wishing to get married must keep this in mind because having children is one of the purposes of marriage. This is so that a God-conscious parent can treat every person in their care with these ideals in mind. Qur'anic du'a for righteous children also highlights the importance Allah attaches to beginning a child's life in the best way- that is through imploring the divine assistance of Allah.¹⁹⁹

Depending on how one defines a "child," statistics on child abuse will vary, and this age might range greatly from one nation and one era to the next. The most consistent teachings in this regard are those of Islam about the age at which one becomes subject to religious obligations.

Puberty, as far as we are aware, serves as an indicative sign that a person has first attained full *'aql* (understanding). It is quite challenging to determine the precise moment that *aql* happens because some persons may not exhibit and vary from any of these symptoms. Since there are no additional symptoms, the scholars have also set a certain age at which puberty or maturity is presumed to have happened.²⁰⁰

According to Imam Shafi, Ahmad, Abu Yusuf, and Muhammad [r], it occurs when fifteen lunar years have passed for both boys and girls, and the Hanafi madhab also has issued the same fatwa based on this opinion.²⁰¹ Imam Malik [r] has related either the start or end of the eighteen lunar years. While Imam Abu Hanifah [r] asserts

¹⁹⁹ Al Baqarah: 36; Āl 'Imrān: 38; As Saffat: 100; Al Ahqaf: 15; Al Baqarah: 128; Ibrahim: 40-41.

²⁰⁰ Azizah Mohd and Nadhilah A Kadir, "Minimum Age of Marriage Under Islamic Law and The Islamic Family Law (Federal Territories) Act 1984: A Preliminary Study on The Ideal Age of Marriage in Malaysia", *Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilization (ISTAC)*, vol. 24, no. 2 (2019): 239–66.

²⁰¹ Barbara Eileen Croken, *Zabid under the Rasulids of Yemen, 626-858 Ah/1229-1454 Ad* (Massachusetts: Harvard University, 1990), 96.

that it happens when a boy turns 18 and a girl turns 17 lunar years of age.²⁰² He quotes this from the [r] *tafseer* of Ibn Abbas, “Come not nigh to the orphan's property except to improve it, until he attains the age of full strength; and fulfil (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning)”²⁰³. The youngest age mentioned for this passage is eighteen, according to Ibn Abbas [r], hence Abu Hanifah [r] considered it to be the most careful interpretation.

However, the physical indicators of maturity typically relate to sexual maturity, indeed it may differ from cognitive and social maturity. It is not required that a girl or boy who has displayed these outward signals be prepared for the duties associated with marriage or business or fully understand the repercussions of crimes. This is why laws that set a minimum age for these contracts must be followed if one lives in such a nation, and even in Muslim nations like Malaysia, there is a push for '*rushd* (sensible conduct, reason, and mental maturity) to replace physical signs to determine marriage laws to lower child abuse and divorce rates.²⁰⁴ This is consonant with the verse, “Test orphans until they reach marriageable age; then, if you find they have sound judgement, hand over their property to them.”²⁰⁵

The above-mentioned range of Islamic legal signs and ages is largely consistent with the "age of majority" in nations today, an age that has varied historically and from place to place for frequently arbitrary reasons. But there does seem to be a consensus that a child develops the abilities necessary to transition from being a child to an adult within this wide age range. According to established legal definitions, the age of

²⁰² Sabine Damir-Geilsdorf and Leslie Tramontini, “Renegotiating Shari‘a-Based Normative Guidelines in Cyberspace: The Case of Women’s ‘awra”, *Online-Heidelberg Journal of Religions on the Internet*, vol. 9, (2015): 15.

²⁰³ Al Isra :34

²⁰⁴ Zaenul Mahmudi and Halimatus Sa’diyah, “The Minimum of Marriageable Age in Maqāsid Al-Sharia and Psychological Perspectives”, (2018): 118–1195.

²⁰⁵ An Nisa:6

majority marks the beginning of adulthood. It is the time when a child ceases to be a juvenile and gains legal authority over their own bodies, conduct, and choices, ending parental or guardian control and legal obligations over them.

The majority of nations in the world, including Malaysia and India, have marked the age of the majority to eighteen years old. Islamic teachings state that we must abide by the rules of the nation in which we reside, hence in nations with laws prohibiting a child from working or getting married, for example, these laws should be upheld as they do not conflict with the Shariah law.

Although the state can and does use its "parens patriae" authority to meddle in areas like public health and education, it is not allowed to meddle with a parent's choice of how to raise their child as long as it does not amount to abuse or neglect.²⁰⁶ Similar to this, Islamic law does not interfere too much in family matters, leaving it up to the parents' judgement, culture, and understanding to nurture their children as best they can as long as Syariah laws are not broken. However, there are Islamic rules guiding child rearing that, if followed, will boost the possibility of a healthy kid-parent and child-God relationship, as is the case for every facet of our lives.

When a child is coerced or forced to engage in sexual activity, whether, by adults or other kids, it is sexual abuse. This type of abuse is sometimes harder to see since it does not necessarily include severe violence and the kid may or may not comprehend what is happening.

Islam is exceedingly strict about sexual behaviour, even when it comes to adults. The only acceptable ways to have sexual gratification are inside the confines of nikah

²⁰⁶ Vivian E Hamilton, "Adulthood in Law and Culture", *Tul. L. Rev.*, vol. 91, no. 55 (2016): 55.

(and a contract of enslavement). One of Islam's seven deadly sins, *zina* is detrimental to a person's faith, family, and society and is despised by Allah SWT.

Ibn Qayyim [r] said: "Zina encompasses all the characteristics of evil: lack of religious commitment, loss of piety, loss of chivalry, lack of protective jealousy (gheerah).²⁰⁷ This is why Allah SWT included it in the verse of prohibition alongside associating partners with him and murder. "And those who invoke not any other ilaah (god) along with Allah, nor kill such person as Allah has forbidden, except for just cause, nor commit illegal sexual intercourse."²⁰⁸

Additionally, having illicit sex with someone over whom you have a duty of care and trust is more despicable and despised and the Prophet (pbuh) listed having illicit relations with the wife of one's neighbour as one of the major sins.²⁰⁹ He صلى الله عليه وسلم also said, "There are four people who are hateful to Allah Almighty: a merchant swearing false oaths, a conceited poor person, an elder who commits adultery, and an unjust leader."²¹⁰

The aforementioned forms of maltreatment and CSA are *zina*, with the spice of sin by engaging and involving a non-consensual, innocent and defenceless kid. In conjunction with the Prophet's comments to "*separate their (child) beds at the age of ten*," parents have a responsibility to shield their children from unwanted sexual approaches and cravings and establish morality and modesty in them from an early age.²¹¹ One can only imagine how harshly the fitnah perpetrator will be punished if this is done to shut the doors to immorality, criminality, or fitnah. The *hurmatul musaharah* judgement is one of the clearest examples of how disgusting and harmful sexual abuse

²⁰⁷ Ibn Qayyim Al-Jawziyyah. *The Garden of the Lovers and the Excursion of Those Who Yearn*, Translated by Khalil Abû Asmâ.

²⁰⁸ Al Furqan: 68

²⁰⁹ Abû Bakr al-Bayhaqî, *Al-Sunnan al-Kubra for the Bayhaqi, Kitab al-Jarrah*, Egypt: Dar al-Kutub Al-Elamiya, vol. 8, 2021, Hadith 12172-13844: 33.

²¹⁰ Imam Ahmad an-Nasa'i, *Sunan al-Nasa'i Kitab al-Zakah al-Faqir al-Mukhtal*, Saudi Arabia: Darussalam, 2007, Hadith 25: 86.

²¹¹ Imam Hafiz Abu Dawud Sulaiman bin Ash'ath, *Sunan Abi Dawud, Kitab al-Salah*, Saudi Arabia: Darussalam, 2008, Hadith 4: 254.

in families is. If the father touches the daughter with desire and lust or touches or glances at her inner private parts with desire, the nikah between the husband and wife will be permanently broken.

Therefore, father sexual abuse in particular has devastating repercussions on people and families.²¹²

Allah SWT warns in the Quran, "*Do not come close to Zina*," and it follows that any actions that lead to sexual activity are also prohibited by this command. When sexual contact with a minor who is unable to give legal consent, the sin of rape is committed in addition to the sin of *zina*. According to some academics, rape falls under the category of *ightisaab* (coercion), which is distinct from *zina* and does not require the *hadd* and its conditions, such as four witnesses. Theoretically, this should make it simpler to convict rapists, and the court has the discretion to impose the harshest sentence necessary, particularly if CSA cases are becoming more and more common.²¹³

Jurists further contend that even if a person were forced to engage in sexual activity with another person, the act would not be acceptable or justifiable because it involves usurping another person's rights for personal gain, which is prohibited. This demonstrates that engaging in sexual activity with a person who is not consenting is against the *huqooq ul-naas* (rights of the people), about which the Prophet (pbuh) said:

Whoever has oppressed another person concerning his reputation/honour or anything else should seek to be absolved by him before [the day when] there will be neither dinar nor dirham. If he [the oppressor] has right actions, they will be taken from him to balance the injustice he did, and

²¹² Ibu Nujaym, Zayn al-Din ibn Ibrahim, *Al-Baḥr al-Rā'iq, Sharḥ Kinz al-Daqā'iq* (Egypt: Al-Islamic Library, 1916), 100.

²¹³ Fereyduṅ Vahman, *The Bab and the Babi Community of Iran* (United Kingdom: Simon and Schuster, 2020), 371. Book of Borders on Indian Fatwas, see page 163, published by Dar Al-Zikr.

if he does not have any good actions, the bad deeds of [the oppressed] will be loaded onto him.”²¹⁴

The Shariah Laws aims to safeguard children by closing the doors to sexual abuse and unlawful partnerships before the disease manifests. Because of this, it is forbidden for children to be alone with someone of the opposite gender, even if you are attracted to them and they are younger than you. "*No man is alone with a woman but the shaytaan is the third one present.*"²¹⁵ The mother's right to custody of the daughter is forfeited if she marries again because of the fears of mistreatment and / or possible abuse by the stepfather. This is done solely for the sake of the child's protection. Similar to this, even if he is the closest relative to her, a young girl over the age of seven cannot reside with any male relative who is not her mahram, such as her uncle's son.²¹⁶

This "Cinderella" phenomenon is based on the study found in 2009 that the families without a man or with a man who was not the biological father of the child in the home were both significantly more likely to be contacted by Child Protective Services than families where the biological father of every child resided with the mother.²¹⁷ Additionally, step parents have been discovered to carry a much higher chance of utilising excessive violence, which can ultimately result in a child's death. Lack of exposure to the learning mechanism known as "incest aversion," which refers to negative sexual imprinting at a crucial period of early development to prevent inbreeding, has been used to explain sexual aggression by stepparents.²¹⁸

²¹⁴ Dr. Muhammad Muhsin Khan, *Ṣaḥīḥ al-Bukhārī, Book of Grievances*, Saudi Arabia: Darussalam, 1997, Hadith 24: 147.

²¹⁵ Ibn Hajar al-'Asqalānī, Aḥmad ibn 'Alī. *Faṭḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*. Dār al-Ma'rifah, 1379 AH. Kitāb al-Nikāḥ, Bāb lā Yakhlu Rajulun bi-Imra'atin illā ma'a Dhī Maḥram, wa al-Dukhūl 'alā al-Nisā', Ḥadīth 49: 59.

²¹⁶ The Confused Response, Part 3, The Nursery Chapter, Page 556, The Islamic Library

²¹⁷ National Centre for Health Research, "Child Abuse and Father Figures: Which Kind of Families Are Safest to Grow Up In?", <<https://www.center4research.org/child-abuse-father-figures-kindfamilies-safest-grow/>> (accessed 10 December, 2021).

²¹⁸ Debowska et al., "Violence Against Children by Stepparents" in *The Sage Handbook of Domestic Violence*, edited by Todd K. Shackelford, (Oakland University: SAGE Publications Ltd, 2020), 69-73.

It can be concluded that Islamic laws seek to stop the occurrence of child sex crimes, which are a threat and, on the rise, today. Therefore, Muslims must follow certain directives or rules, such as the requirement to cover the *awrah*, the recommendation to lower and lower the gaze, the forbiddance of all impolite behaviour and the encouragement of all polite behaviour, and the protocol of asking permission to enter the home and others' rooms, and the instruction to mix with men, women, and men. Because it is important to preserve children's rights, all these laws are designed to stop sexual offences from happening in society. The Almighty Allah does indeed know what is best for His followers.

For a Muslim, this moral duty is related to being accountable to our Creator, hence one should move quickly to encourage good and prevent evil, as is frequently commanded by Quranic believers.²¹⁹ The Qur'anic passage repeatedly repeats to the believers, "*O you who have believed, upon you is [responsibility for] yourself,*" was once read in Abu Bakr's [r] presence. He [r] responded by quoting the Prophet, "*Indeed when people see an oppressor but do not prevent him from (doing evil), it is likely that Allah will punish them all.*"²²⁰ This was in response to the misinterpretation of the verse, which claimed that speaking out against injustice was not required.

2.8.1 Legislation on Sexual crimes in Muslim Countries

The position of Islamic law is based on a diverse interpretation of scholars and jurists which prohibits all kind of oppression. Due to the general prohibition of sexual abuse in the Islamic law, more specific legislation have been passed in Muslim countries such

²¹⁹ Al Maida: 105.

²²⁰ *Sunan Abi Dawud*, Hadith 4338: 347.

as Qatar, Libya, Saudi Arabia and United Arab Emirate (UAE) to strengthen protection of children from sexual abuse.

For instance, sexual abuse in Libya are prosecuted under the Penal Code 1953 while in Qatar, sexual offences generally are governed by Law No. 11 of 2004 Issuing the Penal Code 11 / 2004. Article 296 of the code provides:

Whoever commits the following offences shall be punished with imprisonment for a term of no less than one year and no more than three years: 1- Grooms a female to commit adultery; 2- Instigates, induces, seduces a female in any way to commit adultery or to frequent a brothel in order to commit debauchery whether inside or outside the country; 3- Leading, instigating or seducing a male by in any way to commit sodomy or dissipation; 4- Inducing or seducing a male or a female in any way to commit illegal or immoral actions; 5- Bringing, exposing or accepting a male or a female for the purpose of sexual exploitation.

Similar provision exists under Bahrain Law Amiri Decree No.15 of 1976, also known a Bahraini Penal Code²²¹ and Kuwaiti Penal Code 1960 covers sexual offences.²²²

2.9 CONCLUSION

This chapter explored the conceptual and theoretical underpinnings of CSA generally. Although the focus of this thesis is Malaysia law, it has become expedient to understand the history of sexual abuse against children from the 16th century until 21st century. This historical background has laid the foundation child protection from all sought of abuses under international and domestic law.

²²¹ Amiri Decree No. 15 of 1976, Issuing the Penal Code, as amended. Kingdom of Bahrain Official Gazette, 1976.

²²² *Equality Now*, “Kuwait - Law No. 16 of 1960 Promulgating the Penal Code - Equality Now”, <https://www.equalitynow.org/discriminatory_law/kuwait_-_law_no_16_of_1960_promulgating_the_penal_code/> (accessed 27 July, 2023).

The chapter also covers efforts by researchers to develop this modern concept, with effective definitions and typologies such as incest, child pornography and paedophilia which could assist law making and enforcements. Some theories which have been postulated about the cause of CSA were also examined. The theories include Finkelhor's four preconditions, Ward's Pathway model and rational choice theories. The risk factors in CSA and issues affecting responses to the problems are also addressed. A more scientific distinction was made between risk factors and causes of CSA. The risk factors which are often confused as the causes of CSA are: dysfunctional family, individual factors, societal factors, community and protective factors.

This chapter was able to highlight historical development, definition, causes, risk factors and responses to CSA. The international and Islamic perspective on CSA was also examined based on the principles enunciated in the UDHR, UNCRC and Islamic law. Although, there are no direct provisions against CSA, Islamic law prohibits all sought of abuses and unlawful sexual intercourse with any human. The next chapter will discuss the legal and institutional framework for child protection in Malaysia with a view to analysing the strengths and weaknesses of the law in Malaysia.

Further, in regards to **Policy Recommendations**, the recommendations provided in this study address various facets of child protection and align closely with the theoretical framework established by the UN Convention on the Rights of the Child (CRC). Firstly, the recommendations underscore the importance of revising and updating existing legislation, such as the Sexual Offences Against Children Act (SOACA) 2017, to better categorize and address different forms of sexual assault against children. This aligns with the CRC's emphasis on legal frameworks that provide comprehensive protection for children against all forms of abuse and exploitation.

Secondly, the study advocates for stronger penalties for offenders, including the consideration of life imprisonment and even the death penalty for aggravated penetrative sexual assault offences. This recommendation reflects the CRC's principle of prioritizing the best interests of the child and ensuring effective deterrents against perpetrators to safeguard children's rights to protection and safety.

Furthermore, the study highlights the need for special provisions and protections for nonverbal and mentally challenged victims, emphasizing the CRC's principles of non-discrimination and the right to special care and assistance for children with disabilities.²²³ Additionally, the recommendations stress the importance of allocating dedicated resources and training for law enforcement agencies and the judiciary to effectively handle cases of child sexual abuse, aligning with the CRC's call for state parties to provide appropriate assistance and support to child victims.²²⁴

Moreover, the study advocates for the harmonization and coordination of child-focused laws to ensure clarity and uniformity in child protection measures, mirroring the CRC's emphasis on the importance of a holistic and integrated approach to promoting and protecting children's rights.²²⁵

2.9.1 Practical Recommendations

The operational and practical recommendations derived from the study's findings offer crucial insights for preventing and managing incidents of Child Sexual Abuse (CSA) in Malaysia. Firstly, the need to expand legislation to support various institutions in CSA

²²³ *United Nations*, "Convention on the Rights of the Child: General Comment No. 9", <https://www2.ohchr.org/english/bodies/crc/docs/gc9_en.doc#:~:text=Care%20and%20assistance%20shall%20be,for%20employment%20and%20recreation%20opportunities> (accessed 06 July, 2024)

²²⁴ *United Nations*, "Convention on the Rights of the Child: General Comment No. 13", <https://www2.ohchr.org/english/bodies/crc/docs/crc.c.gc.13_en.pdf> (accessed 17 July, 2024)

²²⁵ *Ibid.*

prevention and management is emphasized, echoing the CRC's call for comprehensive legal frameworks to protect children from all forms of abuse.²²⁶ Secondly, capacity-building activities for professionals involved in handling CSA cases, including law enforcement officials, judges, and social workers, align with the CRC's emphasis on providing appropriate assistance and support to child victims.²²⁷ Additionally, empowering parents with the skills to detect behavioral changes in their children and addressing false claims of CSA through stricter penalties resonate with the CRC's principles of promoting the best interests of the child and ensuring justice for victims.

Furthermore, considering Alternative Dispute Resolution (ADR) mechanisms and victim compensation systems in CSA cases reflects a holistic approach to addressing the complex needs of victims, consistent with the CRC's emphasis on providing comprehensive support and protection to children.²²⁸ Moreover, advocating for harsher penalties for perpetrators of CSA and prioritizing comprehensive psychological treatment for victims underscore the CRC's recognition of the long-term impact of CSA on children's well-being and the importance of ensuring their full recovery and rehabilitation.²²⁹

Lastly, raising public awareness about the existence and provisions of the Sexual Offences Against Children Act (SOACA) aligns with the CRC's emphasis on promoting education and awareness about children's rights and legal protections.

²²⁶ Convention on the Rights of the Child (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989), entry into force 2 September 1990, in accordance with article 49.

²²⁷ *United Nations*, "Convention on the Rights of the Child: General Comment No. 13", <https://www2.ohchr.org/english/bodies/crc/docs/crc.c.gc.13_en.pdf > (accessed 05 June, 2024)

²²⁸ Sandberg, K., "Children's Right to Protection Under the CRC" in *Human Rights in Child Protection*, edited by Falch-Eriksen, A., and Backe-Hansen, E. (Cham: Palgrave Macmillan, 2018), 15-38.

²²⁹ *UNICEF*, "The right of the child to freedom from all forms of violence", <https://www.unicef-irc.org/portfolios/general_comments/CRC.C.GC.13_en.doc.html > (accessed 10 July, 2024).

By disseminating information about SOACA to the public, Malaysia can uphold its commitment to protecting children from CSA and ensure that potential offenders are deterred from committing such crimes.



CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF CHILDREN FROM SEXUAL ABUSE IN MALAYSIA: A LEGAL ANALYSIS

3.1 INTRODUCTION

The role of legislation in the prevention and protection of children cannot be overemphasised. As part of fundamental human rights, children have a right to be protected from all kinds of abuses. In this regard, The Federal Constitution of Malaysia will be discussed based on the rights of children and the protection provided by the constitution. Over a long period of time, the governments have continuously made laws to protect children in Malaysia. These legislative efforts began with the colonial ordinances during the colonial period with Acts of Parliament after independence. Similarly, welfare institutions for children were progressively inherited based on the British colonial framework.¹

The conceptualization of child abuse in legal parlance has been relatively short in Malaysia's legal history; the enactment of the Children and Young Persons Ordinance indicates that some form of child abuse might have been observed in parts of Malaysia at that time.² Experiences of child welfare and neglect in the United Kingdom are other reasons for introducing legislation and institutions for the protection of the child. Therefore, the law was promulgated by the British administration to address some child protection challenges. This might be related to the events surrounding World War II.

¹ Fuziah Shaffie, "British Colonial Policy on Social Welfare in Malaya: Child Welfare Services 1946-1957", (Unpublished Ph.D. thesis, University of Warwick, 2006), 1.

² Nithiyanantham Murugesu, "The Role of the Law and the Courts in Preventing the Abuse of Children- The Malaysian Perspective", *Malayan Law Journal*, vol. 2, no. 5 (2010): 1-25.

The first legislation for the purpose of protecting children in Malaysia was enacted in 1947. Since then, other forms of legislation including Acts of parliaments, subsidiary legislations, guidelines, and rules of courts have emerged in the protection of children from all kinds of abuse, and neglect including sexual abuse and exploitation. Some of these legislations have general application to all issues affecting children while others are specific to address childcare, child witness, child employment juvenile, and court procedures involving a child. Cumulatively, the general objective is to ensure protection for children against sexual abuse, punishment of offenders, and welfare of victims. Until recently, there has been no specific legislation on the management of sexual abuse cases. What existed are guidelines and standard operating procedures (soft laws) with the end goal of providing safe management and inclusive protection of CSA victims. The setting up of the Suspected Child Abuse and Neglect (SCAN) team in the Kuala Lumpur General Hospital is a product of such efforts. This chapter identifies the most relevant legislation including Acts of parliament, state enactments, and institutions in Malaysia relevant to child protection including the Federal Constitution, The Juvenile Courts Act 1947, the Children and Young Persons Act, the Child Act 2001, Child Protection Act 1991 (Act 468), the Juvenile Court Act 1947 (Act 90), the Woman and Girl's Protection Act 1973 (Act 106) and the Domestic Violence Act 1994 (Act 521). Even though few of the legislations have been repealed, they are necessary for the trajectory of discussion in this chapter. There are a few pieces of legislation that have been repealed but they must be acknowledged as part of the legislative history of child protection laws in Malaysia. Among these statutes are : Child Protection Act 1991 (Act 468), the Juvenile Court Act 1947 (Act 90), and the Woman and Girl Protection Act 1973 (Act 106).

This chapter examines the spectrum of Malaysian Legislation which have been enacted for the protection of children in general. A detailed analysis of the legislative framework is provided on the legal development of CSA in Malaysia including all statutes relevant to child protection before independence until the enactment of the Sexual Offences Against Children Act 2017.

3.2 LEGAL DEVELOPMENT OF CHILD SEXUAL ABUSE LAW IN MALAYSIA

The Malaysian legal system has its influence from the English legal system due to its historical and geopolitical relationship with the English Common Law. As a result, statutes relating to children, particularly to address the issue of welfare, employment and protection were enacted in the pre-colonial period. Among such statutes are the Apprentice Ordinance, Children Ordinance 1922, and the Children Ordinance 1939 and 1946 which were introduced by the British in Malaya.³

The trajectory of CSA laws has evolved from the pre-independence period until now. The legal development has shown the gradual movement and preference for specific legislation rather than placing child protection within general legislation. Such as the Penal Code and the Child Act 2001.

This gradual development in child protection legislation has been illustrated in Table 3.1 below. The statutes identified in Phase 1 shows a general interest in the protection of children while Phase 3 zoomed down to specific subjects such as CSA legislation. It's crucial to remember that the Child Act of 2001 evolved from several laws, some of which have since been repealed and some of which are still in effect. The statutes are the Women and Girl Protection Act of 1973 (Act 106), the Children Care

³ Angela Browne Miller, *Violence and Abuse in Society: Understanding a Global Crisis*, (vol. 1) (Ukraine: ABC-CLIO, 2012), 487.

Centre Act of 1984, the Juvenile Court Act of 1947 (Act 90), and the Child Protection Act of 1991 (Act 468). Table 3.1 below provides an overview of legal developments in child protection in Malaysia.

Table 3.1 Development of Legislation on Child Protection in Malaysia

Phases	Legislations
Phase 1: Pre-independence - 1965	Federal Constitution of Malaya (1957) / Federal Constitution of Malaysia (1963). Penal Code 1936 (Act 574). Evidence Act 1950 (Act 56). Children and Young Persons Act 1947 (Act 232). (Repealed) Juvenile Court Act 1947 (Act 90) (Repealed) Guardianship of Infants Act 1961 (Act 351) (Revised 1988)
Phase 2: 1965-1994	Children and Young Persons (Employment) Act 1966 Age of Majority Act 1971 Women and Girl's Protection Act 1973 (Act 106) Children Care Centre Act of 1984 Child Protection Act 1991 (Act 468) Domestic Violence Act 1994
Phase 3: 1994- 2017	Child Act 2001 Sexual offences against Children Act 2017

3.2.1 The First Phase of Development

The first phase of legal development on child protection in Malaysia commenced from 1947 until after independence in 1961. For the purpose of identifying the legal protection for children in Malaysia under this phase, the Federal Constitution, the Children and Young Persons Act 1947 (repealed) and Juvenile Court Act 1947 will be examined based on their provisions, strengths and weaknesses.

Child Protection from Sexual Abuse Under the Federal Constitution of Malaysia

All statutes and legislation to protect children from sexual abuse derives their legitimacy from the Federal Constitution. This is based on the preponderance of legislative powers granted to the parliament i.e., Dewan Rakyat and Dewan Negara to make law for the protection of all citizens irrespective of age including children and minors.

As a result, the constitution provides basic human rights protections for all citizens irrespective of the age i.e., including children and adults. The five rights which include, right to life, freedom of movement, freedom of speech, freedom of religion and right to education were the main priorities of the constitution.⁴ Throughout Articles 5 to 13 of the constitution, there are mainly general rights which are enablers for other legislation including but not limited to Child Act 2001, Domestic Violence Act 1994, Sexual offences Against Children Act 2017, Penal Code among others. As a ground norm, sexual offences were not its specific concerns.

All types of CSA can be viewed from a human right perspective as an infringement of fundamental human rights of the child. Article 5(1) is with respect to personal liberties which in the context of a child could be unlawfully denied when a child is forced into sexual trafficking, sexual abuse or pornography. Sexual violence which has been prohibited expressly under the Domestic Violence Act is also an infringement on the personal autonomy of persons including a child. Similarly, where a child is unlawfully detained and used as a sexual slave, it is an infringement of fundamental rights under Article 6(1) of the constitution.

⁴ Fundamental Liberties, Constitution of Malaysia 1957, Article 5 - 13, Part II.

Penal Code

The Penal Code Act 574 stands second to the constitution in significance concerning child sexual abuse (CSA) in Malaysia. While the constitution emphasizes rights, the Penal Code provides specific offences and punishments for crimes, including sexual offences like rape, molestation, and non-consensual intercourse. However, the Penal Code doesn't focus explicitly on child victims. Key sections include Section 354 (molestation), Section 372 (prostitution exploitation), Section 375 and Section 376 (rape and statutory rape of girls under 16), and Section 375b (gang rape). Notably, Section 376B deals with incest, while other provisions address sodomy, carnal intercourse against nature, and acts meant to insult personal modesty.

A significant limitation is the Penal Code's lack of child-specific references, its gender-biased language that often excludes male victims, and absence of newer offences like child grooming or child pornography. The latter issues were addressed more adequately by the Sexual Offences against Children Act in 2017, which built on and expanded the foundational legal structures provided by the Penal Code.

Evidence Act 1950

The Evidence Act is a piece of legislation which has a great impact in the prosecution of CSA cases in Malaysia. In order to determine the outcome of CSA cases, all pieces of evidence including but not limited to the child witness will be assessed before the court. The traditional view on child evidence is the presumption of unreliability as a witness. This position was stated in the case of ***Chao Chong & Ors v PP***.⁵ Thompson CJ said:

⁵ [1960] 1 MLJ 238.

One reason why children's evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. In this country where evidence is taken on affirmation that consideration losses much of its force. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to distinguish between reason and fantasy.

These weaknesses observed made the evidence of a child unreliable in court. However, this position has been amended through the introduction of section 133A in 1971. The section paved the way for a child of "tender age" to give unsworn evidence not under oath as long as there is enough intelligence and the understanding from the child that there is a duty to speak the truth. Though a better position from the case of *Chao*, there is no definition for "child of tender age" and this is subject to the interpretation and discretion of the court as described in **Arumugam v PP**.⁶

Another challenge for child witnesses which could be burdensome for CSA is the need for corroboration of such evidence by material evidence. Without corroboration, child victim who is likely to be the only admissible witness to their sexual abuse cannot be enough to prove the offence. This position was based on the decision in **PP v Muhammad Terang bin Amit**.⁷ The need to reform the law to ease the evidential burden on child witnesses of CSA was not an issue before 1990 due to the low prevalence and reportage of such cases in Malaysia.

The Evidence Act and the adversarial system placed lots of strain on the child victim of sexual abuse due to the need to narrate mostly painful ordeal. In the case of **Sidek bin Ludan v PP**⁸, a nine-year-old child was raped by his neighbour. While

⁶ [1995] 1 CLJ 58.

⁷ [1999] 1 MLJ 154.

⁸ [1995] 3 MLJ 178.

giving evidence when she was ten years and six months. The judge observed the strain and lack of ease in the narration of the incident between her and the accused.

In a departure from traditional view and towards child friendly evidence procedure, the Criminal Procedure Code (Amendment) Act 2006 permits the giving of evidence via live video link subject to the leave of court. Section 272B read:

Notwithstanding any other provisions of this code or the Evidence Act 1950, a person, other than the accused may, with the leave of court , give evidence through video or a live television link in any trial or inquiry, if it is expedient in the interest of justice to do so.

This amendment is general for all persons and not specifically referring to a child witness. It seems appropriate and suitable for a child who may be strained to narrate a painful or shy ordeal.

Children and Young Person Act 1933

The first legislation on the protection of children in Malaysia emerged during the British colonisation of Malaya through the enactment of the Children and Young Persons Ordinance 1947 and by virtue of Legal Notification LN 322/58, Federal Constitution (Modification of Laws) (Ordinances and Proclamations) Order, 1958, the Ordinance became part of the laws enacted by the parliament of Malaysia as the Children and Young Persons Act 1947 with necessary alterations to several word. The Act was a reflection of the United Kingdom Children and Young Persons Act 1933. This legislation is significant as the earliest recognition of children within the law. Although

not specific in terms of sexual abuse, it is important as the first step in legal protection against cruelty towards children and young person in Malaya.⁹

The Children and Young Persons Act of 1947 was created to safeguard "children" and "young people," even though it has since been superseded by the Child Protection Act of 1991 [Act 468]. Section 3 of the Children and Young Persons Act 1947 (Act 232) is in *pari materia* with s 1 of the Children and Young Persons Act 1933 (UK). The Children and Young Persons Act 1947 was later amended in 1981 to enhance the punishment for offences of child abuse and neglect to a fine of not exceeding RM5,000 or imprisonment not exceeding two years or both. However, it took almost four decades to implement this amendment. The nature of abuses contemplated under this Act was not sexual abuse but serves as a protection for the child.

Guardian of Infant Act 1961

Another important piece of legislation in child protection is the Guardianship of Infant Act 1961 (GIA) which has the objective of granting the custody, support, health and education of any child which has not attained age of majority i.e., infants. The law provides for protection of children through guardianship laws and subject to application granted by the high court. Pursuant to section 2, this Act does not apply by default to persons professing the religion of Islam. The intersection between child abuse, sexual abuse and domestic violence have been observed in custody and guardianship cases.¹⁰ A guardian has the duties enshrined in section 3 of the act vis-à-vis, custody of the infant and responsibility for his support, health and education. This guardian may be removed

⁹ Norbani Mohamed Nazeri, "Protecting Child Victims in Malaysia" in *Support for Victims of Crime in Asia*, edited by Wing-Cheong Chan (United Kingdom: Routledge, 2007), 303–12.

¹⁰ Daleleer K Randawar, Sheela Jayabalan, and Faridah Hussain, "The Intersection of Domestic Violence and Custody Rights of Children: Evidence from Malaysia", *Journal of Economic & Management Perspectives*, vol. 12, no. 1 (2018): 604–9.

where these duties are not performed. Despite the equal guardianship rights given to parents under section 5 of the GIA, the court has found the need to deny parental rights where the infant has been abused by one of the parents. In determining issues relating to the infant, the judge is obliged under section 11 to “have regard primarily to the welfare of the infant” before that of the parent or both parents. This provision prioritises the best interest of the infant in all cases and by extension protection from all kinds of abuses.

A fundamental part of the Act is the designation of the Director General, Deputy Director, divisional director and state director of Social Welfare or Jabatan Kebajikan Masyarakat (JKM) as the protector of the infant under the Act.

3.2.2 The Second Phase of Development

The second phase covers legal developments and legislations passed between 1962 and 1994. The legislation are: Children and Young Persons (Employment) Act 1966, Age of Majority Act 1971, Women and Girl’s Protection Act 1973 (Act 106), Children Care Centre Act of 1984, Child Protection Act 1991 (Act 468) and Domestic Violence Act 1994. Some of the issues addressed in the legislations during this period are harmonisation of the age of children which have been mentioned in previous legislation, protection of women and girl child from domestic violence, regulation of children care centres and ultimately a whole legislation for the protection of children.

Children and Young Persons (Employment) Act 1996

The Act specifically regulates the employment of a child under the age of fifteen-year-old or young person who has attained the age of fifteen and under the age of eighteen. The ages specified in the Act are significant due to the potential exposure and risk factor

to CSA. This is a kind of protection which may place the young person in a vulnerable situation and at risk of CSA. Section 13 of the Act overrides the contractual capacity for young persons under Contract Act 1950 by providing competency for young persons to enter into a contract of service pursuant to the Act. Third Schedule of the Act provides specific regulations on inspection of the children, condition on labour and medical examination for other purpose without express mention of sexual abuse.

Child Care Centre Act 1984

The Child Care Centre Act 1984 in Malaysia aims to regulate, control, and inspect childcare centres. Managed by the welfare department, the Act defines childcare centres as premises caring for four or more children under four years old from multiple households for compensation. Ensuring the safety of these children from sexual abuse is reliant on the effective execution of the Act's provisions on registration, control, and inspection. The Act categorizes childcare centres into four: home-based, work-based, community-based, and institution-based. Before approval, the Director General must deem applicants and their employees "fit and proper" to run the centre, though the Act remains vague on this term's meaning in relation to child sexual abuse. Meanwhile, the Child Act 2001 seeks to uphold quality care in childcare centres. As more women join the workforce, there's a growing demand for childcare centres, emphasizing the need for clear guidelines on preventing and managing CSA. However, the Act notably lacks provisions addressing such abuse, despite childcare centres being potential hotspots for these incidents.

Domestic Violence Act 1994

The Domestic Violence Act 1994 is another piece of legislation which seeks to provide legal protection for a person in a situation of violence irrespective of age or gender. The Act was gazetted on 7th July 1994 and contains specific provisions for the protection of children in domestic and sexual abuse. Section 2 of the Act defines a child as a person “below the age of eighteen who is living as a member of the offender’s family...”. This definition is consistent with the Child Act 2001. Domestic violence was also defined severally to include “compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise...”. The reference to “domestic” in this Act has been interpreted to include all sexual abuses which could involve persons of close relation or family members such as incest.¹¹ The use of delusion towards a child is also well captured in the Act. Such delusion in violent action is not applicable to adults.

As an interim protective measure for the victim including a child, section 4 subsection 1 provides for the power of court to grant interim protection order during the investigation. The order is intended to prohibit the person from further violence against the child or spouse. Section 15 of the Act places specific privileges on a child and an incapacitated adult for the purpose of the application for a protection order involving domestic violence. These categories of persons may rely on a guardian, relative or person responsible for the care of such a child.

Part III of the Act provides for compensation and counselling in domestic violence cases. It is uncertain whether this compensation regime has been ordered by the court in child abuse and violence proceedings. The scope of the compensation provided in section 10 includes the pain and suffering of the victim, the cost of medical

¹¹ Zarina Mohd Zain, “The Awareness on Gender-Based Violence among Students in the Higher Learning Institutions”, *Procedia-Social and Behavioral Sciences*, vol. 38, (2012): 132–40.

treatment, and necessary and reasonable expenses such as separating lodging, safe place, and transport among others. These are normal expenses in novel cases of CSA.

One of the challenges of enforcement under the Act is the unclear distinction between civil and criminal action in domestic violence cases which could affect the application of the penal code and other criminal law legislations.

3.2.3 The Third Phase of Development

The third phase of the child protection laws consider the year 1995 to 2017 including related amendments to the existing laws. Under this phase, specific laws relating to children and specific for of abuse were considered. Under this section, the Child Act 2001 and the Sexual Offences Against Children Act 2017 (“SOACA”) are the most important. Away from the general framework for the protection of children, women and girls, these legislations are special and specific in nature.

Child Act 2001 (Act 611)

The Child Act 2001 of Malaysia consolidates all laws pertaining to the care, protection, and rehabilitation of children. Enacted in 2001 and effective from 2002, it supersedes the Juvenile Courts Act 1947, Women and Girls Protection Act 1973, and the Child Protection Act 1991. The Act, in Section 17(2)(c), defines sexual abuse of a child as any sexual activity the child participates in, either as an observer or a participant, for exploitation. Such abuse can lead to severe emotional, behavioural, and physical consequences for the child.

The Act is grounded in the four core principles of the UNCRC, emphasizing a child's best interests, right to life, non-discrimination, and respect for their views. The rights provided under this act also resonate with the principles of the Shariah law,

especially in matters related to personal and family law for Muslims. The Act's jurisdiction includes re-establishing the National Council for Children, Children Protection Teams (CPTs), and Child Welfare Teams (CWTs). The National Council focuses on nationwide issues concerning children, while the CPTs and CWTs coordinate services for children suspected of requiring care, protection, or rehabilitation.

Like its predecessor, the Juvenile Court Act, the Child Act 2001 also establishes the “Court for Children,” which has jurisdiction over all crimes except those punishable by death. The court aims to differentiate between children who need care and protection from those requiring rehabilitation. This Act places a strong emphasis on preserving the identity of children involved in court proceedings, criminalizing the dissemination of any identifying information in the media.

A significant aspect of the Act is the delineation of “child in need of care and protection,” elaborated in Section 17, which aligns with the definitions in the repealed Children Protection Act 1991. The Act stresses the duty to report abuses and establishes procedures and offenses to counter child trafficking and abduction.

3.3 SEXUAL OFFENCES PRIOR THE ENACTMENT OF SOACA 2017

Prior to the enactment of the SOACA, there are no specific laws in regard to child pornography, sexual grooming and sexual assault which cause the increasing rate of sexual crime against children. There are various cases where the charge has not proceeded to prosecute the perpetrator not because the crime has not been attended and / or investigated but because there is no specific charge under the Malaysian Penal Code, not the Child Act 2001 which is deemed to be ideal and adequate to charge the said

perpetrator due to the lacuna of the law. As a result, the perpetrator remains free in public without being brought to justice.

The rise in CSA and sexual criminality has served as a wake-up call for the legislature, which now needs to treat this issue seriously. The case of the deceased Nurin Jazlin Jazimin's horrific sexual crime, which occurred while she was just eight (8) years old, outraged the entire country in 2007.¹² Tragically, the offender was not found and there was no closure. Since the incident, the “Talian NURIN” was tagged National Urgent Response Information Network (NURIN) and eventually changed to NUR for missing kids modelled after AMBER Alert in the United States. Since 2015, this topic has dominated legislative discussions in the parliament. Among other things, the government took preventive measures to address the problem of statistics of abuse crime and kidnapping for the year 2015.

The arrest of Richard Huckle, 30, a British citizen in June 2016 on 91 charges in a London court involving a sexual crime against children—among them, sexual intimacy with children, taking pictures, recording sexual abuse video on children, and uploading the said video to a dark web for an illicit purpose—was the culmination of the enactment of the special laws related to sexual offences against children. Twenty-three Malaysian children were also involved in the illicit behaviour while Huckle was a teacher at the Christian Church in Kuala Lumpur.

Due to this tragedy, YAB Datuk Seri Najib Tun Abdul Razak as the Prime Minister of Malaysia at that time had proposed two important announcements namely to enact the Sexual Offences Against Children Bill 2017 as the specific law to address child offences holistically and comprehensively. The government also has set up a

¹² Mariani Mansor and Asnarulkhadi Abu Samah, “A Descriptive Analysis on the Personality of Child Physical Abuse Victims”, *International Journal of Business and Social Science*, vol. 2, no. 14 (2011): 94.

Special Court to handle sexual crime proceedings against children. The proceeding shall be conducted by a session court judge with expertise in child-related law along with deputy prosecutors and counsel. The officers involved are required to undergo a Child Sexual Crime Management Course at the Judiciary and Legal Training Institute (ILKAP) in Bangi, Selangor in preparation for handling the case.

Since 2017, there is only one Specialized Criminal Court Putrajaya which shall hear cases involving sexual crime against children which happened in Shah Alam, Petaling Jaya, Kuala Lumpur and Putrajaya. The government proposed to reform with more Children Court and Malaysia has a record among the earliest countries in the ASEAN region.

Subsequently, the cabinet on 24 March 2017 approved the proposed Sexual Offences Against Children Bill (RUU) 2017 to be tabled in Parliament. The second and third readings were conducted on 4 April 2017 and the law was passed on 28 April 2017. The Act came into force on 10 July 2017 and improves the existing legal loopholes related to sexual offences against children, especially for pornography and child sexual grooming offences.

The enactment of special law aims to address the seriousness of sexual offences committed against children in Malaysia by emphasising early prevention measures while increasing the protection of children from sexual offenders as well as looking after the welfare of the children themselves. Basically, the SOACA touches on four main issues, namely on sexual offences against children such as child pornography, child grooming and sexual intercourse (physical and non-physical), punishment of perpetrators and persons with trust relationships involved or abetting in such sexual offences, the testimony of child witnesses and the duty to report.

The Sexual Offences Against Children (Amendment) Bill 2023 has substituted the terminology of "child pornography" with "child sexual abuse material" within the framework of the Sexual Offences Against Children Act 2017 (Act 792). This change carries significant implications for how the severity and actual nature of the offense, which involves exploiting and sexually abusing children, are perceived and portrayed.

Section 2 of the Child Act 2001 defines a child as someone under the age of 18. According to the Department of Statistics, Malaysia, as of 2017, this vulnerable group represents one-third or 29.4% of the country's population. Lately, there have been many issues involving security and protection reported in the local newspaper like the case of rape, abduction, sexually abused and so on. The Royal Malaysian Police showed a total of 22,234 cases of abuse of child sexuality were recorded from 2010 to May 2017, with an average of 3,176 cases per year. That number represents four categories of sexual abuse namely rape 13,272 cases followed by obscenity of 6,014 cases, incest of 1,796 cases and unnatural acts of 1,152 cases. Non-tactile behaviours such as stalking, exposing private parts of the body and obscene words spoken to children are also sexual abuse. In addition, exploiting a child for pornographic purposes through the internet and using such material to allow a child to be used by others as a prostitute is also a form of sexual harassment. Often, sexual abuse against children is intended to provide sexual gratification to the person who commits it.

Most definitions of sexual abuse are comprised of three parts namely acts of touch, acts without touch and child pornography. The act of touch is when there is sexual interaction on the child's genitals such as inserting objects into the genitals, mouth or anus, having oral sex and sodomy, kissing with the tongue, touching sexually by touching the genitals and body parts. While non-contact acts are when showing pornographic materials to children, encouraging children with words, cheating, forcing

or threatening children to engage in any sexual activities or prostitution, making exhibitions, encouraging children to expose their private parts, sending pornographic words, and recording videos as well as pictures. Pornography, on the other hand, is when a child's sexual behaviour is recorded.

Pursuant to the definition given by UNICEF, WHO and the Child Act 2001, several sexual offences against children have been identified and provided for a special act known as the Sexual Offences Against Children Act 2017. Sexual Offences Against Children Act 2017 has expanded the scope of sexual crimes against children by listing child pornography, sexual grooming and sexual assault as sexual offences against children that will convict perpetrators under this Act.

Although there are some existing legislations that provide for sexual offences against children such as rape (Section 375 and 376 of the Penal Code, incest (Section 376A and 376B of the Penal code), unnatural relationships (Section 377 of the Penal Code). However, the absence of laws and special provisions related to pornography, sexual grooming and sexual assault in the existing legislation has previously been identified as one of the causes of sexual crime against children. The lacuna under the law have resulted in the prosecution of cases failing to be carried out and often the perpetrators are not successfully brought to justice.

3.4 ANALYSIS OF SEXUAL OFFENSES AGAINST CHILDREN ACT 2017 (SOACA)

The enactment of special law aims to address the seriousness of sexual offences committed against children in Malaysia by emphasising early prevention measures while increasing the protection of children from sexual offenders as well as looking after the welfare of the children themselves (Salleh Buang, 8 September 2017).

Basically, the SOACA touches on four main issues, namely on sexual offences against children such as child pornography, child grooming and sexual intercourse (physical and non-physical), punishment of perpetrators and persons with trust relationships involved or abetting in such sexual offences, the testimony of child witnesses and the duty to report (Salleh Buang, 8 September 2017).

There are three types of sexual offences against children discussed in the Sexual Offences against Children Act 2017. Part II of this Act discusses offences relating to child pornography. While Part III of this Act discusses offences relating to child sexual grooming and sexual offences (physical and non-physical) discussed in Part IV.

The Sexual Offences Against Children Act 2017 (SOACA) in Malaysia was enacted to address the gravity of sexual offences committed against children by focusing on early prevention measures, enhancing protection from sexual offenders, and safeguarding the welfare of the children. The enactment of SOACA aligns with the United Nations Convention on the Rights of the Child (CRC) and its General Comments, particularly General Comment No. 13 on "The right of the child to freedom from all forms of violence." This General Comment emphasizes the need for comprehensive legislative, administrative, social, and educational measures to protect children from all forms of violence, including sexual abuse and exploitation. It calls for the establishment of child-friendly reporting mechanisms, the training of professionals working with children, and the implementation of preventive and protective interventions.

SOACA's legislative measures ensure that all aspects of child sexual exploitation are covered, from child pornography to grooming and various forms of sexual abuse. This aligns with CRC's General Comment No. 13, which stresses the

importance of enacting detailed and specific laws to address all forms of violence against children.

The SOACA mandates a duty to report suspected cases of child sexual abuse, aligning with General Comment No. 13's call for comprehensive administrative measures. This includes the establishment of reporting mechanisms and the obligation for professionals and the general public to report any suspected abuse. The act also emphasizes the protection and welfare of child victims, ensuring they receive necessary support and care.

SOACA's provisions for the testimony of child witnesses and the inclusion of child protection education align with the CRC's emphasis on educational measures to prevent and address child abuse. Educating children about their rights and how to protect themselves from sexual exploitation is a crucial aspect of preventing abuse. Additionally, training professionals who work with children to recognize and respond to signs of abuse is essential for effective implementation. By criminalizing grooming and establishing stringent penalties for offenders, SOACA incorporates preventive measures that align with the CRC's guidelines. The establishment of the Suspected Child Abuse and Neglect (SCAN) team in the Kuala Lumpur General Hospital exemplifies a proactive approach to identifying and addressing child abuse cases. This multidisciplinary team approach ensures comprehensive care and protection for child victims, addressing their medical, psychological, and legal needs.

General Comment No. 13 of the CRC underscores the importance of child protection systems that are child-centered and rights-based. SOACA embodies this approach by ensuring that children's rights to protection, participation, and provision are upheld. The act's emphasis on early prevention, stringent punishment for offenders,

and support for child victims is consistent with the CRC's requirement for states to take all appropriate measures to prevent violence and protect children's rights.

Furthermore, the CRC's General Comment No. 13 stresses the need for a holistic approach to child protection, integrating legal, administrative, social, and educational measures. SOACA's comprehensive framework, encompassing various forms of sexual offences, reporting mechanisms, and support systems, reflects this holistic approach, ensuring that all aspects of child protection are addressed effectively

In summary, the Sexual Offences Against Children Act 2017 represents a significant step towards ensuring that Malaysia's legal framework is robust enough to protect children from sexual offences. By aligning with the principles and guidelines set forth in the CRC and its General Comments, particularly General Comment No. 13, SOACA provides a comprehensive approach to preventing and addressing sexual exploitation of children. This alignment ensures that children in Malaysia are afforded the highest level of protection, reflecting the global commitment to safeguarding the rights and well-being of every child.

3.4.1 Child Pornography

Prior to the Sexual Offences Against Children (Amendment) Bill 2023, Section 4 of the SOACA has defined pornography as any depiction, whether in visual, audio or written form or a combination of visual, audio or written forms, or in any other way about a child who is engaging in an outright sexual behaviour or about a person who looks like a child who is engaging in an outright sexual behaviour, about a realistic image of a child performing an outright sexual behaviour, or about a realistic image of a person who looks like a child is engaging in an outright sexual behaviour.

Such blatant sexual acts include acts or simulations of sexual intercourse or acts that are encouraging including physical contact involving the genitals, mouth with genitals, anus with genitals, or mouth with anus between people of the same sex or different sex. In addition, animalistic, masturbation and showing genitals, buttocks, breasts, public parts or anus for sexual purposes are also categorised as sexual acts under section 4(b) of this Act.

This definition of pornography has been taken from the Budapest Convention (European Treaty Series- No. 185) which is an international convention on cybercrime. Article 9 of the Convention describes child pornography as:

- i. Producing child pornography for the purpose of its distribution through a computer system.
- ii. Offering or making available child pornography through a computer system.
- iii. Distributing or transmitting child pornography through a computer system.
- iv. Procuring child pornography through a computer system for oneself or for another person.
- v. Possessing child pornography in a computer system or on a computer-data storage medium.
- vi. The term "child pornography" shall include pornographic material that visually depicts:
 - vii. A minor engaged in sexually explicit conduct.
 - viii. A person appearing to be a minor engaged in sexually explicit conduct.
 - ix. Realistic images representing a minor engaged in sexually explicit conduct.

Part II of the SOACA also lists several pornography-related offences as set out in Table 3.2 below. In summary, Part II of the SOACA provides for the prohibition of

using children or exploiting children in the process of preparation or deed to perform, produce, or direct the manufacture or production of child pornography. It also includes collection, publication and sale or participating or participating or receiving profits from the proceeds from the sale of child pornography material including accessing or possessing such pornographic material. A person is said to have accessed child pornography if he viewed child pornography, or the material was sent to himself.

Section 293 of the Penal Code also provides for the offence of pornography when a person sells, rents, distributes, shows, or distributes obscene documents to a person less than twenty years of age. However, Section 9 of the SOACA provides for a harsher sentence for pornography offences than five years imprisonment or a fine under Section 293 of the Penal Code. However, in regards to the above, an amendment to the word's of "pornography" has been changed. This is to curb cases of sexual exploitation of children such as by a paedophilia predator. The table below depict the offences with changes to the terminology of "Child Pornography" to "Child Sexual Abuse Material" as laid out in the Sexual Offences Against Children (Amendment) Bill 2023.

