

Substantive and procedural legislation in the Philippines to combat webcam-related child sexual abuse*

Abstract

This country report examines the criminal laws and procedural rules in the Philippines that apply to webcam or online child sexual abuse. It analyzes the relevant treaties, legislation and case law, particularly those relating to sexual offenses involving minors and cybercrime investigations. The report also tackles specific legal issues concerning the use of Sweetie 2.0 in combating webcam-related child sexual abuse including child pornography, cybersex, child sex tourism, entrapment, and criminal investigations in an online context. Based on the research, many of the sex-related crimes under Philippine law can be used to investigate and prosecute the sexual abuse and exploitation of real children and minors via webcam or other similar means or media. However, most of these crimes do not apply in the case of Sweetie 2.0 because they require as an essential element for their commission the involvement of a real child or minor victim. As such, the possible crimes that may be committed in relation to Sweetie 2.0 are limited to cybersex, attempted cybersex, grooming, and luring. Also, since the general rule is that criminal investigations can only be conducted when a crime has been, is being or is about to be committed, Sweetie 2.0 can only be used in the first instance to investigate these four offenses.

Keywords

Philippines, webcam, online, child abuse, sexual offense, criminal law, procedural rules, criminal investigation

Introduction: Legislation in the Philippines

1.1 General description of the legal framework

Due to its colonial histories with both Spain and the United States, the Philippines has a mixed legal system that primarily follows the civil law tradition, but also draws from the US common law system. Many Philippine laws have their origins in Spanish or continental European legal systems (e.g., the Civil Code and the Revised Penal Code). However, laws

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enacted since the early 20th century and most special laws are based on or inspired by US laws and policies. To illustrate, while the Revised Penal Code has its roots in Spanish criminal laws, the Philippine Rules of Criminal Procedure are similar to and borrow from US procedural rules. The structure and substance of the Philippine Constitution is also very much influenced by the US Constitution. Like the United States, the Philippines has three branches of government (the legislature, the executive, and the judiciary) and subscribes to the system of checks and balances.¹ The Bill of Rights in the Philippine Constitution is based on the Amendments to the US Constitution and landmark US court decisions (e.g., the right to privacy, Miranda rights, etc.). In many instances, the rights under the Philippine Constitution have the exact same wording as those in the United States. With regard to Philippine criminal laws and procedures, it is the legislature that enacts criminal laws, the executive investigates and prosecutes criminal offenses through law enforcement agencies, and the judiciary is the one that promulgates the rules of procedure, interprets laws, decides whether a crime has been committed and what punishment to mete out (which is then carried out by the executive).

Philippine criminal laws adhere to the general principles of generality, territoriality, non-retroactivity, and *in dubio pro reo* (resolving all doubts in favor of the accused). Following the principle of the general application of criminal laws, the law provides that “[p]enal laws and those of public security and safety shall be obligatory upon all who live or sojourn in the Philippine territory, subject to the principles of public international law and to treaty stipulations”.² Furthermore, pursuant to the territoriality principle, criminal laws are enforced “within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone”³ and, save for a handful of specific exceptions, do not have extra-territorial application.⁴ Criminal laws and laws in general are also applied prospectively.⁵ The Philippine Constitution expressly prohibits the enactment of an “*ex post facto* law or bill of attainder”.⁶ However, penal laws may be given “retroactive effect in so far as they favor the person guilty of a felony”.⁷ Moreover, the Philippines subscribes to the principle that “penal

¹ See 1987 Constitution, arts VI, VII and VIII.

² Civil Code of the Philippines, art 14.

³ The Revised Penal Code (as amended), art 2.

⁴ The Revised Penal Code (as amended), art 2.

⁵ Civil Code of the Philippines, art 4.

⁶ 1987 Constitution, art III. Sec 22.

⁷ The Revised Penal Code (as amended), art 22.

statutes are construed strictly against the State and liberally in favor of the accused”.⁸ As explained by the Supreme Court:

the fundamental principle in applying and in interpreting criminal laws is to resolve all doubts in favor of the accused. *In dubio pro reo*. When in doubt, rule for the accused. This is in consonance with the constitutional guarantee that the accused shall be presumed innocent unless and until his guilt is established beyond reasonable doubt.

Intimately related to the *in dubio pro reo* principle is the rule of lenity. The rule applies when the court is faced with two possible interpretations of a penal statute, one that is prejudicial to the accused and another that is favorable to him. The rule calls for the adoption of an interpretation which is more lenient to the accused.⁹

It is worth noting that, with respect to criminal intent, there are two types of crimes in Philippine law: *mala in se* and *mala prohibita*. According to the Supreme Court,

The law has long divided crimes into acts wrong in themselves called “acts *mala in se*,” and acts which would not be wrong but for the fact that positive law forbids the, called “acts *mala prohibita*.” This distinction is important with reference to the intent with which a wrongful act is done. The rule on the subject is that in acts *mala in se*, the intent governs, but in acts *mala prohibita*, the only inquiry is, has the law been violated? When an act is illegal, the intent of the offender is immaterial.¹⁰

The Supreme Court further explains the differences between these two types of crimes:

Generally, *mala in se* felonies are defined and penalized in the Revised Penal Code. When the acts complained of are inherently immoral, they are deemed *mala in se*, even if they are punished by a special law. Accordingly, criminal intent must be clearly established with the other elements of the crime; otherwise, no crime is committed. On the other hand, in crimes that are *mala prohibita*, the criminal acts are not inherently immoral but become punishable only because the law says they are forbidden. With these crimes, the sole issue is whether the law has been violated. Criminal intent is not necessary where the acts are prohibited for reasons of public policy.¹¹

Mala in se crimes are considered harder to prosecute since they require proof of criminal intent or malice on the part of the accused. A number of the sex-related crimes committed against children and minors are punished under special laws rather than the Revised Penal Code. This means that, in general, they are considered *mala prohibita* crimes, and the mere commission of these offenses is punishable regardless of whether the accused had criminal intent or not.

⁸ *People v Valdez*.

⁹ *Intestate Estate of Vda. de Carungcong v People*.

¹⁰ *Dunlao, Sr. v Court of Appeals*.

¹¹ *Garcia v Court of Appeals*.

1.2 Relevant treaties and cybercrime laws

The Philippines is a signatory or state party to the following international treaties and agreements relating to combating child sexual abuse:

- UN Convention on the Rights of the Child;
- Optional Protocol on the sale of children, child prostitution and child pornography; and
- Convention on the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others.

The Philippine laws that are relevant to child sexual abuse are:

- Special Protection of Children Against Abuse, Exploitation and Discrimination Act;
- The Revised Penal Code (as amended);
- The Anti-Rape Law of 1997;
- Anti-Trafficking in Persons Act of 2003 (as amended); and
- Anti-Child Pornography Act of 2009.

With regard to cybercrime, the following national laws apply in the Philippines:

- Cybercrime Prevention Act of 2012;
- Anti-Photo and Video Voyeurism Act of 2009;
- Electronic Commerce Act;
- Access Devices Regulation Act of 1998; and
- Data Privacy Act of 2012.

Analysis of substantive criminal law

1.3 Introduction

Sex-related offenses committed against children and minors are penalized under the Revised Penal Code as well as special laws such as the Special Protection of Children

Against Abuse, Exploitation and Discrimination Act and the Anti-Trafficking in Persons Act of 2003 (as amended), the Anti-Rape Law of 1997, and the Anti-Child Pornography Act of 2009.

Under Philippine law, a child or minor is a “person below eighteen (18) years of age”.¹² However, these terms may also cover “those over [eighteen years of age] but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition”.¹³ The Anti-Child Pornography Act of 2009 similarly defines a child as “a person below eighteen (18) years of age or over, but is unable to fully take care of himself/herself or protect himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition”.¹⁴

1.4 Possibly relevant criminal offenses

1.4.1 Succinct overview of sexual offenses involving minors

The following table lists the possibly relevant criminal law provisions in the Philippines, grouped together by the provisions of the Lanzarote Convention, which gives the most comprehensive catalogue of sexual child abuse offenses available.

Lanzarote Treaty	The Philippines
Article 18. Sexual abuse	<p>Article 266-A of the Revised Penal Code (as amended by The Anti-Rape Law of 1997) Rape. Rape is Committed</p> <p>1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:</p> <p>a) Through force, threat, or intimidation;</p> <p>b) When the offended party is deprived of reason or otherwise unconscious;</p> <p>c) By means of fraudulent machination or grave abuse of authority; and</p> <p>d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.</p>

¹² See Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 3(a); see Anti-Trafficking in Persons Act of 2003 (as amended), sec 3(b).

¹³ Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 3(a); see also Anti-Trafficking in Persons Act of 2003 (as amended), sec 3(b).

¹⁴ Anti-Child Pornography Act of 2009, sec 3(a).

	<p>Article 336 of the Revised Penal Code. Acts of Lasciviousness. Any person who shall commit any act of lasciviousness¹⁵ upon other persons of either sex, under any of the circumstances mentioned in the preceding article, shall be punished by <i>prisión correccional</i>.</p> <p>Article 338 of the Revised Penal Code. Simple Seduction. The seduction of a woman who is single or a widow of good reputation, over twelve but under eighteen years of age, committed by means of deceit, shall be punished by <i>arresto mayor</i>.</p> <p>Article 337 of the Revised Penal Code. Qualified Seduction. The seduction of a virgin over twelve years and under eighteen years of age, committed by any person in public authority, priest, house-servant, domestic, guardian, teacher, or any person who, in any capacity, shall be entrusted with the education or custody of the woman seduced, shall be punished by <i>prisión correccional</i> in its minimum and medium periods.</p> <p>The penalty next higher in degree shall be imposed upon any person who shall seduce his sister or descendant, whether or not she be a virgin or over eighteen years of age.</p> <p>Under the provisions of this Chapter, seduction is committed when the offender has carnal knowledge of any of the persons and under the circumstances described herein.</p> <p>Article 342 of the Revised Penal Code. Forcible Abduction. The abduction of any woman against her will and with lewd designs shall be punished by <i>reclusión temporal</i>.</p> <p>The same penalty shall be imposed in every case, if the female abducted be under twelve years of age.</p> <p>Article 343 of the Revised Penal Code. Consented Abduction. The abduction of a virgin over twelve years and under eighteen years of age, carried out with her consent and with lewd designs, shall be punished by the penalty of <i>prisión correccional</i> in its minimum and</p>
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¹⁵ Under the Rules and Regulations on the Reporting and Investigation of Child Abuse Cases, lascivious conduct is defined as “the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person”.

