Establishing Specific Offences to Criminalize 'Upskirting' Acts

以特定罪行刑事化「裙底偷拍」行為

August 2018

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Preface

The Association Concerning Sexual Violence Against Women (ACSVAW) was established in March, 1997. It is a non-profitable charitable organization which advocates the equity between genders and is concerned about the threats and harm which sexual violence can do to the women, and aims at raising the public's awareness on this issue. ACSVAW founded the first sexual violence crisis centre in Hong Kong, RainLily, in 2000. RainLily coordinates support from different professional disciplines, provides one-stop service on counseling, medical help, legal advice and other relevant assistance, to help women suffering sexual violence rebuild their confidence. In addition to providing preventive education programs though our anti-480 resource centre, ACSVAW also actively advocates relevant legal reforms to protect sexual violence victims.

In recent years, clandestine photo-taking has been serious, with a number of 285 reported cases in 2017 and 313 in 2016. Upskirting or under-the-skirt photo-taking, where a person operates an equipment beneath B's clothing in order to capture an image, is one of the rampant kinds. For upskirting inside the MTR areas, it had been recorded a high number of 327 reported cases in the past three years, with an average of a hundred annually. However, it is just the tip of the iceberg because the number only confines to railway areas. Unfortunately, Hong Kong does not have a single provision for clandestine photo-taking and the police use the public order-related laws for arrest, like loitering, disorderly conduct in a public place and acts outraging public decency. However, clandestine photo-taking among personal and private relationships are not covered in existing criminal charges, thus hardly offering sufficient protection to victims of sexual violence. New offence of 'voyeurism' proposed by the Law Reform Commission should be carried out and let the public understand that clandestine photo-taking and observation are intrusions of others' rights and sexual autonomy. However, it is noticed that the new offence might not cover acts of upskirting. This paper includes ACSVAW's recommendations of improving the proposal of new offence of 'voyeurism' as to extending the coverage of upskirting. We sincerely hope that the government can carry out the reforms as soon as possible.

Ms WONG Sau Yung, Linda
Executive Director
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「裙底偷拍」是指某人在另一人不知情的情況下，以照片、錄影帶或數碼影像等形式觀察或記錄其私處或臀部。「裙底偷拍」行為十分普遍，根據香港警務署的數字，在鐵路區域接獲涉及「裙底偷拍」的舉報數字，每年平均有 100 宗；偷拍者全為男性，受害者全為女性，包括未成年女性，最小的年僅 8 歲。[1] 但官方數字僅僅限於香港鐵路的範圍，未有記錄發生在其他公共場域的數字，例如商場扶手電梯、巴士，實際的猖獗程度遠遠超越官方數字所反映的。

香港法律改革委員會的性罪行檢討小組委員會（下稱小組委員會）自 2012 年，共發表了三份性罪行改革的諮詢文件，包括 2012 年的《強姦及其他未經同意下進行的性罪行》，2016 年的《涉及兒童及精神缺損人士的性罪行》以及最近在 2018 年中旬發表的《雜項性罪行》。小組委員會在第一份諮詢文件中建議擴大性侵犯的定義，涵蓋本質涉及性的「非接觸式」侵犯，以針對在公眾或私人地方所進行的「裙底攝影」。另外，小組委員會在最新發表的《雜項性罪行》諮詢中建議參照英格蘭《2003 年性罪行法令》第 67 條，新訂一項特定的窺淫罪，但新罪行未能涵蓋「裙底偷拍」此類同屬窺淫的行為。

關注婦女性暴力協會（下稱協會）一直倡議性罪行法律改革，包括將裙底偷拍的行為刑事化，以傳遞一個清晰的訊息予公眾：偷拍裙底是剝奪了受害人的性自主權，因為受害人的私密部位在其不知情或不情願的情況下暴露於第三者，是性罪行。協會歡迎小組委員會正視「裙底偷拍」的法律改革議題，因為現時並沒用針對這類犯法行為的特定罪行，控方往往難以找到正確的控罪作出檢控。現時就此類刑事行為所提出的控罪，通常是「在公眾地方行為不檢」[2]、「遊蕩」[3]，或「作出有違公德的行為」這項普通法罪行。

以上述三項在公眾地方擾亂秩序的罪行檢控偷拍，皆不能反映罪行的嚴重性。公眾罪行主要針對被告人破壞了公眾秩序和安全，重點在於懲治在公眾地方發生的各式各樣不檢行為，而不是針對「裙底攝影」。這些控罪未能帶出此行為的性本質，更遑論突顯對性自主權的侵犯，不能指出犯罪行為對受害人帶來的影響，被告人承受的標籤不足以彌補受害人的心理創傷。

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1 "Number of reported cases of sex crimes received by the Railway Police District, with a breakdown by sex and age of the victims and by sex and age of the arrested persons",**香港警務處**, 23 / 11 / 2016, **取自**：http://gia.info.gov.hk/general/201611/23/P2016112200787_248195_1_1479891105844.pdf

2 《公安條例》（第 245 章）第 17B(2)條

3 《刑事罪行條例》（第 200 章）第 160 條

如果在公眾地方行為不檢、遊蕩或作出有違公德的行為這三項控罪均不適用時，控方便會提出「有犯罪或不誠實意圖而取用電腦」[4]的控罪作為最後一著。然而，此控罪已受多方批評，並不適合處理偷拍的案件。在協和小學教師用手機偷拍小一入學叩門試題的案件[5]中，高等法院認為「取用電腦」和「使用電腦」的意思並不相同。該案被告人以手機拍照，法院裁定此舉並不屬於從電腦中未獲授權地取用資料，並非「取用電腦」。律政司在該判詞下達後，即發內部備忘，暫停偷拍裙底等涉及智能手機案件的檢控。[6]

根據每宗案件的個別情況和證據，控方會使用以上四項控罪的其中一項。因此，犯案人和受害人不能明確地知道所涉及的行為干犯了哪一控罪，有違法律的確定性(certainty of law)。另外，控方如要使用公眾秩序罪行，該些行為就必須是在「公眾地方」進行。故這些控罪未能涵蓋在私人地方發生的「裙底偷拍」，對受害人未能提供足夠的保障。以上四項罪行的檢控會出現另一個不足之處是，被告人犯的是涉及性的本質的罪行，但其犯罪紀錄不會出現在性罪行定罪紀錄查核機制裡面，對公眾的保障不足。

小組委員會在最新發表的《雜項性罪行》諮詢建議，新訂一項特定的窺淫罪，但有鑑於新罪行並不針對「裙底偷拍」，協會希望參考其他海外司法管轄區將此行為刑事化的做法，尤其是窺淫罪涵蓋「裙底偷拍」的做法，目的是建議小組委員會訂立一條可以回應社會現況、整全的窺淫罪。

小組委員會建議參照英格蘭《2003 年性罪行法令》第 67 條窺淫罪以針對在未經同意下為了性的目的而對另一人進行觀察或視像記錄的行為。不過，英國議會現在審議《2003 年性罪行法令》第 67 條的修正案[7]，把「裙底觀察和偷拍」行為加入第 67 條。是次修正案緣由 Gina Martin 發起的社交媒體倡議運動。Gina Martin 在 2017 年的一個音樂節被一名男子拍她的裙底位置，但當她去報案時，警察因當時沒有特定刑法去涵蓋「裙底偷拍」行為，所以沒有起訴該男子。Gina Martin 因此發起把「裙底偷拍」行為刑事化的倡議，她在社交媒體的行動引起了英國司法部和政黨的注意，最後英國政府提出上述的**法案**：參照《2009 年性罪行（蘇格蘭）法令》第 9 條窺淫罪，新增條例以涵蓋用攝影設備進行的「裙底觀察和偷拍」行為。

《2009 年性罪行（蘇格蘭）法令》第 9 條除了涵蓋偷窺私人行爲，亦涵蓋「裙底偷拍」。重要元素包括：（1）某人（甲）在另外一個人（乙）的衣服下面操作設備，目的是使自己或其他人（丙）能夠觀察乙的生殖器官或臀部；或甲在乙的衣服下面記錄圖像；（2）乙的生殖器官或臀部是暴露或有內衣覆蓋；（3）行為未得乙的同意及並

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4 《刑事罪行條例》（第 200 章）第 161 條

5 *Secretary for Justice v Cheng Ka Yee and others*[2018] HCMA 466/2017

6 「教師洩漏試題案律政司敗訴 相關控罪成效成疑 檢控偷拍或受阻」。香港 01。10／08／2018，取自：https://www.hk01.com/社會新聞/221067/教師洩漏試題案律政司敗訴-相關控罪成效成疑-檢控偷拍或受阻

7 Voyeurism (Offences) (No.2) Bill

非合理地相信乙同意；（4）目的是為了得到性滿足或使受害人感到受侮辱、困擾或驚恐。

跟蘇格蘭不同的是，新西蘭「裙底偷拍」的相關刑法－「私密視像記錄（making intimate visual recording）」[8] －不需要證明行為的目的是為了得到性滿足或使受害人感到受侮辱、困擾或驚恐，只需要證明被告故意從某人的衣服下面或底部記錄其裸露或以內衣遮蓋的生殖器官、恥骨部位、臀部，或女性胸部，而受害人並不知情或不同意被告上述的行為。新西蘭的窺淫罪只涵蓋以任何媒介進行的視像記錄（例如以照片、錄影帶或數碼影像形式）。換言之，該罪行並不涵蓋為了性的目的而對另一人進行肉眼觀察的行為。除此之外，發佈、輸入、輸出、售賣偷拍得來的影像均是犯法。

至於澳洲，澳洲首都領地、維多利亞、新南威爾士、南澳洲行政區均設有針對偷拍的罪行。

其中，新南威爾士設有特定的「窺淫及相關罪行（voyuerism and related offences）」，包括「私密視像記錄」的特定罪行，以針對以下行為：拍攝任何人進行私人行為的影片[9]、拍攝任何人的私處的影片[10]、安裝器具以便利觀察或拍攝影片[11]。新南威爾士不僅涵蓋生殖器官及臀部，同時涵蓋女性、變性人或陰陽人的乳房。

在澳洲首都領地，觀察和拍攝他人私人部位（包括生殖器官、肛門和女性乳房）乃屬犯罪行為。然而，澳洲首都領地的相關罪行是以「侵犯隱私」為設立基礎。在維多利亞，相關罪行只包括觀察或拍攝他人的生殖器或肛門，不包括乳房。

在南澳洲，相關的條例為「不雅拍攝（indecent filming）」，即有意在設備的幫助下拍攝他人的私處（包括生殖器官、肛門和女性乳房），而在當時的情況下，一名合理的人會期望能獲得私隱。此外，發佈因不雅拍攝而獲得的圖像同屬犯罪行為。

綜觀上述的海外普通法司法管轄區，它們都有針對偷拍的特定罪行，而且不囿於偷拍生殖器官的部位。相比起以一般性罪行來檢控，設有特定罪行可以維持法律的明確性；促進法律的確定性；實現司法公正；保護公眾安全及更有效防範罪行的發生。

首先，「裙底偷拍」行為真正的罪惡是它侵犯了個人的隱私、尊嚴，侵犯了性自主權，是有辱人格的行為，跟現行使用的條例－公眾地方行為不檢、遊蕩、有違公眾道德－的公共元素相去甚遠。維持現行的做法是有違法律的明確性。第二，如果制定「裙底偷拍」的特定罪行，所有的偷拍者都會被控同一罪行，這可促進了「裙底偷拍」方面

[8] 新西蘭《1961 年刑事罪行法令》（Crimes Act 1961）第 216H& 216G(1)條
[9] 新南威爾士《1900 年刑事罪行法令》第 91K(1)條
[10] 新南威爾士《1900 年刑事罪行法令》第 91L 條
[11] 新南威爾士《1900 年刑事罪行法令》第 91M 條