In the case of **Mohamad Zulhusni bin Sohaimi v Public Prosecutor** [2024] MLJU 479, the recent amendment, introduced via A1687, has brought about a notable change in the terminology used within the legal framework governing child sexual abuse material in Malaysia. Section 4 of Act 792, prior to this amendment, defined "child pornography" extensively, encompassing various representations involving children engaged in sexually explicit conduct. However, with the enactment of the amendment, the term "child pornography" has been replaced with "child sexual abuse material." The amended section maintains the definition of "sexually explicit conduct," encompassing a wide range of activities, both actual and simulated, indicative of sexual

exploitation. Notably, the inclusion of "use of any object or instrument for lewd acts" underscores the broad scope of actions covered under this definition, reflecting evolving trends in digital exploitation.

Regarding the present charges under Section 5 of Act 792, the prosecution must establish specific elements to secure a conviction. Firstly, it must be demonstrated that the accused directed and produced material falling under the purview of "child sexual abuse material." This material must consist of visual representations depicting realistic or graphic images of a child engaged in sexually explicit conduct, as defined under the amended section. Moreover, the prosecution needs to establish that the sexually explicit conduct depicted in the material was simulated through the use of objects or instruments for lewd acts. This requirement aligns with the broader objective of the legal framework to combat all forms of exploitation and abuse perpetrated against children, including those facilitated through digital means. By replacing "child pornography" with "child sexual abuse material" and maintaining comprehensive definitions of sexually explicit conduct, including simulated acts involving objects or instruments, the amended legislation strengthens the legal framework's effectiveness in addressing evolving forms of exploitation and abuse in contemporary society.

Table 3.2 Child Sexual Abuse Material-Related Offences

Section	Offence	Punishment/ Sentence
5	Create, produce, direct the manufacture or production of Child Sexual Abuse Material.	Imprisonment not exceeding 30 years; and no less than 6 strokes.
6	To prepare for the making, producing, directing the manufacture or production of Child Sexual Abuse Material.	Imprisonment not exceeding 10 years; and strokes.
7	Using children in the manufacture, production, directing of the	Imprisonment not exceeding 20 years; and no less than 5 strokes.

	manufacture or production of Child Sexual Abuse Material.	
8	Exchange, publish, print, reproduce, advertise, import, and export, collect Child Sexual Abuse Material.	Imprisonment not exceeding 15 years; and no less than 3 strokes.
9	Selling Child Sexual Abuse Material to children.	Imprisonment not exceeding 15 years; and no less than 5 strokes.
10	Accessing Child Sexual Abuse Material.	Imprisonment not more than 5 years; or a fine not exceeding RM10,000; or both.

Source: Sexual Offences against Children Act 2017

3.4.2 Sexual Grooming

Child grooming means a process of making friends and approaching children and gaining their trust with the intention of sexually exploiting them.¹³ There are several stages of how the child's fertilisation is performed. Georgia M. Winter & Elizabeth L.¹⁴ explains the first process begins with the selection of victims who are usually children because children are most susceptible to influence. Further, isolate the child from the people around him so that the prey can fully depend on the predator. Then the predator will approach and gain the trust of the child. As a result of the belief, the predator will gradually make physical contact or touch the child's body in turn committing sexual acts against them.

Offences relating to child sexual grooming are discussed in Part III of the Sexual Offences against Children Act 2017. The definition of child sexual grooming provided for in this Act is to take the example of the provisions of sections 66EB (2), 66EB (2A)

¹³ Samantha Craven, Sarah Brown, and Elizabeth Gilchrist, "Sexual Grooming of Children: Review of Literature and Theoretical Considerations", *Journal of Sexual Aggression*, vol. 12, no. 3 (2006): 287–99.

¹⁴ Georgia M Winters and Elizabeth L Jeglic, "Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters", *Deviant Behavior*, vol. 38, no. 6 (2017): 724–33.

and (2B) of the Crimes Act 1900 and the Crimes Amendment (Sexual Offences) Act 2008 (New South Wales, Australia). Sections 12, 13 and 14 of SOACA describe the sexual grooming method of children, which begins with sexual communication by the criminal or encouraging the child to communicate sexually, followed by the process of sexual grooming of the child which begins with a meeting between the perpetrator of the crime and the child. A person is said to communicate sexually with a child if the communication or any part of the communication is in relation to activities of a sexual nature. However, an exemption is given if the communication is for the purpose of science and medical education.

Through this new special law, paedophile criminals can be prosecuted in court even if only through evidence of recordings of conversations or text messages. Section 13 of SOACA provides that the authorities may detain an individual who is on the way to meet a potential victim and sufficient evidence to suggest that he has committed the act of sexual grooming. In fact, sections 12(2) and 13(2) of this Act also assert that any proceedings under this section shall not need to be proved. Table 3.3 below describes the process and offences and punishments related to the grooming of children as provided in Part III of the SOACA:

With reference to Section 17 of the Act which read that “[N]otwithstanding anything contrary in any other written law, in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, a child is presumed to be competent to give evidence unless the court thinks otherwise.

With reading the above-mentioned section it suggests that any victim of sexual offences who is a child under the provision of the SOACA shall be presumed as a competent witness to give evidence before the Court. In crux, it is not a requirement to

call a child victim as a witness under the said Act as a preliminary requirement as a precondition of competency to determine the intellectual capacity test for a child witness.

This is a historical development on the evidence of competency of a child as according to Section 118 of the Evidence Act as the prerequisite for the competency of a child witness, satisfaction of the intellectual capacity should be established. Referring to the case of *Sidek Bin Ludan v Public Prosecutor* in which the Court held that a condition precedent to determine the competency of a witness (including child witness) shall be based on the establishment of the intellectual capacity of the said witness. Section 118 of the Evidence Act shall be no longer applicable upon the new enactment of Section 17 of the SOACA for cases involving sexual crime against children as a child victim shall be deemed as a credible witness to be called as a full capacity witness under the law.

Table 3.3 Sexual Grooming-Related Offences

Conduct	Section	Offence	Punishment
Communication	11	sexual communication or encouraging a child to communicate sexually	imprisonment not exceeding 3 years
Grooming	12, Illustration (a) & (b)	The process of making friends and approaching children as well as gaining their trust with the intention of sexually exploiting them.	imprisonment not exceeding 5 years; Whipping
Meeting	13, Illustration (a) & (b)	Travel to meet the child or meet the child with the intention of committing sexual offences	Imprisonment not exceeding 10 years; Whipping

Source: Sexual Offences against Children Act 2017

The provisions of these offences are intended to protect children and prevent them from becoming victims of sexual abuse. Such sexual abuse does not necessarily have to actually happen to child victims. The state of Singapore has enacted its criminal act by placing the offence of grooming a child under the age of 16 into section 376E of the Penal Code (Amendment) Act 2007. This amendment has taken aspiration from section 15 of the United Kingdom Sexual Offences Act 2003 where a criminal perpetrator can be pre-emptively prosecuted before they meet face-to-face with a victim at least twice met either face-to-face or online.

3.4.3 Sexual Assault

The third offence discussed in part IV of the SOACA is sexual assaults. These offences are divided into the categories of physical sexual assault and non-physical sexual assault. A person who touches any part of a child's body, makes a child touch any part of the body of that person or another person, makes a child touch any part of his own body, or commits any other activities involving physical contact with a child without intercourse is said to have committed a physical sexual offence.

Whereas a non-physical sexual offence is when an individual for sexual purposes, utters any word or makes any sound or gesture or indicates any object or his body or any part of his body with the intention that the word or sound shall be heard and seen by a child, make the child show his body or any part of his body so that he can be seen by that person or another person, to follow, observe or contact a child in any way repeatedly or regularly, threatening to use any depiction whether in visual, audio, written or a combination of visuals, audio and writing, or any other means regarding any part of a child's body or the sexual activity of a child.

In addition, an individual is also considered to have committed a non-physical sexual offence when engaging in sexual activity in front of a child, causing a child to observe another person engaging in an activity of a sexual nature, causing a child to observe or listen to any depiction whether in visual, audio or written form or a combination of visual, audio or written forms, or in any other way about another person engaging in an activity of a sexual nature, or making a child engage in activities of a sexual nature.

Table 3.4 below explains the offences and punishments relating to physical and non-physical sexual assault on children as provided in Part IV of the SOACA. Provisions relating to sexual assault in Part IV of the SOACA are intended to prevent a child from any form of sexual assault or harassment. These offences in Part IV may apply to anyone including parents, television stations, editors, or magazine printing companies. Accordingly, all parties should take steps that are appropriate to ensure that any actual sexual conduct or visual, audio, or written images are not shown to children.

Table 3.4 Offences with regards to Physical Sexual Assaults and Non-Physical Sexual Assaults

Section	Offence	Punishment
14, Illustration 1 & 2	Physical Sexual Assault: Touching any part of the child's body. Make the child touch any part of the body of that person or another person. Make the child touch any part of his own body. Perform any other act involving physical contact with a child without intercourse.	Imprisonment not exceeding 20 years; Whipping
15, Illustration 1 & 2	Non-Physical Sexual Assault: Indicates any object or body or any part of its body with the intention that such word or sound shall be heard and seen	Imprisonment not exceeding 10 years; A fine not exceeding RM20,000; or both

	by a child. Make the child indicate his body. Follow, observe or contact a child in any way repeatedly or regularly (snooping or spying). Threaten to use any depiction of the child's body parts or the sexual activity of a child. Engage in activities of a sexual nature in the presence of a child. The child observes that another person is engaging in an activity of a sexual nature. Makes a child engage in an activity of a sexual nature.	
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Source: Sexual Offences against Children Act 2017

3.4.4 Punishment

The maximum penalty for sexual offences against children provided for in the SOACA is imprisonment of up to 30 years, a fine of RM20,000 and a minimum of six strokes. Most of the punishments for offences in this Act are of "conjunctive in nature" rather than optional. This means that all punishments enshrined in such provisions should be carried out without fail. For example, for the offence of making, producing, directing the manufacture or production of child pornography, the offender is required to serve a prison sentence not exceeding 30 years and whipping not less than six times.

Section 25 of the SOACA provides that the Court may impose the punishment of whipping on the perpetrator of a crime of men aged fifty years and above although section 289(c) of the Code of Criminal Procedure provides that offenders aged 50 years and above shall not be subject to whipping except for offences under section 76, 377C, 377CA and 377E of the Penal Code. The provisions of section 25 are in line with the

Penal Code (Amendment) 2017 which provides for whipping as a mandatory punishment for perpetrators of sexual offences.

Basically, imprisonment for a long period of between 20 to 30 years is a way to manage criminals for sexual offences against children in most countries and that period is sufficient. But in Indonesia, sexual offenders are subject to chemical imprisonment and the death penalty for child rape in addition to the use of electronic tracking devices to enable the authorities to always control the offenders' activities after their release from prison. Offenders will also be treated with the use of certain drugs capable of lowering their testosterone levels and sexual habits. Similar punishments have also been proposed to be implemented in India to address the seriousness of sexual crimes against women and children.¹⁵

Apart from severe punishment, the SOACA also emphasises the rehabilitation aspect of the offender. Section 26 provides for rehabilitation counselling to be given to offenders as an additional punishment while serving a sentence in prison. England and Wales have introduced offender rehabilitation programmes in a bid to reduce the risk of a repeat of crime among sexual offenders.¹⁶ Once the offender is released from prison, section 27(1) of the SOACA provides that the court shall direct that the offender be placed under police supervision for between one and three years.

Apart from punishments involving criminal offenders, the offenders with trust relationships such as parents, guardians or relatives of a parent or a pet, foster family, nanny, teacher, lecturer, kindergarten warden, school, public institution of higher

¹⁵ Aisha K Gill and Karen Harrison, "Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches", *International Journal of Criminal Justice Sciences*, vol. 8, no. 2 (2013): 166.

¹⁶ Gunda Wößner, "Women and Children as Victims of Sex Offenses: Crime Prevention by Treating the Offenders?" in *Women and Children as Victims and Offenders: Background, Prevention, Reintegration*, edited by H. Kury, S. Redo, and E. Shea (Cham: Springer, 2016), 525-56.

learning or private higher education institution or any person providing the healthcare services involved or abetting such sexual offences will be given an additional sentence of imprisonment not exceeding five years and a minimum of two whipping. This provision warns that a person given the responsibility to protect children must be entrusted with such responsibility. Considering the findings of studies that say that more than 90% of children are victims of sexual abuse by people they know, this provision is in line with the legal effort to address the scenario of sexual offences against children.

3.5 PROCEDURES AND GUIDELINE ON CSA IN MALAYSIA

These Special Guidelines for Handling Sexual Offense Cases Involving Children in Malaysia have been developed by the Office of the Chief Registrar of the Federal Court of Malaysia in 2017. The Chief Registrar's office has taken the initiative to provide specific guidelines to ensure that the rights and well-being of child victims/witnesses are safeguarded throughout the legal process. These guidelines are the result of careful consideration and a commitment to create a child-friendly and just environment within the Court of Sexual Crimes Against Children. These guidelines aim to ensure that every report and investigation of CSA is conducted with utmost care, sensitivity, and effectiveness. For the purpose of these guidelines, "children" refers to individuals under the age of 18. In the Special Guidelines, the following are the guidelines.

In the Special Guidelines for Handling Sexual Offense Cases Involving Children in Malaysia, the guidelines emphasise the need to create a child-friendly atmosphere during the trial proceedings. This includes taking measures to ensure the comfort and well-being of child victims/witnesses throughout the legal process. Next, it is mandated that all trial proceedings involving child victims/witnesses in cases of sexual offences against children must be conducted in camera. This means that the proceedings are held

in private to protect the privacy and dignity of the child. Further, the guidelines stress the importance of maintaining the confidentiality of the identities of child victims and any accused person (OKT) who may have a family relationship with the child. Protecting the identities of all parties involved is crucial to their safety and well-being.

Moreover, recognizing that the court environment can be intimidating for child witnesses, the guidelines emphasise the need for a child-oriented approach throughout the proceedings. This involves creating a supportive and conducive atmosphere that encourages child victims/witnesses to communicate effectively and feel empowered to provide their testimony. The guidelines highlight the significance of effective cooperation among all relevant parties involved in these cases. By working together, including prosecutors, investigators, social workers, and support services, a positive and conducive atmosphere can be created, contributing to the overall effectiveness of the legal process. By adhering to these comprehensive guidelines and fostering cooperation among all relevant stakeholders, Malaysia aims to ensure that sexual offence cases involving children are handled with the utmost sensitivity, compassion, and respect for their rights. These guidelines seek to protect the well-being of child victims/witnesses while working towards the effective administration of justice.

The limited information about work processes and procedures within agencies has been identified as a significant constraint in delivering comprehensive, efficient, and effective services to child victims of sexual offences. To address this issue, the Special Guidelines for Handling Sexual Offense Cases against Children in Malaysia were developed through collaboration among stakeholders such as the Office of the Chief Registrar of the Federal Court, Attorney General's Department, Royal Malaysian Police, Malaysian Bar Council, and relevant Ministries/Departments. These guidelines

serve as a landmark initiative by the government to enforce the Sexual Offences Act against Children 2017 (Act 792).

The technical agencies involved in the development of the guideline include: Office of the Chief Registrar of the Federal Court (PKPMP), Attorney General's Department (AGC), Ministry of Women, Family and Community Development (KPWKM), Ministry of Health Malaysia (KKM), Legal Aid Department (JBG), Royal Malaysian Police (PDRM), academics, Malaysian Bar Council, and Non-Governmental Organisations (NGOs) have collaborated.

3.6 STRENGTH AND WEAKNESS ANALYSIS OF SEXUAL OFFENCES AGAINST CHILDREN ACT 2017

The enactment of the SOACA has in some say rectified the lacuna of the law of sexual crime against Children. The SOACA has widened the scope of sexual crime against children besides emphasizing the preventive aspect of sexual abuse against children. Beyond the above analysis, this section examines the Strengths and weaknesses of SOACA.

3.6.1 Strengths

Like any legislation, the SOACA is subject to criticisms as to its weaknesses as well as strengths and the fact that Act 792 can be considered still in its infancy since it is coming into force on 10 July 2017, the critical analysis it receives is to be expected and necessary for the Act 792 to be a matured and full-fledged legislation.

Special Legislation for Sexual Offences Against Children

Prior to the enactment of the SOACA, the criminal law landscape in Malaysia did not have specific legislation that deals specifically with sexual offences committed against children. Pre-SOACA, the children were protected from sexual offences mainly by provisions in Penal Code, Child Act, and Domestic Violence Act, nonetheless, the provisions in the respective acts have their own unique applications. Under the Penal Code, the most notorious sexual offence against children is rape is governed under section 375(g)¹⁷ where the act of rape is committed against a child victim that is under sixteen years of age or commonly known as ‘statutory rape’ that attracts increased punishment under section 376(2)(d) and (e)¹⁸. Apart from the provision on child rape, the Penal Code provides also affords protection to children via section 377D, the offence of outrage of decency that covers sexual assault and section 377E (Inciting a child to an act of gross indecency). In other instances, section 377D is a general provision that deals with the offence of outrages of decency with any person regardless of the age of the victim and no enhanced punishment is provided under this section should the victim is a child victim. Section 377E makes it an offence if a person is inciting a child to any act of gross indecency however no enhanced punishment is afforded to the section as well and the section lacks an illustration and definitive statement of what kind of acts of gross indecency is meant in that section and this results in burdening the court to interpret further. Another infamous offence that is worth mentioning is Child Sexual Abuse Material is not clearly stipulated under the Penal Code as section 292 is generic in its application as no special treatment is given to children and its scope also is limited.

¹⁷ SOACA 2017, s 375(g).

¹⁸ SOACA 2017, s 376(2)(d) and (e).

After the SOACA came into force, it came with a separate regime that treats sexual offences committed against children with different mechanisms. As previously discussed, the SOACA introduces new lines of sexual offences aiming for the protection of children namely offences pertaining to Child Sexual Abuse Material, grooming, and sexual assault.

In ***Mohd Rasul bin Mat Lasi v Public Prosecutor [2021] MLJU 2230*** has states that :

The preamble of Act 792 provides that it is legislated specifically to deal with certain sexual offences against children and is in addition to other sexual offences against children and their punishment in other written laws, and in relation to it is to provide for the administration of justice for children and connected matters. It has been recently decided by the Federal Court that the underlying purpose of an Act which is self evident in its long title and preamble ought to be taken into account when interpreting and construing any written law.[6] Act 792 applies to a child who is under the age of eighteen years and where this Act relates to any other written law, to a child of such age as specified in such written law.

Hence, the preamble of Act 792 serves as a guiding principle and it extends its jurisdiction to child under the age of eighteen, ensuring comprehensive protection for children. It also clarifies that where Act 792 intersects with other legislation, the age threshold specified in those laws applies.

Offences Relating to Child Sexual Abuse Material

The SOACA has one specific section that penalises each act that made up the system of Child Sexual Abuse Material. Part II of the SOACA has a total of seven sections and each section covers each aspect of Child Sexual Abuse Material. Among the strengths of this Part II is that it is extensive in nature, and it was enacted that way to ensure that any method of commission of the offences can be caught within the definition provided in Part II and to prevent any technical leakage that may be utilised by the offender. By

framing all the offences under Part II this way, it also may ease the burden of the court in interpreting the offences therein. In enhancing Part II, the framer of the SOACA used the terms for instance ‘any representation’ in the definition section 4 of Child Sexual Abuse Material that functions as an extensive mechanism and this selection of terms was brilliantly decided in making the SOACA, especially Part II relevant and adaptive to the ever-changing mode of the offence.¹⁹ The Part II of the SOACA can be clearly seen as a sturdy legal tool that criminalises any act that relates to child pornography including mere access and the SOACA complements the inadequacy of the Penal Code, Domestic Violence Act 1994²⁰ and Child Act 2001.²¹

In **Ow Man Yaw & Ors v Kementerian Dalam Negeri & Anor** [2023] MLJU 2298 states that:

[6] Last but not least, the most recent law enacted to further enhanced the protection of children can be seen in the year 2017 when Act 792 was introduced.

PART II - OFFENCES RELATING TO CHILD SEXUAL ABUSE MATERIAL

Section 7. Using a child in making, producing, directing the making or production of, etc., child sexual abuse material

Any person who uses or causes to be used a child in the preparation to make or produce, or in the preparation to direct the making or production of, or in the making or production of, or in the directing of the making or production of, any child sexual abuse material commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding twenty years and shall also be punished with whipping of not less than five strokes.

Explanation—This section does not apply where the preparation to make or produce or the preparation to direct the making or production of child sexual abuse material or where the making or production or the directing of the making or production of child sexual abuse material uses or causes to be used a person appearing to be a child.

¹⁹ Abu Bakar Munir et al., “The Sexual Offences against Children Act 2017: Flaws in the Law”, *Malayan Law Journal*, vol. 5, (2018): 120–55.

²⁰ Domestic Violence Act 1994 (Act 521).

²¹ Child Act 2001 (Act 611).

In *Ow Man Yaw & Ors v Kementerian Dalam Negeri & Anor* [2023] MLJU

2298, it is highlighted that Act 792, introduced in 2017, plays a crucial role in enhancing the protection of children, particularly through its provisions concerning offences relating to child sexual abuse material. Section 7 of the Act specifically addresses the use of a child in the production or direction of child sexual abuse material. It stipulates that any individual who involves a child in such activities commits an offence and upon conviction, may face imprisonment for up to twenty years along with corporal punishment in the form of whipping, consisting of no fewer than five strokes.

Offences Relating to Sexual Grooming of a Child

Surely Penal Code also provides an avenue for the prosecution to charge a person for the offence of child grooming using section 377E, however, section 377E is not framed as thoroughly as sections 11, 12, and 13 contained in Part III of the SOACA. All these three sections of Part III cover all bases for the offence of child grooming. Section 11 deals with any offences of sexual communication with a child and the word structure used in the section name is particularly comprehensive. Section 11 covers any communication sexual in nature made via any mode and this choice of word is reflecting the Parliament's intention to prevent any offender to escape prosecution on the ground of technicality. By virtue, if this section 11, any communication directed to a child that contains a sexual element may fall under this section, nonetheless there is a defence afforded to the accused under this section that is if the said sexual communication is made for the purpose of education, scientific and medical.²² The introduction of section 11 is very much needed as it functions as a preventive tool in order to stop any sexual

²² SOACA 2017 (Act 792), s 11(3).

offences in its infancy and prevent it from progressing any further.²³ The encompassing nature of section 11 is the quality needed now more than ever in helping the relevant authorities to charge the offender as the mode and manner of sexual communication employed by an offender is very dynamic given the technological advances as well as the variety of approach that depends on the knowledge and skill that varies between the offenders. In tackling the dynamic nature of child grooming-related offences, the flexible nature for instance section 11 is very much welcomed.

In addition to section 11, section 12 also deals with communication that is conditional upon the intention of a person to commit or to facilitate the commission of any offence under sections 5, 6, 7, 8, 14 or 15 of the SOACA any offence as well stipulated in the Schedule of the SOACA. Section 12 also has a special nature attached to it provided under section 12(2). The commission of an offence under section 12 is not conditional upon whether or not any offence specified therein has been proven. In other words, the offence of communication for the purpose of grooming a child is deemed committed irrespective of whether the offence listed under section 12 has been committed or not. Like section 11, this feature is plausibly inserted in order to make section 12 operate as a legal mechanism to stop any person from committing the offence of child grooming and challenge the prosecution by using a defence by stating that no stipulated sexual offences have been committed. Besides, by having these provisions in sections 11 and 12, the sexual offences against children may be pre-emptively curbed at their preliminary stage rather than punishing the offender after the offence has been committed the reason that there is no legal tool to punish a person even though the actual offence has not been committed yet.

²³ Munir et al., "The Sexual Offences,".

While section 11 deals with sexual communication per se and section 12 deal with communication with the intention to commit or facilitate any offences specified thereunder, section 13 criminalises the act of meeting by a person with the targeted child with the intention to commit or facilitate the commission of any offence under section 5, 6, 7, 8, 14 or 15 of Act 792. By examining the wording used in section 13, ‘travels to meet’ may be construed as a physical meeting between the offender and the child victim. Section 13(2) also disposes of the requirement of specifying which offence the meeting is being intended for or a particular offence stated under section 13(1) has been proven of its commission. Meaning that section 13 carries the same effect as section 12, and it can be used against any offender if the offender furthers his intention to commit or facilitates the commission of the stipulated offences following the communication with a child by having an actual physical meeting with the child and the said meeting if occurred become a sufficient ground for the prosecution to charge the offender under section 13.

Sexual Assault Against Children

Part IV of the SOACA provides two offences relating to sexual assault offences against a child namely section 14 covers physical sexual assault and section 15 deals with non-physical sexual assault against a child. The inclusion of offences under Part IV is a commendable decision as these two sections cover sexual assault offences that have been committed specifically against children. Historically, the provisions that deal with sexual assault offences against children may also be found in section 31 of the Child Act (“CA”) ²⁴ and in the Domestic Violence Act (“DVA”) ²⁵. It is noteworthy to briefly

²⁴ Child Act 2001 (Act 611).

²⁵ Domestic Violence Act 1994 (Act 521).

compare the provisions relating to sexual assault against a child between all three legislations. Section 31 (1) (b) CA makes it an offence for any person who's having the care of a child to sexually abuse a child or causes or allows the child under his care to be sexually abused. Section 31 (1) (b) clearly specifies the sexual offence against a child that is under the care of an adult meaning that for this section to be effective the prosecution must prove that the child victim is under the care of the offender at the time of the commission of the offence thereunder and the offender must be the one who has the care of the child victim and thus making this section to be quite limited in its application. Under the DVA, a child is defined as a person who is below the age of eighteen years living as a member of the offender's family or the family of the offender's spouse or former spouse. Under the DVA, the provision on sexual offences is covered within the definition of domestic violence itself, however, the application of the offence of sexual assault under the DVA is limited to the situation where a child falls under any category as specified in the definition of child in section 2. Hence, section 14 and 15 of Act 792 serves as an alternative legal enforcement tool should the situation wherein the sexual assault has been committed is not covered by both section 31 CA and the DVA.

The way section 15 is formulated is aligned with the current situation regarding sexual assault as it broadens the scope of sexual assault that is not only committed if there is direct contact of an offender against a child, but it goes beyond that as it also covers the event if the sexual assault is committed without any physical contact. There are eight conducts of non-physical in total that have been technically crafted under section 15 in an effort to cover any methodology of sexual assault that may be committed by a person.

Person in a Relationship of Trust

Another strong point for Act 792 is the inclusion of the enhancement provision which is section 16. Act 792 extends the power of prosecution to consider the relationship between the offender and the child victim. If the offence under the SOACA is committed in a setting where the offender and the child victim are in any relationship of trust as stipulated under section 16(2), the court is empowered to pass additional punishment on top of the offence the offender is convicted upon. The situation of the relationship of trust under section 16(2) is clearly worded compared to the ones under the Child Act.

Corroboration Rule and the Capacity of a Child as a Witness

Section 17 of the SOACA provides that a child is presumed to be a competent witness for any offence under the SOACA or any offence listed in the Schedule to the SOACA. This section is strengthening the position of a child witness, but it is not for every child, the application of this section is especially for a child who is a victim of the offences stipulated under the SOACA. In order for this presumption to be applicable, the court however must be satisfied that the child witness's competency during the trial. Prior to the enactment of the SOACA, the evidential regime mainly relied upon Evidence Act ("EA") especially section 118 and section 133A in the event of a child witness. Then in addition to the EA, there is another act that deals with child witnesses which is the Evidence of Child Witness Act ("EOCWA"). Unlike the EA, the EOCWA does not deal with substantive evidentiary law however it governs the procedural aspects of laws with regards to the evidence of child witnesses for instance to facilitate the process for a child to give evidence and adjusting the setting of the court to make it child-friendly and less

pressure.²⁶ In the case of **Razali bin Silah v Public Prosecutor** [2019] 12 MLJ 205, although there is section 118 of the EA, section 17 of the SOACA may be interpreted in the way that it functions separately from section 118 of the EA.²⁷ For the accused to rebut the presumption in section 17 of the SOACA, the accused must convince the court that the child witness is not credible in her testimony and that may be done by pointing out to the court that the evidence given by the child is materially inconsistent after being put under rigorous questions during cross-examination. However, if the court is satisfied that the child witness is consistent in her evidence, the court may find that the child witness is credible, and the presumption of competency remains intact.²⁸

The Evidence Act 1950 (Act 56) and the Evidence of Child Witness Act 2007 (Act 676) are the two main statutes being referred to for corroboration of child witness. However, Act 56 remains as the main statute on the evidence law while Act 676 deals specifically in details in regard to the testimony of child witness.²⁹ Referring to the Section 133A of Act 56, it outlined about the evidence adduced by a child in tender years which basically describe about the type of evidence, conditions of acceptance and effect of evidence by children:

133A. Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance

²⁶ Asmida Ahmad, Mohd Nasran Mohamad, and Mohd Al Adib Samuri, "Syariah and Civil Legislation in Malaysia on Child Testimony in Sexual Offences", *Asian Journal of Law and Governance*, vol. 3, no. 1 (2021): 65–75; Aminuddin Mustaffa and Salleh Kamaliah, "Evidence by Child in Criminal Proceedings in Malaysian Courts: A Study on Post Ratification of Convention of Rights of Child", *Malaysian Current Law Journal*, vol. 6, (2010): 1–27.

²⁷ *Razali bin Silah v Public Prosecutor* [2019] 12 MLJ 205.

²⁸ *Ibid.*

²⁹ Ahmad, Mohamad, and Samuri, "Syariah and Civil,".

with section 269 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that section...”

While Act 676 (Child, 2017) is a special statute with notable provisions for child witnesses with the objective of enhancing and recognising the child's right to testify in court.

In *Tajudin Bin Salleh v PP*,³⁰ it was held that Section 133A of Evidence Act 1950 must be read together with Section 118 of the Evidence Act 1950, that has established the general competency of witnesses to satisfy the test of understanding the questions put to them. In practice, Section 133A of Evidence Act 1950 is to act as to qualify to Section 118 of Evidence Act 1950, both sections affect a child of tender years in which the child shall not be prevented from comprehending the questions asked and the child could give sensible answers to questions asked. Thus, the court shall put simple questions to the child to test if the child can understand the nature of speaking the truth. This can be indicated whereby if the child answers the questions satisfactorily, the judge will certify that the child is competent to give evidence.

There are two things to consider in relation to child testimony. The first one concerning sworn testimony. Corroboration of a child's evidence is not mandatory when a child gives sworn evidence in court. However, while evaluating the sworn testimony, the court should issue a corroboration warning. In section 6 of the Oath and Affirmation Act of 1949, requires witnesses to provide testimony under oath. It is further provided that any immature person who ought not to be affirmed or taken under oath may provide testimony under Section 8 of the Act after being cautioned by the court to speak the truth, the whole truth, and nothing but the truth.³¹ The legislation was

³⁰ [2008] 1 MLJ 397.

³¹ Oath and Affirmation Act 1949, ss. 6 and 8.

put into practise in the case of **Public Prosecutor v Gurdial Singh a/l Pretum Singh**³², where the court determined that an accused might still be found guilty of the crime even if certain relevant evidence did not corroborate a child's sworn testimony. In **PP v Thomas Hee Kein Vun**³³, the court upheld the session court's judgement where the court determined that the victim, who was 14 years old at the time she testified, was competent to provide testimony under oath. The court has disregarded the medical evidence provided as corroboration and has relied on the sworn evidence of the child. It can be seen that Section 133A of Evidence Act 1950 is not applicable and the testimony given by the child did not mandate corroborative evidence.

In response to unsworn testimony by child, the Sexual Offences Against Children Act that was established in 2017 had enacted Section 18 of the Act where it solidifies the status quo with regard to a court's power to convict the accused based on the uncorroborated testimony of the child victim. However, the proviso is silent and did not address anything regarding the requirement of a corroboration warning.³⁴ When the judge renders a verdict based solely on unsubstantiated evidence, it is thus likely that the common law prudence requiring such warning should be applied.³⁵

It should be highlighted that the passage of this Act establishes a dual rule for child witnesses. A child witness who is a victim is exempt from corroboration requirements under this Act, but a child witness who is not a victim is still subjected for corroboration under Evidence Act. Since the child is not a victim, it is unfair to use a double standard in which his competence is instantly questioned. The legal maxim "*Generalia specialibus non-derogant*" shall apply in cases where general law does not

³² [2012] 2 AMR 327.

³³ [2019] MLJU 1415.

³⁴ Robyn Blewer, "Testing the Law and Testing a Child's Evidence: Nineteenth-Century Corroboration Reforms and Child Witness Testimony", *Australian Historical Studies*, vol. 51, no. 3 (2020): 266–81.

³⁵ SOACA, s 18.

depart from a specialised law because the two principles disagree. Section 133A of the Evidence Act of 1950 would be superseded by Section 18 of the Sexual Offences against Children Act of 2017. However, the word "may" as mentioned in Section 18 of Sexual Offences against Children Act 2017 give discretion to the court to convict on uncorroborated evidence.

Based on these two sections which are the Sexual Offences Against Children Act 2017 and the Evidence Act 1950 reveals that Malaysia's position on child witnesses is that both sworn and unsworn evidence are admissible in court upon establishing competency. However, the former does not require proof to implicate an accused, whereas the latter does. The corroboration provision in Section 133A of the Evidence Act of 1950 should be repealed as it applies to children of unsworn witnesses, and Section 18 of the Sexual Offences against Children Act of 2017 has to be amended to ensure that all child witnesses are exempt from corroboration.³⁶

It is argued that the insertion of section 18 contributes to the efficacy of the SOACA as a legal mechanism to reduce the sexual offences against children that are on the rise and at the same time prevent the offender to weaken the prosecution's case on the ground of no eye witness that saw a particular commission of an offence under the SOACA that usually occurred in the absence of anyone else except the offender and the child victim.³⁷ This section may stir some controversy at one point but technically it can be considered uplifting the evidential weight of a child witness. Section 18 provides that a court may convict a person that is accused under the SOACA of any offences stated in the Schedule to the SOACA based on the evidence given by a child victim

³⁶ Mohamad Ismail Bin Mohamad Yunus et al., "The Laws Protecting Child Witnesses in Giving Evidence: Harmonization Between Malaysian Laws And As-Sharia", *Indonesia Private Law Review*, vol. 2, no. 2 (2021): 143.

³⁷ Siva Subramaniam and Pachappan, "Corroboration Rules,".

even if the evidence is not corroborated further. Prior to the existence of section 18 of the SOACA, the evidential regime applied to evidence of a child was under sections 118 and 133A of the EA. Section 133A makes it acceptable for unsworn evidence given by a child of tender years who possesses an acceptable amount of intelligence subject to corroboration. As a new provision that also governs the evidence of a child witness and dispose the need to corroborate the evidence of a child witness, Section 18 of the SOACA had been challenged on many grounds in the High Court's case of **Chan Kok Poh v Public Prosecutor** as the accused defence counsel put forward many arguments in support of their challenge and the relevant challenges to be mentioned here that whether section 18 is ultra vires to Article 5 and 8 of the Federal Constitution ("FC") and contradict to the evidence regime under section 133A of the EA.³⁸ In answering the argument put forward by defence counsel, the Judicial Commissioner ("JC") delivered an illustrious and insightful judgement and concluded that section 18 of the SOACA is constitutional on the reason that it has not contravene any rights that have been clearly enshrined in the FC and based on the legal maxim of *generalia specialibus non derogant*, the JC further held that since section 18 is a specific provision, it overruled a general provision.³⁹ The SOACA is specific legislation that governs the rule of evidence only in the cases where the witness was a victim of the sexual offence whereby section 133A of the EA is applicable in a situation where the child is a victim or offender or a witness. The enactment of section 18 of the SOACA also serves as a mechanism to remedy the rules of corroboration of section 133A that seem to be discriminatory and undermine the capacity of evidence given by a child where there is voluminous scientific evidence that supports the capacity of a child to give clear, pure

³⁸ [2022] 9 MLJ 755.

³⁹ Ibid.

and untainted evidence.⁴⁰ As the decision of the learned JC in the aforementioned case law has not been appealed, the decision may be regarded as a valid point of argument in appreciating the evidential effect attached to section 18.

Obligation to Report

Section 19 of the SOACA, imposes an obligation upon any person who has the information with regards to the commission of or intention of any person to commit any offence under the SOACA, to provide the information to the officer in charge at the nearest police station. By having this provision, the duty to curb sexual offences against children is shared among each member of Malaysian society and to educate people on the importance of mutual vigilance by working hand-in-hand with the relevant authorities.⁴¹

3.6.2 Weaknesses

No Clear Terminology

The legislation lacks interpretation provision despite the use of several technical words within the provision. Legislative drafting involves the use of section 2 which is traditionally the interpretation section. The Act is very heavy on the use of terminologies which are used in other laws or new to the law in Malaysia. In order to ensure certainty, it is important for the legislation to provide section 2 or a definition section. Alternatively, the statute may adopt other definitions in similar statutes such as Penal Code or Criminal Procedural Code.

⁴⁰ Abu Bakar Munir, “Child Evidence in the Sexual Offences Against Children Act 2017: So Close , Yet So Far”, *Malayan Law Journal*, vol. 6, (2018): 0–35.

⁴¹ Munir et al., “The Sexual Offences,”.

There is also a conflicting view on the terminology of a child. According to **The Status Report on Child Rights Malaysia (2019)**⁴² which was done by The Child Rights Coalition Malaysia it is reported that any individual under the age of eighteen is considered a child according to the Child Act of 2001. Though Malaysia has removed its objections to Article 1 of the CRC, there are still contradictions in national law regarding what constitutes a child, and the Child Act's definition of a child does not supersede other laws.

This can be seen in **The Immigration Act 1959/63**, which treats children the same as adults, is one worrying example of this. Although the 2017 modification to the Child Act removed the ability for the Children's Court to impose whipping as a punishment, individuals under the age of eighteen can still be arrested, detained, deported, and receive whipping and imprisonment sentences like those of adults. A child is defined as an individual under the age of twelve in the Immigration Department of Malaysia's standard operating procedures (SOPs) (Immigration (Administration and Management of Immigration Depots) Regulations 2003, Regulation 11). These discrepancies lead to any child who is the Immigration Act's jurisdiction and treated as an adult above the age of 12, as well as in the possibly inaccurate data collection on the number of minors in immigration detention facilities.

Different definitions of a child exist in other laws as well. For example, the **Children and Young Persons (Employment) Act 1966** defines a child as anyone who has not reached the age of fifteen. This could result in inconsistent application of the Child Act and possibly in the violation of a child's rights depending on specific circumstances.

⁴² Child Rights Coalition Malaysia, *Status Report on Child Rights in Malaysia 2019* (Petaling Jaya: Child Rights Coalition Malaysia, 2020), 14, <https://wao.org.my/wp-content/uploads/2020/11/CRCM-STATUS-REPORT-2019-FINAL.pdf>.

Without this statutory direction, prosecution and defence will have challenges in defining words such as pornography, sexual grooming, incest, sexual extortion etc. Affecting the lack of definition is the difficulty in identifying the elements of the offences created under the Act. Although extrinsic interpretations be used, this could lead to uncertainty and lacuna in the operationalisation of this special Act.

No Clear provision on an Inconsistency (Burden to the Court to Interpret)

The passing of the SOACA has some effect and intersection with other legislations such as Child Act 2001, Penal Code Act 574, Anti trafficking in persons and Anti-Smuggling of Migrants Act 2007 Communication and Multimedia Act 1998 Film Censorship Act 2002 among others. Despite this intersection, there is no clear provision on how to resolve conflicts and inconsistencies between the legislation and SOACA. This is a major weakness that is capable of reversing the intention of the parliament. As a general rule, special legislation usually prevails over general legislation. But this needs to be enshrined in the Act to further guide the stakeholders, prosecution, defence and the court.

Other than that, according to **The Analysis of Child Sexual Grooming Offences in Malaysia (2023) 7 CRELDA Journal**⁴³ Section 377D and 377E of the penal code has several gaps in addressing child sexual grooming where the same protections that apply to victims under 14 do not apply to CSA victims between the ages of 14 and 18. This is due to Section 377E, which stipulates that an offender may face whipping and a sentence of not less than three years nor more than fifteen years if they commit an act of gross indecency against a victim who is younger than fourteen. Section

⁴³ Izmi Izdiharuddin Che Jamaludin Mahmud et al., “The Analysis of Child Sexual Grooming Offences in Malaysia”, *CRELDA Journal*, (2023): 85-98.

377D of the Penal Code, on the other hand, imposes a less severe punishment—a sentence of imprisonment not to exceed two years—for children between the ages of 14 and 17.

This lack of clear provision can be seen where the prosecution must prove, in accordance with Section 377E, that the offender encourages a minor to act egregiously indecently towards them or another person. As a result, unless the offender's actions later influence the child and cause the child to commit gross indecency, the offender who engages in sexual communication with the CSA victim will not be held criminally responsible right away. Under Section 377D of the Penal Code, an offender may still be held accountable for the crime even in the absence of proof from the prosecution that the offender encouraged a child to commit a grossly indecent act. But as was previously said, Section 377D's penalty is not as harsh as Section 377E's.

Open to Misuse of the Special Privilege

The Act grants special privilege to the evidence of a child victim. This kind of evidence requires no corroboration. Section 18 of the Act provides that “... the court may convict such a person of such offence on the basis of the uncorroborated evidence of a child, given upon oath or otherwise”.

This privilege for the evidence of the victim may be abused by the child witness who may not be sure of the incident or could be driven by emotion or mental capacity. Experts have observed gender inconsistencies in the uncorroborated evidence of a child witness.⁴⁴ The non-corroboration rule is likely to be the reason for false allegations of sexual abuse by a child or family of the child victim.

⁴⁴ Lisa A Allen and Narina Nunez Nightingale, “Gender Differences in Perception and Verdict in Relation to Uncorroborated Testimony by a Child Victim”, *Journal of Offender Rehabilitation*, vol. 24, no. 3–4 (1997): 101–16.

Lack of Minimum Punishment

The Act has been praised for harsher punishment for sexual predators. However, these maximum punishments are not mandatory but are prescriptive in nature with the use of the phrase “not exceeding”. Therefore, the judge has the discretion to prescribe lower imprisonment. According to section 5, producing, Child Sexual Abuse Material attracts imprisonment not exceeding thirty years, making preparation to produce attracts imprisonment not exceeding ten years and whipping.

According to **Zahiruddin bin Osman v Pendakwa Raya (2019)**⁴⁵ the defendant was charged under Section 14(a) of SOACA where the punishment provided is imprisonment for a term not exceeding twenty years and shall also be liable to whipping. Therefore, there is a clear lack of minimum punishment. The argument posited by the researcher was that the absence of a minimum punishment clause within Section 14(a) of SOACA introduces ambiguity regarding the severity of penalties for offenses covered by this statute. This ambiguity could result in inconsistent sentencing, as judges might interpret the law differently or impose varying penalties.

In conclusion, the absence of a minimum punishment specification within section 14(a) of SOACA highlights the need for precise legal frameworks to guide sentencing and uphold principles of fairness and consistency in the judicial process.

As no minimum punishment is prescribed, one-month imprisonment could also be ordered by the court. The discretion given to the judge is too wide in these imprisonment terms.

⁴⁵ *Zahiruddin bin Osman v Pendakwa Raya* [2019] MLJU 1921.

Unclear position on penetrative assault

Before the SOACA came into force, the main provision that governs penetrative sexual assault is section 377CA of the Penal Code (“PC”). Section 377CA of the PC provides mandatory imprisonment of a minimum of 5 years capped at 30 years and shall be liable to whipping. However, section 377CA of the PC is a general provision that doesn’t afford special treatment in the event that the victim is a child. The researcher finds this non-discriminatory provision unbecoming the reason that the primary basis that drove the legislature to enact the SOACA is to hold sexual offences against children at higher gravity than sexual offences committed against adults given the purity and innocent nature of a child. On cursory reading of the wording “does any other acts that involve physical contact with a child without sexual intercourse” used in section 14(d) of the SOACA though it may be construed as any physical acts that in the mind of a trial judge, is a physical sexual assault then it falls under the meaning of section 14(d). Even so, the researcher observes that if the Legislature intends section 14(d) to include penetrative assault against children, then it is recommended to enact a specific provision to that effect and surely with increased punishment to truly appreciate the spirit of the SOACA and the magnitude of the impact of sexual offences against children.

According to **Pendakwa Raya v Mohd Nasir bin Abdul Ghani (2020)**⁴⁶ the SCJ had determined that the element of penetration was unquestionably established. Furthermore, under Penal Code s 376(3), the prosecution is not required by law to establish ejaculation. A rape charge has nothing to do with the victim's status, whether she is a virgin. Penile penetration is what the prosecution must demonstrate. But for a conviction to be obtained, is it legal for the victim to witness the accused's penis entering

⁴⁶ *Pendakwa Raya v Mohd Nasir bin Abdul Ghani* [2020] MLJU 1538.

her vagina? How would you handle a blind victim? What if there was total darkness during the rape? Does that imply that the perpetrator will escape punishment?

Because of these questions it is believed is addressed in the case of **Che Mohd Sufian @ Che Bastian bin Che Rashid v PP (2015)**⁴⁷. In that case, the victim did not see whether there was penile penetration, but she could feel the pain in her vagina.

In conclusion, while there may not be a definitive legal stance on visually witnessing penetration in rape cases, courts have demonstrated a willingness to consider alternative forms of evidence to establish this crucial element.

No Specific Provision for Other Serious Sexual offences

Since the reason behind the enactment of the SOACA, is to provide a new criminal law regime pertaining to sexual offences against children, the fact that quite a number of sexual offences had been left out and remain in the Penal Code and no similar offences being included in the SOACA with modifications to accommodate sexual offences committed against a child, is quite unsatisfactory. Offences such as Rape against children is not covered in the Act despite the gravity and opportunity provided under the general objective of the statute. It is argued that major sexual offences for instance carnal intercourse against the order nature as specified under section 377A Penal Code is highly recommended to be included in the SOACA with enhanced modifications to reflect the heinous nature of the offence committed against a child.

According to **Mohd Firdaus bin Mohd Amin v Public Prosecutor (2020)**⁴⁸ where the defendant was accused of committing an act of gross indecency against a child by the name of "X," specifically by sucking his penis, in violation of s. 377D of

⁴⁷ *Che Mohd Sufian @ Che Bastian bin Che Rashid v PP* [2015] 8 MLJ 643.

⁴⁸ *Mohd Firdaus bin Mohd Amin v Public Prosecutor* [2020] MLJU 1442.

the Penal Code, and sexually abusing him for sex purposes, specifically by touching his chest and nipples, in violation of s. 14(a) of the Sexual Offences Against Children Act 2017 however since this is an act performed between two men, the principle in **Siti Noor Aishah Binti Atam v Pendakwa Raya (2017)**⁴⁹ and **Ho Tze Kean v PP (2018)**⁵⁰ does not suffice to establish sexual purpose even if the accused touched the chest and nipples. The accused's act cannot be interpreted in that way unless there is an overt act intended to arouse PW1, which is required for it to be considered a sexual purpose. It is necessary to take into account the entirety of the accused action and not just the act of touching and sucking the penis, this can be further referred to **Sakai Ak Sanga v PP [2021]** 1 LNS 390.

No Financial Remedies for Victims of Sexual Abuse

In general, the legal remedy of monetary compensation or mostly known as a crime compensation order (“CCO”) is available under the Penal Code via section 426 which authorises the court to make an order for compensation to be paid to the victim whether in a one-off manner or as instalment. However, the SOACA lacks in this aspect as no provision on CCO is being inserted in the special legislation. It is argued that the inclusion of CCO’s provisions in the SOACA is vital to open ways for the child victim to benefit from the criminal justice system and for this to materialize the researcher submits that the Legislature ought to regard child victims as beneficiaries in the criminal justice system, especially in the realm of the SOACA. The reason behind the idea is that the existing policy on criminal justice in Malaysia tends to focus considerable resources to make a child a competent and credible witness to ensure an airtight and solid case.

⁴⁹ *Siti Noor Aishah Binti Atam v Pendakwa Raya* [2017] MLJU 1939.

⁵⁰ *Ho Tze Kean v Pp* [2018] 2 MLJ 721.

The policy is assisted by the current legal tools that are the SOACA, the Child Act (“CA”) and the Evidence of Child Witness Act (“EOCWA”).⁵¹ The consequence of such policy may be disadvantageous to the child victim in the manner that no direct and tangible benefit of the prosecution or even the conviction of the offender towards the child victim apart may be the achievement of justice. This situation may place the child victim in an unfair position where the child suffers so much from the offence and may require medical or psychological assistance that surely will incur costs. Hence, the fact that no CCO provision in the SOACA renders it to be ineffective in the financial aspect.

According to a **Legal Review Between Impacts of Child Sexual Abuse and Criminal Compensation Order in Malaysia**⁵², even though the success rate of CSA prosecutions has increased, the Malaysian government has shown no signs of implementing victims' rights, particularly with regard to the right to compensation for harm caused by CSA offences. According to a United Nations study from 2000 to 2003, Malaysians are among the participants in one of the member states that does not disclose information regarding the existence of a compensation mechanism for child abuse in Malaysia.⁵³

However, there are recent amendments addressed by Minister in the Prime Minister's Department (Law and Institutional Reform) Datuk Seri Azalina Othman Said in 6 April 2023. The amendments introduced have significant implications for the legal framework surrounding sexual offenses against children. By approving the Sexual

⁵¹ Izmi Izdiharuddin B Che Jamaludin Mahmud, Nadzriah Ahmad, and Rafizah Abu Hassan, “Legal Analysis On The Criminal Compensation Order for Child Victims in Malaysia: With Reference to Sexual Offences Against Children Act 2017,” *E-Book of Extended Abstract* (2021): 123.

⁵² Mahmud, I. I. B. C. J., Ahmad, N., and Hassan, R. A., “A Legal Review Between Impacts of Child Sexual Abuse and Criminal Compensation Order in Malaysia”, *Journal of Islamic*, vol. 7, no. 46 (2022): 251.

⁵³ *Office of the United Nations High Commissioner for Human Rights*, “United Nations Study on Violence against Children”, <<https://www.ohchr.org/en/hrbodies/crc/study/pages/studyviolencechildren.aspx>> (accessed 10 July, 2024).

Offences against Children (Amendment) Bill 2023, the Dewan Negara has signaled a commitment to strengthening protections for children who are vulnerable to various forms of sexual exploitation and abuse. One of the key features of these amendments is the introduction of new provisions, specifically Section 26A and Section 26B. These provisions empower the court with the authority to order convicted perpetrators to provide compensation to their victims.

The inclusion of provisions for compensation reflects a recognition of the broader consequences of sexual offenses against children, including emotional and psychological trauma, as well as the potential for long-term harm. By enabling courts to order compensation, the amendments aim to ensure that victims receive appropriate support to aid in their recovery and to mitigate the financial burdens that may arise from their experiences.

Overall, the amendments to the Sexual Offences against Children Act represent a significant advancement in the legal protection of children from sexual exploitation and abuse.

3.7 INSTITUTIONAL FRAMEWORK FOR PROTECTING FROM CHILD SEXUAL ABUSE IN MALAYSIA

In addition to the laws discussed above, there are certain institutions which are necessary within the realm of CSA framework. These institutions have been established for general crime prevention, child protection and child advocacy. Few of them are general purpose institutions not limited to children while others are specially for children. This section discusses the role and responsibilities of the institutions in the context of CSA.

