

LEGAL MEASURES

# PROTECTING KIDS FROM SEXUAL CRIMES

**R**ECENTLY, a man captured national and international attention when he was charged with raping and sodomising his daughter more than 600 times. Cases of sexual assault against minors are nothing new in Malaysia.

Women, Family and Community Development Minister Datuk Seri Rohani Abdul Karim said there were 13,272 rape cases involving victims below 18 reported between 2010 and May this year. This means an average of 2,000 cases a year.

Let us also not forget the many cases that were not reported.

Therefore, the question is: what have we done to address the problem? What can we do to protect our children?

For one, credit must be given to the government for two achievements this year.

First, the Special Court on Sexual Offences Against Children at Putrajaya was launched on June 22. The court sits only for cases of sexual offences against children, thereby expediting the resolution of these cases.

By speeding up the court process, justice is served faster and victims get closure faster, too.

The court is equipped with equipment and toys to help children give evidence calmly and accurately.

This is especially important as the victim's evidence is often the most crucial evidence in the prosecution.

Second, the Sexual Offences Against Children Act 2017 came into force on July 10.

The provisions introduced by the new act include provisions on substantive law, that is, new crimes, as well as procedural law, or new standards in evaluating evidence.

First, the act provides that if an offence under it is committed outside Malaysia, the offender can still be prosecuted. For example, a Malaysian committing an offence in the United Kingdom may be prosecuted if he returns to Malaysia.

Second, child pornography under Section 4, sexual communication with a child under Section 11, child grooming under section 12, are new provisions to criminalise these behaviours.



A man, who was charged with raping and sodomising his daughter more than 600 times, being taken to the Special Court for Sexual Crimes Against Children in Putrajaya on Aug 9. PIC BY MOHD FADLI HAMZAH

Additionally, the act empowers prosecution of physical sexual assault under Section 14 and non-physical sexual assault under Section 15.

Section 14 provides that any person who, for sexual purposes, **TOUCHES** any part of the body of a child;

**MAKES** a child touch any part of the body of such person or of any other person;

**MAKES** a child touch any part of the child's own body; or,

**DOES** any other act that involves physical contact with a child without sexual intercourse, commits an offence and shall, on conviction, be punished with imprisonment not exceeding 20 years and shall also be liable to whipping.

Section 15 provides for sexual assaults that are non-physical, which cover harassment by uttering words or making certain sounds, self-exposure (showing his private parts to a child) and

stalking, for sexual purposes.

Additionally, it is now a crime to engage in an activity that is sexual in nature in the presence of a child, causes a child to watch another person engaging in an activity that is sexual in nature, including through visual audio or written, and make a child engage in an activity that is sexual in nature.

The sentence is imprisonment up to 10 years, a fine not exceeding RM20,000, or both.

The act is silent on consent. Presumably, consent is not a defence under this act.

This is understandable because children are deemed incapable of consenting in law, regardless if they did or not.

However, imagine a person who is 19 and has consensual sex with his partner, 17.

While he will not have committed a crime of statutory rape, as under the Penal Code it applies to children below 16, he would have

committed a crime under sexual assault since consent is not a defence and under the act, a child is defined to be under 18.

This is a grey area that the courts need to clarify.

Additionally, under Section 16, if a person who commits any offence is in a relationship of trust with the child, then, in addition to the punishment he gets for the offence, he will be punished with imprisonment for a term not exceeding five years and whipping of not less than two strokes.

People who are in a relationship of trust to the child include parents, guardian, stepparents, teachers, lecturers, wardens and people in healthcare services.

This means that, for example, the man mentioned above, being the father, will be subjected to additional punishment under this section.

There are new provisions relating to evidence introduced by the new act.

Under Section 17, child witnesses are presumed to have the capacity to give evidence until the court thinks otherwise.

This is the opposite of the legal principles prior to the act, which direct the court to be cautious of the evidence of a child witness, and the court must conduct an inquiry into the capacity of the child before accepting his evidence.

Under previous laws, a court has to conduct a two-tiered test, first, to determine whether the child understands what is an oath, and if the answer is negative, then whether he understands the importance of giving a truthful statement.

If he does not understand what an oath is, but the court finds that he has sufficient maturity and understands the importance of speaking truthfully, he can give an unsworn statement. However, if an unsworn statement by a child is taken, then under Section 133A of the Criminal Procedural Code, the court cannot convict the accused unless the child's evidence is corroborated by other evidence.

The implication of the old principle means two things.

First, the presumption of credibility is against a child.

A child is presumed not trustworthy, mainly because he is as-

sumed to not understand the importance of giving a truthful statement in court as well as his inability to separate imagination and reality.

Second, if he is allowed to give an unsworn statement, if there is no corroborative evidence, the court cannot convict the accused.

More importantly, case laws have also shown that a failure by the court to conduct the two-tiered inquiry is a substantial failure that would warrant a court hearing the appeal to set aside the conviction.

The stakes, in summary, are against the child victim.

However, with Section 17, and Section 18, which states that when a child gives evidence, sworn or unsworn, the court is empowered to convict without corroborative evidence, the tide has now shifted in favour of the child witness, who often is the victim.

When it comes to sentencing, privileges afforded to youthful offenders and first-time offenders would not apply if the person who commits an offence under this act is above 18.

In conclusion, with this new act, our ability to prosecute and convict these crimes have been strengthened.

On top of that, the amendment to the Penal Code that was passed, but not yet in force, would add another crucial change.

Under the amendment, penetration by fingers or other objects constitutes rape.

Nevertheless, while we applaud this progression, we must not limit our efforts in tackling these social ills to law and law enforcement.

The government must look at the big picture when cracking on these problems, including providing better jobs, better incomes, thereby enabling more fulfilling and higher quality life to people, more accessibility to high quality education, fewer taboos on sex education, and definitely less talk about how a rapist can escape conviction by marrying his victim.

Prevention is better than cure.

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