PROPOSED INTRODUCTION OF OFFENCES OF VOYEURISM, INTIMATE PRYING, NON-CONSENSUAL PHOTOGRAPHY OF INTIMATE PARTS, AND RELATED OFFENCES

SUBMISSIONS

1. By this submission, the Law Society is responding to a consultation paper issued by the HKSAR Government in July 2020 on the proposed introduction of the *Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences* (the "Consultation Paper").

2. Instead of using the "Response Form" attached to the Consultation Paper (which mostly requires a yes/no answer), we prefer to provide a submission to reply.

3. Some of the views expressed in this Submission can only be preliminary, as the position to a certain extent depends on the actual wordings of the legislation. In our views, it is more desirable if a draft legislation could be produced with this consultation.

4. For those consultation questions where we have not in this submissions provided any or any full answers thereto, it should not be construed that we at this stage endorse or object to those proposals.

General Comments

5. In our submission of 24 July 2018 rendered in response to a consultation by the Law Reform Commission ("LRC") on its consultation on *Miscellaneous Sexual Offences*, we have already pointed out the deficiency of the current criminal justice system in

combating the sexual offences of voyeurism and upskirt photography. The need for reform is underscored by the recent Court of Final Appeal judgment in *Secretary for Justice v Cheng Ka Yee & Others* [2019] HKCFA 9 whereby, according to the Consultation Paper, the Court took the views that it will no longer be appropriate for the Prosecution to press charge under section 161 of the Crimes Ordinance (Cap 200) against upskirt photography and the distribution of intimate images without consent, if the act involves only the use of the suspect's own computer.

6. We agree that a new specific offence of voyeurism should be introduced and that this (or another) new offence should also address the offence of taking upskirt photograph.

Our further views on those issues raised in the Consultation Paper are set out in the following paragraphs.

Voyeurism

7. The Government is proposing to introduce new offences on (a) *voyeurism* and (b) *intimate prying*. These proposals (Proposals 1 and 2) are tabulated in § 12 of the Consultation Paper. They are excerpted below.

	Proposal 1	**Proposal 2**
Offence	Voyeurism	Intimate prying (statutory alternative to Proposal 1, in addition to being a standalone offence)
Purpose	To obtain sexual gratification	Irrespective of the purpose
Act	• Any person who, without the consent of the victim, with or without the aid of equipment, observes the victim doing an intimate act or records images (including stills and videos) of the intimate act, or operates equipment to enable the intimate act to be observed or images of the intimate act to be recorded.	

	Proposal 1	Proposal 2
	• Any person who installs equipment, or constructs or adapts a structure or part of structure, with the purpose of enabling, without the consent of the victim, the person or another person to observe the victim doing an intimate act or record images (including stills and videos) of the intimate act, or operate the equipment for observation of the intimate act or recording of images (including stills and videos) of the victim doing an intimate act.	
Maximum Penalty	Imprisonment for 5 years	Imprisonment for 3 years

We have the following comments on the above two proposals.

Voyeurism (Proposal 1)

8. We agree that sexual gratification (or arousal) is the central component and purpose of the offence. It does not need to be the defendant's own gratification or arousal, but the alleged act must have a sexual aspect to it.

9. In our submission to the LRC's abovementioned consultation paper, we have said we agreed that the offence of voyeurism be formulated along the lines of section 67 of the English Sexual Offences Act 2003 (see our above submission rendered to the LRC's consultation on Miscellaneous Sexual Offences (excerpts on **Appendix 1** herein)). We repeat our agreement thereto in reply to the Government's Consultation Paper, with additional comments in the following.

10. For the offence of voyeurism to have taken place, the accused should know, first, that they are viewing or recording another person (when that person is engaged in an intimate act), and second, that they do not have that person's consent to do so, or that the person is unaware of the defendant's actions.

11. For the meaning of "intimate act" in the above, the Consultation Paper explains (in §22) in the following

"a person is doing an 'intimate act' if the person is in a place which would reasonably be expected to provide privacy, and –

(a) the person's genitals, buttocks, or breasts are exposed or covered only with underwear;

(b) the person is using the toilet; or

(c) the person is doing a sexual act that is not a kind ordinarily done in public."

The above is not too helpful. We consider that, among other things, the reference to "*reasonably be expected to provide privacy"* in the above should refer to a place *where the person believes* he or she is safe from surveillance or other observation, or specifically *where the person believes* he or she can undress or engages in any specific conduct, without being watched or filmed. There should be a subjective and objective consideration.

