INTRODUCTION

Express development in Information Technology has created opportunities for criminals to misuse Internet to abuse, harm and exploit children. Children are the most valuable asset and our most precious treasure. Internet provides access to criminals to firstly engage, contact and make use of the children’s innocence and organize crimes that abuse children particularly in child pornography. Child pornography means any representation, by whatever means, of a child engaged in actual or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

Child pornography is considered as an atrocious crime against children and Internet contributes towards the increasing of online child pornography. Efforts have been made to criminalize child pornography at all levels. The United States based International Centre for Missing & Exploited Children (ICMEC) conducts a regular
survey entitled “Child Pornography: Model Legislation & Global Review” (Model Legislation Report). The survey examines the legal framework of countries around the world to determine whether national legislation exists with specific regard to child pornography, defines child pornography, criminalizes computer related offences involving child pornography, criminalizes the significant possession of child pornography regardless of the intention to distribute and requires Internet Service Providers to report suspected child pornography to law enforcement bodies or another designated agency.

In the 1st edition of the survey published in 2006 of the 184 member countries of Interpol, only 27 had what ICMEC considered being “legislation sufficient to combat child pornography offences”. This meant that only 27 countries satisfied at least four of the criteria outlined above. 95 countries had no legislation that specifically addressed child pornography. Of the remainder that did have legislation to child pornography, 41 on the other hand did not criminalize the knowing possession not considering of the intention to distribute and 27 did not have legislative provisions to criminalize computer related offences in relation to child pornography.

The 6th edition of the review released in 2010, includes 196 countries and shows some progress. Now 44 countries meet conditions one to four. Others meet fewer than the minimum four considered necessary to deal with this type of crime. Of the 53 Commonwealth Member States, only 11 countries have legislation deemed to be sufficient to combat child pornography. This paper will analyze the approach of other countries such as United Kingdom or jurisdictions in addressing the issue and also looks at the adequacy of Malaysian Law in addressing and combating the use of Internet to commit crimes against children in this cyber era. Efforts to combat and criminalize online child pornography have also taken place at the national level where countries such as United Kingdom has improved and extended the scope of their existing law to address particular issue in child pornography. In these two countries, all activities involved in producing, disseminating and possessing child abused materials are criminalized and definition of child pornography has been absolute to include computer graphic images of a child.

UNITED KINGDOM APPROACH

United Kingdom has amended the existing law governing child pornography to identify the challenges of technology in this digital era. As a result, the Protection of Children Act 1978 has been amended to criminalize the act of taking, making, distributing and possession of child pornography. With this new development, United Kingdom legislated against the production, possession and distribution of child pornography in whatever form. This is dealt with by section 1 of the Protection of Children Act 1978, as amended, which makes it an offence to take or permit to be taken or to make any indecent photograph or pseudo photograph of a child or to distribute or show such photographs or pseudo photographs or to have it in possession with a view to their being distributed or shown by himself to others.

It is also an offence to publish or cause or to be published an advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo photographs or intends to do so. A person is to be regarded as distributing an indecent photograph or pseudo photograph if he engage with possession of it to, or exposes or offers it for acquisition by another person.

Indecent photograph includes data stored on a computer disk by other electronic means which is capable of conversion to a photograph. A pseudo photograph is an image, whether made by computer graphics or anything which appears to be a photograph includes copies of pseudo photographs and data stored on a computer disk or by other electronic means which is capable of conversion into pseudo photographs. If the impression given by the pseudo photograph is that it is of a child then it is taken to be of a child.

Proceeding for offences under the Protection of Children Act 1978 may only be instituted by or with the consent of the Director of Public Prosecutions. The maximum penalty for conviction on indictment is now 10
years imprisonment or a fine or both (increased in 2001). The maximum penalty on summary conviction is imprisonment for a term not exceeding £1000 or such other sum substituted under the Magistrate’s Courts Act 1980. Where the offence is committed by a body corporate, such as a limited company, with the consent or through the neglect of, any director, manager, secretary or other officer or a person purporting to act in such a capacity, that person is also guilty of the offence.

In R v Fellows (1997) 1 Cr App R 24, Fellows was a computer specialist from Birmingham University who used a university computer to store indecent pictures of children and he printed copies. He also made the data available on the internet. The Court of Appeal rejected the accused’s argument that the computer data did not comprise a photograph for the purposes of the Protection of Children Act 1978. The court in this case held that a file on a database, which can be displayed on screen and printed out, constitutes a copy of a photograph and uploading such images constitutes possession with a view to their being distributed or shown. However in relation to possession of an indecent image of a child, some knowledge of its existence was held to be necessary as illustrated in the case of Atkins v Director of Public Prosecution and Goodland v Director of Public Prosecutions [2000] 2 Cr App R 248 (QB).

