1-2020

# Sexual grooming as an offence in Singapore

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## Citation

MOHAN, S. Chandra and LEE, Yingqi. Sexual grooming as an offence in Singapore. (2020). *Singapore Academy of Law Journal*. 32, 96-123.
**Available at:** https://ink.library.smu.edu.sg/sol_research/3083

**Published on e-First 10 January 2020**

# SEXUAL GROOMING AS AN OFFENCE IN SINGAPORE

The offence of sexual grooming of a minor under 16 was introduced in the Singapore Penal Code (Cap 224, 2008 Rev Ed) in 2007. It was designed to protect the growing number of young Internet users from adult sex predators prowling the online platforms. However, there have been very few reported cases of sexual grooming under s 376E of the Penal Code and a noticeable dearth of any local legal comment on this provision. Until the review by the Penal Code Review Committee in 2018 and the consequent legislative changes in May 2019, the offence of sexual grooming has not received much public attention. This article seeks to examine the nature and rationale of the offence as provided in s 376E of the Penal Code, its origins and how the Singapore provision presently compares with that in the UK from where it was imported, and with similar provisions in Canada, Australia and neighbouring Malaysia. Finally, the article considers the recommendations of the Penal Code Review Committee and if the consequent 2019 amendments to s 376E and related sections prevent and punish online sex predators more effectively.

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## I. Introduction

1 "Sexual grooming" is not easy to define. This is because the grooming process can take place over a period of time and may involve many different acts. It has, however, been variously described as "a process by which a person prepares a child, significant adults and the environment for the abuse of this child",[1] or "a process by which a child is befriended by a would-be abuser in an attempt to gain the child's confidence and trust,

1 Samantha Craven, Sarah Brown & Elizabeth Gilchrist, "Sexual Grooming of Children: Review of Literature and Theoretical Considerations" (2006) 12(3) *Journal of Sexual Aggression* 287 at 297.

enabling them [*sic*] to get the child to acquiesce to abusive activity".[2] Grooming, therefore, involves a careful process of seduction and manipulation, often through a non-sexual approach, aimed at enticing a child into a sexual encounter. According to Berson, the inhibitions of a child are lowered through "active engagement, desensitization, power and control. It is often characterized as a seduction, involving a slow and gradual process of learning about a child and building trust".[3] The ultimate objective of the groomer is to create a bond with the victim who is then more likely to comply with his or her wishes.

2 There are some obvious difficulties in defining sexual grooming precisely and consequently in identifying and legislating against it. It has, therefore, been suggested that it is perhaps best that two individual criteria be met for behaviour to be considered "grooming", namely, "(a) the behaviour being evaluated must in and of itself be inappropriate and a case for this inappropriateness must be made, and (b) a sound argument must be presented that the behaviour or behaviours increases the likelihood of future sexual abuse".[4] With the advent of the Internet, the concept of grooming has noticeably extended its reach to the online arena. This has compelled the intervention of the criminal law in many countries including Singapore.[5]

3 As sexual grooming involves merely preparatory acts, the distinction between these and attempts, which traditionally determine criminality, is irrelevant. Such difficulties, both factual and evidential, in determining between a mere preparatory act and an attempt requiring acts towards committing the crime proper, therefore, cease to be important for the offence of sexual grooming. On the other hand, preparatory conduct includes a variety of acts such as gathering necessary information, making and establishing contact with potential victims and obtaining necessary materials to execute a criminal plan, most of which may not necessarily indicate a criminal motive.[6] Particularly in sexual offences such as sexual

2 Alisdair Gillespie, "Child Protection on the Internet: Challenges for Criminal Law" (2002) 14(4) Child & Fam LQ 411 at 411.

3 Ilene Berson, "Grooming Cybervictims: The Psychosocial Effects of Online Exploitation for Youth" (2008) 2(1) *Journal of School Violence* 9 at 11.

4 Natalie Bennet & Willian O'Donohue, "The Construct of Grooming in Child Sexual Abuse" (2014) 23(8) *Journal of Child Sexual Abuse* 957 at 968. See also Ilene Berson, "Grooming Cybervictims: The Psychosocial Effects of Online Exploitation for Youth" (2003) 2(1) *Journal of School Violence* 5; Home Office Task Force on Child Protection on the Internet, *Good Practice Models and Guidance for the Internet Industry on Chat Services* (January 2003).

5 As will be discussed in this article, Malaysia, the UK, Australia and Canada have all implemented various provisions pertaining to child sexual grooming.

6 Daniel Ohana, "Desert and Punishment for Acts Preparatory to the Commission of a Crime" (2007) 20 Can JL & Jurisprudence 113.

grooming, when can it be said with certainty that a person is making preparations to commit a crime as opposed to merely indulging in sexual fantasy or even in innocuous behaviour with a child? However, if "sexual grooming" is ill defined or is a vague general provision, it runs the risk of becoming a drift-net law to capture all sorts of acts involving children and adults, thus presenting considerable difficulties in detection and prosecuting criminal activity.

4 In respect of online sexual grooming, research[7] has identified seven stages in this process. These are the friendship-forming stage, the relationship forming-stage, risk assessment stage, exclusivity stage, sexual stage, fantasy re-enactment stage and the damage limitation stage. Until the sexual stage is reached, there might be insufficient evidence to warrant an arrest and conviction for a sexual offence. However, research also suggests that by the time the sexual stage is reached, there is rapid progression towards the commission of the offence and the child needs immediate protection.[8] Online grooming is in particular difficult to identify early as it may involve a variety of processes and be prolonged in duration. One study of transcripts of online communications between the offender and the children revealed three main themes in online grooming, namely, rapport building, sexual content and assessment.[9]

## II. Sexual grooming in Singapore

### *A. The rationale of the offence*

5 The offence of "sexual grooming of a minor under 16"[10] was introduced in Singapore as part of the amendments to the Penal Code[11] in 2007,[12] in response to the increase in Internet-related sexual crimes.[13]

7 Rachael O'Connell, "A Typology of Child Cybersexploitation and Online Grooming Practices" (July 2013) <http://image.guardian.co.uk/sys-files/Society/documents/2003/07/17/Groomingreport.pdf> (accessed 15 December 2018).

8 Rachael O'Connell, "A Typology of Child Cybersexploitation and Online Grooming Practices" (July 2013) <http://image.guardian.co.uk/sys-files/Society/documents/2003/07/17/Groomingreport.pdf> (accessed 15 December 2018); Pamela J Black *et al*, "A Linguistic Analysis of Grooming Strategies of Online Child Sex Offenders: Implications for Our Understanding of Predatory Sexual Behavior in an Increasingly Computer-mediated World" (2015) 44 *Child Abuse & Neglect* 140.

9 Rebecca Williams, Ian Elliot & Anthony Beech, "Identifying Sexual Grooming Themes Used by Internet Sexual Offenders" (2013) 34(2) *Deviant Behaviour* 135.

10 Penal Code (Cap 224, 2008 Rev Ed) s 376E.

11 Cap 224, 2008 Rev Ed.

12 Penal Code (Amendment) Act 2007 (Act 51 of 2007).

13 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 (Zaqy Mohammed).

Section 15 of the UK Sexual Offences Act 2003,[14] on which our s 376E was drafted, had been introduced in the UK to "strengthen Police's hand in preventing any harm from befalling the victim".[15] In 2006, the number of molestations and rapes in Singapore in which the victims had met their perpetrators over the Internet or phone chat lines had increased, and teenagers made up 64% of molestation victims and 84% of rape victims.[16] Although the increase in numbers in Internet-related crimes was not considered to be significant,[17] they suggested a need to have in place provisions for the protection of minors.

6 Further, household access to the Internet in Singapore had seen a significant increase from 64% in 2004 to 74% in 2007.[18] This rapid adoption of the Internet raised concerns in Parliament about possible "sex predators prowling the online landscape for prey under the guise of making friends".[19]

7 More recently, in 2013, Singapore was reported to be have the world's second highest *social media penetration rate* at 59%, more than double the global average of 26%.[20] In January 2017, this figure increased to 77%, well surpassing the global average of 37%.[21] In January 2019 the rate stood at 79%.[22] As high as 90% of youths aged 15 to 19 use social networking sites such as Facebook, Twitter or Instagram.[23]

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14 c 42.

