

Legal questionnaire completed by Muhendaran Sri • April 2024

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1. What laws and regulations contain legal definitions of the following terms or corresponding terms in your local jurisdiction (links to existing U.S. legal definitions are included, where relevant, as background for comparison – please include definitions of any corresponding terms in your country):

a. child or minor (18 U.S.C. 2256(1), <https://www.law.cornell.edu/uscode/text/18/2256>)

Malaysia is a dualist state by operation of Article 74 of the Malaysian Federal Constitution, wherein international treaties do not give rise to rights and obligations unless they are enacted into domestic law. Currently, Malaysia is a State Party to three international human rights treaties, namely the Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). Malaysia acceded to the Convention on the Rights of the Child (“the CRC”) in 1995, and maintains 8 reservations against the CRC. The Child Act 2001 was enacted by the Malaysian government to implement some of its obligations under the CRC. Our research and response to those questions has taken into account international treaties which have been incorporated into domestic law. It is to be noted that the Federal Constitution guarantees the liberty of the person in Article 5, and prohibits slavery and forced labour via Article 6.

Citation:

https://www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf

Citation: <https://antislaverylaw.ac.uk/wp-content/uploads/2019/08/Malaysia-Child-Act-1.pdf>
(see page 13)

There are found main pieces of legislation in Malaysia which governs child sexual abuse in Malaysia: The Child Act 2001, the Sexual Offences against Children Act 2017 (“SOACA”), the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (“ATIPSOM”), the Penal Code, and the Age of Majority Act 1971.

The definition of a “child” differs with the various legislations and offences in Malaysia.

However a "child" is largely considered to be a person under the age of eighteen:



1. Section 2 of the Child Act 2001 defines a “child” as (a) a person under the age of eighteen years; and (b) in relation to criminal proceedings, a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code.

Citation: <https://antislaverylaw.ac.uk/wp-content/uploads/2019/08/Malaysia-Child-Act-1.pdf> (see page 15)

2. Section 2 of the ATIPSOM defines a “child” as a person under the age of 18.

Citation: <https://toolsfortransformation.net/wp-content/uploads/2017/03/Malaysian-Law-Anti-Trafficking-in-Person-Smuggling-of-Migrants-ATIPSOM-2.pdf> (see page 8)

3. The definition of a “child” in section 2 of the SOACA is as follows:
 - (i) as a person under the age of 18; or
 - (ii) a person who the accused believes to be under the age of 18.

Citation:

[https://lom.agc.gov.my/ilims/upload/portal/akta/outputaktap/1841831_BI/ACT%20792%20\(MUKTAMAD\)%20AS%20AT%2011%20JULY%202023.pdf](https://lom.agc.gov.my/ilims/upload/portal/akta/outputaktap/1841831_BI/ACT%20792%20(MUKTAMAD)%20AS%20AT%2011%20JULY%202023.pdf) (see pages 7-8)

In respect of other sexual offences not covered by the SOACA (which includes Penal Code, Child Act and ATIPSOM offences), the protections afforded to child victims under the SOACA and the applicability of the SOACA is extended only to those persons defined as a “child” in such specified law(s).

4. Instead of one age defining the meaning of “child” to all its provisions, the Penal Code, being the defining legislation prior to 2001, sets different ages as thresholds for different offences. As an example, Section 377 of the Penal Code which criminalises the offence of inciting a child to an act of gross indecency, is only applicable to “a child under the age of 14”, whereas statutory rape is only applicable to a girl under the age of 16.
5. The Age of Majority Act 1971 sets down that a minor is a person under the age of 18.