12. The issue "*reasonable expectation to provide privacy'*, as well as the issue of *consent*, received judicial scrutiny in the UK Court of Appeal. In a recent decision by the UK Court of Appeal [1], the Court considered an appeal by a man who was convicted of filming his sexual activity with two women with whom he had had sexual intercourse in their bedrooms in return for payment. The appellant accepted that the complainants had an expectation of privacy, but contended that s.67(3) and s.68 of the UK Sexual Offences Act 2003 would only provide protection if the filming occurred in a place which could reasonably be expected to provide privacy, and that his presence and participation with the complainants' consent precluded that. His above arguments failed. The Court reportedly held that *"A defendant can be guilty of an offence of voyeurism in relation [to having sex] even when he is a participant … section 67 of the [2003 Sexual Offences Act] which protects individuals against the recording of any person involved in a private act is not limited to protecting the complainant from someone not present during the act."*

[1] *R v Richards* [2020] EWCA Crim 95. See also the report of *the Guardian* of 28 Jan 2020: https://www.theguardian.com/law/2020/jan/28/filming-partner-without-their-consent-during-sex-ruled-a-criminal-offence

13. According to the UK Court of Appeal, a participant to certain activity could be guilty of a s.67(3) offence if he or she secretly records what is otherwise a lawful event in which he or she has participated. Consent to be present does not by itself amount to consent to be videoed. We in principle agree to this view.

14. There is no discussion in the Consultation Paper on the above issues. We expect a fuller discourse when the draft legislation is issued for consultation in due course.

15. Like other criminal offences, the burden of proof of the above offence must remain with the Prosecution and the offences must be proved beyond reasonable doubt.

16. The sentence for the proposed offence is 5 years. For comparison purpose, we note that in the UK, under the Section 67A(4) of the Sexual Offences Act 2003,

- the maximum penalty for summary conviction of voyeurism offences: imprisonment for a term not exceeding 12 months, or to a fine, or to both;

- the maximum penalty for conviction on indictment of voyeurism offences: imprisonment for a term not exceeding 2 years.

In the Scotland, according to Schedule 2 of the Sexual Offences (Scotland) Act 2009,

- the maximum penalty for summary conviction of voyeurism offences: Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)

- the maximum penalty for conviction on indictment of voyeurism offences: Imprisonment for a term not exceeding 5 years or a fine (or both)

We are not at this stage expressing views that the proposed sentence for the offence (5 years) is or is not appropriate, or whether it should be heavier or lighter. We invite views as to whether this proposed sentence is proportionate with other sexual offences.

Intimate prying (Proposal 2)

17. We do not agree that the "purpose" of the offence is "irrespective of the purpose". This proposed scope is too wide and is unreasonable. It goes beyond those suggested by the LRC, which do not cover crimes that lack a sexual element or the sharing of intimate videos and images online. At the same time, the scope could render the proposed offence prone to mistakes, misunderstandings, false accusations or misuses.

18. For instance, on suspicion of the husband committing an adultery, if the wife hides herself in a wardrobe and observes the husband having sex with a female, or the wife installs a camera to collect evidence for the purpose of her subsequent matrimonial proceedings, would the wife have committed the offence of intimate prying on the basis of the present proposal (although she herself is a victim of adultery)?

19. A video camera intended for security surveillance may unintentionally capture a person in a private moment, but without sexual intent. Would a security guard installing and viewing the surveillance footage be caught by the offence?

20. The answers to the above should be no, but the wife and the security guard in the above examples could be guilty of intimate prying, under the current proposal.

21. *A fortiori*, the current proposal could similarly have adverse implications to law enforcement agencies in the course of their surveillance.

22. The second bullet point under "Act" (or *actus reus*) in the table in paragraph 7 above refers to the installation of a camera or recording equipment, to enable the accused to observe or to record another person doing an intimate act. It covers the preparation for the proposed offence and thereby widens the scope of the offence of intimate prying. That heightens our concerns on misuse of this offence as, in some cases, there could be legitimate purpose for the installation of the camera or recording equipment (as in the above examples of a wife collecting evidence in her adultery case, the security guard and the law enforcement agencies in performing their lawful duties).

23. We suggest that the purpose of this offence of intimate prying (if so created) should be *for unlawful purposes (such as humiliating, alarming or distressing the other person).*

24. Our above comments rendered in respect of voyeurism (§§ 10 – 15) apply *mutatis mutandis* to this proposed offence of intimate prying.