However in R v Bowden [2000] 1 Cr App R (S) 26 and R v Jayson CA [2002] EWCA Crim. 683, the court held that downloading an image of a child from the internet amounts to making a photograph, which is an offence contrary to Section 1 of the Protection of Child Act. The act of downloading causes the image to exist on the screen, which therefore becomes a photograph. Section 1 of the Protection of Children Act 1978 applies to opening an email attachment containing indecent photographs of a child as it does in the case of downloading such images from web pages. Both acts involve the offence of making indecent photographs. The only exception is where the person in question was not aware that the attachment contained or was likely to contain an indecent photograph or pseudo photograph of a child.

The defendant may suggest that he was looking at adult pornography sites, or even sites not connected with pornography at all, when child pornography sites popped up on the screen uninvited. In order to refute such a defence your expert witness can show how often the defendant visited such sites and whether he saved the indecent images. The defendant may suggest that someone else has access to the computer and has created the images. The police should always cover this in interview with the defendant. If others do have access, then the caution is needed. It may be appropriate to ask the police to take statements from those who have access to the computer or other storage media to rebut any such suggestion arising at trial. It may be that there is clear evidence that the defendant has his own password to gain access to the computer or to the particular site on which the images have been found, or there may be some other supporting evidence. The law in United Kingdom criminalizes all activities involved in the production, distribution and possession of child pornography in whatever form and the court plays an important role in applying the laws to cover online and offline child pornographic materials. As seen earlier, the United Kingdom has adopted legal mechanism to combat child pornography online and offline. The country has domestic laws that criminalize all activities related to child pornography in whatever form. The courts also play an important role in interpreting the laws and extending the application to criminalize possession of child pornography from offline to online. Apart from using laws, content regulation is also used to protect children from this crime. However in United Kingdom there is no specific statute imposing filtering, rating and labeling. The country employs self regulation and parental control as instrument to protect children online.

Section 160 of the Criminal Justice Act 1988 covers the offence of possession of an indecent photograph of a child. The defenses to this offence are listed in section 160 (2) of the Criminal Justice Act 1988 and section 160A. The defendant must prove both that the photograph or pseudo photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time. The Act does not prescribe what constitutes a prior request nor does it define the parameters of unreasonable time. In particular, it is not clear whether time runs from when it was known by a defendant to have been received. The difference between a pseudo photograph and prohibited image is if an image if printed look like
photograph or pseudo photograph then it should be prosecuted as such. For example, some high quality computer generated indecent images if printed may look like a photograph and such should be prosecuted contrary to PCA 1978 or CJA 1988.

The United Kingdom does not explicitly state that ISPs must report suspected child abuse images to law enforcement or to some mandated agency. However, ISPs may be held liable for third party content if it hosts or caches content on its servers and possession may possibly occur in the jurisdiction where the serve is located. In the United Kingdom, possession is an offense and as such ISPs will report suspected child abuse material to law enforcement once they are aware of it.

It can be confirmed that child pornography in the United Kingdom is covered by the Protection of Children Act 1978, which makes it illegal to take, make, distribute, show or possess an indecent photograph or pseudo-photograph of someone under the age of 18. In the context of digital media, saving an indecent image to a computer’s hard drive is considered “making” the image, as it causes a copy to exist which did not exist before. This law is in force in England, Wales and Northern Ireland. The prohibition of content on the Internet, that is potentially illegal under this law by British internet service providers, is however self regulatory, coordinate by the non-profit charity Internet Watch Foundation (who has partnerships with many major ISPs in the Country). The IWF operates in informal partnership with the police, government, public and Internet service providers.

MALAYSIA APPROACH

In Malaysia, children’s right are protected through domestic legislation and by joining international treaties including UN Convention on the Rights of Child (CRC) and the Optional Protocol to the Convention on Rights of Child on the Sale of Child, Child Prostitution and Child Pornography.