15 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

16 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2313 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

17 *Singapore Parliamentary Debates, Official Report* (17 July 2007) vol 83 at col 2313 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

18 Infocomm Media Development Authority ("IMDA"), Infocomm Usage, Household and Individuals https://www.imda.gov.sg/infocomm-media-landscape/research-and-statistics/infocomm-usage-households-and-individuals#2 (accessed 23 December 2019). In 2017, it increased further to 91%, according to the IMDA figures released in July 2018.

19 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

20 Mohd Azhar Aziz, "Singapore among the Most Active on Social Media: Report" *Today* (10 January 2014). See also *Global Digital Statistics 2014* http://www.slideshare.net/wearesocialsg/social-digital-mobile-around-the-world-january-2014 (accessed December 2019).

21 *Digital in 2017*: *Global Overview* https://wearesocial.com/special-reports/digital-in-2017-global-overview (accessed 23 December 2019).

22 Simon Kemp, "Digital 2019: Global Digital Overview" *Datareportal* (31 January 2019) <https://datareportal.com/reports/digital-2019-global-digital-overview> (accessed 2 August 2019).

23 Youth.sg: The State of Youth in Singapore 2018 https://www.nyc.gov.sg/en/initiatives/resources/national-youth-survey/ (accessed 23 December 2019).

8 Anecdotal evidence seems to support a trend of sex predators increasingly leveraging the Internet to carry out grooming activities. For example, in March 2015, an engineer who had sexually groomed 31 boys on Facebook and had either sodomised or had oral sex with the boys at his rented flat, in hotels and at a swimming complex, was convicted of 12 charges of sexual penetration of a minor and sentenced to 30 years in prison.[24] This was described by the prosecutors as the "worst case of sexual offences against pubescent males".[25] In January 2016, a freelance badminton coach was sentenced to five years' imprisonment for sexually grooming his young student and pressuring the 14-year-old boy to engage in sexual activities. He was charged with 15 counts under the Penal Code for the sexual assault of a minor and one count for the possession of obscene films.[26] Also in January 2016, a 39-year-old married man was charged with statutory rape and the sexual grooming of a 12-year-old girl after he had had sex with her in the backseat of his car, three days after meeting her through a mobile phone messaging application, in what Prosecutors described as "every parent's nightmare". He was sentenced to 12 years' jail and nine strokes of the cane.[27] A similar sentence was imposed on a 21-year-old man in 2018 for grooming and sexually assaulting a 12-year-old girl.[28] A construction worker who had groomed and raped a 12-year-old was sentenced to 22 years in prison and given 18 strokes of the cane in 2019.[29] Offenders have been reported to use popular social media sites such as Friendster, Facebook and dating applications to contact and exploit victims.[30]

9 These are but a few examples of how sex predators are trawling the Internet for easy prey amongst the technologically savvy and sexually curious children and young persons. The urgency to seek preventive rather than reactive measures was accentuated by a combination of the

24 *Public Prosecutor v Yap Weng Wah* [2015] 3 SLR 297.

25 Kelly Ng, "'Unremorseful' Engineer Gets 30 Years' Jail for Sex with 31 Boys" *Today* (20 March 2015).

26 Vanessa Paige Chelvan, "Badminton Coach Jailed 5 Years for Grooming and Sexually Assaulting Boy" *ChannelNewsAsia* (13 January 2016).

27 Selina Lum, "Man Who Had Sex with Girl, 12, Gets 12 Years' Jail and Caning" *The Straits Times* (14 April 2016).

28 *Public Prosecutor v Eugene Teng Jia Ren* (unreported); Gracia Lee, "Man Exploited 12-year-old Victim after Grooming Her" *The Straits Times* (24 April 2018).

29 *Public Prosecutor v Das Ratan Chandra* (unreported); Lydia Lam, "Construction Worker Gets Jail, Caning" *The Straits Times* (12 April 2019).

30 See, for example, *Public Prosecutor v Poong Foo Yun* [2010] SGDC 423; *Public Prosecutor v Siti Norelewati binte Mohamad Jelani* [2014] SGDC 64; *Public Prosecutor v Lee Seow Peng* [2016] SGHC107; *Public Prosecutor v Anthony Lim Yao Ming* (unreported); Selina Lum, "Teen Jailed for Sexually Violating Young Girls" *The Straits Times* (13 March 2018); *Public Prosecutor v Eugene Teng Jia Ren* (unreported); Gracia Lee, "Man Exploited 12-year-old Victim after Grooming Her" *The Straits Times* (24 April 2018).

easy accessibility of mobile technology, the façade of anonymity, the ease at which sex predators prowl for easy prey, and the naivete and curiosity of the youths in sexual matters.[31]

### *B. The statutory provision*

10 The offence of "sexual grooming of a minor under 16", under s 376E of the Penal Code as drafted in 2007 provides as follows:

> Any person of or above the age of 21 years (A) shall be guilty of an offence if having met or communicated with another person (B) on *2 or more previous occasions* —
>
> (*a*) A intentionally meets B or travels with the intention of meeting B; and
>
> (*b*) at the time of the acts referred to in paragraph (a) —
>
> (i) A intends to do anything to or in respect of B, during or after the meeting, which if done will involve the commission by A of a relevant offence;
>
> (ii) B is under 16 years of age; and
>
> (iii) A does not reasonably believe that B is of or above the age of 16 years.
>
> [emphasis added]

11 As originally defined in s 376E, sexual grooming essentially involves preparatory acts of meeting or communicating, on at least two previous occasions, with a minor below 16 years of age and meeting or travelling to meet the minor with the intention of doing an act in respect of a prescribed sexual offence including rape and sexual assault.[32] As explained in Parliament in 2007, the rationale for the provision is to allow law enforcement agencies to intervene before the substantive offence is committed, by showing a requisite number of inappropriate interactions, and the final act of meeting or travelling to meet the victim.[33] It was hoped that this would serve as a deterrent to would-be offenders.[34] Whether the provision, as originally drafted, has achieved these purposes is questionable, as will be discussed elsewhere in this article.

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31 Selina Lum, "Man Who Had Sex with Girl, 12, Gets 12 Years' Jail and Caning" *The Straits Times* (14 April 2016).

32 Penal Code (Cap 224, 2008 Rev Ed) s 376E(2).

33 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

34 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

12 In *Public Prosecutor v Lee Seow Peng*,[35] the High Court identified five elements of the offence of sexual grooming under s 376E:[36]

> First, the [offender,] above 21 years old of age[,] must have communicated with the [victim] on two or more previous occasions. Second, the [offender] must then have intentionally met the [victim]. Third, at the time of meeting the [victim] ('the relevant time'), the [victim] must be under 16 years of age. Fourth, at the relevant time, the [offender] must have intended to do something to the victim, during or after the meeting, which if done would amount to the commission of any of the relevant offences[37] defined in s 376E(2) of the Penal Code. Finally, at the relevant time, the [offender] must not reasonably believe that the [victim] was of or above the age of 16 years.

## III. Sexual grooming in the UK: Origins and reforms

### *A. UK Sexual Offences Act 2003*

13 The provisions on sexual grooming in the UK, tabled as part of the amendments to the Sexual Offences Act 2003, were said to reflect[38] changes in society and social attitudes, and were designed "to better protect the public, particularly children and the vulnerable" and to deal with those who use the Internet to groom children for sexual abuse. Following the recommendations of the Taskforce on Child Protection on the Internet,[39] the 2003 Act created a series of specific offences targeting a wide range of sexual activity with children under 16.[40]

14 Amongst the offences introduced by the revised Sexual Offences Act in 2003 was s 15, "meeting a child following sexual grooming

35 [2016] SGHC 107.

36 *Public Prosecutor v Lee Seow Peng* [2016] SGHC 107 at [69]. The provision has since been accordingly amended by the Criminal Law Reform Act 2019 (Act 15 of 2019).

37 A "relevant offence" is defined in sub-s (2) as an offence under ss 354, 354A, 375, 376, 376A, 376B, 376F, 376G or 377A of the Penal Code (Cap 224, 2008 Rev Ed); s 7 of the Children and Young Persons Act (Cap 38, 2001 Rev Ed); or s 140(1) of the Women's Charter (Cap 353, 2009 Rev Ed).