25. By way of a passing remark we note the *actus* includes "constructs or adapts a structure or part of structure". It is not clear to us as to whether and if so how this *actus* captures the use of modern technology and equipment such as drones covertly deployed to peep and to take recordings of intimate acts. In our views, in an era when technology is developing so quickly the legislation should not be limited by a narrow definition. In the UK, Section 68 of the Sexual Offences Act 2003 (voyeurism: interpretation) provides that *'operating equipment includes enabling or securing its activation by another person without that person's knowledge.'* This includes automated equipment that has been installed without a victim's knowledge. When the Government is to draft the legislation, it should draw reference from the above.

26. We note the Government proposes that this offence *"will be a statutory alternative to the offence of voyeurism, in addition to being a standalone offence (i.e. in the course of a prosecution of voyeurism, if the only element of offence that cannot be proved is the purpose of obtaining sexual gratification, then the accused may still be convicted of the alternative offence of intimate prying)"* (§11 of the Consultation Paper). At the moment, we do not have a draft legislation for review or comment, and we do not know how this proposed alternative is to be applied.

27. As the matter now stands, we have reservation. Seemingly this proposal could duplicate with other offences. For example, according to the Government, the offence of intimate prying could attract blackmailing (§11 of the Consultation Paper). Is intimate prying for blackmailing the same as blackmailing by intimate prying?

28. As the elements of this proposed offence are not precisely defined, and there is not any detailed discussion in the Consultation Paper on the need to have an alternative offence of "intimate prying", it seems to us that this offence as proposed is framed only as a matter of convenience for the Prosecution.

29. On the sentencing for intimate prying, if the purpose of intimate prying is for blackmailing, then that offence of intimate prying by itself should be a more serious offence than voyeurism itself (which is for sexual gratification). However, the maximum sentence for intimate prying is only *3 years* (compared to 5 years for voyeurism). In Hong Kong, any person who commits blackmail shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for *14 years* (see Section 23(3) of Cap. 210 Theft Ordinance).

30. In the above case, the proposed level of sentence by itself does not reflect the gravity of the offence committed. It is also confusing the general public on the nature of the offence or the policy intent of creating this offence. We seek clarifications.

31. In passing, we have a quick research into other common law jurisdictions, but could not find a comparable criminal offence of "intimate prying". If the Government has any research on this proposed offence, we are pleased if the research papers can be shared.

Offences of Non-consensual Photography of Intimate Parts

32. The Consultation Paper has the following proposals on non-consensual photography or upskirt photographing (§15, Consultation Paper):

	Proposal 3	**Proposal 4**
Offence	Non-consensual photography of intimate parts for sexual gratification	Non-consensual photography of intimate parts irrespective of the purpose (statutory alternative to Proposal 3, in addition to being a standalone offence)
Purpose	To obtain sexual gratification	Irrespective of the purpose
Act	• Any person who, without the consent of the victim, operate equipment beneath the clothing of the	

	Proposal 3	Proposal 4
	victim to enable the person or another person to observe the victim's intimate parts or record images (including stills and videos) of the victim's intimate parts or to have access to such recorded images. • In circumstances where the intimate parts would not otherwise be visible • Applicable in both (sic) public or private place.	
Maximum Penalty	Imprisonment for 5 years	Imprisonment for 3 years

Non-consensual photography of intimate parts *for sexual gratification* (Proposal 3)

33. We agree there should be an offence to criminalize the act of non-consensual upskirt-photography done for the purpose of obtaining sexual gratification. Such an offence would then qualify as a sexual offence and be covered by the Sexual Conviction Record Check Scheme. The offence should cover any place (i.e. irrespective of whether the act took place in public or private).

34. For the "Act" (*actus reus*), we repeat that our observation on technology (§ 25) is applicable *mutatis mutandis* to the offence of upskirt photography.

35. In the drafting of the legislation, we invite the Government to look into the latest legislative amendments in the UK's *Voyeurism (Offences) Act 2019*. That creates 2 new offences criminalizing someone who operates equipment or records an image under another person's clothing (without that person's consent or a reasonable belief in their consent) with the intention of viewing, or enabling another person to view, their genitals or buttocks (with or without underwear), where the purpose is to obtain sexual gratification or to cause humiliation, distress or alarm (see new *Section 67A (Voyeurism: additional offences)* and *Section 68(1A)*

(Interpretation))[2]*.* The provisions came into effect on 12 April 2019[3] and may not be reviewed by the LRC's Review of Sexual Offences Sub-committee and thereby may not be included in their study and the related Report[4].

36. For ease of reference, section 67A (Voyeurism: additional offences) is excerpted on **Appendix 2** to this Submission.

