

CHILD SEXUAL ABUSE

RECOMMENDED REFORMS

Introduction

Child sexual abuse and exploitation are issues of growing concern in Viet Nam. Effectively combatting this serious form of violence against children requires:

- ❑ Clearly defined penal provisions prohibiting all forms of child sexual abuse and sexual exploitation;
- ❑ Child-sensitive investigation and trial procedures to assist children to give effective testimony and to reduce additional trauma from participating in criminal proceedings; and
- ❑ Application of such provisions and procedures to all children under-18 years of age.

In recent years, Viet Nam has made considerable progress in strengthening national laws to address violence against minors. The *Law on Children 2016*, *Penal Code 2015* and *Criminal Procedure Code 2015* include many important new provisions to better protect minors from sexual abuse and other forms of violence. However, there are some remaining gaps to address to further align national laws with the *Convention on the Rights of the Child (CRC)* and *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC)*, both of which Viet Nam has ratified.

This paper outlines key gaps in the *Penal Code* and includes recommendations for both short-term and long-term reforms. UNICEF also recommends that the *Criminal Procedure Code* be reviewed and revised to strengthen protections for minors, but the scope of this paper is limited to the *Penal Code*.

Summary of key reforms needed

- * Clarify the definition of “sexual intercourse” and “other sexual activities”
- * Penalise all forms of sexual abuse, contact and non-contact, of children
- * Reinforce and clarify the age of consent for sexual acts
- * Penalise people who use their position of trust or authority to sexually abuse a minor
- * Clarify what constitutes using a child and a minor for pornographic purposes
- * Prohibit grooming or luring of children and minors
- * Penalise child pornography in line with the OPSC
- * Align the definition of child prostitution to the OPSC
- * Ensure protection and support for all child sexual abuse victims under-18 years old

Clarify the definition of “sexual intercourse” and “other sexual activities”

The *Penal Code* 2015 introduced additional sexual offences against minors and expanded the definition of rape to include sexual intercourse and other sexual activities. However, the terms “sexual intercourse” and “other sexual activities” are not defined, and as such the elements of these offences are not clear.

In order to ensure equal protection for girls and boys and to fully capture the different forms of rape, it is recommended that “sexual intercourse” be defined in gender-neutral terms to include all forms of penetration (vaginal, anal and oral) by any part of the body or with an object. A narrow definition of sexual intercourse as only vagina-penile penetration does not take into account the full range of penetrative acts, such as anal rape, which is an equally serious form of sexual violence and causes similar physical and emotional harm to the victim.

It is also recommended that penetration be defined to include penetration **to any extent, however slight**, and regardless of whether there has been ejaculation. This is essential in children’s case, where it can sometimes be difficult to determine the precise degree of penetration that took place. It is rare for sex offenders to fully penetrate a young child, but these children will nonetheless feel pain and experience the act as penetration. Many minors lack sufficient understanding of anatomy and the nature of sexual intercourse to testify clearly about the extent to which they have been penetrated.

In defining sexual intercourse and other sexual activities, it is also recommended that the use of phrases such as “satisfying sexual needs” and “sexual gratification” be avoided as they unnecessarily expand the elements of the offence that need to be proved. Any sexual act with a person without their consent should constitute a crime, regardless of whether the offender’s intention was to satisfy his/her own sexual needs. For unlawful sexual touching of a child where force or lack of consent is not required (Articles 142, item 2, clause b; Article 145), a more neutral term such as “in a sexual manner” or “for sexual purposes” should be used to differentiate between unlawful sexual touching and touching for legitimate purposes (such as bathing a child or medical examination). Whether or not the touching was sexual should be determined based on the context and circumstances of the touching, not the sexual desires or gratification of the perpetrator.

Short-term recommendations

Issue a Resolution providing guidance on the elements of the offence of rape and forcible sexual intercourse (Articles 141-144):

- Define sexual intercourse in gender-neutral terms, encompassing all forms of penetration (vaginal, anal, and oral) by any part of the body or any object. The guidance should also clarify that this includes penetration to any extent, however slight.
- Provide guidance on what constitutes “other sexual activities” ensuring that it includes any touching, in a sexual manner, of the child’s private parts (genitals, breasts, or

buttocks) using any part of the body or an object, or inducing the victim to touch the offender's private parts using any part of the body or an object.

