THE LAW SOCIETY OF HONG KONG 香港律師會

LAW REFORM COMMISSION REPORT ON MISCELLANEOUS SEXUAL OFFENCES

SUBMISSIONS

1. On 16 May 2018, the Law Reform Commission ("LRC")'s Review of Sexual Offences Sub-committee issued a consultation paper on its proposals to reform the law concerning various miscellaneous sexual offences ("Consultation Paper").

2. The Law Society provides the following comments in response. Unless indicated otherwise, the paragraph numberings appearing below refer to those in the Consultation Paper.

INCEST

Recommendation 1: ***The specific offence of incest be retained but should be reformed. Whether it should apply to other forms of penetration or sexual activity and cover adoptive parents be considered by the Hong Kong community***

[The LRC] recommend that the offence of incest be retained and the term incest should continue to be used.

Law Society's Response:

3. We agree that the offence of incest be retained and the term incest should continue to be used.

[The LRC] also recommend that the offence of incest be reformed and the new offence should:

(a)	*be gender neutral;*
(b)	*cover all penile penetration of the mouth, vagina and anus; and*
(c)	*be extended to cover uncles/aunts and nephews/nieces (who are blood relatives).*

Law Society's Response:

4. We agree to the Recommendations (a) and (b) in the above box. Additionally, we have the following observations on gender neutrality.

Gender Neutrality

5. As proposed, the reformed offence is to cover *all forms of penile penetration* (paragraph 1.60 of the Consultation Paper). That would, prima facie, render the offence to be applicable to only one gender.

6. We do not believe the above is the intention of the LRC. Gender neutrality, as well as avoidance of distinctions based on sexual orientation, are two of the guiding principles for reform on substantive law on sexual offences[1].

7. We surmise that the reform on the offence of incest is to also cover situations where, in a blood relation, the female allows or causes penile penetration to herself by the male victim. The above has not sufficiently been made clear in the Consultation Paper and should be clarified.

8. By way of comparison, we note section 376G of the Singaporean *Penal Code.* The offences under the Penal Code are applicable to both genders.

"Section 376G of the Singaporean Penal Code

(1) Any man of or above the age of 16 years (A) who —

(a) sexually penetrates the vagina or anus of a woman (B) with a part of A's body (other than A's penis) or anything else; or

(b) penetrates the vagina, anus or mouth of a woman (B) with his penis, with or without B's consent where B is to A's knowledge A's grand-daughter, daughter, sister, half-sister, mother or

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[1] See LRC's report on review of *Rape and Other Non-consensual Sexual Offences*

grandmother (whether such relationship is or is not traced through lawful wedlock), shall be guilty of an offence.

(2) Any woman of or above the age of 16 years who, with consent, permits her grandfather, father, brother, half-brother, son or grandson (whether such relationship is or is not traced through lawful wedlock) to penetrate her in the manner described in subsection (1)(a) or (b), knowing him to be her grandfather, father, brother, half-brother, son or grandson, as the case may be, shall be guilty of an offence.

(3) Subject to subsection (4), a man who is guilty of an offence under subsection (1) shall be punished with imprisonment for a term which may extend to 5 years

(4) If a man commits an offence under subsection (1) against a woman under 14 years of age, he shall be punished with imprisonment for a term which may extend to 14 years

(5) A woman who is guilty of an offence under subsection (2) shall be punished with imprisonment for a term which may extend to 5 years."

Uncles/Aunts and Nephews/Nieces

9. As for the Recommendation (c) in the above box (i.e. the proposed extension of the offence of incest to cover uncles/aunts and nephews/nieces), we have the following comments.

(a) The LRC said *"people in the relationship of [uncles/aunts and nephews/nieces] are potentially easy preys to sexual abuse in the family*" (paragraph 1.75, LRC report). We express no view as to whether the quoted statement is correct or not.

(b) We consider the offence of incest, if extended, should be on the basis of how close the two relatives are in terms of their blood relationship.