Citation: <https://syazwaniawangco.com/wp-content/uploads/2021/01/Age-Majority-Act.pdf> (see page 5)

- b. child sexual exploitation (Missing Children’s Assistance Act of 2023, Section 2, (a)(1)(9), <https://www.congress.gov/118/bills/s2051/BILLS-118s2051es.pdf>)**

There is no separate classification or definition of “child sexual exploitation” in Malaysian legislation. However, please note that “child sexual exploitation” in Malaysia is criminalised by virtue of four main pieces of legislation as follows:

1. The main one being the SOACA which protects against a wide range of offences including child grooming, sexual extortion of a child, child sexual abuse materials, live streaming etc.



2. Sections 14 and 15 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 cover the exploitation of a trafficked child as follows:
 - (i) Offence of trafficking in children. Any person, who traffics in persons being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.
 - (ii) Offence of profiting from exploitation of a trafficked person. Any person who profits from the exploitation of a trafficked person commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to a fine of not less than five hundred thousand ringgit but not exceeding one million ringgit and shall also be liable to forfeiture of the profits from the offence.

Citation: <https://toolsfortransformation.net/wp-content/uploads/2017/03/Malaysian-Law-Anti-Trafficking-in-Person-Smuggling-of-Migrants-ATIPSOM-2.pdf> (see page 19)

3. Though the Penal Code and the Child Act 2001 do not define child sexual exploitation, they do have specific provisions in respect of slavery, prostitution and child sexual abuse.
 - (i) the Penal Code, criminalises the following, and imposes maximum sentences ranging from a maximum term of 7 years to 20 years in respect of the same:
 - Section 367. Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.
 - Section 370. Buying or disposing of any person as a slave
 - Section 371. Habitual dealing in slaves
 - Section 372. Exploiting any person for purposes of prostitution
 - Section 372A. Persons living on or trading in prostitution
 - Section 372B. Soliciting for purpose of prostitution

Citation: https://ccid.rmp.gov.my/Laws/Act_574_Panel_Code_Malaysia.pdf (see pages 142 to 144)

- (ii) the Child Act 2001 via section 43 has wide provisions in place against the prostitution of children with maximum imprisonment sentences up to 15 years (see pages 55 to 57). The Act in section 2 defines “prostitution” as:
 - “prostitution” means the act of a person offering that person’s body for sexual gratification for hire whether in money or in kind; and “prostitute” shall be construed accordingly.

Note: The Malaysian Penal Code which is modelled on the Indian Penal Code, enacted offences against male or female persons, which would by implication include offences against children. The Child Act 2001 was enacted with a view of Malaysia complying with its obligations under the Convention on the Rights of the Child introduced legislative protections for children. It introduced offences relating to trafficking/prostitution and/or selling of a child as well as the offence of ‘sexual abuse’ of a child. This position was then improved with the enactment of the ATIPSOM and the SOACA.

- c. **sexually explicit conduct (18 U.S.C. 2256(2),**
<https://www.law.cornell.edu/uscode/text/18/2256>)

Section 4(b) of the SOACA defines “sexually explicit conduct” as follows:

“Sexually explicit conduct” includes actual or simulated of the following:

- (i) sexual intercourse, or lewd acts including physical contact involving genital to genital, oral to genital, anal to genital, or oral to anal, between persons of the same or opposite sex;
- (ii) bestiality;
- (iii) masturbation;
- (iv) sadistic or masochistic abuse in a sexual context;
- (v) exhibition for sexual purpose of the genital, buttock, breast, pubic area or anus; and
- (vi) use of any object or instrument for lewd acts.

d. child sexual abuse (18 U.S.C. 2243(a), <https://www.law.cornell.edu/uscode/text/18/2243>)

“Child sexual abuse” in Malaysia is criminalised by virtue of four main pieces of legislation, which cover an extensive variety of sexual offences against children: (i) the Penal Code; (ii) the Child Act 2001; (iii) the ATIPSOM; and (iv) the SOACA.

Whilst the SOACA defines child sexual abuse materials, neither it nor the other 3 main pieces of legislation which govern child sexual abuse provides a definition of child sexual abuse.