	<p>medium periods.</p> <p>Section 3(b) of the Special Protection of Children Against Abuse, Exploitation and Discrimination Act. “Child abuse” refers to the maltreatment, whether habitual or not, of the child which includes any of the following: (1) Psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment;...</p> <p>Section 10 of the Special Protection of Children Against Abuse, Exploitation and Discrimination Act. Other Acts of Neglect, Abuse, Cruelty or Exploitation and Other Conditions Prejudicial to the Child's Development.</p> <p>(a) Any person who shall commit any other acts of child abuse, cruelty or exploitation or be responsible for other conditions prejudicial to the child's development including those covered by Article 59 of Presidential Decree No. 603, as amended, but not covered by the Revised Penal Code, as amended, shall suffer the penalty of <i>prision mayor</i> in its minimum period.</p> <p>(b) Any person who shall keep or have in his company a minor, twelve (12) years or under or who is ten (10) years or more his junior in any public or private place, hotel, motel, beer joint, discotheque, cabaret, pension house, sauna or massage parlor, beach and/or other tourist resort or similar places shall suffer the penalty of <i>prision mayor</i> in its maximum period and a fine of not less than Fifty thousand pesos (P50,000): Provided, That this provision shall not apply to any person who is related within the fourth degree of consanguinity or affinity or any bond recognized by law, local custom and tradition or acts in the performance of a social, moral or legal duty.</p> <p>(c) Any person who shall induce, deliver or offer a minor to any one prohibited by this Act to keep or have in his company a minor as provided in the preceding paragraph shall suffer the penalty of <i>prision mayor</i> in its medium period and a fine of not less than Forty thousand pesos (P40,000); Provided, however, That should the perpetrator be an ascendant, stepparent or guardian of the minor, the penalty to be imposed shall be <i>prision mayor</i> in its maximum period, a fine of not less than Fifty thousand pesos (P50,000), and the loss of parental authority over the minor.</p> <p>(d) Any person, owner, manager or one entrusted with the operation of any public or private place of</p>
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	<p>accommodation, whether for occupancy, food, drink or otherwise, including residential places, who allows any person to take along with him to such place or places any minor herein described shall be imposed a penalty of <i>prision mayor</i> in its medium period and a fine of not less than Fifty thousand pesos (P50,000), and the loss of the license to operate such a place or establishment.</p>
<p>Article 19. Offences concerning child prostitution</p>	<p>Section 5 of the Special Protection of Children Against Abuse, Exploitation and Discrimination Act. Child Prostitution and Other Sexual Abuse. Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.</p> <p>The penalty of reclusion temporal in its medium period to <i>reclusion perpetua</i> shall be imposed upon the following:</p> <p>(a) Those who engage in or promote, facilitate or induce child prostitution which include, but are not limited to, the following:</p> <ol style="list-style-type: none"> (1) Acting as a procurer of a child prostitute; (2) Inducing a person to be a client of a child prostitute by means of written or oral advertisements or other similar means; (3) Taking advantage of influence or relationship to procure a child as prostitute; (4) Threatening or using violence towards a child to engage him as a prostitute; or (5) Giving monetary consideration, goods or other pecuniary benefit to a child with intent to engage such child in prostitution. <p>(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse...</p> <p>(c) Those who derive profit or advantage therefrom, whether as manager or owner of the establishment where the prostitution takes place, or of the sauna, disco, bar, resort, place of entertainment or establishment serving as a cover or which engages in prostitution in addition to the activity for which the license has been issued to said establishment.</p> <p>Section 6 of the Special Protection of Children Against Abuse, Exploitation and Discrimination Act. Attempt to Commit Child Prostitution. There is an attempt to</p>

	<p>commit child prostitution under Section 5, paragraph (a) hereof when any person who, not being a relative of a child, is found alone with the said child inside the room or cubicle of a house, an inn, hotel, motel, pension house, apartelle or other similar establishments, vessel, vehicle or any other hidden or secluded area under circumstances which would lead a reasonable person to believe that the child is about to be exploited in prostitution and other sexual abuse.</p> <p>There is also an attempt to commit child prostitution, under paragraph (b) of Section 5 hereof when any person is receiving services from a child in a sauna parlor or bath, massage clinic, health club and other similar establishments. A penalty lower by two (2) degrees than that prescribed for the consummated felony under Section 5 hereof shall be imposed upon the principals of the attempt to commit the crime of child prostitution under this Act, or, in the proper case, under the Revised Penal Code.</p> <p>Section 3(c) of the Anti-Trafficking in Persons Act of 2003 (as amended). Prostitution – refers to any act, transaction, scheme or design involving the use of a person by another, for sexual intercourse or lascivious conduct in exchange for money, profit or any other consideration.</p> <p>Section 3(h) of the Anti-Trafficking in Persons Act of 2003 (as amended). Sexual Exploitation – refers to participation by a person in prostitution, pornography or the production of pornography, in exchange for money, profit or any other consideration or where the participation is caused or facilitated by any means of intimidation or threat, use of force, or other forms of coercion, abduction, fraud, deception, debt bondage, abuse of power or of position or of legal process, taking advantage of the vulnerability of the person, or giving or receiving of payments or benefits to achieve the consent of a person having control over another person; or in sexual intercourse or lascivious conduct caused or facilitated by any means as provided in this Act.</p> <p>Article 341 of the Revised Penal Code. White Slave Trade. The penalty of <i>prisión correccional</i> in its medium and maximum periods shall be imposed upon any person who, in any manner, or under any pretext, shall engage in the business or shall profit by prostitution or shall enlist the services of women for the purpose of prostitution.</p>
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<p>Article 20. Offences concerning child pornography</p>	<p>Section 3(b) of the Anti-Child Pornography Act of 2009. Child Pornography refers to any representation, whether visual, audio or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of a child engaged or involved in real or simulated explicit sexual activities.</p> <p>Section 4(c)(2) of the Cybercrime Prevention Act of 2012. Child Pornography. The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: Provided, That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.</p> <p>Section 3(j) of the Anti-Trafficking of Persons Act of 2003 (as amended). Pornography – refers to any representation, through publication, exhibition, cinematography, indecent shows, information technology, or by whatever means, of a person engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual purposes.</p> <p>Section 3(a) of the Anti-Child Pornography Act of 2009. For the purpose of this Act, a child shall also refer to:</p> <p>(1) a person regardless of age who is presented, depicted or portrayed as a child as defined herein; and</p> <p>(2) computer-generated, digitally or manually crafted images or graphics of a person who is represented or who is made to appear to be a child as defined herein.¹⁶</p> <p>Section 4 of the Anti-Child Pornography Act of 2009. Unlawful or Prohibited Acts. It shall be unlawful for any person:</p> <p>(a) To hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography;</p> <p>(b) To produce, direct, manufacture or create any form of child pornography;</p> <p>(c) To publish, offer, transmit, sell, distribute, broadcast, advertise, promote, export or import any form of child</p>
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¹⁶ It appears that this provision on computer-generated representations of “child” only applies within the context the Anti-Child Pornography Act and in relation to child pornography.

	<p>pornography;</p> <p>(d) To possess any form of child pornography with the intent to sell, distribute, publish or broadcast: Provided, That possession of three (3) or more articles of child pornography of the same form shall be <i>prima facie</i> evidence of the intent to sell, distribute, publish or broadcast;</p> <p>(e) To knowingly, willfully and intentionally provide a venue for the commission of prohibited acts such as, but not limited to, dens, private rooms, cubicles, cinemas, houses or in establishments purporting to be a legitimate business;¹⁷</p> <p>(f) For film distributors, theaters and telecommunication companies, by themselves or in cooperation with other entities, to distribute any form of child pornography;</p> <p>(g) For a parent, legal guardian or person having custody or control of a child to knowingly permit the child to engage, participate or assist in any form of child pornography;¹⁸</p> <p>(h) To engage in the luring or grooming of a child;</p> <p>(i) To engage in pandering of any form of child pornography;</p> <p>(j) To willfully access any form of child pornography;</p> <p>(k) To conspire to commit any of the prohibited acts stated in this section. Conspiracy to commit any form of child pornography shall be committed when two (2) or more persons come to an agreement concerning the commission of any of the said prohibited acts and decide to commit it; and</p> <p>(l) To possess any form of child pornography.</p>
<p>Article 21. Offences concerning the participation of a child in pornographic performances</p>	<p>Section 9 of the Special Protection of Children Against Abuse, Exploitation and Discrimination Act. Obscene Publications and Indecent Shows. Any person who shall hire, employ, use, persuade, induce or coerce a child to perform in obscene exhibitions and indecent shows, whether live or in video, or model in obscene publications</p>

¹⁷ This provision may not cover *per se* the creation or operation of websites and online chat rooms since the examples contemplate physical spaces. However, the use of these physical spaces, including internet cafes, to for purposes of webcam child sex tourism and child pornography would be covered under the law.

¹⁸ This provision may also apply to webcam child sex tourism and child pornography.