37. We agree that the issue of "down-blousing" could be reserved for the next legislative amendment, not because that is a lesser evil, but mainly because the issues involved are less straightforward and require more deliberation. The discussion on the problem of upskirt photography on the other hand seems to be more mature and readily available. The legislative exercise should be proceeded with expeditiously.

Non-consensual photography of intimate parts *irrespective of the purpose* (Proposal 4)

38. We also agree that the act of non-consensual upskirt-photography should be outlawed irrespective of its purpose (a "catch-all" provision). Same as Proposal 3, this offence should cover any place (public or private).

39. Subject to the comments on sentencing canvassed in the ensuing paragraphs, we echo the views of the LRC in this regard[5]:

- a catch-all provision would have the advantage of criminalizing acts of non-consensual upskirt-photography which are committed by persons under the employment of a third party and may do so for the purpose of obtaining a monetary return rather than for the purpose of obtaining sexual gratification or for humiliating, alarming or distressing the victim.

[2] See https://www.cps.gov.uk/legal-guidance/voyeurism

[3] See Circular No. 2019/01: Implementation of the Voyeurism (Offences) Act 2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790549/circular-voyeurism-offences-act-2019.pdf

[4] See the LRC Report on Voyeurism and Non-consensual upskirt-photography published in April 2019 https://www.hkreform.gov.hk/en/docs/rvoyeurism_e.pdf

[5] See footnote 4 above

- the catch-all provision would be a statutory alternative offence if the purpose of obtaining sexual gratification cannot be proved at trial.

40. On the sentencing for Proposal 4, we note the offence of Proposal 4 attracts a maximum sentence of 3 years. This compares to the maximum penalty of 5 years for Proposal 3. Yet the offence of Proposal 4 needs not be less heinous than the offence of Proposal 3 - for Proposal 3, the offence is for sexual gratification only, but for Proposal 4, that could be a predisposition for other more serious crimes. E.g. a person who takes upskirt photographs not for sexual gratification (or not only for that) but for sale, or for revenge porn. Victims are thereby subject to immense shame, confidence and emotional stress and their feelings of personal security can be compromised. Considering the offence from the above, the penalty should be comparable if not heavier than that for Proposal 3.

41. The circumstances envisaged in the above may (or may not) be relevant to those offences caught under Proposals 5 and 6 below. We invite discussions as to how Proposal 4 relates itself to the Proposals 5 and 6.

Offences of Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images

42. The proposed offences are summarized in the Consultation Paper in the following (§21 of the Consultation Paper):

	Proposal 5	**Proposal 6**
Offence	Distribution of surreptitious intimate images	Non-consensual distribution of intimate images

	Proposal 5	Proposal 6
Act	• Any person who distributes images (including stills and videos) that the person knows to have been obtained from voyeurism, intimate prying or non-consensual photography of intimate parts (for sexual gratification or irrespective of the purpose) (i.e. proposed offences in Proposals 1 to 4) • Regardless of whether the person created, generated, obtained, or was provided with the images in question • Covers distribution through whatever means • The victim does not consent to the distribution	• Any person who distributes images (including stills and videos) showing the victim doing an intimate act • Regardless of whether the person created, generated, obtained, or was provided with the image in question • It does not matter whether the image was taken with the victim's consent in the first place • Covers distribution through whatever means • The victim does not consent to the distribution
Maximum Penalty	Imprisonment for 5 years	Imprisonment for 5 years

43. We are in full agreement with the view of the Court of Appeal canvassed in an upskirt photograph case [6] (as quoted in the Consultation Paper (§ 17)) that *"the indecent photos taken by the defendant could be kept permanently, exchanged, circulated, sold as commodities, or even used to threaten the victim, and that therefore the victim could be subjected to harassment over a long period of time. Such conduct is an affront to the dignity of the female victim."*

[6] *Secretary for Justice v Chong Yao Long Kevin* [2013] 1 HKLRD 794.

44. We are in support of

(a) the introduction of the offence against the distribution of surreptitious intimate images (i.e. Proposal 5) - we add that this offence should be gender-neutral;

(b) the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images);

(c) the introduction of the offence against non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (i.e. Proposal 6) – we add that this offence should be gender-neutral;

(d) the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)

(e) for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution. As to whether the offence could also be constituted when the accused is reckless as to whether the victim gave such consent, we receive mixed views. We envisage situations where it is difficult to ascertain consent; we could as well think of cases where the unintentional forwarding of intimate pictures could attract criminal sanctions. On the other hand, this proposal could also be relevant to the crime of revenge porn, which potentially could be more problematic, as the receiver of intimate pictures could not ascertain consent.