In comparison with United Kingdom jurisdictions, Malaysia law does not provide a clear definition on child pornography. Malaysia regards all pornography as illegal and thus does not have any specific law criminalizing child pornography. There are laws which govern all types of pornography under the category of obscene, indecent and offensive material. Acts such as the Printing Presses and Publication Act 1998 (PPPA), the Film Censorship Act 2002 (FCA) and the Penal Code prohibits obscene and offensive materials in relation to printing and film, whereas indecent, obscene and offensive contents are governed by the Communication and Multimedia Act 1998 (CMA). However, it is unfortunate that our Computer Crimes Act 1997 (CCA) does not address this particular issue since child pornography is considered as a computer crime against children online.

The term “publication” under section 2 of the PPPA only refers to what can be published rather than the process and activities involved in publication in contrast to the definition of the word” publication under section 1(3) of United Kingdom Obscene Publication Act 1959 and the Criminal Justice and Public Order Act 1994 (UK), where the term publication includes distributing, circulating, selling, transmission of a document and electronic file, image or data. The offence under PPPA only focuses on production of obscene materials and does not include internet publication.

Section 292 of the Penal Code Act criminalizes activities dealing with the obscene materials in general. Whoever sells, lets to hire, distribute, publicly exhibit, circulate in whatever manner or for the purpose of sale, hire, distribution, public exhibition or circulation, makes, produces, or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever shall be punished with imprisonment for a term which may extend to three years or with fine or with both. Thus, in contrast to the law in United Kingdom, the Malaysian statutes, as seen do not specifically criminalize the production, offering, distributing and possessing of online child pornography. Further it is prohibited to participate in or receive profit from any business where the offender knows or has reason to believe that any
such obscene objects are produced, kept, imported, exported, conveyed, publicly exhibited or put into the circulation under section 292(c) of the Penal Code.

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

The Child Act 2001 makes it an offence for a person, who is in charge of taking care of a child or permit them to be used in pornographic materials. Section 31 of the Child Act 2001 clearly prohibits sexual abuse of children, while section 43 makes it an offence to sell, buy, let for hire, obtain possession, detain, advertise of a child for the purposes of prostitution. These provisions focus on physical abuse and exploitation that may require judicial activism from the court and prosecutor creativity to extend the application to digital era.

However, new development has been addressed in combating the issue of online pornography or indecent images. Several of the above Acts that were used to govern print and film pornography have been applied to address online crimes in relation to posting, distributing and possessing of indecent photographs online and websites. In the case of Tan Jye Yee & Anor v Pendakwa Raya [2014] 6 MLJ 609, the appellant has been charged inter alia under section 5(1) of the Film Censorship Act 2002 for obscene publication in their Thumblr. The charge is yet to be materialized since he has escaped to another jurisdiction.

In 2013, Fila Syahida Zulkipli was charged under section 292 of the Penal Code by the Mukah Magistrates Court. She pleaded guilty for recording an obscene video of a 15 years old girl using her mobile phone. She was fined for producing the obscene video. The issue on the adequacy of Malaysian Law to cater and address child pornography has become a hot topic recently as the Malaysia student Mohd Fitri Azmeer Nordin was charged and convicted in the UK Court for possessing, making, and distributing pornographic images of children.

The findings indicated that what is lacking in our law is criminalizing possession of indecent or obscene images. Even though the existing law do mention about possession of obscene materials, the provisions may not be enough to address the issue unless the law is specifically extended to include online child pornography materials and images. On this aspect, the case of Fila Syahida should be used as a stepping zone to criminalize possession and production of online child pornography in Malaysia.

Another issue challenging the law on online pornography matter will be the definition of child pornography “image” particularly computer generated images and manipulated photograph. A clear definition is important because it is a criminal prosecution. There is no specific definition on child pornography by any Act in Malaysia but the Content Code regards child pornography as obscene contents that include “depiction of any part of the body of a minor in what might be reasonably considered a sexual context.

The Child Act 2001 states child pornography as sexual abuse, an offence under Section 17 of the Child Act. The act recognizes that a child who is sexually abused if he has taken part, whether as a participant or an observer, in any activity which is sexual in nature for the purposes of (i) any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance, or (ii) sexual exploitation by any person for that person’s or another person’s sexual gratification is a child in need of care and protection. Meanwhile, section 31 of the same act makes it an offence to those who, being a person having the care of a child sexually abuses the child or causes or permits him or her to be so, abused and could be liable to a fine not exceeding RM20, 000.00 or to imprisonment for a term not exceeding ten years or both. The Malaysian legal framework does not address the criminal liability of children involved in pornography as long as they are victims, and not the offenders.

