

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

**VOYEURISM
AND
NON-CONSENSUAL UPSKIRT-PHOTOGRAPHY**

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April 2019

The Law Reform Commission of Hong Kong was established by the Executive Council in January 1980. The Commission considers for reform such aspects of the law as may be referred to it by the Secretary for Justice or the Chief Justice.

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Introduction

1. The Report on Voyeurism and non-consensual upskirt-photography ("this Report") is part of the Law Reform Commission's ("LRC") overall review of the law governing sexual offences and has been prepared expeditiously to provide the LRC's final recommendation on a new and specific offence of voyeurism to deal with an act of non-consensual observation or visual recording (for example, a photograph, videotape, or digital image) of another person for a sexual purpose; and a new and specific offence in respect of non-consensual upskirt-photography.

2. The LRC is of the view that in light of the strong sentiments received during the consultation process and the imminent need¹ for the introduction of these new offences, it would be to the benefit of our community to publish this Report ahead of the Final Report on Substantive Sexual Offences (to be published).

Terms of reference

3. In April 2006, the Secretary for Justice and the Chief Justice of the Court of Final Appeal requested that the Law Reform Commission should review the law relating to sexual and related offences in Hong Kong. As a result of judicial comment in various judgments in Hong Kong as well as the public's comments on the desirability of setting up a register of sex offenders, the terms of reference were expanded in October 2006 to include a study relating to such a register. The expanded terms of reference read as follows:

"To review the common and statute law governing sexual and related offences under Part XII of the Crimes Ordinance (Cap 200) and the common and statute law governing incest under Part VI of the Ordinance, including the sentences applicable to those offences, to consider whether a scheme for the registration of offenders convicted of such offences should be established, and to recommend such changes in the law as may be appropriate."

¹ In *Secretary for Justice v Cheng Ka Yee & 3 Ors*, FACC 22/2018, the Court of Final Appeal unanimously dismissed the Government's appeal and held that s.161(1)(c) of the Crimes Ordinance (Cap 200) does not apply to the use by a person of his own computer, not involving access to another's computer. As such, the authorities can no longer rely on s.161 to prosecute acts of voyeurism and non-consensual upskirt-photography which involved the use of one's own computer (whether in a public or private place) unless such use involves access to another's computer. In any event, and notwithstanding the ruling of the said appeal case, our view is that the dishonest use of computer offence fails to deal with the criminal activity involved. Given the prevalence of upskirt-photography and the strong sentiments we received during the consultation, we see the need to introduce a specific offence as soon as possible.

The Sub-committee and its work to date

4. The Review of Sexual Offences Sub-committee ("the Sub-committee") was appointed in July 2006 to consider and advise on the present state of the law and to make proposals for reform. The Sub-committee members are:

Mr Peter Duncan, SC <i>(Chairman)</i>	Senior Counsel
Hon Mrs Justice Barnes	Judge of the Court of First Instance of the High Court
Mr Eric T M Cheung	Principal Lecturer Department of Law University of Hong Kong
Dr Chu Yiu Kong <i>[Until December 2007]</i>	Assistant Professor Department of Sociology University of Hong Kong
Mr Fung Man-chung <i>[From August 2012 to April 2018]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Paul Harris, SC <i>[Until February 2012]</i>	Senior Counsel
Mr Ho Chun-tung <i>[From August 2017]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Paul Ho <i>[From May 2016]</i>	Acting Deputy Director of Public Prosecutions
Professor Karen A Joe Laidler <i>[From September 2008]</i>	Director Centre for Criminology also Professor Department of Sociology University of Hong Kong
Mr Stephen K H Lee <i>[From January 2008 to August 2010]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Lee Wai-man, Wyman <i>[From July 2014 to August 2017]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force