	<p>or pornographic materials or to sell or distribute the said materials shall suffer the penalty of <i>prision mayor</i> in its medium period.</p> <p>If the child used as a performer, subject or seller/distributor is below twelve (12) years of age, the penalty shall be imposed in its maximum period.</p> <p>Any ascendant, guardian, or person entrusted in any capacity with the care of a child who shall cause and/or allow such child to be employed or to participate in an obscene play, scene, act, movie or show or in any other acts¹⁹ covered by this section shall suffer the penalty of <i>prision mayor</i> in its medium period.</p>
Articles 22. Corruption of children	Article 340 of the Revised Penal Code. Corruption of Minors. Any person who shall habitually or with abuse of authority or confidence, promote or facilitate the prostitution or corruption of persons underage to satisfy the lust of another, shall be punished by <i>prisión correccional</i> in its minimum and medium periods, and if the culprit be a public officer, he shall also suffer the penalty of temporary absolute disqualification.
Article 23. Solicitation of children for sexual purposes	<p>Section 3(h) of the Anti-Child Pornography Act of 2009. “Grooming” refers to the act of preparing a child or someone who the offender believes to be a child for a sexual activity or sexual relationship by communicating any form of child pornography. It includes online enticement or enticement through any other means.</p> <p>Section 3(i) of the Anti-Child Pornography Act of 2009. “Luring” refers to the act of communicating, by means of a computer system, with a child or someone who the offender believes to be a child for the purpose of facilitating the commission of a sexual activity or production of any form of child pornography.</p> <p>Section 3(j) of the Anti-Child Pornography Act of 2009. “Pandering” refers to the act of offering, advertising, promoting, representing or distributing through any means any material or purported material that is intended to cause another to believe that the material or purported material contains any form of child pornography, regardless of the actual content of the material or purported material.</p>

¹⁹ The term “other acts” may cover other lascivious conduct as defined under the Rules and Regulations on the Reporting and Investigation of Child Abuse Cases,

<p>Trafficking in persons</p>	<p>Section 3 of the Anti-Trafficking in Persons Act of 2003 (as amended). (a) Trafficking in Persons – refers to the recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs.</p> <p>The recruitment, transportation, transfer, harboring, adoption or receipt of a child for the purpose of exploitation or when the adoption is induced by any form of consideration for exploitative purposes shall also be considered as ‘trafficking in persons’ even if it does not involve any of the means set forth in the preceding paragraph.</p> <p>Section 4 of the Anti-Trafficking in Persons Act of 2003 (as amended). Acts of Trafficking in Persons. It shall be unlawful for any person, natural or juridical, to commit any of the following acts:</p> <p>(a) To recruit, obtain, hire, provide, offer, transport, transfer, maintain, harbor, or receive a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography, or sexual exploitation;...</p> <p>(e) To maintain or hire a person to engage in prostitution or pornography;...</p> <p>(k) To recruit, transport, harbor, obtain, transfer, maintain, hire, offer, provide, adopt or receive a child for purposes of exploitation or trading them, including but not limited to, the act of buying and/or selling a child for any consideration or for barter for purposes of exploitation. Trafficking for purposes of exploitation of children shall include:... (2) The use, procuring or offering of a child for prostitution, for the production of pornography, or for pornographic performances;</p> <p>Section 4-A of the Anti-Trafficking in Persons Act of</p>
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	<p>2003 (as amended). Attempted Trafficking in Persons. Where there are acts to initiate the commission of a trafficking offense but the offender failed to or did not execute all the elements of the crime, by accident or by reason of some cause other than voluntary desistance, such overt acts shall be deemed as an attempt to commit an act of trafficking in persons. As such, an attempt to commit any of the offenses enumerated in Section 4 of this Act shall constitute attempted trafficking in persons.</p> <p>Section 5 of the Anti-Trafficking in Persons Act of 2003. Acts that Promote Trafficking in Persons. The following acts which promote or facilitate trafficking in persons shall be unlawful:</p> <p>(c) To advertise, publish, print, broadcast or distribute, or cause the advertisement, publication, printing broadcasting or distribution by any means, including the use of information technology and the internet, of any brochure, flyer, or any propaganda material that promotes trafficking in persons;</p> <p>Section 6 of the Anti-Trafficking in Persons Act of 2003. Qualified Trafficking in Persons. The following are considered as qualified trafficking:</p> <p>(a) When the trafficked person is a child;</p> <p>Section 11(a) of the Anti-Trafficking in Persons Act of 2003 (as amended). Use of Trafficked Persons. Any person who buys or engages the services of trafficked persons for prostitution shall be penalized... (1) If an offense ... involves sexual intercourse or lascivious conduct with a child...</p>
Sex tourism	<p>Section 3(g) of the Anti-Trafficking in Persons Act of 2003 (as amended). Sex Tourism – refers to a program organized by travel and tourism-related establishments and individuals which consists of tourism packages or activities, utilizing and offering escort and sexual services as enticement for tourists. This includes sexual services and practices offered during rest and recreation periods for members of the military.</p> <p>Section 4 of the Anti-Trafficking in Persons Act of 2003 (as amended). Acts of Trafficking in Persons. It shall be unlawful for any person, natural or juridical, to commit any of the following acts:</p> <p>(d) To undertake or organize tours and travel plans</p>

	<p>consisting of tourism packages or activities for the purpose of utilizing and offering persons for prostitution, pornography or sexual exploitation;</p>
Cybersex	<p>Section 4(c)(1) of the Cybercrime Prevention Act of 2012. Cybersex. The willful engagement, maintenance, control, or operation, directly or indirectly, of any lascivious exhibition of sexual organs or sexual activity, with the aid of a computer system, for favor or consideration.</p> <p>Section 5(b) of the Cybercrime Prevention Act of 2012. Attempt in the Commission of Cybercrime (in relation to cybersex). Any person who willfully attempts to commit any of the offenses enumerated in this Act shall be held liable.</p>
Photo or video voyeurism	<p>Section 3 of the Anti-Photo and Video Voyeurism Act of 2009. “Photo or video voyeurism” means the act of taking photo or video coverage of a person or group of persons performing sexual act or any similar activity or of capturing an image of the private area of a person or persons without the latter’s consent, under circumstances in which such person/s has/have a reasonable expectation of privacy, or the act of selling, copying, reproducing, broadcasting, sharing, showing or exhibiting the photo or video coverage or recordings of such sexual act or similar activity through VCD/DVD, internet, cellular phones and similar means or device without the written consent of the person/s involved, notwithstanding that consent to record or take photo or video coverage of same was given by such person/s.</p> <p>Section 4 of the Anti-Photo and Video Voyeurism Act of 2009. Prohibited Acts. It is hereby prohibited and declared unlawful for any person:</p> <p>(a) To take photo or video coverage of a person or group of persons performing sexual act or any similar activity or to capture an image of the private area of a person/s such as the naked or undergarment clad genitals, pubic area, buttocks or female breast without the consent of the person/s involved and under circumstances in which the person/s has/have a reasonable expectation of privacy;</p> <p>(b) To copy or reproduce, or to cause to be copied or reproduced, such photo or video or recording of sexual act or any similar activity with or without consideration;</p> <p>(c) To sell or distribute, or cause to be sold or distributed, such photo or video or recording of sexual act, whether it</p>

	<p>be the original, copy or reproduction thereof; or</p> <p>(d) To publish or broadcast, or cause to be published or broadcast, whether in print or broadcast media, or show or exhibit the photo or video coverage or recordings of such sexual act or any similar activity through VCD/DVD, internet, cellular phones and other similar means or device.</p> <p>The prohibition under paragraphs (b), (c) and (d) shall apply notwithstanding that consent to record or take photo or video coverage of the same was given by such person/s. Any person who violates this provision shall be liable for photo or video voyeurism as defined herein.</p> <p>Section 6 of the Anti-Photo and Video Voyeurism Act of 2009. Exemption. Nothing contained in this Act, however, shall render it unlawful or punishable for any peace officer, who is authorized by a written order of the court, to use the record or any copy thereof as evidence in any civil, criminal investigation or trial of the crime of photo or video voyeurism: Provided, That such written order shall only be issued or granted upon written application and the examination under oath or affirmation of the applicant and the witnesses he/she may produce, and upon showing that there are reasonable grounds to believe that photo or video voyeurism has been committed or is about to be committed, and that the evidence to be obtained is essential to the conviction of any person for, or to the solution or prevention of, such crime.</p>
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1.4.2 Overview of sexual offenses related to webcam child sexual abuse

Many of the crimes listed in the table above are relevant and may be applicable to webcam child sexual abuse involving real children and minors because these offenses can also be committed online or at a distance. While there is no specific case law confirming this position, this conclusion is based on a legal analysis of the elements of the relevant criminal offenses and a general review of Philippine law and jurisprudence.

1.4.2.1 Child sexual abuse

Crimes against persons or chastity under the Revised Penal Code like rape, acts of lasciviousness, forcible and consented abduction, and simple and qualified seduction do not

apply in the online context since they require for their commission the physical presence and interaction of the victim and the offender.²⁰ It appears though that the crime of child abuse may be committed using online and digital means since it covers acts that cause “*psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment*” of children.²¹ Under the law, “psychological injury” includes any

harm to a child’s psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of said behaviors, which may be demonstrated by a change in behavior, emotional response or cognition.²²

Under Philippine law, sexual abuse of a child is committed through “the employment, use, persuasion, inducement, enticement or coercion of a child to engage in, or assist another person to engage in, sexual intercourse or *lascivious conduct* or the molestation, prostitution, or incest with children”.²³ Based on the Rules and Regulations on the Reporting and Investigation of Child Abuse Cases, lascivious conduct is defined as

the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with an intent to abuse, humiliate, harass, degrade, or *arouse or gratify the sexual desire of any person*, bestiality, masturbation, *lascivious exhibition of the genitals or pubic area of a person*.²⁴

Willfully engaging in sexual activities with or in the presence a child or minor via a webcam or online may be considered a species of lascivious conduct that is prohibited under the law. While there is no decided case on this matter, the literal meaning of the relevant legal provisions supports this interpretation.

The Special Protection of Children Against Abuse, Exploitation and Discrimination Act further contains a catch-all provision that prohibits and penalizes “acts of neglect, abuse, cruelty or exploitation” that are “prejudicial to the child’s development”.²⁵ Section 10(a) of the Act states that

Any person who shall commit any other acts of child abuse, cruelty or exploitation or be responsible for other conditions prejudicial to the child’s development including those covered by Article 59 of Presidential Decree No. 603 [The Child and Youth Welfare Code], as amended, but not covered by the

²⁰ The Revised Penal Code, arts 226-A, 336, 337, 338, 342 and 343.

²¹ Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 3(b) (emphasis added).

²² Rules and Regulations on the Reporting and Investigation of Child Abuse Cases, sec 2(e).

²³ Rules and Regulations on the Reporting and Investigation of Child Abuse Cases, sec 2(g) (emphasis added)

²⁴ Rules and Regulations on the Reporting and Investigation of Child Abuse Cases, sec 2(h) (emphasis added).

²⁵ Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 10(a).

Revised Penal Code, as amended, shall suffer the penalty of *prision mayor* in its minimum period.²⁶

However, the crimes involving child sex tourism provided for under Sections 10(b), (c) and (d) of Special Protection of Children Against Abuse, Exploitation and Discrimination Act are not applicable in the case of webcam child abuse since they contemplate and require physical proximity and contact between the victim and the offender for the crimes to be committed.