38 United Kingdom, *House of Commons Debates* (19 November 2002) vol 394 at cols 505–520 (David Blunkett, Secretary of State for the Home Department).

39 The taskforce referred to by David Blunkett refers to the Taskforce on Child Protection on the Internet, a co-regulatory body set up in 2001, which has been set up "in response to concerns about the possible risks to children after a number of serious cases where children had been 'groomed' via the internet": United Kingdom, House of Commons, Parliamentary Debates (14 June 2005) vol 435 at col 298W.

40 See David Ormerod & Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (Oxford University Press, 15th Ed, 2018) ch 17 ("Sexual Offences"). In the UK, a "child" refers to any person under 18 years of age.

*etc*",[41] which allowed law enforcement agencies to identify preparatory behaviour before an offender had the opportunity to sexually abuse a child. Before the amendment, the principal offences were those of *attempt*, and the offender had to go beyond acts of mere preparation to the substantive sexual offence to satisfy the elements of the offence. For an attempt to be established, there must be some further act on the part of the offender which is directed to the actual commission of the crime.[42] This was considered to be unsatisfactory to establish the offence of sexual grooming of a minor as it exposed the child to a risk of harm even at the preparatory stage.[43] The amendment hence covered situations where an adult established contact with a child, either through meetings, telephone conversations or Internet communications, all with the intention of gaining the child's trust and confidence in order to meet the child to commit a sexual offence against him or her. Under s 15, the meetings or communication need not necessarily have explicit sexual content although the intent to commit a sexual offence must be proved. According to the Explanatory Notes to the UK Act:

> The *offence will be complete either when A meets the child or when he travels to the prearranged meeting with the intent to commit a relevant offence against the child. The planned offence does not have to take place*. The *evidence of the intent* may be drawn from the *communications* between A and the child before the meeting or may be drawn from other circumstances, for example A travels to the meeting with ropes, condoms and lubricants. [emphasis added]

15 The elements of the offence of sexual grooming in the UK then included either two physical or online communications, a physical meeting or the requirement of one of them travelling with the intention of meeting the other.[44] Additionally, the victim had to be under 16 years at the time of actual or intended meeting, and the offender aged 18 or over. The *mens rea* of the offence required the offender to intend to commit

41 Section 15 of the UK Sexual Offences Act 2003 (c 42) provides that: A person aged 18 or over (A) commits an offence if—
(a) having met or communicated with another person (B) on at least two earlier occasions, he—
(i) intentionally meets B, or
(ii) travels with the intention of meeting B in any part of the world,
(b) at the time, he intends to do anything to or in respect of B, during or after the meeting and in any part of the world, which if done will involve the commission by A of a relevant offence,
(c) B is under 16; and
(d) A does not reasonably believe that B is 16 or over.

42 See, for example, *Thiagarajah v Public Prosecutor* [177] 1 MLJ 79, followed in *Chua Kian Kok v Public Prosecutor* [1999] 1 SLR(R) 826.

43 David Ormerod & Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (Oxford University Press, 15th Ed, 2018) at p 811.

44 Sexual Offences Act 2003(c 42) Explanatory Notes to s 15.

a sexual offence against the child either during or after the meeting, and *reasonably* believe that the victim was 16 years of age and over. In explaining the requirement for the age of the offender to be 18 or over, the English Court of Appeal, in *R v Mansfield*,[45] stated that the provision served to protect young girls "against their own immature sexual experimentation and to punish much older men who take advantage of them".[46]

16 In addressing public concerns that the Sexual Offences Act may criminalise all consensual sexual activity between minors, Lord Falconer, Secretary of State, assured the UK Parliament[47] that the Crown Prosecution Service would exercise its prosecutorial discretion carefully. He rejected the approach in other jurisdictions where liability for consensual sexual activity with those under 16 years would be criminal only where one of the parties was older than the other by a specific number of years,[48] recognising that many offences against children are in fact committed by children.[49]

17 In addition, a series of other provisions in the Sexual Offences Act were introduced to work in tandem, in ensuring that sex offenders who leverage online technology to groom children for abuse are prevented from doing so.[50] Section 123 of the Act provided for a Risk of Sexual Harm Order to prevent harm to children under 16 from sexually explicit communication or conduct where an offender aged 18 or older has already engaged in such behaviour on at least two occasions towards a child, and there is reasonable cause to believe in the necessity of such a restraint.[51] This order could be used to prohibit the defendant from certain behaviour, like sending pornography or indecent text messages by mobile phone to a child.[52] Sexual Harm Prevention Orders, Risk of Sexual Harm

45 [2005] All ER(D) 195.

46 *R v Mansfield* [2005] All ER(D) 195. This is one of the first reported cases under the provision. See also *R v Mohammed* [2006] EWCA Crim 1107.

47 United Kingdom, House of Lords, *Parliamentary Debates* (1 April 2003) vol 646 at cols 1255–1304.

48 Two years in Canada, for example, under s 150.1 of the Criminal Code (RSC, 1985, c C-46).

49 David Ormerod & Karl Laird, *Smith, Hogan and Ormerod's Criminal law* (Oxford University Press, 15th Ed, 2018) at p 811.

50 Alisdair Gillespie, "Indecent Images, Grooming and the Law" [2006] Crim LR 412.

51 These acts include: engaging in sexual activity involving a child or in the presence of a child; causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual; giving a child anything that relates to sexual activity or contains a reference to such activity; and communicating with a child, where any part of the communication is sexual.

52 United Kingdom, House of Lords, *Parliamentary Debates* (13 February 2003) vol 644 at col 773 (Lord Falconer of Thoroton, Minister of State).

Orders and Foreign Travel Orders under the Sexual Offences Act have since been replaced by similar orders introduced by the UK Anti-Social Behaviour, Crime and Policing Act of 2014.[53]

18 Further, s 10 of the Sexual Offences Act makes it an offence for persons aged 18 or over to "cause or incite a child to engage in sexual activity".[54] This offence is a partial strict liability offence, and the Prosecution only has to prove that the offender did not reasonably believe the victim was 16 or over if the child is between 13 and 16 years old.[55] "Sexual activity" here refers to sexual activity with the offender, on the child himself (where the offender causes or incites the child to strip for the offender's sexual gratification), or with a third person (where the offender causes or incites the child to have sexual intercourse with a third party), and the incitement constitutes an offence whether or not the activity incited actually took place, and whether or not the child consented.[56] In this way, offenders who sexually groom a child using the Internet but have no intention of meeting him or her will still attract criminal liability under the Act. Together, these provisions were expected to assist in ensuring that sexual offenders were stopped before the offences were committed. The Singapore Penal Code did not have a provision similar to s 10 of the UK Act until the amendments to the Penal Code were made in May 2019.[57]

### *B. Widening the scope in 2008*

19 User patterns of the Internet evolved rapidly in the UK after the passing of the Sexual Offences Act in 2003, with an estimated 850,000 cases of unwanted online sexual approaches made in Internet Relay Chat rooms during 2006, and 238 offences of meeting a child following sexual grooming recorded in the UK.[58] Consequently, s 15 of the UK Sexual Offences Act 2003 was amended in 2008 to widen the scope of the offence of grooming to include two additional circumstances in

53 c 12.

54 This section has been amended to a more comprehensive section on "child sexual exploitation". See also s 14(1) "arranging or facilitating commission of a child sex offence", considered in *R v Robson* [2009] 1 WLR 713.

55 Sexual Offences Act 2003 (UK) (c 42) s 10(1)(c).

56 Sexual Offences Act 2003 (UK) (c 42) Explanatory Notes, s 10.

57 By the Criminal Law Reform Act 2019 (Act 15 of 2019), passed in May 2019, which has not yet been brought into force. Two new sections introduced by the Act now provide for the offences of "sexual activity or image in the presence of a minor below 16 years of age" (s 376ED) and "exploitative sexual activity or image in the presence a minor of or above 16 but below 18 years of age" (s 376EE): see s 117 of the Criminal Law Reform Act 2019.