(c) In terms of blood relationship (or consanguinity), we consider uncles/aunties and nephews/nieces are sufficiently close[2]. The consanguinity by itself merits the extended coverage of the offence of incest, as proposed.

(d) In making the above comment, we have taken into account the meaning of the term "uncles/aunties" in Chinese – in the Chinese LRC consultation paper, the term "uncles/aunties" are meant to be "伯父、伯母、叔父、叔母、舅父、舅母、姑丈、姑母、姨丈及姨母" (see pg. 26 of the Chinese LRC report). We are of the view that the reformed offence of incest should be extended to the above 10 categories of relatives.

[The LRC] are of the view that the issue of whether the new offence should:

(a) apply to other forms of penetration or sexual activity; and

(b) cover adoptive parents

should be considered by the Hong Kong community. Accordingly, [The LRC] invite the community to express their views on these issues.

Law Society's Response:

10. We agree to the Recommendation (a), but not (b) in the above box.

Adoptive Parents

11. Recommendation (b) puts adoptive parents in the same footing as natural parents insofar as the offence of incest is concerned (paragraph 1.82). The justifications put forward by the LRC on this proposal appear to be the following:

(a) "adoptive parents undertake lifelong trust and responsibility to the adopted children" (paragraph 1.79);

(b) Section 27(1) and Scheduled 5 of the Marriage Ordinance, Cap 181 provides that the marriage between an adoptive parent and an adoptive child is unlawful (paragraph 1.81);

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[2] See the concept of "coefficient of relationship" by Sewall Wright, an American Naturalist: https://en.wikipedia.org/wiki/Coefficient_of_relationship

We have reservations on the above justifications.

12. We consider that, absent any overriding conditions, a necessary requirement for the offence of incest should be the existence of blood relationship. That is not present in adoptive parents / child relationship.

13. Blood relationship as a pre-requisite for the offence of incest is acknowledged tacitly by the LRC itself. In the Consultation Paper, the LRC states the following (emphasis supplied):

> *"1.105 [The LRC] do not consider that the new offence [of incest] should be extended to cover [that relationship] given that a blood relation does not exist between such persons [of that relationship] and the respective child. Furthermore, it may be too wide an extension of the scope of this new offence. Incest is well known to be an offence covering sexual activity between close family members. Such extension would bring the scope of incest beyond sexual activity between close family members, for example, nannies looking after the child. Sexual abuse committed by those who have sought a position of trust in a family in order to gain access to children should be dealt with by way of offences involving a breach of trust rather than incest."*

14. The LRC in the above same paragraph proposes, and we agree, that sexual abuses committed by those in trust relationship should be dealt with by other offences, and not by incest.

15. On the other hand, the LRC has *not* extended the offence to other non-blood relations: adoptive siblings (paragraph1.89), step-parents or foster-parents (paragraph1.99). There is no justification being put forward to distinguish adoptive parents from the others.

16. In the course of deliberation, we did receive views that there is in Hong Kong legislation specifically dealing with the rights and duties of adoptive parents (viz. the Adoption Ordinance, Cap 290). We however have not been given an explanation as to why and, if so, in what ways the Adoption Ordinance could differentiate the approaches to the different non-blood related relationships, insofar as the offence of incest is concerned, and makes only adoptive parents liable for that offence.

17. The other justification of the LRC for the extension of the offence seems to be on the prohibition of marriages between adoptive parents and their children.

18. In respect of the above justification, our researches show that incest and incestuous marriage could be approached differently in other countries and that prohibition of marriages does not necessarily mean that there would be similar prohibition of sex relations between blood relatives.

19. For instance, in Mainland China, subject to further researches, incest is not criminalised under the *Criminal Law of People's Republic of China.* However, there are prohibitions on incestuous marriage:

    (a) According to Article 7(1) of *Marriage Law of the People's Republic of China*, no marriage may be contracted if the man and the woman are lineal relatives by blood, or collateral relatives by blood up to the third degree of kinship.