法律的確定性，儘管每件案件的事實本身有所不同，疑犯均經歷同樣的審判過程、面對同樣的判刑指引，促進法律的確定性。第三，由於現在還沒有特定罪行，而是視乎不同的案情被控告上述的公眾秩序罪性或不誠實取用電腦罪，有些偷拍個案如果未能合乎現行條例的元素，不會被檢控，因此出現司法不公的漏洞，設立特定罪行能堵塞此漏洞。第四，設立特定罪行將反映此類行為是一種性罪行，被定罪者的紀錄將被放置在香港警務處指定的性罪行列表中，僱主可以通過性罪行定罪紀錄查核去檢查將會從事與兒童或精神上無行為能力的人有關工作的未來員工，究竟他們有否因「裙底偷拍」而被定罪。這可以保護弱勢群體的安全。第五，明確地標籤「裙底偷拍」的行為屬於犯法，可以提高公民團體和學校反偷拍教育的說服力，具預防和提醒潛在犯罪者的果效。

在第一份《強姦及其他未經同意下進行的性罪行》的諮詢文件中，委員會建議擴大性侵犯的涵蓋範圍，以涵蓋任何一項本質涉及性的行為，而該項行為若然被另一人知道，則相當可能會為此人帶來恐懼、低貶或傷害。根據此建議，新的性侵犯將會涵蓋「偷拍裙底」。

協會認為擴大性侵犯的定義是不恰當和不必要。現時法律的猥褻侵犯中，「侵犯」一詞採立了普通法中普通襲擊的定義和概念，即包括任何非法的身體接觸，和任何導致另一人預知將受到即時和非法的暴力的行為。如果性侵犯的定義被擴大至任何會為另一人帶來恐懼、低貶或傷害的行為，此定義將會偏離普通法的概念。英格蘭《2003 年性罪行法令》和《2009 年性罪行（蘇格蘭）法令》均沒有採用此定義，委員會這建議亦沒有任何案例支持。再者，我們認為委員會建議擴大性侵犯定義的唯一原因和目的是容許性侵犯涵蓋「裙底攝影」，而這原因並不足以證明擴大涵蓋範圍是合理和必須的。其中一個後果是許多在現行法律下合法的行為，會墮入新定義的涵蓋範圍，尤其新定義覆蓋任何本質涉及性的行為，此定義過於空泛。

因此，與其將性侵犯的定義擴大，我們建議訂定一項針對「裙底攝影」的特定罪行。

小組委員會在《雜項性罪行》諮詢文件中建議參照英格蘭《2003 年性罪行法令》第 67 條，新訂一項特定的窺淫罪。然而，新罪行並不涵蓋「裙底攝影」。第 67 條其中一項元素是受害人在一個其合理地期望能提供私隱的地方進行私人行為，由此可見此罪行主要針對在私人地方如家中、廁所發生的窺淫行為。在香港，大部分「裙底攝影」案件發生在公共交通工具，新罪行便未能涵蓋這些案件。

小組委員會建議參考英國的窺淫罪，英國卻正在修例，在現有條例加入針對偷拍裙底的行徑，她們提出的修訂建議正是參照蘇格蘭的做法，故此，我們建議小組委員會參照《2009 年性罪行（蘇格蘭）法令》第 9 條是更恰當的舉措。

以蘇格蘭的窺淫罪作為基礎，並參考新西蘭、澳洲的做法，協會進一步建議小組委員會考慮在新罪行加入以下元素：一、除了生殖器官及臀部，應涵蓋女性的胸部；二、除了「拍攝」裙底，「觀察」應同樣被視為刑事行為；三、將偷拍裙底定性為性罪行，而非侵犯私隱的罪行以及；四、對兒童設有額外的保障，如受害人為 16 歲以下的兒童，被告負上絕對刑事責任，不能以受害人作出「同意」作為免責辯護，如受害人為 13 歲以下，定罪者應該承擔更高的刑罰，以警戒人們對兒童做出可能犯法的行為，加強對兒童的保護。

Part 1. Introduction

'Upskirting': A voyeuristic act

Under-skirt photo-taking or upskirting is a highly intrusive practice, which typically involves individuals taking a picture under another person's clothing without their knowledge, with the intention of viewing their genitals or buttocks, being covered or bare.

'Upskirting' is common in Hong Kong, as reflected by the number of reported cases of 'under-skirt photo-taking' in railway areas (see Table 3). It is noteworthy that the above number is confined to railway area only, which means the overall number in Hong Kong is higher if shopping malls, other transports and other public areas are also included. Victims of upskirting are as young as 8 years old.

Table 3: Number of reported cases of 'under-skirt photo-taking' cases received by the Railway Police District[12]

Year	Number	Age of the victim (All are female)	Age of the arrested (All are male)
2011	78	8-43	18-52
2012	101	13-40	13-56
2013	110	13-48	12-63
2014	105	14-54	14-65
2015	96	12-50	12-61
2016	121	-	-
2017	110	-	-

Why do we raise the recommendation?

Currently, instances of upskirting are prosecuted under the offences of outraging public indecency (OPD), loitering, disorderly conduct in public places and/or access to computer with dishonest intent. Although instances of upskirting have not gone unpunished in Hong Kong, not all instances of upskirting are necessarily covered by the existing criminal law. *'Part 2. Existing laws for prosecuting 'upskirting' photography in Hong Kong'* will offer detailed analysis of the problems and loopholes of charging upskirting acts by using public order offences.

In the third consultation paper 'Miscellaneous Sexual Offences', Law Reform Commission (LRC) recommended to include a new offence of 'voyeurism' (Recommendation 3). While we agree that a specific offence of 'voyeurism' is necessary in Hong Kong, we submit that the

[12] "Number of reported cases of sex crimes received by the Railway Police District, with a breakdown by sex and age of the victims and by sex and age of the arrested persons", *Hong Kong Police* Force, 23 November 2016, available at http://gia.info.gov.hk/general/201611/23/P2016112200787_248195_1_1479891105844.pdf &明報(2018 年 7 月 22 日) "民建聯公布 17 個走光黑點　批港鐵扶手電梯及圍欄易令女士走光" .取自: https://news.mingpao.com/ins/instantnews/web_tc/article/20180722/s00001/1532243075658

offence should have a larger scope than section 67 of the English Sexual Offences Act 2003 to cover 'upskirting' acts. Indeed, the Voyeurism (Offences) (No. 2) Bill (see Appendix 1 of the Bill) introduced in the House of Commons on 21 June 2018 by the UK government, proposed to add a new section 67A to include two new offences into the Sexual Offences Act 2003 (). The changes will cover upskirting in voyeurism offence. *'Part 3. Recent Development of Voyeurism Offences in the UK*' introduces the amendments that are expected to take place.

We further researched on voyeurism offences in overseas jurisdictions, including Scotland, New Zealand and Australia in *'Part 4. Voyeurism in other jurisdictions covering upskirting'* to gain insights of how upskirting can be specifically criminalized.

Lastly, '*Part 5. Impacts of Establishing a Specific Offence of 'Upskirting''* provides analysis on the legal and social impacts of criminalizing upkirting.

Our recommendations

We recommend that a specific offence for criminalizing upskirting is necessary in delivering a clear message that such behaviour is no longer tolerated nor considered a grey area of the law. Labelling it as a legal wrong would increase the weight and persuasiveness of arguments against such behaviour by advocacy groups and schools, allowing early intervention against potential offenders.

Having considered legislations targeting upskirting in various common law jurisdictions, and most importantly, in the proposed amendment of the English Sexual Offences Act 2003 by the Voyeurism (Offences) (No. 2) Bill, there is no doubt that upskirting should be included under voyeurism. We therefore submit that Hong Kong should establish such an offence along the lines of section 9 of Sexual Offences (Scotland) Act 2009, on which the English Voyuerism (Offences) (No. 2) Bill was based on, to include upskirting as an act of voyeurism. In addition to our recommendation, we raise a range of factors for LRC's consideration as to the new offence, such as inclusion of coverage of female breasts, upskirt observation being carried out with the aid of an equipment or device and bare eyes, and specific rules for protection of children. '*Part 6. Conclusion: Our Recommendations to Law Reform Commission*' contains full elaborations of our recommendations.

Part 2. Existing laws for prosecuting ‘upskirting’ photography in Hong Kong

2.1 Existing laws for prosecuting ‘upskirting’ photography
- 2.1.1 Disorderly conduct in public places
- 2.1.2 Loitering
- 2.1.3 Common law offence of acts outraging public decency
- 2.1.4 Access to computer with criminal or dishonest intent

2.2 Loopholes and problems
- 2.2.1 Failure to bring out the sexual nature of the act
- 2.2.2 Uncertainty of law
- 2.2.3 Difficulty in proving elements of the offence
- 2.2.4 Access to computer with criminal or dishonest intent: an inappropriate charge

2.1 Existing laws for prosecuting 'upskirting' photography

Instances of upskirting are commonly charged with the offences of disorderly conduct in public places, loitering, outraging public decencyor access to computer with criminal or dishonest intent.

2.1.1 Disorderly conduct in public places

One usual charge brought for upskirting is disorder in public places, contrary to section 17B (2) of Public Order Ordinance (Cap. 245):

> *(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.*

In *HKSAR v Cheng Siu Wing*[13], it is established that the conduct of an attempt to photograph or photographing under the skirt of a female was properly categorized as 'disorderly conduct'. Regarding the element of a breach of peace, the appellate judge agreed with the magistrate's remarks that:

> "*Taking into account the likely reaction of members of the public to a person photographing under the skirt of a woman I am very firmly of the view that there is every likelihood of a breach of the peace being caused. In my judgment, the average Hong Kong citizen is likely to be outraged by such behaviour and it is entirely predictable that a hue and cry would be raised and that concerned citizens would endeavour to detain an alleged miscreant. In so acting, it is entirely predictable that both the members of the citizenry and the alleged miscreant would be likely to commit a breach of the peace. In my judgment, therefore, the behaviour alleged against the Appellant is entirely capable of being the sort of behaviour that would make it likely that a breach of the peace would be caused."*

In this case, the defendant held a digital camera under the skirt of a female on a public staircase leading to a footbridge. He was convicted of disorderly conduct and fined $5,000.

2.1.2 Loitering

Loitering, contrary to section 160 of Crimes Ordinance (Cap. 200) could also be used for prosecuting upskirting:

[13] [2003] 4 HKC 471

(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 $10,000 and to imprisonment for 6 months. (Replaced 74 of 1992 s. 3)
(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.

The first element of the offence that must be proved is that the defendant is loitering. Loitering means idling, lingering or hanging about.[14] In *HKSAR v Ma Kei Wing*[15], the appellant was witnessed to have held his cell phone under the hem of the skirt of a female in an MTR train. He denied the allegation. The conviction was quashed as loitering has not been made out by the evidence.

2.1.3 Common law offence of acts outraging public decency

In order to convict a person of outraging public decency, two elements have to be satisfied.[16] The first element relates to the nature of the act which has to be proved to be of such a lewd, obscene[17] or disgusting[18] character that it outrages public decency. The second element, the public element, requires that the act be done in a place to which the public has access or in a place where what is done is capable of public view. The public element is not satisfied unless the act is capable of being seen by two or more persons who are actually present even if they do not actually see it.

In *HKSAR v Lo Hoi Chi*[19], the defendant who took an upskirt video of a female on the street was convicted of doing an act outraging public indecency. He was ordered to perform community service for 120 hours given his good background and contribution to society. However, the appellate court stressed that in respect of the gravity and nature of upskirting, an immediate custodial sentence of 14 days can be imposed on a first offender. This is neither wrong in principle nor manifestly excessive.