58 Stefan Fafinski, *UK Cybercrime Report* (2007) Part VIII ("Sexual Offences") and Appendix F – Sexual Offences.

which the offence could be committed. These were "where a child under 16 *travels* to meet the adult [offender] or the adult [offender] *arranges to meet the child*, following two earlier communications, if the adult offender intends to commit a sexual offence against the child during or after the meeting" [emphasis added].[59] The Court of Appeal's decision in *R v Keiren Matthew Hogan*[60] illustrates how these provisions helped in a successful intervention before the main offence was committed. In that case, a 13-year-old boy got to know the offender through an Internet chatroom and received sexually explicit messages and pictures, and further agreed to meet the accused. The boy's stepfather, having seen the messages, alerted the police and the accused was arrested before the meeting could take place.

### *C. Tighter legislative net in 2015*

20 However, even with these provisions in place, the changing nature of child sexual exploitation, including sexual grooming, continued to challenge law enforcement agencies in the UK. Scandals regarding street grooming gangs, exploitation and abuse of children were discovered in Rochdale,[61] Rotherham[62] and Oxfordshire[63] in the UK from 2008. This raised questions on the effectiveness of the then existing sexual grooming provisions. In its 2013 report, the Child Exploitation and Online Protection Centre[64] highlighted a trend of an extremely short time lapse between initial contact with a child and the offending behaviour, "characterised by rapid escalation to threats and intimidation" and "a 'scattergun' approach … [targeting] a large number of potential victims".[65] A cross-party inquiry[66] into the effectiveness of legislation

59 Criminal Justice and Immigration Act 2008 (c 4) (UK) Explanatory Notes to s 73.

60 [2015] EWCA Crim 1548.The Court of Appeal upheld a 37-month imprisonment sentence and a Sexual Offences Prevention Order.

61 Frances Perraudin, "Rochdale Grooming Case: Nine Men Jailed for up to 25 Years Each" *The Guardian* (8 April 2016).

62 An estimated 1,400 children and youth were allegedly sexually abused in Rotherham. Five men from the town's Asian community were jailed in 2010 for sexual offences against underage girls: see "Rotherham Child Abuse: The Background to the Scandal" *BBC* (5 February 2015).

63 A sexual grooming gang of seven men were jailed in 2013 for abusing six girls in Oxford, between 2004 and 2012. Investigations showed that as many as 373 children may have been sexually groomed and abused: see "Oxfordshire Grooming Victims May Have Totalled 373 Children" *BBC* (3 March 2015).

64 Child Exploitation and Online Protection Centre website https://www.ceop.police.uk.

65 United Kingdom, House of Lords, *Parliamentary Debates* (21 July 2014) vol 755 at col 961 (Lord Faulks, Minister of State).

66 *Report of the Parliamentary Inquiry into the Effectiveness of Legislation for Tackling Child Sexual Exploitation and Trafficking within the UK* (April 2014) (Chair: Sarah Champion). The report highlighted that while there was general agreement that

*(cont'd on the next page)*

for tackling child sexual exploitation and trafficking within the UK in 2014 also found that the existing legislation "may not be sufficiently wide in scope to address the developing nature of online grooming and exploitation".[67] In particular, it questioned the need for two meetings or communications to be proven, when other elements of the offence are met, before the offence could be considered to have been committed.

21 To address these concerns, two further amendments to the 2003 Act were made in 2015.[68] First, s 15 of the Act was amended to reduce the number of occasions the defendant was required to meet or communicate with the child, in order for the offence of sexual grooming to be complete, from two to one.[69] Secondly, s 15A was introduced to create a new offence of "sexual communication with a child" and this has considerably widened the net of protection for a child in the UK. Section 15A criminalises a wide range of conduct of an adult aged over 18, if he intentionally communicates with another person under 16 to obtain sexual gratification and the communication is sexual or is intended to encourage the person to make a communication that is sexual, whether to the adult or to another person.[70] "Sexual communication" here refers to any part of the communication that is sexual, or which a reasonable person would consider to be sexual.[71] What constitutes a communication which is sexual in nature may cause ambiguity. The offence now includes talking sexually to a child via a chatroom or sending sexually explicit text messages to a child, as well as inviting a child to communicate sexually, regardless of whether the invitation is itself sexual. Since the communication must be *sexual in nature* between a child and an adult, it is questionable whether s 15A has ensured that ordinary social or

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the UK Sexual Offences Act 2003 (c 42) was generally sound, there were issues about the understanding, interpretation and implementation of the legislation. In particular, the report highlighted that there was no specific offence of "child sexual exploitation". Instead, prosecutions were brought on a range of offences such as sexual assault, rape and other sexual offences against children under 13; meeting a child following sexual grooming, causing or inciting child prostitution or pornography; and trafficking within the UK for sexual exploitation. Amendments to the legislation were recommended to allow legislation to capture "child sexual exploitation": https://b.barnardos.org.uk/cse_parliamentary_inquiry_report.pdf (accessed 1 May 2016).

67 *Report of the Parliamentary Inquiry into the Effectiveness of Legislation for Tackling Child Sexual Exploitation and Trafficking within the UK* (April 2014) at p 20.

68 By s 36 of the UK Criminal Justice and Courts Act 2015 (c 2) and s 67 of the Serious Crimes Act 2015 (c 9).

69 *Report of the Parliamentary Inquiry into the Effectiveness of Legislation for Tackling Child Sexual Exploitation and Trafficking within the UK* (April 2014).

70 See the UK Serious Crime Act 2015 (c 9) Explanatory Notes to s 67.

71 Serious Crime Act 2015 (UK) (c 9) s 67.

educational interactions between children and adults or communications between young people are not criminalised.[72]

22 It is significant to note that although Singapore adopted the concept of sexual grooming from the UK Sexual Offences Act in 2007, it did not keep pace with the considerable changes in the UK law on this subject until the passing of the Criminal Law Reform Act[73] ("CLRA") in May 2019. This Act was recently enacted following the recommendations of the Penal Code Review Committee ("PCRC").[74]

## III. The law in Canada and Australia

23 By way of contrast, Canadian and Australian legislation on child sexual grooming has been couched in broader terms, thus giving enforcement agencies more latitude in enforcement. Notably, both these jurisdictions do not require the defendant to have arranged for a physical meeting for the offence of sexual grooming to be made out. Any communication for the purpose of committing sexual assault or grooming underaged persons is sufficient to constitute the act of grooming.

### *A. Australia*

24 Legislation pertaining to sexual grooming has been crafted specifically to deal with the online grooming problem in Australia, as shown in s 474.27 ("using a carriage service to 'groom' persons under 16 years of age") of the Australian Criminal Code Act 1995. Section 474.27 of the Act makes the using of a "carriage service"[75] by a person above 18 years of age to transmit an indecent communication where the sender knows or believes the recipient to be below 16 years old "with the intention of making it easier to procure the recipient to engage in sexual activity", an offence of sexual grooming. Hence, the act of grooming *per se* is enough to support a conviction, without any additional requirement in respect of the number of the communications or any intention to meet.

25 As an illustration, a 42-year-old man who impersonated Justin Bieber to groom young girls online and entice them to send him sexually explicit and pornographic photographs of themselves was sentenced to a

72 Serious Crime Act 2015 (UK) (c 9) Explanatory Notes to s 67.

73 Act 15 of 2019, passed in May 2019 but has not yet been brought into force.

74 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018).

75 Under s 7 of the Australian Telecommunications Act 1997, "carriage service" refers to a "service for carrying communications by means of guided and/or unguided electromagnetic energy".

term of six years' imprisonment in 2014 on 29 charges, including that of using a carriage service to groom a person under 16 for sexual activity, using a carriage service to access child pornography and soliciting child pornography using a carriage service.[76]

26 While statistics for such convictions are not readily available, a report by the Australian Institute of Criminology indicates that until 2007, there have been over 130 completed prosecutions for online procuring, grooming and exposure offences in Australia.[77]

### *B. Canada*

27 Similarly, s 172.1(1) of the Canadian Criminal Code of 1985[78] criminalises the "luring of a child" by means of telecommunication, with a person below 18 years of age "for the purpose of facilitating the commission of a sexual offence". The language of the section is noticeably wide, and the Supreme Court has interpreted the provision broadly, thus making it easier to prosecute such offenders.