    (b) According to Article 10(2), the marriage shall be invalid if there is the prohibited degree of kinship between the married parties.

20. Morally speaking, adoptive parents having sex relationship with their children is distasteful and reprehensible. However, *as a matter of legal analysis*, stronger justifications and further deliberations are required before the offence of incest could be extended to adoptive parents.

[The LRC] recommend the retention of the need for the Secretary for Justice's consent to prosecute.

Law Society's Response:

21. At this stage we have no views on this Recommendation.

EXPOSURE

Recommendation 2: ***Proposed new offence of sexual exposure***

[The LRC] recommend that the new legislation should include an offence of sexual exposure along the lines of section 8 of the Sexual Offences (Scotland) Act

[The LRC] also recommend that the offence of sexual exposure should have all of the following elements:

(1) exposure of one's genitals in a sexual manner to another person ("B") with the intention that B will see them;

(2) the exposure is made in a public or private place;

(3) the exposure is made without the consent of B and without any reasonable belief that B consents; and

(4) the purpose of the exposure is for
(i) obtaining sexual gratification, or
(ii) humiliating, distressing or alarming the victim.

Law Society's Response:

22. We note under the proposal the new offence should cover exposure in *any place* (paragraph 2.35).

23. We agree that this proposal could address those matters raised in the Consultation Paper (e.g. paragraph 2.4) – as in a hypothetical case of a boss in his own office exposing his private part to the secretary – for this illustration, the incident would not be a sexual assault; neither would the boss be caught under section 148 of the Crimes Ordinance (paragraph 2.1). There could be difficulties in prosecuting the offence in this hypothetical case under the current law.

24. However, the proposed new offence could be abused. The abuse could arise e.g. in an acrimonious family dispute, when a wife accuses her husband of exposing his private part at home (which the husband did not do), and then maliciously reports the matter to the Police, in order to harass the husband. The above accusation could readily be raised, because there is no statutory requirement for corroboration (see paragraphs 2.15 – 2.41).

25. The danger of making false accusations (as in the above example) should be given a very careful consideration. This is particularly relevant, given the fact that the law on hearsay evidence in criminal matters could be revamped. At the time of this submission, we note an Evidence (Amendment) Bill 2018 has been produced by the Department of Justice. This amendment bill seeks to reform the common law rule against hearsay evidence in criminal proceedings by way of an elaborate legislative scheme. The amendment Bill is to be introduced to the Legislative Council in July 2018.

VOYEURISM

Recommendation 3:	***Proposed new specific offence of voyeurism***
[The LRC] recommend introducing a new specific offence of voyeurism.	
[The LRC] recommend that such an offence be along the lines of section 67 of the English Sexual Offences Act 2003	

Law Society's Response:

26. We note under the current law, acts of voyeurism could be prosecuted for loitering (section 160, Crimes Ordinance) or for disorder in public place (section 70B(2), Public Order Ordinance); both of these offences require however the element of "public" (paragraph 3.3). If the act concerns the use of computer, the offenders may be prosecuted under section 161 of the Crimes Ordinance (paragraph 3.4). The LRC asserts that there are limitations with the above and proposes a new offence of voyeurism.

27. In formulating its proposal, the LRC takes on board the English approach (paragraph 3.22), and follows section 67 of the English Sexual Offences Act 2003:

Section 67 of the English Sexual Offences Act 2003

"*(1) A person commits an offence if—*

(a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and

(b) he knows that the other person does not consent to being observed for his sexual gratification.

(2) A person commits an offence if—

(a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and

(b) he knows that B does not consent to his operating equipment with that intention.

(3) A person commits an offence if—

(a) he records another person (B) doing a private act,

(b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and

(c) he knows that B does not consent to his recording the act with that intention.

(4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1)."