Mrs Apollonia Liu <i>[Until June 2009]</i>	Principal Assistant Secretary Security Bureau
Mr Ma Siu Yip <i>[Until January 2008]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Anna Mak Chow Suk Har <i>[Until May 2011]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Man Chi-hung, Alan <i>[From September 2010 to May 2012]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Millie Ng <i>[From June 2009 to November 2015]</i>	Principal Assistant Secretary Security Bureau
Ms Pang Kit-ling <i>[From April 2018]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Ms Pang Mo-yin, Betty <i>[From May 2012 to June 2014]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Andrew Powner	Partner Haldanes, Solicitors
Ms Lisa D'Almada Remedios	Barrister
Mr Philip Ross <i>[From February 2012]</i>	Barrister
Dr Alain Sham <i>[Until May 2016]</i>	Deputy Director of Public Prosecutions Department of Justice
Mr Andrew YT Tsang <i>[From November 2015]</i>	Principal Assistant Secretary Security Bureau
Ms Caran Wong <i>[From June 2011 to August 2012]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Thomas Leung (Secretary) <i>[Until December 2017]</i>	Senior Government Counsel Law Reform Commission
Miss Sally Ng (Secretary) <i>[Co-Secretary from July 2016 to</i>	Senior Government Counsel Law Reform Commission

Previous work of the Sub-committee

5. The terms of reference cover a diverse range of sexual offences, many of which involve controversial issues requiring careful and judicious balancing of the interests at stake. It was apparent from the outset that completion of the entire reference would take considerable time and it was therefore decided that the terms of reference should be dealt with in stages, with separate papers being issued in respect of different parts of the reference.

Sexual Offences Records Checks for Child-Related Work

6. Because of widespread public concern, the Sub-committee first considered the question of establishing a system of sexual conviction records checks for those engaged in child-related work. In July 2008, the Sub-committee issued a *Consultation Paper on Interim Proposals on a Sex Offender Register*.

7. In February 2010, taking into account the views on consultation, the LRC published a *Report on Sexual Offences Records Checks for Child-Related Work: Interim Proposals*. The report recommended, among other things, the establishment of an administrative scheme to enable employers of persons undertaking child-related work and work relating to mentally incapacitated persons to check the criminal conviction records for sexual offences of potential employees. The proposals in the report were subsequently implemented by the establishment of an administrative scheme, viz, the Sexual Conviction Record Check Scheme, with effect from 1 December 2011.

Presumption that a Boy under 14 is Incapable of Sexual Intercourse

8. The Sub-committee conducted a study into the common law presumption that a boy under 14 is incapable of sexual intercourse and made proposals to the Commission to abolish this presumption.

9. Based on proposals made by the Sub-committee in December 2010, the LRC published a *Report on The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse*, recommending the abolition of this outdated common law presumption. As the issue was considered straightforward and not expected to be controversial, the Commission proceeded straight to a final report without first issuing a consultation paper.

10. The Statute Law (Miscellaneous Provisions) Ordinance 2012 (No 26 of 2012) was enacted on 17 July 2012 to implement the Commission's recommendation for the abolition of the presumption.

Overall Review of the Substantive Sexual Offences

11. The Sub-committee is currently working on an overall review of the substantive sexual offences. The review is the major part of the Sub-committee's study under its terms of reference. Its scope is wide and it raises a number of sensitive and controversial issues which require careful consideration. It is clear that the entire review will take a considerable time to complete. It was therefore decided that the review would be broken down into a number of discrete parts with separate consultation papers on specific aspects of the subjects being issued.

12. It was the Sub-committee's original plan, to be adjusted if necessary in the light of further deliberations, to divide the review into four parts, with separate consultation papers to be issued in respect of each of them and one global final report. The four parts are:

- (1) offences based on sexual autonomy (ie rape and other non-consensual sexual offences);
- (2) offences based on the protective principle (ie sexual offences involving children and persons with mental impairment and sexual offences involving abuse of a position of trust);
- (3) miscellaneous sexual offences; and
- (4) sentencing.

13. During the consultation exercises for the first two parts of the overall review, there were demands from the public as well as the Panel on Administration of Justice and Legal Services of the Legislative Council for expediting the work. In response to these demands, the Sub-committee decided to adjust its original work plan by severing the fourth part relating to sentencing from the overall review. In other words, the overall review will cover the first three parts only, and a final report would be compiled in respect of all the three consultation papers issued. Severance of the fourth part will not affect the integrity of the overall review as the fourth part is intended to cover matters not having a direct bearing on the reform of the substantive sexual offences (viz, a further review of the Sexual Conviction Record Check Scheme, and other new sentencing orders for managing sex offenders etc).

