對香港法律改革委員會
「雜項性罪行」諮詢文件之意見書

Submission on Law Reform Commission's Consultation Paper 'Miscellaneous Sexual Offences'

關注婦女性暴力協會
Association Concerning Sexual Violence Against Women

ACSVAW
關注婦女性暴力協會
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Against Women

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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.[1] 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.[2] 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. Section B of this paper includes ACSVAW's recommendations of improving the proposal of new offence of 'voyeurism' as to extending the coverage of upskirting.

[1] Hong Kong Police Force (2018)
[2] *Ibid*.

Section A of this paper is ACSVAW's response to recent consultation paper on 'Miscellaneous Sexual Offences'. The legal definitions of rape and sexual assault were formed in 1957, which are very obsolete and not up-to-date. They cannot provide enough protection to sexual violence victims and limits sexual autonomy. ACSVAW reckons that the suggestions made by the Review of Sexual Offences Sub-committee of the Law Reform Commission in the past 5 years, including 'Rape and Other Non-consensual Sexual Offences', 'Sexual Offences Involving Children and Persons with Mental Impairment' and the recent 'Miscellaneous Sexual Offences', are more aligned with the social development nowadays. We sincerely hope that the government can carry out the reforms as soon as possible.

Ms WONG Sau Yung, Linda
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Content

Section A

Responses to Recommendations in Law Reform Commission's Consultation Paper 'Miscellaneous Sexual Offences'

對法改會「雜項性罪行」諮詢文件之回應

1. Our responses to Law Reform Commission's (LRC) recommendation 1 on offence of 'incest'

LRC's Recommendation 1:

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

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

We also recommend that the offence of incest be reformed and the new offence should:

(a) be gender neutral;

(b) cover all penile penetration of the mouth, vagina and anus; and

(c) be extended to cover uncles/aunts and nephews/nieces (who are blood relatives).

We are of the view that the issue of whether the new offence should:

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

(b) cover adoptive parents

should be considered by the Hong Kong community. Accordingly, we invite the community to express their views on these issues.

We recommend the retention of the need for the Secretary for Justice's consent to prosecute.

Below are our responses to the above recommendation:

1.1 LRC's recommendation: The specific offence of incest be retained but should be reformed.

We agree with the above recommendation. Sexual abuse within family is common, according to our frontline experience and statistics. In the past 17 years, RainLily has received 3501 cases of sexual violence, among which 464 happened within familial relationships. The forms of sexual violence include rape (37%), indecent assault (58%) and sexual harassment (5%). Concerning the perpetrators, the majority are victims' fathers (31.7%; 147 cases) and brothers (22.0%; 102 cases) respectively. The rest include step-fathers, cousins, uncles, grandfathers, brothers-in-law and adoptive fathers.

The above perpetrators take advantage of the authority position they have in the family to sexually exploit weaker and usually younger family members, such as daughters, granddaughters, nephews/nieces and younger cousins. Sexual abuse in the family may be

prosecuted using a range of offences, including rape, indecent assault and unlawful sexual intercourse with a girl under 16. Where there has been sexual intercourse between close blood relations, the offence incest may be used. Although incest is meant to criminalize *consensual* sexual relations among blood relations, it is also a tool to prosecute *non-consensual* penetrative sexual abuse within blood relationships, including half relations who are in direct blood line (half-brother or half-sister). In order to maintain legal protection of families, in particular of members aged 16 or above, we think it is still necessary to retain the specific offence of incest.

1.2. LRC's recommendation: The new offence be gender neutral.

We agree with the above recommendation. It is aligned with the guiding principle of 'gender neutrality' of legal reforms of sexual offences. The new offence should no longer be gender-specific, with separate offences for 'men' and 'women aged 16 or above'.

Instead, we suggest that the new offence should use 'a person' and 'another person', to indicate that a person of any sex or gender can be a perpetrator or be vulnerable to sexual abuse within family.

1.3. LRC's recommendation: The new offence cover all penile penetration of the mouth, vagina and anus

We agree with the above recommendation, however, it should not limit to penile-penetration only and be extended to other forms of penetration.