3.7.1 The Royal Malaysian Police

As a principal enforcement body in Malaysia, the Royal Malaysian Police (“RMP”) plays a crucial role in providing protection to children against the heinous crime of CSA in Malaysia. Recognising the rampancy of CSA in Malaysia, in 2007 the RMP had taken a definitive decision by reinforcing the structure of the RMP with an establishment of a special division under the umbrella of the Crime Investigation Department called the Sexual Crime and Children Division (“D11”). The setting up of D11 was based on the recommendations specified in the Report of the *Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police 2005* (“RCR 2005”) as one of the RCR 2005’s key findings is that there is a need to establish a specific division to deal with matters relating to women and children.⁵⁴ The D11’s preliminary sole function is to handle the investigation aspect of sexual offences as well as offences relating to domestic violence, and it also includes the power to investigate the case of missing children under 15 years of age.⁵⁵ The inception of D11 provides some degree of relief for Malaysian women and children in the sense that there is a special protective framework in place to assist them through the ordeal of sexual-related offences as well as domestic violence. Prior to the inception of D11, the current responsibility of D11 was formerly under the purview of the Special Investigation Division of the RMP (“D9”).

⁵⁴ UNICEF, *Child Protection System in Malaysia: An Analysis of the System for Prevention and Response to Abuse, Violence and Exploitation against Children* (Kuala Lumpur: Ministry of Women, Family and Community Development, 2016) 48-49.

⁵⁵ Ibid.

Mainly, the governance structure of D11 consists of three units mainly: Children's Unit; Domestic Violence and Sexual Crimes Unit and The Malaysia Internet Crime Against Children (MICAC) Investigation Unit.⁵⁶

Each of the units under D11 has its own expertise and assignment according to their scope of work and namely, the Children's Unit also functions as a Child Protection Unit and the Domestic Violence Unit also operates as a Victim Care Centre.

The unique feature of D11 is that the division most of its manpower is composed of female police officers. Further on the main function of D11, in the sense of investigative function, it is more or less the same as other usual investigations conducted by police officers for instance helping victims find safety, looking into all reports of child abuse and neglect, taking statements from suspects and the victims, making an arrest, search and seizure and gathering evidence to solidify the case for the AGC in ensuring an airtight case to prevent any seepage that might be manipulated by the defence counsel.⁵⁷ In addition, the D11 also has the protective function namely to provide protection to children and this function is executed in tandem with other principal parties, for instance, the Welfare Department ("JKM"). The protective function of D11 is sourced from the Child Act.⁵⁸ It is expected for D11 to discharge their duties professionally and efficiently as RMP is an MS ISO-accredited organisation.

Since D11's scope of work deals with crimes committed against women and children, the task undertaken by officers of D11 requires special training designed to equip them with sufficient knowledge relating to their scope of work that deals with

⁵⁶ *Malaysia Kini*, "Task Force Launched to Curb Sexual Crimes against Children via Internet," 10 February, 2018, 1-2., <https://www.malaysiakini.com/news/411754>.

⁵⁷ T G Mooi and N A M Awal, "A Case Study of Police Investigation of Child Abuse", *Malayan Law Journal*, vol. 3, no. 6 (2018): 28.

⁵⁸ Child Act 2001 (Act 611).

children since Malaysia has special legislations that govern different subject matter pertaining to children, for instance, the Child Act, Domestic Violence Act and Evidence of Child Witness Act. The instances of special training relevant to the officers of D11 are Training of Trainer on Child interviewing Skills ⁵⁹, Child Online Safety Training for Police and Child Protectors. ⁶⁰

D11 Department

Malaysians were outraged at Richard Huckle's conviction in London for 71 sexual assaults involving Malaysian minor victims. When he was apprehended at Gatwick Airport in 2014, police found 20,000 obscene photographs of minors on his computer, including several that depicted him raping a youngster. A special task group was established to review and recommend tighter legislation to safeguard minors from sex predators in the wake of this horrifying incident. ⁶¹ In reaction to this horrific incident, the Malaysian Prime Minister announced the formation of a special task force in August 2016 under the direction of the de facto Minister of Law. The task force's mandate is to evaluate existing laws and recommend harsher ones to protect minors from sexual predators. As a result, the Parliament approved the Sexual Offences Against Children Act in April 2017 (hence referred to as "SOACA"). The task of providing psychiatric care and support to Huckle's young victims was also given to the Sexual Crime and

⁵⁹ Afridah Binti Abas, "Child Abuse in Malaysia: Legal Measures for the Prevention of the Crime and Protection of the Victim", *International Journal of Social Sciences and Humanity Studies*, vol. 4, no. 2 (2012): 1–10.

⁶⁰ Protect and Save the Children, *Annual Report* (Washington: Save the Children, 2015), 3.

⁶¹ Najwa Rosli, Nabilah Hani Ahmad Zubaidi, and Farah Nini Dusuki, "Regulating the Protection and Rehabilitation of Victims of Internet Child Pornography in Malaysia", *International Journal of Academic Research in Business and Social Sciences*, vol. 9, no. 5 (2019): 450–69.

Children Division (D11) of the Royal Malaysian Police (RMP) Criminal Investigation Division.⁶²

The Royal Malaysia Police Criminal Investigation Division's Sexual Crime and Children Division (D11) oversees, among other things, giving psychiatric care and psychosocial support to young victims. In the case of Huckle, this division and several NGOs provided free counselling to the young victims. It was discovered that they had difficulty getting support from parents and getting the victims' cooperation because they were either too young to understand the seriousness of the crime or were so traumatised by the experience that they were afraid to talk about it with the police and the media (RMP, personal communication, 2017; the NGO, personal communication, 2017). Additionally, it was stated that there is a lack of labour and resources to implement the system envisioned by the Child Act of 2001, as well as a lack of capacity to provide the necessary follow-up beyond the initial reaction. The current and early challenges in Malaysia to fully provide a comprehensive and an engaging support system to child victims include a lack of trained child protectors under the Department of Social Welfare and wider coordination issues.

In addition to these legal safeguards, Malaysia additionally employs preventative measures to safeguard kids from exploitation and sexual abuse. For instance, Malaysia has put in place a variety of initiatives and programmes to inform kids about the risks of sexual abuse and exploitation and to give them the abilities and information they need to safeguard themselves. These programmes are frequently carried out in collaboration with NGOs and other local organisations. In order to safeguard children's rights and wellbeing, Malaysia passed the comprehensive Children

⁶² *The Straits Times*, "Malaysian Communities in Denial after British Paedophile Richard Huckle Sentenced: Police," October 15, 2019, 1-2, <https://www.straitstimes.com/asia/se-asia/malaysian-communities-in-denial-after-british-paedophile-richard-huckle-sentenced>.

Act 2001 and the statute addresses a variety of child-related issues, including abuse, neglect, exploitation, and trafficking.⁶³

There are also other programmes aimed at educating people about CSA and equipping kids with self-defense skills. For instance, the National Council for Child Welfare Malaysia (NCCW) offers resources and training to parents, teachers, and other carers on how to recognise and prevent CSA. The Royal Malaysia Police (RMP) also runs the "Safety First" programme, which instructs kids on how to stay safe both online and offline. Overall, even though Malaysia has laws and practises in place to protect children from sexual abuse, more needs to be done to prevent and address this problem, including study and assessment to better understand how effective the laws and practises are.⁶⁴

Malaysia Internet Crime Against Children (MICAC) Investigation Unit

As reported in February 2018, Federal police of Malaysia has established a special task force in 2018 to prevent the online distribution of sexually explicit images, videos, or audio files featuring youngsters. Although the unit is believed to have started operating in 2014, it was only formally introduced to the public in 2018. The Malaysian Internet Crime Against Children Investigations Unit (MICAC) is entrusted with investigating and enforcing the law against sexual offenders in addition to monitoring pornographic online content. The former director of the Bukit Aman Criminal Investigations Unit (CID), Commissioner Datuk Seri Wan Ahmad Najmuddin Mohd, stated that in addition

⁶³ Ilham Sabarudding, "Aspects Of Criminal Law Against Child Predators in Malaysia", *Journal of Judikultura*, vol. 1, no. 1 (2022): 1–5.

⁶⁴ *Ibid.*, 3.

to apprehending perpetrators, the unit will also be exchanging information on technology-facilitated child abuse with local and foreign peers.⁶⁵

The said section, which is overseen by the Sexual, Women, and Child Investigations Department (D11), also aims to inform parents and kids about the possible risks associated with internet activity. According to Wan Ahmad Najmuddin, this made it vital to form a cyber-investigations section that would monitor all online communication channels used by predators to produce and disseminate sexually explicit content aimed at impressionable minors. The purpose of the unit is also to work with national and international law enforcement organisations and to examine cyberthreats that affect children. Additionally, MICAC will collaborate with other digitally smart partners to develop awareness campaigns that draw attention to the risks that exist online.⁶⁶

The government in 2023 has said that a division devoted to combating child pornography operations will be established under Budget 2023. This unit will collaborate with other organisations to identify and track down offenders and will be a part of the Royal Malaysian Police's (PDRM) D11 section, which is the Sexual, Women and Child Investigation Division. The establishment of the new section is consistent with the efforts made by PDRM to look aggressively into sexual incidents involving women and children. In order to provide children more comprehensive support services, the Women, Family, and Community Development Ministry will also create a Child Development Department, which will be housed inside the Social Welfare Department. During the budget presentation, Prime Minister Anwar Ibrahim stated, "The unity

⁶⁵ Emmanuel Santa Maria Chin, "After Four Years, Police's Anti-Child Sexual Crimes Unit Officially," *Malay Mail*, 9 February, 2018, 1-2, <https://www.malaymail.com/news/malaysia/2018/02/09/after-four-years-polices-anti-child-sexual-crimes-unit-officially-launched/1574073>.

⁶⁶ Sabarudding, "Aspects Of Criminal Law," 5.

government is always concerned about the safety of its citizens, especially women and children."⁶⁷ However, the issues impacting women and children continue to be concerning at this time.

According to data from PDRM, there has been fluctuating data on reporting of CSA cases in the past three years i.e., from 2020 to 2022 as shown in Table 3.5 below.



⁶⁷ *Malay Mail*, "Establishment of Children's Development Dept to Be Done in Stages, Says Minister," 25 February, 2023, 1-2, <https://www.malaymail.com/news/malaysia/2023/02/25/establishment-of-childrens-development-dept-to-be-done-in-stages-says-minister/56731>.

Table 3.5 Comparison of Sexual abuse cases involving adult and children between 2020 and 2022¹

OFFENCES/ YEAR		2020				2021				2022		
	Total cases	Adult	CSA	% CSA	Total cases	Adult	CSA	% CSA	Total cases	Adult	CSA	% CSA
1-Rape	1293	256	1037	80.20	1299	230	1069	82.29	1388	205	1183	85.23
2-Gang Rape	85	11	74	87.06	61	7	54	88.52	103	9	94	91.26
3-Incest	259	36	223	86.10	245	23	222	90.61	264	30	234	88.64
4-Outrage Modesty	838	830	8	0.95	876	846	30	3.42	872	861	11	1.26
5-Sexual Harassment	378	354	24	6.35	506	471	35	6.92	477	430	47	9.85
6-Unnatural offences	249	147	102	40.96	222	160	62	27.93	199	141	58	29.15
7-Section 292 of Penal Code	74	73	1	1.35	63	60	3	4.76	69	62	7	10.14
8-Physical Sexual Assault	992	0	992	100.00	952	0	952	100.00	1158	0	1158	100.00
9-Non-physical Sexual Assault	50	0	50	100.00	74	0	74	100.00	52	0	52	100.00
10- Child Sexual Abuse Material	41	0	41	100.00	44	0	44	100.00	30	0	30	100.00
11-Sexually Communicating with a Child (Section 11)	9	0	9	100.00	13	0	13	100.00	41	0	41	100.00
12-Child Grooming (Section 12)	2	0	2	100.00	7	0	7	100.00	17	0	17	100.00
13-Meeting following child grooming (Section 13)	1	0	1	100.00	1	0	1	100.00	3	0	3	100.00
Total	4271	1707	2564	60.03	4363	1797	2566	58.81	4673	1738	2935	62.81

¹ Source: PDRM

The data shows certain peculiarity with the nature of offences affecting only children based on the offences number 8 to 13 which reported no figures for adults. For the offences which were recorded as CSA, it was uncertain what could have happened to such offences during the pre-SOACA era under the Penal code regime. In 2022 62.81 percent of about 4673 reported cases involved a child. This is an increase of about 4 percent from the figures reported in 2021. The data shows the fluctuation in CSA incidents year-on-year despite the existence of special legislation such as SOACA.

Malaysia is also said to have promising methods to stop child exploitation and sexual abuse online by Budget 2023, but effective enforcement is being stifled by poor coordination and insufficient financing. Research by the United Nations organisation for children, UNICEF claimed that more needed to be done to combat the lurking virtual threats lusting after the nation's children. This was one of the report's regrettable discoveries. As a result, it was suggested in the report "Disrupting Harm in Malaysia" to increase awareness of the support and medical services available to all children who have been the victims of online child sexual exploitation and abuse (OCSEA). The report also demanded that greater funding be given to regular courts so that they can be as child friendly as the special courts that were set up to deal with instances of this sort.

The report also emphasised how understaffed and unprepared the Malaysian Internet Crime Against Children (MICAC) Investigation Unit has been to handle and address OCSEA cases. According to the report, the unit is not adequately staffed to handle the overwhelming volume of tip offs received by CyberTips, a global internet centre for reporting child sexual exploitation, from the National Centre for Missing and Exploited Children in the United States. ECPAT International, Interpol, and UNICEF Office of Research - Innocenti collaborated to compile the report, which was overseen by a technical committee headed by the Malaysian Communications and Multimedia

Commission and supported by the Ministry of Women, Family, and Community Development.¹

Moreover, over the past six years, the Royal Malaysia Police (PDRM) has received tens of thousands of internet protocol (IP) addresses accused of disseminating child pornography online from foreign agencies. However, due to a lack of personnel, the number of arrests and inspections made was insignificant. According to the principal assistant director of the PDRM Sexual, Women, and Child Crime Investigation Division (D11), ACP Siti Kamsiah Hassan, she stated the statistics from 2017 to March 2022, the police received 93,368 IP addresses from members of the information-sharing system, including the International Police Criminal Organisation (Interpol), the United States Federal Bureau of Investigation (FBI), and the National Centre for Missing and Exploited Children. The Malaysian Internet Crime Against Children (MICAC) which is under the D11 investigation unit, only has three investigating officers with the level of Inspector, will review the information submitted. As a result, ACP Siti Kamsiah Hassan hopes that the allocation announced by the government in Budget 2022 can be channelled immediately, to ensure that this division in D11 can play a more effective role in tackling crimes involving children.²

According to Siti Kamsiah, D11 wants to establish MICACs in every police contingent with at least one investigative member, as opposed to the current situation of only three officers at the Bukit Aman level. Hence, it is important to strengthen D11

¹ Zaidi Azmi, "Ill-Funded, Loosely Coordinated: M'sia's Grapples with Online Child Sexual Abuse and Exploitation," *Sinar Daily*, [29 September, 2022], 1-2, <https://www.sinardaily.my/article/180930/malaysia/national/ill-funded-loosely-coordinated-msias-grapples-with-online-child-sexual-abuse-and-exploitation>.

² *New Straits Times*, "Police Receive Thousands of IP Addresses Suspected of Sharing Child Pornography," [15 May, 2022], 1-2, <https://www.nst.com.my/news/crime-courts/2022/05/796318/police-receive-thousands-ip-addresses-suspected-sharing-child>.

and MICAC units in terms of staffing and equipment in order to increase the amount of data being evaluated and ultimately result in the arrest of those involved in these crimes.

3.7.2 Department of Social Welfare (“JKM”)

JKM is a prominent agency in handling cases relating to CSA. In providing necessary assistance to the child victim, JKM has vast experience working in collaboration with the RMP and various organisations. Under JKM’s structure of operations, there is a designated position known as ‘Child Protectors’ that handle an investigation, and social assessment to determine the need for protection, ensure the child’s safety and placement in a secure setting, aid in rehabilitation matters as well as financial assistance and other social support.³ These Child Protectors are also officers of the JKM that are appointed under section 8 of the Child Act 2001, and they can exercise a wide range of power as stipulated in the same act. The Child Protectors’ functions in this regard are similar to the investigating officer of RMP but surely with some limitations in terms of capability to handle serious cases which are often accompanied by a high degree of risk and in that case, they will have to seek reinforcement from RMP. Being one of the leading agencies on children’s welfare, JKM can be regarded as one of the main contributors of data in this field to the National Registry. The Child Protectors are also part of the Suspected Child Abuse and Neglect (“SCAN”) Team, a task force with the main purpose of handling and managing cases of CSA.

In addition to the JKM’s investigative and protective functions, the Ministry of Women, Family and Community Development made a notable move by developing a database called the Child Sex Offenders Registry which contains the details of the

³ Guidelines For the Hospital Management of Child Abuse and Neglect prepared by Medical Development Division, Ministry of Health. MOH/P/PAK/130.07(GU).

reported offenders.⁴ At the time of its effective date on 1st April 2019, the registry holds about 3,000 names of the offenders. At the moment, the registry is now available to the public, nonetheless, the registry may greatly benefit many parties be it organisations or individuals such as parents as it assists them in various matters namely for the purpose of recruitment. Although the registry may be one of the preventive tools for preventing further rampancy of CSA, however, records show that only a minimal percentage of the offenders are repeat offenders, and the rest are fresh offenders.

Children Protection Team (CPT)

The Child Protection Team (CPT) is to serve as a support network for child protection services, states and districts establish Children Protection Teams, or (PPKK). Children's Activity Centre (PAKK), which is organised and carried out in accordance with the needs of the neighbourhood, is one of the activities handled by PPKK. Daycare facilities, tuition classes, counselling services, computer instructors, and courses in child development and care are a few examples of programmes and activities offered. This effort is made to aid in the prevention of child abuse and neglect, school absences, moral deterioration, and other societal problems. 132 PPKK and 149 PAKK were present nationwide in 2016. Children in the neighbourhood surrounding PAKK also benefit from this PAKK programme, which offers benefits.

The creation of PAKK is a thorough, more systemic, and successful endeavour to stop child abuse and neglect. A support service or programme run by the Child Protection Team is called PAKK. PAKK is developed to meet regional requirements. The age range of children who require services must be determined as well as key

⁴ Jerry Choong, "Child Sex Offenders Registry Launched, 3,000 Paedophiles Listed," *Malay Mail*, [26 March 2019], 1-2, <https://www.malaymail.com/news/malaysia/2019/03/26/child-sex-offenders-registry-launched-3000-paedophiles-listed/1736695>.

challenges in a given area. This will assist in planning the programme and the appropriate time frame for PAKK. PAKK may be open continuously or just during designated hours. With the assistance of the Local Council, the Local Resident Committee, or assistance or support from individuals, the utilised premises may be rented or acquired without cost. In particular for children who are abused by their families, PAKK's goal is to organise programmes and support services centred on prevention and protection. Subcommittees that the Child Protection Team has appointed make up the membership of PAKK.

Children's Activity Centres, often known as PAKK, play a variety of functions and plan numerous activities for kids. Shelter is one of the roles that PAKK fills. A range of age-appropriate activities are offered by PAKK. It also serves as a centre for advocacy, hosting talks or quick courses for the neighbourhood's residents, parents, and kids. In addition to offering children reading and reference materials, PAKK also serves as a learning centre, offering lessons including guidance, computer, and religious instruction. Finally, it can serve as a social centre to hold sporting events and cultural programmes as well as a crisis intervention centre to offer counselling sessions.

Children Welfare Teams (CWT)

The Child Welfare Team (CWT) is provided for under Section 91 (1) (f) of the 2001 Act. This is related to juveniles accused of crimes and charged to court. The Court for Children in Malaysia has the authority to transfer juvenile offenders to the Approved Schools or the Henry Gurney Schools following the offence the juvenile offenders committed. Additionally, a child will be enrolled in an Approved school if the court determines that he needs institutional rehabilitation and reformation in accordance with Section 67 of the 2001 Act and he committed offences other than grave crimes which

are not serious. Additionally, under Section 75 of the 2001 Act, juvenile criminals who have committed major crimes and who require reformation in order to prevent them from committing new crimes may also be assigned to Henry Gurney Schools. According to Sections 70 and 75 (2) (b) (i) of the 2001 Act, respectively, they are placed under the Probation Officer's, or another person as nominated by the Child Welfare Team's supervision for a period of one (1) year upon their discharge from these facilities.⁵

In order to support child offenders after their release into the community and avoid reoffending by child offenders, certain requirements are crucial. According to reports, Probation Officers would often contact the parents of the children before they are released from the facilities to determine whether they are prepared to assist their children with the reintegration process. It is also claimed that this activity does not offer a systematic pre-release preparation process and that there is no kid reintegration strategy.⁶

However, there is also the Malaysian Council for Child Welfare or Majlis Kebajikan Kanak-Kanak Malaysia (MKKM) which is a premier national non-governmental organisation (NGO) that was established in 1954 under the Societies Act 1966. The aim of MKMM is to promote and safeguard the well-being of children. This also complements and supplements the Government efforts in the welfare and development of children and promotes the general principles as has been embodied in the Convention on the Rights of Child as has been ratified by Malaysia in 1995.⁷

⁵ Nadzriah Ahmad, "Aftercare Programmes in the Juvenile Justice System in Malaysia: Are We Doing Enough for the Child Offenders?", *BiLD Law Journal*, vol. 7, no. 1 (2022): 16–24.

⁶ Colin Cannonier, Monica Galloway Burke, and Ed Mitchell, "The Impact of a Reentry and Aftercare Program on Recidivism", *The Review of Black Political Economy*, vol. 48, no. 1 (2021): 93–122.

⁷ *Hati.my*, "Malaysian Council for Children", <<https://www.hati.my/majlis-kebajikan-kanak-kanak-malaysia-mkkm/>> (accessed 20 October, 2022).

3.7.3 The Suspected Child Abuse and Neglect (“SCAN”) Team

Aside from the RMP, there is another structure formed for the purpose of assisting the case involving child abuse and neglect, hence, SCAN Team came into formation. If the RMP via D11 main resources is focusing on the investigative aspect of child abuse, SCAN Team provides supportive services within the hospital’s walls. The diversity of expertise available in the SCAN Team is operated by a wide range of medical personnel, as well as non-medical personnel, for instance, police officers or the Child Protectors, from the JKM.⁸ There is also a dedicated secretariat that manages matters that are non-medical to avoid unnecessary hiccups in the management aspect of the team. The members of the SCAN Team will receive ample training designed for the management and handling of cases involving child abuse.

Basically, the services of the hospital in child abuse cases are for the purpose of identification of the abused child, diagnosis and documentation, provision of a safe environment while medical evaluation and social assessment are taking place. Others include treatment of any injuries and mental health assessment/counselling, drawing up a management plan in consultation with JKM and/ or police, prior to discharge, follow up and review.

However, due to constraints in resources be it material or human, each hospital may customise its own process and management of child abuse in accordance with the available resources.

⁸ Malaysia Ministry of Health, *One Stop Crisis Center: Policy and Guidelines for Hospitals MOH/P/PAK/130.07(GU)* (Malaysia: Kementerian Kesihatan Malaysia, 2015) pg no.

3.7.4 Child Interview Centre (“CIC) (Court)

The CIC was set up to accommodate the process of obtaining evidence from a child victim via an interview that will be video recorded. The establishment of CIC also is in the spirit of section 6 of the Evidence of Child Witness Act 2007⁹ (“EOCWA”) where the section allows the interview of a child victim to be conducted via video recording and such recording shall be accepted as evidence of examination-in-chief.¹⁰ Section 6 of the EOCWA also sets principles for the evidence of a child witness to be admissible. In appreciating flexibility permitted by section 6 of the EOCWA, comes the function of CIC under RMP’s umbrella that serves as a proper platform for investigating officers to conduct the interview in a less pressure condition to make the child witness comfortable in undergoing the interview. The interview will be conducted by an officer in an interviewing room and recorded by a recording officer in an adjoining room. To render the recorded evidence admissible in court, the recording of the interview must be transcribed using the original language used during the interview or translation should the interview was done using other than the national language.¹¹

Though the existence of CIC was intended to support the building of a strong and air-tight sexual offence case involving children, however, it has come with its own hurdle. In some circumstances, the child witness cannot be referred to the CIC for the reason of impracticability.¹² Since the recorded statement of a child witness by virtue of section 6 of the EOCWA is a testimony of examination-in-chief, the statement is subject to cross-examination by the defence counsel and for that reason the physical attendance of the child witness may still be required during the trial and surely will

⁹ Evidence of Child Witness Act 2007 (Act 676).

¹⁰ Mooi and Awal, “A Case Study of Police,”.

¹¹ Ibid.

¹² Ahmad, Mohamad, and Samuri, “Syariah and Civil Legislation,”.

expose the child witness to the tense experience of the court, hence diminishing the objective of CIC.¹³

3.7.5 Court for Children

The Court for Children was established by virtue of the Child Act 2001 as the main objective of the act is to provide a different mechanism for crimes involving a child whether the child is an offender or a victim of a crime. The formation of the Court for Children is aligned with Malaysia's commitment to the principles laid down in the Convention on the Rights of the Child. By virtue of the Child Act 2001, the Court for Children has jurisdiction over children in need of care and protection¹⁴, children in need of protection and rehabilitation¹⁵ and children beyond control and children who are the offender. Nevertheless, Court for Children has been conferred with a wide range of powers and functions to carry out its duties tailor-made to accommodate cases involving children that cover both procedural and substantive aspects of laws relating to children. Some notable powers of the Court for Children in the aspect of child protection are to order the parents or guardian of the child to execute a bond of proper care and guardianship, to determine the custodial matters of a child, to order supervision of a Child Protector, to place the child in a place of safety.¹⁶ The Child Act 2001 empowers the Court for Children to try all offences under the Malaysian law except offences that are punishable with death which is under the jurisdiction of the High Court.¹⁷

¹³ Ibid.

¹⁴ Child Act 2001 (Act 611), Part V.

¹⁵ Child Act 2001 (Act 611), Part VI.

¹⁶ Child Act 2001 (Act 611), s 30.

¹⁷ Child Act 2001 (Act 611), s 11(5).

3.7.6 One-Stop Crisis Centre (“OSCC”) (Ministry of Health)

The OSCC is a specialised centre established under the framework of hospitals that provides services relating to domestic violence, sexual offences and child abuse. The establishment of OSCC is owed to the unrelenting efforts undertaken by the Ministry of Health and Non-Governmental Organisations (NGOs) that focus on the empowerment of women’s rights.¹⁸ The specialised services provided by OSCC are in terms of care services for the victims including clinical management or survivors (the term used by the OSCC for the beneficiaries of the OSCC), para counselling and acute counselling, emotional support, and temporary shelter.¹⁹ Apart from care services, the OSCC also extends its services to providing social welfare, legal aid assistance, advisory on court procedures and assistance regarding access to police service. All these wide-range services are made available through a successful intersectoral collaboration between various types of organisations.²⁰ As no one can tell the timing of the crime’s occurrence, the OSCC operates on a 24-hour basis, and it is usually situated at the Emergency and Trauma Department of a hospital. These locations were based on the objective of the OSCC to serve as a first checkpoint in the crisis management system.²¹ Once a potential case is identified by the OSCC first responder to the hospital, the responder may contact any relevant agency/personnel in the OSCC framework to provide further services to the suspected victim for instance medical treatment, police

¹⁸ Shizreen Farina Binti Shahrul Rizal, “Women Victims of Crime In Malaysia: Legal Reforms And Prospects Of Restorative Justice Approaches”, *Malayan Law Journal*, vol. 1 (2022): 179.

¹⁹ Ministry of Health Malaysia, “Portal Rasmi MyHEALTH, Kementerian Kesihatan Malaysia. One Stop Crisis Centre,” <<http://www.myhealth.gov.my/en/one-stop-crisis-centre-oscc/>> (accessed 2 February , 2020).

²⁰ Ministry of Health Malaysia. *One Stop Crisis Center: Policy and Guidelines for Hospitals*, MOH/P/PAK/130.07(GU). Putrajaya: Ministry of Health Malaysia, 2007.

²¹ Ministry of Health Malaysia. *One Stop Crisis Center: Policy and Guidelines for Hospitals*, MOH/P/PAK/130.07(GU). Putrajaya: Ministry of Health Malaysia, 2007. <<https://www.moh.gov.my/moh/resources/Polisi/OSCC_policy.pdf> (July 2015) accessed on 12 July 2024.

report or any other evidence gathering matters can be done at the place of OSCC and to make all these services comfortable to the suspected victim, a separate designated consultation room is available for the victim and the OSCC member to handle the crisis in private. OSCC plays vital role in the assistance framework for CSA, nevertheless, as faced by other multi-agencies unit, constraints in terms of funding and manpower are the greatest hurdle for OSCC and as a result the services provided by OSCC are unable to be extended to rural areas.²²

3.8 SEXUAL OFFENCES BILL AGAINST CHILDREN (AMENDMENT) BILL 2023

The Sexual Offences Against Children (Amendment) Bill 2023, approved by the Dewan Negara on 6 April 2023, amends the Sexual Offences Against Children Act 2017 (Act 792). The primary amendment involves the replacement of the term "child pornography" with "child sexual abuse material". This decision aligns with the Luxembourg Guidelines, published in 2016, which provide directives for accurately describing child sexual abuse. The United Nations Committee on the Rights of the Child advised member countries, including Malaysia, against using terms like "child pornography" and "child prostitution". The committee advocated for the term "child sexual abuse material", emphasizing the non-consensual nature of the content involving minors.

Many international initiatives, including the ASEAN Regional Plan of Action and WeProtect Global Alliances, have shifted from using "child pornography" to "child sexual abuse material". Azalina Othman Said, a minister in the Prime Minister's

²² Rizal, "Women Victims,"; Salina Nen and Jill Astbury, "Organisational Barriers in Working with Child Sexual Abuse (Csa) Cases: The Malaysian Professionals' Experiences", *E-Bangi Electronic Journal of Social Sciences and Humanities*, vol. 6, no. 2 (2011): 255-272.

Department, emphasized that the updated terminology better captures the severity and essence of child exploitation crimes. It acknowledges the abuse children undergo during the production of such content. The term also encompasses all parties involved in the crime, from organizers and middlemen to syndicates.

The Disrupting Harm in Malaysia report, supported by agencies like UNICEF, Interpol, and ECPAT International, endorsed this terminology change in line with the Luxembourg Guidelines. These guidelines discourage the use of "child pornography" as it might suggest child consent, potentially trivializing child sexual abuse. Notably, Interpol advocates for the term "child sexual abuse", emphasizing the distinction between consensual adult pornography and crimes against children.

Sharmila Sekaran, from the child advocacy group Voice of the Children (VoC), reiterated the importance of this change, underscoring that it is essential for the public to perceive these materials not as consensual content but as clear representations of child abuse. The 2023 amendment bolsters the existing Act by rectifying its shortcomings and enhancing its efficacy in battling child sexual offenses, particularly regarding terminology, broader offenses, and compensation.²³

3.8.1 Terminology Amendment

In Chapter 3, the first weakness laid out is "No clear terminology." It is stated that the Act lacks an interpretation provision or a definition section, which leads to ambiguity and difficulty in defining key terms used in the legislation. The absence of clear

²³ Ida Lim, "Child Rights Group Lauds New Law against Livestreaming Sex, Hopes Enforcement Can Keep up on Tech Side," *Malay Mail*, 24 March, 2023, 1-2, <<https://www.malaymail.com/news/malaysia/2023/03/24/child-rights-group-lauds-new-law-against-livestreaming-sex-hopes-enforcement-can-keep-up-on-tech-side/61367>>.

definitions for terms such as pornography, sexual grooming, incest, and sexual extortion creates uncertainty and hinders the proper understanding and application of the law.

However, the Sexual Offences against Children (Amendment) Bill 2023 has made a specific amendment to address the weakness of unclear terminology in the Principal Act specifically for the terminology of pornography and sexual extortion. The Act replaced the term "Child Pornography" with "Child Sexual Abuse Material" throughout the relevant provisions. This change provides a more accurate and descriptive term that aligns with international standards and reflects the nature of the offense more accurately.

For the terminology of pornography, in the Amendment, Part II of the Principal Act has replaced the term "Child Pornography" with "Child Sexual Abuse Material." This change reflects a more precise and accurate terminology that aligns with international standards and best practices in addressing the issue of child exploitation. By replacing the term "Child Pornography" with "Child Sexual Abuse Material," the Amendment aims to convey the seriousness and harm associated with the creation, distribution, and possession of such materials involving children. This change in terminology reflects a stronger emphasis on the abusive nature of these materials and the recognition that they involve the exploitation and victimisation of children. This amendment addresses the weakness of unclear terminology in the Principal Act by providing a more explicit and accurate description of the offence. It helps to ensure that the language used in the legislation accurately captures the nature of the crime and facilitates better understanding and enforcement of the law. By using the term "Child Sexual Abuse Material," the Amendment highlights the harm caused to children in the production and dissemination of such materials, emphasizing the need for strong measures to combat this form of exploitation. This change also aligns with international

legal frameworks and conventions including the Luxemburg Guidelines that recognize the importance of using accurate terminology when addressing crimes against children.

For the terminology of sexual extortion, it is stated in Section 15b of the Sexual Offences against Children (Amendment) Act 2023 addresses the offence of sexual extortion of a child. It outlines three different forms of threatening behaviour that constitute this offense:

(a) Threatening a child to engage in a sexual activity that is sexual in nature.

This refers to coercing or pressuring a child to participate in any sexual act or behavior that is explicit or of a sexual nature. It can involve inducing the child through various means to engage in such activities against their will.

(b) Threatening a child to share explicit representations of their body or sexual activities.

This includes coercing or intimidating a child into providing or sharing visual, audio, or written materials that depict their own body, including the genital area, buttocks, breasts, pubic area, anus, or any other part of the body engaged in sexual activities.

(c) Threatening to use or distribute explicit representations of a child's body or sexual activities.

This involves coercing or pressuring a child by threatening to use or distribute visual, audio, or written materials that depict their body or sexual activities. The threat may include electronic, mechanical, digital, optical, magnetic, or manually crafted means of sharing or distributing such materials.

However, Sexual Offences against Children (Amendment) Act 2023 failed to address and laid out the terminology of sexual grooming and incest which will creates uncertainty and hampers the proper understanding and application of the law. It is crucial for the Amendment bill to provide specific definitions and provisions for these offences to ensure consistency, clarity, and effective enforcement in protecting child victims and prosecuting perpetrators.

3.8.2 Expanded Offences

In Chapter 3, one of the weaknesses addressed is also in regards to “No specific provision for other serious sexual crimes” in which this highlighted that the Act does not cover all serious sexual offences against children. Offences like rape against children and carnal intercourse against the order of nature are not included in the Act, despite their significance and the opportunity to address them within the special legislation. Including these offences and modifying the Act accordingly would provide a more comprehensive and effective legal framework.

In response to the weakness stated above, the Act introduced new sections, such as Section 15A and Section 15B, to address specific offences related to sexual performance by a child and sexual extortion of a child, respectively. These additions broaden the scope of offences covered under the Act and ensure that perpetrators of such acts are appropriately prosecuted.

The new Section 15A of the Sexual Offences against Children (Amendment) Act 2023 addresses the offence of sexual performance by a child where it further defines "sexual performance" as any sexually explicit conduct performed before one or more viewers. This conduct can be recorded or transmitted, in whole or in part, using various

means such as electronic, mechanical, digital, optical, or magnetic means. Next, Section 15B addresses the offence of sexual extortion of a child and it covers actions where a person threatens a child to engage in sexual activities or share representations (visual, audio, or written) involving the child's body exposing genital, buttock, breast, pubic area, anus, or engaging in sexual activities.

These new provisions of Section 15A and Section 15B aim to protect children from being coerced, exploited, or subjected to sexual acts through threats or intimidation. By explicitly criminalizing these offences, the law seeks to deter individuals from engaging in such acts and provide legal recourse for victims of sexual performance and sexual extortion involving children.

3.8.3 Compensation for Child Victims

In Chapter 3, the next weaknesses laid out is “No financial remedies for victims of sexual abuse” which highlighted the lacks provisions in the Act for monetary compensation or crime compensation orders (CCOs) to be awarded to child victims of sexual abuse. This omission leaves child victims without direct financial support for the harm they have suffered. Including provisions for CCOs in the Act would acknowledge the needs of child victims and provide them with tangible assistance through the criminal justice system.

Hence, the amendment has introduced new sections, 26A and 26B, which allow the court to order the payment of compensation to child victims of sexual offences. The court can consider various factors, including the nature of the offence and the physical or emotional injury suffered by the child, when determining the compensation amount. These provisions aim to provide financial support to victims and recognize the impact of the offence on their well-being. When a person is convicted and ordered to pay

compensation under Section 26A, the court has the authority to determine the manner of payment. The court may choose to allow the convicted person time to pay the entire sum or direct payment to be made in instalments. If the convicted person fails to pay the compensation or does not possess sufficient assets to satisfy the sum owed, the court may issue a warrant for the levy of that sum. This allows the court to seize and sell any property belonging to the convicted person to recover the owed amount. Further, in cases where the convicted person fails to pay the compensation or provide sufficient assets, the court may direct that the person be imprisoned for a specific duration in addition to any other imprisonment imposed for the underlying offense. The term of imprisonment varies based on the amount owed, with a maximum of one month for sums not exceeding RM500, two months for sums between RM500 and RM1000, and six months for larger sums.

Under the said section, the court-imposed imprisonment under this section ceases once the owed compensation is paid or fully recovered through legal means, such as the sale of property. If the convicted person makes partial payment or partial recovery of the owed amount, the court may terminate the imprisonment when the time served is proportional to the remaining unpaid portion. The warrant for the levy of the owed sum can be executed anywhere in Malaysia. However, if execution is required outside the state where the warrant was issued, it must be endorsed by a Judge or First-Class Magistrate with jurisdiction in the relevant state.

These provisions provide the court with discretion in determining the payment options, enforcing payment through property levy, and imposing additional imprisonment for non-payment. The intention is to ensure that compensation awarded to child victims is effectively recovered and that the convicted person fulfils their financial obligations.

In light of the preceding paragraph, the current framework for addressing sexual offences against children, as delineated in the Sexual Offences Against Children Act (SOACA), alongside other pertinent statutes such as the Penal Code, Child Act 2001, Criminal Procedure Code, and special guidelines for handling cases of sexual offences against children, presents a comprehensive but fragmented legal landscape. Effective implementation of these laws necessitates stakeholders possessing an in-depth understanding of the diverse statutes and guidelines established for child sexual protection. Despite the thoroughness of the existing legislation, there remains potential for enhancement to ensure the highest standards of child protection are upheld.

To enhance the effectiveness of the Sexual Offences Against Children Act 2017 (SOACA) and further align Malaysia's child protection framework with international standards set by the United Nations Convention on the Rights of the Child (CRC), several recommendations can be made. Firstly, it is crucial to strengthen the implementation and enforcement mechanisms of SOACA. This can be achieved by providing continuous training and capacity-building programs for law enforcement officials, judiciary members, and child protection officers to ensure they are well-equipped to handle cases of child sexual abuse with sensitivity and efficiency. Additionally, public awareness campaigns should be intensified to educate the community about the provisions of SOACA, the importance of reporting suspected cases of abuse, and the resources available for victims.

Secondly, there should be a concerted effort to improve interagency collaboration and coordination among various stakeholders involved in child protection, including healthcare providers, social services, and educational institutions. Establishing a centralized database for tracking and managing cases of child sexual

abuse can facilitate better data collection, monitoring, and analysis, thereby informing policy decisions and interventions.

Moreover, it is essential to expand support services for child victims of sexual abuse, ensuring they receive comprehensive care that addresses their physical, psychological, and legal needs. This includes establishing more specialized child advocacy centers that provide a safe and supportive environment for children to receive medical care, counseling, and legal assistance.

Finally, Malaysia should consider periodic reviews and updates of SOACA to incorporate emerging best practices and address any gaps identified in the law's implementation. Engaging with international bodies and child protection experts can provide valuable insights and recommendations for strengthening Malaysia's child protection framework. By adopting these measures, Malaysia can ensure a more robust and effective response to child sexual abuse, safeguarding the rights and well-being of all children in the country.

3.9 CONCLUSION

From the foregoing, this chapter has examined the legal development for CSA and protection in Malaysia based on legislation enacted since independence in three phases. Despite the elaborate and progressive enactments, the issue of CSA has reached a boiling point. Heated debate and legislative action have led to reforms in criminal law and child protection statutes and penal codes which seek to serve the special needs of children. The Sexual Offences Against Children Act (SOACA) in Malaysia has undergone amendments to address weaknesses identified in the Principal Act. However, there are still several weaknesses that need to be addressed to enhance the effectiveness of the legislation.

These weaknesses include firstly the lack of clear provision on inconsistency with other legislations, leading to potential confusion. Clear guidelines are needed to resolve conflicts and inconsistencies with other laws to provide guidance to stakeholders. Secondly, special privilege is granted to child victims' evidence without corroboration, which can be misused, resulting in false allegations or unreliable testimonies. Safeguards should be implemented to ensure the credibility and accuracy of child witnesses' evidence. Thirdly, Absence of minimum punishments for offences, leading to inconsistent sentencing and potentially inadequate punishments for offenders. Introducing minimum punishments would promote consistency and ensure appropriate consequences for offenders. Fourth, unclear provision on penetrative sexual assault against children, lacking a specific provision addressing this serious crime. Establishing a specific provision with enhanced punishment would acknowledge the severity of such offences.

Addressing these weaknesses would strengthen the SOACA, improve its clarity, and enhance its ability to protect children from sexual offences effectively.

This chapter finds that initial criminal law legislation such as the Penal Code serves the general purpose as primary tools for prosecuting all crimes and offences which are criminalised by the state including CSA. Sexual abuse or sexual harassment has been considered a criminal offence in several legislation. In other words, the scope of criminal and penal laws includes sexual offences against persons including children who are supposed to be a special class in society. Over time several jurisdictions have realised the inadequacy of general criminal enactments in addressing CSA. Early criminal legislation only recognised and defined rape as an act of sexual intercourse but excludes the definition for non-penetrative sexual acts such as oral and anal sex. These were not within the scope of criminal enactments and were considered under sodomy

laws. In addition, the chapter observed the lack of context for children in early sexual offences legislation. In other words, the gender and age specificity of rape and sexual assault were missing in criminal legislation.



CHAPTER FOUR

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES: A COMPARATIVE PERSPECTIVE

4.1 INTRODUCTION

The focus of this chapter is on the protection of children against sexual offences under Indian Law. In 2012, in compliance with the United Nations Optional Protocol to The Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000,¹ the Indian legislature passed a landmark legislation, i.e., the Protection of Children from Sexual Offences Act 2012 or POCSO 2012. This legislation may be viewed as an extension to the Indian Penal Code 1860 (“IPC”) in specific criminal laws namely sexual offences committed against children in India, which contains a few generic provisions regardless of whether the victim of the sexual offences is an adult or a child namely has proven inadequate for the protection of children from sexual offences like sexual assault, rape, child pornography and other vices. Prior to the enactment of the POCSO 2012, only a few provisions under the IPC such as sections 375, 377, and 354 are applicable to children². These provisions were considered to be quite limited in scope when applying to the case of sexual offences involving children and this inadequacy drove the Indian Parliament to enact the POCSO as a special law in giving better legal protection to the vulnerable children of India that represents 42% of the Indian total population.³ POCSO 2012 serves as a comparative basis for law reforms in CSA in Malaysia. On the justifications for choosing the Indian legislation as

¹ Sumana Vedanth, “A Decade of Protection of Children from the Sexual Offences Act 2012-Success or Failure”, *International Journal of Early Childhood Special Education*, vol. 14, no. 7 (2022): 10-11.

² Ibid.

³ Sanjay Verma, “Sexual Offences And Abuses Against Children: A Study Of Gaps, Provisions, Concerns And Challenges In Pocso Act 2012”, *Elementary Education Online*, vol. 20, no. 6 (2021): 936.

a basis for comparing the existing child protection laws in Malaysia, it is important to note that the criminal legislation in Malaysia has its origin in the Indian Penal Code 1860. The fact that the legislation was created to address rising sexual pervasions that the Indian Penal Code (IPC) had not previously recognised is another argument for talking about the CSA laws that are in effect in India.

This chapter discusses POCSO's establishment as a new legislative framework to safeguard children from sexual offences. An overview of POCSO in terms of its unique background also shall be discussed in this chapter. It was significant to look at POCSO offences and distinguishing features from both a legislative, procedural and judicial standpoint. Additionally, this chapter serves as a foundation for potential comparative lessons in criminal justice and the handling of CSA cases in Malaysia and in India. It starts off by providing a general overview of CSA in India and recognising the issue as a pressing one. The chapter also analyses cases of CSA prosecuted under the Criminal Law Amendment Act of 2013 and the Indian Penal Code of 1860.

4.2 CHILD SEXUAL ABUSE IN INDIA

The 156th Indian Law Commission Report in 1997 provided a legal definition of the term “CSA” as “any kind of physical or mental violation of the child with sexual intent usually by an elder person who is in a position of trust or power viz-a-viz the child”.⁴ This definition has been referred to in explaining the Indian Penal Code 1860. In commenting on the nature of sexual crimes in India, Narrain observed that “the substantive law in India is limited in its understandings of what a sex act is and sees

⁴ Rukmini Sen, “Law Commission Reports on Rape”, *Economic and Political Weekly*, vol. 45, no. 44/45 (2010): 81–87.

rape as a crime of non-consensual sex only”.⁵ In other words, consensual sex is not likely to achieve a successful prosecution.

The magnitude of CSA in India was not publicly acknowledged until the beginning of the last decade.⁶ In 2007, 53.22% of children in India faced sexual abuse, with 21.90% under severe forms of abuse. Among the causes of CSA is lack of sexual education, poverty, the abundance of obscene posters, caste-based discrimination, child labor, online materials, and others.⁷ Latest data from the National Crime Record Bureau (NCRB) shows that in 2020, “approximately 28.9% of the entire child population experienced some form of sexual crime, yet only 65.6% of these crimes were reported.”⁸ The various sexual behaviors include touching the breast, genitalia, and buttocks. The penetration of the vagina and anus with sexual organs or objects are two further, more extreme cases of abuse uncovered. These abuses occur whether the perpetrators and victims are of the same gender or different gender. Due to the unreported nature of CSA, cover, or protection in the family, it was earlier believed that there was no CSA in India.⁹

As of 2020, rape incidents in India are 22,172 out of 100,000 citizens.¹⁰ With a children population of 440 million, children in India constitute 19% of the world’s children population.

⁵ Arvind Narrain, “Violation of Bodily Integrity: The Delhi Rape Case among Others”, *Economic and Political Weekly*, vol. 48, no. 11 (2013): 17–20.

⁶ Jyoti Belur and Brijesh Bahadur Singh, “Child Sexual Abuse and the Law in India: A Commentary”, *Crime Science*, vol. 4, no. 1 (2015): 1–6.

⁷ Harikumar Pallathadka, Sanjeev Kumar, and V Kumar, “A Socio-Legal Analysis of Child Sexual Abuse in India”, *Des Eng*, vol. 9, (2021): 1768–75.

⁸ Megha Chaturvedi, “Child Sexual Abuse in India: Alarming Statistics, Lifelong Impact, How to Heal,” *India Today*, [04 August 2023], 1-2, <https://www.indiatoday.in/education-today/featurephilia/story/child-sexual-abuse-in-india-alarming-statistics-lifelong-impact-how-to-heal-2416285-2023-08-04>.

⁹ Prakash Balkrishna Behere and Akshata Nandu Mulmule, “Sexual Abuse in 8-Year-Old Child: Where Do We Stand Legally?”, *Indian Journal of Psychological Medicine*, vol. 35, no. 2 (2013): 203–5.

¹⁰ Shashank Tyagi and Sunil Karande, “Child Sexual Abuse in India: A Wake-up Call”, *Journal of Postgraduate Medicine*, vol. 67, no. 3 (2021): 125.

These cruel deeds, whether committed directly or indirectly towards a child, may have both short- and long-term negative effects on their health. Short-term impacts might range from academic underachievement to depression, sexual promiscuity, and suicidal thoughts from an early age. It is possible for victims of childhood sexual abuse to develop depression, low self-esteem, anger difficulties, anxiety, obsessions and compulsions, sexual dysfunctions, self-mutilation, suicidality, dissociation, problems with substance misuse, interpersonal challenges, and numerous mental disorders.

A case that ends in acquittal, legal system involvement, lack of maternal support, and use of avoidant coping mechanisms by the mother all have more severe effects on the victim than other aspects of the abuse (such as sexual abuse within the family, ongoing and multiple episodes, the use of force, methods used to gain child secrecy, and multiple perpetrators). Bad physical and mental health impacts frequently persist until adulthood, and some victims go on to commit crimes which was the root of their traumas in the first place.

One of the impetuses for sexual abuse in India is the widespread online peddling of child sexual abuse materials (CSAM). Data from Interpol shows that 2.4 million instances of online-related sexual abuse involve young girls as victims. As a result, the Indian Central Bureau of Investigation (CBI) has launched a massive operation against online child sexual abuse materials in India in coordination with other law enforcement agencies around the world.

4.2.1 Road Leading to the Passing of POCSO

Based on the findings of Bajpai¹¹ it was found that there were loopholes surrounding IPC and the provisions overseeing matters such as child sexual violence, child sex trafficking and pornography.

Some events were immediate or remote factors that paved the road for child-specific legislation on sexual abuse. Several gang rape incidents, such as Nirbhaya's case¹², which occurred between 2012 and 2013, shocked the nation and led to public outcry and the eventual amendment to the Indian Penal Code.¹³ One is the expansion of punishment to life imprisonment, i.e., section 376(2), and the second is the gangrape of women under the age of 16 or under the age of 12. Section 376DA imposes a mandatory life sentence for gang rape of a woman under the age of 16 years while Section 376DB imposes life imprisonment or death for gang rape of a woman under the age of 12 years. In the case of online child pornography, the Information Technology Act 2000 has often been used to prohibit and prosecute the publishing and transmission of pornographic materials, while the Immoral Traffic (Prevention) Act 1956 has been applied to the criminalisation of prostitution and human trafficking within the Indian subcontinent.

In addition to these provisions, some child-specific provisions have prohibited inducing any minor girl to have sexual intercourse with another person pursuant to section 366A of IPC. Others are section 372 and 373, which punishes the selling or buying of minor girls for prostitution and illicit intercourse for any unlawful and

¹¹ A Bajpai, "Right to Protection against Sexual Abuse and Exploitation", *Child Rights in India: Law, Policy, and Practice*, (2006): 208–78.

¹² Eshita Baghel, "Analysis of Death Sentence in Nirbhaya Rape Case", *Issue 1 Int'l JL Mgmt. & Human*, vol. 5, no. 1 (2022): 2265.

¹³ Richa Sharma and Susan Bazilli, "A Reflection on Gang Rape in India: What's Law Got to Do with It?", *International Journal for Crime, Justice and Social Democracy*, vol. 3, no. 3 (2014): 4–21.

immoral purpose. These child-specific provisions attract punishment of imprisonment of up to ten years and a fine.¹⁴

Due to the observed weaknesses of the criminal justice system in CSA cases, the Criminal Law (Amendment) Act 2013 was passed to increase the punishment for the rape of a minor. It was aggravated under section 376(2)(i) to a minimum of ten years and can extend up to life imprisonment.¹⁵

The most critical challenge to CSA prevention before 2012 was the absence of a specific gender-neutral legal framework designed to address and rectify all instances of sexual offenses perpetrated against children to protect children against the offences identified under the IPC as well as to introduce other new acts that are relevant in this current time to be brought under the criminal law as offences. The use of IPC to afford sufficient protection for children has not achieved the desired outcome.¹⁶ Therefore; experts argued that since 42% of the Indian population is below 18 years and the second largest children population in the world, it becomes necessary to provide a legal framework for the protection of children from sexual offences. As a result, the POCSO bill was drafted and deliberated and passed into law.¹⁷

To further put the urgent need for PCSO into perspective, in the last six months of 2012 alone, more than 24,000 child sexual cases were reported in India. Maharashtra, Uttar Pradesh and Tamil Nadu have the highest CSA offences reported.¹⁸

¹⁴ Bajpai, "Right to Protection,".