14. It should be noted that a number of new offences were created under the English Sexual Offences Act 2003 ("the English Act") following a major overhaul of the law relating to sexual offences in England and Wales in 2003.² The English Act was based on proposals made by a Home Office Review Group in the UK in its paper, *Setting the Boundaries: Reforming the Law on Sex Offences* ("the Home Office Paper").³

15. A similar reform of the law on sexual offences also took place in Scotland, resulting in the enactment of the Sexual Offences (Scotland) Act

² The English Act came into force on 1 May 2004 (see Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874).

³ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (July 2000).

2009 ("the Scottish Act") which provides a set of new statutory sexual offences to meet the needs of modern society.⁴ The Scottish Act was based on a review of the law on sexual offences by the Scottish Law Commission. The Commission consulted the public on its initial proposals in a discussion paper on *Rape and Other Sexual Offences* ("the Scottish Law Commission Discussion Paper").⁵ The final proposals were made in the Scottish Law Commission's report on *Rape and Other Sexual Offences* ("the Scottish Law Commission Report").⁶

16. In undertaking our review of the substantive sexual offences, we have had the benefit of the examination of these reviews together with more recent studies and law changes in England, Scotland and other jurisdictions such as Australia, Canada, New Zealand and Singapore. We have chosen to use the English Act as a starting point because many of the existing sexual offences in Hong Kong were originally based on similar provisions in English legislation.

Part 1 – Consultation Paper on Rape and other Non-consensual Sexual Offences

17. In September 2012, the Sub-committee issued a Consultation Paper on Rape and Other Non-consensual Sexual Offences. This consultation paper was the first of the three consultation papers issued by the Sub-committee. It covered non-consensual sexual offences which are concerned with promoting or protecting a person's sexual autonomy, such as rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent.

Part 2 – Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment

18. In November 2016, the Sub-committee issued a Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment. This consultation paper covered sexual offences involving children and persons with mental impairment and sexual offences involving abuse of a position of trust. These offences are largely concerned with the protective principle, that is to say that the criminal law should give protection to certain categories of vulnerable persons against sexual abuse or exploitation.

⁴ The Scottish Act came into force on 1 December 2010 (see Sexual Offences (Scotland) Act 2009 (Commencement No 1) Order 2010, Scottish SI 2010/357).

⁵ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (January 2006), Discussion Paper No 131.

⁶ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209.

Part 3 – Consultation Paper on Miscellaneous Sexual Offences

19. In May 2018, the Sub-committee issued a Consultation Paper on Miscellaneous Sexual Offences. It covered miscellaneous sexual offences such as incest, exposure, voyeurism, bestiality, necrophilia, acts done with intention to commit a sexual offence, together with a review of homosexual or homosexual-related buggery and gross indecency offences in the Crimes Ordinance.

This Report

20. As we have set out in the introduction, this Report is prepared expeditiously as we apprehended from the community a pressing need for the introduction of specific offences of voyeurism and non-consensual upskirt-photography. Our view is that the severance of this part from the Final Report on Substantive Sexual Offences will not affect the integrity of the overall review as the recommended new offences address concerns confined in a self-contained context. It is also our belief that the final recommendation on the new offences could be implemented by legislative amendments without the need to await the completion of the remaining tasks within the Sub-committee's terms of reference.

Consultation Paper on Miscellaneous Sexual Offences, Recommendation 3: Proposed new specific offence of voyeurism

21. In Chapter 3 of the Consultation Paper on Miscellaneous Sexual Offences ("the consultation paper"), the Sub-committee considered whether a specific offence of voyeurism should be introduced to deal with an act of non-consensual observation or visual recording (for example, a photograph, videotape, or digital image) of another person for a sexual purpose.

22. The Sub-committee is aware that there is no specific legislation in Hong Kong dealing with an act of such voyeurism. Neither is there any specific legislation dealing with non-consensual upskirt-photography.