In overseas jurisdictions such as Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, Western Australia, Canada, New Zealand, Singapore, and Taiwan, the offence of incest applies to penile penetration of the vagina, anus and mouth (see Table 1). In Hong Kong, however, incest applies to vagina-penile penetration only. The existing provisions, sections 47 and 48 of Cap. 200 Crimes Ordinance, are framed as purely heterosexual offences. Male victims who are penetrated by their male family members are not protected under the current offences.

We welcome the recommendation that the scope of penile penetration be extended to cover penetration of the vagina, anus or mouth of another person, as opposed to that of the vagina only in the existing law. In other words, the scope of protection is extended to include males and transgender as well, instead of the females only. Besides, penile penetration of the mouth, vagina and anus can be as harmful as penile-vaginal intercourse. They represent just as much an abuse of the familial relationship as acts of sexual intercourse. Based on the protective principle, the scope should be extended in order to provide a larger degree of protection. We submit that the new offence should apply to other forms of penetration by any part of the body and objects.

1.4. Should the new offence apply to other forms of penetration or sexual activity?

We submit that the new offence should apply to penetration of the anus and vagina by objects or any part of the body. Firstly, non-penile penetrative acts bring serious and long-

lasting physical and psychological harm to the victims as much as penile penetrative acts do. Secondly, the new offence can avoid gender bias and fulfill the principle of gender neutrality.

In Queensland, Tasmania and Canada, the offence of incest covers penetration of the anus and vagina by objects or any part of the body. In England and Wales, under sections 64 and 65 of Sexual Offences Act 2003, 'sex with an adult relative' covers penetration of a person's vaginal, anus with a part of body or other objects, and penetration of mouth by penis. It provides wider protection. Homosexual acts are covered so that male victims are within the net as well. It can be seen that overseas jurisdictions already recognize the seriousness of non-penile penetration. As opposed to penile penetrative acts, non-penile penetrative acts committed by the perpetrators include penetration of vagina and anus of the victim by using tools such as finger, tongue and hard objects. As such, penetrative acts as such signify the exploitation of the weak by the dominant. In light of the above, including non-penile penetration can highlight the harm brought by both, so as to stress the gravity of any kinds of penetrative acts.

What's more important, including penetration of the anus and vagina by objects or any part of the body in new offence can avoid the assumption that only males are perpetrators. If the new offence also covers forms of penetration other than using penis, it can capture the penetrative acts done by female perpetrators, because women might commit the offence, too. By doing so, the new offence can fulfill the principle of gender neutrality by taking away gender bias. It will also provide better protection to the family.

As for whether the new offence should extend to sexual activity, we submit that it should *not*. Including all types of sexual activity may dilute the severity of the offence of incest. Extending the offence to cover non-penetrative acts may be a too significant departure from what we perceive as 'incest' and its seriousness.

1.5. LRC's recommendation: The new offence be extended to cover uncles/aunts and nephews/nieces (who are blood relatives).

We agree with the above recommendation. There are strong arguments for ensuring that uncles and aunts, nephews and nieces are included in the scope of the offence. Russell found that abuse by uncles was the most prevalent form of abuse by relatives in her survey. The survey consists of 930 randomly selected adult female residents in the US, who reported their sexual abuse experience (including vaginal, oral or anal intercourse), of which 20 had been abused by a brother/half-brother, 42 by a father and 46 by an uncle. [3]

Therefore, we agree that the new offence should offer wider protection to deter sexual abuse by uncles and aunts of blood relations.

1.6. Should the new offence cover adoptive parents?

We submit that the new offence should cover adoptive parents.

[3] Russell, D. (1983). 'The incidence and prevalence of intrafamilial and extrafamilial sexual abuse of female children' in *Child Abuse & Neglect (7)*. https://doi.org/10.1016/0145-2134(83)90065-0

The law of Hong Kong treats relationships by adoption as on a par with relationships by blood: the position of the adoptive parent is legally the same as that of a natural parent and adoptive parents should treat the children as if they are their natural born children. According to section 13 of the Cap. 290 Adoption Ordinance:

Upon an adoption order being made–

a. all rights, duties, obligations and liabilities of the parents (other than a parent referred to in section 5(1)(c) if the order is made under that section) or guardians of the infant in relation to the future custody, maintenance and education of the infant (in this section referred to as " the relevant matters"), including all rights to appoint a guardian to consent or give notice of dissent to marriage, shall be extinguished;

b. all the relevant matters shall vest in and be exercisable by and enforceable against the adopter, as if-