An offence under section 67 in the UK is triable either way (i.e. in the magistrates' court or the Crown court, depending on seriousness). The maximum sentence on conviction in the magistrates' court is six months and/or a fine. The maximum sentence on conviction in the Crown court is two years imprisonment.

28. In certain circumstances a person convicted of a section 67 offence will be made subject to the notification requirements set out in Part 2 of the Sexual Offences Act 2003 (i.e. the sex offenders register).

29. We support the two Recommendations in the above box, subject to the caveat that in considering the reform on voyeurism, the new offence should also address the offence of taking upskirt photograph ("upskirting").

30. Section 67 of the English Act currently covers four types of activity. They are set out in section 67(1), (2), (3) and (4) (see above). A key requirement of the above section 67 offences is that the person being observed or recorded must be doing a *"private act"*. "Private act" is defined in section 68 of the 2003 Act – a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and

- the person's genitals, buttocks or breasts are exposed or covered only with underwear;
- the person is using a lavatory, or
- the person is doing a sexual act that is not of a kind ordinarily done in public.

31. The current requirement in the UK for a section 67 offence to involve a "private act" creates problems in the context of upskirting, which by its nature tends to take place when the victim is in a public place.

32. Taking intimate videos without consent in upskirting cases often does not fall within the above offence, even when done for sexual gratification. The offence requires the victim to be doing a private act, or to be in a place such as a lavatory or a changing room where some degree of exposure or nudity may occur but one can reasonably expect privacy. Neither of these conditions is fulfilled when the victim is fully dressed in a public place. (The UK Law Commission in its report[3] commented that this is the reason why the relevant criminal charge would usually be made out not under voyeurism but another offence (viz. outraging public decency[4])).

33. The above shortcomings have been addressed in Scotland which introduced legislative amendments to make specific provision to cover upskirting.

34. New sections (viz. subsections 9(4A) and (4B)) have been introduced in 2010 to the Sexual Offences (Scotland) Act 2009. They provide that a person ("A") will commit the offence of voyeurism if they do any of the following:

"(4A) The fourth thing is that A —

(a) without another person ("B") consenting, and

(b) without any reasonable belief that B consents, operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

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[3] Law Commission, Simplification of Criminal Law: Public Nuisance and Outraging Public Decency, Law Com No 358, June 2015. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/438194/50076_Law_Commission_HC-213_bookmark.pdf

[4] See *R v Hamilton* [2007] EWCA Crim 2062. In that case a barrister was convicted of outraging public decency after filming underneath the clothes of women and a 14 year old girl while they shopped in supermarkets.

(4B) The fifth thing is that A—

(a) without another person ("B") consenting, and

(b) without any reasonable belief that B consents, records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.

35. Subsection 9(7) (as above-mentioned) provides that these things must be done for the purposes of "obtaining sexual gratification (whether for A or C)", or "humiliating, distressing or alarming B". There is deliberately no requirement for the victim to have been doing a private act at the time they are observed or recorded. The offence is triable either way. The maximum penalty following summary conviction is 12 months and/or a fine. The maximum penalty following conviction on indictment is five years and/or a fine.

36. The Scottish Government' explained that:

- subsection 9(4A) offence is intended to cover cases such as "where a person uses a hidden video camera to view the buttocks or genitals of passers-by".
- The subsection 9(4B) offence is intended to cover cases such as "where a person uses a hidden camera to record so-called 'up-skirt' photographs of people".
- In all cases, the offence is committed where it may reasonably be inferred that A acted for the purpose of obtaining sexual gratification. or for the purpose of humiliating, distressing or alarming B. As such, these provisions would not apply where, for example, a shop fitted CCTV in changing rooms for security purposes (though an offence under this section may be committed by someone who subsequently misused the CCTV for voyeuristic purposes).
- Anyone convicted of a section 9 offence is placed on the sex offenders register.