23. Such types of activities, if committed in a public place, and depending on the facts of the case, may be prosecuted for loitering contrary to section 160 of the Crimes Ordinance (Cap 200)⁷ or for disorder in public

⁷ "(1) A person who loiters in a public place or in the common parts of any building with intent to commit an arrestable offence commits an offence and is liable to a fine of \$10000 and to imprisonment for 6 months.

(2) Any person who loiters in a public place or in the common parts of any building and in any way wilfully obstructs any person using that place or the common parts of that building, shall be guilty of an offence and shall be liable on conviction to imprisonment for 6 months.

(3) If any person loiters in a public place or in the common parts of any building and his presence there, either alone or with others, causes any person reasonably to be concerned for his safety or well-being, he shall be guilty of an offence and shall be liable on conviction to imprisonment for 2 years.

places contrary to section 17B(2) of the Public Order Ordinance (Cap 245).⁸ For these two offences, the "*public*" element is required.

24. If the acts concern the use of computers (whether in a public or private place), the offenders may be prosecuted under section 161 of the Crimes Ordinance for access to computer with criminal or dishonest intent.⁹ However, one should note the latest judgment *Cheng Ka Yee & 3 Ors* which held that "*..... s 161(1)(c) on its proper construction does not apply to the use by a person of his or her own computer, not involving access to another's computer.*"¹⁰ In light of the said judgement, a person who uses his or her own computer (whether in a public or private place) to commit the acts concerned without involving access to another's computer will not be guilty of an offence contrary to section 161.

The offence of voyeurism – overseas jurisdictions

25. The Sub-committee has studied the offence of voyeurism in a number of overseas jurisdictions.

Canada

26. Section 162 of the Canadian Criminal Code provides for an offence of voyeurism:

"Voyeurism

162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

(a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital

(4) In this section "common parts" (公用部分), in relation to a building, means-

(a) any entrance hall, lobby, passageway, corridor, staircase, landing, rooftop, lift or escalator;

(b) any cellar, toilet, water closet, wash house, bath-house or kitchen which is in common use by the occupiers of the building;

(c) any compound, garage, carpark, car port or lane."

⁸ "*(2) Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine at level 2 and to imprisonment for 12 months.*"

⁹ "*(1) Any person who obtains access to a computer-*

(a) with intent to commit an offence;

(b) with a dishonest intent to deceive;

(c) with a view to dishonest gain for himself or another; or

(d) with a dishonest intent to cause loss to another, whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years."

¹⁰ *Secretary for Justice v Cheng Ka Yee & 3 Ors*, FACC 22/2018, para.40

organs or anal region or her breasts, or to be engaged in explicit sexual activity;

- (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or*
- (c) the observation or recording is done for a sexual purpose."*

27. A visual recording is defined in subsection (2) as including "a *photographic, film or video recording made by any means.*"

28. Subsection (4) provides for an offence for printing, publication, etc, of voyeuristic recordings:

*"(4) Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available."*¹¹

England and Wales

29. Section 67 of the English Act provides for an offence of voyeurism:

- "(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—*

¹¹ The purpose of publishing or transmitting an intimate image is irrelevant for the commission of the offence.

- (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)."*

30. Under section 68(1), a person is doing a private act if he or she:

"is in a place which, in the circumstances, 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 a lavatory, or*
- (c) *the person is doing a sexual act that is not of a kind ordinarily done in public."*

New South Wales

31. The legislation of New South Wales in Australia provides for a narrower offence of voyeurism. The offence covers observation but not intimate visual recording of another person. This narrow offence of voyeurism is supplemented by other specific offences covering intimate visual recording.