Long-term recommendations

- ❑ Amend the *Penal Code* to re-define rape as any act of penetration (vaginal, anal, oral) without the victim's consent, and eliminate the requirement for force or threats.
- ❑ Consider including a separate offence of "sexual assault" to address unlawful sexual acts that do not constitute penetration (e.g. non-consensual sexual touching with any body part or object).

Penalise all forms of sexual abuse, contact and non-contact, of children

Effectively addressing child sexual abuse requires clear provisions penalising all forms of sexual contact with a child – all penetrative acts, all non-penetrative acts (such as sexual touching), as well as sexual acts that do not involve physical contact (such as exposing oneself to a child or inducing a child to expose her/himself).

As noted above, the *Penal Code* defines rape to include both sexual intercourse and other sexual activities. This appears to encompass all penetrative and non-penetrative sexual acts; however, it is not clear what is the distinction between "sexual activities" under Articles 141-144, and "obscene acts" against a child under Article 146. It is recommended that further guidance be provided on what constitutes an obscene act against a child, and whether sexual touching of a child between the ages of 13 and 16 falls under Article 145 or Article 146.

Short-term recommendations

- ❑ Issue a Resolution clarifying the distinction between "other sexual activities" and "obscene acts";
- ❑ Define "obscene acts" to include sexual acts that do not involve physical contact between the child and the perpetrator, including exposing oneself to a child, inducing a child to expose him/herself, and inducing a child to masturbate or touch him/herself or a third party;
- ❑ In light of the relatively low penalty under Article 146, consider limiting "obscene acts" to non-contact offences, and penalise sexual touching and other contact offences as "other sexual activities" under Articles 142, 144 and 145.

Reinforce and clarify the age of consent for sexual acts

The *Penal Code* lacks a clear statement of the age of consent to engage in sexual activity. The age of consent is addressed under Article 142 (prohibiting any sexual intercourse or other sexual act with a person aged under 13 years) and Article 145 (prohibiting an adult from having sexual intercourse or other sexual acts with persons aged from full 13 to under

16 years old). However, additional guidance may be needed to ensure that these provisions are understood and properly applied.

Short-term recommendations

Issue a Resolution providing guidance on the age of consent to engage in sexual acts under the *Penal Code*, clarifying that:

- ❑ Children under the age of 13 years cannot consent to engage in a sexual act under any circumstances. It is an offence under Article 142 for anyone (adult or juvenile) to have sexual intercourse or any other sexual act with a child under the age of 13 years. There is no requirement to prove that force, threats or inducements were used, and the act is still an offence even if the child was 'willing'.
- ❑ Any adult who engages in sexual intercourse or a sexual act with a child aged full 13 to under 16 commits an offence under Article 145, even if the child consented, and there is no requirement to prove force, threats or inducements.
- ❑ It is not an offence for two juveniles to engage in sexual intercourse or other sexual acts, provided they are both aged full 13 years or older and the act was consensual.

Penalise people who use their position of trust or authority to sexually abuse a minor

International standards recommend that there be safeguards against sexual abuse of persons under-18 years of age by adults who take advantage of the minor's immaturity and dependency. In particular, there are certain specific relationships (e.g. caregiver, family member, teacher, employer, religious instructor, sports coach, etc.) where the potential for imbalance of power is so significant that a higher age of consent should be applied. This is because the imbalance of power in these situations may unduly influence the minor such that s/he is not able to give valid and informed consent. The crime is proven by the nature of the relationship between the minor and the defendant, without needing to show trickery or inducements or that the act was against the minor's will.

The *Penal Code* does not have a clear provision preventing persons in a position of power, trust, or authority over a minor from engaging in sexual acts with that minor. Some protection is provided under the offences of forcible sexual intercourse (Article 143) and forcible sexual intercourse with a person aged full 13 to under 16 (Article 144), but both provisions require the use of tricks or inducements and that the act be against the minor's will. These provisions should be strengthened to protect minors from being manipulated into sexual acts by adults in a position of authority.