37. The UK is also taking steps to legislate against upskirting, as a result of a campaign by a Ms Gina Martin. In that case, police declined to prosecute a man accused of taking underskirt pictures of Ms Martin on the man's phone at a music festival in July 2017 in London. As a victim of upskirt photography, Ms Martin launched a petition for upskirting to be made illegal under the Sexual Offences Act 2003. Her petition received enthusiastic support from the community[5].

38. The above campaign was backed by Government[6] - the Justice Minister Lucy Frazer introduced a public bill as the Voyeurism (Offences) (No. 2) Bill[7] to the House of Commons. It was given its First Reading on 21 June 2018.

39. The second reading of the bill took place on 3 July 2018 and the Bill was committed to a Public Bill Committee for further scrutiny[8].

40. The Bill adopts a similar approach to that taken in Scotland, adding a new section 67A to the Sexual Offences Act 2003, which sets out two new voyeurism offences aimed at tackling "upskirting".

> *"**67A Voyeurism: additional offences***
>
> *(1) A person (A) commits an offence if—*
>
> *(a) A operates equipment beneath the clothing of another person (B),*
>
> *(b) A does so with the intention of enabling A or another person (C),for a purpose mentioned in subsection (3), to observe—*

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[5] The Petition Site, I had upskirt photos taken of me – please sign to make this illegal under the Sexual Offences Act of 2003: https://www.thepetitionsite.com/takeaction/887/239/401/

See also the Petition Site, Email your MP: Make upskirt photos a specific sexual offence, whenMarin started another petition asking people to support the bill https://www.thepetitionsite.com/takeaction/569/552/828/

[6] Theresa May Prime Minister of the UK had said: "Upskirting is an invasion of privacy which leaves victims feeling degraded and distressed" : https://www.thesun.co.uk/news/6560079/gina-martin-victim-upskirting-change-law/

[7] The Bill is available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0235/cbill_2017-20190235_en_2.htm#l1g1

[8] See https://www.parliament.uk/business/news/2018/july/have-your-say-on-the-voyeurism-offences-no2-bill/ and https://www.gov.uk/government/publications/voyeurism-offences-no-2-bill

(i) B's genitals or buttocks (whether exposed or covered with underwear), or

(ii) the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and

(c) A does so—

(i) without B's consent, and

(ii) without reasonably believing that B consents.

(2) A person (A) commits an offence if—

(a) A records an image beneath the clothing of another person (B),

(b) the image is of—

(i) B's genitals or buttocks (whether exposed or covered with underwear), or

(ii) the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible."

41. Two new forms of voyeurism would cover the operation of equipment or recording of an image under another person's clothing with the intention of viewing their genitals or buttocks (with or without underwear), and without that person's consent. The offences would apply where the perpetrator had a motive of either obtaining sexual gratification, or causing humiliation, distress or alarm to the victim. The new offences would be triable either way. The maximum sentence following summary conviction would be 12 months imprisonment and/or a fine. The maximum sentence following conviction on indictment would be two years and/or a fine.

42. Hong Kong does not have a specific law criminalizing upskirting. Moreover, since upskirting has not been made a sexual offence, offenders of this crime in Hong Kong might not be placed on the Sexual Conviction Record Check administered by the Hong Kong Police[9].

43. We ask the LRC to duly consider the above developments in the Scotland and in the UK.

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[9] See https://www.police.gov.hk/ppp_en/11_useful_info/eta.html

BESTIALITY

Recommendation 4: ***Bestiality be replaced by an offence of sexual intercourse with an animal***

[The LRC] recommend that the offence of bestiality in section 118L of the Crimes Ordinance (Cap 200) should be replaced by an offence of sexual intercourse with an animal.

Law Society's Response:

44. This Recommendation is supported.

NECROPHILIA

Recommendation 5: ***Proposed new offence of sexual activity with a dead person***

[The LRC] recommend that there should be a new offence of sexual activity with a dead person.