28 In *R v Legare*[79] ("*Legare*"), a 32-year-old defendant, pretending to be 17 years of age, engaged a 12-year-old girl in an online conversation in a public chat room. They moved quickly to a private chat space, where two "sexually explicit" conversations took place, followed by two phone calls, where the defendant told the girl he wanted to perform oral sex on her. The girl's father found out about the chats and called the police, who obtained transcripts of one online conversation for the purpose of making out the elements of the offence of "invitation to sexual touching" under s 152 of the Canadian Criminal Code. Legare was charged under s 172.1 of the Canadian Code. The trial judge held that to be guilty of "facilitating" the offence, there must be an intention to lure the girl to meet him. As this element of the offence was found not to be proved, Legare was found not guilty.

29 However, the Court of Appeal set aside the acquittal. It held that the trial judge had erred in adopting an "unduly restrictive construction" of s 172.1, and that it would be possible to convict a suspect of luring, even in the absence of evidence of an attempt to meet the intended victim

76 Mark Russell, "Every Parent's Worst Nightmare': Justin Bieber Impersonator Jailed for Child Sex Grooming" *The Age* (14 November 2014).

77 Kim-Kwang Raymond Choo, "Responding to Online Child Sexual Grooming: An Industry Perspective" *Trends and Issues in Crime and Criminal Justice* (July 2009).

78 RSC, 1985, c C-46.

79 *R v Legare* 2009 SCC 56; [2009] 3 SCR 551.

for the commission of the offence. Fish J, on behalf of the seven-judge panel, explained:[80]

> [Section] 172.1(1)(c) creates an incipient or 'inchoate' offence, that is, a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime. It criminalizes conduct that *precedes* the commission of the sexual offences to which it refers, and even an attempt to commit them. Nor, indeed, must the offender meet or intend to meet the victim with a view to committing any of the specified secondary offences. This is in keeping with Parliament's objective to close the cyberspace door before the predator gets in to prey.

30 Notably, the court also said that it was not necessary to use "sexually explicit language" to run afoul of the law:[81]

> … Its focus is on the *intention* of the accused at the time of the communication by computer … But those who use their computers to lure children for sexual purposes often groom them online by first gaining their trust through conversations about their home life, their personal interests or other innocuous topics.
>
> …
>
> Accordingly, the content of the communication is not necessarily determinative: What matters is whether the evidence *as a whole* establishes beyond a reasonable doubt that the accused communicated by computer with an underage victim *for the purpose of facilitating* the commission of a specified secondary offence in respect of that victim. [emphasis in original; other emphasis added]

In *Legare*, although there was no invitation or arrangement to meet, the accused's actions, including the sexually explicit conversations, were held to constitute preparatory steps for facilitating the secondary offence of inviting sexual touching under the Canadian Act.

## IV. Sexual grooming in Malaysia

31 Across the straits in Malaysia, the 2016 conviction of serial British paedophile Richard Huckle for abusing 191 children and the finding that Malaysia ranks third amongst ASEAN countries for child pornography violations[82] brought to the fore the threat of sex predators

80 *R v Legare* 2009 SCC 56; [2009] 3 SCR 551 at [25]. For a similar view of "arranging or facilitating the commission of a child sex offence" under s 14(1) of the UK Sexual Offences Act 2003 (c 42), see *R v Robson* [2008] EWCA Crim 619. See also Tonda Maccharles, "Online 'Grooming' of Kids Ruled a Crime" *The Star Online* (4 December 2009).

81 *R v Legare* 2009 SCC 56; [2009] 3 SCR 551 at [29] and [31].

82 Hemananthani Sivanandam, "Malaysia Ranks Third in [ASEAN] Countries for Child Porn Violations" *The Star Online* (26 June 2016). See also End CSEC Network

*(cont'd on the next page)*

in the country and Malaysia's inadequate preventive legislation.[83] In April 2017, the Malaysian Parliament, therefore, passed the Sexual Offences against Children Act,[84] with provisions for offences relating to the sexual grooming of children.[85] Part II of the Act, entitled "Offences Relating to Child Grooming", contains three provisions in respect of sexual communications with children,[86] child grooming[87] and a physical meeting following the grooming of the child.[88] Taken together, the three provisions seem to provide comprehensive coverage to capture the inchoate offence of sexual grooming. Following the enactment of the Sexual Offences against Children Act in 2017, Malaysia has also established a special criminal court on sexual offences in a number of states,[89] and between July 2017 and February 2019, 2,466 cases of sexual abuse against children were registered in the court, with 369 convictions.[90]

32 One obvious problem with these wide provisions is that of detecting and punishing the actual sexual groomers. In particular, s 13 makes it an offence of "child grooming" if any person "communicates by any means with a child with the intention to commit or to facilitate the commission of *any* offence" [emphasis added].[91] While this allows law enforcement agencies to get around the requirement of the accused having to meet or to travel to meet the victim ("the travel requirement"), as required in many jurisdictions including Singapore prior to the 2019 amendments, and the need for sexual communication with the child in capturing the inchoate offence, this is a widely worded provision which runs the risk of becoming a drift net to capture all sorts of acts involving

Malaysia and ECPAT International, *Sexual Exploitation of Children in Malaysia* (29 March 2018) (submission to the Human Rights Council) at para 9 <http://www.ecpat.org/wp-content/uploads/2018/07/Universal-Periodical-Review-Sexual-Exploitation-of-Children-Malaysia.pdf> (accessed 18 December 2018); Manique Cooray, "Sexual Offences against Children Bill 2017 (Malaysia): Some Observations" [2017] 3 MLJ cvii.

83 Tan Sri Lee Lam Thye, "Malaysia Must Enact Anti-grooming Laws" *New Straits Times Online* (17 June 2016).

84 No 792 of 2017. "Dewan Rakyat Passes Sexual Offences against Children Bill 2017" *The Star Online* (4 April 2017). It was brought into force on 10 July 2017. The Malaysian courts have accepted the need for deterrent sentences of imprisonment even if the charge for child abuse is under the Malaysian Penal Code (No 574 of 1997): *Mohamad Izzaini bin Zainudin v Public Prosecutor* [2019] 7 MLJ 366.

85 Sexual Offences against Children Act 2017 (No 792 of 2017) (M'sia) ss 12–14, which appear to have been taken from the UK Sexual Offences Act 2003 (c 42).

86 Sexual Offences against Children Act 2017 (No 792 of 2017) (M'sia) s 12.

87 Sexual Offences against Children Act 2017 (No 792 of 2017) (M'sia) s 13.

88 Sexual Offences against Children Act 2017 (No 792 of 2017) (M'sia) s 14.

89 "Malaysia's New Child Sexual Crimes Court Resolves 14 Cases in First Month" *The Straits Times* (5 August 2017).

90 Yuen Meikeng, "173 Abusers Put behind Bars" *The Star Online* (29 April 2019).

91 Sexual Offences against Children Act 2017 (No 792 of 2017) (M'sia) s 13.

children. Clearly, a balance needs to be struck: the issue here is where the line should be drawn. It remains to be seen how the Malaysian courts approach this problem in interpreting these provisions.

33 Thus, it has been seen that the threshold for conviction differs across the various jurisdictions. In the UK, the higher threshold presented obvious evidential difficulties and the latest reform in 2015 has somewhat mitigated them by reducing the number of meetings required from two to one, with a new provision that captures mere sexual communication with a child. In Australia and Canada, the Legislature adopts a decidedly liberal approach in allowing the Judiciary to determine what constitutes sexual grooming. In Malaysia, the newly enacted sexual grooming provisions appear to provide comprehensive coverage in capturing the inchoate offence. A common thread that runs through these provisions is a move towards conferring on law enforcement agencies more power to prevent rather than react to child sexual exploitation. With this in mind, the authors now turn back to Singapore to examine what steps have been taken to prevent child sexual grooming more effectively

## V. The Singapore experience

34 It bears reiterating that the Singapore legislature's rationale for making sexual grooming of a minor an offence in 2007 echoed the same concerns as that of the UK, namely, to stop online sex predators through preventive measures and early intervention.[92] However, until the enactment of the 2019 amendments to the Penal Code, no efforts were made to introduce legislative changes to the sexual grooming provisions, despite considerable changes to the law in the UK. The impetus for these changes finally came from the PCRC in 2018.[93] This article will now discuss the limitations of s 376E and other related sexual offences to consider the recommendations of the PCRC and to examine the relevant amendments introduced by the CLRA in May 2019.