1.4.2.2 Child prostitution and sexual exploitation

Under Philippine law, it may be possible to commit child prostitution through digital and online means. While there can be no sexual intercourse using a webcam and other technologies, child prostitution and prostitution in general can also be committed by having “lascivious conduct” with another person.²⁷ As stated in the Special Protection of Children Against Abuse, Exploitation and Discrimination Act, “[t]hose who commit the act of sexual intercourse or *lascivious conduct* with a child exploited in prostitution or subjected to other sexual abuse” are subject to criminal prosecution.²⁸ The Supreme Court has ruled that “[t]he mere act of having sexual intercourse or committing lascivious conduct with a child who is exploited in prostitution or subjected to sexual abuse constitutes the offense. It is a *malum prohibitum*, an evil that is proscribed”.²⁹ According to the Supreme Court, “[a] child is deemed exploited in prostitution or subjected to other sexual abuse, when the child indulges in sexual intercourse or lascivious conduct (a) for money, profit, or any other consideration; or (b) under the coercion or influence of any adult, syndicate or group”.³⁰ The Supreme Court has also held that Section 5(b) of the Special Protection of Children Against Abuse, Exploitation and Discrimination Act “penalizes not only child prostitution, the essence of which is profit, but also other forms of sexual abuse of children.”³¹

It should be noted though that, given the lack of physical presence of the parties, the crime of attempt to commit children prostitution does not apply in the context of webcam or

²⁶ Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 10(a).

²⁷ Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 5; see also the Anti-Trafficking in Persons Act of 2003 (as amended), sec 3(c) (which defines prostitution as “any act, transaction, scheme or design involving the use of a person by another, for sexual intercourse or *lascivious conduct* in exchange for money, profit or any other consideration”)(emphasis added).

²⁸ Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 5(b) (emphasis added).

²⁹ *Malto v People*.

³⁰ *People v Larin*.

³¹ *People v Larin*; see also *Olivarez v Court of Appeals*.

online sexual activities since the offense requires that the offender “who, not being a relative of a child, is found alone with the said child inside the room or cubicle... or any other hidden or secluded area” or “is receiving services from a child in a sauna parlor or bath, massage clinic, health club and other similar establishments”.³² Following the rule of *ejusdem generis*, the phrase “other hidden and secluded areas” does not appear to cover online spaces and internet forums since the situations and examples listed in the law only cover physical locations.

In any event, persons involved in webcam child sexual abuse can be held liable for sexual exploitation under the Anti-Trafficking in Persons Act of 2003 (as amended). Under the law, sexual exploitation

refers to *participation by a person in prostitution, pornography or the production of pornography, in exchange for money, profit or any other consideration or where the participation is caused or facilitated by any means of intimidation or threat, use of force, or other forms of coercion, abduction, fraud, deception, debt bondage, abuse of power or of position or of legal process, taking advantage of the vulnerability of the person, or giving or receiving of payments or benefits to achieve the consent of a person having control over another person; or in sexual intercourse or lascivious conduct caused or facilitated by any means as provided in this Act.*³³

Procuring the services of a child prostitute and/or carrying out lewd or lascivious acts with him or her through a webcam or other means of communication can be construed as sexual exploitation and may be punishable under the law.

1.4.2.3 Child pornography

Based on the Anti-Child Pornography Act of 2009, child pornography “refers to any representation, whether visual, audio or written combination thereof, by *electronic, mechanical, digital, optical, magnetic* or any other means, of a child engaged or involved in real or simulated explicit sexual activities”.³⁴ Similarly, the Anti-Trafficking of Persons Act of 2003 (as amended) defines pornography as

any representation, through publication, exhibition, cinematography, indecent shows, *information technology, or by whatever means*, of a person engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual purposes.³⁵

³² Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 6.

³³ Anti-Trafficking in Persons Act of 2003 (as amended), sec 3(h).

³⁴ Anti-Child Pornography Act of 2009, sec 3(b) (emphasis added).

³⁵ Anti-Trafficking in Persons Act of 2003 (as amended), sec 3(j) (emphasis added).

With regard to the definition of a child, Section 3(a) of the Anti-Child Pornography Act of 2009 provides that:

“Child” refers to a person below eighteen (18) years of age or over, but is unable to fully take care of himself/herself or protect himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.

For the purpose of this Act, a child shall also refer to:

- (1) a person regardless of age who is presented, depicted or portrayed as a child as defined herein; and
- (2) computer-generated, digitally or manually crafted images or graphics of a person who is represented or who is made to appear to be a child as defined herein.³⁶

It should be noted that this provision on computer-generated representations of “child” only applies within the context the Anti-Child Pornography Act. It does not affect the general definition of a child or minor, which contemplates a real person.

The Act’s definition of child pornography appears to be broad enough to cover webcam child sexual abuse since a live video feed or streaming images are undoubtedly audiovisual representations by digital or optical means of a child engaged in real or simulated explicit sexual activities.³⁷ Furthermore, the Cybercrime Prevention Act of 2012 expressly states that child pornography “committed through a computer system” is a criminal offense and is punishable by a penalty “one degree higher than that provided for” in the Anti-Child Pornography Act of 2009.³⁸ In relation to webcam child sexual abuse, the Anti-Child Pornography Act of 2009 prohibits the following acts or conduct:

- (a) To hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography...
- (c) To publish, offer, transmit, sell, distribute, broadcast, advertise, promote, export or import any form of child pornography...
- (d) To possess any form of child pornography with the intent to sell, distribute, publish or broadcast: Provided, That possession of three (3) or more articles of child pornography of the same form shall be prima facie evidence of the intent to sell, distribute, publish or broadcast...
- (j) To willfully access any form of child pornography...

³⁶ Anti-Child Pornography Act of 2009, sec 3(a).

³⁷ See Anti-Child Pornography Act of 2009, sec 3(b).

³⁸ Cybercrime Prevention Act of 2012, sec 4(c)(2).

(l) To possess any form of child pornography.³⁹

1.4.2.4 Pornographic performances and corruption of children

An offender who takes part in webcam child sexual abuse can also be charged for the crime of using or inducing a child to perform in obscene exhibitions and indecent shows. Under the Special Protection of Children Against Abuse, Exploitation and Discrimination Act, it is a crime to “hire, employ, use, persuade, induce or coerce a child to perform in obscene exhibitions and indecent shows, *whether live or in video*, or model in obscene publications or pornographic materials or to sell or distribute the said materials”.⁴⁰ With respect to corruption of minors, while the person who “promote[s] or facilitate[s] the prostitution or corruption of persons underage to satisfy the lust of another” is considered the principal of the crime,⁴¹ the person who has lascivious conduct with a minor may be charged as an accomplice under the law.⁴² The sex offender may be deemed an accomplice since that person “cooperate[d] in the execution of the offense by previous or simultaneous acts”.⁴³

1.4.2.5 Solicitation of children

In relation to the solicitation of children for sexual purposes, the Anti-Child Pornography Act of 2009 criminalizes the acts of “grooming” and “luring”. Under the law, grooming “refers to the act of preparing a child or *someone who the offender believes to be a child* for a sexual activity or sexual relationship by communicating any form of child pornography. It includes online enticement or enticement through any other means”.⁴⁴ Luring is “the act of *communicating, by means of a computer system*, with a child or *someone who the offender believes to be a child* for the purpose of facilitating the commission of a sexual activity or production of any form of child pornography”.⁴⁵ These crimes are very relevant to combating webcam child sex abuse. It is worth highlighting that, with regard to the crimes of grooming and luring, the victim does not have to be an actual child and he or she can be

³⁹ Cybercrime Prevention Act of 2012, sec 4.

⁴⁰ Special Protection of Children Against Abuse, Exploitation and Discrimination Act, sec 9 (emphasis added).

⁴¹ The Revised Penal Code, art 340.

⁴² The Revised Penal Code, arts 16-18.

⁴³ The Revised Penal Code, art 18.

⁴⁴ Anti-Child Pornography Act of 2009, sec 3(h) (emphasis added).

⁴⁵ Anti-Child Pornography Act of 2009, sec 3(i) (emphasis added).

“someone who the offender believes to be a child”.⁴⁶ As of yet, there is no case law on this subject.

1.4.2.6 Trafficking in persons

Webcam child sexual abuse may also involve the crime of trafficking in persons, which covers:

the recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim’s consent or knowledge, within or across national borders by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, *the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation* which includes at a minimum, *the exploitation or the prostitution of others or other forms of sexual exploitation*, forced labor or services, slavery, servitude or the removal or sale of organs.⁴⁷

The following acts of trafficking in persons are pertinent to webcam child sexual abuse since the law does not require that the sex offender have physical contact with the child victim:

(a) To recruit, obtain, hire, provide, offer, transport, transfer, maintain, harbor, or receive a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography, or sexual exploitation...

(e) To maintain or hire a person to engage in prostitution or pornography...

(k) To recruit, transport, harbor, obtain, transfer, maintain, hire, offer, provide, adopt or receive a child for purposes of exploitation or trading them....
Trafficking for purposes of exploitation of children shall include:... The use, procuring or offering of a child for prostitution, for the production of pornography, or for pornographic performances...⁴⁸

In addition, a person may be charged for trafficking when he or she uses trafficked persons such as when an offender “buys or engages the services of trafficked persons for prostitution” including “sexual intercourse or *lascivious conduct* with a child”.⁴⁹ It should be noted that “when the trafficked person is a child”, the crime committed is qualified trafficking in persons and the penalties are higher.⁵⁰ It is also possible for the sex offender to be held

⁴⁶ Anti-Child Pornography Act of 2009, sec 3(h) and 3(i).

⁴⁷ Anti-Trafficking in Persons Act of 2003 (as amended), sec 3 (emphasis added).

⁴⁸ Anti-Trafficking in Persons Act of 2003 (as amended), sec 4.

⁴⁹ Anti-Trafficking in Persons Act of 2003 (as amended), sec 11(a) (emphasis added).