Law Society's Response:

45. This Recommendation is supported.

ADMINISTERING A SUBSTANCE

Recommendation 6: ***Administering drugs to obtain or facilitate an unlawful sexual act be replaced by the offence of administering a substance for sexual purposes***

[The LRC] recommend that the offence of administering drugs to obtain or facilitate an unlawful sexual act in section 121 of the Crimes Ordinance (Cap 200) be replaced by the offence of administering a substance for sexual purposes.

[The LRC] recommend that the proposed offence be along the lines of section 11 of the Sexual Offences (Scotland) Act 2009.

Law Society's Response:

46. The LRC proposes to revise the existing offence, on the model of section 11 of the Sexual Offences (Scotland) Act 2009, which provides as follows (with emphasis supplied):

Section 11 of the Scottish Act:

"*(1) If a person ("A") intentionally administers a substance to, or causes a substance to be taken by, another person ("B") -*

(a) without B knowing, and

(b) without any reasonable belief that B knows,

and does so for the purpose of stupefying or overpowering B, so as to enable any person to engage in a sexual activity which involves B, then A commits an offence, to be known as the offence of administering a substance for sexual purposes.

(2) For the purposes of subsection (1), if A, whether by act or omission, induces in B a reasonable belief that the substance administered or taken is (either or both) —

(a) of a substantially lesser strength, or

(b) in a substantially lesser quantity,

than it is, any knowledge which B has (or belief as to knowledge which B has) that it is being administered or taken is to be disregarded."

47. We note in particular the proposal to replace the phrase *"drug, matter or thing"* in the existing section 121 of the Crimes Ordinance by the word *"substances"*. Section 121 of the Crimes Ordinance currently reads as follows:

"Section 121 of the Crimes Ordinance:

A person who applies or administers to, or causes to be taken by, another person any drug, matter or thing with intent to stupefy or overpower that other person so as thereby to enable anyone to do an unlawful sexual act with that other person shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years."

48. The Consultation Paper is not very clear on the new offence, e.g. when the "substances" being offered are not hypnotic drugs or date rape drugs, but are simply alcoholic drinks being commonly offered in rave parties or social occasions, would this offence be applicable? Consider these situations:

(a) A offered several glasses of alcohol to B, as a prequel to their sexual activity (B knew she was offered alcohol). A honestly thought that B could take those volumes, but it turned out that B could not. Would A be innocently caught by this new offence?

(b) A asked B "would you like a drink?" – thinking that he could offer vodka mixed with orange juices, but B took the offer under the impression that she was being offered orange juices only. They then had sexual activity. Would A again be innocently caught?

49. The answers to the above might not be an easy "YES / NO" answer: what has been set out in the Consultation Paper, in our views, has not clearly explained the scope and the application of this new offence.

50. As the new offence is based on section 11 of the Scottish Act, we have researched and noted the following explanation by the Scottish Government[10]:

"52. The [Scottish section 11] offence is intended to cover the use of so-called "date rape drugs" (for example chloroform,

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[10] See http://www.gov.scot/Topics/archive/law-order/8980/rape-sexual-offences-bill/guidance

Gammahydroxybutyrate (GHB) and Rohypnol) administered without the victim's knowledge. It also covers the use of any other substance with the same intention. As such, it would cover the situation in which A 'spikes' B's drinks with alcohol without B's knowledge (i.e. where B did not know that he was consuming alcohol). On the other hand, the offence would not cover A encouraging B to get drunk, or to take other intoxicating drugs, so that A could have sex with B, where B knew that he was consuming alcohol or drugs. However, if A subsequently engaged in sexual activity with B while he or she was incapacitated through drink or drugs, this may itself be a criminal offence (see section 13).

53. The substance may be administered to B in any way, for example, in a drink, by injection, or by covering B's face with a cloth impregnated with the substance.

54. The intended sexual activity need not involve the person (A) who administers the substance. If A administers a substance to B with the intention of enabling a friend (C) to engage in sexual activity with B, A would commit this offence.