[14] *R v Ng Chun Yip* [1985] HKLR 427
[15] HCMA 1260/2003
[16] *R v Hamilton* [2008] QB 224
[17] An obscene act is an act which offends against recognized standards of propriety and which is at a higher level of impropriety than indecency: see *R v Stanley* [1965] 2 QB 327
[18] A disgusting act is one which fills the onlooker with loathing or extreme distaste or causes annoyance: *R v Choi* (unreported)
[19] HCMA 524/2007

2.1.4 Access to computer with criminal or dishonest intent

A charge for access to computer with criminal or dishonest intent, contrary to section 161 of Crimes Ordinance (Cap.200) may be brought as a last resort where the photography involves the use of computer, as smartphones fall within the meaning of 'computer'[20]:

> *(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.*
> *(2)For the purposes of subsection (1) gain (獲益) and loss (損失) are to be construed as extending not only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and—*
> *(a)gain (獲益) includes a gain by keeping what one has, as well as a gain by getting what one has not; and*
> *(b)loss (損失) includes a loss by not getting what one might get, as well as a loss by parting with what one has.*

In *Secretary for Justice v Chong Yao Long Kevin*[21], the defendant, a private tutor, used a mobile phone to capture upskirt images of his students. He was charged with four counts of obtaining access to a computer with a view to dishonest gain. He pleaded guilty and was sentenced to a total of 4 months' imprisonment.

2.2 Loopholes and problems

2.2.1 Failure to bring out the sexual nature of the act

The above offences are general offences covering various types of misconduct in a public place. They can be described as public offences instead of sexual offences targeting at upskirting. They are mainly the legal tools to deal with offences threatening public order and disturbing peace. Therefore, they fail to bring about the sexual nature of the criminal activity concerned, let alone highlighting the respect for sexual autonomy.

Upskirting is an unlawful act which not only involves public danger but also infringes an individual's right and sexual autonomy. It is a sexual act because it involves the unwilling exposure of one's private part to a third party. The High Court judge in *Lo Hoi Chi*[22] opined

[20] *Secretary for Justice v Wong Ka Yip, Ken* [2013] 4 HKLRD 604
[21] [2013] 1 HKLRD 794
[22] *HKSAR v Lo Hoi Chi*, HCMA 524/2007

that upskirting amounted to a serious violation of privacy, '*and the obscenity and sense of humiliation such conduct entailed are definitely no less than that of an indecent assault.*' Upskirting is an affront to the dignity of the victim[23]. Nevertheless, under public offences, the victim of upskirting is not important in the sense that the emphasis is on public order instead of the violation of an individual's rights. The labelling of the offender cannot fully compensate the mental harm done to the victim if the charge is a public offence but not a sexual offence. Furthermore, the charge itself cannot reflect the specific act (i.e. upskirting) involved as well as its seriousness. The conviction record, despite the sexual nature of the act, will not be shown on the Sexual Conviction Record Check.

2.2.2 Uncertainty of law

The above four offences are all available charges for 'upskirting' depending on the particular circumstances and evidence in each case. This creates uncertainty and incurs problems as the offender and the victim could not reasonably know which offence is involved in the incident. Moreover, there are different sentences for each offence, whereas the length of maximum imprisonment for each offence is not the same. The sentencing guidelines laid down for each offence may not be uniform as well. It may cause injustice to the offenders.

2.2.3 Difficulty in proving elements of the offence

In order for the sexual act to fall under loitering, disorderly conduct in public places or outraging public indecency, the act must be carried out in a public place since the offences are 'public' in nature. These provisions are not able to capture upskirting carried out in private areas and hence provide insufficient protection.

To establish the offence of loitering, it is required that the act causes any person reasonably to be concerned for his safety or well-being. In most circumstances, the victims are not aware of the offender taking pictures beneath their clothing. It is also not an easy task to prove that the offender is loitering, i.e. idling, lingering or hanging about.

Regarding outraging public indecency, it may not be possible to identify whether at least two people were capable of seeing the offender taking the up-skirt pictures. An instance of upskirting in an empty train carriage or in a private area may not be captured.

As to the offence of obtaining access to a computer with a view to dishonest gain, Deputy High Court Judge C P Pang ruled in *Secretary for Justice v Cheng Ka Yee and others*[24] that 'obtaining access to a computer' and 'using a computer' have different meanings. He adopted the statement in *Li Man Wai*[25] which set out the ambit of the offence: "*it only prohibits the unauthorized and dishonest extraction and use of information.*" He decided that the defendants

[23] *Attorney-General V Wai Yan Shun* [1991] 2 HKLR 209
[24] HCMA 466/2017
[25] [2003] 6 HKCFAR 466

in *Cheng Ka Yee,* whose acts of using their own smartphones to take photographs were not unauthorized extraction and use of information from a computer. Thus, they were not 'obtaining access to computer'. In cases of upskirting, the offender usually employs a smartphone or a digital camera to take upskirt photos or video recordings. After *Cheng Ka Yee,* it poses a genuine difficulty for the prosecution to prove the actus reus of the offence i.e. the unauthorized extraction and use of information from a computer.

2.2.4 Access to computer with criminal or dishonest intent: an inappropriate charge

When disorderly conduct in public places, loitering or the common law offence of outraging public decency are not suitable, a charge for dishonest use of computer may be brought as a last resort. However, it has been criticized that this is not an appropriate charge to deal with upskirting.

In *Chong Yao Long Kevin,*[26] the magistrate opined that the nature of the criminal act of taking upskirt photos or video recordings is different from that of an ordinary case of obtaining access to a computer with a view to dishonest gain. The appellate judge said that '*it appears to be somewhat strange that the wrong conduct of the respondent was dealt with by the charges of obtaining access of a computer with a view to dishonest gain*'. The offence is not designed to deal with the act of upskirting and the sentencing guidelines usually applicable to this offence is not applicable to upskirting cases. Only in exceptional circumstances where no other alternative charge is available should this charge be used. It would be absurd to convict the offender of dishonest use of computer when the conduct involved is a sexual offence.

As discussed in section 2.2.3 above, it will be a challenging task for the prosecution to prove the actus reus of the offence. It is our opinion that this offence should not be used to deal with upskirting.

[26] CAAR 2/2012

Part 3. Recent Development of Voyeurism Offences in the UK

Part 3. Recent Development of Voyeurism Offences in the UK

In its third consultation paper "Miscellaneous Sexual Offences", LRC proposed to include new specific offence of voyeurism along the lines of section 67 of the English Sexual Offences Act 2003 (Recommendation 3). We noticed that section 67 is *now* subject to amendment in the UK, where the government introduced the Voyeurism (Offences) (No. 2) Bill ('the Bill') on 21 June 2018 to the Parliament (see Appendix 1 of the Bill), proposing amendments to section 67 by including upskirt observation and photography.

3.1 Background of the Amendment

The amendment of section 67 of the English Sexual Offences Act 2003 was sparked by a social media campaign initiated by Gina Martin, who found herself unaided by the law after a man took a photo of her crotch at a concert in London in 2017. Recalling the incident, she described how:

"[t]wo guys standing nearby were acting really creepy towards us, I told them to leave us alone and kind of brushed it off. About half an hour later, I saw one of them holding his phone, he was on Whatsapp. There was a picture and it was up a girl's skirt, right between her legs. I just knew it was me."[27]

Though she got hold of the man's phone and showed it to the police, she was told that while *"[i]t shows more than [she'd] like... it's not graphic. So there's not much [the police] can do because you can't see anything bad ... [she] might not hear much from [the police]*."[28] At the time, there was no law specifically criminalising upskirting in England and Wales. Her case was closed, and the police let the perpetrator go, with no criminal charges brought against the man who took the photo without her consent.

Gina Martin, on the other hand, did not let it go. Sharing her experience online, she received a great number of messages from people from all walks of life saying that it has happened to them too, which convinced her to do more. She started a petition[29] calling for the introduction of a specific sexual offence of upskirting to the UK Sexual Offences Act 2003, attracting over 107,000 supported as of the time of writing. Using the punning hashtag "#StopSkirtingTheIssue", her campaign captured the attention of the public, the UK Ministry of Justice, as well as politicians across the political spectrum.

In March 2018, Wera Hobhouse MP presented a Private Member's Bill to the House of Commons that would create the additional voyeurism offence of upskirting under the Sexual

[27] "Meet Gina Martin, the 25-year-old who wants to make upskirting a sexual offence in England and Wales", *Rights Info*, 13 June 2018, available at https://rightsinfo.org/gina-martin-upskirting/
[28] "Upskirting – how one victim is fighting back", *BBC*, 9 August 2017, available at https://www.bbc.co.uk/news/magazine-40861875
[29] Available at https://www.thepetitionsite.com/takeaction/887/239/401/

Offences Act 2003, which was supported by the UK government as well. However, on its second reading on 15 June 2018, it was objected by Sir Christopher Chope MP – not out of inherent objection to its content, but rather out of opposition to the procedure with which it was brought in.[30] He later reiterated his support for the proposed changes.

Ministers therefore decided to intervene and adopted it as a Government Bill, in order to make sure that the new law would be introduced without delay.[31] The Government Bill would build on Wera Hobhouse MP's proposals and bring the punishment for upskirting in line with other existing voyeurism offences in the UK. UK Justice minister Lucy Frazer said that the government's priority was "*to ensure that this legislation gets on the statute book as soon as possible*".[32]

The Bill was introduced in the House of Commons on 21 June 2018.

3.2 Voyeurism (Offences) (No. 2) Bill

3.2.1 Overview

Introduced by the UK government, the Bill would add a new section 67A to include two new offences into the Sexual Offences Act 2003. The changes will cover England and Wales as upskirting is already a specific offence in Scotland.

Adopting a similar approach to that taken in Scotland, the offences would capture instances where, without consent (and without reasonably believing that there is consent), a person either (a) operates equipment beneath or (b) records an image beneath someone's clothing to observe, or allow someone else to observe, their genitals or buttocks (whether exposed or covered by underwear), in circumstances where the genitals, buttocks or underwear would not otherwise be visible. The offences would apply where the perpetrator had a motive of either obtaining sexual gratification, or causing humiliation, distress or alarm to the victim.

A summary conviction would carry a sentence of up to one year in prison and/or a fine. And a more serious offence, after a conviction on indictment, would carry a sentence of up to 2 years in prison and/or a fine. The most serious offenders would be put on the sex offenders register.[33]

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[30] "Christopher Chope exclusive: I do support upskirting ban. I've been scapegoated.", *Daily Echo*, 17 June 2018, available at http://www.bournemouthecho.co.uk/news/16296117.Christopher_Chope_exclusive__I_DO_support_upskirting_ban__I___ve_been_scapegoated_/

[31] "Government acts to make "upskirting" a specific offence", *UK Government*, 15 June 2018, available at https://www.gov.uk/government/news/government-acts-to-make-upskirting-a-specific-offence

[32] House of Commons Hansard, 18 June 2018, volume 643, c40, available at https://hansard.parliament.uk/Commons/2018-06-18/debates/5D764E22-1EFB-4F49-89C7-86AD375DFE9D/Upskirting#debate-475049

[33] See Part 3.2.4 below.

3.2.2 Legal Background

Similar to Hong Kong, the practice of upskirting could be prosecuted under the offence of outraging public indecency (OPD) in the UK. In some circumstances, it may also be covered by the offence of voyeurism under the Sexual Offences Act 2003 and the Protection of Children Act 1978 if it involves the taking of an indecent photograph of a child.