⁵⁰ Anti-Trafficking in Persons Act of 2003 (as amended), sec 6.

answerable for attempted trafficking in persons “[w]here there are acts to initiate the commission of a trafficking offense but the offender failed to or did not execute all the elements of the crime, by accident or by reason of some cause other than voluntary desistance”.⁵¹

1.4.2.7 Child sex tourism and cybersex

A crime that is closely associated with webcam child sex abuse is sex tourism, which is defined by the Anti-Trafficking in Persons Act of 2003 (as amended) as “a program organized by travel and tourism-related establishments and individuals which consists of tourism packages or activities, utilizing and offering escort and sexual services as enticement for tourists”.⁵² It is considered an act of trafficking in persons “[t]o undertake or organize tours and travel plans consisting of tourism packages or activities for the purpose of utilizing and offering persons for prostitution, pornography or sexual exploitation”.⁵³ The crime of sex tourism can equally apply in an online or digital context because, as discussed earlier, prostitution (in the form of lascivious conduct) and sexual exploitation of children can also be committed online or at a distance. The Cybercrime Prevention Act of 2012 clearly states that “[a]ll crimes defined and penalized by the Revised Penal Code, as amended, and special laws, if committed by, through and with the use of information and communications technologies shall be covered by the relevant provisions of this Act”.⁵⁴ According to the Supreme Court, this provision, “merely makes commission of existing crimes through the Internet a qualifying circumstance”.⁵⁵ As the Supreme Court clarifies,

there exists a substantial distinction between crimes committed through the use of information and communications technology and similar crimes committed using other means. In using the technology in question, the offender often evades identification and is able to reach far more victims or cause greater harm. The distinction, therefore, creates a basis for higher penalties for cybercrimes.⁵⁶

Another offense that is particularly pertinent to webcam child sex tourism is cybersex. Under Philippine law, cybersex, which is the “willful engagement, maintenance, control, or operation, directly or indirectly, of any lascivious exhibition of sexual organs or sexual

⁵¹ Anti-Trafficking in Persons Act of 2003 (as amended), sec 4-A.

⁵² Anti-Trafficking in Persons Act of 2003 (as amended), sec 3(g).

⁵³ Anti-Trafficking in Persons Act of 2003 (as amended), sec 4.

⁵⁴ Cybercrime Prevention Act of 2012, sec 6 (the penalty imposed “shall be one (1) degree higher than that provided for by the Revised Penal Code, as amended, and special laws, as the case may be”).

⁵⁵ *Disini, Jr. v Secretary of Justice*.

⁵⁶ *Disini, Jr. v Secretary of Justice*.

activity, with the aid of a computer system, for favor or consideration”, is a punishable offense.⁵⁷ The Supreme Court has ruled that the crime of cybersex only applies to “persons engaged in the business of maintaining, controlling, or operating, directly or indirectly, the lascivious exhibition of sexual organs or sexual activity with the aid of a computer system as Congress has intended”.⁵⁸ As the Supreme Court further explains,

The understanding of those who drew up the cybercrime law is that the element of ‘engaging in a business’ is necessary to constitute the illegal cybersex. *The Act actually seeks to punish cyber prostitution, white slave trade, and pornography for favor and consideration. This includes interactive prostitution and pornography, i.e., by webcam.*⁵⁹

According to the implementing rules and regulations of the Cybercrime Prevention Act of 2012, “[c]ybersex involving a child shall be punished” and dealt with in the same manner as “child pornography”.⁶⁰ In addition to being prosecuted under the Cybercrime Prevention Act of 2012, a person committing cybersex may be held liable for acts involving trafficking in persons.⁶¹ There are no decided cases in this area.

1.4.3 Conclusion

In summary, many of the sex-related crimes in Philippine law may be used to prosecute and punish the sexual abuse and exploitation of real children and minors via webcam or other similar means or media. This is so because the elements or the conditions for the commission of these crimes do not require the physical presence, contact or interaction between the victim and the offender and can thus be committed online or at a distance. To reiterate, a person engaged or involved in the webcam child sex abuse or sex tourism may be investigated, charged and prosecuted for the following crimes: child sexual abuse, child prostitution, child sexual exploitation, child pornography, pornographic performances of children, corruption of children (as accomplices), grooming, luring, qualified trafficking in persons, attempted trafficking in persons, child sex tourism, cybersex and attempted cybersex. Law enforcement authorities can conduct investigations when any of these crimes have been, are being, or are about to be committed.

⁵⁷ Cybercrime Prevention Act of 2012, sec 4(c)(1).

⁵⁸ *Disini, Jr. v Secretary of Justice*.

⁵⁹ *Disini, Jr. v Secretary of Justice*.

⁶⁰ Implementing Rules and Regulations of the Cybercrime Prevention Act of 2012, sec 5(2).

⁶¹ Implementing Rules and Regulations of the Cybercrime Prevention Act of 2012, sec 5(2).

Assuming the victim is an actual child or minor, the offender may still be held criminally liable even if the child victim does not actually undress because the act of undressing is not an essential element for the commission of the following crimes: child sexual abuse, child prostitution, child sexual exploitation, pornographic performances of children, corruption of children, grooming, luring, trafficking in persons, child sex tourism, and cybersex. The offender can be prosecuted based on other overt acts that he or she committed that constitute these crimes.

In relation to attempted crimes, Article 6 of the Revised Penal Code provides that “There is an attempt when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance”. The offender who carries out webcam or online child sexual abuse may be held liable for attempting to commit the crimes discussed above.

1.5 Possible obstacles in substantive law concerning Sweetie

Despite the applicability of many sex-related crimes to webcam child sex abuse or sex tourism, most of these crimes would not apply in the case of Sweetie 2.0 because they require as an essential element for their commission the involvement of a real child or minor victim. Given that Sweetie 2.0 is a computer program or system, it is not considered a “natural person”⁶² under the law and, as such, has no civil or juridical capacity or legal rights and personality.⁶³ Because Sweetie 2.0 is not a “person”, it is not protected under the law and it cannot be the victim of a crime. Further, the following crimes discussed above cannot be committed without a natural person being involved, targeted or victimized: child sexual abuse, child prostitution, child sexual exploitation, child pornography,⁶⁴ attempt to commit child pornography,⁶⁵ pornographic performances of children, corruption of children, grooming, luring, qualified trafficking in persons, attempted trafficking in persons, and child sex tourism.⁶⁶ Some of these crimes would apply in the case of Sweetie 2.0 if the program performed “simulated explicit sexual activities” or had “any representation of the sexual parts

⁶² Civil Code of the Philippines, art 40.

⁶³ Civil Code of the Philippines, art 37.

⁶⁴ Subject to the qualification that this crime applies to computer-generated child pornography.

⁶⁵ Subject to the qualification that this crime applies to computer-generated child pornography.

⁶⁶ It should be noted that, with respect to grooming and luring, while not a child, another natural person is involved (i.e., “someone who the offender believes to be a child”).

of a person for primarily sexual purposes”.⁶⁷ However, giving Sweetie 2.0 these features and making it function this way would amount to child pornography and subject Sweetie 2.0’s developer and operator to potential criminal liability.

While a number of crimes may not apply to Sweetie 2.0 because it is not an actual child or minor, pursuant to Article 59 of the Revised Penal Code, the offender may still be held criminally liable in connection with an impossible crime. Article 59 states that

When the person intending to commit an offense has already performed the acts for the execution of the same but nevertheless the crime was not produced by reason of the fact that the act intended was by its nature one of impossible accomplishment or because the means employed by such person are essentially inadequate to produce the result desired by him, the court, having in mind the social danger and the degree of criminality shown by the offender, shall impose upon him the penalty of *arresto mayor* or a fine ranging from 200 to 500 pesos.⁶⁸

The penalty of *arresto mayor* ranges from one month and one day to six months imprisonment. According to the Supreme Court,

the requisites of an impossible crime are: (1) that the act performed would be an offense against persons or property; (2) that the act was done with evil intent; and (3) that its accomplishment was inherently impossible, or the means employed was either inadequate or ineffectual.⁶⁹

The Supreme Court ruled that:

To be impossible under this clause, the act intended by the offender must be by its nature one impossible of accomplishment. There must be either (1) legal impossibility, or (2) physical impossibility of accomplishing the intended act in order to qualify the act as an impossible crime.⁷⁰

The article on impossible crime may apply in relation to Sweetie 2.0 because: acts of webcam or online child sex abuse are offenses against persons; they are done with evil intent; and their accomplishment is inherently impossible since, unbeknownst to the offender, Sweetie 2.0 is a computer program and not an actual child.

The few sex-related activities carried out in relation to Sweetie 2.0 that may be punishable offenses and would trigger further or potential criminal investigation and/or prosecution are cybersex, attempted cybersex, grooming and luring. Grooming and luring can apply in the case of Sweetie 2.0 because these offenses may involve “someone who the

⁶⁷ Anti-Trafficking of Persons Act of 2003 (as amended), sec 3(j); Anti-Child Pornography Act of 2009, sec 3(b).

⁶⁸ The Revised Penal Code, art 59.

⁶⁹ *Jacinto v People*.

⁷⁰ *Jacinto v People*.

offender believes to be a child”⁷¹ (e.g., an undercover police officer). While the crime of cybersex appears to contemplate two persons engaging in lascivious conduct or sexual activity using a computer for consideration or profit (e.g., in the context of prostitution or pornography), the offense may also apply in the case of Sweetie 2.0 since “any lascivious exhibition of sexual organs or sexual activity... with the aid of a computer system” is a punishable offense.⁷² If an offender engages or attempts to engage in any lascivious or sexual acts with Sweetie 2.0, a crime is committed since the presence or involvement an actual victim is not necessary to be charged and prosecuted for this offense. Further, cybersex is *mala prohibita* crime and the mere carrying out of this prohibited act is already a violation of the law.

Sweetie 2.0 may also be used to investigate and prosecute crimes involving the solicitation of children (i.e., grooming and luring) since they may be committed in relation to “someone who the offender believes to be a child” and an actual child does not have to be present.⁷³ It should be noted though that the provisions on grooming and luring use the term “someone”, which contemplates the involvement of a real person (e.g., a police officer or member of law enforcement). To get around this requirement without having to amend the law, Sweetie 2.0 can be designed to be semi-automated or not completely autonomous. Sweetie 2.0 can be programmed in such a way that, while it may generally operate or function without human intervention, it should always be subject to the control of a human operator. In this way, the offender would still be soliciting “someone who the offender believes to be a child”, albeit the human operator is using a sophisticated computer system to communicate and interact with numerous suspected sex offenders around the world.