The Penal Code particularly section 292 also criminalized child pornography within the scope of obscenity laws. The law thus needs to be stretched to cover online child pornography like United Kingdom which has
reasonable definition of child pornography and extend the definition to cover online pornography. However, Malaysian Law does not criminalize simple possession of child pornography regardless of the offender’s intention. It only criminalizes possession of any obscene objects for the purpose of hire, sale, distribution or public circulation pursuant to Section 292(a) of the Penal Code which reads as (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public circulation makes, produces, or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation, or figure or any other obscene object or whatsoever.

Malaysian law does not have reporting requirements for Internet Service Provider (ISPs) upon finding child pornography on the network. However, Section 211(1) of the Communication and Multimedia Act 1998 prohibits content applications service providers or other persons using a content applications service from providing content which is indecent, obscene, or offensive in character with the intent to annoy, abuse, threaten, or harass any person.

FINDINGS

From the overall findings it is clear that the Malaysia laws are not sufficient enough to combat online child pornography in this digital era. The process and activities involving making, producing, disseminating, selling of pornographic materials in the offline world are criminalized, as seen in Section 292 of the Penal Code and Section 5 (1) of the Film Censorship Act but the CMA particularly section 211, confines the process and activities only to the term ‘provide’. It does not criminalize the process and activities of creating, uploading, downloading, transmitting, posting, transferring, receiving, viewing and possessing of the prohibited materials as it is provided in the laws in United Kingdom.

Also, there is no clear legal definition on the term pornography, child pornography, obscenity and offensiveness provided by the statutes. It may lead to coordinate the application of the laws to cover all types of pornography. The Content Code does provide definition of the above terms, it is only used as a reference or a guideline for self-regulatory device by online content providers. It does not binding and cover individuals involved in creating, producing, disseminating, viewing, and possessing the material.

Other than that, the non censorship policy over internet under the CMA, the Bill of Guarantee and the Film Censorship Act 2001 has the effect of allowing access to pornographic materials and websites. Such offensive materials are accessible to all especially youth due to the absence of mechanism to filter access to online contents, parental guidance and control mechanism, as well as lack of self-resilience among all. This could be the root to all evils that could spoil the positive development of the people in Malaysia.

The prosecuting cases under the CMA for online pornography will make stronger the applicability of the law through judicial interpretation and through this also the law could adapt to the advance in technology and the technical process. Most of the cases brought at the lower courts have relied and extended the application of the Penal Code and Film Censorship Act to cover online matters. In the United Kingdom, the courts have in several cases, extended the interpretation of ‘photograph’ to include computerized images and pseudo virtual photographs. Therefore, any database consisting of such images is caught under the United Kingdom Protection Of Children Act 1978, United Kingdom Obscene Publication Act 1959 and United Kingdom Criminal Justice and Public Act 1988.

CONCLUSION

Crimes against children are on the rise in Malaysia especially in this digital era. Therefore, appropriate laws are needed to protect children from being the victims of child pornography. In Malaysia, the existing laws are still far reaching to meet the challenges of ICT facilitated crimes against children. In particular the laws governing pornography should be clear and adequately comprehensive to cover both online and offline pornography and the laws should form an integrated system that criminalizes child pornography.
In this context, the Penal Code, CMA, and CCA should be specifically criminalizing online child pornography. Further the Child Act 2001 being the important act to protect children needs to integrate physical and online offences together to give protection in full for children.

The Courts particularly the higher courts should be given opportunity to interpret the application, terminology and forms under the various statutes governing pornography, obscene, indecent and offensive materials. Other than that the Malaysian Code of Content should be made mandatory or alternatively be made as mandatory reference in relation to issues involving pornography and obscene materials.

Even if the Malaysian student Nur Fitri Azmeer Nordin were to resume his consumption of child pornography upon his return to Malaysia after serving his sentence in the United Kingdom, there appears to be no laws in the country to tackle possession of pornographic material if the scholarship holder or anyone else here were to view obscene material. This is because, while Section 292 of the Penal Code deals with sale and distribution of obscene material, and Section 233 of the Communication and Multimedia Act (CMA) deal with the making, creating and transmitting of such material, they do not touch the issue of possession and viewing.

There appeared to be limited context on using the Internet for disseminating obscene materials under Section 233 of the CMA. As for Section 2, it is more targeted towards preventing distribution of obscene material or selling for profit. Section 233 on the other hand seems to be limited in its application. There is nothing on having possession. It appears as though there is nothing to deal with this specific situation. Therefore an amendment is needed to the existing legislation to cover the loophole there because it is for the protection of minors. We cannot allow any activity that would encourage or allow for minors to be exploited.

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