However, not every instance of upskirting is covered by the existing criminal law in the UK. For example, the OPD offence requires at least two people to have witnessed the act or be capable of witnessing it, so that an instance of upskirting in deserted places such as an otherwise empty train carriage could go unpunished. The voyeurism offence requires the person being observed or recorded must be doing a "private act", but instances of upskirting usually take places in a public place which might not be expected to provide privacy for the person, such as public transport or music festivals. Further, upskirting is not a sexual offence under the existing law, meaning that most serious offenders would not have to be put on the sex offenders register and victims have no automatic right to anonymity.

In Scotland, the general offence of voyeurism under the Sexual Offences (Scotland) Act 2009 was amended to include a specific provision covering upskirting in 2010.

3.2.3 The Proposed Offences

The Bill includes two proposed offences, along the same liens as the Scottish Act in criminalizing upskirt observation and photography with the aid of device or equipment.[34]

Section 67A(1) makes it an offence is to operate equipment beneath a victim's clothing without consent with the intention of observing, or enabling another person to observe, the victim's genitals or buttocks (whether exposed or covered with underwear), in circumstances where their genitals, buttocks or underwear would not otherwise be visible, for a specified purpose.

Section 67A(2) makes it an offence to record an image beneath the clothing of a victim's clothing without consent to look at the image, or allow another person to look at the image, of the victim's genitals or buttocks (whether exposed or covered by underwear), in circumstances where their genitals, buttocks or underwear would not otherwise be visible, for a specified purpose.

Section 67A(3) sets out the specified purposes themselves. These are: (a) obtaining sexual gratification (either for themselves or for the person they are enabling to view the victim's genitals, buttocks or underwear), and (b) to humiliate, distress or alarm the victim.[35]

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[34] See *'Part 4.1.Voyeurism in Scotland'* below for explanation of the elements of the proposed offences.

[35] Voyeurism (Offences) (No. 2) Bill Explanatory Notes, UK House of Commons, 21 June 2018, para 15-17, available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0235/en/18235en.pdf

3.2.4 Sex Offenders Register

The Bill provides that offenders convicted of the proposed offences would be placed on the sex offenders register if (a) the offence was committed for the purpose of obtaining sexual gratification and (b) the "relevant condition" is met.

The "relevant condition" is the same as the current provision for the existing section 67 voyeurism offences, including:

- if the offender is aged under 18, the relevant condition is that they have been sentenced to imprisonment for at least 12 months;
- in any other case, the relevant condition is either that the victim was under 18, or the offender has been sentenced to a term of imprisonment, detained in a hospital, or given a community sentence of at least 12 months.[36]

Similarly, Hong Kong may put the proposed offences on the list of specified sexual offences under the Sexual Conviction Record Check if the offender committed the offence for the purpose of obtaining sexual gratification, but not if the purpose was to humiliate, distress or alarm the victim. This is to ensure that only sexual offenders will be covered by the Sexual Conviction Record Check.

3.3 Reactions to the Bill and its Development in the UK

The Bill received cross-party support in the Parliament and was fully backed by the UK government. A number of government officials and public figures have spoken of their support for both Gina Martin's campaign and the proposed changes to the law.

3.3.1 Government Officials and Politicians

Following Gina Martin's successful campaign, the Justice Secretary David Gauke announced in September 2017 that he had asked Ministry of Justice officials to review relevant areas of the law:

"I have taken very seriously the representations made not only by Gina Martin, but by some of the police and crime commissioners around the country. I have asked for detailed advice on this, but I hope the hon. Gentleman will understand that, before proceeding to a commitment to legislation, I want to be absolutely certain that this would be the right course to take."[37]

[36] Voyeurism (Offences) (No. 2) Bill Briefing Paper, UK House of Commons Library, 28 June 2018, section 3.2, available at https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8356

[37] House of Commons Hansard, 5 September 2017, Volume 628, c 20, available at https://hansard.parliament.uk/Commons/2017-09-05/debates/5985C2BB-5EC8-464E-A554-C07B343BFD3B/TopicalQuestions

In April 2018, the Secretary of State acknowledged the inadequacy of the existing criminal law, stating:

"As I have said, I am sympathetic to the idea of our taking action in this regard. There are instances in which people have been successfully prosecuted for upskirting in the context of outraging public decency, and voyeurism can also apply under the Sexual Offences Act 2003. However, those offences do not necessarily cover every instance of upskirting, which is why there is a strong case for looking at the law and considering whether we need to change it."[38]

After Wera Hobhouse MP's bill came to an end after a member's objection, UK Prime Minister Theresa May announced her commitment to legislating for upskirting, and said, "*I am disappointed the Bill didn't make progress in the Commons today, and I want to see these measures pass through Parliament – with government support – soon.*"[39]

Announcing introduction of the Government Bill, Justice Minister Lucy Fraser said:

"*This behaviour is a hideous invasion of privacy which leaves victims feeling degraded and distressed. By making 'upskirting' a specific offence, we are sending a clear message that this behaviour will not be tolerated, and that perpetrators will be properly punished.*"[40]

In response, Wera Hobhouse MP stated, "*The fact that the government have listened to our calls is testament to the widespread consensus that there was a gap in the law that needed to be addressed ... We all made the case for common sense. Now if someone is to fall victim to upskirting, the law will recognise them as the victim, and the police will be able to act immediately and bring the perpetrators to justice."*[41]

3.3.2 Public Figures

Katie Ghose, Chief Executive of Women's Aid, said:

"*We welcome the government taking decisive action to make upskirting a criminal offence. This form of abuse is painful and humiliating for victims and often has a devastating impact on all aspects of their lives. We hope that this new criminal offence will be another step forward in challenging the prevailing sexist attitudes and behaviours in our society that underpin violence against women and girls. Domestic abuse does not happen in a cultural vacuum. By*

[38] House of Commons Hansard, 24 April 2018, Volume 639, c 725, available at https://hansard.parliament.uk/Commons/2018-04-24/debates/5C5F8149-AED3-4702-B68B-72AD8D3BC88C/Upskirting
[39] n 25 above (Voyeurism (Offences) (No. 2) Bill Explanatory Notes), para 9
[40] n 21 above ("Government acts")
[41] *Ibid*.

condemning this form of abuse, we can send out the powerful message that upskirting is unacceptable and perpetrators of this crime will be held to account."[42]

Lisa Hallgarten, Head of Policy & Public Affairs for Brook, said:

"*Brook welcomes the Government's recognition of the seriousness of upskirting as a move towards tackling the widespread incidence of sexual harassment of women and girls. However, we know that the law alone is not enough and schools have a critical role in challenging harmful behaviours and practices by dealing with any issues promptly and in line with robust PSHE and safeguarding policies. In order to keep children and young people safe from harm we must teach them at the earliest opportunity to respect each others' privacy, to know their rights, and to understand issues around consent, coercion, and unwanted/unsafe touch.*"[43]

3.3.3 The Public

A poll conducted by ITV found that over 95% of the British public supported making upskirting a specific criminal offence as of the time of writing.[44]

In the UK, upskirting victims include children as young as 10; and locations include nightclubs, restaurants, and the streets. Only 15 out of 44 police forces in England and Wales recorded allegations of upskirting in 2016 and 2017, a further 14 said that there were no such records on their systems, and 15 forces refused or failed to respond to the information request. Of the 78 incidents reported, only 11 resulted in perpetrators being charged using existing criminal offences.[45]

3.4 A Wake-Up Call for Hong Kong

The public's call for criminalisation of upskirting in the UK and the existence of such specific criminal offence in countries such as Scotland, Australia and New Zealand is a wake-up call to Hong Kong to follow suit, where upskirting is rampant, often unpunished, and even unreported. There will not be a more appropriate time to create a specific offence of upskirting in Hong Kong, along with other voyeurism offences proposed by the Law Reform Commission in the final stage of its review of substantive sexual offences.

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[42] *Ibid*.

[43] *Ibid*.

[44] "Should "upskirting" be made a sexual offence?", *iTV*, 22 March 2018, available at http://www.itv.com/thismorning/hot-topics/should-upskirting-be-made-a-sexual-offence

[45] ""Upskirting" must be made a criminal offence as girls as young as 10 are photographed, campaigners say", *Independent*, 20 February 2018, available at https://www.independent.co.uk/news/uk/crime/upskirt-photos-law-illegal-criminal-offence-needed-campaigners-statistics-10-girls-children-police-a8218491.html

According to the Hong Kong Police Force (HKPF), there were a total of 327 reported cases of upskirting in the MTR during 2015 –2017.[46] Statistics from the Railway District of the HKPF for the years 2011 – 2015 shows that victims included females aged 8 to 54, while the perpetrators were all male, aged 12 to 65.[47] Worse still, it is not difficult to find footages and collection of upskirting photos shared in online voyeur communities. In 2011, two brothers were arrested for upskirting under the charge of outraging public indecency and were found to have as many as 10,000 photos on their computers, who also shared the photos and videos online.[48]

Upskirting is more than an intrusion to a person's privacy. It is a form of image-based sexual violence and voyeuristic behaviour that reinforces the idea that the victim, typically a woman, is a sexual object. Victim's private parts are exposed when they do not intend to reveal themselves in such a way. It is common sense and uncontroversial that every person, regardless of their gender, should have a reasonable expectation of privacy regarding their own bodies in public places and that their dignity would not be stripped by others. In the words of the Hon Mr Justice Fok PJ, Hong Kong courts, in sentencing for the offence of OPD for upskirting cases, emphasised that it is a "*serious violation of the victim's privacy and dignity, as well as being degrading and humiliating for [the victim]*."[49]

In the case of *Secretary for Justice v Chong Yao Long Kevin*, the Court of Appeal opined that:

"*The courts have repeatedly pointed out that taking upskirt photos or videos of a female is a very serious crime. This is because such conduct caused the victim distress and was regarded by the public with disgust. The courts also strongly commented 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*."[50]

The practice of upskirting is likely to grow worse with the ubiquity and increasing accessibility of technology such as smartphones, hidden cameras, and action cameras, which make taking photos or videos up or inside a person's clothing undetected easier. Equally, internet access makes it easier to distribute the images taken on discussion forums and pornography websites.

It is clear that Hong Kong can do more than installing panels and opaque stickers near staircases, escalators, and lifts. We must act now to criminalise upskirting.

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[46] "港鐵偷拍裙底案 3 年逾 300 宗　建議設立女士車廂", *HK01*, 1 August 2018, available at https://www.hk01.com/社會新聞/216960/女士小心-港鐵偷拍裙底案 3 年逾 300 宗-建議設立女士車廂

[47] "Number of reported cases of sex crimes received by the Railway Police District, with a breakdown by sex and age of the victims and by sex and age of the arrested persons", *Hong Kong Police* Force, 23 November 2016, available at http://gia.info.gov.hk/general/201611/23/P2016112200787_248195_1_1479891105844.pdf

[48] "港鐵偷拍王　藏數萬張裙底照　香港史上最大宗" , *Apple Daily*, 15 April 2011, available at https://hk.news.appledaily.com/local/daily/article/20110415/15169705

[49] Hon Mr Justice Fok PJ, "Outraging Public Decency: In Your Face and up Your Skirt--The Dynamism and Limits of the Common Law," 47 *Hong Kong Law Journal* 33

[50] *Secretary for Justice v Chong Yao Long Kevin* [2013] 1 HKLRD 794, at 42.

Part 4. Voyeurism in other jurisdictions covering "upskirting"

4.1 Voyeurism in Scotland

- 4.1.1. Introduction
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4.2Voyeurism in New Zealand

4.3Voyeurism in Australia

- 4.3.1 Australian Capital Territory
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4.4 Comparison of upskirting offences in different jurisdictions

Part 4. Voyeurism in other jurisdictions covering 'upskirting'

We submit that the offence of voyeurism in overseas jurisdictions are more comprehensive than the offence contained in section 67 of the English Sexual Offences Acts 2003 in the sense that upskirting is also included as an offence. In particular, the Scottish approach covers both up-skirt observation and photography as well as, provides separate sentencing rules for protection of vulnerable children.