32. Section 91J of the Crimes Act 1900 (New South Wales) provides for an offence of voyeurism which covers observation:

- "(1) *A person who, for the purpose of obtaining sexual arousal or sexual gratification, observes a person who is engaged in a private act:*
- (a) *without the consent of the person being observed to being observed for that purpose, and*
 - (b) *knowing that the person being observed does not consent to being observed for that purpose,*
- is guilty of an offence"*

33. Under section 91I (the definitions section), a person is engaged in a private act if:

- "(a) *the person is in a state of undress, using the toilet, showering or bathing, engaged in a sexual act of a kind not ordinarily done in public, or engaged in any other like activity, and*
- (b) *the circumstances are such that a reasonable person would reasonably expect to be afforded privacy."*

34. Regarding intimate visual recording, there are specific offences which deal with such acts, viz,

- Filming a person engaged in a private act (section 91K).¹²
- Filming a person's private parts (section 91L).¹³
- Installing device to facilitate observation or filming (section 91M).¹⁴

New Zealand

35. In contrast to the situation in New South Wales, the offence of voyeurism in New Zealand covers only visual recording (for example, a photograph, videotape, or digital image) using any device: it does not cover simple observation of another person for sexual purposes.

36. Section 216H of the Crimes Act 1961 (New Zealand) provides as follows:

¹² S 91K(1) of the Crimes Act 1900 (New South Wales) provides:
"A person who, for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification, films another person who is engaged in a private act:
 (a) *without the consent of the person being filmed to being filmed for that purpose,*
and
 (b) *knowing that the person being filmed does not consent to being filmed for that purpose,*
is guilty of an offence."

¹³ S 91L of the Crimes Act 1900 (New South Wales) provides:
"A person who, for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification, films another person's private parts, in circumstances in which a reasonable person would reasonably expect the person's private parts could not be filmed:
 (a) *without the consent of the person being filmed to being filmed for that purpose,*
and
 (b) *knowing that the person being filmed does not consent to being filmed for that purpose,*
is guilty of an offence."
 ("Private parts" means "a person's genital area or anal area, whether bare or covered by underwear") (s 91I)

¹⁴ S 91M of the Crimes Act 1900 (New South Wales) provides:
"A person who, with the intention of enabling that person or any other person to commit an offence against section 91J, 91K or 91L, installs any device, or constructs or adapts the fabric of any building, for the purpose of facilitating the observation or filming of another person, is guilty of an offence."

"Everyone is liable to imprisonment for a term not exceeding 3 years who intentionally or recklessly makes an intimate visual recording of another person"

37. An "intimate visual recording" is defined in section 216G(1) as follows:

"a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device without the knowledge or consent of the person who is the subject of the recording, and the recording is of —

- (a) *a person who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and that person is—*
 - (i) *naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or*
 - (ii) *engaged in an intimate sexual activity; or*
 - (iii) *engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or*
- (b) *a person's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—*
 - (i) *from beneath or under a person's clothing; or*
 - (ii) *through a person's outer clothing in circumstances where it is unreasonable to do so."*

The need for a specific offence of voyeurism

38. Having considered the abovementioned overseas legislation, our preliminary recommendation is that it would be to the benefit of our community if a specific offence of voyeurism is introduced in order to criminalise acts of non-consensual observation or visual recording (for example, a photograph, videotape, or digital image) of another person for a sexual purpose. Such an act is a serious violation of another person's sexual autonomy.

39. The circumstances usually covered by the offence of voyeurism are spelt out in overseas legislation. In the Canadian provisions, voyeurism covers situations where the victim is (or in a place which can reasonably be expected to be) *"nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity"*.

40. In the English legislation, voyeurism covers situations where the victim is doing a private act. As aforementioned in paragraph 30, private act is defined in the legislation.

41. In deciding between the Canadian Criminal Code and the English Act together with the legislation referred to above, we favour the English approach because it covers all aspects of the conduct including observation, channelling and recording; the purpose of obtaining sexual gratification is an element of the offence; and the definition of "a private act" is provided for in the legislation. As such, the Sub-committee made Recommendation 3 : The introduction of a specific offence of voyeurism. The Sub-committee also recommended that such an offence be along the lines of section 67 of the English Act.¹⁵

The need for a specific offence in respect of non-consensual upskirt-photography

42 In the process of preparing the consultation paper, in particular "Chapter 3 – Voyeurism", the Sub-committee did not specifically address non-consensual upskirt-photography. The main reason was that the Sub-committee had already covered non-consensual upskirt-photography in Recommendation 20 of its Consultation Paper on Rape and other Non-consensual Sexual Offences¹⁶. However, it became apparent through our interaction with the public in discussion forums and seminars during that consultation that the majority of the responses was not in support of expanding the scope of sexual assault to include non-consensual upskirt-photography. Their main concern was that upskirt-photography is not essentially a form of sexual assault. Instead, it was suggested that a separate offence be created to cover this conduct.