- *where the order is made under section 5(1)(c) , the infant were a child born to the adopter and the parent referred to in that section in lawful wedlock;*
- *in any other case, the infant were a child born to the adopter in lawful wedlock; and*

c. in respect of the relevant matters-

- *where the order is made under section 5(1)(c) , the infant shall stand to the adopter and that parent exclusively in the position of a child born to them in lawful wedlock;*
- *in any other case, the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.*

Adoptive parents assume parental rights, responsibilities, obligations and liabilities over the adoptive children. In a family, they are legally no different from birth parents. They undertake lifelong trust and responsibility to the children they adopted, and that they should be treated on a par with natural parents. There are also arguments that the relationship is so important that this responsibility should continue throughout life or after an adoptive relationship has been ended. If adoptive parents are considered as the same as the natural parents of the child, we also consider whether there should be a permanent prohibition of sexual relationships. In fact, there is a prohibition against marriage with an adopted child in Hong Kong. According to Section 27 and Schedule 5 of Cap. 181 Marriage Ordinance, marriage between men with (former) adoptive mother or (former) adoptive daughter as well as, marriage between women with (former) adoptive father or (former) adoptive son are *invalid*. Such prohibitions of marriage align with Cap. 290 Adoption Ordinance, which states the equal legal status of adoptive parents with that of natural parents.

In reality, some children are adopted at a very young age and may have no idea that their adoptive parents are not their natural parents. Even some children might know they are adoptive parents, since they are raised in the family at a young age, they regard adoptive parents as biological ones. Adoptive children expect adopters to treat them as if they are natural children. As the maintenance of family structure and protection of children are the aims of the law of incest, we recommend that adoptive parents be included within the new offence for the same ground as blood relatives.

1.7. LRC's Recommendation: the retention of the need for the Secretary for Justice's consent to prosecute

We agree with the above recommendation.

Table 1: Comparison of offence 'incest' of overseas jurisdictions

	Hong Kong	**England and Wales**	**Scotland**	**Australia**	**Canada, Singapore and New Zealand**
Offence	Incest	Sexual activity with a child family member[s.25]& Sex with adult relative: penetration[s.64]	Incest	Incest	Incest
What sexual acts does it cover?	Vagina-penile penetration	Children: penetrative and non-penetrative; Adult: penetrative; Both cover penetration to anus or vagina by any parts of body or objects	Vagina-penile penetration	Penile penetration to anus, vagina or mouth (Tasmania, Queensland cover penetration to anus or vagina by any parts of body or objects)	Penile penetration to anus, vagina or mouth (Canada covers penetration to anus or vagina by any parts of body or objects)
Gender specific or neutral	Gender specific Section 47：by men Section 48：by women of or over 16	Gender neutral	Gender specific	Gender neutral	Gender neutral
Does it cover uncles/Aunts?	No	Yes	Yes	No (except Queensland)	No

Does it cover adoptive parents?	No	Yes	Yes	No (except Queensland)	No
Does it cover step parents?	No	s.25：yes s.64：no	Yes	No(except Australian Capital Territory, Victoria, Western Australia and Queensland[4] [1])	No

2. Our responses to LRC's recommendation 2 regarding new offence of 'sexual exposure'

LRC's recommendation 2:

Proposed new offence of sexual exposure

We recommend that the new legislation should include an offence of sexual exposure along the lines of section 8 of the Sexual Offences (Scotland) Act.

We also recommend that the offence of sexual exposure should have all of the following elements:

- *(1) exposure of one's genitals in a sexual manner to another person ("B") with the intention that B will see them;*
- *(2) the exposure is made in a public or private place;*
- *(3) the exposure is made without the consent of B and without any reasonable belief that B consents; and*
- *(4) the purpose of the exposure is for*
  - *(i) obtaining sexual gratification, or*
  - *(ii) humiliating, distressing or alarming the victim.*

Below are our responses to the above recommendation:

We welcome the proposed new offence 'sexual exposure'. By establishing the new offence, sexual exposure shall be treated as a *sexual* offence and no longer charged using an irrelevant

[4] In Queensland, it does not criminalize the sexual activity happens between two adults (Criminal Code (Queensland), s.222)

public order offence (i.e. section 148 of the Crimes Ordinance). It will also be able to capture sexual exposure that happened in a private place, which indicates wider protection.