4.1 Voyeurism in Scotland

4.1.1. Introduction

With due respect, the Law Reform Commission's Review of Sexual Offences Sub-committee overlooked the offence of voyeurism in Scotland while referring to certain overseas jurisdiction. It is our opinion that the Scottish Act contains the most comprehensive provision in respect of the offence of voyeurism. It targets different kinds of private acts and covers also upskirt photography. Most importantly, it has two separate provisions to protect children of under 13 years old and older children over the age of 13 and below the age of 16.

4.1.2. Background of creating a specific offence to deal with upskirting

4.1.2a) Inclusion of the offence of voyeurism

The offence of voyeurism was introduced at Stage 2 of the consideration of the Scottish Bill, as the Scottish Bill as drafted did not include provision for such an offence. The Justice Committee of the Scottish Parliament considered that the offence of voyeurism is 'clearly'[51] a sexual offence and given that people being convicted of it shall be placed on the sex offenders register, a separate offence of voyeurism should be provided for.

4.1.2b) Amendment of the Act to include the offence of upskirting

When the Act was first enacted, upskirting was not included as an act that would constitute the offence of voyeurism. In 2010, the Sexual Offences (Scotland) Act 2009 was amended by section 43 of the Criminal Justice and Licensing (Scotland) Act 2010. Accordingly, the new subsections (4A) and (4B) were inserted under section 9 of the Sexual Offences (Scotland) Act 2009, and subsection (5) and (7) of section 9 of the Sexual Offences (Scotland) Act 2009 were revised. After the amendment, acts of upskirt observation and photography are covered by the Scottish Act and constitute voyeurism.

[51] Scottish Parliament Justice Committee, Official Report of Meeting 17 March 2009 (Consideration of amendments, Day 1) http://archive.scottish.parliament.uk/s3/committees/justice/or-09/ju09-0902.htm (visited 28 Jul 2018).

4.1.3. Section 9 of Sexual Offences (Scotland) Act 2009

It is an offence under section 9 of the Sexual Offences (Scotland) Act 2009 to do any of the six types of conduct as listed below. In particular, it is an offence to carry out upskirt photography and observation.

9 Voyeurism

"(1) A person ("A") commits an offence, to be known as the offence of voyeurism, if A does any of the things mentioned in subsections (2) to (5).

(2) The first thing is that A—

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

(b) without any reasonable belief that B consents,

for a purpose mentioned in subsection (6) observes B doing a private act.

(3) The second thing is that A—

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

(b) without any reasonable belief that B consents,

operates equipment with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A—

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

(b) without any reasonable belief that B consents,

records B doing a private act with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(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.

(5) The sixth thing is that A—

(a) installs equipment, or

(b) constructs or adapts a structure[52] or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).

(6) The purposes referred to in subsection (2) are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(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."

In all cases, the offence is committed where A acts without B's consent and without any reasonable belief that B consents. Such conduct, in Scotland, would previously have been prosecuted under the common law as a breach of the peace.

Different subsections cover specific but typical conducts of voyeurism. Table 4 provides a quick summary of examples for each subsection, as provided by the Guidance on the Sexual Offences (Scotland) Act 2009.[53]

Table 4: Examples of subsections under Section 9 of Sexual Offences (Scotland) Act 2009

Subsection	Example
9(2)	A person ("A") looks through a window or peephole at another person ("B") using a lavatory or getting dressed.
9(3)	A landlord operated a webcam to allow people, via the Internet, to view for their sexual gratification live images of his tenant getting undressed.
9(4)	A person ("A") secretly recorded another person ("B") engaging in sexual activity to show others for their sexual gratification. [Note: the offence criminalises the person who *records* the image rather than the person who looks at it.]
9(4A)	A person ("A") uses a hidden video-camera or mobile phone to view the buttocks or genitals of passers-by.
9(4B)	A person ("A") uses a hidden video-camera or mobile phone to record so-called "up-skirt" photographs of people.
9(5)	A person ("A") drilled a "peephole" into a wall with the intention of spying on someone ("B") for sexual gratification, even if the peephole was not actually used in that way.

The offence of voyeurism is triable summarily or on indictment. The maximum penalty on conviction on indictment is 5 years' imprisonment.

[52] "Structure" is defined in section 10 of the Scottish Act to include a "tent, vehicle or vessel of other temporary or moveable structure."

[53] Guidance on the Sexual Offences (Scotland) Act 2009, https://www.gov.scot/Resource/Doc/254429/0105624.pdf, pp.7-8 (visited 28 Jul 2018).

4.1.4. Offence of voyeurism targeting "private acts"

Under subsections (2), (3), (4) and (5) of the Sexual Offences (Scotland) Act 2009, a person commits the offence of voyeurism if he observes, operates equipment to observe, records another person doing a private act, or installs equipment or constructs/adapts a structure to conduct the above acts without B's consent and for the purpose of obtaining sexual gratification or humiliating, distressing or alarming B.

Section 10 of the Sexual Offences (Scotland) Act 2009 provides the interpretation for "private act" as follows:-

"(1) For the purposes of section 9, 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—

(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."

Of course, it would be a matter for the court to determine in each individual case whether the complainer was in a place which in the circumstances would reasonably be expected to provide privacy. However, it is not sufficient that a person is in a place which in the circumstances would reasonably be expected to provide privacy. The person must at the same time, be engaged in the three stipulated acts but not any other acts.

4.1.5. Elements of the specific upskirting offences

To established upskirt observation, three elements must be proved[54]:-

(1) A operates equipment beneath B's clothing;

(2) Intention of doing (1): to enable A or C to observe B's genitals or buttocks (whether exposed or covered in underwear), or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible;

(3) A acts for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B; and

(4) B does not consent and A has no reasonable belief that B consents.

Similarly, to establish upskirt photography, three elements must be proved:-

(1) A records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered in underwear), or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible

(2) Intention of doing (1): that A or C will look at the image;

[54] Scottish Children's Reporter Administration, Practice Direction 31. http://www.scra.gov.uk/wp-content/uploads/2018/04/Practice-Direction-31-Sexual-Offences-Scotland-Act-2009-Appendices.pdf (visited 4 Aug 2018).

(3) A acts for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B; and
(4) B does not consent and A has no reasonable belief that B consents.

4.1.5a) Purpose of performing the listed acts: obtaining sexual gratification / humiliating, distressing or alarming another person ("B")

A's purpose can be said to be for 'obtaining sexual gratification; or humiliating, distressing or alarming' B if in all the circumstances of the case it may reasonably be inferred that A was doing the act in question for that purpose.

- *Obtaining sexual gratification*:
  A subjective test is engaged to determine whether A obtains sexual gratification. Whether or not a reasonable person would have got such gratification is neither here nor there.
- *Humiliating, distressing or alarming B*:
  Whether B was in fact humiliated, distressed or alarmed is irrelevant.

4.1.5b) Consent

It would constitute an offence of voyeurism under the Scottish Act if A does the six listed conducts "without another person ("B") consenting and without any reasonable belief that B consents".

Consent, under Scottish Act, means "free agreement"[55]. The fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement. The "consent" has to be an ongoing, cooperative and positive attitude of agreement rather than a one-off statement of permission. In other words, "if there is any doubt that the other person is consenting, then the obvious step to take is to ask."[56]

The Scottish Act also provides circumstances where consent is considered to be absent[57]. Since this section is a non-exhaustive list, lack of agreement can be found even if none of these circumstances applies. Such circumstances include:-

(i) Conduct occurs at a time when B is incapable of consenting to it because of the effect of alcohol or some other substance;
The focus of this situation is on whether B was incapable at the time of the conduct. A prior expression of consent, before getting drunk, is irrelevant. However, a prior expression of consent may give room for A to argue that A had a reasonable belief that B consented. This echoes Hong Kong's position which the ability to give valid consent is removed by alcohol or drugs, or when one is asleep (*R v Camplin* (1845)).

[55] Section 12, Sexual Offences (Scotland) Act 2009.
[56] Scottish Law Commission, Report on Rape and Other Sexual Offences (December 2007), para 2.27, https://www.scotlawcom.gov.uk/files/4712/7989/6877/rep209.pdf (visited 28 Jul 2018).
[57] Section 13, Sexual Offences (Scotland) Act 2009.

(ii) B agrees or submits to the conduct because of violence against B or another, or because of threats of violence against B or another;
It is relevant only if B has agreed or submitted to the conduct. "Threat" must be of violence and not any other harm, although it needs not be of immediate violence. This is consistent with the Hong Kong's position which violence vitiates consent (*R v* Oluboja [1982] QB 320; *R v Larter and* Castleton (1998)). No causal link is required between the threat and the agreement or submission. Furthermore, the fact that B agrees to the conduct due to threats other than violence could be evidence showing lack of consent.

(iii) B agrees or submits to the conduct because B is unlawfully detained by A;

(iv) B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct;
The deception must relate to the nature or purpose of the act, such as "where a woman is told that some form of sexually intimate examination is a necessary medical procedure" [58].

(v) B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B; or

(vi) The only expression or indication of agreement to the conduct is from a person other than B.

4.1.6. Difference with the English Act

4.1.6a) Coverage of 'upskirt' observation and photography

One of the major differences between the Scottish Act and the English Act is the inclusion of "upskirt" observation (subsection 4A) and 'upskirt' photography (subsection 4B). The Voyeurism (Offences) Bill is currently introduced to the UK Parliament to revise the English Act such that it will be in line with the Scottish Act (see *'Part 5 Recent Development of Voyeurism Offences in the UK*').

4.1.6b) The element of consent

The general statutory definition of "consent" differs between Scotland and England and Wales. As discussed above in 4.1.4c, consent is statutorily defined as "free agreement" under the Scottish Act, while it means agreement "by choice, and has freedom and capacity to make that choice" under English law. The Scottish Law Commission (the SLC) expressly favoured the shorter definition which sets out the core elements of the concept of consent, as it has the "merit of brevity"[59] and "avoids the use of complex terminology"[60]. At the same time, the shorter definition focuses on the key issue in the context of sexual activity – the agreement must be a real, full and valid agreement instead of just any agreement.

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[58] Sexual Offences (Scotland) Bill, Policy Memorandum http://www.parliament.scot/S3_Bills/Sexual%20Offences%20(Scotland)%20Bill/b11s3-intro-pm.pdf (visited 4 Aug 2018).

[59] Frazer McCallum, Sexual Offences (Scotland) Bill SPICe briefing (08/48), 17 September 2008, http://www.parliament.scot/SPICeResources/Research%20briefings%20and%20fact%20sheets/SB08-48.pdf (visited 4 Aug 2018).

[60] ibid.

In the part of voyeurism offences, one notable difference between the Scottish and English Acts is the use of the language in respect of the element "consent". The English Act uses "knows that the other person does not consent" while the Scottish Act presents the element of consent as "without another person consenting and without any reasonable belief that B consents". However, under the English Voyeurism (Offences) Bill, the offence of upskirting adopts the same language for consent as the Scottish Act.

On the one hand, section 16 of the Scottish Act provides elaboration on "reasonable belief" as to consent:-

> "*In determining, for the purposes of Part 1, whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were*."

On the other hand, knowledge as used in the English Act refers to the accused's actual knowledge that the other person does not consent to being observed by the accused for the specific purpose of obtaining sexual gratification from that observation.[61] Knowledge also includes "wilfully shutting one's eye to the truth", i.e. deliberately refraining from making inquiries. It is likely that knowledge can be established without difficulty if the observation is made secretly in public. Yet knowledge may be raised by the accused as a defence where he or she had a prior agreement with the person being observed, or where the person being observed had agreed to such observation on previous occasions.