92 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

93 The Penal Code Review Committee ("PCRC") was convened by the Ministry of Home Affairs and Ministry of Law, in July 2016, to undertake a review of the Penal Code (Cap 224, 2008 Rev Ed) and make recommendations on reforming it. It submitted its report in August 2018. Following the report, the Criminal Law Reform Act 2019 (Act 15 of 2019) was enacted by Parliament in May 2019, containing most of the PCRC's recommendations. The Act received the President's assent on 27 May 2019 and is expected to be brought into force in early 2020.

### *A. Limitations of the Singapore provisions prior to 2019*

#### *(1) Sexual grooming: Section 376E*

35 Section 376E of the Singapore Penal Code, modelled after s 15 of the UK Sexual Offences Act 2003, adopted essentially the same words as the UK provision as at 2007, with the exception that the minimum age of the offender was 21 instead of 18 as in the UK.

36 There are a number of problems with s 376E of the Penal Code. First, the five elements required by the section, as discussed above,[94] to establish the offence of sexual grooming set a high threshold, posing difficulties in detection, prosecution and conviction. Second, the requirements of at least two communications, to signal repeat behaviour,[95] and travel, appear incongruent with what appears to be a provision creating an inchoate offence to capture the early grooming process and where the key element of the offence should be the *criminal intent* at the time of grooming the child. The purpose of such provisions is to impose criminal liability on preparatory acts to prevent children from being subjected to sexual abuse *before* the commission of the offence.[96]

37 Challenges exist in circumscribing the parameters of this inchoate offence. The requirement for travel, as indicated by s 376E, often represents that final stage before the substantive offence is committed. There is, hence, only a short interval between the grooming process and the apprehension of the offender. This results in the enforcement of the provision being reactive rather than preventive, which clearly defeats the purpose of the provision. Such difficulty is evident in the noticeable dearth of reported cases involving prosecutions and convictions under s 376E.[97] *Public Prosecutor v Poong Foo Yun*[98] appears to be one instance where s 376E was successfully used to prevent the substantive offence. In that case, the 25-year-old offender became acquainted with the 11-year-old victim through internet chatrooms and, pretending to be a female, persuaded the victim to perform indecent acts on video camera and recorded them. After several communications, he threatened to post the videos online unless the victim met him. Upon meeting him in person and realising that the offender was male, the victim sought help and the police were alerted.

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94 See paras 10–12 above and *Public Prosecutor v Lee Seow Peng* [2016] SGHC 107 at [69].

95 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2431 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

96 See *R v Robson* [2009] 1 WLR 713 at [7].

97 Linette Heng, "Is It Sexual Grooming?" *The New Paper* (8 February 2013).

98 [2010] SGDC 423.

38 Other local reported child sexual grooming cases[99] point to the recurrent inability to stop the inchoate offence being committed; offenders were mostly caught only after they had committed the substantive offence. In most cases, a charge under s 376E was but one of multiple charges against the offender, the principal offence being the substantive offence. For instance, in *Public Prosecutor v Yap Weng Wah*,[100] the offender had spent time online grooming some 31 boys before sexually exploiting them. Yet, he was only caught after the offences had been committed.[101] As a provision intended to capture inchoate offences at a very early stage, s 376E has hence proved disappointing.

39 Unlike the UK provision which since 2008 required only one occasion of communication to establish the offence, s 376E, until the 2019 amendments, still required a prior meeting or communication on at least two occasions. Further, the requirement of "travelling" with the intention of meeting the minor also appears to take the requirements of the provision beyond the realm of mere preparation to that of attempting to commit the principal sexual offence. Finally, setting the minimum age of the offender at 21, under s 376E of the Penal Code, raises the question of what happens when younger persons are themselves the offenders.[102]

40 A delicate balance must thus be struck between prevention of sexual abuse of children and having drift-net legislative provisions that may entrap innocent communications with or by children.

(a) The Penal Code Review Committee's proposals and the 2019 amendments

41 According to the PCRC, "one possible reason" for the small number of prosecutions under s 376E was that the age requirement of the offender and the requirement of two previous communications or meetings, before the accused travels to meet or meets the victim with the intention of committing a sexual offence, are difficult to fulfil.[103] Having examined legislation in the UK, Scotland, Canada and Australia (state of Victoria), the PCRC, therefore, recommended that the number

99 See, for example, *Public Prosecutor v Yap Weng Wah* [2015] 3 SLR 297.

100 [2015] 3 SLR 297.

101 He was eventually charged with 76 charges: 75 charges were brought under s 376A of the Penal Code (Cap 224, 2008 Rev Ed) and one charge was brought under s 7(*b*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed).

102 Anthony Lim Yao Ming was aged between 14 and 17 years when he sexually violated four teenage girls after befriending them on Facebook: Selina Lum, "Teenage Jailed for Sexually Violating Young Girls" *The Straits Times* (13 March 2018).

103 See the Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 118.

of previous communications between the offender and the victim be reduced from two to one as this "will also allow the Police to intervene at an even earlier stage to protect minors from predatory offenders".[104] This recommendation has been incorporated in the amendment to s 376E of the Penal Code introduced by s 116 of the CLRA.

42 It is interesting to note that in adopting similar recommendations of the cross-party inquiry supported by children's charity Barnardo's[105] for the 2015 amendment to the UK Sexual Offences Act, Member of Parliament Sarah Champion highlighted the core problems with the requirement for two communications:[106]

> [If] contact had been made on a single occasion and the circumstances and other information that was available to us suggested that the contact was illegitimate it would not be helpful if we were required to wait until another contact had been made or the person had travelled with the intention of meeting the child and for more evidence that the meeting was likely to lead to sexual abuse, before we could intervene … [further], one lengthy internet conversation could last hours or the best part of a day and could be much more significant than two short conversations …

43 Extrapolating from this, it can be seen that in the UK approach adopted by the PCRC and the 2019 amendment, the *content* of the communication matters more than the *frequency*. Reducing the requirement from two occasions of communications to one would allow law enforcement agencies to apprehend online sex predators before physical harm is done. In Singapore, given our small geographical size and ease of travel, it is much easier for sex predators to set up such meetings after just one occasion of communication. This problem is compounded by the fact that, as indicated earlier, minors in Singapore are increasingly

104 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 120.

105 *Report of the Parliamentary Inquiry into the Effectiveness of Legislation for Tackling Child Sexual Exploitation and Trafficking within the UK* (April 2014) (Chair: Sarah Champion). Among the concerns raised, the report highlighted that while there was general agreement that the UK Sexual Offences Act 2003 (c 42) is generally sound, there were issues about the understanding, interpretation and implementation of the legislation. In particular, the report highlighted that there is no specific offence of "child sexual exploitation"; instead, prosecutions may be brought on a range of offences such as: sexual assault, rape and other sexual offences against children under 13, meeting a child following sexual grooming, causing or inciting child prostitution or pornography, and trafficking within the UK for sexual exploitation. Amendments to the legislation were recommended to allow legislation to capture "child sexual exploitation".

106 United Kingdom, House of Commons, *Parliamentary Debates* (12 May 2014) vol 580 at col 502.

connected on the Internet and online grooming cases are on the rise as part of a worldwide trend.

44 The PCRC also recommended that s 376E be expanded to cover the situation where the victim travels to meet the offender who has arranged the meeting, following one occasion of prior contact, rather than *vice versa* as provided in the section.[107] This was accepted and is reflected in the amendment to s 376E introduced in s 116 of the CLRA.

