

CHILD ABUSE IN MALAYSIA: LEGAL MEASURES FOR THE PREVENTION OF THE CRIME AND PROTECTION OF THE VICTIM

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ABSTRACT

Child abuse is not a new phenomenon. It happens all over the world. From the statistic, the case of child abuse is not something that we should take it lightly. Even though many steps have been taken by the government, cases of child abuse keep increasing. Hence, it should be taken seriously and provide the way to protect the victim and to prevent it from happening. In Malaysia, many laws have been passed with the objective of protecting the welfare of the child. In the same time, the law is also tries to prevent the crime from being committed. This paper will discuss the Malaysian Child Act 2001(Act 611) which came into force on 1 August 2002. The Act attempts to promote the right of a child and at the same time aims to implement the United Nation on Children Right Convention (UNCRC). However the discussions will only focusing on the provisions relating to the welfare of the child abuse victim and the rights and responsibilities of publics to prevent child abuse. As the victim of the abuse may later on required to give evidence in the court of law, being a child, it is expected that a normal proceeding could not be applied to them. There should be a special way of obtaining and allowing them to give evidence. In 2007, Evidence of Child Witness Act was passed with the aims to make provisions relating to giving of evidence by child witnesses. It is the aims of this paper to see how such laws are effective in providing the protection to the child abuse victim.

Key Words: *Child abuse, Protections, Preventions.*

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INTRODUCTION

Child abuse and violence are of global concern and have been an issue long outstanding. Even though many steps have been taken by the government to prevent it, statistic shows that child abuse cases keep increasing. Children experience violence in all spaces most familiar to them: in homes, schools and communities they live in. They also suffer abuse and exploitation in orphanages, in place of detention and on streets. The willful maltreatment of children has been recognized internationally as a matter of great sociological impact with legal significant and medical concern.

Law as one of the mechanism to ensure that all the policy and planning of the government run smoothly. For example, it is a policy of the government of Malaysia that no child is abused or neglected. Therefore the government of Malaysia has passed legislations to protect the child from being abused and also to ensure the perpetrator being punished. The Domestic Violence Act 1994 and the Child Act 2001 are the main legislations which govern the case of child abuse. The other laws which dealt with the case of child abuse are the Penal Code and the Evidence of Child Witness Act 2007.

2. DEFINITION OF CHILD

Age is an important factor or criteria in determining whether a person is a child or not. It is important to determine whether a person is considered as a child or not because if he is a child, a specific provisions of law which provides for the protection of a child will be applicable. Therefore, child will be protected from being exploited by the adolescent.

The Child Act was which passed in 2001 (Act 611) as to consolidate three major statutes governing children and young persons i.e the Juvenile Court Act 1947, Child Protection Act and Women and Girls Protection Act 1973 defines a child as all persons aged below 18 years. The definition also in line with Article 1 Convention on The Right of Child 1991 i.e. child is defines as who is under the age of 18.

3. DEFINITION OF CHILD ABUSE

It is actually difficult to define child abuse with precision as there can be no universal meaning based on a broadly acceptable value. (Augustine Paul,1991:

ixiv). This is because form of neglect may not be an abuse of one community but it may be considered as a form of abuse in another society.

World Health organization define child abuse as all forms of abuse whether physical, emotional, sexual, neglect, abuse, maltreatment or exploitation which may cause injury or damage to the health, life, development or dignity of the child done by those who have the responsibilities, trust or authority over the child.

Sometimes we need to differentiate between abuse and right of the parent to discipline their child. The parent has the right to discipline their child as long as it is done in a reasonable manner and moderate in degree and otherwise does not constitute cruelty. .

4. FORMS OF CHILD ABUSE

Child abuse can be divided into four kinds-emotional, physical, sexual and neglect. It usually consists of a pattern of behavior which may include more than one kind of abuse. (Hall & Martin, 1981:2)

a. Emotional / psychological

Emotional abuse is a psychological trauma that invade the mind turns and layers of protection so that the mind is disturbed for a short or long term according to the intensity of the trauma that happened. (Kassim,1998). It may takes in the form of failure to meet a child's need for affection, attention and stimulation (even though good physical care may be provided) or that may be constant verbal abuse, rejection, threat of violence or attempts to harm the child.(Hall, 1981:3). It may also refer to the negative behavior of the parents or guardians towards children under their custody. (Jal Zabdi, 2010:18).

b. Physical abuse

Physical abuse occurs when a child is injured by a parent or guardian. Act or omission would amount to 'physical abuse' if they occur intentionally or with intent to injure the child. The examples of physical abuse are kicking, punching, shaking, strangling, beating until he passed out and broke the bones. While injuries which are always associated with physical abuses are bruises, scratches, brain damage, bleeding and some cases involving death.

c.. Sexual abuse

Sexual abuse is defined as involvement of children in sexual activities that they do not fully understand what is being done or the impact of the consent given, or the act is something contrary to role of the family. The example of sexual abuse included the act of having sex with a child, rape, incest, exposing genitals, sexual sadist, child prostitution and child pornography images. Molesting acts like holding, kissing, rubbing private parts of children and unnatural sexual behavior are also sexual abuses.

d. Neglect

Neglect can be defined as the persistent and serious failure to provide basic physical, emotional and development needs in terms of health, education, emotional development, nutrition, shelter and safe life for children. (Malaysia's National Policy). Neglect occurs when caretakers fail to provide children with essential food, clothing, shelter, medical care, education, nurturance, or love.