¹⁵ Ayushi Tyagi, "Inconsistency between Protection of Child from Sexual Offences and Indian Penal Code: Analysis of Child Sexual Abuse in India", *Issue 4 Int'l JL Mgmt. & Human*, vol. 4, no. 4 (2021): 1409.

¹⁶ Alok Kumar et al., "The Problem of Child Sexual Abuse in India Laws, Legal Lacuna and the Bill—PCSOB-2011", *Journal of Indian Academy of Forensic Medicine*, vol. 34, no. 2 (2012): 169–74.

¹⁷ Sanjana Srivastava, "Indian Legal Analysis on Child Sexual Abuse: POCSO Act 2012", *Supremo Amicus*, vol. 19, (2020): 437..

¹⁸ Pallathadka, Kumar, and Kumar, "A Socio-Legal Analysis,".

Historically, the law was drafted after the first official report of the Ministry of Women and Child Development in 2007 showed a high prevalence of CSA across India.¹⁹ The pre-drafting stage includes extensive consultation held by the Department of Women and Child Development in 2005 which generated data on the demographics, gender, age group, variations, and statistics on CSA. The reports identified children on the street, children at work and children in institutional care as the highest victim of reported sexual assault incidence while family settings are places where the majority of incidents occur. In 2005, the first draft of the Children Bill was prepared in cooperation with civil society participants and experts, and it covered several offences which were intended to be incorporated as new amendments into the IPC. As a result of the long process of amending the IPC, the Department considered new comprehensive legislation on CSA.

There was a challenge in justifying the need for a bill that contains offences already available in other laws such as the IPC, the Immoral Traffic Prevention Act 1956, the Information and Technology Act 2000 and the Child Labour (Prohibition and Regulation) Act 1986. After a discussion during an inter-ministerial briefing in 2006, the Department of Legal Affairs returned the draft bill due to the unclear purpose of bringing new criminal legislation. After further review, the draft bill was revised with a clarification on the purpose which is to provide stringent punishment for offences that already existed under existing law.

Apart from the ministries and the National Commission for the Protection of Child Rights (NCPCR), the consultation also included the India Alliance for Child Rights, HAQ Centre for Child Rights, UNICEF, and Centre for the Prevention and

¹⁹ Sankar Sen and P M Nair IPS, “A Report on Trafficking in Women and Children in India 2002-2003”, *Methodology*, vol. 33, no. 39 (2006): 39.

Healing of Child Sexual Abuse (CPHCSA) - TULIR. The consensus was in favour of separate legislation to protect children against sexual abuse. Other suggestions for amendment or introduction of additional chapters to the Criminal Procedure Code 1973 and the Indian Evidence Act 1872 were turned down. Relevant sections of existing law were to be amended to prevent the victimization of children and speedy justice while also seeking separate legislation. Ultimately, by November 2010, the Ministry of Women and Child Development had received a draft bill from the NCPCR based on all recommendations from State Governments and Union territories.

In Parliament, the Protection of Children from Sexual Offences Bill 2011 was introduced in the *Rajya Sabha* i.e., the Upper House of the Indian Parliament on 23 March 2011. After 5 Days, the bill was referred to the Parliamentary Standing Committee on Human Resource Development on 28 March 2011 for examination. The report of the committee was tabled to the *Rajya Sabha* on 21 December 2011 and passed to the *Lok Sabha* on the same day. Having been passed by the *Rajya Sabha* and *Lok Sabha* on 10 May 2012 and 22 May 2012 respectively, the bill received Presidential assent on 19 June 2012 and entered into force on 14 November which is Children's Day in India.

4.3 THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012: AN OVERVIEW OF PRESCRIBED OFFENCES

4.3.1 Background

As a result of the endemic nature of rape and other sexual offences against children in India, the legislature passed the Protection of Children from Sexual Offences Act 2012 (POCSO Act). This act was passed as a special law to protect children and provide safety, security and a dignified childhood experience for children in India. The POCSO

Act was predicated on India's ratification of the UN Convention on the Rights of the Child in 1989. In furtherance of the commitment to prevent CSA and the provision of the Indian Constitution which enjoin the state to provide developmental advantages for children facilities to grow, dignity in adolescence and safeguard from exploitation. Article 21 of the Indian Constitution also enjoins states to provide early childhood education until the age of six. Before the POCSO Act, there had been inadequate legislative responses to child protection in India.

The bill is divided into 10 parts that address offences, penalties, mandatory reporting, false complaints, the process for obtaining a child's statement, the duties of the police and magistrate, the special evidential rules regarding child witnesses, and the procedure for the child's medical examination. Additionally, POCSO also established special courts for offences committed under the Act, the right to unrestricted legal aid for those in need, obligations for states, pre-trial support, and the function of the National Commission for Protection of Child Rights ("NCPCR"). The nature of the POCSO Act is that it is special legislation that has been considered to take precedence over substantive laws when the offence committed comes within the purview of the special legislation. In other words, the IPC will become secondary when it comes to sexual offences against children in India. It is a momentous legislation that changed the scope of sexual abuse protection for children by overriding all existing laws regarding offences against children.

4.3.2 Overview of the Structure of the POCSO

There are nine categories of offences under the POCSO Act which have significantly extended the scope of criminal laws and uplifted the child protection laws to a new height. The offences re-enacted and rebranded under this law come with enhanced

punishment, unlike the lack of clarity and difficulty under the Indian Penal Code. The next section will discuss the offences identified under the POCSO Act.

The nature of offences prescribed in the POCSO Act is not new to the criminal justice system. However, the law provides clarity to the existing offences and provides clear terminologies, definitions and penalties for the offences. Offences such as rape, kidnapping, prostitution, human trafficking, and insulting the modesty of a woman/girl were already recognised under the Indian Penal Code. Child-specific offences such as the purchase of a minor section 373, kidnapping a minor from the guardian section 361A and selling a minor for prostitution among others.

This landmark legislation might be summed up as promoting the reporting of more sexual abuse instances and a relatively low conviction rate, even if the law is gradually being enforced and applied. The law has been amended to include capital punishment and more severe penalties. In 2019, several amendments were made to the POCSO Act due to some notable incidents that led to public outcry and the extensive media coverage given to the rape cases of Kathua and Unnao just to mention a few. Both cases involved minor girls below the age of eighteen. Although the amendments still have no provisions for speedy trials and investigation, the POCSO Act is a work in progress that can be emulated by other countries in formulating their own version of the laws regarding the protection of children from sexual abuse.

What the POCSO Act has done differently is to bring all previous amendments under one legislation and provide strict penalties and certainty for the protection of children. Table 4.1 further highlights the offences prescribed under the POCSO Act.

Table 4.1 Categories of offences in POCSO 2012

No.	Offences	Provision	Minimum Punishment	Maximum Punishment
1.	Penetrative sexual assault	Section 3 and 4	10 years of imprisonment + fine (16-18 years of age)	20 years of imprisonment + fine (below 16 years of age)
2.	Aggravated penetrative sexual assault	Section 5 and 6	20 years imprisonment	Life imprisonment + fine
3.	Sexual assault	Sections 7 and 8	3 years of imprisonment	5 years of imprisonment
4.	Aggravated sexual assault	Section 9 and 10	5 years of imprisonment	7 years of imprisonment
5.	Sexual harassment (Sections 11 and 12)	Section 11 and 12	Up to 3 years of imprisonment + fine	Up to 3 years of imprisonment + fine
6.	Using a child for pornographic purposes (pornographic material)	Section 13	Up to 5 years of imprisonment + fine (1 st offender)	Up to 7 years of imprisonment + fine (Repeat offender)
7.	Using child for pornographic purposes (pornographic acts)	Section 14 (By Section 3)	10 years imprisonment + fine	Life imprisonment + fine
8	Using child for pornographic purposes (pornographic acts)	Section 14 (By Section 5)	Life Imprisonment + fine	Life Imprisonment + fine
9.	Using child for pornographic purposes (pornographic acts)	Section 14 (By Section 7)	6 years of imprisonment + fine	8 years of imprisonment + fine
10.	Punishment for storage of pornographic material involving child	Section 15	3 years of imprisonment + fine	3 years of imprisonment + fine

11.	Abetment of an offence and punishment	Section 16 and 17	Imprisonment for 7 years and fine	Imprisonment for 14 years and fine
12.	Punishment for attempt to commit an offence	Section 18	One-half of imprisonment for life OR one-half of the longest term of imprisonment for the offence or with fine or both	One-half of imprisonment for life OR one-half of the longest term of imprisonment for the offence or with fine or both

Penetrative Sexual Assault (PSA)

The first category of offence in the POCSO Act is provided under section 3 and a corresponding punishment under section 4. Penetrative sexual assault is traditionally restricted to penile penetration of the vagina by the penis. However, POCSO extends this to the insertion of any object into the body of the child either male or female. It also covers manipulation of any part of the body of a child to cause penetration into the mouth, urethra or anus of the child.

The provision of section 3 noticeably is not similar to section 375 of IPC with some modifications including the use of gender-neutral terms. The provision also provides four (4) means or conducts by which the offence of PSA can be committed with the use of terminologies namely “penetrates”, “inserts”, “manipulates”, and “applies” as specific operative words for the four variations of offences. The punishment provided for section 3 is imprisonment for 7 years up to life imprisonment and a fine. It is found that the recognition of PSA is in response to calls by legal experts to expand the meaning of the word “rape”.²⁰ and this is reflected.

²⁰ Madhu Mehra, “Why the Law on Sexual Offences Must Be Changed”, *Kafila* (2013):12.

In the case of *Padam Singh v State of Himachal Pradesh*, where the accused was held liable and convicted of inserting a finger in the private part of a 12-year-old. An eyewitness who rescued the girl corroborated the allegation.²¹

The punishment prescribed in section 4 of POCSO has two (2) different punishments depending on the age of the child victim. The basic punishment is when the child is above sixteen years old and below eighteen years old, the offender shall be punished with imprisonment for a term not less than ten (10) years and shall also be liable with a fine. The imprisonment may be extended to life imprisonment.²² The punishment for this category is similar to the punishment provided under section 376 of the IPC. The second category of punishment is the offender shall be punished with imprisonment for a term not less than twenty (20) years extendable to life imprisonment and shall also be liable to a fine. This punishment is available should the victim be below sixteen (16) years of age. It is arguable that this provision aligns with the ones in IPC but specifically for children.

The punishment for rape prescribed in section 4 of POCSO appears to be higher than the punishment prescribed for rape under section 376(1) IPC which shall not be less than 7 years imprisonment and may extend to life as well as fine.

Aggravated Penetrative Sexual Assault

Statutes have progressively targeted the power imbalance in devising sexual assault legislation.²³ Persons in a position of authority obviously have powers over those under their authority. In the case of a child, they are expected to obey management staff and

²¹ 2016 Cr LJ 643

²² POCSO 2012, s 4(1).

²³ Susan A Lentz and Robert H Chaires, "Sexual Assault Statutes Targeting Authority & Power Imbalances: A Step Forward in Rape Law Reform", *Freedom Center J.*, vol. 3, (2011): 1.

officers in their safe houses, school, police stations, religious institutions, and other places. Where the person in charge commits sexual offences against this child under their custody or supervision, thus that person has committed, this is the basis of aggravated penetrated assault under section 5 of the POCSO Act. The basis of aggravated sexual assault lies in the nature of the relationship between the offender and the victim.

This offense is primarily based on the class of perpetrators, types of acts, and certain types of victims. This kind of offense is common among military officers and persons in positions of authority. Where the position of authority is not present, it is a mere penetrative assault and not aggravated.²⁴ In determining whether or not the offender can be punished under section 6, the court must be satisfied that the commission of the act must fall into any or a combination of the circumstances listed under section 5 (a) until (u).

For persons in a position of authority and power who intimidate children to commit a sexual act on them, the punishment is aggravated under the law. Persons who fall under this aggravated punishment are police officers, members of the armed forces, or security forces. This also includes public servants, management staff of jail, custody officers, hospital management staff, religious officers, management of educational institutions, and a relative of the child including parents. The law may be extended to persons who hold a position of trust or authority over a child in any institution or home. The also covers the circumstance *inter alia* where the offender knows that the child victim is pregnant and still commits a penetrative assault on the child.

²⁴ Eric R Carpenter, “Differential Treatment of Sexual Assault Cases by US Army Law Enforcement Personnel”, *Violence against Women*, vol. 29, no. 5 (2023): 882–900.

The types of acts that qualify for aggravated punishment are gang rape, penetrative sexual assault on a child, use of a deadly weapon, causing grievous bodily harm, injury to a sex organ, making a child pregnant, causing a child to become mentally ill, inflicting a child with HIV or other life-threatening diseases, penetrative assault on a child who has been convicted of an offence or making a child strip or parade naked in public. The category of children who may be victims under section 5 is mentally or physically disabled children and children below the age of twelve.

Section 6 of the POCSO Act 2012 stipulates, the punishment for aggravated penetrative assault is imprisonment for a term that shall not be less than ten years which, may be extended to life, and shall also be liable to a fine. Consent is irrelevant under this provision. Nevertheless, after the amendment in 2019, the punishment for this offence has been strengthened to imprisonment for a minimum period of twenty (20) years and extendable to life imprisonment and also punishable with death. It is plausible to say that the extreme punishment of the death sentence is necessary considering the circumstances under which the offence is committed against the children.

Sexual Assault

Sections 7 and 8 deal with the offence of sexual assault. The scope of sexual assault under the POCSO Act is the intentional touch of the vagina, penis, or breast of the child or making the child touch the sexual parts of such person. The provision also generally applies to physical contact without penetration. Where penetration is involved, it is a penetrative sexual assault that falls under section 3.

The punishment for sexual assault is provided under section 8 that are imprisonment for a period not less than three (3) years capped at five (5) years and shall also be liable to fine.

To successfully prove sexual assault is committed under section 7, the alleged conduct must include either of the three actions: touching the private part of the child with sexual intent, making a child touch the private part of a person or such person or doing any other act with sexual intent involving physical contact without penetration. In the case of *Parash Mondal v State of West Bengal*²⁵, the court convicted the accused under section 7 of the POCSO Act and the term was reduced to three years from five since there was no penetration. Where an accused is alleged to have committed penetrative assault, but the medical report shows no sexual contact but scratches on the body of the victim, the accused may be made liable under Section 7. In the case of *Bijoy alias Guddudas v State of West Bengal*²⁶, it was held the provision may be applicable to touching any part of the body with sexual intent not only the vagina. In the case of *Arjun Subba v the State of Sikkin*²⁷, the court convicted the accused stepfather in an attempt to rape his stepdaughter. The case was dealt with under sections 7 and 8 as the victim woke up with cries of witnesses calling out the accused and found the victim's trousers pulled down without any explanation.

It is plausible to say that this provision is properly designed by highlighting the physical touches of the usual human parts namely the vagina, penis or breast and the provision also comprehensively includes any physical contact without penetration as a blanket provision to avoid technical maneuvering on the part of the offender. Interestingly, section 7 also appreciates the fact that sexual assault is not necessarily done through direct action, it also acknowledges the fact that gratification resulting from sexual assault may be achieved by the offender via indirect means such as making the child touch themselves, and this kind of twisted acts also punishable under section 8.

²⁵ 2016 Cr LJ 5091

²⁶ 2017 (2) Crimes 392 (Cal)

²⁷ 2017 Cr LJ 2739

Provision on sexual harassment can be found under the IPC, particularly under section 354A (Sexual harassment and punishment for sexual harassment). This section was inserted after the Criminal Law (Amendment) 2013 ²⁸ has come into effect. However, in comparison, the gist of section 354A IPC can be considered limited in nature since it is only providing only four (4) acts of sexual harassment including only one (1) physical act of sexual harassment ²⁹ compared to the extensiveness of sections 7 and 9 of the POCSO. As for the punishment provided under section 354A IPC is also lighter in contrast to the ones under sections 8 and 10 of the POCSO. For offences under section 354A (i), (ii) and (iii), the IPC only provides the punishment of imprisonment up to three (3) years only or with a fine without a minimum term. The same goes for the punishment for section 354A(iv) which is punishable with imprisonment for up to one (1) year only or with a fine. Both punishments have no mandatory fine or a mandatory minimum term for imprisonment. Hence, sections 7, 8, 9, and 10 have a more preventive force and are much more intimidating. It is also pertinent to note that “sexual harassment” under section 354A IPC also can be taken as a physical act, unlike the POCSO that meticulously categorizes non-physical sexual assault under a specific section 11 of Part E of the POCSO.

Aggravated Sexual Assault

Quite similar to the concept of aggravated penetrative sexual assault, the acts of sexual assault become aggravated when the perpetrator is in a position of authority or has power over the victim. This is an offence at the aggravated level and the law deems it necessary to protect the child from those whom they are entrusted with. Sections 9 and

²⁸ Act No.13 of 2013) (w.e.f.21.4.2018)

²⁹ Indian Penal Code 1860, Section 354A(i).

10 of the POCSO Act provide special offences and punishments for categories of people of authority including police officers, armed forces, security forces, teachers, doctors and so forth. The provision contextualises the use of a deadly weapon, heated substance, or corrosive substance utilised to assault the child or cause grievous bodily injury to the sexual organ without penetration.

Other contexts provided in this provision include assault on a pregnant child, during communal or sectarian violence, or assault on a child who has been previously convicted under the POCSO Act.

The punishment is prescribed under section 10 i.e., a term which shall not be less than 5 years but may extend to 7 years and a fine.

Sharing the same concept with section 5, there are a total of twenty-two (22) circumstances stipulated under section 9 that elevates a common sexual assault into aggravated sexual assault. The structure of section 9 truly reflects the deliberation on the part of the Legislature in listing out the aggravating factors, for instance, the offence was committed by a police officer, security forces, or people in management, causing hurt in the course of the offence, the child victim is physically disabled so on and so forth. The insertion of this particular section is deemed necessary in order to discriminate against the offenders of section 9 on the reason that their acts are very grave and despicable above normal occurrence. It is arguably unfair for the child victim should the offender who committed sexual assault be punished with a general or basic punishment.

Sexual Harassment

Section 11 and Section 12 prescribe various acts which can be considered sexual harassment upon a child as long as the acts are done with sexual intent. These include

six categories of acts mainly, uttering or words, making a child exhibit his body in any form or media for pornography, constantly following or contacting or watching a child, threatening to use any form of media real or fabricated, enticing a child for pornographic purposes or giving gratification. According to section 12, the punishment for sexual harassment is a term of imprisonment which may extend to three years and shall be liable to a fine.

There are also offences of sexual harassment under the IPC even though the composition of the provisions is quite different from the ones under the POCSO. Apart from section 354A as discussed previously above, there are the offences of voyeurism³⁰ and stalking³¹. As for stalking, the POCSO may have a law concerning it under section 11(iv) that states ‘A person is said to commit sexual harassment upon a child when such person with sexual intent repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means. Nevertheless, it can safely be opined that compared to section 454D of the IPC, the POCSO clearly lacks clarity when it comes to combating stalking. The IPC also lays down some defence available to any person who can prove that the conduct is justified and reasonable according to the law. The punishment for stalking under the IPC is imprisonment for a term of up to three (3) years for first offenders and it can be up to five (5) years for repeat offenders and also a mandatory fine given the addictive nature of the act. Furthermore, there is no provision for voyeurism under the POCSO as the one found under the IPC. Hence, the POCSO may be enhanced further by revising section 11 to reflect the intent of the POCSO to truly protect the children.

³⁰ Section 354C of the IPC.

³¹ Section 354D of the IPC.

Using Children for Pornographic Purposes

Sections 13 and 14 of the POCSO Act define this crime and prescribe punishment for using a child for pornography. This was predicated on the protocol of the UNCRC which defines child pornography as “any representation by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of sexual parts of a child for primarily sexual purposes”. The definition in section 13 of the POCSO Act covers “representation of a sexual organ”, and usage of a child in real or simulated” including indecent and obscene representations. The section is appended with an explanation regarding the expression “use a child” which extends to any medium such as print, electronic or computer any other technology used to prepare, produce, offer, transmit, publish, facilitate and distribute the material.³² Subsection 2 extends the provision to sales of obscene books, songs and objects with the exception of publication for the promotion of science and religion, representation of ancient monuments and related purposes.

It is important to analyse the meaning of “pornography material” “paedophile pornography” or “obscene material”. Vide Black Law Dictionary described such material as “any writings, photographs or movies depicting sexual activity or erotic behaviour in a way that is designed to arouse sexual excitement”. In the case of ***Kamlesh Vaswani v Union of India***³³, the court focused on the meaning of paedophile pornography. The involved pornographic material is directed at children between the age of 14 to 18 years. In the case of ***State v Thakur Prasad***³⁴, the word “obscene” may

³² K J Aiyar, *Iyer’s the Protection of Children from Sexual Offences Act, 2012 (POCSO): As Amended by the Criminal Law (Amendment) Act, 2018 (Act No. 22 of 2018) : With Retrospective Effect from 21.04.2018 Alongwith the Protection of Children from Sexual Offences Rules* (Delhi: Delhi Law House, 2019). 84.

³³ (2014) 6 S.C.C 705 at 706.

³⁴ (1958) All LJ 578: A.I.R 1959 All 49.

be taken as “meaning offensive to chastity or modesty, expressing or personating to the mind or view something that delicacy, purity and decency forbid to be expressed; anything expressing or suggesting unchaste and lustful ideas, impure, indecent, lewd.”³⁵

This is an improvement from the IPC which has not criminalised this action although the sale of obscene materials and objects to young persons are offences under section 292 or 293. Similarly, section 67B of the Information Technology Act 2000 prescribes child pornography as a punishable offence. In the Kamlesh case, the petitioner requested the Government of India to direct certain internet service providers to disable some websites as it relates to morality and decency. In the petition, section 79(3) (b) of the Information Technology Act 2000 and Article 19(2) of the Constitution of India were cited to support the prevention of child pornography.

Section 14 provides for punishment which is imprisonment that may extend to five years and a fine for first-time offenders and imprisonment of seven years for and fine for a second or subsequent conviction. The section also provides for situations where the person commits the offence under section 13 along with other prescribed offences under the act such as sections 3, 5, 7 and 9. The punishment under section 14 is similar to provision Section 67(B) of the Information Technology Act 2000 on the use of child pornography.

Storage of Pornographic Materials Involving Child

In relation to pornography, section 15 prohibits the storage of materials involving children for commercial purposes. This provision has been criticized for falling short of international best practices in the prohibition of child sexual abuse materials.

³⁵ Aiyar, "Iyer's the Protection,".

Furthermore, there are inconsistencies between the Information Technology Act 2000 and the POCSO regarding the definition, punishment, and severity of the online abuse occasioned by storage. The emphasis on storage for “commercial purposes” also exonerates those who possess such materials. The punishment prescribed in the POCSO Act may extend to three years or with a fine or both.

Abetment of and Attempt to Commit an Offence

The Act provides extensively on the Abetment of an Attempt to commit an offence in Chapter IV. Section 16 defines three instances of abetment. It includes an act of instigation of another, engages with one or more persons in any conspiracy and intentionally aids the doing of that offence. Furthermore, section 17 prescribes the punishment for abetment while section 18 prescribes the punishment for attempting to commit an offence.

It is important to note that abetment is also covered in Chapter V of the IPC. The ingredients of abetment have been dealt with in the case of *Janardhan v State of Andhra Pradesh*.³⁶ Section 17 prescribed the same punishment for the offence of abetment equal to the offence abetted. This is similar to the provision of the IPC. In other words, the consequence of abetment shall be punished with the punishment provided for the offence. From the cursory reading of section 17 of the POCSO, the abetment is punishable provided that the act abetted is committed and will receive the equal or the same punishment as the accused.³⁷ Under the Indian Penal Code's provisions for abetment, the punishment for the individual who abets an offence is not necessarily commensurate with the punishment of the actual offence abetted.

³⁶ 1999 (2) ALT (in) 434.

³⁷ Aiyar, "Iyer's the Protection,".

On the punishment of an attempt to commit an offence, section 18 of the POCSO specifies the punishment for an attempt to commit an offence as either a fine, a term of imprisonment of any kind specified for the offence that may reach half of a life sentence or, as the case may be, half of the longest term of imprisonment specified for that offence, or both.

4.4 PROCEDURE FOR REPORTING OF CASES

Chapter V of the POCSO Act provides a thorough procedure for reporting child sexual abuse (CSA). The key provisions include, firstly, Mandatory Reporting as stated in Section 19 and 20 where anyone with knowledge³⁸ of CSA must report it to the Special Juvenile Police Unit (SJPU) or local police. The aspect of non-reporting the commission of such an offence under the Act 2012 is discussed in *Kamal Prasad Patade v State of Chhattisgarh*, 2016 Cr LJ 3759.

Secondly, Jurisdiction & Trial as provided in Indian Penal Code 45 of 1860 and Section 19 where the Act stipulates specific jurisdictions for CSA trials, with a preference for courts headed by women. It also outlines the trial procedure for juvenile offenders, emphasising a safe environment for the child victims. Thirdly, Protection for Reporters in which those reporting CSA in good faith are shielded from both civil and criminal liabilities, encouraging more individuals to come forward as provided in the General Clauses Act of 1877, Section 3(22).

Fourth, Immediate Action & Child Welfare as stated in Section 19 where once an incident is reported, the SJPU or local police must ensure the child's well-being, offering immediate care, shelter, and medical attention. The Child Welfare Committee

³⁸ POCSO Act 2012, s 19, Chapter V.

should be informed within 24 hours. Fifth, Penalties for Non-reporting are stated in Section 21 which lays out that failure to report or record CSA leads to imprisonment and/or fines. Employers can be penalised for their subordinate's offences, emphasising organisational responsibility. Sixth, Protection against False Accusations are prescribed in Section 22 where the Act safeguards against false allegations regarding an offence under sections 3,5,7 or 9 of the POCSO committed against a child under the age of sixteen with the sole intent to humiliate, extort, threaten, or defame that person shall be punished with up to six months in jail, fine or both. While genuine victims are protected, maliciously false claims can result in penalties. Next, Media Guidelines as stated in Section 23 where the media's role is strictly regulated. They cannot disclose a child's identity or present potentially harmful content without permission. Violations lead to imprisonment and/or fines. The case of **Directorate General, Doordarshan v Anand Patwardhan**³⁹ defines the term "obscenity," further guiding media conduct.

Moreover, Employer Accountability is governed in Section 23(3) where employers of media or studios are jointly and severally responsible for their employees' actions and face penalties for violations.⁴⁰ Lastly, it can be seen in the Recognition & Protection of the POCSO Act which is notable for its detailed protection of child victims. It not only emphasises the reporting and legal process but also ensures the child's mental and emotional well-being. In essence, the POCSO Act's comprehensive approach addresses CSA's various facets, from initial reporting and child care to judicial proceedings and the media's role, aiming for a secure environment for children.

³⁹ AIR 2006 SC 3346.

⁴⁰ POCSO Act 2012, s 23.

4.5 PROCEDURES FOR RECORDING STATEMENT OF THE CHILD

Chapter 6 of POCSO provides further scrutiny on how the obtainment of the statement of the child or in simpler terms, how the authorities should undergo an investigation which concerns children. In the case of *Asaduddin Owaise v State of Andhra Pradesh*⁴¹, the definition of the investigation was laid out by the judge. The investigation covers all legal actions taken in accordance with the Code of Criminal Procedure 1973, for the purpose of gathering evidence, whether they are carried out by a police officer, a person other than a magistrate, or a person authorized in this capacity by a magistrate. This was defined in Section 2(h) of the Code of Criminal Procedure 1973 to serve as a notice of authority to conduct a fair investigation.

The procedure stated in the case of Assadudin was incorporated into the Standard operating procedure (SOP) for the investigation of cases under POCSO as approved by the Ministry of Home Affairs, India. Section 24 stipulates that the police officer must now be in uniform in order to record a child's statement. On top of that, it is stated that the police officer conducting the investigation must make sure that the child is never in any way in contact with the accused while the child is being examined at the child's residence or a place where he is familiar and comfortable. This provision specified that the officer initiating the investigation should be a female officer not below the rank of sub-inspector. The court accepts that the prosecutrix's sole piece of evidence is all that is necessary to support a conviction. There would not be a need for corroboration unless there was convincing evidence. Consequently, the requirement for judicial reliance on the prosecutrix's testimony to be corroborated is a matter of discretion rather than a legal requirement.

⁴¹ 2001 Cr LJ 3939.

This was exemplary in *Narender Kumar v State (NCT of Delhi)*⁴², that the statement provided by the prosecutrix. Because her deposition contained significant inconsistencies, the prosecutrix's statement cannot be depended on. She had a lot of issues and facts brought up in relation to her statement made in accordance with Section 161 of The Code. Her statement has undergone so significant embellishments or improvements that it is no longer reliable. The prosecutrix was a promiscuous woman who engaged in unlawful relationships with numerous children. The lower court made a mistake by improperly valuing the testimony of the defence witnesses questioned by the appellant. In a situation like this when the prosecutrix was married and 25 years old, the medical evidence is irrelevant. As a result, the court was of the opinion that an appeal should be allowed, following the provision mentioned as the court had discovered convincing evidence to disregard the statement of the prosecutrix.

It is a well-established legal principle that, once the prosecutrix's statement invokes confidence and the court accepts it as such, an indictment can be based solely on her testimony. The prosecutrix's statement need not be corroborated unless there are special conditions that require the court to do so. As a prerequisite for judicial reliance, the prosecutrix's testimony must be corroborated. This is not a legal necessity, but rather a prudential guideline given the facts and circumstances. Minor discrepancies or contradictions should not be used as an excuse to invalidate a solid prosecution case. A prosecutrix who alleges that she was a victim of rape is not a co-conspirator after the fact. Her testimony must be viewed in light of the law of probabilities, just like that of any other witness, as a high degree of possibility has been shown given that the topic at hand is a criminal charge. Interestingly, if the court regards it impossible to accept the

⁴² AIR 2012 SC 2012 Cri LJ 3033.

prosecutrix's version of events at the bare bones, it may look for direct or substantial evidence that might bolster her testimony.

In *Suresh N. Bhusare & Ors v State of Maharashtra*⁴³, the court notes testimony must be viewed in light of the law of probabilities, just like that of any other witness, as a high degree of possibility has been shown given that the topic at hand is a criminal charge. Interestingly, if the court regards it impossible to accept the prosecutrix's version of events at the bare bones, it may look for direct or substantial evidence that might bolster her testimony. Where the court could not have found any substantial support for the testimony, the prosecutrix's testimony shall not prevail in court. It can be seen that the court is very sensitive in the process of dismissing the prosecutrix's statement. The court would weigh the overall likelihood of a case rather than letting tiny inconsistencies or glaring disparities in witness testimony that are not of substantial nature. In terms of the acceptability of the victim's statement, the court should typically have little reluctance in adopting her account of the incident unless the evidence shows that she and her husband had compelling reasons to falsely blame the accused. A prosecutrix's statement must be given top priority consideration in a rape case, but at the same time, the general rule that the prosecution must prove its case beyond a reasonable doubt also applies, and there can be no indication that a prosecutrix would.

The report dives deep into legal guidelines and their implications. According to Sub-section 6 of the Act, unnecessary or irrelevant portions of a statement can be indicated for omission by a police officer, who then provides justifications to the

⁴³ 1999 1 SCC 220.

magistrate. However, further inquiries are still allowed even after an initial report is filed to the Magistrate as per subsections (2) and (8).

Section 26 meticulously lays down procedures for recording child statements. Statements from minors are to be recorded in the presence of trustworthy persons, often the child's parents or other trusted individuals. If language barriers or communication issues arise, the provisions of Section 26(2) and Section 26(3) allow for the involvement of translators, special educators, or experts attuned to the child's communication needs. For transparency and record-keeping, Section 26(4) mandates capturing these statements on audio-video devices.

The study made by Renu, R., & Chopra, G⁴⁴, citing the case of Jagadeesh, Deosthali, and Rege⁴⁵, exposes challenges inherent in the reporting requirements. The legal framework aims to punish offenders, but it might inadvertently deter victims from coming forward due to fears ranging from threats to societal shaming. A significant oversight in the POCSO Act is highlighted, wherein it lacks clear provisions that hold parents or guardians accountable, especially considering that many CSA incidents occur within the household setting. Looking abroad, the laws in Malaysia, especially under SOACA, serve as a point of comparison. There, stringent rules penalise family members and childcare providers who fail to report CSA incidents, as indicated by sections 27, 28, and 29 of the Child Act 2001 as cited by Wabah⁴⁶.

Further studies, including those by Agarwal et al. (2017) and Arya & Chaturvedi, tackle dilemmas faced by medical professionals and institutions connected

⁴⁴ Renu Renu and Geeta Chopra, "Child Sexual Abuse in India and the Protection of Children from Sexual Offences (POCSO) Act 2012: A Research Review", *Integrated Journal of Social Sciences*, vol. 6, no. 2 (2019): 49–56.

⁴⁵ N Jagadeesh, Padma Bhate-Deosthali, and Sangeeta Rege, "Ethical Concerns Related to Mandatory Reporting of Sexual Violence", *Indian J Med Ethics*, vol. 2, (2016): 1–5.

⁴⁶ Renu and Chopra, "Child Sexual Abuse,".

to children. The mandatory reporting requirements put many professionals, from teachers to doctors, in morally challenging positions, risking the breach of trust or violating children's rights to confidentiality.⁴⁷ Therefore, the occurrence should be recorded, but decisions about registering an offence and opening an investigation may be up to the investigator⁴⁸.

4.6 MEDICAL EXAMINATION

Section 27 of the POCSO Act provides a significant directive concerning the treatment and medical examination of child victims of sexual offences. According to this mandate, even if a formal FIR has not been lodged, the immediate medical examination of a child victim becomes imperative. This is to be conducted in alignment with the protocols set out in section 164A of the Code of Criminal Procedure, 1973. Moreover, if the victim is a female, it is prescribed that a female doctor should undertake the medical procedure. During this procedure, it's paramount that the child is accompanied by a trusted individual, ensuring the child's emotional security is not compromised. The law stipulates that a hospital employee who commits rape must serve at least seven years in prison⁴⁹.

Every hospital and medical institution in India is constitutionally bound to offer care to victims of child sexual abuse (CSA). This obligation under the law was evident in the case of *State vs Pankaj Chaudhary & Anr*⁵⁰. In this particular case, the absence of medical evidence led to the acquittal of the accused, even though the child's testimony

⁴⁷ Y Arya and A Chaturvedi, "Analysis of Underreporting of Cases of Child Sexual Abuse in India", *The World Journal on Juristic Polity*, (2017): 5.

⁴⁸ Belur and Singh, "Child Sexual Abuse,".

⁴⁹ Sydney Moirangthem, Naveen C Kumar, and Suresh Bada Math, "Child Sexual Abuse: Issues & Concerns", *The Indian Journal of Medical Research*, vol. 142, no. 1 (2015): 1.

⁵⁰ Criminal Appeals No. 2299 of 2009 with No. 2298 of 2009, decided on October 30, 2018.

indicated guilt. This event underscored the critical role that medical examinations and evidence play in cases pursued under the POCSO Act.

However, the Act and its mandates are not without challenges. One critique is its apparent gender bias, particularly when it specifies that a female victim should be examined only by a female doctor. Furthermore, there's a glaring inadequacy in the training provided to medical practitioners in India. Many still resort to outdated and traumatizing methods like the “two-finger test”⁵¹. The unreliability and distress caused by this test were highlighted in the case of *Raj vs State (NCT of Delhi)* (2014)⁵². Here, the court relied on the results of the test to acquit the accused, notwithstanding the Supreme Court's 2013 decree against its usage.

Healthcare professionals, though central to the Act's implementation, often remain unprepared or inadequately informed about CSA cases. Their unawareness can have devastating repercussions for victims, as shown in the *Babloo @ Dinesh vs State* (2019)⁵³ case. The court, in this case, accentuated the pivotal role of medical professionals and emphasized their need to be adequately trained to manage CSA cases sensitively.

The issue of consent and reporting obligations of medical professionals has also come to the fore. In the landmark judgment of *X vs State of Maharashtra* (2017)⁵⁴, a medical practitioner faced penalties for neglecting to report a CSA incident, emphasizing the legal duty of healthcare professionals in such situations.

⁵¹ Nisreen Khambati, “India’s Two Finger Test after Rape Violates Women and Should Be Eliminated from Medical Practice”, *BMJ*, vol. 348, (2014): 11.

⁵² CRL.A. 1702/2014.

⁵³ FIR No.251/2019.

⁵⁴ *Mukesh v State (NCT of Delhi)*, (2017) 3 SCC 717.

Further complications arise from contradictions within the law itself. A case in point is *Lalita Kumari vs State of Uttar Pradesh* (2012)⁵⁵, where the Supreme Court announced that lodging an FIR is compulsory for grave crimes like rape. This verdict, albeit not directly under the POCSO Act, poses questions about the Act's provision that permits medical examinations without an FIR's presence.

In wrapping up, it's evident that while the POCSO Act has made strides in addressing child sexual abuse, its actual execution in real-world scenarios has manifested gaps, from collecting medical evidence to ensuring healthcare professionals are equipped and informed. The Act's interpretation in various courts also brings to light inherent contradictions, concerns of gender bias, and the sensitivity demanded when handling CSA cases.

4.7 SPECIAL COURTS

Special Courts are provided for under Section 28. It states that the State Government shall designate for each district a Court of Session to be a Special Court to try the charges under the proposed legislation after consulting with the Chief Justice of the High Court and by announcement in the Official Gazette. A Special Court shall also try an offence for which the accused may be prosecuted under The Code concurrently with the prosecution of an offence under the legislation being considered.⁵⁶ Additionally, it stipulates that the Special Court established by the proposed legislation shall have jurisdiction to hear cases involving violations of section 67B of the Information Technology Act of 2000 that involve the publication or transmission of sexually explicit

⁵⁵ (2012) 4 SCC 1.

⁵⁶ S Yadukul, Sagar Vidya, and H S Kavyashree, "Profile of Cases Booked under POCSO (Protection of Children from Sexual Offences) Act in Chamarajanagar District, Karnataka", *Journal of Indian Academy of Forensic Medicine*, vol. 39, no. 1 (2017): 78–82.

material that represents children in any act or conduct or that facilitates the abuse of children online. Guidelines for Special Public Prosecutors are laid forth in Section 32. According to the proposed legislation's requirements, the State Government is required to designate a Special Public Prosecutor for each Special Court by publishing a notice in the Official Gazette. It also states that in order to qualify for appointment as a Special Public Prosecutor, a person must have practiced law for at least seven years. Anyone appointed under this provision is deemed to be a Public Prosecutor under The Code, and provisions of The Code will take effect accordingly.

4.7.1 Powers of Special Courts

The authority and operation of Special Courts are outlined in Section 33. It states that any offence may be brought before a Special Court without the accused being brought before it for trial upon receipt of a complaint of the circumstances constituting the offence or upon receipt of a police report of those facts.⁵⁷ It further stipulates that the Special Public Prosecutor or, as the case may be, the defence attorney must inform the Special Court of the questions to be asked of the child while the Special Court is recording the main examination, cross-examination, or re-examination of the kid. The Special Court has the authority to provide youngsters during trial frequent breaks if it deems it essential. It also states how the Special Court shall make certain the child is not called to testify in court repeatedly and establish a child-friendly environment by allowing a family member, guardian, friend, or relative whom the child has confidence in to be present in the court. Therefore, the Special Court must ensure that the child's dignity is always maintained and that aggressive questioning or character assassination

⁵⁷ Sessa Kethineni and Murugesan Srinivasan, "Special Courts and Protection of Children From Sexual Offenses in India", *Kriminalističke Teme*, no. 5–6 (2018): 189–204.

of the child is prohibited. Additionally, the Special Court must make sure that the child's identity is never revealed during an investigation or trial without the child's, his parents, or guardian's permission.

Additionally, it states that in addition to the child's name, the identity of the child's family, neighbourhood, school, and any other information that might identify the child's identity must also be disclosed. Special Court may, in suitable circumstances, order the immediate rehabilitation of a child or direct payment of compensation to a kid for any bodily or emotional harm inflicted on him in addition to the penalty. Furthermore, this clause stipulates that the Special Court shall, for the purpose of trying any offense against the proposed legislation, have all the authority of a Court of Session and shall, to the extent possible, follow the procedure laid out in The Code for trials before Courts of Session. The process in cases when a minor commits an infraction and the Special Court determines their age is covered in Section 34. It states that a kid who commits a crime covered by the proposed legislation will be dealt with in accordance with the Juvenile Justice Act 2000 of the Care and Protection of Children. Any order made by the Special Court shall be deemed invalid by any subsequent proof that the age of a person as determined by the Special Court was not the correct age of that person. Such question shall be determined by the Special Court after satisfying itself as to the age of such person. It shall record in writing its reasons for such determination.

4.7.2 The Special Court's Proceedings

Section 27 of the POCSO Act underscores the pivotal role of immediate medical examinations for child victims of sexual offenses, even in the absence of an FIR. This

was exemplified in the case of *State vs Pankaj Chaudhary & Anr.* (2018)⁵⁸, where an absence of medical evidence significantly impacted the acquittal of the accused. Additionally, critiques of the Act highlight a perceived gender bias, especially in its specifications about female victims and their examiners. Cases like *Raj vs State (NCT of Delhi)* (2014)⁵⁹ bring attention to dated and potentially traumatic medical practices, such as the contentious "two-finger test", that is still in use.

Healthcare professionals play a central role in the Act's execution, yet their readiness and adeptness often come under scrutiny. The *Babloo @ Dinesh vs State* (2019)⁶⁰ case emphasized the need for medical professionals to be sufficiently trained and sensitive in handling CSA cases. Furthermore, their obligations, as stressed in the *X vs State of Maharashtra* (2017)⁶¹ case, require them to report instances of abuse, emphasizing the considerable responsibility they bear. The *Lalita Kumari vs State of Uttar Pradesh* (2013)⁶² case, although not directly under the POCSO Act, introduced complexities concerning medical examinations and the necessity of an FIR, reflecting the intricacies and potential inconsistencies in the Act's real-world applications.

4.8 DISTINCTIVE FEATURES OF THE POCSO

There are certain unique features of POCSO that make it suitable for CSA cases and ahead of the general criminal enactment i.e., the Indian Penal Code. Some of the features include the definition/interpretation section, clarification on the consent of a child, punishment on obligatory reporting, offence of penetrative assault, aggravative penetrative sexual assault, and the use of gender-neutral words.

⁵⁸ Criminal Appeals No. 2299 of 2009 with No. 2298 of 2009, decided on October 30, 2018.

⁵⁹ CRL.A. 1702/2014.

⁶⁰ FIR No.251/2019.

⁶¹ *Mukesh v State (NCT of Delhi)*, (2017) 3 SCC 717.

⁶² (2012) 4 SCC 1.

4.8.1 Terminologies/ Definitions

will Using appropriate terminologies to describe matters relating to CSA has been one of the distinctive features of the POCSO Act, as the correct definition of a matter may avoid issues on technical interpretation later during the implementation of the law.⁶³ Arguably, the poor structuring of definitions in legislation may cause cracks in the prosecution case, which undoubtedly benefit the offender by playing around the issue of technicalities to escape conviction. Another significance of having appropriate, vivid, and unambiguous definitions is to save the court from unnecessary judicial interpretation of the definition, as the court may be able to infer the legislature's clear intention.

In appreciating the importance of the appropriate definitions, it is necessary to study the definitions used under the framework of the POCSO Act and further comprehend the nature of the subject matter to which the definition tries to give meaning. Under the POCSO Act, the main section that contains the specific definitions to be effective throughout the act is section 2, and it contains fourteen definitions that are unique in the context of the POCSO Act. Section 2 covers some definitions that are newly introduced under the Act, namely 'aggravated penetrative sexual assault', 'aggravated sexual assault', 'child', 'child pornography', 'penetrative sexual assault', 'sexual assault', 'sexual harassment', 'shared household', 'Special Court', 'Special Public Prosecutor'. Apart from new definitions, section 2 of the Act also covers some existing definitions under different legislation, namely 'domestic relationship' and 'religious institution'.⁶⁴

⁶³ B Manimozhi, "Interpretation of Sexual Assault under the POCSO Act with Special Reference to *Satish Ragde v State of Maharashtra: A Critical Study*", *Supremo Amicus*, vol. 27, (2021): 279.

⁶⁴ Ibid.

Since the POCSO Act's definition section does not cover all definitions, section 2(2) acts as a general provision, stating that any terms and expressions used in the POCSO Act that are not defined but are covered by other laws, such as the Indian Penal Code, the Code of Criminal Procedure, the Juvenile Justice (Care and Protection of Children Act, and the Information Technology Act, shall be defined in accordance with those laws.

4.8.2 Definition of Child

Since the POCSO Act is all about protecting sexual offences from children, thus, the definition of a child is significant as the child is the essence of the POCSO Act. Although one might argue that 'child' under Indian law has various meanings assigned to it according to different legislations as well as particular circumstances relating to children, there is quite an amount of literature that celebrates the definition of a child being used in the POCSO as a "critical since it not only identified a 'child', but also provided for offences to be tried under that definition" (Tejas Chhabbra, 2021)⁶⁵, "salient feature" (Harikumar Pallathadka et al., 2021)⁶⁶. Apart from its recognition in affording protection generally to all persons who is under the age of 18 years, the framing of the definition of 'child' also suffers some backlash as it is argued that the definition is not appreciating the social facts that in India generally, it is typical for the child under the age of 16 years to be sexually active in a consensual manner.⁶⁷ It is further argued that the legislature, in enacting the definition of 'child', seems to

⁶⁵ Tejas Chhabbra, "Current Position of Child Sexual Abuse in India", *Int'l JL Mgmt. & Human*, vol. 4, no. 6 (2021): 160.

⁶⁶ Pallathadka, Kumar, and Kumar, "A Socio-Legal Analysis,".

⁶⁷ Chitwan Deep Singh, Prashant Pranjali, and Sahil Arora, "The Protection of Children from the Sexual Offences Act, 2012: A Critique of the Decision to Raise the Age of Consent for Sexual Relations", *J. Indian L. & Soc'y*, vol. 3, (2011): 286.

disregard the recommendations made by the National Commission for the Protection of Child Rights and other Indian prominent social figures to set the cut-off age at below 16 years for the POCSO to be applicable and not to the criminalise consensual sexual activities for a person beyond 16 years of age.⁶⁸

Additionally, Renu and Geeta Chopra,⁶⁹ in contending against the idea of criminalising sexual engagement between persons under eighteen, laid down the argument that in doing so, the current law seems to hinder adolescents from seeking advice on sexual health knowledge from medical professionals to guide them in preventing unsafe sexual exploration and therefore on the said basis the law must allow specific exceptions to that effect.⁷⁰ Notwithstanding the opposing arguments, the current definition of ‘child’ enshrined under the POCSO Act is aligned with international policy documents namely the Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse that has been adopted by the Interagency Working Group including INTERPOL and the United Nations Convention on the Rights of the Child (UNCRC) that had been ratified by India.⁷¹

4.8.3 The Issue of Consent

Jurisprudence is split into two ideological perspectives regarding the age of consent. One viewpoint deems the current legal framework satisfactory, while the other viewpoint asserts that it is inadequate. As for the former view, it had been reflected in the definition of ‘child’ under the POCSO Act that covers anyone who is under eighteen

⁶⁸ Ibid.

⁶⁹ Renu and Chopra, “Child Sexual Abuse,”.

⁷⁰ Abhinav Mehrotra and Konina Mandal, “POCSO Cases: Pathetic Pendency”, (2021): 14-15.

⁷¹ ECPAT International. *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*. 2016. Available at: <https://ecpat.org/wp-content/uploads/2021/05/Terminology-guidelines-396922-EN-1.pdf>. Accessed on December 2024.

years of age, and this is the view subscribed by the Standing Committee formed by the Indian Parliament that finally enshrined as a current position of law relating to CSA.⁷² Ironically, the draft bill of the POCSO was prepared by the National Commission for the Protection of Child Rights initially proposed the definition of child under POCSO to be “anyone who is under 16 years of age” and obviously this suggestion is not accepted by the Committee and therefore increased the age threshold.⁷³ The view of the committee was based on the fact that by considering the other laws relating to children for instance the Indian Juvenile Justice Act 2006 that regards a child to be under eighteen years of age and to further support its move, the committee argued that the age threshold of a child is in parallel with Article 5 of the Convention on the Rights of the Child (“CRC”). Nonetheless, the committee’s stance faced a multitude of criticisms based on the arguments that the current definition of a child is an outright disregard of the present social attitudes that are prevalent among Indian adolescents for instance child marriages and also denies the rights of the child in the sense of consensual sexual relationship.⁷⁴

4.8.4 Obligatory Reporting

Another distinctive feature of the POCSO Act is that under this act, there is a provision for mandatory reporting of CSA pursuant to Section 19. The effect of this provision is that it creates an obligation for every person including the child victim to report to the Special Juvenile Police Unit (SJPU) or ordinary police. This provision is enacted in accordance with the recognised international policy concerning child protection.⁷⁵ It is

⁷² Singh, Pranjali, and Arora, “The Protection of Children,” 286–301. .

⁷³ Ibid.

⁷⁴ Belur and Singh, “Child Sexual Abuse and the Law in India: A Commentary.”

⁷⁵ Hitabhilash Mohanty and Devpriya Banerjee, “An Analysis of Protection of Children from Sexual Offences Act, 2012 (POCSO ACT)”, *SSRN*, vol. 00, no. 00 (2021): pg no.

understood that the spirit of this provision is to make the duty to report CSA widely shouldered among the community and to encourage proactive communal participation in preventing child sexual offences. Section 21 provides for a punishment of six-month imprisonment where any person in the community fails to report an offence under the Act.⁷⁶

It is argued that the reporting obligation is creating difficulty for healthcare professionals or school counsellors in providing guidance and education to adolescents about safe and healthy sexual relationships because as adolescents, they are still exploring their sexuality. By report, the sexual activities done between the adolescent will violate the doctor-patient or counsellor-student confidentiality. Mandatory reporting also creates several challenges for institutions, charities, and organizations firmly devoted to establishing trusting connections with young people and engaging with underprivileged communities and children. If they are obligated by law to disclose any knowledge of the consensual sexual activity, though in the case involving minors, this would severely impair their ability to connect and engage with young people, and also, they may lose the trust placed by the child beneficiaries upon the organisations. In this line of work, trust is of prime importance. Losing the trust will impact their effort to connect with the child beneficiaries.