55. The offence would be completed where A administered the substance or caused B to take it with the relevant purpose in mind, regardless of whether any sexual activity actually took place. Where the intended sexual activity does take place, both the administering of the substance and the substantive sexual offence could be charged. Even if the accused was acquitted of the substantive sexual offence, because there was doubt as to whether the sexual activity had in fact taken place, it should still be possible to convict the person of the administration of the substance with intent to commit the sexual offence, if the intent is proven."

51. Would the above be the intended scope of application of the offence under the proposal? We invite clarifications.

COMMITTING AN OFFENCE WITH INTENT TO COMMIT A SEXUAL OFFENCE

Recommendation 7: ***Assault with intent to commit buggery be replaced by a new offence of committing an offence with intent to commit a sexual offence***

[The LRC] recommend that the offence of assault with intent to commit buggery in section 118B of the Crimes Ordinance (Cap 200) be replaced by a new offence of committing an offence with intent to commit a sexual offence.

[The LRC] recommend that the new offence be along the lines of section 62 of the English Sexual Offences Act 2003.

Law Society's Response:

52. We agree with the two recommendations in the box above.

TRESPASS WITH INTENT TO COMMIT A SEXUAL OFFENCE

Recommendation 8: ***Burglary (with intent to rape) be replaced by a new sexual offence of trespass with intent to commit a sexual offence***

[The LRC] recommend that the offence of burglary (with intent to rape) in section 11 of the Theft Ordinance (Cap 210) be replaced by a new sexual offence of trespass with intent to commit a sexual offence.

[The LRC] recommend that the new offence be along the lines of section 63 of the English Sexual Offences Act 2003.

[The LRC] further recommend that the new offence should cover trespass with intent to commit any sexual offence and such intent must have been formed at the time when the accused enters the premises as a trespasser.

Law Society's Response:

53. The LRC proposes to introduce a new sexual offence to be modeled on section 63 of the English Sexual Offences Act 2003. Section 63 of the English Act provides as follows:

Section 63:

"*Trespass with intent to commit a sexual offence*

(1) A person commits an offence if—

(a) he is a trespasser on any premises,

(b) he intends to commit a relevant sexual offence on the premises, and

(c) he knows that, or is reckless as to whether, he is a trespasser.

(2) In this section—

"premises" includes a structure or part of a structure;

"relevant sexual offence" has the same meaning as in section 62;

"structure" includes a tent, vehicle or vessel or other temporary or movable structure ...."

54. We have two observations on the scope of application of this new offence. Firstly, the new offence could be committed if a trespasser enters a premises with the intention to commit a relevant sexual offence inside the premises, *even when* the premises is vacant at the material time, or when the intended victim is not present in the premises. It appears that the new offence is aimed to protect victims of intrusive attacks when they are in the sanctity of their own home, where they should and they are entitled to feel safe and comfortable. The intent for this offence is likely to be inferred from what the defendant says or does to the intended victim (if there is one) or from items in possession of the defendant at the time he commits the trespass (for example, condoms, pornographic images, rope etc.).

55. From our research, we note the UK case of a 'rape tour' of British universities[11]. In that case, the defendant was charged with, and found guilty of, among others, the section 63 offence. Before

[11] See https://www.independent.co.uk/news/uk/crime/man-who-went-on-a-rape-tour-of-british-universities-is-jailed-a7053936.html

convicting the defendant, the Court received evidence of how the defendant drove through various universities, his taking detailed photos of premises where students lived, in particular entrances and access rooms, and his posing as a student for which purpose he had obtained a highly convincing fake student union ID card.

56. Our second observation is similar to our observation on the recommendation on exposure - could this offence be abused in, e.g., a family dispute where the wife could readily and maliciously accuses her innocent husband of entering her room to commit a sexual offence on her? Notably, Hong Kong is having a crowded living condition. It might not be too difficult to make out a complaint of trespass (?) for harassing people.