Short-term recommendations

- ❑ Issue a Resolution clarifying that, for the purposes of Articles 143 and 144, a “situation of dependence” includes not just financial or material dependency, but also situations where the perpetrator is in a position of trust, power or authority over the minor, including any caregiver, family member, teacher, employer, religious instructor, coach, or other person responsible for the minor’s care or education.

Long-term recommendations

- ❑ Amend the *Penal Code* by adding a new provision making it an offence for a person in a position of trust, power or authority towards a minor under the age of 18 to engage in sexual intercourse or any sexual act with that minor.

Clarify what constitutes using a child for pornographic purposes

Article 147 prohibits persuading, enticing or forcing a child under-16 to participate in a pornographic performance. However, what constitutes a “pornographic performance” is not defined, the offence only protects children under-16 years rather than under-18 as required by the OPSC, and the penalty is quite low (between 6 months and 3 years imprisonment) given the grave nature of this crime.

The use of children in pornographic performances has been an issue of growing global concern in recent years due to the rapid spread of this material through the Internet. In many countries, improved access to high-speed Internet has resulted in increased use of ICT for live streaming of child sexual abuse or pornographic performances by children. Children are also at risk of being groomed or induced to share explicit photos or videos of themselves through ICT. Engaging minors in obscene performances is a very serious form of child sexual abuse.

Short-term recommendations

- ❑ Issue a Resolution defining a “pornographic performance” to include a child engaged in a real or simulated sex act (including sexual intercourse, masturbation and other sexual acts), or who is induced to strip or expose him/herself. These acts alone should be sufficient, without the added requirement that the performance “stimulate sexual desire” or sexual gratification.
- ❑ Clarify that the phrase “in any form” under Article 147 includes live-streaming of a pornographic performance involving a child and inducing a child to expose her/himself through ICT or to share images or video of the child engaged in a real or simulated sex act or that depict the sexual parts of the child.

Long-term recommendations

- ❑ Amend Article 147 to more clearly prohibit inducing or using a child under-18 years in the production of child pornography and increase the penalty to better reflect the gravity of this crime.

Prohibit grooming or luring of children

“Grooming” refers to the common practice of perpetrators befriending and establishing an emotional connection with a child, and sometimes the child’s family, to lower the child’s inhibitions with the objective of sexually abusing the child. Increasingly, perpetrators are using ICT, including social networking sites, chat, texts and instant messaging to interact with and lure children online.

The *Penal Code* does not currently address grooming of children through ICT or other means. Globally, many countries have introduced new crimes relating to grooming, online solicitation or luring of children that prohibit communicating with a child for the purpose of facilitating the commission of a sexual offence against the child. This allows investigation agencies to intervene early once there is clear evidence of grooming, but before the sexual abuse actually takes place.

Short-term recommendations

- ❑ Issue a Resolution guiding the interpretation of Article 141 and 142 of the *Penal Code*, stating that the use of “trickeries” includes acts of grooming, i.e. communicating with, befriending or establishing an emotional connection with a child (in person or through ICT) to lower the child’s inhibitions with the objective of sexually abusing the child.

Long-term recommendations

- ❑ Amend the *Penal Code* to include the offence of grooming or online solicitation of a child.

Penalise child pornography in line with the OPSC

Viet Nam has taken steps to enhance the *Penal Code* provisions on pornographic materials. Article 326 of the *Penal Code* prohibits disseminating pornographic materials, and clause 2 (e) provides for an aggravated penalty where the materials are distributed to persons under the age of 18. However, there are some remaining shortcomings:

- ❑ The aggravated penalty applies only to ‘dissemination’ of pornographic material to minors, and not pornographic images ‘depicting’ minors;
- ❑ Simple possession of child pornography material is not a crime;
- ❑ Criminal penalties apply only to dissemination of enormous quantities of material, or where the person has been previously administratively sanctioned for such acts.