Furthermore, the mandatory reporting imposed under the POCSO Act is still debatable as to its effectiveness due to the prevalent factors in India because the majority of child sexual offences were committed by members of the family, extended family, or someone within the family circle that affects the decision-making process to report the crime to avoid further conflicts within the family and to escape the inconvenience

⁷⁶ Belur and Singh, "Child Sexual Abuse,".

of going through all the legal process.⁷⁷⁷⁸ To illustrate the hesitancy on the part of the victims to come forward and report the sexual crime that befell them, it is best to delve into the usual events faced by the victims and those who support them in the context of India. The victims and those who support them are usually subject to hostile police interrogations, humiliating and unpleasant medical tests, the offender's intimidating pressure to withdraw the police reports, and the fear that the offender will cause harm as an act of revenge. Court proceedings may also be stressful and not accommodating for children since they might run for years and entail intense cross-examinations.⁷⁹

Sadly, the lack of community support and cultural stigma also contribute to the non-reporting factor in Indian society as the victim's family tends to avoid the shame of the sexual crime that taints the family above all else. This attitude affects their decision not to make any report even though the silence will indeed gravely affect the victim the most as the victim is the one who has to continuously suffer the sexual abuse indefinitely.⁸⁰

4.8.5 Penetrative Sexual Assault

Under the POCSO Act, specific provisions govern the offence of penetrative sexual assault. The definition of penetrative sexual assault under the POCSO Act recognises a wide range of conducts to be part of sexual abuse, namely penetration by penis or by object or body part other than the penis into the vagina, mouth, urethra, or anus of a child or makes the child do so with him or any other person and also cover oral sex. The provision also extends to manipulating any part of the child's body to cause penetration

⁷⁷ Renu and Chopra, "Child Sexual Abuse," 49–56.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Belur and Singh, "Child Sexual Abuse,".

into the vagina, urethra, anus or any part of the child's body or makes the child do so with him or any other person. The current position of penetrative sexual assault under the POCSO Act affords reinforced protection to children in India against any form of sexual assault.⁸¹

Prior to the enactment of the POCSO Act, a notable case known as *State vs Pankaj Choudhary* is often cited where the defendant in this case was convicted exclusively for the offense of indecently violating modesty according to the IPC. The justification for not pursuing a rape charge under the IPC against the defendant was that it didn't cover the specific act of 'digital penetration of the anus and vagina of a child victim'.⁸² Post-POCSO, the *lacunae* had been cured as a similar act shall be caught under section 3 of the POCSO Act. The punishment aspect of penetrative sexual assault had undergone a substantive amendment in 2019. In contrast, the previous punishment provided under the POCSO Act is a generic punishment of imprisonment for a minimum term of 7 years but may be extended to imprisonment for life and shall be liable to a fine. The 2019 amendment of the POCSO Act further enhances the gravity of the punishment by stipulating a specific imprisonment term for an offender who committed penetrative sexual assault against a child below 16 years of age that is punishable with a minimum of 20 years to life. According to the new 2019 amendment, the punishment of fines is also described as just and reasonable and paid directly to the victim to cover the medical expenses and rehabilitation costs.

⁸¹ Ibid.

⁸² Srivastava, "Indian Legal Analysis,".

4.8.6 Aggravated Penetrative Sexual Assault

In addition to the ordinary penetrative sexual assault, the POCSO Act also provided for provisions governing various penetrative sexual assault acts that fall under the aggravated penetrative sexual assault category, which is embodied under section 5. Section 5 was framed in a voluminous manner to encompass diverse aggravating circumstances, including when the crime was committed by the police, member of the armed forces, public servants, hospital workers, institution staff, and many more. The punishment for aggravated penetrative sexual assault also increased after the post-amendment of the POCSO Act from imprisonment of a minimum of 10 years to not less than 20 years. Also, the court in India presently has the option to pass the death sentence.

4.8.7 Gender-neutrality

The definition of ‘child’ in respect of the meaning of gender under the POCSO Act is a notable and awaited progress in the Indian criminal justice system. By virtue of section 2 of the Act, the definition of a ‘child’ states “any person,” denoting a gender-neutrality effect of the provisions stipulated under the Act. Through its gender-neutral approach, the POCSO Act doesn't confine safeguarding against sexual offenses solely to female children; instead, it also encompasses the protection of male children. This effect aligns with the findings of a child abuse report conducted by the Ministry of Women and Child Development of India in 2007 reveals that contrary to the consensus in India, young men are just as likely to be victims of sexual abuse as young women are.⁸³ This salient feature of the POCSO Act is also in compliance Article 2 of the United Nations Convention on the Rights of the Child prohibits any laws relating to children of its

⁸³ Lina Acca Mathew, “Legislative Models of Prosecuting Child Sexual Abuse in India: A Review and Critical Analysis,” (Unpublished Ph.D thesis, Queensland University of Technology, 2017) 77-78.

member state to treat children equally and free from discrimination, for instance, based on gender. Hence, the POCSO Act truly adheres to the principle of equality before the law enshrined under Article 14 of the Constitution of India.⁸⁴ Definitely, the gender-neutrality nature of the POCSO Act marks a new milestone in the criminal laws system in India as it has been strengthened and rendered the legislation effective in combating the rise of sexual abuse committed against children regardless of their gender.⁸⁵

4.8.8 The implementation of United Nation Convention on the Rights of Child into POCSO 2012

The Protection of Children from Sexual Offences Act 2012 (POCSO 2012) was enacted by the Indian legislature as a response to the growing recognition of child sexual abuse (CSA) and in compliance with the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC, adopted in 1989, is a comprehensive international treaty that sets out the civil, political, economic, social, health, and cultural rights of children. By ratifying the UNCRC, India committed to taking all necessary legislative, administrative, and other measures to protect the rights of children. POCSO 2012 is a testament to this commitment, incorporating the principles and obligations of the UNCRC to create a robust framework for protecting children from sexual offences.

The principle of the best interests of the child in Article 3 is a fundamental aspect of the UNCRC, which mandates that all actions concerning children should primarily consider their best interests. POCSO 2012 reflects this principle by ensuring that the legal framework is child-centric, prioritizing the protection and welfare of children over other considerations.

⁸⁵ Ibid.

For the Non-Discrimination under Article 2), The UNCRC requires that all children are treated equally and are protected from all forms of discrimination. POCSO 2012 upholds this principle by adopting a gender-neutral stance, ensuring that both male and female children receive equal protection under the law.

Article 6 of the UNCRC underscores the child's inherent right to life and the obligation of states to ensure the child's survival and development. POCSO 2012 aligns with this principle by providing stringent measures to prevent sexual offences against children and ensuring their physical and psychological well-being.

Next, the Protection from All Forms of Violence in Article 19, the UNCRC explicitly states that children must be protected from all forms of physical or mental violence, injury, abuse, neglect, or exploitation. POCSO 2012 embodies this commitment by criminalizing a wide range of sexual offences, including penetrative and non-penetrative sexual assault, sexual harassment, and the use of children for pornographic purposes.

Article 12 of the UNCRC affirms that children have the right to express their views freely in all matters affecting them and that their views should be given due weight according to their age and maturity. POCSO 2012 incorporates this principle by ensuring that the child's testimony is given significant importance during judicial proceedings.

POCSO 2012 includes provisions for the mandatory reporting of sexual offences against children. This aligns with the UNCRC's call for states to implement measures that protect children from abuse. Section 19 of POCSO mandates that any person who has knowledge of an offence under the Act must report it to the Special Juvenile Police Unit or local police, ensuring that cases of CSA are promptly addressed.

The Act mandates immediate medical examination and psychological assistance for child victims of sexual offences, even in the absence of a formal First Information Report (FIR). This provision ensures that the child's health and well-being are immediately addressed, reflecting the UNCRC's emphasis on the child's right to health and recovery.

POCSO 2012 emphasizes the need for the training and sensitization of all stakeholders involved in the implementation of the Act, including police officers, judicial officers, and medical professionals. This aligns with the UNCRC's call for states to take appropriate measures to ensure that those responsible for the care and protection of children are adequately trained.

POCSO 2012 is a landmark legislation that significantly enhances the protection of children from sexual offences in India. The implementation of POCSO 2012 demonstrates India's commitment to fulfilling its obligations under the UNCRC and provides a comprehensive framework for safeguarding the rights and well-being of children.

4.9 COMPARATIVE PERSPECTIVE BETWEEN POCSO AND SOACA

To examine and subsequently measure the adequacy of the current Malaysian SOACA in combating and eradicating sexual crimes against children, it is necessary to put both the SOACA and the POCSO Act side by side and draw comparisons based on several headings as thoroughly discussed below: -

4.9.1 Categorisation and Composition of Offences

POCSO 2012 outlines a range of five types of offenses. Firstly, Penetrative Sexual Assault involves acts such as inserting the penis, an object, or another body part into a

child's mouth, anus, urethra, or vagina. It also covers instances where an individual solicits or coerces a child to engage in such acts. Secondly, Sexual Assault pertains to situations where someone intentionally touches a child in a sexual manner or compels the child to engage in such contact with themselves or others. Thirdly, Sexual Harassment encompasses various behaviours, including making sexually suggestive remarks, gestures, or noises toward a child, repeatedly following a child, or engaging in indecent exposure. Fourth, Child Pornography addresses activities involving the creation, distribution, possession, or viewing of explicit material involving children, aiming to prevent the exploitation of minors for the production or consumption of sexually explicit content. Fifth, Aggravated Penetrative Sexual Assault/Aggravated Sexual Assault involves committing penetrative sexual assault or sexual assault under heightened circumstances, often entailing specific aggravating factors that exacerbate the gravity of the offense.

On the other hand, SOACA 2017 has three specific categories of sexual offenses involving children. First, Child Sexual Abuse Material (Part II) deals with offenses related to Child Sexual Abuse Material, encompassing activities such as creating, distributing, possessing, or viewing explicit material involving minors. Secondly, Child Sexual Grooming (Part III) addresses offenses related to child sexual grooming, which includes actions aimed at enticing or preparing a child for sexual exploitation. Thirdly, Sexual Offences (Physical and Non-Physical) (Part IV) covers a broad spectrum of sexual offenses against children, which are both physical and non-physical forms of sexual abuse.

However, the Sexual Offences Against Children Act (SOACA) of 2017 does not encompass penetrative sexual assault as addressed in the POCSO Act of 2012. The act of penetrative sexual assault is dealt with under Section 376 of the Penal Code,

pertaining to the punishment for rape, and under Section 377A, which concerns carnal intercourse against the order of nature. The aspects of Sexual Assault outlined in the POCSO Act of 2012 are accounted for in Part IV of the SOACA 2017. This encompasses Section 14 for physical sexual assault on a child and Section 15 for non-physical sexual assault on a child. Moreover, the category of Sexual Harassment as defined in the POCSO Act of 2012 finds its place within the SOACA 2017 as offenses associated with child grooming, specifically under Section 11, which deals with sexually communicating with a child. Lastly, aggravated penetrative sexual assault or aggravated sexual assault is not within any provisions of the SOACA 2017.

In essence, even though both Acts share the common goal of protecting children from sexual offenses, the difference in the number of offenses they address reflects a nuanced approach in their respective scopes. SOACA 2017 chooses to concentrate on specific categories of offenses with detailed provisions, while POCSO 2012 opts for a broader categorization, encompassing a wider range of offenses against children.

4.9.2 False Reporting/ False Complaint

While reporting is pertinent to be made mandatory, other aspects that should be addressed are the failure to report or worse, the lodgement of a false report. In terms of failure to report and providing a false report, the POCSO Act draws out the law and clarifies that the penalty for failing to report in accordance with Sections 19 or 20 or failing to record in accordance with Section 19(2) is either imprisonment of either sort, which may last up to six months, or a fine, or both. Importantly to note, Section 21(3) safeguards children from the obligation of making a report if such a case is within their knowledge. Meanwhile, Section 22(1) provides for the penalty to anyone who files a false complaint or gives false information about another person in connection with a

violation of Sections 3, 5, 7, or 9 solely with the goal to humiliate, extort, threaten, or defame him is subject to a fine, a term of imprisonment that may reach six months, or both. In a similar vein, subsection (3) penalizes anyone who knowingly provides false information against a child, and thereby such action results in the victimization of the child is an offence under the Act and shall be punished with imprisonment of a maximum of one year period or subscribed to a fine payment or both. Likewise, the above, children enjoy the privilege of being immune to this punishment as subsection (2) rules that no punishment will be upon a child who gives false complaints or reports. Regardless, this calls for a revision because, in some instances, this privilege is always misused. It is afraid that a child who has enmity or is against any adult, especially the family member may use this immunity to put an adult in hot water.

One significant case is ***Mohd Hussain v State*** in which the appellant appealed to the Appellate Court to set aside the judgment and the order of conviction under Section 342, 376 of the Indian Penal Code and Section 6 of POCSO Act, 2012 by the Special Judge at Puducherry UT and acquit him from the charges of the offence. During the appeal, the appellant's lawyer argued that the child victim had been coached and influenced by her mother, who held animosity towards the appellant due to a financial transaction between their families. The appellant's defense rests on the absence of substantial evidence besides the victim's statement. This argument is founded on the observation that the child victim appeared content and composed while being questioned in court, indicating an absence of emotional distress. Additionally, the prosecution's counterargument, contradicting the victim's statement, lacked support from the victim's medical records, which indicated vaginal 'congestion' and suggested the absence of penetrative assault.

Nonetheless, the Appellate Court decided against the Appellant by defending the child victim to be ‘relaxed’ and not disturbed during the examination in chief which took place three years after the date of the incident. Thus, the Court believed that the period is long enough to justify the emotional difference displayed by the child victim.⁸⁶ However, contemplating that if the enmity and vengeance issue due to the financial issue that may have occurred between the parties as claimed by the Appellant had truly taken place, there may be possibilities of this luxury to be misused between adults to deny the freedom of another. Although the POCSO Act is applauded for seemingly covering entirely the rights of children, it must also deliver fairness and just as all other laws do. On the contrary, there are no provisions under the SOACA to mention the tendency of false reporting instances what more the penalty over such an offence. It is a loophole that shall be scrutinised by the Malaysian authority so as to ensure that the law is not exploited at the whims and fancies of ill-intended persons.

4.9.3 Aspect of Punishment

Minimum Punishment

Under the POCSO Act, the punishment for different offenses varies. Under Section 7, as outlined in Section 8, the prescribed punishment involves minimum imprisonment for at least 3 years and a maximum of 5 years, along with a fine. For offenses related to the use of a child for pornographic purposes and Section 3 states that a minimum imprisonment term of 2 years, which can extend up to life imprisonment, coupled with a fine. Regarding the exploitation of a child for pornographic purposes as per Section 7, the punishment is a minimum imprisonment of 6 years, which may extend to 8 years,

⁸⁶ *Indian Kanon*, “Mohamed Hussain vs The State Of Puducherry U.T Rep.By on 16 March, 2021”, <<https://indiankanon.org/doc/103451600/>> (accessed 30 July, 2023).

alongside a fine. Similarly, for the exploitation of a child for pornographic reasons under Section 9, the prescribed penalty is a minimum imprisonment term of 8 years, which can be extended to 10 years, accompanied by a fine.

In Malaysia's legal framework, SOACA 2017 does not specify a mandatory minimum imprisonment term for these offenses. This distinction highlights that Malaysia's approach to punitive measures lacks a predetermined minimum duration of imprisonment, differing from the POCSO Act, which expressly establishes specific minimum terms of imprisonment for certain offenses.

Maximum Punishment

The POCSO Act has a more stringent punishment framework, following the amendment act of 2019, in which it entails the harshest consequences, including a potential sentence of life imprisonment or, in certain instances, the imposition of the death penalty. Contrasting this, within the context of Malaysia's legal landscape, under Section 5 of the SOACA 2017, the maximum penalty entails a period of imprisonment, reaching up to 30 years, and a minimum of six strokes of whipping.

In essence, the POCSO Act, distinguished by its robust punitive spectrum heightened by the 2019 amendment, embraces the concept of rigorous life-term imprisonment as its foremost punitive tool. In contrast, in Malaysia, specifically outlined in Section 5 of the Sexual Offences Against Children Act 2017 (SOACA 2017), the approach to punishment takes on a multifaceted character. This involves combining an extended period of imprisonment with a distinct and notable element of corporal punishment through whipping.

4.9.4 Definition and Interpretation Section

The POCSO Act provides one specific section that contains all the definitions and meanings used in the context thereunder. However, all the definitions under section 2 of the POCSO Act are further defined in the particular sections that contain the respective offences namely definitions under sections 12(1)(a), (b), (f), (g), (i), (j), (l), (m). Some of the definitions under section 2 adopt and refer to similar definitions stipulated under other legislation namely section 12(1)(e) and (h) which refers to the definition under the Protection of Women from Domestic Violence Act, 2005, and the Religious Institutions (Prevention of Misuse) Act, 1988 respectively. Since the POCSO Act cut across various other Indian legislations, section 2(2) is necessary to adopt the definitions from the listed statutes therein should there be words and expressions used but not defined under the POCSO Act. Whereas, the SOACA does not have a specific definition section and this leads to uncertainty in the interpretation and enforcement of the Act. Further, the SOACA also has a schedule of offences in the other Malaysia legislations that may be charged under the act in the event that the victim is a child, and in these circumstances for the offence listed in the schedule, the definitions assigned in that particular legislation shall be applicable. Similar to the POCSO Act, the SOACA's nature is cross-cutting legislation, and the court in interpreting the expressions and terms used but not specifically defined thereunder, may utilize its discretion and refer to the Interpretation Act 1948 And 1967 to achieve the best reflection of the intention of the legislature.⁸⁷

⁸⁷ Interpretation Act 1948 (Act 388); *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; *Syed Afendy Ali bin Syed Abid Ali v Public Prosecutor* [2021] 8 MLJ 643; *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590.

4.9.5 Publicity and Awareness of the POCSO Act

Among other features that set the POCSO Act apart from the SOACA is that section 43 of the POCSO Act prescribes specific obligations on the Central Government and every State Government to conduct advocacy and publicity initiatives for the purpose of propagation of awareness on the provisions of the act to the public via all forms of media.⁸⁸ In addition, the provision also obligates the officers of the government of each level to be equipped with sufficient knowledge relating to the implementation through training. By having this kind of provision, the POCSO Act radiates its seriousness in addressing challenges from any angle possible including its implementation and operation. Unlike the POCSO Act, there is no provision to that effect, and it depends on the effort of the respective ministry's policy in ensuring the provisions of the SOACA without any statutory urge.

4.9.6 Conflict with other Laws and Inconsistencies

Since the POCSO Act cross-cuts many legislations, mainly the Indian Penal Code, the issue of possible contradiction is inevitable, and to address this issue, the Indian legislature had embedded a specific provision of section 42A stating that the POCSO Act is not in derogation of any other law, but it shall be an addition to the provisions of any law for the time being in force in the event of inconsistency. As far as the provision on inconsistency is concerned, the SOACA does not prescribe any provision for that matter, nonetheless, the issue of inconsistency had been dealt with by the Malaysian court and it was held that in the event of inconsistency provided that the offences committed are under the SOACA, the maxim of *generalia specialibus non-derogant*

⁸⁸ S Chemmalar, "Roles and Functions of Various Agencies in Conducting POCSO Cases: Judiciary, Prosecutors, Police and the Child Welfare Committee" in *Delivering Justice*, edited by Sibnath Deb & G. Subhalakshmi (London: Routledge India, 2020), 231–42.

applies in favour of the SOACA on the ground that the act is special legislation dealing with sexual offences against children.

In the case of *Chan Kok Poh v Public Prosecutors*⁸⁹, the question posed was whether Section 18 of SOACA 2017 empowered the trial judge to convict the accused based on the uncorroborated evidence of the child which was contrary to Articles 5 and 8 of the Federal Constitution and s 133A of the Evidence Act 1950. The court in deciding the matter has stated that the Evidence Act 1950 is a general law governing the general law on the reception of evidence while SOACA 2017 is a specific law on sexual offences against children, and Section 133A of the Evidence Act 1950 is applicable whether the Child is a victim or offender or a witness but Section 18 of the SOACA 2017 is specifically for a child who is a victim.

The court has cited the case of *Mohamed Sugul Esa Mamasan Rer Alalah* where as a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character; unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character; and whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

⁸⁹ [2022] 9 MLJ 755.

The court has further stated the maxim *generalia specialibus non-derogant* meaning a specific provision in a specific law overrides a general provision in a general law. The general principle to be applied to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together. And the reason is that the legislature has had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do. In conclusion, the court held that the public prosecutor is not relieved of his burden at all. What happened is, by giving some emphasis on the child evidence where a child is the victim (and not in any other case).

4.9.7 Evidential Regime

In terms of the evidential regime relating to a child, the POCSO Act is overtaken by the SOACA as there is no provision stipulated under the POCSO Act to govern the evidence of a child witness. Chapter VIII of the POCSO Act only covers the procedure and powers of Special Courts to tone down the common stringent and intimidating legal procedure to accommodate the child victim. In relation thereto, sections 33 until 38 of Chapter VIII laid down the provisions on how the recording of evidence, manner of testifying, and trials need to be conducted with high consideration to the fact that the victim is a child that is vulnerable to the usual ways of criminal procedure and thus, Chapter VIII is included under the POCSO Act. However, no provisions on the evidential rules especially for offences under the POCSO Act were stipulated thereunder.

In contrast, the SOACA does not prescribe any provisions in relation to the procedure of the court in child sexual offences cases for the reason that under Malaysian law, there is special legislation namely the Child Act 2001⁹⁰ (“CA 2001”) that governs the Court for Children. As opposed to the POCSO Act, section 17 under the SOACA provides a presumption stating that a child victim is a competent witness and subject to the court’s opinion if it is otherwise. The position of a child witness under the SOACA is given a heavy evidential value as under section 19, the court is allowed to convict an accused of offences under the SOACA based on the uncorroborated evidence of a child witness given under oath or not.

4.9.8 Defence of Reasonable Step Ascertaining the Child’s Age

Under the SOACA, section 20 affords specific defence to the accused under the circumstances whereby the accused may escape conviction under the act if the accused believes that the victim is not a child. Nonetheless, for the defence to be invoked, the accused shall prove to the satisfaction of the court that prior to the commission of the offence stipulated under the SOACA, all reasonable measures had been taken to ascertain the age of the victim. In comparison, the POCSO Act does not have the same defence.⁹¹ Where successfully proven, the defence of mistaken believe of victims' age will be upheld in favour of the accused. This is especially important in the era of statutory rape as long as the accused took reasonable steps to determine the age of the child.⁹²

⁹⁰ Child Act 2001 (Act 611).

⁹¹ Arshia Sekhri, “Critical Analysis: Age Determination under the POCSO Act, 2012”, *Indian JL & Legal Rsch*, vol. 5, no. 2 (2023): 1.

⁹² Larry W Myers, “Reasonable Mistake of Age: A Needed Defense to Statutory Rape”, *Michigan Law Review*, vol. 64, no. 1 (1965): 105–36.

4.9.9 The Aspect of the Court's System and Enforcement Authority

Section 19(6) of the POCSO Act is about the three main bodies involved in enforcing the law at hand. Those are the Special Juvenile Police Unit (SJPU), the Special Court and the Child Welfare Committee (CWC). The optional to the SJPU is the local police whereas the special court is the sessions court. This coordination is intended to be accomplished through Section 28(1) of the POCSO Act that State governments are obligated to consult the chief justice of the High Court to designate a sessions court to be a special court to attempt similar crimes in order to speed up the legal process. Additionally, Section 32(1) requires that a special public prosecutor be appointed by the state government for handling cases under the POCSO Act and at the special court. This indicates that the Prosecutors ought to have specialised training to handle these instances and be knowledgeable about the POCSO Act 2012. However, the implementation has been insufficient in practice as the Special Courts are not built in every district of the country. The disposal process has been significantly delayed as a result of this. According to a Praja Foundation study, 99% of cases reported under the (POCSO) Act are still being tried as of 2020. Setting up of the virtual courts to blend with the pandemic situation and the disorganised police mechanism are among the factors to the delay among others.⁹³

As such, the Supreme Court ruled that the constitution of a special police task force should be done by every State. In contrast, the current practice of only having this special force in a selected place has been seen cause delays in the investigation. It is ridiculous for these limited forces to handle all investigations throughout the Country whereby a further classification by each State hopefully is able to ease the investigation

⁹³ Mehrotra and Mandal, "POCSO Cases,".

process. It further directs that all High courts be mindful to delegate the cases under the POCSO Act to be tried and disposed of by the designated special courts. This is believed to only help with the cases documented because apparently to date, the judges serving these special courts are not subject experts that have yet to receive the additional training by the state government. As such, these judges do not possess the capability of understanding the nuances relating to the POCSO laws perfectly.

Mehrotra & Mandal⁹⁴ cited a judgment delivered by one special court in Thane, Maharashtra on 22nd December 2016 whereby the court gave a 16-year-old girl a perjury notice. The case violated Section 22 (2) of the Act, which protects children from being punished for providing false information. Hearings are delayed as a result, which negatively affects the child who then frequently has to testify before the court. The child becomes ashamed in front of people, fears seeing the accused, and repeatedly experiences anxiety when confronting the judges. Other than that, is a reminder for the judges to avoid adjourning cases but instead attempt to complete the trial without prolonging it. Needless to say, a quality trial and justice must be prioritised and not only to chase the completion per se. The High Court is again reminded to create a child-friendly atmosphere in reference to Section 33(4) of the POCSO Act, taking into consideration and making it practicable that the victim's family member, guardian, friend, or relative that are trusted by the victim should be present during the Court proceedings to keep the victim accompanied and not feel alien of the serious environment. The importance of doing so is to make the victim comfortable so that the victim is more confident and relaxed in helping the Court run the trials.

⁹⁴ Ibid.

Interestingly, the establishment of a committee known as the Child Welfare Committees (CWC) was constituted under the Juvenile Justice (Care & Protection of Children) Act, 2000. According to Mehrotra & Mandal, the committee consists of one chairperson with four non-judicial members who are knowledgeable and specialised in the matter of child welfare and child psychology. These committees are entrusted with a variety of duties, including directing the medical officer to conduct a thorough physical exam in accordance with child-friendly procedures, taking note of children produced by the police or NGO, investigating the possibility of a sexual offence for each child, and recording their version of the incident. As a result, they are also responsible for supporting the filing of FIRs under the POCSO Act and setting up legal representation for the child. Despite the strictness of the law, instances of CSA have recently increased. The authors further opine on the pertinence of not only focusing to prevent the crime but also deterring it through more prevention-oriented clauses like the creation of a one-stop centre or providing a problem-solving mechanism for the victims. A compelling fact is that Malaysia implements a one-stop centre which shall be discussed later.

As for SOACA, the Guideline draws complete incorporation of special forces including the special court. This is where the POCSO loses but can make the Guideline a good reference for additions and improvements. Under Chapter 1 of Division 5 which discusses the retrieval of reports and the conduct of investigations, clause A(4) gives the benefit to a child informer or witness or the victim himself to be interviewed through a video recording at a Child Interview Centre (CIC) if deemed necessary. Clause B(3)(a) specifies that the medical practitioner assigned to handle matters of CSA must have received proper training through courses or have exposure to the guides to managing victims of CSA known as the Suspected Child Abuse and Neglect (SCAN) squad. In

this vein, the cases are divided into two that are not critical and critical or semi-critical. A One-Stop-Crisis-Centre is established for the placement of the CSA suspected victims for the purpose of examinations and questioning by the SCAN squad. The squad is also expected to alarm the Jabatan Kebajikan Masyarakat (JKM) and the police should a police report has not been done.

Clause 14 of the FAQ to Chapter 1 of Division 5 mentions the special team under the PDRM that offers a counselling and support system for the victims. This special team is available at every contingent and the headquarter itself, located in Bukit Aman. Chapter 3 of Division 5 further points out the parties that are usually in contact with the victims or child witnesses during the trial of a CSA hearing. Mentioned are the special court itself, the PDRM, Public Prosecutor and the lawyers, Legal Aid, the JKM, NGOs, etc. It specifically outlines the responsibility due from each of those named above. Although many are existing bodies, this chapter proves that there is an effort to ensure the bodies allocate their specialised teams for CSA matters. In the meantime, Chapter 4 of Division 5 is dedicated especially to the four entities that are involved to provide protection and support to the CSA victim or a child witness. These entities are the JKM, Kementerian Pembangunan Wanita, Keluarga dan Masyarakat (KPWKM); Kementerian Kesihatan Malaysia (KKM); the PDRM; and the Legal Aid Centre. What is likeable about this Guideline is that it does not only concern the CSA victim but also the witness if it is a child and this can be seen clearly under Chapters 3 and 4 whereby the conducts of the proceedings include the safeguards of a child witness too.

4.9.10 The Special Court's Power & Procedures

As delivered above, Section 28 of the POCSO Act orders for the creation of a distinct court for the matters that fall under the Act. Such a court is simply known as the Special

Court and its designation serves mainly the purpose of speeding up trials without delay. Thereby, Section 28(1) reads that the Special Court must be built in every district, but prior discussions have seen that in reality to date, there are a limited number of the Special Court establishment and most are focused only in major cities. Other than the Special Court, Section 28 acknowledges that the Sessions Court serves as the alternate to a Special Court and under Section 31 it provides that the Special Court is one to be deemed as a Sessions Court whereas the person conducting the trial is the Public Prosecutor. The Public Prosecutor shall be appointed in accordance with Section 32. It is mentioned separately to emphasize the special role of this Public Prosecutor as he needs to be one who has practised for more than seven years, meaning an experienced lawyer and that his appointment as a Special Public Prosecutor shall only be for the purpose of trials under the Special Court and the POCSO Act. Section 33 outlines the procedures and powers of this Special Court. In the meantime, Section 34 clarifies if the perpetrator is a child, then he should be subjected to the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].

The procedure requires that the Special Court may declare any offence to have occurred upon receiving a complaint of the circumstances constituting the offence or upon obtaining a police report of the same. This occurs without the accused being brought before the court for trial. The Special Public Prosecutor is required to put forth or make known the questions to the child victim that are to be asked during the recording of the examinations at the Court. Frequent breaks should also be granted to the child if deemed necessary by the Court other than creating a child-friendly atmosphere by allowing the relative or those that the child has trust to accompany the child's presence in the Court. To ensure a minimal mental effect towards the child with the court process, the Court shall not call a child repeatedly to testify, to govern the questions asked are

not aggressive or intimidating, and that the child's identity or information remains confidential unless disclosed in the interest of the child so as to behold the child's dignity at all times. The Special Court is also able to direct payment for the trauma or injury that the child suffers through compensation including to order for an immediate rehabilitative counselling session.

As for Malaysian law, the procedures for the Special Court are outlined under the Guideline. Chapter 2 of Division 5 is dedicated wholly towards the discussion of the Court procedure from the beginning towards the end of a case and it provides two options which are a full trial or a summary trial. A full trial is where the witness will be summoned whereas the summary trial is when the accused confesses to his crime. The Chapter is divided into five clauses whereby Clause A speaks about the mentioning of a case, Clause B is about case management, Clause C refers to the guideline of the Special Court, Clause D is about sentencing, and Clause E pertains to the post-trial effects. The relevant rules that concern the topic can be found under Clause B(2) which states the Court's duty to make the child familiarized with the court surrounding, that Section 10 of the Evidence of Child Witness Act 2007 (Act 676) requires the official attire of the parties in the Court shall be exempted at the Special Court, that there shall be an intermediary appointed especially if the accused wish to interact with the child in the Court should the accused be unrepresented, that the usage of a doll to be used for physical references and not the physical of the child, and most interestingly a 12-month duration from the date of registration are allocated for each case which means that no case shall exceed this period.

Clause C stipulates miniature rules for the Court to bear in mind during a full trial those are to block the access of media and reporting as well as not run any competence test towards the child victim or witness unless the Court finds it necessary

to be conducted. Clause C (C) is special in the sense that it protects the interest of a child witness. It requires that the child witness be isolated from the Courtroom during a proceeding and be accompanied by an intermediary appointed by the Court with a Pekerja Khidmat Saksi Jabatan Kebajikan Masyarakat (JKM)), that the testimony be made through a video link so that the child is not in view of the accused and that any questions shall be passed through the intermediary or the Court's interpreter. Clause E concerns the well-being of the child victim after the trial. It requires that the Court examines the report produced by the JKM officer to decide on the child's shelter and medical attention. The decision or judgment of the Court must be delivered to the child victim by either the Court, the PDRM, the Legal Aid Department or the JKM. The FAQ under this chapter also provides that the child victim or witness is allowed a break time and that the child must not be in view of the accused at all. The child may also inform the Court if the accused is causing a disturbance. In relation to this, Chapter 3 of Division 5 guides the court and its officers about the supervision of the child victim or witness during the pre-trial and the trial itself.

4.9.11 Mandatory Reporting

In India, failure to report is a punishable offence, with imprisonment of up to six months, or a fine, or both as stated in Section 21 of POCSO 2012. Referred to as "Mandatory Reporting," this obligation to notify authorities holds significant importance. The efficacy of the legal process and subsequent punitive measures hinges upon the timely reporting of crimes. This obligation is fundamentally designed to ensure the protection of the child, uphold their best interests, and proactively shield other vulnerable children who may potentially be exposed to abuse from the wrongdoer. Furthermore, this

principle serves as a deterrent, discouraging potential abusers, and justifiably seeks to hold perpetrators accountable for their reprehensible actions.

In the context of Malaysian law, the concept of mandatory reporting is enshrined within both the Child Act 2001 and the Sexual Offences Against Children Act 2017. Under Sections 27, 28, and 29 of the Child Act 2001, specific individuals, including medical officers, registered medical practitioners, the child's family members, and childcare providers, are mandated to promptly inform welfare officers if they possess a reasonable belief that a child has suffered physical or emotional harm due to ill-treatment, neglect, abandonment, exposure, or sexual abuse. Non-compliance with this obligation could result in a fine not exceeding five thousand ringgit or a term of imprisonment not exceeding two years, or both, as applicable. Within the framework of the Sexual Offences Against Children Act 2017, a pivotal provision pertains to the obligatory reporting of instances of CSA to designated entities such as the police and welfare officers. The term "any person," as delineated in Section 19 of the Act, encompasses individuals associated with the child, including educators, school counselors, principals, child care personnel, medical professionals, child care providers, neighbors, and the general public. Failing to provide information regarding the perpetration or intended commission of offenses under this Act renders the individual liable to a fine not exceeding five thousand ringgit. In essence, both the Child Act 2001 and the Sexual Offences Against Children Act 2017 underscore the essential duty of certain individuals to promptly report instances of child harm or abuse, with the aim of ensuring the safeguarding and protection of children.

4.9.12 Relationship between Special Legislation and other legislation

The POCSO Act of 2012 serves as a comprehensive legislation aimed at shielding children from various forms of sexual offenses, encompassing sexual assault, harassment, and involvement in explicit material. It places a strong emphasis on upholding the child's well-being throughout the entire legal process, incorporating child-friendly procedures for reporting, gathering evidence, conducting investigations, and expediting the trial of offenses through specialized courts. The Act establishes "Special Courts" where the young victim can provide their statement in a comfortable setting, recorded on camera, ensuring a child-friendly environment. Additionally, the Act ensures that the child's identity remains confidential and undisclosed.⁹⁵ The POCSO Act has been enacted as the principal act involving the protection of children against sexual offences in a comprehensive manner with a standalone character without the need to be referred to other statutes.

In contrast in Malaysia, the legal framework concerning offenses against child predators is governed by the Sexual Offences Against Children Act 2017 (SOACA).⁹⁶ This Act establishes a comprehensive structure within which children are safeguarded against sexual exploitation and abuse. According to SOACA, it is deemed a criminal violation for an adult to engage in any form of sexual activity with an individual under the age of 18, encompassing acts like sexual penetration, sexual grooming, and the possession or distribution of child pornography.⁹⁷ Furthermore, the Act also outlaws procuring a child for sexual exploitation and trafficking children for sexual motives. A

⁹⁵ Shrabanti Maity and Pronobesh Ranjan Chakraborty, "Implications of the POCSO Act and Determinants of Child Sexual Abuse in India: Insights at the State Level", *Humanities and Social Sciences Communications*, vol. 10, no. 1 (2023): 1–13.

⁹⁶ Zainal Amin Ayub and Zuryati Mohamed Yusoff, "Right of Online Informational Privacy of Children in Malaysia: A Statutory Perspective", *UUM Journal of Legal Studies*, vol. 9, (2018): 221–41.

⁹⁷ Bathabile Mandisi Maureen Ngubane, "Challenges Facing Child Victims in South African Courts: An Overview of the South African Legal Framework and the Protection of Such Children, with a Specific Focus on Courts in Durban, KwaZulu-Natal", *Inyuvesi Yakwazulu-Natali*, (2022): 25-26.

failure to report knowledge or suspicions of CSA or exploitation is likewise considered an offense. The punitive consequences for these transgressions are notably severe, encompassing incarceration and fines.⁹⁸ In instances involving the sexual exploitation or abuse of a minor, the court may additionally mandate the offender to undergo therapeutic treatment or counselling⁹⁹. Beyond SOACA, Malaysia's legal framework includes supplementary measures for the protection of children, notably the Child Act 2001, which criminalizes instances of child abuse and neglect, and the Children and Young Persons (Employment) Act 1966, which prohibits the engagement of minors in hazardous or unsuitable labour. In sum, Malaysia's criminal jurisprudence exhibits a robust stance against perpetrators of child-related offenses, assuring extensive safeguards for children against sexual exploitation and abuse.¹⁰⁰

Unlike comprehensive legislation like POCSO 2012, Malaysia's approach to dealing with offenses against children is more complex. This is because there are several different laws or rules in place, each aimed at protecting children in various ways. While this comprehensive approach is intended to provide better overall protection, it can also lead to confusion and uncertainty about which specific laws apply in different situations. Having multiple laws means there might be questions about which one should be followed or given more importance. This can be especially challenging when dealing with cases involving child predators. Clarity is essential to avoid procedural challenges, ensure equitable enforcement, and guarantee comprehensive protection for children

⁹⁸ Rochelle Morton, Michelle L Hebart, and Alexandra L Whittaker, "Increasing Maximum Penalties for Animal Welfare Offences in South Australia—Has It Caused Penal Change?", *Animals*, vol. 8, no. 12 (2018): 236.

⁹⁹ Tamara S N Wild et al., "Web-Based Health Services in Forensic Psychiatry: A Review of the Use of the Internet in the Treatment of Child Sexual Abusers and Child Sexual Exploitation Material Offenders", *Frontiers in Psychiatry*, vol. 9, (2019): 763.

¹⁰⁰ Hai Thanh Luong, "Prevent and Combat Sexual Assault and Exploitation of Children on Cyberspace in Vietnam: Situations, Challenges, and Responses," in *Combating the Exploitation of Children in Cyberspace: Emerging Research and Opportunities*, edited by Hossam Nabil Elshenraki (Hershey: IGI Global, 2021): 68–94.

against sexual exploitation and abuse. This complexity can arise because these laws might have different procedural laws that cover different areas, or have been made by different authorities. Figuring out how all these laws fit together and which one should be used in a particular situation can be quite complicated. To avoid confusion and make sure that children are fully protected, it might be helpful to review and clarify these laws. Establishing mechanisms for harmonization and clarity within this intricate legal landscape will be instrumental in optimizing the protective regime for children and ensuring the seamless adjudication of causes related to offenses against child predators.

4.10 INDIA'S CURRENT MEASURES TO ADDRESS THE INADEQUACY IN POCSO 2012

4.10.1 Definition of Child

India has taken measures to define the definition of a child under the Protection of Children from Sexual Offences (POCSO) Act. The POCSO Act, enacted in 2012, defines a child as any person below the age of 18 years. This can be seen in the case of **Manivasagan Versus State by Inspector of Police, Sirubakkam Police Station, Cuddalore District (2022)**¹⁰¹ since the victim was only 16 years old and had not reached the age of 18, she qualified as a child under POCSO Act 2(1)d. On top of that even if the victim left her home voluntarily and the appellant took her somewhere else at her request and consent, the victim's consent is irrelevant because, as a minor, she is unable to give consent and, even if she did, it would not be enforceable legally. This is the case even if the court determines that the victim is a child under the POCSO Act.

Furthermore, according to **Sankar Versus State of Tamil Nadu, Rep. by Inspector of Police, All Women Police Station, Panruti, Cuddalore District**

¹⁰¹ *Manivasagan Versus State by Inspector of Police, Sirubakkam Police Station, Cuddalore District, Crime No.78 of 2014 [2022] 1 MLJ (CRL) 35.*

(2021)¹⁰² consequently, it is abundantly evident that, in accordance with the POCSO Act of 2012, the victim was under the age of eighteen when the appellant engaged in aggravated, penetrated sexual relations with her. The victim girl's age at the time of the incident—whether she was 18 or younger—is the only question that needs to be answered in this criminal appeal. No offence would be committed under the POCSO Act or the Prohibition of Child Marriage Act if the victim had reached the age of 18.

4.10.2 Mandatory Reporting

India has also implemented stringent measures in mandating the reporting of child sexual abuse. According to **X versus Government of NCT, Delhi (2022)** Section 19(1) of the POCSO Act, an RMP must notify the relevant authorities about the offence committed when a minor seeks medical assistance for a pregnancy termination resulting from consensual sexual activity. The mandatory reporting requirement may make an adolescent and her guardian nervous because they might not want to get involved in the legal system. It is likely that minors and their guardians will have to choose between approaching an RMP and potentially facing criminal charges under the POCSO Act, or approaching an unqualified physician for a medical termination of the pregnancy. Minors may be less likely to seek out RMPs for safe pregnancy terminations under the MTP Act if there is an emphasis on the minor's name being disclosed in the report under Section 19(1) of POCSO.¹⁰³

¹⁰² *Sankar Versus State of Tamil Nadu*, Rep. by Inspector of Police, All Women Police Station, Panruti, Cuddalore District.

¹⁰³ *X versus The Principal Secretary*, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr 5802 of 2022.

4.10.3 Penetrative Sexual Assault

India has also enforced measures regarding penetrative sexual assault through judicial precedents as can be illustrated in **M. Loganathan Versus State, rep. By Inspector of Police, Kadathur Police Station, Erode District (2016)**¹⁰⁴ where it has been stated in Section 4 of the Protection of Children from Sexual Offences Act, 2012 that the punishment for penetrative sexual assault is Penetrative sexual assaulters will be punished with either type of imprisonment for a minimum of seven years, with the possibility of a life sentence, as well as a fine. Furthermore, the definition was defined in Section 3 of POCSO Act where it states that any penetration of the penis into a child's mouth, urethra, vagina or anus, or encouraging the child to do so with him or another individual, constitutes penetrative sexual assault.

4.10.4 Aggravated Penetrative Sexual Assault

India has also enforced the aggravated penetrative sexual assault in which according to **State Rep. by The Inspector of Police, Keeranur and Another Versus Danish Patel and Another (2022)**¹⁰⁵ where it was discussed that the prosecution has established beyond a reasonable doubt that the victim child suffered from aggravated penetrative sexual assault, resulting in harm to the sexual organ, which ultimately led to the victim child's death. Additionally, the prosecution's witness has unequivocally demonstrated the victim child's mental disability.

¹⁰⁴ *M. Loganathan Versus State, rep. By Inspector of Police, Kadathur Police Station, Erode District* [2016] 3 MLJ (CRL) 755.

¹⁰⁵ *State Rep. by The Inspector of Police, Keeranur and Another Versus Danish Patel and Another* [2022] 2 MLJ (CRL) 305.

4.10.5 Issue of Consent

The matter of consent concerning underage victims has been also been addressed by the Indian court to address situations where minors may have provided consent in which according to **Manivasagan Versus State by Inspector of Police, Sirubakkam Police Station, Cuddalore District (2021)**¹⁰⁶ where it was held that even if the victim left her home voluntarily and the appellant took her somewhere else at her request and consent, the victim's consent is irrelevant because, as a minor, she is unable to give consent and, even if she did, it would not be enforceable legally. This is the case even if the court determines that the victim is a child under the POCSO Act.

4.10.6 Gender Neutrality

India has also expanded the scope of laws governing child sexual abuse by making them gender-neutral in which according to **Alakh Alok Srivastava Versus Union of India and Others (2018)**¹⁰⁷ where it must be asserted from the beginning that the POCSO Act is gender-neutral legislation. Adding on to that in the case of **Shatrughna Baban Meshram Versus State of Maharashtra (2021)**¹⁰⁸ where the Amendment Act's provisions reinstated the victim's pre-existing, non-neutral position and since Section 376A, as amended by the Ordinance, was victim-neutral with regard to gender, it naturally covered cases in which the victim was a woman.

Lastly, according to the NCRB report, there is a discrepancy between the total number of cases registered and the number of victims under POCSO. In comparison to 2018, the number of POCSO victims rose by 18% in 2019. that is, 48,043 victims in

¹⁰⁶ *Manivasagan Versus State by Inspector of Police, Sirubakkam Police Station, Cuddalore District, Crime No.78 of 2014* [2022] 1 MLJ (CRL) 35

¹⁰⁷ *Alakh Alok Srivastava Versus Union of India and Others* [2018] 3 MLJ (CRL) 282

¹⁰⁸ *Shatrughna Baban Meshram Versus State of Maharashtra* [2021] 1 MLJ (CRL) 38

2019 compared to 40,810 in 2018. The fact that there were more victims than cases total indicates that there are situations in which multiple victims are included in a false complaint. Of all the cases filed under POCSO in 2019, 55% of them were filed under Child Rape (Sections 4 and 6 of the POCSO Act and Section 376 of the IPC), with 99% of the victims being female. Since 2017, these percentages have not changed. On the other hand, more male children are becoming victims of penetrating sexual assault. There were 229 male child victims in 2018, up from 183 in 2017, a 25% increase in the number of male victims. In 2019, this climbed by an additional 17%. e.g., (from 229 male victims who were children in 2018 to 268 in 2019).¹⁰⁹

According to a study conducted by the India Child Protection Fund, in 2022, convictions under the Protection of Children from Sexual Offences (POCSO) Act resulted in only 3% of cases. Even though the average cost of each Fast Track Special Court (FTSC) case was Rs 2.73 lakh, on average, only 28 Pocso cases were resolved by FTSCs in 2022.¹¹⁰

4.11 RECOMMENDATION

The Protection of Children from Sexual Offences Act 2012 (POCSO 2012) in India and the Sexual Offences Against Children Act 2017 (SOACA) in Malaysia represent robust legislative frameworks aimed at safeguarding children from sexual abuse. However, the comparative analysis reveals several areas where improvements can be made, especially by incorporating best practices from each other's legal systems and aligning more closely with the principles and general comments of the United Nations Convention on

¹⁰⁹ Status-of-POCSO-Cases-2017-2019

¹¹⁰ Amrita Madhukalya, "Only 3% of POCSO cases in 2022 saw convictions: Report," *Deccan herald*, 9 December, 2023, 1-2., <https://www.deccanherald.com/india/over-243-lakh-pocso-cases-pending-in-fast-track-courts-till-jan-2023-3-conviction-rate-in-2022-report-2804200>

the Rights of the Child (UNCRC). The following recommendations are proposed to enhance the effectiveness of both POCSO and SOACA in protecting children from sexual offences.

Matters	Recommendation	Rationale
Expanding the Scope of Offences	Malaysia's SOACA should expand its scope to include categories of offences such as aggravated penetrative sexual assault, as outlined in India's POCSO Act. This would ensure a comprehensive legal framework that addresses the severity of various sexual crimes against children.	The inclusion of aggravated offences would provide stronger legal protection and ensure that perpetrators of severe crimes face appropriately stringent penalties. This aligns with Article 19 of the UNCRC, which mandates the protection of children from all forms of violence, injury, and abuse.
Addressing False Reporting and Complaints	Both POCSO and SOACA should incorporate provisions to address and penalize false reporting and complaints, ensuring that these provisions are balanced to prevent misuse while protecting genuine victims.	False reporting can undermine the integrity of the legal system and detract resources from genuine cases. Penalizing false reports, while ensuring children are not unduly punished for honest mistakes, helps maintain the credibility of child protection laws. This aligns with the UNCRC's emphasis on the best interests of the child and the need for effective legal frameworks (Article 3).
Standardizing Minimum and Maximum Punishments	Standardize the minimum and maximum punishments for sexual offences against children across both POCSO and SOACA to ensure	Uniformity in punishments ensures that all offenders face appropriate consequences,

	consistency and severity in punitive measures.	which acts as a deterrent and reinforces the seriousness of these crimes. This consistency is crucial for upholding the rights and protection of children as emphasized in the UNCRC (Article 19).
Enhancing Definitions and Interpretations	Introduce a comprehensive definitions section in SOACA, similar to POCSO's Section 2, to provide clarity and avoid ambiguity in the interpretation and enforcement of the law.	Clear definitions ensure that all stakeholders, including law enforcement and judiciary, have a consistent understanding of the terms used in the legislation, which is essential for effective implementation. This recommendation aligns with the UNCRC's requirement for clear and accessible legal frameworks (Article 4).
Publicity and Awareness Campaigns	Both POCSO and SOACA should include provisions mandating extensive publicity and awareness campaigns to educate the public about the laws and the rights of children.	Raising awareness is crucial for prevention and encourages reporting of offences. Publicity campaigns help in creating an informed society that can better protect its children, in line with Article 42 of the UNCRC, which emphasizes the importance of disseminating information about children's rights.
Addressing Legal Inconsistencies	Introduce clear provisions in both POCSO and SOACA to address conflicts and inconsistencies with other laws, ensuring that child protection laws take precedence in cases of overlap.	Clear guidance on legal precedence ensures that child protection laws are effectively enforced without confusion or conflict, supporting the

		UNCRC's aim for a coherent legal framework that prioritizes the protection of children (Article 4).
Strengthening Evidential Provisions	Incorporate specific evidential provisions within POCSO and SOACA to streamline the process of collecting and presenting evidence in cases involving child victims and witnesses.	Specialized evidential rules help protect the rights of child victims and ensure that their testimonies are handled with the sensitivity and respect they deserve. This aligns with the UNCRC's principle of ensuring that the legal process is child-friendly and protects the dignity of the child (Article 12).
Mandatory Reporting	Ensure that mandatory reporting provisions are effectively implemented and monitored, with penalties for non-compliance clearly defined in both POCSO and SOACA.	Mandatory reporting is crucial for early intervention and protection of children from ongoing abuse. Effective implementation of these provisions ensures that potential cases of abuse are promptly addressed, aligning with the UNCRC's mandate to protect children from harm (Article 19).
Gender-Neutral Legislation	Both POCSO and SOACA should emphasize gender-neutrality in their provisions to ensure protection for all children, regardless of gender.	A gender-neutral approach ensures that all children, including boys and non-binary individuals, are equally protected under the law. This is in line with Article 2 of the UNCRC, which mandates non-discrimination and equal protection for all children.

By adopting these recommendations, both India and Malaysia can strengthen their legislative frameworks to better protect children from sexual offences. Aligning more closely with the principles and general comments of the UNCRC will ensure that both POCSO and SOACA provide comprehensive, effective, and child-friendly protection, upholding the rights and well-being of all children.

4.12 CONCLUSION

In conclusion, the POCSO Act stands commendable for its comprehensive coverage in safeguarding the interests of CSA victims, setting a precedent that Malaysia could emulate when revising its laws on this matter. However, it's advised not to rush, urging authorities to meticulously devise plans from inception, weighing the pros and cons of special legislation. This approach ensures that the law isn't just theoretical but visibly upheld, aligning with the principle of justice being both served and perceived. Thus, analysing the procedural aspects of the POCSO Act is pivotal. From the perspective of a student in Hyderabad, India, certain measures are proposed to enhance the POCSO Act's enforcement. To better support CSA victims and facilitate reporting, a safe reporting platform is imperative. Widespread awareness campaigns are suggested, extending to remote areas with limited educational access. Current practices focusing solely on specific institutions should shift to engaging citizens for more impactful cooperation in law enforcement. Furthermore, government support for social workers and NGOs championing CSA rights could be increased to fortify the fight against these crimes. Drawing a parallel to Malaysia's introduction of sex education, India could consider implementing a sensitively structured curriculum for teenagers in schools.

This issue is manageable with the work of a thoroughly planned syllabus suiting the locals' susceptibility and respecting the cultural values that they uphold. Other than

the constant calls for an amendment regarding the gender-biased provisions, the Judiciary ought to revise the compensation scheme offered to the CSA victims to ensure that they are capable of getting sufficient funds for their immediate well-being. summarises that in reality, the implementation of this law is still at its weak stage considering that statistics given by the National Crimes Records Bureau (NCRB) that the conviction rate by the Courts for offences under the POCSO Act is only 4%, acquittal rate is 6% and pendency rate is nearly 90% parallel to the consistent rise of the cases notwithstanding the fact that the CSA crimes boost up to six times from 22,500 cases in 2008 to 141,764 cases in 2018 (according to the 2008 and 2018 NCRB statistics). In another writing, Kulkarni and colleagues (2016) suggest that all relevant parties specified in the POCSO Act, including teachers, parents, NGOs, medical professionals, as well as judicial and law enforcement authorities, should undergo training that emphasizes their crucial role during the reporting stage. According to the findings of their study, data collected from police stations and designated city hospitals in Mumbai, responsible for cases under the POCSO Act, reveal a consistent and alarming rise, with the year 2016 marking the highest number of reported incidents. Interestingly, this surge occurred four years after the introduction of the POCSO Act. Similarly, the chapter underscores the insufficient efforts by state authorities, law enforcement, and educational institutions in Malaysia to raise awareness about CSA laws.