43. With these responses in mind, we decided to revisit and examine the need for a specific offence in respect of non-consensual upskirt-photography when we reviewed the responses collected on the proposed new offence on voyeurism.

Consultation

44. In May 2018, the Sub-committee issued the consultation paper setting out nine recommendations for comment and discussion by the public. The consultation exercise ended on 15 August 2018, but substantial

¹⁵ Please see discussion in Chapter 3 of the Consultation Paper on Miscellaneous Sexual Offences.

¹⁶ The Sub-committee recommended that the offence of sexual assault in the new legislation should further be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which would have been likely to cause B fear, degradation or harm had it been known to B, irrespective of whether it was known to B.

responses were received as late as 10 September 2018. We wish to thank all those who responded to the consultation paper for their contribution.

Consultees' responses

45. We received overwhelming support for Recommendation 3 (a specific offence of voyeurism) of the consultation paper.

46. However, the vast majority of those who responded commented that the recommended offence only covers situations where the victim is acting in private. As such, a typical act of non-consensual upskirt-photography would not be covered by the new offence.

47. A majority of the respondents indicated a wish to follow the upskirt-photography legislation in England & Wales¹⁷; Scotland¹⁸; or New Zealand¹⁹.

Our views

Specific offence of voyeurism

48. The Sub-committee has noted the overwhelming support for our proposed new offence of voyeurism designed to criminalise acts of non-consensual observation or visual recording (for example, a photograph, videotape, or digital image) of another person for a sexual purpose. Such an act is a serious violation of another person's sexual autonomy.

49. As we have explained in Chapter 3 of the consultation paper, we favour the English approach because it covers all aspects of the conduct including observation, channelling and recording; the purpose of obtaining sexual gratification is an element of the offence; and the definition of "*a private act*" is provided for in the legislation.

50. We maintain our view that a new specific offence of voyeurism along the lines of section 67 of the English Act should be introduced.

Need of a specific offence for non-consensual upskirt-photography

51. As mentioned earlier in this Report, we have received a clear message from the community that a specific offence in respect of non-consensual upskirt-photography is also necessary. We have therefore reviewed the upskirt-photography legislation in England and Wales, Scotland and New Zealand in particular in light of the responses received.

¹⁷ Comments from a law-related society, a political party and a Legislative Councilor.

¹⁸ Comments from a few women concern groups and a few individuals.

¹⁹ Comments from a government department.

England and Wales

52. In England and Wales, the Voyeurism (Offences) (No. 2) Bill ("the UK Bill") was introduced to the UK parliament in 2018 to outlaw up-skirting. Following agreement by both Houses on the text of the UK Bill, it received Royal Assent on 12 February 2019²⁰ and the Voyeurism (Offences) Act 2019 ("the Voyeurism Act") came into effect on 12 April 2019.²¹

53. The Voyeurism Act amended the English Act by inserting a new section 67A after section 67 (voyeurism):-

- "(2) *After section 67 (voyeurism) insert—*
- “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*

²⁰ UK Parliament, *Voyeurism (Offences) Act 2019*, see online at: <https://services.parliament.uk/bills/2017-19/voyeurismoffencesno2.html> (last accessed on 27 February 2019)

²¹ The Act extends to England and Wales only. Voyeurism (Offences) (No. 2) Bill Factsheet, see online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718308/voyeurism-offences-bill-factsheet.pdf (last accessed on 17 April 2019)

- 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."*

Scotland

54. Upskirting is a specific offence in Scotland under section 9 of the Scottish Act. Section 43 of the Criminal Justice and Licensing (Scotland) Act 2010 amended (amongst other things) section 9 of the Scottish Act by inserting subsections 4A and 4B thereto, extending the definition of voyeurism to cover upskirting.