The OPSC defines “child pornography” as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes” and requires States parties to make it a crime to produce, distribute, disseminate, import, export, offer, sell or possess for the above purposes child pornography. The UN Committee on the Rights of the Child and the Council of Europe Convention on Cybercrime also recommend that countries prohibit possession, downloading or accessing child pornography.

The possession and distribution of child pornography is a more serious crime than other forms of pornographic material because it encourages the sexual abuse of children by depicting them as sexual objects for the gratification of adults. By ratifying the OPSC and joining the WeProtect Global Alliance to End Child Sexual Exploitation Online, Viet Nam has signalled its commitment to join in the international efforts to eliminate this harmful industry.

Short-term recommendations

- ❑ Issue a Resolution providing guidance on the definition of “pornographic material”. In line with the OPSC, this should include any representation, by whatever means, of a minor engaged in real or simulated sexual activities or any representation of the sexual parts of a minor for primarily sexual purposes. It should also include “virtual” child pornography, i.e. material that appears to depict children engaged in sexual acts but that is actually the product of digital creation, animation, morphing or composite making.

Long-term recommendations

- ❑ Amend the *Penal Code* to include a separate offence of child pornography that prohibits producing, copying, distributing, disseminating, selling, importing, exporting, possessing, accessing, or downloading pornographic material depicting a minor engaged in real or simulated sexual activities or any representation of the sexual parts of a minor for primarily sexual purposes.
- ❑ Apply criminal penalties to child pornography offences, regardless of quantity.

Align the definition of child prostitution to the OPSC

The OPSC requires States parties to prohibit offering, obtaining, procuring or providing a minor under-18 years for child prostitution. “Child prostitution” is defined as the “use of a child in sexual activities for remuneration or any other form of consideration.”

The *Penal Code* 2015 includes a separate crime of engaging in prostitution with a person under the age of 18 years (Article 329). Other acts in relation to child prostitution are addressed under the offences of harbouring prostitutes (Article 327) and procuring (Article 328), applicable to adults and children. However, some shortcomings remain:

- ❑ The term “prostitution” is not defined, and it is therefore not clear if this applies only to sexual intercourse or also other sexual acts;
- ❑ The term “buying” or “engaging” has not been defined, and therefore it is unclear if this encompasses payment of any form or remuneration or consideration, or only cash transactions;
- ❑ The penalties for prostitution-related offences committed against minors do not reflect the very serious nature of these crimes. Exploiting minors through prostitution is an extremely serious crime, and should be treated as a separate and distinct crime with penalties aligned with those for rape of a child.

Short-term recommendations

- ❑ Issue a Resolution to provide guidance on the definition of “prostitution” for the purposes of Articles 327-329. In line with the OPSC, it should include both sexual intercourse and other sexual acts.
- ❑ Clarify that “engaging” or “buying” sex from a minor (Article 329) includes all forms of remuneration or consideration (including exchange of gifts, favours, etc.) not just transactions involving payment of money, and that “sex” includes sexual intercourse or any other sexual act.

Long-term recommendations

- ❑ Amend the *Penal Code* to include a separate and distinct offence of child prostitution that encompasses offering, obtaining, procuring or providing a child under the age of 18 for prostitution, defined broadly in accordance with the OPSC and with penalties on par with rape of a child.

Ensure protection and support for all child sexual abuse victims under the age of 18

The *Law on Children* currently defines a “child” as a person under the age of 16. This means that all of the special protections and support measures for child sexual abuse victims under the *Law on Children* **only apply** to children who are under-16 and not those aged 16 and 17. The definition of a ‘child’ as under 16 years while the age of majority is simultaneously recognized by the Civil Code as being 18 years is not in line with the CRC, which defines a child as a person under-18 years of age unless under the law applicable to the child, majority is attained earlier. Nor is this in line with the *Penal Code* and *Criminal Procedure Code*, which recognise the special vulnerability of minor witnesses under the age of 18.

Long-term recommendations

- ❑ Amend the *Law on Children* to state that a “child” is a person under-18 years of age.