While a search of both English and Scottish Hansard failed to yield any result on the issue as to whether there is such a difference in the language used, it is noteworthy that the newly proposed upskirting related offence under the English Voyeurism (Offences) Bill adopts the same language as the Scottish offence. Hence, we submit that the Scottish language of *'without another person consenting and without any reasonable belief that B consents'* should be adopted.

4.1.7. Protection of children (sections 26 and 36)

The Scottish Act also contains separate provisions for the protection of vulnerable persons. Section 26 makes it a criminal offence if the accused commits essentially the same conducts in section 9 to a child below the age of 13 years old ("young child"). However, it is important to note that voyeurism towards a young child is an offence with absolute liability. In other words, it is not a defence for the accused to claim that he committed the criminal acts with victim's consent and with reasonable belief that the victim consents. This is to reflect the legislative intent for protection of children. The SLC held the view that young children (aged below 13) have no capacity to consent to sexual activity. As such, while the conducts that constitute

[61] *R v Bassett* **[2008] EWCA Crim 1174** at 61

voyeurism and the mental elements of the offence are essentially the same for both sections 9 and 26, the consent element is removed.

In respect of older children aged 13 to below 16 years old ("older child"), the SLC recognised that older children, different from young children, have a limited capacity to give consent to sexual activity. The SLC held the view that older children aged between 13 to 16 years old may engage in consensual sexual conduct and criminalisation of such behaviour may not be the most appropriate manner dealing with it.

However, the SLC also considered the fact that there could be abuse by adult (over 16 years old) towards older children for reason of older children's relative immaturity or vulnerability, given the "*clear social need for the protection of children from sexual abuse and exploitation, especially by adults*"[62]. These reasons explain why under section 36, voyeurism is an offence with strict liability (i.e. consent is irrelevant) if the acts in question are committed by a person over 16 years old (but not anyone below 16 years old) towards an older child. Nonetheless, "proximity of age" is a defence in respect of sexual activity with older children[63]. It is a defence for a person over the age of 16 to engage in sexual conduct (other than sexual activity involving penetration of the anus or vagina when both parties are older children) provided he or she is no more than 2 years older than the child.

26 Voyeurism towards a young child

"(1) If a person ("A") does any of the things mentioned in subsections (2) to (5) in relation to a child ("B") who has not attained the age of 13 years, then A commits an offence, to be known as the offence of voyeurism towards a young child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.

(3) The second thing is that A operates equipment with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(4A) The fourth thing is that A 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—

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

(b) 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 records an image beneath B's clothing of—

[62] n 46 [SLC Report on Rape and Other Sexual Offences] above, paragraph 4.43.

[63] Section 39(3), Sexual Offences (Scotland) Act 2009.

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

(b) 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.

(5) The sixth thing is that A—

(a) installs equipment, or

(b) constructs or adapts a structure or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).

(6) The purposes referred to in subsection (2) are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(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.

(8) Section 10 applies for the purposes of this section as it applies for the purposes of section 9 (the references in that section to section 9(3), (4A) and (5) being construed as references to subsections (3), (4A) and (5) of this section)."

36 Voyeurism towards an older child

"(1) If a person ("A"), who has attained the age of 16 years, does any of the things mentioned in subsections (2) to (5) in relation to a child ("B") who—

(a) has attained the age of 13 years, but

(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of voyeurism towards an older child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.

(3) The second thing is that A operates equipment with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(4A) The fourth thing is that A 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—

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

(b) 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 records an image beneath B's clothing of—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or
(b) 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.

(5) The sixth thing is that A—
(a) installs equipment, or
(b) constructs or adapts a structure or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).

(6) The purposes referred to in subsection (2) are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(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.

(8) Section 10 applies for the purposes of this section as it applies for the purposes of section 9 (the references in that section to section 9(3), (4A) and (5) being construed as references to subsections (3), (4A) and (5) of this section).

4.1.8. Penalty[64]

4.1.8a) General

Generally, the maximum penalty on summary conviction for the offence of voyeurism are imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both. The maximum penalty on conviction on indictment is imprisonment for a term not exceeding 5 years or a fine (or both).

4.1.8b) Voyeurism towards a young child

For voyeurism towards a young child, the maximum penalty on summary conviction for the offence of voyeurism are imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both). The maximum penalty on conviction on indictment is imprisonment for a term not exceeding 10 years or a fine (or both).

4.1.8c) Voyeurism towards an older child

For voyeurism towards an older child, the maximum penalty on summary conviction for the offence of voyeurism are imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both). The maximum penalty on conviction on indictment is imprisonment for a term not exceeding 5 years or a fine (or both).

In essence, the penalty for voyeurism towards an older child is same as other cases (except for voyeurism towards a young child).

[64] Section 48 and Schedule 2, Sexual Offences (Scotland) Act 2009.

4.2Voyeurism in New Zealand

The offence of upskirting in New Zealand is different from that of Scotland, in the sense that it covers only upskirt photography but not upskirt observation.

Under section 216H of the Crimes Act 1961 (New Zealand) [65], making an intimate visual recording of another person [66] is an offence with maximum punishment of 3 years' imprisonment. Intimate visual recording is defined as:

> *"a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device without the knowledge of or consent of the person who is the subject of the recording, and the recording is of –*
> *...*
> *(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."*[67]

However, compared to the Scottish Act, it may be easier to secure a conviction under the New Zealand Act since it is not necessary to prove that the recording is made for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the victim. Only three elements have to be proved:

(1) Makes an intimate visual recording of another person (including recording a person's naked or undergarment-clad genitals, pubic area, buttocks or female breasts which is made from beneath or under a person's clothing);
(2) Intentionally or recklessly does the act in (1); and
(3) Without the knowledge or consent of the person who is the subject of the recording.

The New Zealand Act further prohibits the publication, import, export and sale of such intimate visual recording[68], save in certain situations[69]. Anyone who publishes, imports, exports and sells the intimate visual recording is liable to a maximum of 3 years' imprisonment.

[65] Note: the name of the section is "Prohibition on making intimate visual recording".
[66] Section 216H, Crimes Act 1961 (New Zealand).
[67] Section 216G(1), Crimes Act 1961 (New Zealand).
[68] Section 216I, Crimes Act 1961 (New Zealand).
[69] Section 216K, Crimes Act 1961 (New Zealand).

4.3 Voyeurism in Australia

4.3.1 Australian Capital Territory

It is an offence to observe and film another person's private parts (including both genitals or anal region and breasts of female) under section 61B of the Crimes Act 1900.

Compared to the Scottish Act, it is not necessary for the accused to observe or film another's private parts with any sexual purpose. However, the observation or filming should be considered an invasion of privacy in order to establish the offence. It should also be noted that lack of consent is not an element of the offence, albeit the presence of consent operates as a defence under subsection (7).

Section 61B Intimate observations or capturing visual data etc

"(5) A person (the **offender**) commits an offence if—

(a) the offender observes another person with the aid of a device or captures visual data of—

(i) another person's genitals or anal region; or

(ii) for a female or a transgender or intersex person who identifies as a female – the breasts; and

Example

using a mobile phone to take photos of a woman's underwear under her skirt or down the front of her blouse

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(b) a reasonable person would, in all the circumstances, consider the observing or capturing of visual data to be an invasion of privacy.

Maximum penalty: 200 penalty units[70], imprisonment for 2 years or both.

(6) Strict liability applies to subsection (5)(b).

(7) It is a defence to a prosecution for an offence against subsection (5) if the defendant proves that the defendant—

(a) believed on reasonable grounds that the other person consented to the defendant observing or capturing visual data of the other person's genital or anal region or breasts; or

(b) did not know, and could not reasonably be expected to have known, that the observing or capturing of visual data of the other person's genital or anal region or breasts was without consent.

[70] i.e. $42,000 (200 penalty units multiplied by $210, as defined in section 4AA(1) of the Crimes Act 1914 (Australian Capital Territory).

(8) Subsections (1) and (5) do not apply to—

(a) an observation made by viewing data that was previously captured; or

(b) an observation or capturing of visual data—

(i) by a law enforcement officer acting reasonably in the performance of the officer's duty; or

(ii) by a licensed security provider acting reasonably in carrying on a security activity authorised under the security provider's licence; or

(iii) of a child or other person incapable of giving consent in circumstances in which a reasonable person would regard the observing or capturing of visual data as acceptable; or

Example

taking a photograph or movie of a naked newborn relative

(iv) for a scientific, medical or educational purpose; or

Example

a patient consents to her doctor taking an image of a mole on her breast for the purpose of showing another doctor for a second opinion about the mole

(v) by a person in the course of reasonably protecting premises owned by the person; or

(vi) in circumstances or for a purpose prescribed by regulation.

(vii) Nothing in subsection (8) prevents a person being found guilty of an offence under or because of the Criminal Code, part 2.4 (Extensions of criminal responsibility).

(viii) In this section:

breasts, of a female or a transgender or intersex person who identifies as a female, means the person's breasts whether covered by underwear or bare.

capture visual data—a person captures visual data of another person if the person captures moving or still images of the other person by a camera or any other means in such a way that—

(a) a recording is made of the images; or

(b) the images are capable of being transmitted in real time with or without retention or storage in a physical or electronic form; or

(c) the images are otherwise capable of being distributed.

device does not include spectacles, contact lenses or a similar device when used by someone with impaired sight to overcome the impairment.

genital or anal region, of a person, means the person's genital or anal region whether covered by underwear or bare.

law enforcement officer means—
(a) a police officer; or
(b) a member of the staff of the Australian Crime Commission established by the Australian Crime Commission Act 2002 (Cwlth).

licensed security provider means a person who holds a licence under the Security Industry Act 2003.

security activity—see the Security Industry Act 2003, section 7.

4.3.2 New South Wales

Division 15B of the Crimes Act 1900 (New South Wales) provides a number of "voyeurism and related offences".

4.3.2a) General offence

Under section 91L, it is an offence if 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*", without the consent of the person being filmed to being filmed for that purpose, and knowing that the person being filmed does not consent to being filmed for that purpose[71].

"Private parts" are defined as:

(a) a person's genital area or anal area, whether bare or covered by underwear, or
(b) the breasts of a female person, or transgender or intersex person identifying as female, whether or not the breasts are sexually developed.

In other words, compared to the Scottish Act, this provision has a wider scope since it covers not only genitals or buttocks, but also breasts of female person, transgender or intersex person identifying as female.

Nonetheless, while it is an offence to film a person's private parts, the offence does not specifically target upskirting-related offence (i.e. not a requirement that the filming is made beneath one's clothing).

Filming another person's private parts is a summary offence with the maximum penalty of 100 penalty units[72] or imprisonment for 2 years, or both[73].

[71] Section 91L(1), Crimes Act 1900 (New South Wales)
[72] i.e. $11,000 (100 penalty units multiplied by $110), as defined in section 17 of the Crimes (Sentencing Procedure) Act 1999 No 92 (New South Wales)
[73] Section 91L(2), Crimes Act 1900 (New South Wales)

4.3.2b) Aggravated offence

Section 91L(3) provides a separate aggravated offence, *inter alia*, if the victim is a child under the age of 16 years:

(3) 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 expect that his or her 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, and

(c) ***in circumstances of aggravation****,*

is guilty of an offence.[74]

"Circumstances of aggravation" is defined under section 91L(4), meaning circumstances in which"

(a) the person whom the offender filmed was a child under the age of 16 years, or
(b) the offender constructed or adapted the fabric of any building for the purpose of facilitating the commission of the offence.[75]

The maximum penalty for aggravated offence is heavier, which is imprisonment for 5 years.