5. FACTORS CONTRIBUTE TO CHILD ABUSE

There is generally no single factor that results in abuse. There is also no known cause of child abuse. Nor there any single description that captures all families in which children are victims of abuse. However, research has proved that a number of risk factors or attributes commonly associated with maltreatment. The risk factors can be grouped into four domains i.e parent or caregiver factors, family factors, child factors and environmental factors.

6. LEGAL MEASURES TO PREVENT AND PROTECT THE VICTIM

It is undoubtedly that law is the important component to prevent the abuse and neglect cases. Therefore, most of the country passed the law for the protection of the children. For example the Children Act 2001 in Ireland, the Protection of Children and Juveniles Ordinance in Hong Kong, and the Children and Young Persons Act 2001 in Singapore. As for Malaysia, a number of laws are providing the protection for the abused child.

a) The Child Act 2001

The Child Act 2001 brought major changes in the law relating to the protection of the child in Malaysia where the rights of the child was recognized openly by the government. The preamble of the Act recognized children as the important

component of the society and since the children are not matured, the protection and special care should be given to them. The Child Act provides provisions to protect abused children or children in need of care and protection as follows:

1. Restrictions on media reporting and publications

In order to protect the interest and welfare of the child, any mass media report regarding any child in respect of whom custody is taken under Part V of the Child Act shall not reveal the name, address or educational institution, or include any particulars calculated to lead to the identification of any child so concerned wither as being the person against or in respect of whom action is taken or as being a witness to the action. The picture of any child concerned or any other person, place or thing which may lead to the identification of any child concerned also shall not be published in any newspaper or magazine or transmitted through any electronic medium.(section 15(1) and (2) of the Child Act 2001).

2. Duty of protector/police officer taking a child into temporary custody and putting them in a safe house

Protector here means the Director General, the Deputy Director General, Divisional Director of Social Welfare, Department of Social Welfare, the State Director of Social Welfare of each states, any social Welfare Officer appointed under the Child Act 2001. If the protector or police officer is satisfied on reasonable grounds that a child is in need of care and protection, they may take the child into temporary custody.(section 18 of the Child Act 2001)

3. Duty to inform on abuse case to the relevant authority

The duty to inform is imposed to the medical officer or medical practitioner who believes on reasonable grounds that a child he is examining or treating is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused. (section 27(a) of the Child Act 2001) Failure to inform is an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both. (sections 27(b) of the Child Act 2001)

The duty to inform is also extended to the family members of the child and the child care provider. (sections 28 and 29 of the Child Act 2001) It is different as compare to Child Protection Act 1991 which only imposed the duty to the medical

practitioner. Looking to these two additional categories, it can be said that there two categories also have the possibilities to know the abuse cases earlier than the medical practitioner. (Mohd Yusoo, 2002: 71)

Section 2 of the Act defines “member of the family” as includes a parent or a guardian, or a member of the extended family, who is a household member, while household member is define as a person who ordinarily resides in the same household as a child. While child care provider is defined as a person who looks after one or more children for valuable consideration for any period of time.

The duty to inform arises according to section 28(1) and section 29(1) when the respective parties have the reasonable grounds to believe that a child is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused. Here, the standard use is whether a reasonable man based on the reasonable grounds believes that the child is abused. (Mohd Yusoo, 2002: 79)

Since the law makes it compulsory for the family member and child care provider to inform about the abuse, failure to comply with the duty is an offence under section 28 of the Act and if convicted to be released on a bond on condition to be determined by the Court. Failure to comply with the bond will be liable to a fine not exceeding RM5,000.00 or to imprisonment for a term not exceeding two years or to both.

It is suggested that the duty to inform should be extended to the neighbor as well as teachers because they are the people who always deal with child and may have seen the signs of abuse in the child.

b) Domestic Violent Act 1994

The Domestic Violent Act 1994 was designed to grant both civil and criminal remedies for the survivor or victim of domestic violent, irrespective of race, religion, and cultural and family background differences. The Act provides protection to all persons including the spouse, former spouse, child, incapacitated adult or any member of the family. Domestic violence includes the case of child abuse (section 3 of DVA). The problem is only that DVA does not provide for specific offence but it must be read together with Penal Code. Furthermore, even DVA provides the provision for the public to give information to the authorities if

they have any information relating to domestic violence but it does not provide any penalty for failure to give such information.