Section 4(a) of the SOACA defines child sexual abuse materials as follows:

- (a) “child sexual abuse material” means any representation in whole or in part, whether visual, audio or written or the combination of visual, audio or written, by any means including but not limited to electronic, mechanical, digital, optical or magnetic means, or manually crafted, or the combination of any means—
 - (i) of a child engaged in sexually explicit conduct;
 - (ii) of a person appearing to be a child engaged in sexually explicit conduct;
 - (iii) of realistic or graphic images of a child engaged in sexually explicit conduct; or
 - (iv) of realistic or graphic images of a person appearing to be a child engaged in sexually explicit conduct;”

e. child pornography or child sexual abuse material (CSAM) (18 U.S.C. 2256(8), <https://www.law.cornell.edu/uscode/text/18/2256>)

Section 4(a) of the SOACA defines “child sexual abuse material” as follows:

“child sexual abuse material” means any representation in whole or in part, whether visual, audio or written or the combination of visual, audio or written, by any means including but not limited to electronic, mechanical, digital, optical or magnetic means, or manually crafted, or the combination of any means:

- (i) of a child engaged in sexually explicit conduct;
- (ii) of a person appearing to be a child engaged in sexually explicit conduct;
- (iii) of realistic or graphic images of a child engaged in sexually explicit conduct; or
- (iv) of realistic or graphic images of a person appearing to be a child engaged in sexually explicit conduct.



- f. **computer-generated images or videos of child pornography or CSAM (created by artificial intelligence or morphed) (18 U.S.C. 2256(8) & (9), <https://www.law.cornell.edu/uscode/text/18/2256>)**

Malaysia does not have any specific definitions for computer-generated images or videos of child pornography or CSAM (created by artificial intelligence or morphed). However “child sexual abuse material” is defined in section 4(a) of the SOACA (the definition has been provided in the above 2(e) responses), and the concept of the “computer-generated images or videos of child pornography or CSAM” can be covered by such definition.

- g. **enticement or grooming (encouraging, persuading, or coercing a child to engage in sexual activity or to create child pornography or CSAM) (18 U.S.C. 2422(b), <https://www.law.cornell.edu/uscode/text/18/2422>)**

Child grooming is an offence by virtue of Part III of the SOACA, under which Sections 11, 12 and 13 of the SOACA provides the rules governing “sexually communicating with a child”, “child grooming”, and “meeting following child grooming”. Here are relevant provisions.

Section 11 of the SOACA:

- (1) Subject to subsection (3), any person who (a) sexually communicates with a child; or (b) encourages a child to sexually communicate, by any means, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding three years.
 - (2) For the purposes of this section, a person is said to sexually communicate if—
 - (a) the communication or any part of the communication relates to an activity that is sexual in nature; or
 - (b) any reasonable person would consider any part of the communication to be sexual.
- ...

Section 12 of the SOACA:

- (1) Any person who communicates by any means with a child with the intention to commit or to facilitate the commission of any offence under section 5, 6, 7, 8, 14, 15, 15A or 15B or any offence specified in the Schedule against the child commits an offence ...

Section 13 of the SOACA:

- (1) Any person who, having communicated by any means with a child, travels to meet with the child or meets with the child with the intention to commit or to facilitate the commission of any offence under section 5, 6, 7, 8, 14, 15, 15A or 15B or any offence specified in the Schedule against the child commits an offence and shall, on conviction, be punished with imprisonment ...

- h. **legal age of consent for sexual activity – are there laws and regulations, if so, what ages are specified?**

The age of consent to sexual intercourse in Malaysia is 16, for female children, pursuant to section 375 (f) of the Penal Code (which age falls short of the recommendations of the Lanzarote Convention). Section 375(f) defines as rape, the act where a man has sexual



intercourse with a woman with or without her consent, when she is under 16 years of age.

Citation: https://ccid.rmp.gov.my/Laws/Act_574_Panel_Code_Malaysia.pdf (see page 146)

There is no legal age of consent defined for male children.