In relation to the solicitation of children, the developer or operator of Sweetie 2.0 should take care not to commit the crime of pandering. Under the Anti-Child Pornography Act of 2009, pandering is “the *act of offering, advertising, promoting, representing or distributing through any means any material or purported material that is intended to cause another to believe that the material or purported material contains any form of child pornography, regardless of the actual content of the material or purported material*”.⁷⁴ In its attempt to expose, identify and gather evidence against online sex offenders using Sweetie 2.0, Sweetie 2.0’s developer may end up unwittingly committing this crime. It appears though that the crime of pandering would not apply if Sweetie 2.0 was utilized as a part of a

⁷¹ Anti-Child Pornography Act of 2009, secs 3(h) sec 3(i).

⁷² Cybercrime Prevention Act of 2012, sec 4(c)(1).

⁷³ Anti-Child Pornography Act of 2009, sec 3(h) and 3(i).

⁷⁴ Anti-Child Pornography Act of 2009, sec 3(j).

police investigation since such actions are within the remit and authority of law enforcement and thus impliedly excluded from criminal liability.⁷⁵

Finally, using Sweetie 2.0 to target and expose online sex offenders may fall under the Anti-Photo and Video Voyeurism Act of 2009. Under the law, photo or video voyeurism is a punishable offense:

“Photo or video voyeurism” means the act of taking photo or video coverage of a person or group of persons performing sexual act or any similar activity or of capturing an image of the private area of a person or persons without the latter's consent, under circumstances in which such person/s has/have a reasonable expectation of privacy, or the act of selling, copying, reproducing, broadcasting, sharing, showing or exhibiting the photo or video coverage or recordings of such sexual act or similar activity through VCD/DVD, internet, cellular phones and similar means or device without the written consent of the person/s involved, notwithstanding that consent to record or take photo or video coverage of same was given by such person/s.⁷⁶

The law criminalizes the following acts:

- (a) To take photo or video coverage of a person or group of persons performing sexual act or any similar activity or to capture an image of the private area of a person/s such as the naked or undergarment clad genitals, pubic area, buttocks or female breast without the consent of the person/s involved and under circumstances in which the person/s has/have a reasonable expectation of privacy;
- (b) To copy or reproduce, or to cause to be copied or reproduced, such photo or video or recording of sexual act or any similar activity with or without consideration;
- (c) To sell or distribute, or cause to be sold or distributed, such photo or video or recording of sexual act, whether it be the original, copy or reproduction thereof; or
- (d) To publish or broadcast, or cause to be published or broadcast, whether in print or broadcast media, or show or exhibit the photo or video coverage or recordings of such sexual act or any similar activity through VCD/DVD, internet, cellular phones and other similar means or device.

The prohibition under paragraphs (b), (c) and (d) shall apply notwithstanding that consent to record or take photo or video coverage of the same was given by such person/s. Any person who violates this provision shall be liable for photo or video voyeurism as defined herein.⁷⁷

⁷⁵ See Anti-Child Pornography Act of 2009, secs 2, 21 and 22; see Cybercrime Prevention Act of 2012, sec 2 and Chapter IV.

⁷⁶ Anti-Photo and Video Voyeurism Act of 2009, sec 3.

⁷⁷ Anti-Photo and Video Voyeurism Act of 2009, sec 4.

The Act only provides one express exemption for any police or “peace officer, who is authorized by a written order of the court, to use the record or any copy thereof as evidence in any civil, criminal investigation or trial of the crime of photo or video voyeurism”.⁷⁸ It should be noted that the exemption only applies if the record or copy is used as evidence in prosecuting photo or video voyeurism cases and not other crimes.⁷⁹ Save for this exemption, evidence gathered using Sweetie 2.0 would be inadmissible in all other cases, investigations, trials and prosecutions.⁸⁰ The Anti-Photo and Video Voyeurism Act of 2009 unequivocally states that: “Any record, photo or video, or copy thereof, obtained or secured by any person in violation of the preceding sections shall not be admissible in evidence in any judicial, quasi-judicial, legislative or administrative hearing or investigation”.⁸¹ Despite the provisions of this Act, there are legal and policy grounds to argue that this exclusionary rule does not apply to the taking of photos or recording of videos of sexual acts conducted by law enforcement authorities pursuant to a lawful court order to investigate the commission of crimes other than photo or video voyeurism. It is clearly not the purpose of a special law like the Anti-Photo and Video Voyeurism Act of 2009 to restrict or effectively bar the ability of law enforcement authorities to investigate and gather evidence on other forms of sex-related crimes found in the Revised Penal Code and other special laws. Such investigatory activities carried out by the police are clearly not “photo or video voyeurism” since they are part of lawful investigations. Furthermore, using Sweetie 2.0 may involve the Data Privacy Act of 2012, specifically the possible unauthorized processing and disclosure of sensitive personal information of suspected sex offenders.⁸² The above liabilities under data privacy law do not apply if law enforcement authorities operate Sweetie 2.0 as it would be part of their lawful investigations and prosecutions.

Analysis of criminal procedure law

1.6 General description of legal framework

In the Philippines, criminal actions are instituted or commenced with the filing of a formal complaint or information. A complaint is “a sworn written statement charging a

⁷⁸ Anti-Photo and Video Voyeurism Act of 2009, sec 6.

⁷⁹ Anti-Photo and Video Voyeurism Act of 2009, sec 6.

⁸⁰ Anti-Photo and Video Voyeurism Act of 2009, sec 7.

⁸¹ Anti-Photo and Video Voyeurism Act of 2009, sec 7.

⁸² Data Privacy Act of 2012, secs 25 28 and 32.

person with an offense, subscribed by the offended party, any peace officer, or other public officer charged with the enforcement of the law violated”,⁸³ while an information is “an accusation in writing charging a person with an offense, subscribed by the prosecutor and filed with the court”.⁸⁴ Save in cases where a person is lawfully arrested without a warrant or the penalty for the offense charged is less than “four (4) years, two (2) months and one (1) day [imprisonment] without regard to the fine”, a preliminary investigation is normally held before a person is arraigned and tried.⁸⁵ The main aim of a preliminary investigation is “to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial”.⁸⁶ Preliminary investigations may be conducted by: “(a) Provincial or City Prosecutors and their assistants; (b) Judges of the Municipal Trial Courts and Municipal Circuit Trial Courts; (c) National and Regional State Prosecutors; and (d) Other officers as may be authorized by law”.⁸⁷ The above investigating officers are responsible for determining whether to file or dismiss the complaint or information.⁸⁸ During the preliminary investigation, the relevant judge or court may issue an arrest warrant.⁸⁹ Under Philippine law, a peace officer or a private person may arrest a person without a warrant in the following circumstances:

- (a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;
- (b) When an offense has just been committed and he has probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and
- (c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or is temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.⁹⁰

Aside from arrests, criminal investigations and prosecutions often necessitate conducting searches and seizures. In the Philippines, only a judge or court may issue a search warrant.⁹¹ As stated in the Philippine Constitution,

⁸³ Revised Rules of Criminal Procedure, rule 110 sec 3.

⁸⁴ Revised Rules of Criminal Procedure, rule 110 sec 4.

⁸⁵ Revised Rules of Criminal Procedure, rule 112, secs 1 and 7.

⁸⁶ Revised Rules of Criminal Procedure, rule 112 sec 1.

⁸⁷ Revised Rules of Criminal Procedure, rule 112 sec 2.

⁸⁸ Revised Rules of Criminal Procedure, rule 112 sec 4.

⁸⁹ Revised Rules of Criminal Procedure, rule 112 sec 6.

⁹⁰ Revised Rules of Criminal Procedure, rule 113 sec 5.

⁹¹ 1987 Constitution, art III sec 2; see also Revised Rules of Criminal Procedure, rule 126 secs 1 and 2.

no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.⁹²

A search though may also be conducted as an incident to a lawful arrest and a “person lawfully arrested may be searched for dangerous weapons or anything which may have been used or constitute proof in the commission of an offense without a search warrant”.⁹³

It should be noted that there are no specific laws in the Philippines on undercover policing and operations. Such activities are subject to general laws (e.g., the rights and protections granted under the Philippine Constitution) and the relevant case law on entrapment.

1.7 Investigatory powers

1.7.1 Succinct overview of investigatory powers

Council of Europe Convention on Cybercrime	The Philippines
Article 16. Expedited preservation of stored computer data	<p>Section 13 of the Cybercrime Prevention Act of 2012. Preservation of Computer Data. The integrity of traffic data and subscriber information relating to communication services provided by a service provider shall be preserved for a minimum period of six (6) months from the date of the transaction. Content data shall be similarly preserved for six (6) months from the date of receipt of the order from law enforcement authorities requiring its preservation.</p> <p>Law enforcement authorities may order a one-time extension for another six (6) months: Provided, That once computer data preserved, transmitted or stored by a service provider is used as evidence in a case, the mere furnishing to such service provider of the transmittal document to the Office of the Prosecutor shall be deemed a notification to preserve the computer data until the termination of the case.</p> <p>The service provider ordered to preserve computer data</p>

⁹² 1987 Constitution, art III sec 2; see also Revised Rules of Criminal Procedure, rule 126 sec 4.