However, we are concerned that the new offence does not offer enough protection to children. Therefore, we submit that there shall be separate offences concerning children under 13 and children above 13 yet below 16. We submit that in addition to including an offence of sexual exposure along the lines of section 8 of the Sexual Offences (Scotland) Act, there should be an inclusion of section 25 and section 35 of Scottish Act:

s.25: Sexual exposure to a young child (below 13 years old):

"(1) If a person ("A") intentionally and for a purpose mentioned in subsection (2) exposes A's genitals in a sexual manner to a child ("B") who has not attained the age of 13 years, with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to a young child.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

s.35: sexual exposure to an older child (below 16, above 13):

"(1) If a person ("A"), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) exposes A's genitals in a sexual manner to a child ("B") who—

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

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

with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to an older child.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B

During the course of consultation and/or discussion of Sexual Offences (Scotland) Act 2009, it was agreed that specific sets of sexual offences should be created to protect children from sexual activities. In particular, young children have no capacity to consent to sexual activity and older children have only a limited capacity to do so. As such, protective offences that were modelled on the offences in relation to adult victims but with the consent element removed were designed.

Hence when the victim involved is under 13, the offence of sexual exposure involves strict liability and the accused will have no defence. Where the victim is 13 to 16 years old, the Commission recognised that older children may have the capacity to consent to sexual activity, particularly there may be consensual sexual conduct between young children and criminalisation of such behaviour may not be the most appropriate manner dealing with it. Nonetheless, there should still be a criminal offence where an adult (over 16 years old) sexually

exposes his/her genitals to an older child even where that child is consenting, for reason of older child's relative immaturity or vulnerability. The Scottish Law Commission (the Commission) especially viewed that there is a "clear social need for the protection of children from sexual abuse and exploitation, especially by adults'[5].

'*The Commission takes as another of its guiding principles the protective principle. This holds that there are certain people who should be protected from all sexual activity, such as young children. In addition, a more limited form of protection should cover those who may be able to consent to sexual activity but who should be protected in view of their relative immaturity or vulnerability.*

*The Commission recommends the creation of two sets of sexual offences which are aimed at protecting children. The first set applies to children under the age of 13. As Professor Maher explains: "**Children under 13 lack the ability to consent to sexual activity. It is a major wrong, which the law should mark out and penalise, when someone involves a young child in sex**." There are to be special versions of the offences of rape, sexual assault, and coercing sexual conduct where the victim is under 13. These offences will involve 'strict liability', that is the accused will have no defences (for example, by saying that he thought the child was over 13). The situation is different in respect of older children (those between 13 and 16). **Older children may have the capacity to consent to sexual activity**. However the Commission believes that there should still be criminal offences where an adult has sexual activity with an older child, even where that child is consenting. These offences will carry lesser punishment than the corresponding offences against young children. Moreover, the accused would be allowed certain types of defence, for example that he believed, on reasonable grounds, that the child was 16 or older. **Special provision is made where both parties involved in consensual sexual activity are in the 13 to 16 age range. The Commission does not believe that the law should be seen as ignoring or condoning this type of conduct between young people. At the same time, getting the criminal law involved is not the appropriate response where both parties are consenting**. The Commission believes that, depending on the facts and circumstances, such children may be in need of appropriate welfare measures. To deal with this situation the Commission recommends that it should be a new ground for referring a child to a children's hearing that the child has engaged in sexual activity.*' [6]

In view of the commission's view, Table 2 below summarizes the age range for accused and victim, the consent thereof and the relevant offence:

[5] Scottish Law Commission. (2007) *Report on Rape and Other Sexual Offences* (Scot Law Com No 209), paragraph 4.43.

[6] Scottish Law Commission, Report on Rape and Other Sexual Offences to be published, Justice, Clarity and Consent: New Sex Laws for Scotland. https://www.scotlawcom.gov.uk/files/7112/8022/1970/nr_rep209.pdf

Table 2. Different circumstances charged under Scottish provisions

	Age of the Accused	Age of Victim	Whether there is consent?	Result
a.	Any age	<13 years old	Consent is irrelevant – strict liability	Charged under s.25
b.	13 - <16	13 - <16	Yes	Not an offence as long as consensual
c.	13 - <16	13 - <16	No	Charged under s.8
d.	>16	13 - <16	Consent is irrelevant	Charged under s.35
e.	Any age	>16 years old	Yes	Not an offence since consensual
f.	Any age	>16 years old	No	Charged under s.8