4.3.2c) Installing device to facilitate observation or filming

Furthermore, it is an offence if a person "*installs any device, or constructs or adapts the fabric of any building, for the purpose of facilitating the observation or filming of another person*" with the intention of enabling him or any other person to commit the above two offences or to commit an offence of voyeurism under section 91J. [76]

4.3.3 Victoria

It is an offence if a person, with the aid of a device, intentionally observe another person's genital or anal region in circumstances in which it would be reasonable for that other person to expect that his or her genital or anal region could not be observed.[77] The maximum penalty is 3 months' imprisonment.

Furthermore, if a person intentionally visually captures another person's genital or anal region in circumstances in which it would be reasonable for that other person to expect that his or her genital or anal region could not be visually captured.[78] The maximum penalty for this offence is 2 years' imprisonment.

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[74] Section 91L(3), Crimes Act 1900 (New South Wales)
[75] Section 91L(4), Crimes Act 1900 (New South Wales)
[76] Section 91M, Crimes Act 1900 (New South Wales)
[77] Section 41A, Summary Offences Act 1966 (Victoria), "Observation of genital or anal region".
[78] Section 41B, Summary Offences Act 1966 (Victoria), "Visually capturing genital or anal region".

Section 41D of the Summary Offences Act (Victoria) provides exceptions to the above two offences, which include that the conduct was done with express or implied consent of the "victim", by accessing the Internet or a broadcasting service or datacasting service, or by a law enforcement officer acting reasonably in the performance of his or her duty.

By way of comparison, the upskirting offence in Victoria is similar to that of New South Wales in the sense that it does that require the observation and filming be beneath one's clothing. However, the offences in Victoria cover only observation and filming of another person's genital or anal region but not other private parts such as female's breasts.

4.3.4 South Australia

Section 26D of the Summary Offences Act 1953 (South Australia) labels the offence of filming private areas in a slightly different way ("indecent filming"). It is an offence to film another person's private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed. Same as the upskirting offence in Australian Capital Territory, consent is a defence but not an element of the offence. Furthermore, it is an offence to distribute the images obtained by indecent filming under subsection (3).

"26D—Indecent filming

(1) A person must not engage in indecent filming.
Maximum penalty:
(a) if the person filmed was under the age of 17 years—$20 000 or imprisonment for 4 years;
(b) in any other case—$10 000 or imprisonment for 2 years.

(2) It is a defence to a charge of an offence against subsection (1) to prove—
(a) that the indecent filming occurred with the consent of the person filmed; or
(b) that the indecent filming was undertaken by a licensed investigation agent within the meaning of the Security and Investigation Agents Act 1995 and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit.

(3) A person must not distribute an image obtained by indecent filming.
Maximum penalty:
(a) if the person filmed was under the age of 17 years—$20 000 or imprisonment for 4 years;
(b) in any other case—$10 000 or imprisonment for 2 years.

(4) It is a defence to a charge of an offence against subsection (3) to prove 1 or more of the following:
(a) that the person filmed—

(i) consented to that particular distribution of the image the subject of the offence; or

(ii) consented to distribution of the image the subject of the offence generally; or

(b) that the defendant did not know, and could not reasonably be expected to have known, that the indecent filming was without the person's consent; or

(c) that the indecent filming was undertaken by a licensed investigation agent within the meaning of the Security and Investigation Agents Act 1995 and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit and the distribution of the image was for a purpose connected with that claim."

"Indecent filming" is defined to be "*filming of—*

(a) another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy; or

(b) another person engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy; or

(c) *another person's private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed*"[79]

"Private region" is defined to mean "*the person's genital or anal region, or in the case of a female, the breast, when covered by underwear or bare*".[80]

An apparent consent is not effective and valid if it is given by a person under the age of 17 years or with a cognitive impairment, or is obtained from a person by duress or deception.[81]

Section 26E(2) also provides exception to the offence:

(2) The following persons do not commit an offence against this Part:

(a) law enforcement personnel and legal practitioners, or their agents, acting in the course of law enforcement or legal proceedings;

(b) *medical practitioners, or their agents, acting in the course of medical practice or for genuine educational or research purposes*.

[79] Section 26A, Summary Offences Act 1953 (South Australia)

[80] Section 26A, Summary Offences Act 1953 (South Australia)

[81] Section 26E(1), Summary Offences Act 1953 (South Australia)

4.4 Comparison of upskirting offences in different jurisdictions

	Scotland	New Zealand	Australia					
			Australian Capital Territory		New South Wales	Victoria		South Australia
Name / category of the offence	Voyeurism	Prohibition on making intimate visual recording	Intimate observations or capturing visual data etc		Voyeurism	- Observation of genital or anal region - Visually capturing genital or anal region		Indecent filming
Private area concerned	genitals, buttocks, or underwear covering genitals or buttocks	genitals, pubic area, buttocks, female breasts	genitals, anal region, female breasts		genitals, anal area, female breasts	genitals, anal region		genitals, anal region, female breasts
Consent	Element of the offence (without B consenting and without any reasonable belief that B consents)	Element of the offence (without knowledge of or consent of the person)	Defence to the offence		Element of the offence (without the consent of another person and knowing that the person does not consent)	Defence to the offence		Defence to the offence
Upskirt observation as an offence	✓	✗	✓	**NB:** not necessarily beneath one's clothing	✗	✓	**NB:** not necessarily beneath one's clothing	✗
Upskirt filming as an offence	✓	✓	✓		✓; **NB:** not necessarily beneath one's clothing	✓		✓; **NB:** not necessarily beneath one's clothing

Specific protection for children	✓, parallel offences but consent is irrelevant	✗	✗	Aggravated offence if done towards a child, heavier penalty associated	✗	No valid consent can be given by a person under the age of 17; heavier punishment if victim is below 17 years old
Sexual purpose specifically required as an element	For the purpose of sexual gratification OR humiliating, distressing or alarming B	✗	✗	To obtain or to enable another person to obtain sexual arousal or sexual gratification	✗	✗
Other requirement(s)	where the genitals, buttocks or underwear would not otherwise be visible	N/A	The observation / filming is considered an invasion of privacy	Reasonable person would reasonably expect the person's private parts could not be filmed	Reasonable to expect that genital or anal region could not be observed or captured	A reasonable person would not expect that the person's private region might be filmed
Maximum penalty	- Summary conviction: 12 months' imprisonment; fine; or both - Conviction on indictment: 5 years' imprisonment (10 years for voyeurism towards a young child); fine; or both	3 years' imprisonment	200 penalty units; 2 years' imprisonment; or both	- General offence: 100 penalty units; 2 years' imprisonment; or both - Aggravated offence: 5 years' imprisonment	- Observation: 3 years; - Filming: 2 years	- Victims of <17 years old: $20,000 or 4 years' imprisonment; - Other cases: $10,000 or 2 years' imprisonment

Part 5. Impacts of Establishing Specific Offences of 'Upskirting'

5.1 Overview
5.2 Clarify the Law
5.3 Promote Certainty of the Law
5.4 Achieve Justice
5.5 Protect the Public
5.6 Deter Potential Offenders

Part 5. Impacts of Establishing Specific Offences of 'Upskirting'

5.1 Overview

Upskirting is the non-consensual taking of images of an individual's public area underneath their outer clothing in public places. Creation of a specific offence of upskirting along with other voyeurism offences in Hong Kong would be beneficial in the following ways: clarifying the law, promoting certainty of the law, achieving justice, protecting the public, and deterring potential offenders. [82]

5.2 Clarify the Law

With a specific offence of upskirting, the Hong Kong courts no longer have to overstretch the existing criminal law to cover the target behaviour. Currently, instances of upskirting are prosecuted under the offences of disorderly conduct in public places, outraging public indecency (OPD), loitering, and/or access to computer with dishonest intent. However, as none of the three offences were intended to deal with upskirting, courts have to sacrifice the clarity and certainty of the law to ensure that offenders would be convicted.[83]

For example, as noted by the Hon Mr Justice Fok PJ, the courts "*have not emphasised the lewd, obscene or disgusting nature of the act or that people would be shocked by it*" in sentencing for the offence of OPD in upskirting cases. He further pointed out that "*the real vice of upskirting is that it violates privacy and dignity, and is degrading and humiliating, is a far cry from the rationale of the public element of the offence*".[84] As the UK Law Commission remarked, upskirting involves a "*different wrong*" than OPD and its "*fundamental mischief ... is not creating disgusting sights in public but infringing the dignity of individuals*".[85] Therefore, while the existing criminal law could be used to prosecute some instances of upskirting, it would regrettably cloud the clarity of the law at the same time. Professor Alisdair Gillespie makes a similar argument and suggests the creation of a specific offence for upskirting.[86] This would address the growing social issue without sacrificing the clarity of the law.

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[82] See also Voyeurism (Offences) (No. 2) Bill Impact Assessment, UK Ministry of Justice, 21 June 2018, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/718305/e-signed-impact-assessment-government-bill.pdf

[83] See Part 2 above.

[84] n 41 above, Fok PJ, "Outraging Public Indecency"

[85] "Simplification of Criminal Law: Public Nuisance and Outraging Public Indecency", *Law Commission*, 24 June 2015, Law COM No 358, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/lc358_public_nuisance.pdf

[86] Alisdair Gillespie, "'Up-skirts' and 'down blouses': voyeurism and the law," [2008] *Criminal Law Review* 370.

5.3 Promote Certainty of the Law

If a specific offence is established, all offenders accused of upskirting would be charged with the same offence. This promotes the certainty of the law in this area and thus ensures that despite the different factual matrixes involved, these defendants will face a similar trial process and be subject to the same sentencing guidelines. This would be a much welcome development from the current situation where accused offenders could be charged with different offences depending on the factual matrix.

5.4 Achieve Justice

The proposed offences would ensure that behaviours of upskirting in all factual matrixes could be prosecuted and convicted, so that offenders would be captured in the criminal justice system. As discussed in Part 2 above, not all instances of upskirting would be caught by the existing criminal law in Hong Kong. In other words, some perpetrators would be unpunished, and this disincentivises victims from reporting. A specific offence created to target upskirting could close the gaps in the existing criminal law in Hong Kong.

5.5 Protect the Public

The specific offence would reflect upskirting's true nature as a sexual offence, which could not be achieved if the behaviour is prosecuted with the charge of OPD, loitering, and/or access to computer with dishonest intent. If the new offence is placed in the Hong Kong Police Force's (HKPF) specified list of sexual offences, employers are able to check via the Sexual Conviction Record Check whether potential employees undertaking child-related work and work relating to mentally incapacitated persons have been convicted of such offences. This provides the public, specifically vulnerable groups, with stronger protection from perpetrator of sexual offences. In addition, the new offence means that the HKPF would be able to act under additional circumstances and be more incentivised in pursuing reported cases of upskirting.

5.6 Deter Potential Offenders

Creating an offence of upskirting may have a deterrent effect as it is a clear message that such behaviour is no longer tolerated or considered a grey area of the law, but is instead criminalised by the laws of Hong Kong. Labelling it as a legal wrong would also increase the weight and persuasiveness of arguments against such behaviour by advocacy groups and schools, allowing early intervention against potential offenders. This would benefit the welfare of potential victims of this offence.

Part 6. Conclusion: Our Recommendations to the Law Reform Commission

6.1 Extension of sexual assault to cover ‘upskirting’
6.2 New offence: voyeurism
    6.2.1 Possible inclusion of female breasts
    6.2.2 Consent as an element of the offence but not a defence
    6.2.3 Whether the upskirt observation must be carried out with the aid of an equipment or device
    6.2.4 Separate protection of children
    6.2.5 Upskirting is a sexual offence

Part 6. Conclusion: Our Recommendations to Law Reform Commission (LRC)

In the first published consultation paper, 'Rape and Other Non-consensual Sexual Offences', LRC recommended that the scope of sexual assault should be expanded to cover any acts of a sexual nature. Upskirting will be covered in sexual assault under the expansion. It is of our opinion that this recommendation is not appropriate and *"6.1. Extension of sexual assault to cover 'upskirting'"* will offer our rationales.