⁹³ Revised Rules of Criminal Procedure, rule 126 sec 13.

	shall keep confidential the order and its compliance.
Article 17. Expedited preservation and partial disclosure of traffic data	Section 14 of the Cybercrime Prevention Act of 2012. Disclosure of Computer Data. Law enforcement, upon securing a court warrant, shall issue an order requiring any person or service provider to disclose or submit subscriber's information, traffic data or relevant data in his/its possession or control within seventy-two (72) hours from receipt of the order in relation to a valid complaint officially docketed and assigned for investigation and the disclosure is necessary and relevant for the purpose of investigation.
Article 18. Production order	Section 14 of the Cybercrime Prevention Act of 2012. Disclosure of Computer Data. Law enforcement, upon securing a court warrant, shall issue an order requiring any person or service provider to disclose or submit subscriber's information, traffic data or relevant data in his/its possession or control within seventy-two (72) hours from receipt of the order in relation to a valid complaint officially docketed and assigned for investigation and the disclosure is necessary and relevant for the purpose of investigation.
Article 19. Search and seizure of stored computer data	Section 15 of the Cybercrime Prevention Act of 2012. Search, Seizure and Examination of Computer Data. Where a search and seizure warrant is properly issued, the law enforcement authorities shall likewise have the following powers and duties. Within the time period specified in the warrant, to conduct interception, as defined in this Act, and: (a) To secure a computer system or a computer data storage medium; (b) To make and retain a copy of those computer data secured; (c) To maintain the integrity of the relevant stored computer data; (d) To conduct forensic analysis or examination of the computer data storage medium; and (e) To render inaccessible or remove those computer data in the accessed computer or computer and communications network. Pursuant thereof, the law enforcement authorities may

	<p>order any person who has knowledge about the functioning of the computer system and the measures to protect and preserve the computer data therein to provide, as is reasonable, the necessary information, to enable the undertaking of the search, seizure and examination.</p> <p>Law enforcement authorities may request for an extension of time to complete the examination of the computer data storage medium and to make a return thereon but in no case for a period longer than thirty (30) days from date of approval by the court.</p>
Article 20. Real-time collection of traffic data	There are no specific rules. The general principles and rules on searches and seizures apply.
Article 21. Interception of content data	There are no specific rules. The general principles and rules on searches and seizures apply.
Destruction of computer data	Section 17 of the Cybercrime Prevention Act of 2012. Destruction of Computer Data. Upon expiration of the periods as provided in Sections 13 and 15, service providers and law enforcement authorities, as the case may be, shall immediately and completely destroy the computer data subject of a preservation and examination.

1.7.2 Human rights

The above investigatory powers are subject to fundamental constitutional rights and legal protections. Persons have the right against unreasonable searches and seizures. Article III Section 2 of the Philippine Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.⁹⁴

As a general rule, it is mandatory for law enforcement authorities to obtain a warrant from a judge or court in order to conduct searches and seizures. Furthermore, a person's right to privacy of communication and correspondence is protected. As stated in the Constitution: "The privacy of communication and correspondence shall be inviolable except upon lawful

⁹⁴ 1987 Constitution.

order of the court, or when public safety or order requires otherwise as prescribed by law”.⁹⁵ A judicial warrant or court order is therefore needed to collect or intercept a person’s communications or correspondence. In case any collection, interception, search or seizure does not comply with the constitutional and legal requirements, “[a]ny evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding”.⁹⁶ Criminal investigations and prosecutions must also respect the rights of the accused, including the right to due process,⁹⁷ the right of presumption of innocence,⁹⁸ the right to a fair trial,⁹⁹ and the right against self-incrimination.¹⁰⁰

1.7.3 Entrapment

Under Philippine law, there is an important distinction between entrapment and instigation. An arrest made pursuant to an entrapment is lawful, while one based on instigation or inducement is prohibited. According to the Supreme Court,

Entrapment is the employment of such ways and means for the purpose of trapping or capturing a lawbreaker. Oftentimes it is the only effective way of apprehending a criminal in the act of the commission of the offense. In entrapment the idea to commit the crime originated from the accused. Nobody induces or prods him into committing the offense. A criminal is caught committing the act by ways and means devised by peace officers.

It must be distinguished from inducement or instigation wherein the criminal intent originates in the mind of the instigator and the accused is lured into the commission of the offense charged in order to prosecute him. The instigator practically induces the would-be accused into the commission of the offense and himself becomes a co-principal. In entrapment ways and means are resorted to for the purpose of capturing the lawbreaker in *fragrante delicto*. In entrapment, the crime had already been committed while in instigation, it was not and could not have been committed were it not for the instigation by the peace officer.¹⁰¹

In another case, the Supreme Court further explains the difference between lawful entrapment as opposed to instigation:

There is entrapment when law officers employ ruses and schemes to ensure the apprehension of the criminal while in the actual commission of the crime. There is instigation when the accused was induced to commit the crime. The difference

⁹⁵ 1987 Constitution, art III sec 3(1).

⁹⁶ 1987 Constitution, art III sec 3(2).

⁹⁷ 1987 Constitution, art III sec 14(1).

⁹⁸ 1987 Constitution, art III sec 14(2).

⁹⁹ 1987 Constitution, art III sec 14(2).

¹⁰⁰ 1987 Constitution, art III sec 17.

¹⁰¹ *People v Gatong-o*.

in the nature of the two lies in the origin of the criminal intent. In entrapment, the *mens rea* originates from the mind of the criminal. The idea and the resolve to commit the crime comes from him. In instigation, the law officer conceives the commission of the crime and suggests to the accused who adopts the idea and carries it into execution.

The legal effects of entrapment and instigation are also different. As already stated, entrapment does not exempt the criminal from liability. Instigation does.¹⁰²

In light of the above court rulings, the use of Sweetie 2.0 to investigate webcam child sex abuse would be considered permissible and lawful entrapment. It is clear that the *mens rea* or criminal intent to commit sex-related offenses originated from the alleged sex offenders themselves. Since Sweetie 2.0 is only used in existing online fora and chatrooms known to be frequented by persons seeking to have online sex with children, whoever is controlling Sweetie 2.0 (whether its developer or law enforcement authorities) cannot be accused of instigating or inducing these people to commit crimes. The alleged offenders already had the intent to commit sex crimes, and the use of Sweetie 2.0 merely assisted in catching them in the act.

1.8 Succinct overview of investigatory powers in an online context

The general principles, rules and procedures for criminal investigations and prosecution mentioned in Sections 1.6 and 1.7 are applicable as well in the online context. The Cybercrime Prevention Act of 2012 provides additional investigatory powers to law enforcement authorities concerning computer data and systems

1.8.1 Preservation and disclosure of computer data

There are three types of computer data involved an investigation: subscriber's information, traffic data, and content data. Subscriber's information is defined as:

any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services *other than traffic or content data* and by which identity can be established:

(1) The type of communication service used, the technical provisions taken thereto and the period of service;

¹⁰² *Araneta v Court of Appeals*.

(2) The subscriber's identity, postal or geographic address, telephone and other access numbers, any assigned network address, billing and payment information, available on the basis of the service agreement or arrangement; and

(3) Any other available information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.¹⁰³

On its part, traffic data or non-content data means “any computer data *other than the content of the communication* including, but not limited to, the communication's origin, destination, route, time, date, size, duration, or type of underlying service”.¹⁰⁴ Content data “refers to the communication content of the communication, the meaning or purport of the communication, or the message or information being conveyed by the communication, *other than traffic data*”.¹⁰⁵

In relation to the preservation of computer data, Section 13 of the Cybercrime Prevention Act of 2012 requires that a service provider offering communications services must preserve traffic data and subscriber information for “a minimum period of six (6) months from the date of the transaction”.¹⁰⁶ With respect to content data, it must be “preserved for six (6) months from the date of receipt of the order from law enforcement authorities requiring its preservation”.¹⁰⁷ A court order is not required in either case. The preservation order may be extended once “for another six (6) months”.¹⁰⁸ The law also requires the service provider “keep confidential the order and its compliance”,¹⁰⁹ which rules out the possibility of the service provider notifying or informing the relevant subscriber or user about the order and the former's compliance with it.

Unlike a preservation order, a production order to disclose computer data has stricter requirements and may not be carried out on the basis of an order from law enforcement authorities. A production order requires the issuance of a “court warrant” and the order must be “in relation to a valid complaint officially docketed and assigned for investigation and the disclosure is necessary and relevant for the purpose of investigation”.¹¹⁰ A person or service providers who receives a valid production order must “disclose or submit subscriber's

¹⁰³ Cybercrime Prevention Act of 2012, sec 3(o) (emphasis added).

¹⁰⁴ Cybercrime Prevention Act of 2012, sec 3(p) and sec 12 (emphasis added).

¹⁰⁵ Implementing Rules and Regulations of the Cybercrime Prevention Act of 2012, sec 3(m) (emphasis added).

¹⁰⁶ Cybercrime Prevention Act of 2012, sec 13.

¹⁰⁷ Cybercrime Prevention Act of 2012, sec 13.

¹⁰⁸ Cybercrime Prevention Act of 2012, sec 13.

¹⁰⁹ Cybercrime Prevention Act of 2012, sec 13.

¹¹⁰ Cybercrime Prevention Act of 2012, sec 14.

information, traffic data or relevant data in his/its possession or control within seventy-two (72) hours from receipt of the order”.¹¹¹

1.8.2 Search and seizure of computer data

The general rule is that the search, seizure and examination of computer data must be undertaken pursuant to a court order or warrant.¹¹² On the basis of a validly issued warrant to search and seize computer systems and data and “[w]ithin the time period specified in the warrant”, law enforcement authorities can carry out the following investigatory activities: “conduct interception”; “secure a computer system or a computer data storage medium”; “make and retain a copy of those computer data secured”; “maintain the integrity of the relevant stored computer data”; “conduct forensic analysis or examination of the computer data storage medium”; and “render inaccessible or remove those computer data in the accessed computer or computer and communications network”.¹¹³ The Supreme Court has ruled that these investigatory powers do not “appear to supersede existing search and seizure rules but merely supplements them”.¹¹⁴

In addition, law enforcement authorities can require the action or assistance of a service provider or any third party. Under the law, law enforcement authorities “may order any person who has knowledge about the functioning of the computer system and the measures to protect and preserve the computer data therein to provide, as is reasonable, the necessary information, to enable the undertaking of the search, seizure and examination”.¹¹⁵ However, law enforcement authorities and service providers have the additional duty to “[u]pon the expiration of the periods as provided... immediately and completely destroy the computer data subject of a preservation and examination” pursuant to a preservation order or a search warrant.¹¹⁶

1.9 Application of relevant investigatory powers to the Sweetie case

Any of the investigatory powers discussed above can be used or applied to cases of webcam child sex abuse and sex tourism involving real children and minors since they

¹¹¹ Cybercrime Prevention Act of 2012, sec 14.

¹¹² Cybercrime Prevention Act of 2012, sec 14.

¹¹³ Cybercrime Prevention Act of 2012, sec 15.

¹¹⁴ *Disini, Jr. v Secretary of Justice*.

¹¹⁵ Cybercrime Prevention Act of 2012, sec 15.