45 A new offence, "exploitative sexual grooming of a minor of or above 16 but below 18 years of age", was introduced in s 376EA by the CLRA. One of the principal ingredients of the new offence is that the accused is in a "relationship that is exploitative" of the victim and it is this ingredient that distinguishes this offence from that of sexual grooming under s 376E. The PCRC was concerned that it is "extremely easy for young persons to be exploited and manipulated by predatory offenders", and had recommended that the maximum age of the victim should be increased from 16 to 18 if exploitation could be proven by the Prosecution.[108] The new s 376EA is largely a response to the recommendations of the PCRC. The problem with the recommendation is that the age of sexual consent in Singapore is generally 16 years old and the element of exploitation is ambiguous. The new Act therefore increases the age of the victim by two years to 18 and has a wide definition of the term "exploitative relationship" in s 377CA of the Penal Code.[109]

46 The new s 377CA defines the term "exploitative relationship" used in respect of offences relating to sexual activities with minors below 18 years, including those under s 376EA. Whether an accused person's relationship with a minor is exploitative appears to be a question of fact to be determined in each case, and in so doing the court must have regard to the non-exhaustive factors listed in s 377CA(1). These factors include the age of the minor, the difference in age between the accused person and the victim, the nature of the relationship, which must be paramount, and the degree of control or influence exercised over the minor. Section 377CA(2) raises a presumption of an exploitative relationship if there is in existence certain prescribed categories of fiduciary relationships between the minor and the accused person.[110] As the English Court of

107 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 120.

108 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) Recommendation 35 at p 100.

109 Criminal Law Reform Act 2019 (Act 15 of 2019) s 121; yet to be brought into force.

110 Where the offender is a parent, step-parent, foster parent or guardian or the partner of the parent, guardian or foster parent of the minor, a religious, sports or music instructor, a registered medical practitioner or psychologist treating the minor, or an

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Appeal held in *Legare*,[111] although it was not necessary to use "sexually explicit language" to run afoul of the law, the sexual intent of the offender must not be lost sight of in the interpretation of these new provisions.

*(2) Reducing the offender's minimum age*

47 Until the 2019 amendments, s 376E required that the *offender* be at least 21 years of age. The reason, as articulated by Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs, during the parliamentary debates on the Penal Code Amendment Bill which introduced the offence of sexual grooming, was that "the offence is targeted at *adult* sexual predators who themselves target vulnerable minors, not quite the experimenting teenagers or those who are not predators" [emphasis added].[112] Viewed alongside other provisions for sexual offences against children and young persons in the Penal Code,[113] Children and Young Persons Act[114] ("CYPA") and the Woman's Charter,[115] which do not impose such an age requirement for offenders, this requirement appears out of place. Indeed, in our highly wired nation where a high proportion of youths are engaged actively on social media, it may be argued that it is presently "clear that the age of innocence is crossed before 21 years of age".[116] Accordingly, having a minimum offending age at 21 naturally leads us to the question of how to deal with younger sex predators that children may be victims of. As recognised in the UK,[117] many offences against children are committed by children. For example, in 2018 there were at least three reported cases of youths below 21 years old befriending young girls through the social media and sexually violating them.[118]

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advocate and solicitor or counsellor of the minor other than the spouse of the minor: Penal Code (Cap 224, 2008 Rev Ed) s 377CA.

111 Discussed at para 30 above.

112 *Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 at col 2429.

113 Penal Code (Cap 224, 2008 Rev Ed) ss 376A (sexual penetration of minor under 16), 376B (commercial sex with minor under 18), 376C (commercial sex with minor under 18 outside Singapore) and 376D (tour outside Singapore for commercial sex with minor under 18).

114 Children and Young Persons Act (Cap 38, 2001 Rev Ed) s 7.

115 Women's Charter (Cap 353, 2009 Rev Ed) ss 143–145.

116 As Member of Parliament for the West Coast Group Representation Constituency, Ho Geok Choo, told Parliament during the debate on the Penal Code Amendment Bill: *Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 at col 2373.

117 David Ormerod & Karl Laird, *Smith, Hogan and Ormerod's Criminal law* (Oxford University Press, 15th Ed, 2018) at p 811. See also para 14 above.

118 Selina Lum, "Man Admits to Sexual Offences against Girls" *The Straits Times* (20 February 2018); Selina Lum, "Teen Jailed for Sexually Violating Young Girls" *The Straits Times* (13 March 2018); Fabian Koh, "Reformative Training for Child Molester" *The Straits Times* (29 December 2018).

(a) The Penal Code Review Committee's proposals

48 The PCRC members were not unanimous as to the reduction of the minimum age for offenders for sexual grooming under s 376E. The majority of the members were of the view that the age requirement ought to be reduced from 21 to 18 years, referring to one case[119] where the predator was in fact 20 years old who could only be charged for the sexual offences he had committed on 12- and 13-year-old girls he had groomed on social media platforms. The minority of the members, however, were against reducing the age limit to ensure "that sexting between younger minors will be sieved out and will avoid serious resource implications due to the increased prevalence of such sexting behaviour in the context of dating".[120] They made reference to the Minister's concern in Parliament,[121] when s 376E was introduced, that a low age requirement could unwittingly catch the unintended group of "experimenting teenagers" who are not quite sex predators.[122] It has been argued that teenage "sexting", which refers to the activity of sending text messages that are about sex or intended to sexually excite someone, is far less grave because the images are often not created in circumstances which are exploitative or abusive.[123] The Government chose to go with the majority view to reduce the minimum age of the offender to 18, in an amendment to s 376E in the CLRA.[124]

49 In view of the differences amongst the PCRC members, a close-in-age exemption, commonly known as the "Romeo and Juliet" exception or age gap consideration, could have been considered as a defence for young offenders between 18 and 21 years if there is consent. The "Romeo and Juliet" exception is based on the small age difference between the offender and the victim. Allowing this defence would bring us more in line with Canada and most US states.[125] Canada exempts criminal liability for certain sexual offences committed with consent and where the age

119 *Public Prosecutor v Koh Kah Aip* (unreported), cited from Selina Lum, "Man Admits to Sexual Offences against Girls" *The Straits Times* (20 February 2018).

120 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 119.

121 Discussed at para 45 above.

122 *Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 at col 2429 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

123 Carissa Byrne Hessick & Judith M Stinson, "Juveniles, Sex Offenses and the Scope of Substantive Law (2013) 46 Tex Tech L Rev 5 at 15.

124 See the Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 119.

125 See Steve James, "Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform" (2009) 78 UMKC L Rev 241 at 247–248; Carissa Byrne Hessick & Judith M Stinson, "Juveniles, Sex Offenses and the Scope of Substantive Law" (2013) 46 Tex Tech L Rev 5.

difference between the complainant and the offender is between two and five years.[126] In Florida the permissible age difference is four years and in Texas it is three years.[127]

*(3) Defence of mistake of age*

50 The offence of "sexual grooming of a minor under 16", under s 376E of the Penal Code, is obviously not made out if the complainant or intended victim is not below 16 years of age.[128] In addition, no offence is disclosed if the accused "does not reasonably believe" that the victim is 16 years or above.[129] The provision is inconsistent with the other sexual offences involving minors in the Penal Code as it makes available the mistake of fact defence[130] if the offender *reasonably believes* that the victim is above 16 years of age. In contrast, other sexual offences involving minors in the Penal Code,[131] Women's Charter[132] and the CYPA are strict liability offences, at least for offenders above 21 years of age who have not been previously charged with a similar offence, and a mistaken belief as to age does not excuse the offender.

51 An argument for such a defence to remain is that, notwithstanding the parliamentary intent to protect the young and vulnerable from online and offline sexual grooming, there will be circumstances where the perceived victim is neither vulnerable nor truthful and has taken advantage of the anonymity of the Internet to knowingly communicate with the offender.