Table 2 explains:

- The offence of sexual exposure to a young child (<13 years old) can be committed by a person of any age - **situation (a)**
- The offence of sexual exposure to an older child can be committed only by a person who has attached the age of 16 years – **situation (d)**
- If sexual exposure to an older child is committed by an offender who is under 16, the offender can still be charged under s.8 – **situation (c)**
- Therefore, it is not an offence for an older child to exposure his/her genitals to another older child, provided that such exposure is consensual – **situation (b)**[7]
    - Exposure by someone below the age of 16 years old to an older child is not caught by section 35 nor section 25
    - The only possible offence would be the usual section 8
    - Since consent existed, no charge can be brought against the accused.

We submit that the same set of reasons apply equally in Hong Kong. In relation to sexual offences, Hong Kong's current position is that children aged below 16 cannot give valid consent. For instance, unlawful sexual intercourse with a girl under 13 (s.123 of Cap. 200 Crimes Ordinance) and with a girl under 16 (s.124 of Cap. 200 Crimes Ordinance) are both absolute liability offences. The fact that the girl consented is not a defence to the charge, but at most only relevant in mitigation of sentence. Similarly, distinctions of criminality in respect of sexual exposure can also be drawn on the basis of age range of the victim. It is submitted that, by establishing similar offences in Hong Kong as those in Scotland, it can deter people from committing unlawful acts to children. This is expected to better protect children.

[7] Col 1667 Judicial Committee 10th Meeting 2008, Session 3, http://archive.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1002.htm#Col1667

3. Our responses to LRC's recommendation 3 regarding new offence of 'voyeurism'

LRC's recommendation 3:

> ***Proposed new specific offence of voyeurism (see near paragraph 3.22)***
>
> *We recommend introducing a new specific offence of voyeurism.*
>
> *We recommend that such an offence be along the lines of section 67 of the English Sexual Offences Act 2003.*

While we agree that a specific offence of 'voyeurism' is necessary in Hong Kong, we do not agree to include a new offence be along the lines of section 67 of the English Sexual Offences Act 2003, because it does *not* cover 'upskirting' acts, the making of unauthorized photographs under a woman's skirt or man's kilt, capturing an image of underwear and sometimes genital. It is a kind of voyeuristic act. 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'*. However, a significant number of upskirting cases take place on public transports or other public places which might not be expected to provide privacy. These incidents thus cannot be captured by the new offence of voyeurism.

Regarding the above, our association has conducted a thorough research named *'Establishing Specific Offences to Criminalize 'Upskirting' Acts* (以特定罪行刑事化「裙底偷拍」行為*)*' to convince LRC our recommendations on criminalizing 'upskirting'. Please see our full research in **Section B** of this submission paper.

Having considered the legislations of various jurisdictions, **we submit that Hong Kong should follow section 9 of Sexual Offences (Scotland) Act 2009, because it 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 section 67 of English Sexual Offences Act 2003 by a Government Bill 'Voyeurism (Offences) (No. 2) Bill' in the UK, 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 so as to include upskirting as an act of voyeurism.

4. Our responses to LRC's recommendations 4- 9

LRC's Recommendation 4: Bestiality be replaced by an offence of sexual intercourse with an animal

We agree with the above recommendation.

LRC's Recommendation 5: Proposed new offence of sexual activity with a dead person

We agree with the above recommendation.

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

We agree with the above recommendation.

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

We agree with the above recommendation.

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

We agree with the above recommendation.

LRC's Recommendation 9: Assault with intent to commit buggery, procuring others to commit homosexual buggery, gross indecency by man with man otherwise than in private, and procuring gross indecency by man with man be abolished

We agree with the above recommendation.