"[Section] 9 Voyeurism

- (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.

.....

(7) *The purposes referred to in subsections (3), (4), (4A) and (4B) are—*

(a) *obtaining sexual gratification (whether for A or C),*

(b) *humiliating, distressing or alarming B."*

55. "Obtaining sexual gratification" and "humiliating, distressing or alarming B" are further elaborated under section 49 of the Scottish Act:-

"49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) *For the purposes of sections 5 to 9, 22 to 26 and 32 to 36, A's purpose was –*

(a) *obtaining sexual gratification, or*

(b) *humiliating, distressing or alarming B,*

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) *In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A."*

New Zealand

56. The relevant legislation in New Zealand has been set out in paragraphs 36 – 37 above.

57. Having examined the legislation in the above jurisdictions, we are inclined to follow the wordings of the newly added section 67A of the English Act subject to a few refinements which we shall explain in more detail below.

Cover any location, whether private or public

58. We take the view that the new offence should cover any place ie irrespective of whether the act took place in public or private. There may be situations where it is difficult to distinguish whether the act took place in a public or private setting.

Purpose provision

59. Under the newly added section 67A of the English Act, one of the elements of the offence is that the accused commits the act for the purpose of (a) obtaining sexual gratification (whether for himself/herself or another person); or (b) humiliating, alarming or distressing the victim ("purpose provision"). Section 7 of the Scottish Act includes a similar purpose provision. However, in the New Zealand Act, it is not necessary to prove any particular purpose.

60. We have considered whether a purpose provision is necessary.

61. We can see the strength of the approach in the New Zealand legislation. The offence is committed if a person intentionally or recklessly makes an intimate visual recording of another irrespective of the purpose of the conduct.

62. In light of the phenomenon of non-consensual upskirt-photography, our view is that such an act should be outlawed irrespective of its purpose. Such a "catch-all" provision would have the added advantage of criminalising acts of non-consensual upskirt-photography which are committed by persons under the employment of a third party. These people who commit the offence 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.

63. Apart from a general catch-all provision, we take the view that there should be an additional offence to criminalise an 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 prosecution may charge the accused for the sexual offence if it considers that there is sufficient evidence that the non-consensual upskirt-photography was done for the purpose of obtaining sexual gratification. However, if it turns out at trial that the purpose of obtaining sexual gratification cannot be proved beyond reasonable doubt, the Court should be allowed to convict the accused of the general offence as a statutory alternative offence.

Conclusion and final recommendation

64. Given the various considerations as set out in this Report, we recommend that Recommendation 3 of the consultation paper be amended as follows:-

"We recommend introducing a specific offence to regulate upskirt-photography.

We recommend that such an offence be along the lines of the newly added section 67A of the English Sexual Offences Act 2003 while taking into account the following:-

- (a) the purposes stipulated in section 67A(3) will not be applicable to the new offence;
- (b) there should be a separate offence which requires proof that the act was made with the purpose of obtaining sexual gratification;
- (c) the new offence (as envisaged in (a)) should be a statutory alternative to the offence envisaged in (b); and
- (d) the offences in (a) and (b) should cover any place."

Final Recommendation 3

- (1) We recommend the introduction of an offence of voyeurism.**
- (2) We recommend that such an offence be along the lines of section 67 of the English Sexual Offences Act 2003.**
- (3) We recommend the introduction of a specific offence in respect of non-consensual upskirt-photography.**
- (4) We recommend that the offence referred to in (3) above be along the lines of the newly added section 67A of the English Sexual Offences Act 2003 while taking into account the following:-**
 - (a) there be an offence in respect of conduct the purpose of which is to obtain sexual gratification;**
 - (b) there be a separate offence irrespective of the purpose of the conduct;**
 - (c) that the offence (b) above be a statutory alternative to**

(a) above in addition to it being a "stand-alone" offence; and

(d) the offences in (a) and (b) should cover any place.