The SOACA sets out and criminalises a wide range of sexual offences against children including physical and non-physical assault, grooming, sexually communicating with a child and sexual extortion which covers persons under the age of 18 which has resulted in some contradiction, as a female child above the age of 16 is capable of giving consent to sexual intercourse (pursuant to section 375(f) of the Penal Code), but cannot consent to physical or non-physical “assault” of her person or sexually communicate until she is 18.

For clarity:

1. Physical sexual assault is defined in section 14 of the SOACA as:

Any person who, for sexual purposes

- (a) touches any part of the body of a child;
- (b) makes a child touch any part of the body of such person or of any other person;
- (c) makes a child touch any part of the child’s own body; or
- (d) does any other acts that involve physical contact with a child without sexual intercourse, commits an offence.

2. Non-physical sexual assault is defined in section 15 of the SOACA as:

Any person who

(a) for sexual purposes

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or his body or any part of his body with the intention that such word or sound shall be heard, or such gesture or object or body or part of his body shall be seen by a child;
 - (ii) makes a child exhibit the child’s body or any part of the child’s body so as it is seen by such person or any other person; or
 - (iii) repeatedly or constantly follows or watches or contacts a child by any means;
- (b) (Deleted by Act A1687);
 - (c) engages in an activity that is sexual in nature in the presence of a child;
 - (d) causes a child to watch such person or any other person engaging in an activity that is sexual in nature;
 - (e) causes a child to watch or hear any representation in whole or in part, whether visual, audio or written or the combination of visual, audio or written, by any means including but not limited to electronic, mechanical, digital, optical or magnetic means, or manually crafted, or the combination of any means, of such person or any other person engaged in an activity which is sexual in nature; or
 - (f) makes a child engage in an activity that is sexual in nature, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding twenty thousand ringgit or to both.



- i. **Sextortion (extorting money or sexual favors from a child by threatening to share sexually explicit, child pornography or CSAM images of the child) (Missing Children’s Assistance Act of 2023, Section 2, (a)(1)(8), <https://www.congress.gov/118/bills/s2051/BILLS-118s2051es.pdf>)**

Section 15B of the SOACA defines sexual extortion of a child as follows:

15B. Any person who—

- (a) threatens a child to engage in an activity that is sexual in nature;
- (b) threatens a child to share any representation in whole or in part, whether visual, audio or written or the combination of visual, audio or written, by any means including but not limited to electronic, mechanical, digital, optical or magnetic means, or manually crafted, or the combination of any means, of a body or any part of the body of a child exposing a child’s genital, buttock, breast, pubic area or anus or of a child engaged in an activity that is sexual in nature; or
- (c) threatens to use or distribute any representation in whole or in part, whether visual, audio or written or the combination of visual, audio or written, by any means including but not limited to electronic, mechanical, digital, optical or magnetic means, or manually crafted, or the combination of any means, of a body or any part of the body of a child exposing a child’s genital, buttock, breast, pubic area or anus or of a child engaged in an activity that is sexual in nature,

commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding ten years.

2. Please explain any legal or regulatory requirement or recommendation for Online Platforms to undertake any of the following activities on their systems to protect children online from sexual exploitation:

- a. **review, screen, moderate, or detect content to identify child pornography or CSAM content**

At present Malaysia has no such regulatory requirements or recommendations.

- b. **review, screen, moderate, or detect content to identify enticement, grooming, or sextortion of a child**

At present Malaysia has no such regulatory requirements or recommendations.

- c. **report child pornography, CSAM, enticement, grooming, or sextortion that they become aware of or are notified about on their systems to a law enforcement or government agency or nongovernmental organization**

At present Malaysia has no such regulatory requirements or recommendations.

- d. **remove or take down any child pornography, CSAM, enticement, grooming, or sextortion that they identify, become aware of, or are notified about**

At present Malaysia has no such regulatory requirements or recommendations.