57. In summary, we take the view that the legal policy which underpins the proposed offence is to be welcomed (including the types of sexual offences to be covered (paragraph 6.49) and when should the intent to commit a sexual offence be formed (paragraph 6.50 – 6.52)). At the same time, we however express reservation as set out in the above.

SOME EXISTING HOMOSEXUAL OR HOMOSEXUAL-RELATED BUGGERY AND GROSS INDECENCY OFFENCES

Recommendation 9: ***Assault with intent to commit buggery, procuring others to commit homosexual buggery, gross indecency by man with man otherwise than in private, and procuring gross indecency by man with man be abolished (see near paragraph 7.4)***

[The LRC] recommend that the following offences be abolished:

(i) Assault with intent to commit buggery (section 118B of the Crimes Ordinance (Cap 200)).

(ii) Procuring others to commit homosexual buggery (section 118G of the Crimes Ordinance (Cap 200)).

(iii) Gross indecency by man with man otherwise than in private (section 118J of the Crimes Ordinance (Cap 200)).

(iv) Procuring gross indecency by man with man (section 118K of the Crimes Ordinance (Cap 200)).

Law Society's Response:

58. We note that the above Recommendations are based on the principles of gender neutrality and avoidance of the distinction based on sexual orientation. We have no objection to the above Recommendations.

CONCLUDING REMARKS

59. This Consultation Paper of the LRC is said to be the third and "the final" part of the overall of the substantive sexual offences (paragraph 18 of the Preface to the Consultation Paper). However, in the course of our preparation of this submission, we note that other jurisdictions have already been proceeding with their reviews of some other sexual offences not currently canvassed by the LRC. E.g. in the UK and also in Scotland, there have been legislation against the offence of what is colloquially called "revenge porn". This refers to the situation when a person shares or distributes intimate private videos or photographs of another person without their prior permission. This type of activity is usually conducted by an ex-partner or jealous person from a prior relationship by way of punishing, tarnishing, embarrassing and attacking the victim. In the vast majority of cases, the victim is female, and the perpetrator is

male, though this offence can occur in the opposite way or with both the victim and perpetrator being of the same sex.

60. The UK has legislated against revenge porn. *Section 33 of the Criminal Justice and Courts Act 2015*[12] makes it a criminal offence for a person to 'disclose a private sexual photograph or film if the disclosure is made (a) without the consent of the individual who appears, and (b) with the intention of causing that individual distress'.

61. For Scotland, section 2 of the *Abusive Behaviour and Sexual Harm (Scotland) Act 2016* [13] provides for an offence against revenge porn:

"A person ("A") commits an offence if—

(a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation,

(b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and

(c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent."

62. The above should be considered by LRC as part of the overall review of sexual offences, or as a separate or extended study. A timely review is justified and required, given the popularity of and the access to chat rooms and social platforms nowadays.

63. For the avoidance of doubt, we are not at this stage expressing views on whether Hong Kong should or should not legislate against revenge porn. We are also not saying that the above-mentioned is the only other sexual offences that the LRC should additionally consider[14]. We raise the above as we consider that, if another sub-committee under LRC is to be set up only years later to review this

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[12] See http://www.legislation.gov.uk/ukpga/2015/2/section/33/enacted

[13] See http://www.legislation.gov.uk/asp/2016/22/section/2/enacted

[14] See our earlier comments on upskirting. Other examples that we could suggest the LRC to consider could be law reforms relating to the offences of
(a) exposure where there is no intention to cause alarm or distress and
(b) masturbation or other sexual activity in public that does not involve exposure.

(or other) sexual offence(s), the updating process would take a very long period of time. This would leave significant legislative gaps in the protection of vulnerable persons.

A modern and a comprehensive criminal justice system protecting victims of all forms of sexual offences is important to Hong Kong.

The Law Society of Hong Kong
24 July 2018