CHAPTER FIVE

RESULTS AND DISCUSSION

5.1 INTRODUCTION

In the previous chapters, emphasis has been placed on the doctrines and concepts related to CSA in Malaysia and India. The purpose of the chapter is to provide a qualitative approach and analysis of participants who are the main stakeholders in the protection of children against sexual abuse. This chapter builds on the objectives and the research question of the study with a synthesis of data aggregated from the semi-structured interview in Appendix II (transcript). The chapter describes the process of designing the interview questions, the process of administering the participants, the categories of participants, and the transcription of the audio to provide a basis for thematic analysis of the data. According to Braun and Clarke¹, Thematic Analysis or TA “is a method for identifying, analysing and interpreting patterns of meaning (themes)”. Therefore, in order to draw relevant themes not bound by theoretical sentiments but bound to the text of the transcripts thematic analysis will be adopted. The chapter includes a detailed step and description of the materials and methods used in the research, their relevance in literature, justification for the approach, anonymized details, and categorization and labelling of participants and thematic framework.

¹ Braun, Virginia, and Victoria Clarke. *Thematic analysis* (United States of America: American Psychological Association, 2012), 2.

5.2 MATERIALS AND METHODS

This section discusses the materials for data collection and analysis techniques. This comprises justifications for the interview, mapping of scripted interview questions to research questions, and categorization of participants sampled.

5.2.1 Participants' Profile and Anonymized Labelling

This study engaged a diverse group of 26 experts who hold significant roles in various sectors related to the protection of children against sexual offences in Malaysia. The occupational categories of the participants encompass nine distinct professions: politicians, prosecutors, legal practitioners, SCAN team, PDRM, NGO, JKM, and academicians. Each participant was carefully chosen to ensure that the study captures a broad yet specialized range of perspectives, thereby fostering a more holistic understanding of the challenges and opportunities in safeguarding children from sexual offences.

The selection of participants was done after a review of stakeholders based on literature and legal documents. To extract informed consent, twenty-six participants were invited based on nine categories broadly belonging to two groups i.e., enforcement officers and non-government individuals. While our study initially considered including parents and child victims as participants, we ultimately excluded them due to ethical concerns regarding the sensitive nature of the subject matter. This decision was made to prioritize the well-being of vulnerable individuals and to adhere to the highest ethical standards in research. As a result, our study focuses on professionals who are experts in their respective fields. Recruiting these professionals often required multiple follow-ups and reminders through emails and phone calls to secure their valuable input for our study. Table 6.2 shows the final response/consent rate among the invited participants.

Table 5.1. Categories of participants

CATEGORY	Projected participant	Interviewed	No response
POLITICIAN	2	2	0
AGC	3	3	0
SCAN TEAM	3	3	0
LAWYER	3	3	0
POLICE	3	3	0
JUDGE	3	3	0
NGO	3	3	0
JKM	3	3	0
LECTURER	3	3	0
Total participant	26	26	0

The recording of each interview was done in both audio and / or video form. Part of the participants opted for text responses to the questions which have been sent to them via email. Follow-up questions were sent to elicit more responses based on the answer earlier provided.

After the interview, the transcription of the audio was done using MS Teams transcriber which also requires editing of mispronounced words from the participants. Data was stored in Google Sheets with some level of anonymity and confidentiality as promised to the participants. The labelling of participants was done to remove any traceability and identification.

Table 5.2 Anonymised Labelling Participants.

participant ID Code	Anonymised participant Labels
P1	Representative of the Ministry of Women, Family and Community Development
P2	Public prosecutor and investigator
P3	Public prosecutor and investigator
P4	Representative of the SCAN Team - Medical Doctor
P5	Representative of the SCAN Team - Physician

P6	Representative of the SCAN Team - Paediatrician
P7	Representative of the Bar - Legal Practitioner
P8	Representative of the Bar - Legal Practitioner
P9	Representative of the Bar - Legal Practitioner
P10	Senior Police Officer, Representative of D11, Royal Malaysian Police
P11	Senior Police Officer, Representative of D11, Royal Malaysian Police
P12	Senior Police Officer, Representative of D11, Royal Malaysian Police
P13	Crime analyst and representative of non-governmental organisation
P14	Public prosecutor and investigator
P15	Representative of Non-governmental organisation
P16	Representative of the Ministry of Women, Family and community Development
P17	Representative of the Ministry of Women, Family and community Development
P18	Representative of the Ministry of Women, Family and community Development
P19	Representative of the Legal academia
P20	Representative of Non-governmental organisation
P21	Representative of the Legal academia
P22	Children's Commissioner
P23	Serving judge, Representative of the Judiciary
P24	Serving judge, Representative of the Judiciary
P25	Serving judge, Representative of the Judiciary
P26	Minister of Law in the Prime Minister's Department

5.3 THEMES, SUB THEMES AND DESCRIPTION

Several themes and sub-themes have been identified in the text during the transcription.

The themes are five main themes include the role of the participants, inter-agency collaboration, adequacy of the law, challenges of implementation of the law, and the improvements needed for the protection and management of CSA in Malaysia.

5.3.1 Role of Participants in the Protection and Management of CSA in Malaysia

As a stakeholder in the society, inquiries were made to the participants regarding their role in child protection and management of CSA in Malaysia. The researcher is unable to find a unified document on the role of stakeholders in child protection in Malaysia. Therefore, participants show a slight but major divergent view on their role in the prevention and management of CSA.

Following ethical considerations, parents of victims and child victims were excluded from the interview hence no participation. These two categories of stakeholders have been tagged “silenced stakeholders”² due to their penchant for privacy in the management of CSA.

Among all participants, they appeared to state their role succinctly while others referred to duties imposed on them by law with respect to managing CSA cases. These roles can be categorized into enforcement and management roles. A participant (P3) stated his role as:

Prosecute accused who commit a criminal offense, directing the investigating officer to Jabatan Kebajikan Masyarakat for interim protection Order or set up some kind of protection for the children until after the trial is done.

Knowledge of the participant’s enforcement role was also identified when P14 stated that:

...our fundamental role is to bring any child-sexual related case-offender to justice, pursuant to Article 145(3) of the Federal Constitution coupled with Section 376(3) of the Criminal Procedure Code ("Act 593").

² Chris Klease, "Silenced stakeholders: responding to mothers' experiences of the child protection system", *Children Australia*, vol. 33, no. 3 (2008): 21-28.

The use of collective words “our” reflects the teamwork among the enforcement officers from the view of P14. Similar supporting role was observed by P11 where the participant stated that:

deals with sexual offences against children, interviews the victims for evidence and testimonies to be used in court.

This emphasis on child victims underscores the delicate and vital nature of such work, and highlights the need for expertise and sensitivity when dealing with this vulnerable population.

Certain participants such as P13 and P15 have advocacy roles along with P16, P17, and P18. This category of participants has a mediating role as they work together with government agencies and defense lawyers. The Advocacy against CSA has been largely between government, civil societies, and NGO. In this direction, one participant i.e., P15 stated their role thus:

An NGO that works closely with the Department of Welfare for Women & Children. Educating the children on their rights as a minor as well as educating them on sex education, care for their welfare, health, and education. Provides aftercare for victims of sexual offences against children. Educate children across the country, especially in schools on boundaries between children and adults as well as how to generally care for themselves. For example, Children are taught prevention strategies in Personal Safety Education (PSE). This teaches the children to protect themselves from sexual abuse as well as teaching them to say no to the person violating the child and confide in a trusted child....My organization has organized talks and forums with parents in regard to this issue. Parents and guardians are taught to deal with children who have experienced sexual abuse, as well as guidelines on how to protect their children online and offline.”

P22 highlights the role of a Children’s Commissioner:

As the Children's Commissioner, the role involves safeguarding children's rights comprehensively. This includes addressing sexual offenses through awareness, coordination, and oversight. Educating the public, ensuring law compliance, and advocating for policy

improvements are vital. The Commissioner acts as a bridge between child protection agencies, promoting collaboration and accountability. They guide victims and families, connect them with services, and ensure proper investigations and support.

Reactive Role

Apart from civil society representatives, participants show a general reactive role in the issues regarding CSA. All mechanism is geared towards the after-event or reactionary roles. For instance, participant P4 mentioned:

Taking for instance, the moment an Investigation Paper ("IP") is brought before us by an Investigative Officer ("IO") seeking for a charge to be instituted against a perpetrator and when we found that all elements of the charge under Sect. 14 of Act 792 has been completely met under the law, we would then give our consent to charge and eventually present all prevailing facts of the case before a Judge, via case trial (in the case of an accused claim for trial), as required under the law. Having said that, the accused will be sent to jail to serve punishment, should the Prosecution succeed in proving all ingredients of the charge beyond a reasonable doubt at the completion of the case trial.

This does not include awareness campaigns or preventive measures for repeat victimization or reporting mechanisms. On the other hand, P4 is aware of the role of educating “more children on this issue”. Similar proactive role was exhibited by P15 when the participant stated:

My organization has organised talks and forums with parents in regard to this issue. Parents and guardians are taught to deal with children who have experienced sexual abuse, as well as guidelines on how to protect their children online and offline. This information and knowledge is vital for the public to know in our effort to combat Child Sexual Abuse in Malaysia.

The contextualization of participants' roles is important. Clarity on their roles can be established through reference to child protection legal instruments such as SOACA, health guidelines, and others in performing their responsibilities. To this end, P18

appears to be highly informed about the status of SOACA. Similarly, P4 stated the role of CSA with reference to health guidelines by stating:

To carry out a medical assessment, to treat any injuries victims had suffered, and to provide relevant samples and materials for investigation purposes and use for court. follow-up support is offered in most cases in cases where it is needed and required by the health team. The participant aims to further revise MOH's guidelines on treating and how to attend child sexual offence victims on a state level as well as to educate more children on this issue.

Recognition of New Offences

P22 highlights the new offenses that were introduced in SOACA 2017:

Sexual Offences Against Children (Amendment) Bill 2023 aims to enhance the protection of children and address issues related to child sexual abuse material and sexual performances involving children. One of the key changes mentioned is the replacement of the term "child pornography" with "child sexual abuse material" in the Sexual Offences Against Children Act 2017 (Act 792). This change in terminology reflects a more accurate and sensitive way of addressing the issue.

On the other hand, P24 states briefly on the recognition of new offences:

Specific ones are in regard to accessing, selling, exchanging, publishing, or any kind of activity dealing with child pornography, Section 4 until 10 SOACA. There are also offences of child grooming of communicating with a child and meeting a child towards that end, Section 11 until 13 SOACA.

Further, P25 outlines that the Act, established in 2017, comprehensively addresses the court compensation order:

The concept of a court compensation order in cases of child sexual abuse involves the establishment of a mechanism to provide financial restitution to the victims. Referring to India's system as an example, a supervised compensation scheme ensures that the compensation is managed and distributed efficiently. This supervision prevents misuse of funds and guarantees that victims receive the intended support. Creating a dedicated body to manage compensation can be beneficial. This body would handle the administration and disbursement of funds, relieving the burden on the

court and ensuring a streamlined process. The court's primary focus should be on administering justice and determining guilt or innocence. Shifting the responsibility of compensation to a specialized body helps conserve judicial resources and prevents unnecessary delays in the court proceedings.

P23 mentioned the recent amendments made by the Parliament:

Yes. As of April 2023, the Parliament had passed an amendment Bill for SOACA and the government will from time to time review and renew the SOACA depending on the development of the new Statute.

5.3.2 Inter-agency Collaboration on CSA

Inter-agency collaboration is one of the deductive themes which is based on research questions and objectives. This is directly linked with the need for synergy among all categories of stakeholders including but not limited to the public prosecutor and legal practitioner. Existing studies show the impact of interdisciplinary, multi-agency, and professional collaboration in the prevention and management of CSA cases.³ Further, Inter-agency collaboration has a profound impact on addressing CSA by improving victim support, enhancing investigation and prosecution, strengthening prevention strategies, facilitating a coordinated response, and increasing public awareness. By working together, agencies can create a more robust and effective system to protect children, prevent abuse, and support survivors on their path to healing and justice.

Inter-agency collaboration between respected parties is crucial in further combatting CSA and protecting children from harm. Each party has their own function and area of expertise to play in handling the incestuous difficulties and must rely on others to complete the task, collaborative efforts are crucial to address the issues of incest.

³ Fargason Jr. et al., "Enhancing multi-agency collaboration in the management of child sexual abuse", *Child Abuse & Neglect*, vol. 18, no. 10 (1994): 859-869.

The inter-agency collaboration was fairly praised as an excellent initiative by an ex-Deputy minister at the Ministry of Women, Family and Community Development, P1, in which P1 indicated that:

Good but needs to widen the approach and range of demography to reach more people.

Meanwhile, the AGC at Mahkamah Tinggi Sungai Petani, Kedah, in which her primary role is prosecuting the accused who commits a criminal offence, directing the Investigating Officer to refer the children to Jabatan Kebajikan Masyarakat for Interim Protection Order or set up some kind of protection for the children until after the trial is done. Based on P2's vast experiences, she gave a fair assessment of the effectiveness of inter-agency collaboration by saying that:

Every agency plays their role well in great fluidity.

P2's statement was supported by P14, Deputy Public Prosecutor at Mahkamah Kuala Terengganu, who has been working for ten years in the prosecutor's office in which his fundamental role is to bring any child-sexual related case offender to justice, in pursuant to Article 145(3) of the Federal Constitution read together with Section 376(3) of the Criminal Procedure Code. P14 believes that the inter-agency collaboration between the pertinent agencies has been powerful, compelling, and formidable so far.

P14 stated:

We found no incidents of no-show enforcement officers in my good office as well as in Court whenever and wherever they needed to do so. This is, of course, arising from good command/communication between the parties involved. As they are experts in their field of work like for instance an armourer, a gambling expert etc, carrying out our duty as Prosecutor becomes much easier and smoother.

Meanwhile, P19, a psychology lecturer at International Islamic University Malaysia (IIUM) has made noteworthy points by stating the genuine collaborations of respected bodies. P19 mentioned that:

Collaboration between the government and the judiciary towards the establishment of the Sexual Crime Court against Children in 2017 has assisted in a way to expedite the disposal rate of cases involving sexual offences against children....Next, is the collaboration with Non-Government Organisations such as End Child Prostitution and Trafficking (ECPAT). ECPAT's mandate is to end the sexual exploitation of children. ECPAT works on this problem in all its settings, including child sexual exploitation through prostitution; trafficking; early and forced marriage of children, online and in the context of travel and tourism. We work to better understand the problem through research while pushing for the critical systemic and social changes necessary to end the sexual exploitation of children by governments, intergovernmental institutions, the private sector, civil society, and the general public, including the children themselves.

The viewpoints expressed by P19 were supported by P17, personnel from the Social Welfare Department Malaysia (JKM) at Selayang, Selangor. P17 affirmed that:

The Social Welfare Department Malaysia (JKM) has collaborated with other stakeholders in order to protect the child from being the victim of sexual crimes. The Minister of the Ministry of Women, Family and Community Development also has launched Jelajah Kasih Kanak-Kanak Prihatin in collaboration with JKM and Majlis Perwakilan Kanak-Kanak (MPKK) with the same purpose to advocate the children by having the seminars, quizzes and other activities which attract the children to join them. In addition, the JKM in collaboration with the Ministry of Education has signified to include sexual education to the children at school. The students will be exposed to understanding and knowing themselves biologically in order to protect them specifically from sexual offences. Therefore, comprehensive sex education or comprehensive sexuality education as used by the Pertubuhan Bangsa-Bangsa Bersatu (PBB) is very much needed in educating children against sexual crimes.

In addition, P9, who is a criminal lawyer in a legal firm at Taman Melawati, Kuala Lumpur has asserted that inter-agency collaboration is quite effective with just minor changes and enhancements. P9 stated that:

Inter-agency collaboration is fairly effective with a few tweaks and improvements. For example, it may take some time to produce medical evidence to the court. A medical check-up is necessary vital in determining any signs of strangling, or other indications of compulsion and threat as well as any possibility of pregnancy. Where the procedure for this is slow, it will deter the victim's trial procedure and may jeopardise the victim's case.

Another participant, P8, a criminal lawyer in a legal firm in Johor Bahru, Johor, which his primary role is providing legal assistance to the victims and their families by giving advice as well as representing them in court, is in agreement with P9, where P8 informed that there is a collaboration between lawyers, children's rights communities, and key stakeholders. P8 informed that:

The collaborations are to advocate policy changes that would improve the legal and social framework in addressing child sexual abuse in Malaysia. However, the hierarchy of decision-making power can be blurry at times during these types of inter-agency teamwork. Generally, it is a smooth synergy but with clearer guidelines, it could be better.

A response from, P12, a police investigator at Klang District Police Headquarters, Selangor, that deals with sexual offences against children, interviews the victims for evidence and testimonies to be used in court, has also mentioned the applauded procedural guidelines laid out by this inter-agency collaboration. P12 stated that:

For sexual cases involving children, upon receiving the report, an officer from D11 will be assigned for the police report and at the Emergency Department (Hospital) where most of the hospital will have their own One Stop Crisis Centre to specifically handle an investigation regarding child sexual abuse cases. At the One Stop Crisis Centre, the SCAN (Suspected Child Abuse and Neglect) Team from the hospital will further examine and supervise the child.

The next participant, P15 who is a founder of an NGO that works closely with the Department of Welfare for Women & Children, has also commented on the positive collaboration between JKM, the Lembaga Penduduk Dan Pembangunan Keluarga

Negara (LPPKN), and Child Investigation Centre (D11) from the police department.

P15 further asserted that:

A lot of programs have been done in schools and at homes between all of these agencies to educate children on protecting themselves from sexual abuse and basically sex education. On the other hand, better guidelines on how related agencies should work together. Especially in the prevalence of power in dealing with sexual assault cases against children.

It is also worth noting that P20, another esteemed founder of a NGO, explained the international collaboration where P20 clarified that:

In order to address online CSEA, UNICEF is one of the major partners in the worldwide Partnership to End Violence Against Children, is building a worldwide political response. In Malaysia, UNICEF collaborates with partners, regulators, and the government to develop a secure internet environment for kids so they may benefit from it while also being aware of the hazards.

Even while the inter-agency collaboration garnered favourable remarks, there were also criticisms that arose from the said collaborations. A member of the SCAN Team, P4, a paediatrician at Hospital Sultan Ismail, Johor Bahru, asserted that:

There are good synergy and ongoing dialogues on all levels throughout the country but missing key elements in the process could stunt progress.

P6, another medical doctor at Hospital Sultan Ismail, Johor Bahru, who is also from the SCAN Team, has shared the same concerns in regard to the ongoing dialogues that happened throughout the country. P6 asserted that:

There are ongoing dialogues regarding inter-agencies at district, state and national levels throughout the country but with only brief presence of key personnel, progress would be delayed and slowed. A lot of child protection-related activities can be done in 2 teams which are Pasukan Perlindungan Kanak-Kanak and Pasukan Kebajikan Kanak-Kanak, both supervised by the Welfare Department under the Child Act legislation.

On the other hand, P5, an emergency physician at Hospital Sultan Ismail, Johor Bahru, has said that there is a lack of understanding and a common ground of thinking and expertise. P5 from the SCAN Team mentioned that:

Lack of understanding and common ground of mindset and knowledge despite legal responsibilities of each agency. Too rigid especially on accepting non-clear-cut cases among young medical officers. Slow progress until it affects procedures concerning the victim's welfare such as hindering children protection services after normal hours.

In the meantime, from the perspective of a legal professional, P7, a criminal lawyer in a legal firm in Bangi, Selangor has claimed that there is a lack of collaboration between defence counsel and government agencies. P7 further elaborated that:

Settlements and closure are often denied, and matters can be deliberately jeopardized which results in unresolved matters. The lack of care for the victim's welfare by the police after the issue goes to trial. Some courts also fail to follow guidelines such as to protect the victims from being seen by the accused.

Meanwhile, a senior police investigator at Shah Alam District Police Headquarters, Selangor, P10, claimed that there is a rough guideline and flow of work in the agencies, which causes the process of prosecuting the perpetrator to become slow and delayed in the result. P10 further mentioned the factors that cause delay:

Some of the factors that cause a delay is the video recording of child victims giving out interviews and information to the police that is halted on grounds that an appointment is needed. Next, forensics analysis using machinery or medical equipment that takes time and an official medical report that also takes time to obtain.

A response by P13 was also given by a crime analyst and a member of the International Association of Crime Analysts, an NGO in Kuala Lumpur where he asserted the clashes of viewpoints made where he explained:

Too many clashes of understanding and point of view can deter progress and produce unhealthy ideas instead. Some participants need to realize their prerogative's impact on the public and provide positive criticism.

It is also important to note the challenges that arose in which personnel from JKM have made a fair comment on it. P16, enforcement officer at Selayang, Selangor stated that:

The challenges that The Social Welfare Department Malaysia had to encounter in the protection of children from sexual crimes are first, the cyber safety...more than 70% of students admitted to engaging in various forms of online harassment, including name-calling, posting inappropriate messages, and sending inappropriate photos. Second, the lack of responses. The Department of Social Welfare is grossly understaffed and the need to train the social worker. Third, most sexual offenders are acquainted with their victims. The majority of sexual abusers are known to their victims. In 2008, 733 incidents in Malaysia were reported to the Social Welfare Department, and 72% of those cases involved incest.

P22 has also explained the challenges that has been encountered by Children's Commissioner:

The Children's Commissioner faces significant challenges in addressing child sexual offenses. These complexities are heightened when young children are involved, as they may not grasp the wrongfulness of certain actions. Limited awareness of child protection laws hampers prevention efforts. Varying capacities among agencies and professionals hinder effective response. Misunderstandings about offenses like statutory rape led to underreporting. Laws mandating reporting exist, but implementation gaps persist, with few consequences for non-compliance. Private doctors might not consistently report due to various reasons. Ensuring understanding and compliance across all entities is crucial.”

There is also a recommendation given by the participant as a response to safeguarding and protecting children from CSA. P11, a police investigator at Shah Alam District Police Headquarters, Selangor state that:

Attorney General Malaysia (AGM) should impose a bigger influence on coordinating the agencies in terms of handling sexual crimes against children's cases. These agencies only act within their prerogatives without proper aim and might slow each other thus lessening their

efficiency. A part of the problem is how the collaboration should be. Some works are done as a delegate rather than active cooperation and this is neither efficient nor effective.

P23 has also mentioned and praised the good efforts made by the stakeholders in the inter-agency collaboration:

Collaboration among stakeholders, including NGOs like Women's Centre for Change (WCC), is crucial for addressing sensitive issues like child sexual abuse. This synergy enhances responses and is exemplified by WCC's rapid guidelines development in two days. However, the effectiveness of these guidelines needs ongoing evaluation. Tools like anatomy dolls aid child victims' communication in courtrooms, demonstrating a commitment to their participation. Advanced tools like live streaming underline the judiciary's dedication to sensitive proceedings. Prolonged collaboration highlights the complexity, requiring collective efforts to create a comprehensive support system for child victims.”

Last recommendation and viewpoints are given by P18, JKM's personnel in Seremban, Negeri Sembilan where P18 mentions that:

The collaboration between Police, Social Welfare Department, Hospital and Agencies such as D11 is sufficient. However, there are no proper guidelines or a pyramid of power for them to follow. This could result in a slow and lengthy process, especially for the children who are the victims. There should be some sort of a structure and handbook of guidelines for these agencies to follow. Institutions suchlike schools should empower children and educate them on what constitutes sexual abuse. Most of these children are easily manipulated by the perpetrators.”

In conclusion, the various perspectives provided by the participants highlight the importance of inter-agency collaboration in combating CSA in Malaysia. As an example, the perspectives provided by participants from the enforcement and protection field, namely P2, P3, and P14, highlight the significance of agencies such as JKM and Jabatan Bantuan Guaman in supporting court proceedings related to CSA cases. These perspectives emphasize the need for increased manpower to ensure comprehensive coverage of all cases.

Additionally, the perspectives provided by participants in the medical field, specifically P4, P5, and P6, who are also part of the SCAN Team, highlighted the importance of fostering good synergy and ongoing dialogues among relevant agencies throughout the country. They emphasized the need for a comprehensive understanding of the legal responsibilities held by each agency involved in combating CSA. These participants recognized that effective collaboration and communication are essential in addressing the issue of CSA. By maintaining a continuous dialogue, agencies can share knowledge, exchange best practices, and coordinate efforts more efficiently. This synergy allows for a more unified and coordinated approach to combating CSA across different regions and jurisdictions in Malaysia. Furthermore, these participants stressed the significance of having a clear understanding of the legal responsibilities of each agency involved. This understanding ensures that each agency can fulfill its specific role effectively and contribute to a well-coordinated response. By being aware of their legal obligations, agencies can work together more seamlessly, ensuring that the necessary actions are taken to protect and support child victims of sexual abuse.

Criminal lawyers P7, P8, and P9, experienced in CSA cases, emphasized the need for cooperation between defense counsel and government agencies. Effective communication and collaboration are vital to protect both accused rights and child victims' interests. These lawyers highlighted the decision-making hierarchy's significance and stressed the importance of accurate medical evidence in court. Their insights underscore cooperation, understanding hierarchy, and reliable evidence as crucial for a just legal process in CSA cases.

Police Investigators P10, P11, and P12 highlighted challenges in agency coordination for CSA cases. Clear guidelines and workflows are needed to ensure efficient collaboration. Effective communication channels and protocols are vital for

synergy. Obtaining evidence poses difficulties, causing investigation delays. Heavy workloads on Investigating Officers, including unrelated cases, impact efficiency, potentially delaying progress.

NGO participants P13, P15, and P20 voiced concerns about conflicting views hindering progress and promoting unhealthy ideas. They stressed the impact of their roles on the public and advocated for open dialogue to address differences constructively. Positive agency collaborations like JKM, LPPKN, and D11 were noted for educating children and preventing abuse. While progress is evident, awareness and advocacy for child rights need strengthening. Ongoing efforts are essential to engage communities, raise awareness, and ensure effective policy implementation.

Enforcement officers from JKM which are P16, P17, P18 have noted satisfactory agency collaboration with Police, Social Welfare, Hospital and D11 in addressing CSA. Lack of clear guidelines and power structure raised coordination concerns. Improved protocols are needed. Ministry initiatives like Jelajah Kasih Kanak-Kanak Prihatin, JKM, and MPKK collaborations were highlighted. JKM's partnership with Education Ministry for sexual education in schools was encouraged. Effective protocols, coordination, and empowering children through education are crucial.

The psychology lecturer from IIUM, P19, highlighted significant collaborations and initiatives in addressing CSA. They mentioned a dedicated sexual crime court, school-based prevention programs, MCMC's internet safety campaigns, NGO collaborations, and involvement of international stakeholders like UNICEF. These collaborations showcase a comprehensive approach involving legal, preventive, educational, and global efforts to safeguard children from exploitation.

Overall, these perspectives demonstrated the significance of strong inter-agency collaboration and effective communication in addressing CSA. While some challenges,

such as limited manpower exist, the shared goal of combating this issue and the collaboration between various agencies are crucial for providing support and justice to the victims. As the parties are closely involved with the present challenges at hand, all of the diverse perspectives provided by the respected parties have helped to solve all of the concerns holistically.

5.3.3 Adequacy of the Law

This theme focuses on the sufficiency and adequacy of the legal framework for the protection of children from CSA. Adequacy of the legal framework is among the research questions which prepare the basis for recommendations towards amendment and improvement to the law on CSA. The depth of this theme reveals sub-themes such as legal adequacy and procedural adequacy.

Legal adequacy

The extent of available institutions and legislations or policies are the main crux of this sub-theme. With the passing of SOACA 2017, it was assumed that the special legislation would cover the field in the CSA case. There are divergent views on the adequacy of the legislation among participants. One of the participants captured a comparison of the pre-SOACA era and the post-SOACA era. P3 stated that:

SOACA is better than the penal code at one point as it is more beneficial for children, especially in terms of burden of proof. In terms of enforcement, it does help especially when they waive the need to have corroboration evidence.

On the sufficiency of the legal framework, P9 stated that:

The law is sufficient that it covers sexual offences involving children as it safeguards the children from sexual offences under the provisions set

in The Sexual Offences Against Children Act of 2017 that has laid out legislations that tackles the ambiguity of the acts covering sexual offences in other acts in Malaysia such as the Penal Code.”

P18 acknowledged the significance of the existing legislation and also recognized the importance of continuous efforts to strengthen the legal framework in protecting children from sexual abuse:

In my opinion, SOACA puts a good foothold and is on the right path in emphasizing the importance of the safety of our children. Although there are gaps in the law, the government of the day should always put emphasis on the welfare of children, especially their aftercare. Continuous effort should be carried out by relevant parties in order to promote better laws, harsher punishments, and effective enforcement of the law regarding sexual abuse against children in Malaysia.

P1 reinforced the idea that addressing CSA requires continuous efforts to strengthen laws, improve their implementation, and safeguard the well-being of children.:

Good effort but needs improvement in the law and implementation.

Meanwhile, P2 indicates that the current legal framework adequately serves its intended function of combating CSA in Malaysia:

The law has already achieved its purpose.

As for P13's perspective, he indicated a positive assessment of the progress made in the law governing CSA in Malaysia, particularly in terms of recognizing and protecting children as citizens and implementing child-friendly trial procedures. It reflected the acknowledgement of the continuous evolution of the legal framework and the commitment to providing a stronger protection system for children affected by sexual abuse.:

Child Protection Act 2001 came into force in Malaysia to protect the children and to recognise them as citizens of the country. The law can be

seen to have dynamically improved since it was first enacted and has evolved through the years, the improvement in 2016, specifically has better improved the bubble of protection towards children, especially in trial procedures.”

P22 has also applauded the adequacy of the law and praised the efforts of establishing a specialized court:

Establishing a specialized court for sexual offenses against children is a significant step in enhancing the legal response to such sensitive cases. A Sexual Crime Court against Children can provide a child-friendly environment where child victims feel more comfortable sharing their experiences. This might include specially designed witness rooms, support services, and communication aids tailored to the needs of children. The implementation of guidelines, such as the ones issued by Federal Court in 2017, further streamlines the legal process.

In the aspect of punishment and penalties in the law, P3 added that:

Punishment is quite severe and adequate as compared to penal code, especially section 354 (cabul). If section 14 which is equivalent, is more severe as it doesn't warrant a fine

However, this decried the absence of major sexual offences in the SOACA including child rape and penetrative assault.

P25 states that the sentencing process carried out by the court:

In cases involving child sexual crimes, court sentencing goes beyond legal consequences. It conveys a strong message to society against such offenses. The court's stance is clear in which these crimes won't be taken lightly. Sentencing not only punishes but deters and prevents further harm. It aims to instil a lasting lesson about the severity of the crime. Recognizing irreparable harm to a child's innocence, the court's role is to ensure justice and impose fitting penalties.

Both the participants, P14 and P10 applauded the non-corroboration rule on the evidence of a child which is considered as an improvement from the Criminal Procedure Code and departure from the Evidence Act. According to P14, the overall success and adequacy of the Act can be measured with the number of successful prosecutions achieved at trial since the emergence of the Act. He stated:

On adequacy, we are of the opinion that the law has served its purpose ever since it took place in March 2017 whereby, we have achieved quite a number of successful convictions over the years of which the Court also plays its paramount role as guardian of public interest as a whole.

This has been further supported by P15 who stated that:

I believe SOACA 2017 has achieved its purpose. On the other hand, the law will always need amendments and improvements as society evolves and improves. As in India, POCSO acts as a special act that includes all the sexual offences against children including rape and penetration. In Malaysia, Judges and Lawyers have to revise and look at multiple Acts such as SOACA and Penal Code as the law, specifically on rape is somewhat scattered across Malaysia's legal vicinity.

Contrastingly, P14 mentioned the inadequacy of the law as it does not cover non-verbal and non-articulate victims such as infants and mentally challenged children. P18 reflected on gaps that need to be filled in the SOACA. The participant opined as follows:

In my opinion, SOACA puts a good foothold and is in the correct direction in putting the importance of the safety of our children. Although there are gaps in the law, the Government of the day should always put emphasis on the welfare of children, especially their aftercare. Continuous effort should be carried out by relevant parties in order to promote better laws, harsher punishments and effective enforcement of the law regarding sexual abuse against children in Malaysia.

P4's response emphasized concerns about the enforcement of laws related to CSA in Malaysia, as well as challenges in the integration of victims and offenders into the community and the placement of victims in welfare homes.:

Lack of enforcement in Malaysia, integration of victims and offenders into the community is good despite the lots of weaknesses in the process of doing so. placement of victims to welfare homes are limited and many siblings are being separated as a result.

P17 stressed that the SOACA alone may not be sufficient to effectively protect children and emphasised the need for collaboration between different legislations or acts to address the complexity and severity of sexual offences against children. P17

statement aligns with the concerns raised by P4 regarding the need for improvements in the law and its implementation to provide better protection for children.:

The Sexual Offences Against Children Act 2017 only is not adequate in protecting children. The Act 2017 must be corroborative with other enactments or other acts in dealing with the offender in criminal matters in court since it has come into force. From what I see, it is not comprehensive enough when it is clearly seen that the Act needs revisions and amendments to cover the loophole in protecting the children against sexual offences.

Moreover, P11 pointed out several areas where SOACA falls short where the act is not written comprehensively and has not undergone any amendments since its enactment. This suggested that the act may not cover all aspects of CSA and may lack provisions for effective prevention and aftercare for victims. P11's views highlighted the limitations and weaknesses of the SOACA in effectively preventing and addressing sexual offences against children.:

SOACA lacks effectiveness in preventing child sexual crimes. It's incomplete, outdated, and defers to broader statutes. It superficially handles child pornography and lacks victim aftercare. Lenient penalties and gaps in coverage limit its impact. In comparison, India's POCSO excels with detailed provisions, precedence over conflicting laws, and comprehensive justice guidance. Adapting some POCSO aspects would benefit Malaysia due to legal similarities.

Meanwhile, P19 emphasized the importance of addressing these gaps through urgent amendments and law reform:

Important protections designed to safeguard the rights of children in the criminal justice system have been introduced. However, there are key gaps that still need to be addressed. This gap shall be closed by the urgency of amendments and reforming the law. Laws must be changed to prevent and punish abusers as technology advances and new abuse techniques are utilised both online and offline”

Likewise, P5's recommendation focused on the need for improvements at the ground level and suggested specific measures that can enhance the effectiveness of the legal framework.:

Lots of areas to be improved, especially on the ground level. Needs laws to acknowledge that sexual crimes can happen non-verbally and in non-articulate victims. Needs a compulsory reporting law or face heavy legal consequences.

In addition, P20 has mentioned the need of ensuring law enforcement agencies are adequately trained:

The Sexual Offences Against Children Act 2017 is a massive step forward in Malaysia's fight against CSA. However, implementation is key, and it is still in its early stages. More needs to be done to ensure that law enforcement agencies and the legal system are adequately trained and equipped to handle CSA cases from an investigational and judicial perspective. Overall, the Act has achieved its purpose to some extent, but the progress is still relatively new and needs more time before we can evaluate its effectiveness.

P7 shared a similar perspective with P5, acknowledging the efforts made in addressing CSA through the SOACA, but also highlighting the need for further improvements in both the law itself and its implementation. According to P7, while there have been positive steps taken, there is still room for improvement.:

Good effort but needs improvement in the law and implementation. A heavy sentence imposed by SOACA is parallel to Malaysia's political thought in terms of social problems and structural inequality.

P12 pointed out the application of the different statutes involved in handling CSA cases in Malaysia. According to him, the absence of a centralised statute specifically addressing child sexual crime investigations can lead to a lack of clarity and consistency in the procedures involved.:

With regard to conducting the investigation on child sexual crime cases, the main statute involved is the Criminal Procedure Code. Other relevant

statutes would be the Child Witness Act, Evidence Act, Sexual Offences Against Children Act, Child Act and Penal Code. It was a compilation of statutes involved but there are no centralised or “main principle” statutes pertaining to the investigation of child sexual crime. The lawmaker should propose one main centralised statute that covers comprehensively regarding the child sexual crime from the procedure receiving the report up until prosecuting the Accused in Court.

P25 pointed out the importance of incorporating this into one single Act

Consolidating laws concerning sexual offenses against children into a single act holds the potential to streamline legal procedures, making them more accessible and efficient. By encompassing a broad spectrum of offenses under one umbrella, the legal framework can provide a clearer understanding of prohibited behaviors, simplifying the interpretation for both legal professionals and the public. This consolidation could also lead to more consistent and robust prosecution, as law enforcement agencies and courts would have a unified reference point, potentially reducing delays and ensuring a swifter delivery of justice.

Furthermore, a comprehensive act could enhance the prevention of such offenses. It would allow child protection agencies, educators, and advocacy groups to focus their efforts on a singular piece of legislation, making it easier to raise awareness, educate the public, and implement preventive measures. The act's encompassing nature would address potential gaps that might exist when laws are spread across multiple statutes.”

On the other hand, P26 is of the view that the legal department is currently in the process of incorporating guidelines as a regulation in the SOACA 2017:

One of the matters that the Legal Affairs Division is looking into is the introduction of regulations to the SOACA, as an effort to streamline the practices in handling child sexual victims, with the new processes introduced by legislative amendments in March 2023, as well as international best practices from other Commonwealth jurisdictions. We are in the midst of reviewing and identifying present challenges, as a way forward to address and streamline the procedures.

P6 further acknowledged that there have been changes in the adequacy of laws regarding CSA in Malaysia, which are in line with UN recommendations but emphasize the need for better enforcement.

The changes are in keeping with UN recommendations but there is still a lack of enforcement in Malaysia. Integration of victims and offenders into

the community is a good move which has been practised in other countries but the specific details of the process to achieve the main purpose for Malaysia are lacking. As mentioned in the challenges regarding placement of the victim as welfare homes are limited and many siblings end up being separated. The law needs to be more specific and concise.”

P22 acknowledged the comprehensiveness of SOACA 2017:

I expressed my reservations about the need to introduce specific statutes for physical and non-physical offenses, as well as having definitive clauses for different types of offenses. Your reasoning could stem from concerns about creating overly detailed and rigid legislation that might not capture the full spectrum of possible scenarios or adequately adapt to changing circumstances. I acknowledge that SOACA 2017 is comprehensive in addressing various aspects of child sexual abuse. My insight into the practicalities of changing enacted laws highlights the complexities of legislative amendments would be the role of the Attorney General's Chambers (AGC) and the need to carefully consider changes within the existing legislative framework are essential considerations. I emphasis on the need for greater awareness and training for officers involved in addressing child sexual abuse aligns with the understanding that effective enforcement and implementation often rely on the competence and awareness of professionals responsible for upholding the law.

P26 further gives comment on the awareness of SOACA 2017:

when it comes to awareness raising, I believe that an all-of-society approach is needed. The law and legislation alone can only do that much, but for the people, the children to know about the laws protecting them and what recourse is available for them, it requires much more than words on a piece of paper. Hence it is my belief that when it comes to implementation and awareness, a proactive multi-agencies, multi-stakeholders approach must be taken.

Procedural and Operational Adequacy

This theme involved the extent of training and professional efficiency of personnel, officers, and volunteers within the scope of CSA. It also covers the rules of evidence and guidelines to be followed by stakeholders in the management of CSA cases at the police station, hospital and during the trial.

Both P11 and P9 observed certain operation and procedural inadequacies in the pre-trial protection of the child and aftercare of the victim. P9 stated that:

The law is sufficient that it covers sexual offences involving children as it safeguards the children from sexual offences under the provisions set in The Sexual Offences Against Children Act of 2017 that has laid out legislations that tackles the ambiguity of the acts covering sexual offences in other acts in Malaysia such as the Penal Code. It has also acknowledged physical and non-physical sexual offences as well as imposed maximum sentences for these offences. The law has also catered to the children's needs and welfare, especially in court proceedings. To change the court's setting to suit the children's comfort and to test the mental capacity of the victims for their ability to give an honest testimony during the trial.

As mentioned by P10, the absence of proper guidelines has been identified as a major weakness of the law and there are procedural and practical challenges:

The law needs to be more concise and detailed alongside proper guidelines either procedurally or in practicality. Several offences need to be more specific. In the Evidence Act, children's testimony in court needs corroboration but in SOACA, there is no need for corroboration for their testimony in court. This can lead to inconsistency in our laws and lack of sternness in the execution of our laws.

P8 suggested that the SOACA could benefit from more specific legislation that aligns with the seriousness of the crime:

As far as SOACA is concerned, if the legislation is more specific according to the seriousness of the crime, then it will be able to provide more adequate punishment. The categorisation will help the justice system to identify a specific crime according to the facts of one particular case rather than the other. hence, a more appropriate and adequate punishment may be prescribed better.

A succinct view of the adequacy was made by P17 where the participant stated that:

The Sexual Offences Against Children Act 2017 only is not adequate in protecting the children. The Act 2017 must be corroborative with other enactments or other acts in dealing with the offender in criminal matters in court since it has come into force. From what I see, it is not

comprehensive enough when it is clearly seen that the Act needs revisions and amendments to cover the loophole in protecting the children against sexual offences.”

P23 has given a valuable insights in regards to the procedural adequacy:

Sentences must send a clear message to shape attitudes, especially in child-related crimes. The judiciary's role is to uphold child welfare and deter wrongdoing. Strong sentences deter potential offenders and prioritize children's safety. Collaborative efforts involving police and NGOs educate children about boundaries and safety. Teachers have a vital role in preventing abuse. Initiatives like talks in Perlis promote awareness and prevention. Balancing punishment and rehabilitation in sentencing are crucial for deterrence and reform.

We have taken an initiative to conduct a talk with Pandu Puteri in Perlis to educate children about boundaries and safety, a proactive step against abuse. Collaborations with police (PDRM) and (WCC) offer a comprehensive approach. Children's innocent questions emphasize the need for awareness. Public consciousness about actions' impact is vital. Sentencing should balance punishment and rehabilitation, deterring offenders while allowing for reform.

Meanwhile, to improve the procedural adequacy of CSA, P20 recommended training of judicial officers, prosecution, social welfare officers and police personnel to improve the procedural adequacy of CSA:

Improvements are needed in the Sexual Offences Against Children Act 2017. Firstly, emotional support for child victims through Witness Support Services (WSS) during trials, managed by the Social Welfare Department. Secondly, the underutilized Legal Companion Service from the Legal Aid (Amendment) Act 2017 should aid abuse victims in Special Courts. Thirdly, specialized training for judges and prosecutors to expedite cases, enhancing the Child Sexual Unit for competent personnel.

In conclusion, in the context of the sufficiency and adequacy of the legal framework for the protection of children from CSA, there were various views expressed by the participant. Some participants stressed the positive aspects of the legal framework, while others pointed out its limitations and the need for improvement. Those who considered the legal framework to be adequate highlighted the benefits of the SOACA compared to the Penal Code. They mentioned that SOACA is more

beneficial for children, especially in terms of the burden of proof and enforcement, as it waives the need for corroboration of evidence. They also acknowledged the significance of existing legislation, such as the SOACA, in safeguarding children from sexual offences. They emphasised the importance of continuous efforts to strengthen the legal framework, promote better laws, harsher punishments, and effective enforcement.

On the other hand, participants who expressed concerns about the legal adequacy of the framework mentioned various gaps and limitations. They noted that the SOACA does not cover major sexual offenses like child rape and penetrative assault. They also highlighted the absence of provisions for non-verbal and non-articulate victims, such as infants and mentally challenged children. Additionally, they pointed out that the law should provide for the aftercare of victims and ensure that victims living with their perpetrators are placed in special homes to prevent future trauma.

Participants also raised concerns about the enforcement of laws related to CSA, the integration of victims and offenders into the community, and the limited placement options for victims in welfare homes. They suggested that the law should be more comprehensive and cover all aspects of CSA, including prevention and aftercare for victims. Some participants recommended specific improvements, such as the inclusion of provisions for non-verbal victims, mandatory reporting laws, and heavy legal consequences for non-reporting.

In terms of procedural and operational adequacy, participants highlighted the importance of training and equipping law enforcement agencies and the legal system to handle CSA cases effectively. They emphasized the need for clarity and consistency in the procedures involved and suggested the proposal of a centralized statute specifically addressing child sexual crime investigations.

Overall, the discussions revealed a recognition of both the positive aspects and limitations of the current legal framework for protecting children from CSA in Malaysia. There was a consensus among participants that continuous efforts are required to improve the law, enhance its implementation, and ensure the well-being and protection of children.

5.3.4 Challenges in Implementation

Challenges in the enforcement and implementation of CSA laws could come in different forms and dimensions. This theme is mapped directly to the second research question and objective. However, this was mainly external factors and unrelated to the inadequacies discussed above. The scope of the challenges identified fell within reporting, investigation, evidence, and trial period. No challenges were reported for education and awareness of the general public. The prominent sub-themes reflected challenges from the victim's family.

Non-Reporting and Influence of Family

Non-cooperation by the family or guardian of the victim is a major challenge to the implementation and enforcement of CSA laws in Malaysia. The majority of the participants reported family challenges at different stages of CSA management and protection while others report technology and social media as an enabler of CSA.

P1 and P3 observed the failure to report CSA cases as soon as they occurred, usually in the name of “maintaining the status and credibility” of the family. P1 stated that:

Victim's family's refusal to report to maintain status and credibility.

To curb this, P3 suggested the need for mandatory reporting for family members and teachers:

Mandatory reporting is good to have so that school especially for teachers to come forth if they knew. Should be clearly stated in the act to warn those who are responsible under the law.

P12's perspective elucidated the challenges faced when family members, particularly guardians, were uncooperative in cases of CSA:

Some guardians cooperate during investigations but resist subjecting their children to full trials, fearing the trauma it may inflict. Often, they minimize the incidents or are in denial about the crimes against their children. Some initially supportive guardians back out upon witnessing their child's trauma. In cases where the guardian is the perpetrator, they frequently discredit the child, claiming they imagined the incident or threatening them into silence. Such guardians exploit their authority, manipulating children into criminal acts, and later argue that the children willingly or curiously participated or even consented.

P15's response emphasized two key factors that can impede the pursuit of justice in cases of CSA:

Reluctancy of victims to attend court as a witness during trial and lack of support from family members towards the victim.”

On the other hand, P17's statement pointed out the detrimental consequences that can arise when families or close relatives choose to remain silent about incidents of CSA:

Also, mostly the family or the closest one will be silent about this just for the sake of the family's name and this will cause serious harm to the children when there is no justice served.

Indeed, P18's view further supported the statement made by P17 regarding the reluctance of families to report cases of CSA:

One of the biggest challenges in battling sexual offences against children here in Malaysia is the fact that there are so many sexual offences cases

against children being unreported. Their reasons could vary from the perpetrator being an important member of the family, unsure of their welfare if the being is brought forward by the law, and lastly, the social stigma to shy away from public embarrassment.”

Moreover, P19 provided valuable insights into the influence of family dynamics on reporting child sexual offenses and highlighted that individuals who suspect child abuse in a particular home may be hesitant to become involved:

Instances of child sexual offenses often go unreported to the police due to factors like prioritizing family reputation over victim protection, especially when a family member is involved. Fear, uncertainty about abuse, and distrust of authorities contribute to silence, compounded when the offender is a close relative. Children fear not being believed, causing family disruption. Families might avoid reporting outsider abuse to spare the child a lengthy inquiry or due to distrust of authorities, fearing legal consequences for false reports.

P21 further reinforced the influence of family dynamics on the reporting of child sexual offences, echoing some of the points mentioned in the previous statements:

Guardians sometimes hesitate to report crimes, prioritizing family reputation over child safety. If a family member is involved, the urge to conceal is stronger. Concerns arise if the perpetrator is the family's leader or provider, with normalcy misconceived. Suspecting abuse, people fear involvement and conflict escalation, leading to avoidance.

On the other hand, P22 is on another view in regards to mandatory reporting:

Even though Section 19 of SOACA lacks imprisonment, however, it is important to underline the complexities in addressing child sexual abuse and reporting. Awareness and prevention are key. Education and public awareness can reduce abuse and encourage reporting. Mandatory reporting laws are crucial for child safety, but successful implementation and understanding are vital. POCSO Act's provisions on consequences for non-compliance showcase potential effectiveness.

However, as you mentioned, even with these provisions, the actual implementation can be challenging. Striking a balance between creating awareness and implementing punitive measures is essential. Awareness campaigns can help prevent offenses and encourage reporting, but having consequences for failing to report can also act as a deterrent. While imprisonment might not be the immediate solution, addressing challenges

related to awareness, resources, training, and support for professionals involved in mandatory reporting can lead to a more effective approach.”

Lack of awareness and support

P5 pointed out the issue of lack of awareness regarding CSA, particularly in understanding that even if the abuse is apparently consensual, it is still legally considered statutory rape when it involves an underage child:

Lack of awareness on child sexual abuse although the abuse has consented, it would still be legally treated as statutory rape if it concerns an underage child; this view is also adopted among the people that are supposed to uphold the law. Implementation and enforcement of the law need to be improved.

P15 revealed the lack of support from the government, particularly in the aftercare of child victims of sexual abuse where this poses a significant challenge for organisations working with these victims:

My organization faces government support gaps in child victim aftercare. Many victims live with perpetrators due to familial ties. Victims rely on our welfare homes for recovery and safety. Lack of government power and laws on child sexual assault is evident. We aid victims through investigation and evidence collection, but delays can invalidate evidence. No law penalizes family members who fail to report assaults on their children.

P17 identified a specific challenge faced by JKM in protecting children from sexual offences, which is the lack of qualified social workers with the necessary credentials to handle victims of sexual offences:

The other challenges faced by JKM in protecting the children from the sexual offences are the lack of social workers who have the necessary credentials in handling the victim of the sexual offences.

Meanwhile, P19 highlighted the inefficient and inadequate efforts by government bodies or authorities in combating sexual offences against children in Malaysia:

Government efforts to combat child sexual crimes are inefficient and insufficient. SOACA 2017 addresses online grooming, but limitations exist. In 2018, numerous IP addresses and websites with CSA content were identified but lacked prosecution. Blocking alone is ineffective; offenders shift to hidden networks. Authorities act mainly if victims file reports. Police officers lack knowledge on SOACA's rules and CSA effects. This explains why Malaysia is ranked 23 out of 60 countries in response to the threat of child sexual exploitation and abuse (CSEA) with a total score of 56.9 behind regional peers such as Indonesia (68.1), Thailand (58.7), Philippines (58.4) and Vietnam (58.4).

Moreover, P19 punctuated the lack of awareness of CSA as another challenge in addressing and combating sexual offences against children in Malaysia:

Last but not least, the fact that sexual offences against children are a topic that is rarely mentioned in homes or schools is another connected issue that impedes success in the fight against sexual crime against Children. Although sexual education is included in the school curriculum, some teachers might not feel adequately prepared to cover the topic holistically. Beyond laws, it is crucial to take preventive actions in which kids can take part. A few suggestions are made in the section that follows.”

P21 clarify on the lack of support from public authorities as a significant challenge in addressing child abuse and neglect in Malaysia:

First, it is difficult to receive aid from public authorities. It is difficult for children to receive aid and for the authorities to hold those guilty of child abuse and neglect accountable since these laws and policies are not strictly enforced. Additionally, due to Malaysia's dual legal system, there are inconsistencies in child safety across the nation as a result of disparities in the state and federal levels' implementation of child protection laws and regulations. Children are defined differently in civil law and Syariah law, and there are differences between the definitions of children in other national laws as well. It is challenging to offer complete assistance to them due to the lack of coordination among governmental bodies, non-governmental organisations (NGOs), and other players involved in child protection.