- e. **review content by human moderators to screen or moderate for child pornography or CSAM**

At present Malaysia has no such regulatory requirements or recommendations.

- f. **remove child pornography, CSAM, enticement, grooming, or sextortion from their systems when notified of its presence by a victim, nongovernmental organization, law enforcement, or government agency**

At present Malaysia has no such regulatory requirements or recommendations.

- g. **use any specific technology to detect, remove, block, or take down any child pornography, CSAM, enticement, grooming, or sextortion, including:**
 - i. **“Hashing technology”** (<https://www.thorn.org/blog/hashing-detect-child-sex-abuse-imagery/>). Many Online Platforms hash and tag images and videos of child pornography or CSAM and then use hashing technology to scan content on their systems to detect the distribution of child pornography or CSAM online so it can be removed.
 - ii. **Artificial intelligence or machine learning tools to detect the presence of child pornography, CSAM, enticement, grooming, or sextortion.**

Many Online Platforms hash and tag images and videos of child pornography or CSAM and then use hashing technology to scan content on their systems to detect the distribution of child pornography or CSAM online so it can be removed.

- h. **if the applicable laws or regulations require some, but not all, Online Platforms to perform any of the above activities, describe how the differing requirements apply. For example, are differences based on the number of online users, types of services offered, etc.?**

At present Malaysia has no such regulatory requirements or recommendations.

- 3. **Are Online Platforms legally required or recommended to implement any method to verify the age of a user before allowing access to an online platform?**

At present Malaysia has no such regulatory requirements or recommendations.

- 4. **Are Online Platforms legally required or recommended to implement any method to obtain parental consent before a child uses the services of such Online Platforms?**

At present Malaysia has no such regulatory requirements or recommendations.

- 5. **Are there legal remedies for children who have been victimized by online child sexual exploitation? This may include children who are victimized by the distribution of child pornography or CSAM imagery in which they are depicted, or children victimized by enticement, grooming or sextortion. If such legal remedies exist, do they include:**

NO

- a. **The ability to stop the publication of the pornography or CSAM imagery by the Online**



Platform?

No, except where for example it is Meta or some other such international online platform which already has some measures and protocols in place because of international obligations.

b. An obligation on the part of the Online Platform to take active steps to remove the pornography or other imagery from their servers?

No, except where for example it is Meta or some other such international online platform which already has some measures and protocols in place because of international obligations.

c. An ability to get an injunction or other court order against the Online Platform to stop them from publishing the pornography or imagery?

Yes. Chapters IX and X of the Specific Relief Act 1951 set out means for any person to obtain preventive reliefs and perpetual injunctions. The law on injunctions in Malaysia is well settled, and has been used in the past to take down defamatory media stories for example.

Citation: <https://faolex.fao.org/docs/pdf/mal197811.pdf>

Note:

This has not been tested in Malaysia for CSAM publishing, and may be difficult to prove, as the current jurisprudence on preventing publication has centered around the laws of tort and specifically defamation, and whether the statement made is true or not.

The challenge Malaysia faces is that there is little awareness or knowledge amongst the public, the judiciary, the prosecution services or even the Royal Malaysian Police Department about the impact and harm CSAM has on the child.

Examples:

In 2021, Malaysian Police arrested one of the world's most wanted paedophiles, but Malaysian prosecutors only chose to charge him with physical sexual abuse of 5 identified child victims, although Malaysia has enough laws to prosecute CSAM.

Citations:

<https://dayakdaily.com/police-set-to-uncover-more-of-sexual-predator-alladins-dark-secrets/>

<https://www.dailyexpress.com.my/news/177415/how-one-of-world-s-most-wanted-paedophiles-nabbed-in-sarawak/>

A recent news article had Sexual, Women and Child Investigation Division (D11) principal assistant director Assistant Commissioner of Police inadvertently showcasing the indulgent eye local police have on CSAM.