Under the DVA, there are two types of protection the victims can ask for:

1. Interim Protection Order- where the court may, during the pendency of investigations relating to commission of an offence involving domestic violence, issue an interim protection order to prohibit the person against whom the order is made from using domestic violence against the child. This interim protection order shall cease to have effect upon the completion of the investigations. (section 4 of DVA)
2. Protection Order - This protection order will be given in proceedings involving a complaint against domestic violence and the offence committed is a compoundable offence or bailable offence under Penal Code.(section 5 of DVA)
3. Other orders- Besides those two orders, the court can also give an order to restraint the accused from entering to the house occupied by the complainant/victim or temporary shelter of the victim.

The court also can allow the claim for damages made by the victim. The claim may include damages for the injuries suffered by the victim, damages for the loss or damage to the property and financial loss.

C. The Child Witness Act 2007

As the victim of the abuse may later on required to give evidence in the court of law, being a child, it is expected that a normal proceeding could not be applied to them. There should be a special way of obtaining and allowing them to give evidence. According to section 118 of the Evidence Act 1950 if the child can understand the nature of the question put to him and can give the rational answer to that question, he is competent to give evidence. Child being a competent witness will be treated as adult witness. He is expected to retell the story, live, on the day of the trial in front of the judge, court officials, defence counsel and the alleged offender. This is a strange environment for the child and it can rapidly confuse him. The young child may also find its frightening to see the accused in court. The child will also be subjected to cross-examination by the defence counsel which will not only traumatize the child but also less likely to produce the truth.

In Malaysia, the Evidence of the Child Witness Act was passed in 2007 with the objective to reduce the trauma experienced by child witnesses in court appearances. The Act provides for a child witness to give evidence in the courtroom but shielded by a screen between him and the accused person or a child charged with the offence or by the live link or by video recording.

1. Video recording

In this case the child witness should be interviewed by a qualified and experienced person and that a videotape of the interview should be used as evidence at the trial. Video recording means a video recording of the oral evidence of the child witness, in the form of an interview conducted by a police officer or other officer and the child witness, expressed upon any format, made with a view to its admission as evidence of examination in chief of the child witness. The major advantages of the use of the recorded evidence are less trauma for the child, the freshest possible evidence is obtained, pleas of guilty are encouraged and the accused who asserts his/her innocence is in a better position to do so when he/she knows all the details of the child's evidence before the trial.(William, 1987:370)

However, the video recorded evidence may be attacked as improper by the defence counsel since it may involve leading question to be asked in order to get effective interview. This may discredit the reliability of the statement given by the child witness.

2. Live Links or closed-circuit television

Live link means a live TV link or other arrangement whereby the child while absent from the courtroom is able to see or hear or be seen and heard by the person in the courtroom. The section provides for the evidence to be given in a normal way except that the witness will not be in the courtroom. It is mainly introduced to minimize the stressful effect of a court appearance upon child witnesses in alleged child abuse.

Examination of the child witness may be done through the court or an interpreter or an intermediary authorized by the court. The intermediary communicates the questions put to the child witness and communicates the child's answer to the person putting the questions. He also explains the questions and answers to be understood by the child but shall not prompt or influence the child or disrupt the questioning. If the accused person is unrepresented, he is not entitled to question a child witness directly but he may do so through an intermediary.

3. Screening

A child witness, while giving evidence in Court, may be prevented by means of a screen or other arrangement from seeing and being seen by the accused or a child charges with an offence. However, the screen or other arrangement shall not prevent the child witness from being able to see, and to be seen by the Court, the prosecutor, the advocate for the accused or the child charges with any offence and the interpreter.

4. Accompany adult

The court may allow a child witness to be accompanied by an adult while giving evidence, presumably to give physical comfort and assurance to the child so as to lessen the trauma. Section 9 of the Child Witness Act provides that the court may allow a child witness to be accompanied by one or more adult but the adult accompanying the child shall not prompt the child witness to answer the question or influence the answer or disrupt the questioning of the child witness.

5. Formal court attire

Formal court attire may be dispensed with. This is provided in section 10 of the Evidence of Child Witness Act 2007. This can be seen as one of the ways to make the courtroom appear friendly and normal in cases where the child witness gives evidence in the courtroom. It cannot be denied that the experience of being a witness is unpleasant and even daunting for most children.(Spenser and Flin, 1990: 358) The usual set-up of courtrooms and court personnel are intimidating from children's perspectives, who, for this very reason may be discourage from giving reliable testimony. The objective of this section is to make the courtroom appear friendly and normal in cases where the child witness gives evidence in the courtroom.

7. CONCLUSION

Despite significant strides made by the government in improving child protection measures, in recent year, the cases of child abuse keep increasing. The laws and procedures alone cannot solve the problem. It is only one of the methods of providing solution to the problem. More efforts have to be taken to make the society aware that child abuse is a crime and can causes a country the loss of the loss of human potential.

The Department of Social Welfare under the Ministry of Women, Family and Community Development and NGO's have carried out awareness campaigns periodically in mass-media and a nationwide campaign through posters and billboards as the main source of medium. As for the protection of the victim, they also provide shelter for the victim.

Community based project should also be developed which involve the society at large to create awareness that child abuse is a crime. They should be made well aware of the current situation, the law concerning the issues and measures taken by the government and government agencies.

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