¹¹⁶ Cybercrime Prevention Act of 2012, sec 17.

concern the investigation and prosecution of various sex-related crimes (see Sections 1.4.2, and 1.4.3). There are grounds to undertake the search, seizure, preservation and production of computer systems and data in cases involving real children because a crime is either being, about to be, or has been committed. However, as discussed above, the only crimes applicable in the case of Sweetie 2.0 are grooming, luring, cybersex, and attempted cybersex (see Sections 1.4.2.5, 1.4.2.7 and 1.5). This means that if law enforcement authorities utilize Sweetie 2.0 to combat webcam child sex abuse, they will only be able to use these investigatory powers if these four crimes are involved. Short of this, there will be no legal basis for law enforcement authorities to search, intercept or collect data from or about suspected sex offenders since the latter are neither involved in the commission of any crime.

With regard to the admissibility of any evidence or data gathered, Sweetie 2.0's chat script may be used as evidence in criminal prosecutions for the crimes of grooming, luring, cybersex, and attempted cybersex. With respect to other sex-related crimes, any computer data gathered by law enforcement authorities could be deemed inadmissible since such investigations may be deemed invalidly undertaken since, in relation to Sweetie 2.0, those other sex crimes do not apply. Without a crime being, about to, and having been committed, there would be no legal or factual bases on the part of law enforcement to conduct an investigation. The Cybercrime Prevention Act of 2012 contains an exclusionary rule that clearly states that “[a]ny evidence procured without a valid warrant or beyond the authority of the same shall be inadmissible for any proceeding before any court or tribunal”.¹¹⁷

It could be argued that any computer data collected by Sweetie 2.0's developer or operator would not be covered by the exclusionary rule since this rule only applies to unlawful searches and seizures carried out by government and not those conducted by private persons or entities.¹¹⁸ The Supreme Court has ruled that, “the Bill of Rights cannot be invoked against acts of private individuals, being directed only against the government and its law-enforcement agencies as a limitation on official action”.¹¹⁹ As such, computer data gathered by a private entity like Sweetie 2.0's operator can be used as evidence to prosecute alleged sex offenders. It should be noted though that, even if the computer data collected through Sweetie 2.0 is admissible, the private person may be subject to a civil action for damages for violating the constitutional and human rights of suspected sex offenders. Under Philippine law, “[a]ny public officer or employee, or any private individual, who directly or

¹¹⁷ Cybercrime Prevention Act of 2012, sec 18.

¹¹⁸ *People v Marti*.

¹¹⁹ *People v Domasian*.

indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages” including “[t]he right to be secure in one’s person, house, papers, and effects against unreasonable searches and seizures” and “[t]he privacy of communication and correspondence.¹²⁰ In its use of Sweetie 2.0, a private person may be violating the fundamental rights and liberties of people and may be liable to pay damages to the offended parties. The law does not provide any express or special exemptions or defenses to the claim for damages.

1.10 Relevant aspects of digital forensic evidence

The Rules on Electronic Evidence do not contain specific rules on the collection of evidence in an online context and the rules are mostly concerned with the introduction and admission of electronic documents in court proceedings.¹²¹ There are also no formal standards or technical requirements for digital forensics.

Miscellaneous

The Anti-Child Pornography Act of 2009 imposes additional duties on internet services providers (ISPs) in relation to online child pornography. The law requires ISPs to “notify the Philippine National Police (PNP) or the National Bureau of Investigation (NBI) within seven (7) days from obtaining facts and circumstances that any form of child pornography is being committed using its server or facility”.¹²² ISPs must also “preserve such evidence for purposes of investigation and prosecution by relevant authorities”.¹²³ Furthermore, they should, “upon the request of proper authorities, furnish the particulars of users who gained or attempted to gain access to an internet address which contains any form of child pornography”.¹²⁴ Finally, ISPs are required to “install available technology, program or software to ensure that access to or transmittal of any form of child pornography will be blocked or filtered”.¹²⁵ Aside from ISPs, internet content hosts are also subject to positive duties. Internet content hosts have the legal responsibility to: “[n]ot host any form of child

¹²⁰ The Civil Code of the Philippines, art 32.

¹²¹ See Rules on Electronic Evidence.

¹²² Anti-Child Pornography Act of 2009, sec 9.

¹²³ Anti-Child Pornography Act of 2009, sec 9.

¹²⁴ Anti-Child Pornography Act of 2009, sec 9.

¹²⁵ Anti-Child Pornography Act of 2009, sec 9.

pornography on its internet address”; “[w]ithin seven (7) days, report the presence of any form of child pornography, as well as the particulars of the person maintaining, hosting, distributing or in any manner contributing to such internet address, to the proper authorities”; “[p]reserve such evidence for purposes of investigation and prosecution by relevant authorities”; and “upon the request of proper authorities, furnish the particulars of users who gained or attempted to gain access to an internet address that contains any form of child pornography”; and “remove any form of child pornography within forty-eight (48) hours from receiving the notice that any form of child pornography is hitting its server”.¹²⁶ In relation to other business establishments, the Anti-Child Pornography Act of 2009 stipulates that “photo developers, information technology professionals, credit card companies and banks and any person who has direct knowledge of any form of child pornography activities” have a “duty to report any suspected child pornography materials or transactions to the proper authorities within seven (7) days from discovery thereof”.¹²⁷ Sweetie 2.0’s developer or operator can trigger the above duties of Philippine ISPs, internet content hosts and other business establishments by informing them about such facts and instances of child pornography on their systems and services that the developer or operator was able to gather through Sweetie 2.0. The ISPs, internet content hosts and other businesses would then be obligated to notify law enforcement and preserve and provide the necessary information and computer data to the authorities.

It is worth noting that child pornography is treated as a transnational crime under Philippine law and is potentially an extraditable offense.¹²⁸ In addition, the Philippines has extra-territorial jurisdiction over crimes punished under the Anti-Trafficking in Persons Act of 2003 (as amended) “even if committed outside the Philippines”.¹²⁹ An act of trafficking is considered a “continuing offense”,¹³⁰ which means that an offender may be arrested or searched at any time or place without need of a warrant.

Conclusions and recommendations

In conclusion, a person engaged in webcam child sex abuse or sex tourism with real minors and children can be the subject of a criminal investigation and prosecution for

¹²⁶ Anti-Child Pornography Act of 2009, sec 11.

¹²⁷ Anti-Child Pornography Act of 2009, sec 10.

¹²⁸ Anti-Child Pornography Act of 2009, secs 22 and 23.

¹²⁹ Anti-Trafficking in Persons Act of 2003 (as amended), sec 26-A.

¹³⁰ Anti-Trafficking in Persons Act of 2003 (as amended), sec 26-A.

violating a number of crimes under the Revised Penal Code and special laws, namely: child sexual abuse, child prostitution, child sexual exploitation, child pornography, pornographic performances of children, corruption of children (as accomplices), grooming, luring, qualified trafficking in persons, attempted trafficking in persons, child sex tourism, cybersex, and attempted cybersex. However, with regard to Sweetie 2.0, the possible crimes that may be committed are limited to cybersex, attempted cybersex, grooming, and luring because these are the only offenses that do not require the presence or involvement of an actual child or minor for their commission. Furthermore, since the general rule is that criminal investigations are only conducted when a crime has been, is being or is about to be committed, Sweetie 2.0 can only be used *in the first stance* to investigate these four offenses.

Nonetheless, while it may appear that the utility of Sweetie 2.0 to gather evidence about online child sexual abuse and prosecute offenders is somewhat limited, the crimes of cybersex and attempted cybersex actually cover many actions and preparatory activities that sex offenders normally undertake to commit many other sex-related crimes against children. This means that once these sex offenders perpetrate cybersex or attempted cybersex (i.e., any lascivious exhibition of sexual organs or sexual activity with the aid of a computer system), it would serve as a legal basis for law enforcement authorities to conduct further investigations not just into cybersex but also other sex-related crimes that these offenders may commit or have committed. By engaging or attempting to engage in cybersex, the offenders have committed a crime, which means that, in addition to giving grounds to arrest them, law enforcement authorities have probable cause to conduct further investigations, as well as to request a judge or court to issue the necessary orders or search warrants in connection with all of the possible crimes that these offenders may commit or have committed.

As a matter for law reform, it would be helpful in the fight against online child abuse for other countries to include cybersex in the catalogue of child sexual abuse offenses and make it a crime to commit or attempt to commit *cybersex with a child or someone who the offender believes to be a child*. With the growing use of digital and online technologies to commit child sex abuse, criminalizing cybersex with a child would improve the ability of the police and law enforcement bodies to undertake undercover operations and use advanced computer systems like Sweetie 2.0 to investigate and prosecute online sex offenders more effectively and efficiently and on a much larger scale.

With regard to procedural matters, Sweetie 2.0 can be lawfully used in the first instance to investigate sex-related crimes against children such as cybersex, attempted cybersex, grooming and luring. Since entrapment is permissible under Philippine law,

Sweetie 2.0 can be used to catch sex offenders in the act of committing these offenses. In order to make the use of Sweetie 2.0 applicable to the crimes of grooming and luring, it would be advisable to design Sweetie 2.0 to be semi-automated or not completely autonomous so that Sweetie 2.0's human operator would fall under the category of "someone who the offender believes to be a child".¹³¹

Finally, it is recommended that Sweetie 2.0's developer or operator work together with law enforcement authorities when using Sweetie 2.0 to investigate, identify or deter webcam child sex abuse or online sex tourism. Otherwise, the developer or operator could potentially find itself liable for the crimes of pandering and photo or video voyeurism (see Section 1.5). Moreover, by undertaking investigations on its own and without the cooperation or assistance of law enforcement authorities, Sweetie 2.0's developer or operator could be charged with violating the Data Privacy Act of 2012 for unauthorized processing and disclosure of sensitive personal data of suspected sex offenders (see Section 1.5). Furthermore, it could find itself civilly liable for damages for violating the rights and liberties of the latter (see Section 1.9).

¹³¹ Anti-Child Pornography Act of 2009, secs 3(h) and 3(i).

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Rules and Regulations on the Reporting and Investigation of Child Abuse Cases

Rules on Electronic Evidence

Special Protection of Children Against Abuse, Exploitation and Discrimination Act

The Revised Penal Code (as amended)

The Anti-Rape Law of 1997