P22 opined that the consequences of insufficient funding can significantly impede the effective implementation and enforcement of the provisions outlined in the Sexual Offences Against Children Act (SOACA) concerning child protection:

Insufficient funding can have a substantial impact on the implementation and enforcement of the provisions of the Sexual Offences Against Children Act (SOACA) related to child protection.

Regular training for law enforcement, legal professionals, and other stakeholders is essential for the proper enforcement of the SOACA's provisions. Inadequate funding may limit the availability of training programs, leading to gaps in knowledge and skills. Effective enforcement of child protection laws requires engagement with local communities and NGOs. Insufficient funding can limit the resources available for building partnerships and engaging in outreach initiatives.”

P24 emphasized that the absence of sufficient funding can significantly hinder the seamless execution of protective and aftercare services for victims:

Lack of funding means that the protection or aftercare services to the victim cannot be executed flawlessly. With no adequate funding the provision in the SOACA (if any), would not help the victim and would not be practical. The welfare of the children, the main aim of SOACA in the first place to be enacted would not be achieved. It will also discourage the parents or concerned parties to report or resort to a court proceedings in view that it will only traumatize the victim more, without the counseling and aftercare service.”

Investigation and evidence gathering

In the aspect of investigation and evidence gathering, participants also reported major challenges involving the victim and the role of family members. A hesitant child victim may not be able to give valuable evidence due to shyness or trauma. According to P14, the trial may be halted directly or impliedly due to non-cooperative child victims who

may be shy or emotional to give evidence. This position was corroborated by P2 who stated that:

Collecting evidence from the child victims that are hesitant, shy or worse, refuse to cooperate as instructed by family members.

The impact of delayed reporting and the validity of evidence gathered was highlighted as a major challenge when it involves medical sample collection. P4 stated that:

Family members decide to keep the victims from speaking out or refuse to lodge a report. Victim blaming the children. Lack of sex education among children and teenagers. Excessive and improper use of social media. Lapse of time due to late report thus resulting in insufficient and unreliable evidence sample.

P10 pointed out an important challenge in addressing CSA in Malaysia, which is the lack of specific training for police officers who handle such cases:

As most police officers that tend to CSA cases are not specifically trained, there would be difficulties in communicating with them, especially with children under 5 years old. There would be misused of some terms and understanding between the victims and officers that handle the investigation. Interviews that involve medical proof and medical information would be hindered by lack of training and exposure.

P7 raised an important issue regarding the lack of cooperation between governing bodies, specifically mentioning the legislative, judiciary, and executive bodies, which contributes to delays in investigating child sexual offence cases in Malaysia:

Malaysian Anti-Corruption Commission should investigate all cases of coaching children. Lack of cooperation between the legislative, judiciary and executive body which hinders progress in dealing with child sexual offence cases.

The challenges of non-reporting and the role of the family also corroborated by P4 who extended this to the ignorance or lack of sex education among children and

teenagers and the role of social media as an enabler. In relation to social media and the challenges of CSA, P16 observed the importance of MCMC. He observed that:

The Malaysian government has launched several efforts, including Klik Dengan Bijak, to provide youngsters with a secure online environment. According to Section 211 of the CMA, it is unlawful for a content application service provider or another user of the service to offer, create, or solicit indecent, obscene, false, menacing, or offensive content with the intent to annoy, abuse, threaten or harass any person. On the other hand, Section 233 of the CMA forbids the abuse of network resources or services to offer communications to anybody for either commercial or non-commercial purposes. According to Zulkarnain Mohd Yasin, Chief Compliance Officer of MCMC, through collaboration and information sharing between Interpol, PDRM, and MCMC, the Commission has restricted access to more than 400 websites that contained child sexual abuse content from 2015 to 2018.

P12 raised several significant challenges faced when interviewing child victims of sexual abuse, which can contribute to difficulties in gathering accurate information and evidence:

In most cases, I will face difficulties in interviewing the children (victims) as most of the children are traumatized and scared due to the crime that happened to them. Younger children struggle to communicate effectively. Gathering information is difficult as children's answers are unsure. Evidence collection is hindered by compromise, contamination, and lack of awareness. Young children's uncertainty affects evidence collection. Accused might hide or lack evidence, relying on circumstantial evidence.

P23 gives a valuable insight about corroborative evidence when it comes to a child witness:

The concept of corroborative evidence and its significance in legal proceedings can vary across jurisdictions. In some jurisdictions like the UK, the notion of corroborative evidence may not hold the same weight as it does in others. Section 18 and other related legal provisions may not explicitly require corroborative evidence. In some cases, the focus may be on whether the evidence is sworn or unsworn rather than its corroboration. When dealing with child witnesses, their evidence is often evaluated for its consistency and convincing nature. A child's testimony, if consistent and compelling, can carry significant weight in court. However, inconsistencies or indications of coaching may raise doubts

about the reliability of the evidence. While corroborative evidence might not be mandatory, its presence can certainly strengthen a prosecution case. Inconsistencies or a lack of evidence might create doubts and potentially weaken the case. Therefore, when corroborative evidence is available, it can contribute to building a more robust argument. The reference to case laws highlights that legal decisions can be influenced by rules of prudence and practice, not solely by strict legal provisions. The nature of the offence and the specific circumstances may shape how corroborative evidence is perceived.

P25 further reiterate on the non-corroborative evidence:

The principle of non-corroborative evidence in legal proceedings, especially in cases involving child sexual abuse, is a complex issue that requires careful consideration. The general rule in legal proceedings has been to require corroborative evidence to support the testimony of a single witness, particularly in serious cases like sexual offenses. This is to ensure that the testimony is credible and accurate, as corroboration can strengthen the overall case. If there are inconsistencies or discrepancies in the testimony of the witness, the court may require corroborative evidence to validate the reliability of the testimony. Corroboration in such cases helps establish the veracity of the claims. The age of the child witness is a critical factor. Younger children might have difficulty articulating their experiences consistently or comprehensively. Courts recognize the need for flexibility in assessing the evidentiary value of a child's testimony, and the requirement for corroboration might be less stringent for younger children. Decisions about allowing uncorroborated evidence should be made on a case-by-case basis. The court must weigh the factors of credibility, consistency, and the nature of the testimony against the need for corroboration.

Other family-related challenges revealed by P14 include family arranged marriage between the victim and the accused before or during the trial:

Challenges did happen when a child victim was unable to testify in court due to inability to recall the traumatised sexual incidents occurred prior to case trial resulting from unnecessary/inevitable series of trial adjournments, child-victim-hesitancy to give evidence due to family backlash/case withdrawal by family members/complainant and family-arranged-marriage between the victim and the perpetrator in the course of trial due to family's refusal to prolong the case in court. The challenges that we faced are quite concerning whereby we are unable to proceed with the case trial in the event of victim-hesitancy, family-refusal and etc taking place before or in the course of case trial.

Again, some legal challenges were mentioned by P3 which could be an inadequacy of the Act. They are the absence of a compensation regime and the lack of a definition section/clause. P3 stated that:

Next, adequate compensation is not easy to give ruling as to quantify such damage. And it is difficult to enforce in order to retrieve the money. SOACA should lay down clear definition clauses in the statute to avoid confusion on its enforcement.

After care is also being raised as an important aspect of managing CSA cases.

P15 detailed the challenges faced by the victims during and after trial:

Most victims are abandoned, and some victims still need to live with their perpetrators as some of them are sexually abused by persons in their family. Hence, victims have to heavily rely on organisations such as ours to provide them a welfare home for them to recover from their traumatic experiences or as a temporary safe haven while waiting for trial.

No clear guidelines and inadequacy of law

P8 highlighted the lack of clear guidelines on interagency collaboration as a challenge in dealing with CSA cases. Without clear guidelines, coordination and cooperation between different agencies involved in the investigation and prosecution of these cases may be hindered:

There is no clear guideline on how interagency collaboration should be operated on. This could hinder progress in dealing with child sexual abuse cases. In POCSO, it is easier to apply the laws in conducting duty as counsel for the accused as POCSO provides more comprehensive and detailed provisions. This will result in more requirements to be fulfilled by the prosecuting officers hence it is easier for certain requirements to be overlooked.

P11 stated that the lack of a proper structure for inter-agency collaboration as a challenge in dealing with CSA cases:

Interagency collaboration lacks proper structure, affecting evidence procurement, especially medical evidence. In Malaysia, child testimony requires corroboration under the Evidence Act, hindering cases involving child victims. Guidelines and roles for the Children Court, like POCSO, are crucial. Contradiction between Acts leaves matters to the court, often favouring the Evidence Act. SOACA's provision of child witness competence becomes ineffective.

P16 emphasised the need for urgent revision and amendment of the Sexual Offences Against Children Act of 2017:

The Sexual Offences Against Children Act of 2017 has to be revised and amended urgently in order to make it child-friendly and encourage more kids to come forward and testify in court. The law has achieved its purpose to cover most area of child sexual abuse but more holistic and detailed area must be covered as to give full protection towards sexual offences against children. The act must also govern all the steps taken in the process of the criminal justice system for a sexual crime against children to be more accessible and child friendly.

P18 highlighted the issue of having multiple laws governing sexual abuse against children, such as the Child Act 2001 and the Penal Code. P18 suggested the need for a provision that clearly specifies which law should be applied in cases involving the welfare of children in sexual abuse cases:

On another note, the various different laws that govern sexual crimes against children such as Child Act 2001 and the Penal Code. There should be a provision that stated the prevalence of which law should the court use in cases that concerns the welfare of children in sexual abuse cases towards children.

P23 pointed out a vital point in which lawyers shall prepare the questions for the child witness beforehand:

Shielding children from sexual offenses is vital, yet obstacles like time-consuming proceedings and repetitive questioning persist. This prolongs distress and jeopardizes testimony accuracy. The UK's approach, involving judges to filter questions and expediting proceedings, serves as a model. Efficient cases minimize victim impact, maintain accurate testimonies, and uphold public trust. Tailored questioning, considering age and emotions, is crucial. Exploring truth through expert counselors or interviewers is more productive than reiteration if inconsistencies

arise. Prioritizing children's well-being ensures a just and compassionate legal process.

Funding and resources

Funding is another major challenge as identified by Participant, P21. This includes a lack of funds to implement child protection policies and training/certification of welfare departments among others. Specifically, it was observed that:

Lack of funding and resources. The money and resources for child protection services are frequently insufficient and this causes hurdles to understanding the scale of the problem and coming up with workable remedies given the paucity of trustworthy data and the depth of research on child safety in Malaysia due to the lack of funding. It is a known reality that the Welfare Department lacks sufficient resources, staff, and organisation, hence, a thorough reform of the administration is required, including professional training and uniform certification.

P13 emphasized the importance of having aftercare and post-trial measures to protect child victims of sexual abuse:

However, aftercare and post-trials should also use the law as an entrustment to protect these children from problems such as to provide shelters for the victims, provide protective custody and home therapy. Conclusively, it is adequate for now but the law needs to grow in parallel to the evolution of the masses, Emphasis should also be put on laws to PREVENT such heinous crime from happening.

P16 revealed the challenge faced by the Social Welfare Department Malaysia in protecting children from sexual offenses, particularly in the context of cyber safety:

The Social Welfare Department in Malaysia faces a challenge in protecting children from sexual offenses, notably in cyber safety. A UNICEF report indicates that around 4% of internet-using children aged 12-17 in Malaysia experience online sexual exploitation and abuse. This includes blackmail, sharing sexual images without consent, and coercion. Inadequate computer-based education programs underscore the need for awareness among school children.

P25 discusses how insufficient funding can have negative consequences on initiatives and systems aimed at protecting children:

Insufficient funding can have detrimental effects on initiatives and systems designed to protect children, leading to prejudice against child protection efforts. It can result in understaffing, lack of resources, and overworked staff within child protection agencies, hampering effective responses to child abuse cases. Prevention efforts, such as educational programs and awareness campaigns, may be curtailed, leaving communities unaware of recognizing and reporting abusive situations. Limited funding can delay services for children and families in need, exacerbating trauma and hindering recovery.

In conclusion, the enforcement and implementation of CSA laws in Malaysia face several challenges, particularly in reporting, investigation, evidence gathering, trial proceedings, and the influence of family dynamics. Non-reporting and the reluctance of families or guardians to report cases hinder the effective enforcement of CSA laws. Lack of awareness and support, both from the general public and the government, further exacerbate the issue. The inadequate training of professionals and the lack of coordination among authorities and organisations also contribute to the challenges. Addressing these challenges requires mandatory reporting, improved awareness programs, better aftercare for victims, and enhanced coordination among stakeholders. Additionally, training for police officers handling CSA cases and revising laws to address changing social norms and technological advancements are crucial. By enhancing police training and revising outdated laws, Malaysia can strengthen its approach to combating CSA. Data-driven reviews and collaboration among various stakeholders will be instrumental in informing these reforms. Ensuring the protection of our children should remain a national priority, and these proactive measures can bring us closer to delivering justice for victims and establishing a safer environment for all.

5.3.5 Improvement of the Law

In furtherance of the challenges observed by the participants, another emergent theme is the need to improve the law for the effective protection of children and the management of CSA cases in Malaysia. This theme is in line with the last research question and objective number four. Some of the prominent subthemes relates to need for stricter punishment, mandatory reporting by teacher and family, harsher punishment for false reporting, child friendly process, the role of technology, need for CSA guideline and training of officers.

Mandatory Reporting and Family

When the participants were asked how to improve the law, the majority replied on the need to make CSA reporting mandatory for family members and teachers soonest possible. P2 requested that the law should place consequences on failure to report sexual offences against children:

Investigation and the legal process takes too long and there needs to enact a compulsory law that demands family or guardian to report and lodge any sexual offence case or face legal consequences.

Similar comments were made by P6 and P10. P6 suggested implementing mandatory reporting by the victim's family in cases of CSA, emphasizing that failure to report should result in heavy legal consequences.

There must be mandatory reporting by the victim's family if there is any child sexual abuse taking place. Failure to report may lead to heavy legal consequences. As per example in India's special act for child sexual abuse, minimum punishment should be imposed on certain offences.

P10 pointed out aspects concerning CSA cases and the legal framework surrounding them in which P10 emphasized the need for guardians or family members to report any instances of CSA to the police.:

Mandatory reporting laws require guardians or family members in certain jurisdictions to promptly report suspected cases of child sexual abuse to the police or relevant authorities, aiming to safeguard children's well-being. Failure to fulfil this obligation can lead to legal consequences, including imprisonment, as these laws prioritise the swift intervention and protection of children at risk.

Additionally, P15, P18 and P13 agreed that there should be stricter punishment for non-reporting by family members and guardians. Most of the participants highlighted the lack of reporting by family members and guardians who will not assist the victims. P15 also proposed that SOACA should include provisions for harsh legal punishments for family members or guardians who refuse to report sexual assault cases to the police:

Refusal by family members or guardian to report any sexual assault cases to the police could also face harsh legal punishment as stated by POCSO and this should also be followed by SOACA 2017.

Likewise, P8 recommended that the Act include provisions for mandatory reporting of CSA cases:

The implementation of the mandatory reporting should require certain supervision or acknowledgement from professionals such as teachers, healthcare workers and social workers to assist in reporting such cases.

P18 concurred with the need for harsh laws and punishments related to mandatory reporting of CSA cases:

There should also be harsh laws for mandatory reporting as well as harsher punishment for this.

P13 asserted that it should be legally binding for the family or legal guardian to report any sexual offences taking place within the family:

It should also be legally binding for the family or legal guardian to report any sexual offences cases happening within the family or face harsh legal consequences.

P23 mentioned that mandatory reporting mandates certain individuals or professionals:

Mandatory reporting is a legal requirement that mandates certain individuals or professionals to report suspected cases of abuse, neglect, or other harmful situations involving vulnerable individuals, such as children. While mandatory reporting laws serve a crucial role in ensuring the safety and well-being of those at risk, there are considerations regarding the potential consequences, including imprisonment, for those who fail to comply. One of the primary concerns with mandatory reporting laws is the potential imposition of imprisonment as a consequence for non-compliance. I would say that the imprisonment might be too harsh, especially for professionals who might genuinely intend to report but face challenges in doing so due to various reasons, such as fear of retaliation or misunderstanding of reporting procedures. However, there's a need to strike a balance between punishing individuals who knowingly fail to report, and those who may have unintentionally fallen short due to factors beyond their control. It's important to consider the intent behind the non-reporting and the potential impact on the individual's life and livelihood.

Despite the lack of reporting, only one of the participants mentioned the phenomenon of false reporting to avoid confusion or wrongful conviction. P10 highlighted the importance of having consistent and concise laws regarding CSA cases and P10 suggested that the provisions should be in place to provide clarity and guidance to all parties involved:

The law in regard to child sexual abuse cases should be consistent and concise. To avoid false or no report, there should be provisions to avoid confusion". This becomes very important due to the non-corroboration rule of child evidence under SOACA.

The consensus among participants is clear: mandatory reporting of child sexual abuse (CSA) cases by family members and guardians is urgently needed. P2, P6, P10, P15, P18, P8, and P13 all highlight the necessity of legal consequences for failure to report such cases. These recommendations stem from the recognition that non-reporting is a significant issue, often leaving victims without the necessary support and

intervention. The participants also emphasized the importance of ensuring that laws are consistent, concise, and clear to prevent confusion and false reporting. This collective call for mandatory reporting underscores the need to create a legal framework that actively protects and supports victims of CSA.

Stricter Law Harsher Punishment and Additional Provisions

The importance of adding additional provisions in safeguarding the identities of child victims and protecting them from media attacks and public exposures has been pointed out by participant, P18:

The safeguard and identity of the children should also be governed by the law to protect the victims from media attacks and from the public.

Again, P13 raised several crucial points regarding aftercare and the need for additional legal provisions for victims of CSA:

Inadequate victim aftercare tools exist. Provision for shelter homes or protective custody is needed. Malaysia should establish specific offenses in a special act like SOACA, prevailing over other laws like the Penal Code. This ensures detailed provisions for child sexual offenses, aftercare, and procedures. Prioritizing victim welfare over offender punishment is essential.

Meanwhile, P3's observation suggested that the punishment system in the SOACA is perceived as being better than the Penal Code in certain aspects.

The punishment in SOACA appears better than the Penal Code and more beneficial for children, especially in terms of burden of proof.

Then again, P8 recommended that the act should be amended to impose stricter penalties for CSA offences and emphasizes the need for harsher punishments specifically for repeat offenders:

The Act should be amended to increase the penalties for child sexual abuse crimes including the mandatory minimum sentences and harsher punishment for repeat offenders. The age of consent in Malaysia is too low and an increase from 16 to 18 years of age should be made to provide better protection to minors from sexual abuse of any kind.

Next, P20 provided a different perspective on several aspects related to child abuse and protection:

The penalties for child abuse should be harsher in order to act as a strong deterrent. It is important for Malaysia to follow the practice in the United States, and publicize its sex offender registry at both federal and state levels. Next, the age of consent should be standardised across the country.

On the part of P24, he focuses on two key aspects: procedural changes in education and legislative amendments to address CSA:

Procedurally, an amendment towards the child syllabus in primary and secondary schools can be amended to incorporate digital literacy and holistic sexual education in school at home. This is due to the fact that most children are easily exposed to perpetrators on the internet and how easy it is for the child to access the internet nowadays. Legislatively, an amendment towards the Sexual Offences Against Children Act 2017 must also include a thorough discussion between the local governments, the national government and other stakeholders to look at the issues concerning children and discussing what the areas that could be changed better to protect children from child sexual abuse.

P25 states the important of having child-sex education starting at an early age:

Implementing comprehensive, accessible, and age-appropriate child sex education is crucial for preventing sexual abuse. It should be integrated into both government and private education, ensuring consistent understanding of healthy relationships, consent, and boundaries. Regular lessons empower children to recognize and report inappropriate behaviour, with parental involvement enhancing early intervention. Public awareness campaigns and tailored programs for rural areas further reinforce the importance of teaching children about personal boundaries, consent, and communication.

P9 highlighted the need for concise and clearly defined provisions within the SOACA, specifically focusing on Section 18 and Section 15(ii):

Section 18 of SOACA needs to be more concise and clearly defined as it concerns corroboration in testimony and someone gambling their future for 3 years which is a severe penalty. There are ambiguous acts that have to be updated. For example, the provision in section 15(ii) of SOACA that governs the law about persistent monitoring or stalking or any act that could constitute stalking. As technology and society have evolved, the law needs to be more specific in its wording, in this case, stalking could happen to anyone and in many forms through the usage of the internet and social media. A line has to be drawn to constitute the extent where stalking is aggravating and no longer casual.

P7 emphasized the importance of having a law in place to protect innocent individuals who are falsely accused of an offence. P7 proposed the need for guidelines and regulations:

There needs to be a law to protect innocent persons accused of the offence. Guidelines and regulations are needed so that every case ends with conviction, acquittal or DNAA should include a short list of reasons in a report, and this report is forwarded to the Attorney General and the Chief Police Malaysia. any mistake made carelessly.

P5 stressed the importance of empowering society through governing law to prevent CSA and advocating for the elimination of social norms that encourage sweeping CSA cases under the radar to save face:

Laws to prevent child sexual abuse should be empowered to the society. Social norms such as sweeping CSA cases under the radar to save faces should be abolished. This is also good to prevent future offenders from abusing innocent children. Hence, a harsh law regarding compulsory reporting should be implemented and enforced accordingly.

P14 suggested that the remand procedure under Section 117 of Act 593 should be strengthened when dealing with suspects involved in child rape cases and recommended that the process of gathering evidence from child victims should be conducted at the earliest opportunity in court:

That a remand procedure under Section 117 of Act 593 should be enhanced when dealing with child-rape related-suspect produced before a Magistrate. That the evidence taken for child victim should be made at the earliest opportunity in court saying for instance the application of

Section 396 of Act 593 before an actual trial takes place years after an abuser is charged in court.

P15 recommended that SOACA should impose harsher punishments and stricter laws, especially for repeat offenders.

Legislatively, SOACA should put POCSO as an example to which India has gathered all sexual offences towards a child under one specific Act. This could show prevalence in law as a specific special act is used for Sexual Assault Against Children thus easing the court process.

Further, P25 also mentioned the need of the inclusion of definitive clause in SOACA 2017:

In legal statutes, especially in laws regarding child sexual offenses, including a definition clause is crucial for clarity and consistency. This clause establishes standardized meanings for terms, reducing ambiguity for legal practitioners and the public. Reference to case law ensures informed definitions, aligning with legal principles. While providing clarity, flexibility is essential to accommodate changing social norms. A definition clause is especially valuable for addressing non-obvious scenarios, like defining appropriate touch in familial contexts, to prevent misunderstandings and unnecessary legal actions.

Finally, the suggestions made by P18 reflect a call for legislative changes aimed at prioritizing child protection and addressing the issue of CSA with greater severity:

Legislatively, it should be imposed that in cases concerning sexual abuse against children, SOACA should prevail above the rest of the other laws. There should be harsher punishments, more so on repeat offenders.

The importance of safeguarding child victims and enhancing their protection from media scrutiny and public exposure is highlighted by P18. P13 emphasizes the need for aftercare and specific legal provisions for victims, suggesting the creation of a special act similar to SOACA in India. P3 and P8 comment on the relative merits of the punishment system under SOACA compared to the Penal Code and the need for comprehensive reform. P20 calls for harsher penalties and the standardization of the age of consent. P16 proposes procedural changes in education and legislative amendments

to better address CSA. P9, P7, P5, P14, P15, and P18 provide various perspectives on the need for clearer definitions, the protection of innocent individuals, harsher punishments, better remand procedures, and the prioritization of child protection within SOACA. These diverse recommendations underscore the multifaceted nature of the issue and the importance of comprehensive legal, procedural, and societal changes to effectively combat child sexual abuse.

Minimum punishment

The nature of punishments for child sexual crime provided in the SOACA has been a major issue among participants. A participant, P6 commented on the lack of minimum punishment for offences in the Act. The participant referred to another jurisdiction when he stated that:

As per example in India's special act for child sexual abuse, minimum punishment should be imposed on certain offences. The courts in handling cases concerning children especially sexual abuse among children, should reconsider whether children still need to attend court, and that courts should be more child-friendly to them if they are needed to come to court or the court should require the children to be accompanied by members of the family, legal guardian or someone that they could trust. We also need more trained magistrates and DPP in child cases.

P3 commented on the compensation regime and the difficulty in quantifying the amount where he stated:

Adequate compensation is not easy to give a ruling as to quantify such damage. And it is difficult to enforce an order to retrieve money.

P23 highlights the recent addition of Sections 26A and 26B to the SOACA Amendment Bill, which empowers the court to impose compensation for child victims in cases involving Act 792 or listed offenses:

The concept of a compensation clause within legal proceedings involves addressing the issue of compensating victims for the harm they have suffered as a result of a crime. Looking at international practices, such as the model in India where perpetrators pay the government, can provide insights. A visit to India's courts could provide firsthand experience and learning opportunities on the implementation of compensation clauses. Incorporating a compensation clause into legal proceedings requires thorough analysis. It involves evaluating policy implications, understanding existing schemes, considering payment responsibility, addressing potential refusal scenarios, and learning from international practices. Ultimately, the decision should align with the goals of justice, victim support, and legal effectiveness.

P26 states that a well-structured compensation scheme falls under the purview of the Ministry of Finance:

One of the recommendations that I have received when we were looking into the amendments to the SOACA early this year was to establish a victim compensation fund, similar to the India and UK model. Nonetheless, a comprehensive and in-depth examination is necessary to properly evaluate the most suitable mechanism to be used, such as the source of the funds, the scope of victims, management of the funds etc.

Concern about the need for minimum punishment was shared by P8:

The Act should be amended to increase the penalties for child sexual abuse crimes including the mandatory minimum sentences and harsher punishment for repeat offenders.

P15 proposed that SOACA should enforce a minimum punishment for sexual offenses committed against children:

Minimum punishment should be imposed on sexual offences against children. SOACA should also impose harsher punishments and stricter laws, especially for repeat offenders. As such in POCSO, a repeat offender can be punished up to life imprisonment.

P25 highlighted the importance of conveying messages to the public when imposing sentences:

The topic of minimum punishment within sentencing for offenses, particularly those involving child sexual abuse and positions of trust, involves a nuanced discussion. One of the key objectives of sentencing is

to deter potential offenders and send a clear message that such behavior will not be tolerated. A minimum punishment can act as a baseline for the severity of consequences an offender can expect. Offenses committed by individuals in positions of trust should be met with particularly harsh punishments. This is due to the added breach of trust and the potential long-term impact on the victim. A minimum punishment could reflect society's strong stance against such offenses. Mandatory minimums could restrict a judge's ability to tailor sentences to individual circumstances. Focusing on maximum sentences might be more effective. This approach provides a wider range for judges to consider, allowing them to apply a punishment that appropriately fits the severity of each case. Higher maximums offer room for judges to impose harsh sentences when warranted.

However, on the contrary, P23 states that even without the minimum punishment, the courts have the discretion in determining the appropriate sentences:

In cases without specific minimum punishments, courts possess discretion in determining appropriate sentences, considering factors like offense severity, harm to victims, and offender history. Sentencing aligns with proportionality and case law analogies, maintaining flexibility for unique circumstances. While absence of a minimum sentence offers discretion, judges are guided by statutory maximums. This discretion, paired with transparent rationale, ensures just and adaptable decisions. The necessity of minimum sentences is debated; they can balance consistency and adaptability or risk injustice. Regardless, courts must prioritize victim welfare, serve justice, and align punishment with crime severity, with or without minimum sentences, through careful deliberation and adherence to legal principles.

P22 states that there is no necessity to have the minimum punishment for child sexual abuse offences under SOACA:

Recognizing the complexity of child offenders, a differentiated approach is needed. Awareness is crucial, acknowledging that preventing child sexual offenses requires legal measures and comprehensive education for potential offenders and the public. Emphasizing rehabilitation for child offenders aligns with a restorative approach, considering their unique circumstances. Unlike adults, minimum punishment might not effectively deter children. Distinct from minimum punishment, sentencing guidelines offer a flexible framework. Balancing accountability and rehabilitation is essential for child offenders' reintegration into society.

Moreover, P6 mentioned the impacts of the absence of a minimum punishment:

Absence of minimum punishment signals offenders that the offense isn't serious. Court's full discretion without a minimum punishment allows leniency. Minimum punishment compels harsher sentences despite defense mitigation. In a new and evolving child sexual offenses law, minimum punishment deters and allows legislative improvements. It achieves deterrence and legislative progress.

P2 emphasises the need to have minimum punishment in SOACA:

In the first place, the children need to be protected at any cost and in the name of deterrence, no minimum punishment shall be entertained. Though under SOACA there was no minimum punishment prescribed, the Court still have the discretion to punish the Sexual Offender with a minimum punishment since the wording used in SOACA was “for a term not exceeding”. Parliament in India in 2012 passed Protection of Children Against Sexual Offences (POSCO 2012) whereby the punishment on one side is heavier compared to SOACA. Though POSCO clearly stated the minimum punishment for Sexual Offenders, the lowest punishment for imprisonment was ‘not less than 3 years imprisonment’. Thus, even though POSCO clearly stated the minimum punishment, in fact, the punishment may look like minimum but not really minimum.

On the other hand, P22 agreed on the existing punishment imposed towards child sexual abuse offenders:

I agree on the existing maximum punishment of 30 years for child sexual and I would say that there is no need for death penalty as SOACA 2017 reflect a cautious and humane perspective. It must be noted that no legal system is immune to errors, and the irreversible nature of the death penalty means that any miscarriages of justice cannot be rectified.

The issue of punishments for child sexual crimes has been a focal point for participants, reflecting a range of perspectives. Concerns about the lack of minimum punishment under the Sexual Offences Against Children Act (SOACA) have been expressed by multiple participants. P6 emphasized that without minimum punishments, offenders might perceive the offenses as less serious, impacting deterrence. P23 highlighted the need for stringent punishments to protect children's well-being and deter potential offenders. However, the concept of minimum punishments also raises complexities. Moreover, high minimum sentences may not necessarily deter sexual

violence or improve the criminal justice system's efficiency, especially in weaker and under-resourced systems. The recent addition of Sections 26A and 26B to the SOACA Amendment Bill, as noted by P23, empowers the court to impose compensation for child victims, indicating a significant step toward addressing the issue of compensation for victims of child sexual abuse. While the absence of a minimum punishment remains a concern, the overarching goal shared by participants is to create a comprehensive legal framework that effectively protects children from sexual offenses, ensures justice for victims, and prevents future instances of abuse. This involves carefully balancing deterrence, proportionality, and victim support while addressing the complexities inherent in child sexual abuse cases.

Child friendly

The procedure could be made friendlier to children. One of the participants commented on the need to give support to the child victim during the trial. P6 stated the need for courts to reconsider whether children should still be required to attend court proceedings, especially in cases involving sexual abuse:

The courts in handling cases concerning children especially sexual abuse among children, should reconsider whether children still need to attend to court, and that courts should be more child-friendly to them if they are needed to come to court or the court should require the children to be accompanied by members of the family, legal guardian or someone that they could trust. We also need more trained magistrates and DPP in child cases.

In the same context, P15 noted that students are a vulnerable category of the society who need to be educated on:

Court should also be more child friendly as most children are intimidated to come forward to give their testimonies. More concise and clear guidelines on how to cater to children in court. There is a clear

contradiction in the law regarding how different SOACA and Evidence Act looks at children as witnesses in court. SOACA treats children as competent witnesses and that evidence provided by a child witness can be used in court without corroboration. This contradicts the provision in the Evidence Act where child witnesses need corroboration. There is no further clear explanation whether in SOACA or Evidence Act as to which Act would prevail and this would leave the Court a choice to choose from.

P8 suggested that improving the law on child protection should include the age of consent. The participant observed that:

The age of consent in Malaysia is too low and an increase from 16 to 18 years of age should be made to provide better protection to minors from sexual abuse of any kind.

P21 further emphasized the importance of strengthening existing child-friendly mechanisms in Malaysia to combat child sexual offences and child rape:

Strengthening the existing child-friendly mechanisms. Government programmes such as Talian Kasih, Childline Malaysia, and Cyber999 shall be promoted more in schools. Through these initiatives, NGOs and the government can work together to implement more child-friendly policies. LaporPredator is one such instance in Malaysia. LaporPredator is an online chatbot that victims can reach via the LaporPredator website or through their WhatsApp application and where they can opt to report their instances anonymously. It was created by the youth-based NGO known as Monsters Among Us. Following the report, trained child safety volunteers will provide more assistance to the victims. If necessary, the child protection volunteer or manager will assist the person making the report in directing their situation to the appropriate authorities for additional action.

P4 raised several important considerations related to child witnesses, digital evidence in court, attendance requirements for children in court, issues with companionship during court proceedings, the establishment of child-friendly courts, and the need for more training for magistrates and AGC in child cases:

Definition of child witnesses, digital evidence in court and whether the child needs to attend court, issues with the companion of the child or legal guardian during court proceedings because at times family members have to stand as a witness. a child-friendly court, more training needs to be

done on magistrates and DPP in child cases. Smoothens the arrangement of court cases for underprivileged families.

P25 has also urge on the need to make the court-procedures to be child-friendly:

Creating a child-friendly courtroom environment is crucial for cases with child witnesses. This recognizes their vulnerability and prioritizes comfort and accurate testimony. Allowing avoidance of intimidating setups and facilitating mediator-assisted interactions respects their emotions. Careful framing of questions by mediators or interpreters ensures effective communication. Restricting questions to relevance prevents undue stress, promoting accurate information sharing.

Finally, P18 emphasized the importance of making procedures easy and child-friendly when dealing with child sexual crimes and child rape cases:

The procedure should be easy and child friendly. More medical workers and staff should be trained to cater to children so as to not intimidate them and assure their safety in order to gain their trust. There should also be a special court for children as the typical court setting could intimidate and scare them off into telling the truth to the judges.

In conclusion, participants' viewpoints converge on the importance of making legal procedures more child-friendly and supportive for child victims of sexual abuse. P6 and P15 emphasise the need for courts to consider whether children should attend proceedings and to create a more welcoming environment. P8 advocates for amending laws to increase penalties, revisiting the age of consent, and implementing mandatory reporting with professional supervision. P20 contended the significance of strengthening child-friendly mechanisms such as Talian Kasih and Childline Malaysia. P4 underscores several aspects including child witnesses, digital evidence, attendance requirements, companion issues, child-friendly courts, and training for magistrates and AGC. P18 proposed the need for easy, child-friendly procedures and specialised courts. Collectively, these perspectives highlight the urgency of prioritizing children's protection, trust, and well-being throughout legal processes involving sexual abuse cases.

Training and Capacity Building

The training needs of the court officials, judges, social welfare officers, and others were also reflected in the response by the participant, P16. He elucidated that:

The Education Ministry should utilize social media for educational videos on child sexual abuse awareness, prevention, and reporting. Collaborative campaigns involving various stakeholders can amplify awareness efforts. Increasing trained social workers in the Social Welfare Department is essential due to rising child protection needs.

With respect to judicial training, P6 and P4 put forward that magistrates be trained to improve service delivery. P6 further emphasized the importance of having more trained magistrates and AGC specifically in cases involving children:

We also need more trained magistrates and DPP in child cases.

A similar aspect was forwarded by P4 which is the need for additional training for magistrates and AGC who handle the child cases:

More training needs to be done on magistrates and DPP in child cases.

Then again, P21 affirmed the importance of awareness campaigns in addressing CSA and online child sexual exploitation and abuse (OCSEA) in Malaysia:

Eighth, awareness campaigns. Authorities, social workers, community-based groups, and schools can collaborate with parent-teacher associations to implement awareness programs. For instance, the nationwide #SayaSayangSaya campaign gave 1,564 students from 316 schools in Malaysia the chance to interact with professionals from the police's Sexual, Women, and Child Investigation Unit and learn about reproductive health issues, child sexual abuse, and cyber safety. The Women's Centre for Change led numerous targeted outreach programs for schools at the state level in Penang, including Finding My Voice for Girls, Boyz Programme for Boys, Cybersafety Programme for Teenagers, Ok Tak Ok Programme for Children, and RESPEK for Teenagers. These targeted awareness initiatives, which target certain populations, provide a secure environment for participants to voice their worries and may be duplicated with great success in other states. Such programs not only raise awareness but also help volunteers and organizers understand how CSA and OCSEA are happening.

The recommendations put forward by P4 addressed various aspects related to child witnesses and their involvement in court proceedings:

Whether the child needs to attend court, issues with the companion of the child or legal guardian during court proceedings because at times family members have to stand as a witness, a child-friendly court, more training needs to be done on magistrates and DPP in child cases.

Nonetheless, P10 also discovered that the collection of medical proof and information requires training for effective management:

The law in regards to child sexual abuse cases should be consistent and concise. To avoid false or no reports, there should be provisions to avoid confusion during the trial. Where the law regarding corroboration in children's testimony is different in Evidence Law and SOACA, there needs to be drawn a line for prevalence shown of one law to another especially in regard to sexual offence in children to show consistency to the law.

In addition, P12 noted that officers need more frequent training to be at par with the incidence of CSA. He observed that:

Most of the officers received basic training which requires additional and frequent training from time to time. Frequent training is important as it will provide opportunities for the officers to share with other officers their knowledge and experiences when handling CSA.

Meanwhile, the observation made by P15 highlighted the need for training related agencies and government officers in dealing with sexual abuse cases against children:

Most related agencies and government officers need to be trained in dealing with sexual abuse cases against children.

P20 pointed out various measures and recommendations related to child protection services, reporting mechanisms, and the importance of digital literacy and comprehensive sexual education:

The Department of Social Welfare in Malaysia provides shelters for abused children, collaborating with various stakeholders including police, medical facilities, schools, and hotlines like Talian Kasih. Childline Malaysia (15999) and Cyber999 assist children and address online child exploitation. One Stop Crisis Centres aid sexual assault victims. To enhance child safety, integrate digital literacy and holistic sexual education into schools and homes. Tailored digital literacy education should cover online safety and recognizing predatory behavior. The Education Ministry could utilize materials like webtoons to address child abuse and exploitation, involving parents in teaching and monitoring online activities.

The recommendation presented by P18 suggested that all victims, particularly pregnant victims, should be placed in a care home for their protection and support:

Finally, all victims should be put in a care home, especially pregnant victims. Public institutions like public schools and local authorities should educate all levels of society and provide programmes to educate the public of this matter.

P25 has also recommended for a compulsory campaign to be made by the relevant parties:

Enforcing a mandatory awareness campaign within child protection measures is a proactive strategy to prevent child sexual abuse. Incorporating these campaigns into legal statutes underscores government commitment to child safety. Oversight by the Ministry of Women, Family and Community Development ensures effective execution, coordination, and impact assessment. Assigning penalties for non-compliance underscores the seriousness and priority of campaign implementation.

Last but not least, P14 suggested that the Law Minister should advocate for prioritising child victim cases by allocating more resources to establish specialist judges and prosecutors dedicated to handling and expediting these cases:

That the Law Minister should draw the Government's attention towards prioritising the child-victim-case by spending more allocations in the formation of specialist Judge /Prosecutor to handle and to hear those kinds of cases in a bid to avoid unnecessary delay in the handling and

conviction of cases of sexual offences against children which causes a deficiency in terms of the preventive effect of the law.”

The responses of participants highlight the critical need for comprehensive training to address child sexual abuse (CSA) and ensure effective legal proceedings. P16 emphasizes educational videos and awareness campaigns to prevent and report CSA, as well as the importance of trained social service workers. P6, P4, and P12 stress training for magistrates, law enforcement, and officers dealing with CSA cases. P21 underscores awareness campaigns and digital literacy, while P15 notes training for related agencies and government officers. The incorporation of digital literacy and sexual education is highlighted by P20. P18 advocates for care homes for victims, and P14 recommends specialised judges and prosecutors. Overall, these insights emphasise the imperative of robust training, collaborative efforts, and legal support to combat CSA and protect children.

Supremacy Clause and Another Jurisdiction

The need to provide clarity on the definition and supremacy clause have been highlighted by P3. Few participants raised the absence of a supremacy clause that clashed with other statutes such as the penal code and the Evidence Act. The provisions of SOACA appear to be in conflict with some provisions in other written laws. Often, there could be the need for cross-reference and a lack of clarity on which of the legislation is supreme. The observation made by P3 highlighted the recommendation that the SOACA legislation should explicitly include provisions for rape and penetrative assault:

SOACA should provide for rape and penetrative assault such as rape so that we don't need to cross-reference to other statutes to charge offenders.”

P23 states that even without the supremacy clause, judges would still be able to navigate the conflicting legislation through cases and legal principles:

The rules of law concerning evidence, specifically the rules of evidence, are essentially the procedures that govern the admission and presentation of evidence within legal proceedings. Whether in criminal or civil cases, these rules provide a structured framework to ascertain the truth while protecting the rights of all parties involved. The concept of the "supremacy clause" plays a significant role in legal contexts. In jurisdictions where a supremacy clause exists, it establishes a hierarchy between different laws. For example, if there are two conflicting laws, the one specified as superior under the supremacy clause takes precedence. However, even in the absence of a supremacy clause, legal professionals can still navigate conflicting legislation through other legal principles. Judges and legal experts can analyse the legislative intent, the specific context of each law, and relevant case law to make informed decisions. This demonstrates the flexibility and adaptability of the legal system to address issues even when a clear hierarchy is not explicitly defined.

P22 highlights that the absence of a supremacy clause in the Sexual Offences Against Children Act (SOACA) 2017 would not affect current practices as:

Special laws take precedence over general laws and when specific provisions within special laws address the same matter as those in general laws, the special law's provisions prevail. There is a Latin maxim underscores the long-standing nature of this legal principle. The maxim reinforces the notion that when there are conflicting provisions on a particular matter, the more specific or specialized law takes precedence over the more general law.

As emphasized by P24, the need for a supremacy clause within the Sexual Offences Against Children Act (SOACA) is crucial due to its status as a criminal legislation:

SOACA is a criminal legislation. Generally, in Malaysia, criminal offences are gathered comprehensively under Penal Code but for a few exceptions like commercial crimes and such. However, since there is already existing criminal legislation, the supremacy clause is crucial to ensure that Penal Code, Criminal Procedure Code, and SOACA did not conflict themselves and made it easier for the Court to interpret and implement SOACA to the intention of the Parliament. Without it, the

Court is left to its jurisdiction on which to pick and use. Specifically, for SOACA, it matters a lot. The list goes on from the definition of a child, the credibility of a child witness, the criminal compensation given to the victim, the matters of procedure, whether it's the same as what is provided under Penal Code, and lapsing offences. If the Parliament intended the SOACA to operate on its own then it must have a supremacy clause.”

P25 recommended that the incorporation of a supremacy clause is crucial to avoid a scenario where diverse decisions and penalties emerge, causing inconsistencies and miscarriages of justice that adversely impact both victims and the rights of perpetrators:

The concept of a supremacy clause within legal frameworks raises important considerations, particularly in the context of issues such as rape and sexual offenses against children. This clause serves to establish hierarchy when conflicts arise between different laws, ensuring that one law takes precedence over another. The incorporation of a supremacy clause in the principal act would streamline the legal landscape, consolidating all matters related to sexual offenses against children into a single comprehensive law. This unity simplifies the legal framework, making it easier for legal professionals, law enforcement, and the public to understand and navigate. The issue of consent age is significant in cases of sexual offenses against children. The presence of a supremacy clause can help align the definition and application of consent age across related laws. However, the absence of a consent age in the principal act should be addressed independently, as it's a pivotal aspect of protecting children's rights. In the absence of a supremacy clause, cross-referencing to other acts becomes necessary. While this approach allows for a harmonized interpretation of the law, it can also create complexities in legal procedures and may not provide a clear hierarchy of laws.

Similarly, P13 suggested the introduction of new offences such as rape or penetrative assault in SOACA in line with the CSA law in India i.e., POCSO:

There are not enough tools for victim's aftercare. There should be a provision to send victims to a shelter home or protective custody. Malaysia must provide special offences such as rape or any penetrative assault and embed them into a special act like SOACA. This would also require this special to prevail over other acts in Malaysia such as the Penal Code where rape is mentioned but not specifically against children such as in India. This is to highlight the law on sexual offences against children

and also gives room for detailed provisions on handling these cases regarding children and also their aftercare and procedures. The law should also focus more on the welfare of the victims in comparison to punishing the offender. It should also be legally binding for the family or legal guardian to report any sexual offences cases happening within the family or face harsh legal consequences.

It is observed that not many participants were aware of the laws on CSA in other jurisdictions. P15, P11, P6, P13 and P18 referred to lessons from other jurisdictions for the improvement of CSA laws in Malaysia. The recommendation presented by P15 suggested that the SOACA should adopt the example of the Protection of Children from Sexual Offences Act (POCSO) in India:

SOACA should use India's POCSO as a model, which consolidates child sexual offences under a single act, streamlining legal procedures. Harsher penalties, especially for repeat offenders, should be mandated, with the possibility of life imprisonment like in POCSO. Guardians failing to report offences should also face severe consequences. The courts need to be more child-friendly, with clear guidelines for handling child witnesses. There's an inconsistency between SOACA, which accepts child testimonies without corroboration, and the Evidence Act, which requires it. This legal ambiguity needs addressing to provide clear guidance to the courts.

The recommendation by P6 emphasized several important points regarding CSA and the legal process:

There must be mandatory reporting by the victim's family if there is any child sexual abuse happening. Failure to report may face heavy legal consequences. As exemplified in India's special act for child sexual abuse, minimum punishment should be imposed on certain offences. The courts in handling cases concerning children especially sexual abuse among children, should reconsider whether children still need to attend court, and that courts should be more child-friendly to them if they are needed to come to court or the court should require the children to be accompanied by members of the family, legal guardian or someone that they could trust. We also need more trained magistrates and DPP in child cases.

The suggestions by P13 raised several important points regarding the aftercare of victims, legal provisions, and the welfare of child victims of sexual offences:

Malaysia needs enhanced provisions for victim aftercare, including shelter or protective custody options. There's a call for specific legislation like SOACA to address child-specific sexual offences, ensuring it takes precedence over broader laws like the Penal Code. This approach, modelled after India's, would offer a clearer framework for handling child sexual offence cases, prioritizing victim welfare and aftercare. Additionally, families or legal guardians should be legally obligated to report intra-family sexual offences or face significant legal penalties.

Meanwhile, P18 suggested that in cases of sexual abuse against children, the principle of SOACA shall take precedence over other laws:

Legislatively, it should be imposed that in cases concerning sexual abuse against children, SOACA should prevail above the rest of the other laws. There should be harsher punishments, more so for repeat offenders. There should also be harsh laws for mandatory reporting as well as harsher punishment for this. The safeguard and identity of the children should also be governed by the law to protect the victims from media attacks and from the public.

This is among one of the most significant references to lessons from another jurisdiction. The reference to POCSO by the participant is with respect to Indian law on CSA. There seems to be an opinion towards a comparative approach to improving the law. According to P15, he suggested that:

SOACA should put POCSO as an example to which India has gathered all sexual offences towards a child under one specific Act. This could show prevalence in law as a specific special act is used for Sexual Assault Against Children thus easing the court process. Minimum punishment should be imposed on sexual offences against children. SOACA should also impose harsher punishments and stricter laws, especially for repeat offenders. As such in POCSO, a repeat offender can be punished with up to life imprisonment. Refusal by family members or guardians to report any sexual assault cases to the police could also face harsh legal punishment as stated by POCSO and this should also be followed by SOACA 2017.

Participants observed that there are no guidelines for interagency collaboration in the management of CSA. The only guideline available was issued by the Federal court. In relation to this, P8 noted that:

The Act should be amended to increase the penalties for child sexual abuse crimes including the mandatory minimum sentences and harsher punishment for repeat offenders. The implementation of mandatory reporting should require certain supervision or acknowledgement from professionals such as teachers, healthcare workers, and social workers to assist in reporting such cases. The age of consent in Malaysia is too low and an increase from 16 to 18 years of age should be made to provide better protection to minors from sexual abuse of any kind.

In conclusion, the participants in the discussion expressed a strong consensus on the need for mandatory reporting of CSA by family members and teachers. Participants believe that immediate action should be taken to make reporting CSA mandatory and that failure to report should have legal consequences. Several participants suggested that there should be stricter punishments for non-reporting, specifically targeting family members and guardians, and recommended that SOACA 2017 include provisions for harsh legal punishments for those who refuse to report sexual assault cases to the police. Overall, the participants stressed the urgency of mandatory reporting by family members and teachers in cases of CSA and recommended that strict punishments be imposed for non-reporting. Next, participants have also emphasised the importance of adding additional provisions to safeguard the identities of child victims and protect them from media attacks and public exposure. This includes provisions for sending victims to shelter homes or protective custody and ensuring their aftercare and welfare.

Suggestions are also made to embed all CSA offenses into a special act, similar to the Protection of Children from Sexual Offences (POCSO) Act in India. Clear definitions and provisions should be included in the act to handle cases involving children and their aftercare. Moreover, participants emphasized the need to make court procedures more child-friendly, especially in cases involving child victims. There is a consensus that the Act should impose minimum punishment for sexual offences against children to ensure consistency and deterrence. This is seen as necessary to address the

lack of minimum punishment provisions in the current legislation. It is highlighted that training and capacity building are essential for court officials, judges, social welfare officers, and other relevant personnel. This includes training magistrates and AGC in handling child cases, providing more trained social service workers, and improving the child protection workforce.

Hence, it is evident from the provided statements that the participants are concerned about the well-being of child victims, the need for a comprehensive legal framework, and the importance of preventive measures through public awareness and education.

Categorisation of sexual offenders based on their privileged position to the victim.

The concept of categorizing sexual offenders based on their privileged position in relation to the victim is essential for a more nuanced understanding of the case of sexual abuse and exploitation. This approach recognizes that individuals who hold positions of trust, authority, or influence over their victims can exploit their authority to commit sexual offenses.

P24 elaborated that when it comes to legal interpretations within the context of the SOACA, the definitions provided within the Act itself take precedence:

Court will prioritize SOACA definitions first. However, Section 16(1) keeps the phrase “person in a relationship of trust to the children” not narrowly defined and open to interpretation. Same as subsection (2) which includes the wording “including but not limited to” in the categorization of the offender.

Similarly, P25 reiterates the information shared in P24, discussing Section 16 of SOACA:

Section 16 of SOACA 2017 is a robust provision that specifically addresses sexual offenses committed by individuals in positions of trust.

Its comprehensive framework, child-centric approach, and ability to deter potential offenders make it a significant tool in preventing and addressing these types of abuses. While the sufficiency of Section 16 is recognized, regular evaluation and adjustments may still be necessary to ensure that it remains effective in combating evolving forms of exploitation and abuse.”

In conclusion, categorizing sexual offenders based on their privileged positions enhances our understanding of abuse. SOACA's Section 16 addresses offenders in positions of trust, emphasizing penalties.

5.3.6 Sexual Offender Registry System

The law governing the registration of sex offenders in Malaysia is outlined in Section 118 of the Child Act 2001 (Act 611), as amended in 2016. This law mandates the maintenance of a "Register of Children" which contains information about individuals convicted of offenses against children.

P24's perspective casts a critical light on the current state of the sexual offender registry, revealing significant inefficiencies and shortcomings:

In fact, our sexual offender registry is plagued with inefficiency and weakness. The list had only predators or offenders from the year 2017 onwards. The public cannot even access it, it is only accessible to employers with child-related business-like kindergarten.