52 Further, similar to other sexual offences involving offenders below 21 years of age, the defence of mistake of fact as to the victim's age should also be available to cater for circumstances where unintended groups of offenders are caught by the provision. This is because it is often difficult to determine the age of the parties due to the nature of the offence, the level of maturity of the youth and their technological savviness, and also because sexual grooming is often done through anonymous online communication with no physical contact.[133]

126 Criminal Code (RSC, 1985, c C-46) (Canada) ss 150(2) and 150(2.1).
127 Florida Statutes (2008) § 943.04354; Texas Penal Code § 22.011(e).
128 Penal Code (Cap 224, 2008 Rev Ed) s 376E(1)(ii).
129 Penal Code (Cap 224, 2008 Rev Ed) s 376E(1)(iii).
130 Penal Code (Cap 224, 2008 Rev Ed) s 79, where s 376E(1)(*b*)(iii) states that an offence is committed when the offender "does not reasonably believe that B is of or above the age of 16 years".
131 Penal Code (Cap 224, 2008 Rev Ed) s 377D.
132 Women's Charter (Cap 353, 2009 Rev Ed) ss 140(4) and 140(5).
133 See, for example, the troublesome decisions in *Buergin Juerg v Public Prosecutor* [2013] 4 SLR 87 and *Leu Xing Long v Public Prosecutor* [2014] 4 SLR 1024 in respect

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53 Under the new s 377D(2) introduced by the CLRA, a defence of a reasonable mistake as to the age of the victim will remain a defence only for offenders below 18 years, although it must be remembered that in view of the requirement of s 376E, a reasonable belief of the age of the victim must be proven by the Prosecution. It is strange that in the explanation to the section, it was thought necessary to declare that the fact that the minor was observed to be participating in activities which are restricted to persons of or above 18 years of age, such as smoking a cigarette or admission to premises with access restricted to persons of or above 18 years of age, "is neither sufficient to constitute a reasonable basis for the mistaken belief nor reasonable steps to verify that minor's age". These may well be reasonable indicators of a person's age to youth below 18 years old.

### *C. Creating a new offence: "Sexual communication with a child"*

54 As discussed above,[134] the latest amendment to the UK Sexual Offences Act in 2015 created the offence of "sexual communication with a child".[135] As a new provision, s 15A of the UK Act criminalises sexual communication with a child for the purpose of obtaining sexual gratification, even when there is no intention to meet the victim. For the purpose of this section, communication has been defined as sexual if any part of it relates to a sexual activity.[136] This provision has also been adopted in Malaysia, in s 12 of the Sexual Offences against Children Act 2017.[137]

55 In Singapore, an offender who sexually grooms a minor online but has no intention of meeting him does not commit an offence under s 376E. However, he may be committing an offence of "exploiting a child or young person" under s 7 of the CYPA.[138] The section makes it an offence if any person procures or attempts to procure the commission of any obscene or indecent act by any child or young person. In *AQW v*

of commercial sex cases where the offenders were deliberately led to believe by the victim that she was above 18 years.

134 See para 41 above.

135 Sexual Offences Act 2003 (c 42) (UK) s 15A, where "child" is defined as any person under the age of 18.

136 See s 15A(2) of the UK Sexual Offences Act (c 42) for the definitions of "sexual communication" and "sexual activity".

137 Section 12 of the Sexual Offences against Children Act 2017 (No 792 of 2017) (M'sia) makes it an offence to sexually communicate (relating to a sexual activity) with a child below 18 years of age, or to encourage the child to sexually communicate, other than for education, scientific or medical purposes.

138 A "child" refers to one under 14 years of age and a young person is one between 14 and 16 years of age.

*Public Prosecutor*,[139] Sundaresh Menon CJ explained that the section's "key element is that there must be some 'obscene or indecent act' involving any child or young person, or at least an attempt to bring about such an act".[140] The gravity of this offence is arguably not adequately reflected by the prescribed punishment for this offence which is only a maximum fine of $10,000 or imprisonment up to five years for a first offender.

56 Further, criminal liability would be attracted under s 11 of the Undesirable Publications Act[141] if the offender exhibits or distributes any obscene material in his possession. Again, the maximum punishment prescribed is only $10,000 or two years' imprisonment and the Act provides for no offence specifically protecting children from such offences.

57 Considering these provisions in totality, it appears that, in the absence of any distribution of obscene material, an attempt to procure any indecent act, and an intention to meet, *mere sexual communication* with a child or young person was not an offence until 2019.

*(1) The Penal Code Review Committee's proposals*

58 Following a review of legislation in England and Western Australia, the PCRC recommended the creation of a new offence, "Sexual communication with a child". The Committee was concerned that s 376E allows authorities to intervene only where an offender meets or attempts to meet victims face-to-face *and* where there has been communication on previous occasions.[142] It lamented that there was "no specific legal response available where an offender sexually communicates with a

139 [2015] SGHC 134. In this case it was held that the accused's acts of masturbating the minor clearly amounted to the commission of an offence under s 7(*b*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed). Under s 153 (1) of the Canadian Criminal Code (RSC, 1985, c C-46), the offence of "sexual exploitation" includes being in a relationship that is exploitative of a young person (between 16 and 18 years). Section 153(1.2) raises an inference of a relationship that is exploitative of the young person from "the nature of and circumstances of the relationship", including the age, the difference in age between the parties, the evolution of the relationship and the degree of control or influence.

140 *AQW v Public Prosecutor* [2015] SGHC 134 at [11].

141 Cap 338, 1998 Rev Ed.

142 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 121, para 20.

young victim, with no intention of meeting or attempting to meet the victim".[143] The impetus for the PCRC's review was the:[144]

> … increased utilisation of communication via online communication technology, which has facilitated opportunities for individuals to gain access to minors for sexual activity. There is hence a need to move further upstream to target early predatory conduct by adult offenders, which could facilitate sexual activity with such minors later.

59 Following this recommendation, two new offences were added to the Penal Code. A new offence, "sexual communication with a minor below 16 years of age", was added under s 376EB. Further, another new s 376EC makes it an offence for the *exploitative* sexual communication with a victim between 16 and 18 years, which is determined by whether the offender was in an exploitative relationship with the victim.[145]

60 Finally, following the PCRC's recommendations, a number of new offences relating to using a child in producing, possessing and distributing "child abuse material"[146] have been added. These help to address "the rapid development of several other technologies which has allowed for fast, widespread, and anonymous distribution of such exploitative and abusive material",[147] engaging in sexual activity before a minor below 16 years or before a minor between 16 and 18, with whom the offender is in an exploitative relationship, and causing a minor below 16 to look at a sexual image.[148]

## VII. Conclusion

61 Two distinct patterns appear clear in the authors' examination of the jurisdictions surveyed, with Canada and Australia adopting a liberal approach in allowing law enforcement agencies to interpret what constitutes sexual grooming on one hand, and Malaysia and the UK

143 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 121, para 20.

144 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 121, para 21.

145 Inserted by s 117 of the Criminal Law Reform Act 2019 (Act 15 of 2019). "Exploitative relationship" is widely defined in s 377CA of the Penal Code (Cap 224, 2008 Rev Ed) and discussed above at para 30.

146 Sections 377BG to 377BL of the Penal Code (Cap 224, 2008 Rev Ed) were inserted by the Criminal Law Reform Act 2019 (Act 15 of 2019). "Child abuse material" has been defined in s 337BL(6).

147 Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 125, para 6.

148 Sections 376ED and 376EE of the Penal Code (Cap 224, 2008 Rev Ed) were inserted by the Criminal Law Reform Act 2019 (Act 15 of 2019).

enforcing a series of complementary legislation to comprehensively cover the various circumstances that could arise with the rapidly changing technology. In particular, s 15 of the UK Sexual Offences Act, which Singapore has modelled s 376E after, has undergone several rounds of reform to align itself with the original objective of criminalising the *process* of grooming. Following the recommendations of the PCRC, the Singapore parliament has now moved to keep abreast of technological developments and legislative measures in other jurisdictions and to react appropriately in dealing with child sexual abuse and exploitation.

62 As observed in this article, s 376E of the Penal Code was a "silent" provision, as the many requirements for the offence of sexual grooming of a minor presented challenges in detecting and apprehending offenders at the early preparatory stage of grooming and before the sexual offence was itself attempted. Ironically, it may still remain a less-used provision but for a different reason. The number of the new offences against minors that have been created by the 2019 amendments may be easier to detect and enforce. For example, the offence of sexual communication with a minor under ss 376EB and 376EC is a very early preparatory step in sexual grooming, without the need to prove the ingredients of a prior contact and arrangement to meet. With the latest amendments to the Penal Code in 2019, all the different sequential stages of sexual grooming now appear to have been criminalised: communicating with a minor over the Internet; making plans to meet him or her; and travelling or getting him or her to meet the offender; and the more overt acts of sexual grooming such as those that relate to the use of child abuse materials, engaging in sexual activity before the minor and committing a sexual offence.[149]

149 See Ministry of Home Affairs and Ministry of Law, Penal Code Review Committee, *Report* (August 2018) at p 121.