While in the third consultation paper, 'Miscellaneous Sexual Offences', LRC recommended to include a new offence voyeurism along the lines of section 67 of the English Sexual Offence Act 2003. We noticed the inadequacy of English provision in capturing upskirting acts. Yet, it is of our opinion that upskirting should be categorised under the broader offence of voyeurism, with regards to the practices of other major common law jurisdictions. Most importantly, in the proposed amendment of the English Sexual Offences Act 2003 by the Voyeurism (Offences) (No. 2) Bill, there has never been a doubt as to why upskirting should be included under voyeurism.

It is therefore submitted that Hong Kong should refer to the Scottish equivalent provision and include upskirting as an act of voyeurism. In addition, we raise several factors for LRC's consideration for establishing the specific offences, including, possible coverage of female breasts, whether the upskirt observation must be carried out with the aid of an equipment or device, separate protection of children.

6.1 Extension of sexual assault to cover 'upskirting'

In the consultation paper 'Rape and Other Non-consensual Sexual Offences', it is recommended that the scope of sexual assault should be expanded to cover any act of a sexual nature which would have been likely to cause another person 'fear, degradation or harm' had it been known to the other person (Recommendation 20).[87] Under the expansion, upskirting will be covered in sexual assault.

Expanding the scope of sexual assault could be problematic. The term 'assault' in sexual assault adopts the definition and concept of common assault in common law. It includes any unlawful bodily contact and any conduct that may cause another person to apprehend the use of immediate and unlawful personal violence. If the scope of assault extends to include any acts of sexual nature which would have been likely to cause another person 'fear, degradation or harm', it will be a deviation to the common law definition of assault. This expansion is not adopted in English and Wales or Scotland. The expansion is not supported by any case law in which the court provides legal reasons for enlarging the scope.

[87] 'Consultation Paper: Rape and other Non-consensual Sexual Offences', *Law Reform Commission*, paragraph 6.26

In addition, the only reason for and effect of such an extension as provided by the Committee is that upskirting can be captured. With due respect, the justifications are insufficient. One possible threat is that the wider definition of sexual assault will capture much more behaviours which are not criminally wrong under the existing definition. The suggested definition includes 'any act of a sexual nature'. With the broad and vague wording, many acts will attract criminal liability if the scope of sexual assault is expanded in such a way.

It is therefore more satisfactory to introduce a specific statutory offence for upskirting, rather than expanding the scope of sexual assault which leads to a much wider concept of 'assault'. As a prevalent and serious social phenomenon, upskirting is should be dealt with by a separate from sexual assault.

6.2 New offence: voyeurism

In the consultation paper 'Miscellaneous Sexual Offences', it is recommended that a new offence of voyeurism should be introduced and be along the lines of section 67 of the English Sexual Offences Act 2003 (Recommendation 3).

However, upskirting may not be covered in the new proposed offence. One of the elements of the new offence is that the victim is *'doing a private act in a place which, in the circumstances, would reasonably be expected to provide privacy'*. It can be argued that where the public have general access to an area, then it is a public rather than private place.[88] The new offence mainly captures unlawful act carried out in private areas. However, a significant number of upskirting cases take place on public transports. These incidents thus cannot be captured by the new offence of voyeurism. '*Part 5. Recent Development of Voyeurism Offences in the UK'* details the Voyeurism (Offences) (No. 2) Bill and its proposal to establish a specific offence of upskirting as discussed in the United Kingdom at the time of writing.

In light of the inadequacy of section 67 of the English Sexual Offence Act 2003 and having considered the legislations of various jurisdictions, we submit that the Scottish upskirting offence shall be followed as the Sexual Offences (Scotland) Act 2009 is the most comprehensive piece of legislation. The offence of upskirting should be categorised under the broader offence of voyeurism, with regards to the practices of other major common law jurisdictions. Most importantly, in the proposed amendment of the English Sexual Offences Act 2003 by the Voyeurism (Offences) (No. 2) Bill, there has never been a doubt as to why upskirting should be included under voyeurism. We therefore submit that Hong Kong should refer to the Scottish equivalent provision such and include upskirting as an act of voyeurism.

[88] Rook and Ward, *Sexual Offences: Law and Practice* (2004), pp.401-402

6.2.1 Possible inclusion of female breasts

It is our stance that the Hong Kong shall, at minimum, adopts the Scottish provision in respect of the upskirting offence.

However, following an examination of legislations of other jurisdictions, we recommend the LRC to also consider the possibility of criminalising "downblousing" observation or filming of female breasts.

Firstly, female breasts, in addition to genitals and buttocks, are also private areas of which a reasonable person would expect privacy, especially in a public setting. It is highly unlikely that a female would agree to non-consensual observation and filming of her breasts in public.

Secondly, same as upskirting, downblousing is equally a form of street harassment that leaves women feeling vulnerable in public spaces. An accused gains sexual pleasure by observing private parts of another person, be it their genitals, buttocks or (female) breasts. In essence, the nature of upskirting and downblousing are the same.

Additionally, we would like to stress that if LRC does take into account our recommendation to criminalise also the downblousing observation and filming of female breasts, it may be necessary to expressly state that the breasts concerned are "the breasts of a female person, or transgender or intersex person identifying as female, whether or not the breasts are sexually developed" (i.e. New South Wales equivalent provision). This description of the term "breasts" would extend protection over female children, and at the same time respect gender autonomy.

6.2.2 Consent as an element of the offence but not a defence

In theory, explicitly making consent a defence to the offence would shift the (evidential) burden to the defendant to raise evidence that consent was present on the balance of probabilities. Accordingly, this may assist the prosecution in securing a conviction. However, in practice, we submit that most upskirting takes place in public area which the victims do not know the accused and could hardly consent to such behaviour. Therefore, it will not be too difficult for the prosecution to establish the lack of consent.

Most importantly, in order to be in line with other existing and proposed sexual offences, we submit that consent should constitute an element of the offence, instead of a defence to the offence.

6.2.3 Whether the upskirt observation must be carried out with the aid of an equipment or device

It is our view that in relation to upskirt observation, it should *not* be a requirement or element of the offence that the observation be carried out with the aid of an equipment or device.

Upskirt observation can be carried out with one's bare eyes where the act of observation is so obvious that it cannot be said that the accused did so accidentally. An example is where the perpetrator peeks under the table repeatedly or for an unusually long period in a public place, such as a library. We opine that even the Scottish provision on upskirt observation may not provide sufficient protection for victims in such situations. We are of the view that the proposed Hong Kong legislation, albeit largely based on the Scottish equivalent provision, should include revision in this aspect such that upskirt observation would constitute an offence, whether or not any equipment or device is used to assist the upskirt observation, as long as all other elements of the offence are satisfied.

6.2.4 Separate protection of children

We submit that Hong Kong's present position that no valid consent can be given by a person below 16 years old[89] does not offer as much protection as the Scottish legislation.

In this regard, we recommend that separate provisions be included for the protection of vulnerable victims, especially children, same as that under the Sexual Offences (Scotland) Act 2009. The Scottish approach provides sufficient protection for children by recognising that children aged below 13 have no capacity to consent to sexual activity whereas older children aged 13 to below 16 years old have a limited capacity to give consent to sexual activity. The social need for protection of such children from sexual abuse and exploitation by adults justifies the necessity of having separate offences without the consent element, to deal with upskirting that involves a (young or older) child. The effect of a separate offence in relation to child victim implies that the defendant could not raise a defence of a genuine mistaken belief as to the age of the child victim. The fact that the accused reasonably believed the child to be older is irrelevant to his criminal liability. [90]

On the one hand, these separate offences offer a lower threshold for the prosecution to establish the offence and to secure conviction where children are involved, as the prosecution is not required to prove the lack of consent from the victim. On the other hand, since voyeurism (including upskirting) towards children is made an offence with absolute liability, a distinction can be shown between voyeurism towards children and voyeurism towards any other victims. This would reflect the seriousness of committing such offence towards vulnerable groups of victims.

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[89] Archbold 2018, 21-158.

[90] n 48 above [Sexual Offences (Scotland) Bill, Policy Memorandum], para. 105.

6.2.5 Upskirting is a sexual offence

To emphasise the sexual nature of this offence, we recommend that we should follow the Scottish approach to make it an element of the offence that the upskirting is conducted for the purpose of *obtaining sexual gratification or humiliating, distressing or alarming B*.

(i) The New Zealand Crimes Act 1961, (ii) the Crimes Act 1900 (Australian Capital Territory), (iii) the Summary Offences Act 1966 (Victoria) and (iv) the Summary Offences Act 1953 (South Australia) which mention nothing about the sexual purpose or objective of the accused cannot show the sexual nature of the offence. For that reason, we submit that the Scottish provision provides the best approach in emphasising that the offence of upskirting is a sexual offence rather than one that simply deals with an invasion of one's privacy.

It is hoped that by creating specific sexual offence of upskirting along with other voyeurism offences in Hong Kong would be beneficial in clarifying the law, promoting certainty of the law, achieving justice, protecting the public, and deterring potential offenders.

Appendix 1

Voyeurism (Offences) (No. 2) Bill

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Ministry of Justice, are published separately as Bill 235-EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Secretary David Gauke has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Voyeurism (Offences) (No. 2) Bill are compatible with the Convention rights.

Voyeurism (Offences) (No. 2) Bill

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TO

Make certain acts of voyeurism an offence, and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Voyeurism: additional offences

(1) The Sexual Offences Act 2003 is amended as set out in subsections (2) to (4).

(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 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."

(3) In section 68 (voyeurism: interpretation), after subsection (1) insert—

"(1A) For the purposes of sections 67 and 67A, operating equipment includes enabling or securing its activation by another person without that person's knowledge."

(4) In Schedule 3 (sexual offences for purposes of notification requirements), after paragraph 34 insert—

"34A(1) An offence under section 67A of this Act (voyeurism: additional offences), if—

(a) the offence was committed for the purpose mentioned in section 67A(3)(a) (sexual gratification), and

(b) the relevant condition is met.

(2) Where the offender was under 18, the relevant condition is that the offender is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months.

(3) In any other case, the relevant condition is that—

(a) the victim was under 18, or

(b) the offender, in respect of the offence or finding, is or has been—

(i) sentenced to a term of imprisonment,

(ii) detained in a hospital, or

(iii) made the subject of a community sentence of at least 12 months."

(5) In Schedule 1 to the Children and Young Persons Act 1933 (offences against children and young persons with respect to which special provisions of Act apply), for "and 67 of the Sexual Offences Act 2003" substitute ", 67 and 67A of the Sexual Offences Act 2003".

(6) In paragraph 10 of Schedule 34A to the Criminal Justice Act 2003 (child sex offences for the purposes of section 327A), for "or 67" substitute ", 67 or 67A".

(7) In paragraph 33 of Schedule 4 to the Modern Slavery Act 2015 (offences to which defence in section 45 does not apply), in paragraph 33 (offences under Sexual Offences Act 2003), after the entry for section 67 insert—

"section 67A (voyeurism: additional offences)".

2 Extent, commencement and short title

(1) This Act extends to England and Wales only.

(2) This Act comes into force at the end of the period of two months beginning with the day on which this Act is passed.

(3) This Act may be cited as the Voyeurism (Offences) Act 2018.

Voyeurism (Offences) (No. 2) Bill

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B I L L

To make certain acts of voyeurism an offence, and for connected purposes.

Presented by Secretary David Gauke
supported by
The Prime Minister,
Secretary Penny Mordaunt,
Secretary Matt Hancock,
The Attorney General,
Andrea Leadsom,
Rory Stewart, Lucy Frazer and Edward Argar.

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