In Malaysia, the registration of sex offenders is governed by the Child Act 2001, amended in 2016. Perspectives by the participants reveal the potential and limitations of the sex offender registry established by the Ministry of Women, Community and Family Development in 2019. While it includes offender details accessible to authorised parties, criticisms highlight inefficiencies and exclusivity. Similarly, the registry under SOACA 2017 is restricted and focuses on offences against minors since its enactment

in 2017. Enhancing accessibility and efficiency in these registries is vital to effectively safeguard children from sexual offences.



CHAPTER SIX

DISCUSSION AND CONCLUSION

6.1 INTRODUCTION

The purpose of this research was to investigate Malaysia's legal framework for protecting children from sexual abuse and offences. This study demonstrated a nexus between child protection legislation, institutions, and the judicial process. The study recognises the relevance of the Malaysian parliament's special enactment for the protection of children, as opposed to the general punitive framework that applies to both adults and children. Although the Sexual Offences Against Children Act 2017 was the focus of this research, the Act's connections with the Child Act, Penal Code, and Evidence Act, among others, form a holistic interplay of a reactive legal framework for CSA legislation. Though based on Malaysian legislation, the study conducted a comparative examination of India's Protection of Children from Sexual Offences Act 2012. The reference to Indian legislation is supported by the statutory history of Malaysian criminal enactments, which have their legal origins in India.

To achieve the stated objectives and research questions, the study used a combination of doctrinal and non-doctrinal approaches. A qualitative approach, on the other hand, was used to gather primary data by delivering semi-structured data to selected participants who are professionals or key informants in their field of expertise and law enforcement, as the case may be. Using a combined approach of doctrinal and non-doctrinal research approaches, this study methodically reveals Malaysia's various efforts to protect children against CSA. The study not only emphasises these safeguards, but it also looks into the difficulties and obstacles that key stakeholders, such as law enforcement, the welfare department, prosecutors, civil society organisations, and the

judiciary. This detailed investigation ensures an in-depth understanding of the situation, establishing the groundwork for actionable findings and future improvements in child protection measures.

Utilising the essential input from various participants, this research presents an in-depth analysis of Malaysia's existing legislative framework for Child Sexual Abuse (CSA) protection. Notably, participants made suggestions for strategic improvements, with some focusing their recommendations on comparative learnings from countries such as India. This chapter carefully integrates the overall conclusions, summaries, and findings, connecting them with the research's objectives. Finally, the report makes practical recommendations to strengthen Malaysia's legal, legislative, and procedural frameworks against CSA.

6.2 SUMMARY OF THE RESEARCH

This study analysed the Malaysian legal system, with an emphasis on the rules governing sexual offences against children, and conducted an analytical comparison with the laws in India. The framework for the investigation is provided in chapter one. It outlines the research's objectives, research questions, literature review, and methodology. The chapter explored the gaps in the literature on CSA, chosen definitions, and CSA legal difficulties. The reason for comparing Malaysian and Indian law on CSA was well-defined and concluded with the research structure.

Chapter two examined the history, definitions, typology, and features of CSA in order to better comprehend the idea. Based on existing literature, the chapter also analysed the history of CSA from the 16th century to the present, as well as its causes and risk factors. This chapter established the conceptual origins of CSA in

contemporary society, as well as its acknowledgement in several disciplines of research, as well as international efforts to safeguard children and the Islamic Law point of view.

The third chapter of the research examined Malaysia's legislative and institutional framework for safeguarding children from sexual abuse. It provides a chronological timeline of child protection legislation from pre-colonial times to the present. Institutions involved in child protection were also examined, including JKM, PDRM, SCAN, the Court for Children, and the Child Interview Centre (CIC). The discussion centred on the role of important institutions as well as the strengths and limitations of the legislation, including the SOACA and the proposed amendment bill.

Chapter four analysed the Child Sexual Offences Act 2012 (hereafter referred to as "POCSO") in India in order to propose reforms to Malaysia's existing CSA law. The chapter discussed the origins of POCSO in light of the Indian Penal Code's shortcomings in CSA instances and the Indian Law Commission's recommendations. Some of the new offences are explained, along with the corresponding punishments, including medical examination processes. POCSO's distinguishing characteristic was emphasised in depth. These characteristics were compared to SOACA to identify potential areas of improvement.

Chapter five summarises one of the research methodologies used in this study, namely the semi-structured interview. The content and techniques, as well as the responses of the participants, were thoroughly examined based on topics and sub-themes determined to be important to the prevention and management of CSA in Malaysia.

The study's themes and conceptual analysis have been integrated into the research questions that the study attempted to address. The study intends to address the

following research questions in accordance with the conceptual analysis, themes, and assumptions of the research objectives:

- i. How adequate is the legislation on child sexual abuse in Malaysia?
- ii. What are the primary legal and procedural obstacles encountered in cases related to child sexual abuse in Malaysia?
- iii. What is the comparative legislative reform of the Sexual Offences Against Children Act 2017 in Malaysia with the Protection of Child Sexual Offences in India?
- iv. What are the legal reforms in child sexual abuse legislation in Malaysia?

The research questions are normally chapter specific, however owing to various linked topics, such as child protection, sexual offences, and applicable legal framework under Malaysian and Indian laws, these frequently get cross-referenced in the different chapters. The major findings revealed in Chapters 5 and 6 represent the cross-section of study issues observed. The results are summarised below.

6.3 MAJOR FINDINGS

This section describes the major findings of this research, which are based on the framework for child protection against sexual offences in Malaysia, including but not limited to provisions of the Sexual Offences Against Children Act 2017 and relevant law, judicial decision, and participant results. Important empirical findings were also revealed as a result of discussions and results from semi-structured interviews, as well as themes and sub-themes identified in Chapter 5. The results of the research highlight an emerging trend: the increasing interweaving of criminal law and procedural. The subsequent sections are carefully constructed to ensure clarity and orderly progression, presenting the findings in a chronological order that directly addresses and answers each

posed research question. This approach ensures that the defined objectives are explored in an orderly and targeted manner.

6.3.1 Lack of detail and depth of offences

In the first major finding, as discussed in chapter three, the study highlighted substantial areas of concern within the SOACA. Notably, there appears to be a distinct lack of precision and depth in the prescribed offences, as well as concerns about the CSA, particularly in the context of statutory rape. These findings are strongly related to the original research question addressing the robustness of Malaysia's existing CSA legislation. The results from the semi-structured interviews outlined in chapter five provide further evidence of these findings. When compared to the structured requirements of the POCSO Act, it is clear that SOACA's provisions, as they presently exist, are relatively broad and lack the necessary specificity.

6.3.2 Lack of Minimum Punishment for Prescribed Offences

The second major finding was the lack of minimum punishment for prescribed offences in the current special Act. Although several SOACA offences have a potential punishment of 30 years in prison, the Act does not provide a minimum term of imprisonment to allow the court to impose an obligatory period of imprisonment. This information, according to the researcher, is a gap that must be filled. It is proposed that all imprisonment for SOACA offences comes with a mandatory minimum term; such an action may relieve the court's sentencing burden, and the minimum mandatory periods can function as an additional deterrent aspect of the SOACA.

6.3.3 Recognition of New Offences

The inclusion of offences not previously recognised under the Penal Code by the SOACA signified a paradigm change in Malaysia's criminal law landscape. In comparison to existing Malaysian legislation addressing child sexual abuse, the SOACA distinguishes itself by broadening the scope of the law to include growing dangers such as child pornography and grooming. By recognising the varied complexities of crimes such as child grooming, the Act recognises that many offences against children are not spontaneous acts, but rather the consequence of meticulous, calculated efforts by criminals. The Legislature's forethought in criminalising grooming is admirable, given its hidden nature and tendency to masquerade as benevolent motives. This not only improves protection against direct injury, but it also prevents the manipulation that often precedes more overt offences. Furthermore, the Act's provisions, which are suited to new technical circumstances, assure its continuous relevance and effectiveness in today's digital era.

6.3.4 Lack of Definitions Section

The inclusion of definitions, particularly for newly added terminology, is an essential component of the SOACA's application and clarity. The research highlights a substantial gap in this area, citing the lack of a separate definitions section as a key omission. This gap, which is directly related to the study's objective of determining the law's sufficiency, poses real issues for important parties, particularly prosecutors and defence counsel. Without precise definitions, the enforcement and interpretation of the Act's provisions become intrinsically difficult, possibly compromising its intended efficacy.

6.3.5 Absence of a Supremacy Clause

The evaluation of SOACA's provisions reveals a critical aspect of its legislative integrity. The Act's noticeable lack of a supremacy clause creates considerable difficulties, especially when disputes emerge between the SOACA and other existing general or specialised legislation. While previous case law may advocate for specialised laws to take precedence over general ones, the SOACA's lack of an express supremacy clause exposes it to possible interpretive disputes with parallel legislation. This deficiency threatens the SOACA's authority and effectiveness in the larger legal landscape.

6.3.5 Challenges of Enforcement and Implementation

The research highlights substantial barriers to the enforcement and implementation of CSA regulations in Malaysia. Among these difficulties include deficiencies in investigation rigour, difficulties in obtaining evidence, and complexities in trial processes. Furthermore, the complexities of family dynamics frequently compound these challenges, with guardians' hesitancy to report instances and general unawareness acting as significant hurdles. The lack of strong government support and widespread public knowledge dilutes the regulations' effectiveness even more. Furthermore, the professional arena's lack of specialised training, paired with fragmented coordination among authoritative organisations and institutions, exacerbates the difficulties in resolving CSA instances comprehensively.

6.3.6 Additional Punishment for Persons in Position of trust

A significant finding from the research highlights the SOACA's unique method of categorising sexual offenders based on their trusted connection with the victim. While this aspect of the Act is essential and should be preserved, there is space for improvement. Drawing comparisons, the POCSO Act similarly discriminate against criminals in positions of authority, although it is clear that the SOACA lacks the same level of precise detail as the POCSO Act. Within the SOACA framework, if the prosecution successfully proves that the criminal continued a position of trust with the child victim, they can use this clause to seek for enhanced punishments in addition to the standard sanctions. This provision of the SOACA stands out as a strong deterrent, particularly for those who take advantage of the confidence given upon them by unsuspecting minors.

6.3.7 Stringent evidential rule

The SOACA brings a transformational approach to CSA evidentiary rules within the Malaysian justice framework. It provides distinct regulations that run parallel to the existing Evidence Act. This variation applies to cases involving child witnesses and is solely confined to SOACA offences. The Act brazenly allows for the acceptance of a child's testimony even in the absence of further corroborative evidence; however this is at the discretion of the judge. Such a clause significantly increases the power of SOACA, particularly in circumstances when the child victim is the sole witness. Furthermore, the SOACA's one-of-a-kind evidentiary rule deviates from the Evidence Act by eliminating the requirement for corroborative evidence when a child victim testifies. Given the complexities of CSA cases, this modification benefits the prosecution. However, practical difficulties exist, such as when child interview centres

(CIC) fail to gather testimony from victims who may be reluctant owing to trauma or innate shyness.

6.3.8 Funding and capacity training

Data from semi-structured interviews show that both the Children Interview Centre and the One Stop Crisis Centre (OSCC) experience financial constraints, limiting their ability to perform child-related duties. Similarly, the JKM and SCAN teams require additional training to effectively handle CSA situations. Greater personnel is also required for the Children Welfare Team (CWT) and the Children Protection Teams (CPT). These observations are consistent with the discussion in Chapter 3 and the responses to research questions 1 and 4. Furthermore, while existing CSA legislation provides for victim compensation, it lacks a comprehensive framework. The mechanism referred to in Section 426(1A) of the CPC, the Criminal Compensation Code (CCO), appears insufficient for dealing with the complexity of child sexual abuse.

6.3.9 Punishment for non-reporting

The study discovered that participants agreed unanimously on the necessity for mandatory imprisonment for failure to report under the CSA, particularly by family members and teachers. There is an overwhelming need for immediate legislation to make reporting mandatory, in addition to mandatory imprisonment, with legal consequences for noncompliance. Participants specifically support for harsher penalties, including mandatory imprisonment, for family members or guardians who fail to report such incidents.

6.4 RECOMMENDATIONS

Based on the findings and the research questions, the study makes recommendations on policy and practical matters towards improving Malaysia's CSA legislation. The policy recommendation focuses on amendment and institutional reform ideas that may be relevant to the welfare department, Royal Malaysia Police, and health practitioners involved in the management of CSA in Malaysia while the practical recommendations, on the other hand, focus on ways to enhance the operational and procedural concerns surrounding the protection and administration of CSA in Malaysia. These recommendations are organised to address the research questions in seriatim.

6.4.1 Recommendations on Research Question 1

The first major recommendation is in relation to the first research question on the adequacy of the Sexual Offences against Children Act 2017 in governing child sexual abuse in Malaysia. This recommendation can be divided into short and long term.

- (i) Short Term Recommendation: With respect to the first research question, this study suggests specific short-term recommendations below:
 1. The researcher strongly recommends allocating special budgetary allocations explicitly targeting enforcement and operational measures to protect children from sexual offences. Such financial prioritisation can significantly improve the operational capabilities of major institutions and government departments, including JKM, PDRM, AGC, and numerous advocacy organisations. A more comprehensive and effective child protection system may be built and maintained by channelling resources in this manner. Article 19 of the UNCRC mandates that States Parties take all appropriate legislative,

administrative, social, and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. The identified barriers in the enforcement and implementation of CSA regulations directly undermine this mandate. To comply with Article 19, Malaysia must address the deficiencies in investigation rigor, evidence collection, and trial processes to ensure effective protection for children.

2. The importance of school advocacy in combating child sexual abuse (CSA) cannot be underestimated. The obligation for raising awareness and encouraging early reporting of CSA must be legally delegated to the Welfare Department under the JKM. While significant efforts have been made by civil society organisations, establishing a legal mandate for the Welfare Department to conduct school-based advocacy campaigns will help to strengthen an organised and long-term strategy to CSA prevention in educational institutions. General Comment No. 13 on the right of the child to freedom from all forms of violence emphasizes the need for a comprehensive approach to protecting children from violence, including sexual abuse. This includes effective law enforcement, specialized training for professionals, public awareness campaigns, and strong government support. The research highlights significant gaps in these areas within the Malaysian context. Addressing these gaps is crucial for the effective implementation of CSA regulations and ensuring that children are protected from sexual abuse and exploitation. General Comment No. 5 on general measures

of implementation of the Convention on the Rights of the Child underscores the importance of having clear and consistent legislation, effective enforcement mechanisms, and adequate resources to implement the Convention effectively. The barriers identified in the research indicate a need for improved coordination among authoritative organizations and institutions, specialized training for professionals, and enhanced government support.

(ii) Long term Recommendation

1. The recommendations for addressing the lack of detail and depth in SOACA offenses are closely aligned with the principles and provisions of the United Nations Convention on the Rights of the Child (UNCRC). Firstly, detailed definitions and categorizations of offenses correspond with Article 19, which mandates the protection of children from all forms of physical or mental violence, injury, abuse, neglect, and exploitation. This comprehensive approach ensures that children are safeguarded from a wide range of abuses, adhering to the principle of protecting children from all forms of abuse and neglect. Enhancing statutory rape provisions and penalties for aggravated offenses also aligns with Article 34's requirements to protect children from sexual exploitation and abuse. By explicitly addressing various forms of sexual offenses, SOACA can ensure comprehensive protection for children against sexual exploitation in all its forms.
2. To align with the spirit of the SOACA in combating sexual offences against children, it is critical for the Legislature to fully appreciate the reason for the Act's enactment, which is to severely punish offenders

and act as an effective deterrent to the general public, while keeping in mind that the victims are our nation's pillars, the children. However, the present trajectory of the SOACA appears to disregard this principle, since it provides for more moderate penalties than the POCSO Act. The researcher believes that the time has come for the Legislature to consider imposing life imprisonment and the death penalty for aggravated penetrative sexual assault offences. This may expect a significant reduction in sexual offences involving children if information is effectively delivered across the entire nation.

3. The recommendation to impose minimum punishment aligns with the principles and guidelines of the United Nations Convention on the Rights of the Child (UNCRC), particularly Articles 3, 19, and 34. Article 3 emphasizes that in all actions concerning children, the best interests of the child must be a primary consideration. By establishing minimum mandatory sentences for child sexual abuse offenses, the legal system can ensure consistent and severe punishment for offenders, thereby prioritizing the safety and well-being of children. Article 19 of the UNCRC mandates that States Parties take all appropriate legislative, administrative, social, and educational measures to protect children from all forms of physical or mental violence, injury, abuse, neglect, or negligent treatment. Introducing mandatory minimum sentences for SOACA offenses would represent a significant legislative measure to protect children more effectively. Article 34 specifically requires States Parties to protect children from all forms of sexual exploitation and sexual abuse. By implementing

mandatory minimum sentences, the legal framework can provide a robust deterrent against child sexual offenses. This aligns with the UNCRC's mandate to take all appropriate national, bilateral, and multilateral measures to prevent the inducement or coercion of a child to engage in unlawful sexual activity, thereby strengthening the overall protective environment for children.

4. Given the unique vulnerabilities and obstacles that nonverbal and mentally challenged victims experience, it is critical to implement legal protections that address their special requirements. Furthermore, there is an urgent need to implement mechanisms for post-trauma treatment and appropriate placement options, particularly for victims who live with their abusers, in order to prevent repeated trauma. A list of concentrated recommendations has been developed, including the incorporation of rules catering to nonverbal victims, the institutionalisation of mandatory reporting procedures, and the implementation of severe legal ramifications for failure to report. In terms of procedural and operational efficacy, appropriate resources and specialised training must be allocated to both law enforcement organisations and the larger legal ecosystem to ensure competent management and adjudication of CSA incidents.

General Comment No. 13 on the right of the child to freedom from all forms of violence emphasizes the need for a comprehensive approach to protecting children from violence, including sexual abuse. This includes effective law enforcement, specialized training for professionals, public awareness campaigns, and strong government

support. The research highlights significant gaps in these areas within the Malaysian context. Addressing these gaps is crucial for the effective implementation of CSA regulations and ensuring that children are protected from sexual abuse and exploitation. General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child underscores the importance of having clear and consistent legislation, effective enforcement mechanisms, and adequate resources to implement the Convention effectively. The barriers identified in the research indicate a need for improved coordination among authoritative organizations and institutions, specialized training for professionals, and enhanced government support.

6.4.2 Recommendations on Research Question 2

Certain recommendations related to the second research question which focuses on the comparative legislative reforms on the Sexual Offences Against Children Act 2017 in Malaysia with the Protection of Child Sexual Offences in India?

1. Given the absence of statutory minimum sentence, the present legislative structure, while strong in spirit, falls short of delivering uniform punitive measures for offences. This essentially imposes a huge load on the judiciary, perhaps resulting in disparate verdicts for comparable offences. To rectify this contradiction, the Act must be modified to provide explicit minimum penalties for offences. Furthermore, there is an urgent need to explore instituting capital punishment for the most severe offences, which is noticeably lacking from the current SOACA. As the Legislature considers

expanding the SOACA, it would be prudent to commission significant study to discover and incorporate additional relevant offences to ensure a comprehensive approach. The current Penal Code, which is rich in its definition of sexual offences, might be a useful reference point, with appropriate adjustments that correspond with the SOACA's particular context and objectives. General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence highlights the importance of ensuring accountability and appropriate sanctions for those who commit violence against children. Mandatory minimum sentences can enhance accountability and serve as a clear message that society will not tolerate child abuse.

2. Regarding the supremacy clause, it has been noted that the Act makes no provision for resolving conflicts between SOACA and other laws, either general or special law, such as the Penal Code, Evidence Act, or any other special law. The addition of a supremacy clause or section will help to clarify such a contradiction. The recommendation is based on the POCSO Act of 2012.

Article 19 mandates that States Parties take all appropriate legislative, administrative, social, and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. A supremacy clause would reinforce SOACA's role as the primary legislative framework for addressing sexual offenses against children, ensuring consistent and robust protection as envisioned by the UNCRC.

3. It also recommends that a particular provision on the process in the case of conflict between SOACA requirements and other laws in effect be included. The probable impact of the lack of this proposed clause may complicate the court's decision on legal inconsistencies. By including an explicit provision for inconsistency, the court will be led by a clear legal principle while considering the SOACA case. On that point, the SOACA gives adequate clarity to the court and eliminates uncertainty by establishing a particular clause on how the law should be studied in the case of conflict. The inclusion of a supremacy clause within SOACA aligns closely with the principles and articles of the United Nations Convention on the Rights of the Child (UNCRC), particularly Articles 4, 19, and General Comments. Article 4 of the UNCRC obliges States Parties to undertake all appropriate legislative measures for the implementation of the rights recognized in the Convention. By including a supremacy clause, SOACA would ensure that its provisions are effectively implemented and prioritized over conflicting laws, thereby fulfilling the State's obligation under this article to provide the highest standards of legal protection for children. General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child emphasizes the need for clear and consistent legislation to implement the Convention effectively. A supremacy clause would provide clarity and prevent legal ambiguities, ensuring that SOACA's provisions are consistently applied and upheld in all legal contexts.
4. Participants emphasise the need of establishing mandatory CSA reporting processes, particularly among family members and guardians. There is an urgent need to strengthen the Sexual Offences Against Children Act 2017

(SOACA) with severe penalties for noncompliance. It is critical to prioritise the anonymity of affected minors by safeguarding them from unwarranted media attention and public scrutiny. Furthermore, the legislative structure should include measures for providing victims with protected shelters and a comprehensive aftercare system. Malaysia stands to strengthen its position against CSA as a result of these proposed changes, assuring a more robust protection framework for its young people. An integrated, cohesive, interdisciplinary and coordinated system is required, which incorporates the full range of measures identified in article 19 of the UNCRC. The state parties shall ensure that the relevant legislation provides adequate protection of children in relation to media.

All child-focused laws must be harmonised and coordinated in order to ensure clarity and uniformity. The existing interplay between the Sexual Offences Against Children Act 2017 (SOACA) and other relevant child protection legislation is inadequate. As a result, an in-depth analysis and future amendment of these laws is recommended to incorporate specific guidelines for interagency collaborations and provide a comprehensive framework. This is based on best practice in other jurisdictions such as India.

6.4.3 Recommendations on Research Question 3

Some policy and practical recommendations are focussed on the third research question which relates to improving the child sexual abuse legislation in Malaysia

1. The policy recommendation is the legislative revision and modification of the present SOACA to include additional categorisations and divisions of acts that constitute physical sexual assault in order to offer more precise provisions on physical sexual assault. The POCSO Act may be utilised and copied as a realistic legal framework model since it methodically categorises physical sexual assault into four subcategories: Penetrative Sexual Assault, Aggravated Penetrative Sexual Assault, Sexual Assault, and Aggravated Sexual Assault. Potentially, the thorough classification of physical sexual assault will improve the SOACA's practicality while also assisting the judiciary in correctly interpreting the statute to reach a just fair decision. According to the researcher, additional research is needed to determine if other sexual offences involving children should be included under the SOACA rather than being classified under the Penal Code. Alternatively, the Legislature may use the subsequent amendment to broaden the definition of physical sexual assault for each category to include a wide range of acts amounting to physical sexual assault in order to ensure a high conviction rate while also preventing the offender from circumventing the current law due to technicalities. Article 19 obliges States Parties to take all appropriate legislative, administrative, social, and educational measures to protect children from all forms of physical or mental violence, injury, abuse, neglect, or negligent treatment. By incorporating offenses like grooming and child pornography into SOACA, Malaysia is addressing the intricate and covert nature of these threats, thereby providing comprehensive protection as mandated by the UNCRC. This proactive legislative advancement ensures that children in Malaysia

are better safeguarded against emerging and complex forms of exploitation and abuse, reflecting a strong commitment to upholding children's rights and well-being.

2. Based on the study's findings, many operational and practical recommendations for preventing and handling CSA incidents were developed. These suggestions are centred on institutional adjustments and procedural concerns at police stations, Child Interview Centres, hospitals, and schools. There is an urgent need to increase the scope of legislation that assist various institutions in CSA prevention and management. Currently, the federal court's restrictions are largely aimed at enforcement officials participating in CSA prosecutions. Drawing influence from frameworks like as the POCSO regulations, detailed recommendations that not only aid in the proper implementation of SOACA but also give clear direction to all stakeholders are required. It is critical to provide clarity and procedural consistency in order to achieve the best results. It is also critical to promote inter-agency collaboration. A well-written rule book will act as a road map, emphasising spots of overlap and promoting smooth collaboration among the many experts entrusted with maintaining CSA. This comprehensive strategy will definitely boost the effectiveness of our efforts to address this critical issue.

The recent inclusion of offenses not previously recognized under the Penal Code by the Sexual Offences Against Children Act (SOACA) signifies a paradigm shift in Malaysia's criminal law landscape. By broadening SOACA's scope to include offenses such as child pornography and grooming, Malaysia is aligning its legal framework closely with the

principles and articles of the United Nations Convention on the Rights of the Child (UNCRC), particularly Articles 19 and 34, and the recommendations provided in the General Comments.

3. To effectively address CSA in Malaysia, extensive capacity-building activities targeted for all individuals involved, from first reporting to ultimate prosecution, are critical. Notably, considering the large workload, the present pool of professionals skilled in questioning children remains insufficient. Aside from that, it is critical to widen the training scope to include school administrators and childcare providers, with a focus on CSA prevention techniques. Feedback from involved stakeholders emphasises the importance of such activities. Key efforts include specialised instructional modules for members of the judiciary, court officials, and social welfare representatives. Furthermore, a greater focus should be placed on tailoring seminars for judges and AGCs to child-centric situations. To strengthen Malaysia's resistance against CSA, there is a clear necessity for an increase in the number of skilled social service workers as well as a strategic strengthening of the overall child protection workforce. Article 34 of the UNCRC mandates that States Parties protect children from all forms of sexual exploitation and abuse. This obligation includes taking measures to prevent the inducement or coercion of a child into any unlawful sexual activities, the exploitative use of children in prostitution or other illegal sexual practices, and the exploitative use of children in pornographic performances and materials. However, the effective enforcement and implementation of child sexual abuse (CSA) regulations in Malaysia face significant challenges. Strengthening investigation and trial processes,

enhancing evidence collection, and addressing the complexities inherent in family dynamics are crucial steps toward fulfilling the obligations under Article 34.

4. Child Sexual Abuse (CSA) prevention is heavily reliant on parents' capacity to detect behavioural changes in their children that indicate probable trauma. Equipping parents with the necessary skills can help to reduce trauma and promote prompt reporting. Concurrently, dealing with the issue of false claims is critical. Given the significant cultural stigma associated with sexual offences, unjustified charges can have far-reaching consequences. As a result, while the Sexual Offences Against Children Act (SOACA) serves as a deterrent to CSA, it should also be strengthened with clauses imposing harsh punishments for false claims in order to avoid possible abuse. Malaysia's current framework addresses with false complaints under Section 182 of the Penal Code, although its broad character may not give significant deterrence particular to CSA. As a result, it is critical that SOACA have measures that give more severe penalties than those in Section 182 of the Penal Code, targeting those who intentionally seek to ruin reputations with spurious complaints, in order to protect innocent persons from the grave harm caused by false accusations. Article 19 of the UNCRC obliges the State Parties to provide educational measures to address attitudes, traditions, customs and behavioural practices which condone and promote violence against children. They should encourage open discussion about violence, including the engagement of media and civil society. They should support children's life skills, knowledge and participation and enhance the capacities of caregivers and professionals in

contact with children. They can be initiated and implemented by both State and civil society actors under the responsibility of the State.

5. In the context of CSA cases, the incorporation of Alternative Dispute Resolution (ADR) and Victim Compensation systems is worth considering. Given the sensitivity and seriousness of CSA offences, the proposal may raise eyebrows. Nonetheless, investigating a potential settlement mechanism inside the SOACA is worthwhile, especially given that some of these instances may result from the mutual activities of participating parties. Traditional settlement is frequently centred on remuneration and, in some cultural situations, marriage. However, there is an evident need to thoroughly investigate the adaptability and suitability of such remedies in the context of Malaysian criminal law, assuring alignment with society values and jurisprudence. This recommendation is based on an intention to reduce the workload of the court, but it must be used with caution. While compensation may be handled in criminal processes, victims should be able to seek further compensation through civil claims against perpetrators if they deem it necessary. Article 19 of the UNCRC mandates that the State Parties for its Judicial Involvement to ensure compensation for children who have suffered from violence in its various form.
6. The severity and ramifications of CSA necessitate an appropriate disciplinary reaction. Currently, the SOACA may appear lenient when compared to the gravity of the offence. Drawing similarities with the POCSO, which provides for the death penalty in the most severe circumstances, the Researcher discovers a significant gap. CSA, especially penetrative or aggravated assaults, can cause significant trauma, medical

issues, unexpected pregnancies, and, in very terrible cases, the victim's death. As a result, Malaysia must reconsider the SOACA and consider increasing the severity of penalty for such criminals, including the potential of life imprisonment or more severe penalties. The growing trend of CSA in Malaysia emphasises the need of this revision to ensure that the punishment measures are proportionate to the gravity of the offence. Article 19 of the UNCRC encourages the State Parties at all levels of the State responsible for the protection of children from all forms of violence may directly and indirectly cause harm by lacking effective means of implementation of obligations under the Convention. Such omissions include the failure to adopt or revise legislation and other provisions including including but not limited to provide adequate punishment, inadequate implementation of laws and other regulations, and insufficient provision of material, technical, and human resources and capacities to identify, prevent and react to violence against children

7. CSA causes psychological scars that can last a lifetime, in addition to immediate physical trauma. The present SOACA version lacks a comprehensive approach to victim compensation, particularly an obligatory provision for financial retribution from the perpetrator. While financial compensation is necessary, the victim's larger demands include secure shelter and medical, particularly psychological, treatment. There is a critical need to update the SOACA in light of the POCSO findings and the enormous mental health requirements of CSA victims. The legislation must prioritise the need for comprehensive psychological treatment, recognising that emotional trauma may be just as devastating as physical injuries, if not

more so. Although the SOACA requires counselling sessions for those who have been convicted, such options are not explicitly available to victims. It is critical for the SOACA to state explicitly that it would provide victims with both urgent and long-term psychological care. This comprehensive approach not only helps the victim rehabilitate, but it also emphasises society's and the state's obligation to support individuals impacted by such horrible acts. Article 19 of the UNCRC mandates that Treatment” is one of the many services needed to “promote physical and psychological recovery and social reintegration” for children who have experienced violence, and must take place “in an environment which fosters the health, self-respect and dignity of the child” (art. 39). In this respect attention must be given to: (a) inviting and giving due weight to the child’s views; (b) the safety of the child; (c) the possible need for her or his immediate safe placement; and (d) the predictable influences of potential interventions on the child’s long-term well-being, health and development.

8. It is recommended that the existence of SOACA be made more widely known to the general population. Since the purpose of legislation or law, such as the SOACA, is to govern people and protect children from CSA, the Researcher contends that a specific section requires the government, through its relevant apparatus, to conduct successful campaigns to make the existence of SOACA known to the public and cannot rely solely on the legal maxim of 'ignorantia Juris non-excusat' but must go above and beyond to educate the public. The researcher believes that, with today's telecommunications technology, it is not difficult for the relevant authorities to take on the responsibility of effectively disseminating information on

SOACA, rather than simply announcing that a new law has been passed without organising the information that is to be disseminated to the public in graphics or any other mode. It is intended that once the information has reached the public, it will cause potential offenders to reconsider their plan to perpetrate the crime under SOACA; hence, the feature of SOACA promotion is a critical component in the combat against CSA. Article 19 obliges the State Parties to support parents and care givers to to understand, embrace and implement good child-rearing, based on knowledge of child rights, child development and techniques for positive discipline in order to support families' capacity to provide children with care in a safe environment. This includes Providing pre- and post-natal services, home visitation programmes, quality early-childhood development programmes, and income-generation programmes for disadvantaged groups.

6.5 DIRECTION FOR FUTURE RESEARCH

The study's findings might serve as a starting point for future research in child protection and sexual abuse from views other than legal adequacy. The inability to interview child sexual assault victims and their guardians is a significant disadvantage of this study. This gap might be investigated further in fields such as anthropology and social welfare. Cultural and religious perspectives on CSA prevalence, reporting, and the dimension of occurrence are other connected social sciences fields that might arise from this study. The methodology adopted in this study focussed on participants, with a qualitative and semi-structured interview technique, a more extensive study using a quantitative survey may provide a large data set and different approach to law reforms and public engagement. the legal similarity in the jurisdiction compared in the study are quite

peculiar, a look at other jurisdictions other than India could provide a different perspective on comparative law reform.



REFERENCES

BOOKS

- Aiyar, K. J. (2019). *Iyer's the protection of children from sexual offences act, 2012 (POCSO): As amended by the criminal law (amendment) act, 2018 (act no. 22 of 2018): With retrospective effect from 21.04.2018 along with the protection of children from sexual offences rules*. Delhi: Delhi Law House.
- Bottom, B., Najdowski, C., and Godman, G. (2009). *Child victims, child offenders: Psychology and the law*. Guilford: The Guilford Press.
- Cheu, H. T. (2001). *Global culture and its effect on the Malay family and community, globalisation and indigenous culture*. Japan: Institute for Japanese Culture and Classics, Kokugakuin University.
- Croken, B. E. (1990). *Zabid under the Rasulids of Yemen, 626-858 AH/1229-1454 AD*. Massachussets: Harvard University.
- Dantzker, M. L, and Ronald D. H. (2006). *Research methods for criminology and criminal justice: A primer*. United States of America: Jones & Bartlett Learning.
- Schwartz, B. K. (2011). *Handbook of sex offender treatment*. New Jersey: Civic Research Institute.
- Stead, W. T. (2020). *The maiden tribute of modern babylon*. Scotland: Good Press.
- Stekel, W. (2013). *Sadism and masochism-the psychology of hatred and cruelty* (Vol. 2). India: Read Books Ltd.
- Ward, T. D. P, and Anthony R. B. (2006). *Theories of sexual offending*. Germany: John Wiley & Sons.

CHAPTER IN EDITED BOOK

- Bacon, H., and Richardson, S. (2005). Child sexual abuse and the continuum of victim disclosure: Professionals working with children in Cleveland in 1987. In Catherine Itzin (Ed.). *Home truths about child sexual abuse*. London: Routledge.
- Felitti, V. J., and Anda, R. F. (2010). The relationship of adverse childhood experiences to adult medical disease, psychiatric disorders, and sexual behavior: Implications for healthcare. In R. A. Lanius, E. Vermetten, and C. Pain (Eds.), *The impact of early life trauma on health and disease: The hidden epidemic*. Cambridge: Cambridge University Press.
- Luong, H. T. (2021). Prevent and combat sexual assault and exploitation of children on cyberspace in Vietnam: Situations, challenges, and responses. In Juriah Abdul

Jalil (Ed.), *Combating the exploitation of children in cyberspace: Emerging research and opportunities*. Hershey, Pennsylvania: IGI Global.

Nazeri, N. M. (2007). Protecting child victims in Malaysia. In Wing-Cheong Chan (Ed.), *Support for victims of crime in Asia*. United Kingdom: Routledge.

Wyre, R. (2005). Paedophile characteristics and patterns of behaviour: Developing and using a typology. In Catherine Itzin (Ed.), *Home truths about child sexual abuse*. New York & London: Routledge.

JOURNAL ARTICLE

Abdullah Al-Ahsan. (2008). Law, religion and human dignity in the Muslim world today: An examination of OIC's Cairo declaration of human rights, *Journal of Law and Religion* Vol. 24. No. 2. 2008 Issue. pp. 569–97.

Abu Bakar Munir. (2018). Child evidence in the Sexual Offences Against Children Act 2017: So close, yet so far, *Malayan Law Journal* Vol. 6. November 2018 Issue. pp. 0–35.

Abu Bakar Munir. (2018). Child evidence in the Sexual Offences Against Children Act 2017: So close, yet so far, *Malayan Law Journal* Vol. 6. November 2018 Issue. pp. 0–35.

Afridah Binti Abas. (2012). Child abuse in Malaysia: Legal measures for the prevention of the crime and protection of the victim, *International Journal of Social Sciences and Humanity Studies* Vol. 4. No. 2. 2012 Issue. pp. 1–10.

Alexander, P. C., & Shirley L. L. (1987). Family characteristics and long-term consequences associated with sexual abuse, *Archives of Sexual Behavior* Vol. 16. 1987 Issue. pp. 235–45.

Allen, L. A., & Nightingale N. N. (1997). Gender differences in perception and verdict in relation to uncorroborated testimony by a child victim, *Journal of Offender Rehabilitation* Vol. 24. No. 3–4. 1997 Issue. pp. 101–16.

Alpert, J. L. (1991). Retrospective treatment of incest victims: Suggested analytic attitudes, *Psychoanalytic Review* Vol. 78. No. 3. 1991 Issue. pp. 425.

Anderson, W. P., Joseph T. K., and Brice R. (1979). Sex offenders: Three personality types, *Journal of Clinical Psychology* Vol. 35. No. 3. July 1979 Issue. pp. 671–676.

Andrews, G., Justine, C., Tim, S., Cathy I., and Heather S. (2004). Child sexual abuse, *Comparative Quantification of Health Risks: Global and Regional Burden of Disease Attributable to Selected Major Risk Factors* Vol. 2. No. 1. 2004 Issue. pp. 1851–1940.

Appell, A. R. (2009). The pre-political child of child-centered jurisprudence, *Hous. L. Rev.* Vol. 46. No. 3. 2009 Issue. pp. 703.

- Arya, Y., & Chaturvedi, A. (2017). Analysis of underreporting of cases of child sexual abuse in India, *The World Journal on Juristic Polity*. 2017 Issue. pp. 5.
- Asmida Ahmad, Mohd Nasran Mohamad, & Mohd Al Adib Samuri. (2021). Syariah and civil legislation in Malaysia on child testimony in sexual offences, *Asian Journal of Law and Governance* Vol. 3. No. 1. 2021 Issue. pp. 65–75.
- Assink, M., Claudia E. V. D. P, Mandy W. C. M. M., Nynke M. J, Frans J. O., Geert J. J. M. S., & Machteld H. (2019). Risk factors for child sexual abuse victimization: A meta-analytic review, *Psychological Bulletin* Vol. 145. No. 5. 2019 Issue. pp. 459.
- Babington, B. (2011). National framework for protecting Australia's children: Perspectives on progress and challenges, *Family Matters*. No. 89. 2011 Issue. pp. 11–20.
- Balogh, R., Bretherton, S. K., Whibley, T. B., Graham, P. R. S., Worsley C., & Hugh F. (2001). Sexual abuse in children and adolescents with intellectual disability, *Journal of Intellectual Disability Research* Vol. 45. No. 3. 2001 Issue. pp. 194–201.
- Becker, J. V., Kaplan, M. S., Cunningham-Rathner, J., & Kavoussi, R. (1986). Characteristics of adolescent incest sexual perpetrators: Preliminary findings, *Journal of Family Violence* Vol. 1. No. 3. 1986 Issue. pp. 85–97.
- Behere, P. B., and Akshata N. M. (2013). Sexual abuse in 8-year-old child: Where do we stand legally? *Indian Journal of Psychological Medicine* Vol. 35. No. 2. 2013 Issue. pp. 203–5.
- Belur, J., & Brijesh B. S. (2015). Child sexual abuse and the law in India: A commentary, *Crime Science* Vol. 4. No. 1. 2015 Issue. pp. 1–6.
- Besinger, B. A., Garland, A. F., Litrownik, A. J., & Landsverk, J. A. (1999). Caregiver substance abuse among maltreated children placed in out-of-home care, *Child Welfare* Vol. 78. No. 2. 1999 Issue. pp. 221–39.
- Bhabha, J. (2006). The child—What sort of human? *PMLA* Vol. 121. No. 5. October 2006 Issue. pp. 1526–35.
- Bingham, A., Delap, L., Jackson, L., & Settle L. (2016). Historical child sexual abuse in England and Wales: The role of historians, *History of Education* Vol. 45. No. 4. May 2016 Issue. pp. 411–29.
- Blewer, R. (2020). Testing the law and testing a child's evidence: Nineteenth-century corroboration reforms and child witness testimony, *Australian Historical Studies* Vol. 51. No. 3. July 2020 Issue. pp. 266–81.

- Briere, J., & Diana M. E. (1993). Sexual abuse, family environment, and psychological symptoms: On the validity of statistical control, *Journal of Consulting and Clinical Psychology* Vol. 61, No. 2. 1993 Issue. pp. 248-288
- Bryant, N. (2016). The Franklin scandal: The cover-up of child abuse and its analogues to dissociative identity disorder, *Global Perspectives on Dissociative Disorders: Individual and Societal Oppression*. 2016 Issue. pp. 155.
- Bullough, V. L. (1998). Alfred Kinsey and the Kinsey report: Historical overview and lasting contributions, *The Journal of Sex Research*. Vol. 35, No. 02. 1998 Issue. Pp. 127-131.
- Chen, J. Q., & Da Guang C. (2005). Awareness of child sexual abuse prevention education among parents of grade 3 elementary school pupils in Fuxin City, China, *Health Education Research* Vol. 20. No. 5. 2005 Issue. pp. 540–47.
- Clarke, V., & Braun V. (2006). Using thematic analysis in psychology, *Qualitative Research in Psychology* Vol. 3. No. 2. 2006 Issue. pp. 77–101.
- Cooray, M., Siti Zaharah Jamaluddin, & Zulazhar Tahir. (2020). Violence and sexual offences against children in Malaysia: Searching for the right approach, *International Journal of Business and Society* Vol. 21. No. S1. 2020 Issue. pp. 152–64.
- Craven, S., Brown S., and Gilchrist E. (2006). Sexual grooming of children: Review of literature and theoretical considerations, *Journal of Sexual Aggression* Vol. 12. No. 3. 2006 Issue. pp. 287–99.
- Dargan, S., Isabelle, D., Ovetchkine, P., Jud, A., & Frappier, J. (2019). Association between child sexual abuse and infectious disease diagnoses, *Child Abuse & Neglect* Vol. 97. 2019 Issue. pp 104-142.
- Davies, E. A., & Alyson C. J. (2013). Risk factors in child sexual abuse, *Journal of Forensic and Legal Medicine* Vol. 20. No. 3. 2013 Issue. pp. 146–50.
- Dearnley, C. (2005). A Reflection on the use of semi-structured interviews, *Nurse Researcher* Vol. 13. No. 1. 2005 Issue. pp. 19-28.
- Edwards, T., Sharpe, T. L., Sibblis, C., McPolland, M., Bonomo, A., & DeVylder, J. (2022). Civilian perceptions of police: A thematic analysis of non-physical encounters with law enforcement, *Journal of Human Behavior in the Social Environment* Vol. 33. No. 6. August 2022 Issue. pp. 1–13.
- Finkelhor, D. & Baron, L. (1986). High-Risk children, *A Sourcebook on Child Sexual Abuse* 1st Ed. May 1986 Issue. pp. 60–88.
- Finkelhor, D., Ormrod, R. K., & Turner H. A. (2007). Poly-victimization: A neglected component in child victimization, *Child Abuse & Neglect* Vol. 31. No. 1. 2007 Issue. pp. 7–26.

- Gephart Jr, R. P. (2004). Qualitative research and the academy of management journal, *Academy of Management Briarcliff Manor NY* Vol. 47. No. 4. Month 2004 Issue. pp. 105-10.
- Gibbs, L., Kealy, M., Willis, K., Green, J., Welch, N., & Daly, J. (2007). What have sampling and data collection got to do with good qualitative research? *Australian and New Zealand Journal of Public Health* Vol. 31. No. 6. 2007 Issue. pp. 540–44.
- Gill, A. K., & Harrison, K. (2013). Sentencing sex offenders in India: retributive justice versus sex-offender treatment programmes and restorative justice approaches, *International Journal of Criminal Justice Sciences* Vol. 8. No. 2. 2013 Issue. pp. 166.
- Gillespie, A. A. (2010). Defining child pornography: Challenges for the law, *Child & Fam. LQ* Vol. 22. 2010 Issue. pp. 200.
- Gilligan, P., & Shamim, A. (2006). Cultural barriers to the disclosure of child sexual abuse in Asian communities: Listening to what women say, *British Journal of Social Work* Vol. 36. No. 8. 2006 Issue. pp. 136-177.
- Holton, J. A. (2007). The coding process and its challenges, *The Sage Handbook of Grounded Theory* Vol. 3. No. 010. 2007 Issue. pp. 265–89.
- Kamaludin, Nawal Nabilah, Rosediani Muhamad, Zainab Mat Yudin, and Rosnani Zakaria. (2022). Barriers and concerns in providing sex education among children with intellectual disabilities: Experiences from Malay mothers, *International Journal of Environmental Research and Public Health* Vol. 19. No. 3. 2022 Issue. pp. 1070.
- Kempe, C. H., Silverman, F. N., Steele, B. F., Droegemueller, W., & Silver, H. K. (1962). The battered-child syndrome, *Jama* Vol. 181. No. 1. July 1962 Issue. pp. 17–24.
- Kempe, R., & Kempe C. H. (1976). Assessing family pathology, *Child Abuse and Neglect: The Family and the Community* Issue. pp. 115–26.
- Lamont, A. (2011). Who abuses children? *NCPC Resource* 2011 Issue. pp. 1–6.
- Lentz, S. A., & Robert H C. (2011). Sexual assault statutes targeting authority & power imbalances: A step forward in rape law reform, *Freedom Center J* Vol. 3. No. 1. Month 2011.
- M'jid, N. (2015). Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Najat Maalla M'jid Human Rights Council Nineteenth Session Agenda Item* Vol. 3. December 2015 Issue. pp. 1–24.

- Mariya Ali. (2014). Child sexual abuse: Can the doctrines of Al-Maqasid Al-Shariah and Maslahah assist in challenging the honour ideology? *The International Journal of Human Rights* Vol. 18. No. 4–5. May 2014 Issue. pp. 508–26.
- Mason, Jennifer. (2017). Qualitative researching. *Qualitative Researching* 2017 Issue. pp 1–288.
- McKillop, N., Rayment-McHugh, S., & Bojack, R. (2020). Comparing the onset of child sexual abuse perpetration from adolescence into adulthood: Are there unique risks, and what does this mean for prevention? *Child Abuse & Neglect* Vol. 107. No. 3. 2020 Issue. pp. 104-630.
- Najwa Rosli, Nabilah Hani Ahmad Zubaidi, and Farah Nini Dusuki. (2019). Regulating the protection and rehabilitation of victims of internet child pornography in Malaysia, *International Journal of Academic Research in Business and Social Sciences* Vol. 9. No. 5. 2019 Issue. pp. 450–69.
- Ngubane, B. M. M. (2022). Challenges facing child victims in South African courts: An overview of the South African legal framework and the protection of such children, with a specific focus on courts in Durban, *KwaZulu-Natal* 2022 Issue. pp 25-26
- Plummer, C. A. (1999). The history of child sexual abuse prevention: A practitioner's perspective, *Journal of Child Sexual Abuse* Vol. 7. No. 4. April 1999 Issue. pp. 77–95.
- Rohayah Husain, Rosliwati Md Yusoff, Mohd Jamil Yaacob, & Zaharah Sulaiman. (2009). Depression and coping strategies among sexually abused children in a Malay community in Malaysia, *ASEAN Journal of Psychiatry* Vol.10. No. 2. November 2009 Issue. pp. 1–12.
- Shonkoff, J. P., Boyce, W. T., & McEwen, B. S. (2009). Neuroscience, molecular biology, and the childhood roots of health disparities: Building a new framework for health promotion and disease prevention, *JAMA* Vol. 301. No. 21. June 2009 Issue. pp. 2252–59.
- Simsek, S., Fettahoglu, E. C., & Ozatalay, E. (2011). Post-Traumatic stress disorder in children who were sexually abused and in their parents, *Dicle Medical Journal* Vol. 38. No. 3. Month 2011 Issue. pp. 318–24.
- Smallbone, S. W., & Richard K. W. (2001). Child sexual abuse: offender characteristics and modus operandi, *Australian Institute of Criminology Canberra* Vol. 193. Month 2001 Issue. pp. 1.
- Smart, C. (2000). Reconsidering the recent history of child sexual abuse 1910–1960, *Journal of Social Policy* Vol. 29. No. 1. January 2000 Issue. pp. 55–71.
- Srivastava, S. (2020). Indian legal analysis on child sexual abuse: POCSO Act 2012, *Supremo Amicus* Vol. 19. 2020 Issue. pp. 437.

- Summit, R. C. (1983). The Child sexual abuse accommodation syndrome, *Child Abuse & Neglect* Vol. 7. No. 2. September 1983 Issue. pp. 177–93.
- Widom, C. S., & Massey, C. (2015). A prospective examination of whether childhood sexual abuse predicts subsequent sexual offending, *JAMA Pediatrics* Vol. 169. No. 1. January 2015 Issue. pp. e143357–e143357.
- Wild, T. S. N., Fromberger, P., Jordan, K., Müller, I., & Müller, J. L. (2019). Web-based health services in forensic psychiatry: A review of the use of the internet in the treatment of child sexual abusers and child sexual exploitation material offenders, *Frontiers in Psychiatry* Vol. 9. 2019 Issue. pp. 763.
- Yarina Ahmad, & Hamid, S.N.F.A. (2020). Monster in the family, young victims and issues across border: Future outlook of child sexual abuse in Malaysia, *Journal of Critical Reviews* Vol. 7. No. 8. 2020 Issue. pp. 1713–18.
- Yeo, S., Morgan, N., & Chan, W. C. Criminal Law in Malaysia and Singapore, *LexisNexis 3rd Edition 23 May 2018*. Issue. pp. 73.
- Zainal Amin Ayub, & Zuryati Mohamed Yusoff. (2018). Right of online informational privacy of children in Malaysia: A statutory perspective, *UUM Journal of Legal Studies* Vol. 9. 2018 Issue. pp. 221–41.

THESIS/DISSERTATION

- Fuziah Shaffie. (2006). *British colonial policy on social welfare in Malaya: Child welfare services 1946-1957*. (unpublished Ph.D Thesis). Coventry: University of Warwick.

TRANSLATED OR RE-PUBLISHED WORKS

- Stekel, W. (2013). *Sadism and Masochism Volume 2: The Psychology of Hatred and Cruelty* (L. Brink, Trans.). London, UK: Read Books Ltd. (Original work published 1953)
- Stead, W. T. (2020). *The maiden tribute of modern babylon*. ([DigiCat], Trans.). Scotland: Good Press.

ARTICLE IN NEWSPAPER

- Sheith Khidhir Bin Abu Bakar. (2018, February 22). Child sex victims need long-term help, NGO says. Free Malaysia Today (FMT). pp. 1-2.
- Zaidi Azmi. (2022, September 29). Ill-funded, loosely coordinated: M'sia's grapples with online child sexual abuse and exploitation. Sinar Daily. pp. 1-2.

Perimbanayagam, K. (2017, September 25). A Paedophile's Diary: Richard Huckle Kept Account of His Grotesque Acts. *New Straits Times*. pp. 1-2.

ANONYMOUS ARTICLE IN NEWSPAPER

DAP: Court's lenient jail term against man won't deter paedophiles, AGC should appeal. (29 September 2018) *Malay Mail*, p. 1-2. <https://www.malaymail.com/s/1677789/dap-courts-lenient-jail-term-against-man-wont-deter-paedophiles-agc-should>.

Police Receive Thousands of IP Addresses Suspected of Sharing Child Pornography. (15 May 2022). *New Straits Times*, p. 1-2. <https://www.nst.com.my/news/crime-courts/2022/05/796318/police-receive-thousands-ip-addresses-suspected-sharing-child>.

ENCYCLOPEDIA

Walker, D. (1980). The Oxford Companion to Law. In *Oxford Reference*. London: Oxford.

WEBSITE PAGES

5 Ways One New Law Is Protecting Malaysian Children. Retrived July 26, 2023, from. AskLegal.My website: <https://asklegal.my/p/sexual-offences-children-abuse-assault-grooming-pornography-loop-hole>.