Citation:



<https://www.malaymail.com/news/malaysia/2024/01/08/make-no-mistake-downloading-and-viewing-child-porn-is-a-crime-in-malaysia-heres-what-the-numbers-tell-us/108340>

- d. **A protective order or other court order that prohibits the person who posts the pornography or imagery from doing so in the future on the same or other Online Platform?**

Yes, on the same principles as above.

- e. **the ability to seek financial damages or any sort of monetary recovery from an offender who has shared the child's image or video, either in a civil or a criminal proceeding?**

Yes, civil remedies are available to a child victim, who can afford the cost of litigation, which can be prohibitive.

Malaysia follows the UK system on damages, so a child seeking such financial damages has the burden of not only proving that the image was shared by that offender, but further must establish the actual damages suffered by the child - which must be quantifiable.

Citations:

https://www.cljlaw.com/others/clj_bulletin/Bulletin_29_2014.htm;

DATUK MOHD ALI HJ ABDUL MAJID & ANOR v. PUBLIC BANK BHD [2014] 6 CLJ 269

- f. **the ability to seek any other forms of victim compensation/recovery/services provided for under the law and/or by a government-funded source?**

Yes, upon conviction. Section 26A of the SOACA provides that:

- (1) The court before which a person is convicted of any offence under this Act, or any offence specified in the Schedule where the victim is a child, may make an order against the convicted person for the payment by him of a sum to be fixed by the court as it deems just and reasonable as compensation to a child victim in respect of the injury suffered by the child victim as a result of the offence committed.
- (2) Where the person convicted of an offence referred to in subsection (1) is a child, the court shall make an order for the payment of the compensation to be made by the child's parent or guardian.
- (3) Where the child victim is deceased, the court shall make an order for the payment of compensation to be made to a representative of the deceased child victim.
- (4) The court shall, in making an order under subsection (1), take into consideration any factor which the court thinks fit including—
 - (a) the nature and seriousness of the offence committed;
 - (b) the physical or emotional injury suffered by the child victim;
 - (c) the expenses incurred by the child victim, including expenses for treatment, rehabilitation or counselling of the child victim;
 - (d) the damage to, or loss of, property suffered by the child victim; and
 - (e) the ability of the convicted person to pay or where the convicted person is a child, the ability of the parent or guardian of the child to pay.
- (5) For the purpose of making an order under subsection (1), the court may hold an inquiry as it thinks fit.
- (6) Where the court makes an order for payment of costs of prosecution under section 426 of the Criminal Procedure Code against the convicted person in respect of any

offence under this Act, or any offence specified in the Schedule where the victim is a child, an order for payment of compensation under this section shall have priority over an order for the payment of costs of prosecution.

- (7) To the extent of the amount which has been paid to the child victim, or to the representatives of the child victim, under an order for payment of compensation, any claim of such child victim or representatives of the child victim for any injury, damage or loss suffered by reason of the offence shall be deemed to have been satisfied, but the order for payment shall not prejudice any right to a civil remedy by the child victim or by the representatives of the child victim against the convicted person for the damages beyond the amount of compensation paid under the order.

g. notification to a victim when an offender is arrested for distributing child pornography or CSAM in which the child is depicted?

No.

6. “Safety by Design” is defined as tools or processes that are built into an Online Platform to protect children by making it easier for the relevant Online Platform to detect or prevent the distribution of child pornography or CSAM.

a. Are Online Platforms legally required to incorporate “Safety by Design” into their systems?

No

i. If so, must these steps be taken before the launch of an Online Platform?

No

ii. If so, if an Online Platform has already been in public use, when must they have incorporated “Safety by Design” measures?

Not applicable

iii. For each of 6(a)(i) or (ii) above, please describe the legal requirement or recommendation.

Not applicable

b. Please include information about the parameters for monitoring, management, and enforcement of any legal or regulatory requirements for the Online Platform’s incorporation of “Safety by Design”?

Not applicable