All the above issues merit further discussion and elaboration.

(f) for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress.

45. We have in the above paragraphs alluded to the various issues including expectation of privacy, knowledge and consent etc (see § 12 above). Apart from these, complications could also arise in the case of a subsequent withdrawal of the consent for distribution. If a

person initially consents to the distribution of his or her intimate photos but later withdraws his or her consent, would the distributor be caught by the above offences, notwithstanding the prior agreement? These matters require further discussion and clarifications

46. As for the sentencing level, save and except our observations in the paragraph below, we express no comments at this stage and await clarifications on the above paragraphs.

47. In this day and age, technology is easily accessible and social platforms are popular. It is not difficult to envisage that youngsters would frequently receive intimate photos and videos from groups of friends[7]. They could naively think that these are funny and would, without serious thoughts or simply being reckless, forward those to another circle of friends. The chain of forwarding could easily continue, with no one checking for consent, and the "forwarding" could be within the meaning of "distribution".

48. The Consultation Paper is not clear as to whether the Government, in offering Proposal 6, has taken into account such mode of non-consensual "distribution" of intimate pictures on social media platforms. While we are not advocating a separate sentencing regime for this sexual offence for a particular group of offenders (e.g. youngsters), we seek a thorough policy deliberation on the above situation.

Intimate acts and Intimate parts

49. For the consultation question on "intimate act", please see our views in paragraph 11 in the above.

50. For the consultation question on "intimate parts" i.e. whether it should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear, without prejudice to our answer in paragraph 37 in the above, we suggest to delete the reference to "breasts and chests" for the purpose of the proposed offences.

[7] E.g. see the news article "Why an explicit picture on your child's phone could wreck their career: Lockdown saw the number of sex texts sent by teenagers rocket. Now, a leading expert sends parents a disturbing message of his own" The Daily Mail of 5 Aug 2020

Defences

51. In principle, we agree that a defence of lawful authority or reasonable excuse be provided for all the proposed offences under Proposals 1, 2, 3, 4, 5 and 6. We reserve our further comments until we are to review the draft legislation.

Sexual Conviction Record Check Scheme

52. As to whether the offences under Proposals 1 to 6 as described in the Consultation Paper be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme (the "Scheme"), we receive mixed views. Some of the offences e.g. blackmailing or revenge porn arguably might not fall within the four corners of the Scheme which is for sexual crimes. Yet, we acknowledge the underlining nature of the criminal offences (e.g. see paragraph 33 above). We are thinking whether the placing of the offenders of these offences into the Scheme should explicitly be directed by the trial judge, and invite deliberations.

Conclusion

53. We note with concern that currently there is no specific offence against voyeurism or upskirt photography. At the moment, these acts can be prosecuted only with other charges such as loitering and disorder in public places. These are of little assistance, if any. These criminal offences violate the victim's right to privacy and sexual autonomy; they cause long-term distress, humiliation, harassment and stress to the victim. We acknowledge the efforts to as soon as practicable plug the loophole for these offences. We are prepared to be engaged in further consultation on and in deliberation of the relevant draft legislation, which we keenly await.

The Law Society of Hong Kong
29 September 2020

EXCERPTS FROM LAW SOCIETY SUBMISSION IN RESPONSE TO LRC CONSULTATION ON MISCELLANENOUS OFFENCES IN APRIL 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[48])).

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.

(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.

[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.

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[9] to the House of Commons. It was given its First Reading on 21 June 2018.

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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/

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[10].

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—
(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."

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

10 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

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[11].

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

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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'.

[11] See https://www.police.gov.hk/ppp_en/11_useful_info/eta.html
[12] See http://www.legislation.gov.uk/ukpga/2015/2/section/33/enacted

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 (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

[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.

UK SEXUAL OFFENCES ACT 2009 - EXCERPTS

67AVoyeurism: 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—

(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,

(c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and

(d) A does so —

(i) without B's consent, and

(ii) without reasonably believing that B consents.

(3) The purposes referred to in subsections (1) and (2) are —

(a) obtaining sexual gratification (whether for A or C);

(b) humiliating, alarming or distressing B.

(4) A person guilty of an offence under this section is liable —

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.

(5) In relation to an offence committed before the coming into force of section 154(1) of the Criminal Justice Act 2003 (increase in maximum term that may be imposed on summary conviction of offence triable either way), the reference in subsection (4)(a) to 12 months is to be read as a reference to 6 months