5. 對法改會「雜項性罪行」諮詢文件之整體回應 (中文撮要)
Our overall responses to LRC's consultation paper (Chinese abstract)

法律改革委員會性罪行檢討小組委員會（下稱小組委員會）於 2018 年 5 月 16 日發表了第三份諮詢文件《雜項性罪行》，就改革涉及雜項性罪行的法律提出建議，包括：保留亂倫為特定罪行，但改革罪行的元素；新訂一項性露體罪、一項窺淫罪和一項與死人進行涉及性的行為罪；與動物性交罪取代現有的獸交罪；廢除同性或關乎同性肛交和嚴重猥褻之罪行。關注婦女性暴力協會（下稱協會）尤其關注亂倫罪、性露體罪、窺淫罪的部分，以下是我們對於小組委員會提出之建議的回應。

5.1. 關於改革亂倫罪(建議 1)之回應

協會同意保留亂倫為特定罪行。刑事法對於超過同意年齡但屬某些特定家庭關係（例如父女、母子等）的人之間涉及性的行為設有限制，此法律限制乃是藉亂倫罪施行。我們認為法律不應該禁止任何經雙方同意的性行為。然而，實際情況卻是：有不少個案由於未能證明受害人是否同意或者受害人難以出庭作供，因而未能以「強姦」罪名控告，而以「亂倫」作為交替性控罪。根據我們前線經驗，家庭成員利用其權威地位或與信任關係性侵害其家人是十分常見。風雨蘭過去 17 年的 3501 個個案數字當中，有 200 多宗涉及被近親性侵害，包括父親及兄弟，分別是 147 宗、102 宗。法例應該懲處利用信任關係而做出的性侵害，但由於香港刑事法在處理家庭內性剝削的條例並不完整，當受害人超過合法的同意年齡 16 歲的時候，有可能失去法律的保護，故香港仍然有需要繼續保留亂倫罪來處理家庭內性剝削 。

關於亂倫所牽涉的親屬關係，我們同意新罪行應擴大涵蓋範圍至伯父／伯母、叔父／叔母、舅父／舅母、姑丈／姑母、姨丈／姨母及姪／姪女、甥／甥女，因為來自以上親屬的性侵犯並不罕見。風雨蘭過去 17 年，收到的涉及親屬性侵的 464 宗個案裡面，有 37%涉及被近親以外的親屬性侵害，包括表兄弟、伯父、叔父、祖父、家公、姐夫、領養父親等。

協會同意新罪行涵蓋領養父母。法律上，領養父母等同親生父母，需要承擔幼年人日後的管養、贍養和教育方面的一切權利、職責、義務和法律責任，領養子女猶如是他們在合法婚姻中所生的子女一樣。[8] 因此亂倫的條例應該視領養父母等同親生父母。

[8] 第 290 章《領養條例》第 13 條

我們同意小組委員會新罪行應「無分性別」的建議。新罪行應摒棄指名男性與女性的罪行，而以「一人(a person)」與「另一人(another person)」的字眼，因為無論任何性別的人均有可能為犯罪者和受害者，不應隱藏任何性別偏見。

關於新罪行所涉及的行為，我們同意涵蓋所有以陽具插入口腔、陰道及肛門的行為，亦建議應該同時涵蓋故意以身體的任何部分或任何其他物件插入陰道或肛門的行為，例如手指、舌頭。若新罪行只限於陽具插入的性侵，只會假設侵犯者為男性，也忽視了非陽具插入可以對受害人帶來同等的傷害。然而，我們不同意新罪行涵蓋非插入式的涉及性的行為（如撫摸），此做法未能反映亂倫罪的嚴重性，也會偏離亂倫一詞所盛載的意思。

5.2. 關於新罪行性露體罪(建議 2)之回應

我們歡迎新訂一項性露體罪的建議。香港現階段並沒有針對性露體的罪行，均以公眾地方的猥褻行為罪檢控[9]，但它是屬於公共秩序罪行而非性罪行。訂立性露體罪，將可以以清晰且明確的罪行予以檢控，干犯者知道自己所犯的罪行爲性罪行，侵犯他人的性自主。性罪行定罪紀錄會顯示此罪行，干犯者將會背負性罪行定罪紀錄，僱主將會查核得到。

然而，我們擔心新法例對兒童的保護不足，我們建議除了參照《性罪行（蘇格蘭）法令》第 8 條之外，可以參照蘇格蘭法令第 25 條「對 13 歲以下兒童作出性露體」及第 35 條「對 13 歲或以上但未達 16 歲的兒童作出性露體」。如受害人為 16 歲以下，受害人的同意與被告的罪責沒有關係，爲絕對刑責（absolute liability）；若受害人為 13 歲以下，犯案者的最高刑罰比起當受害人為 13 歲以上的更高，以下表格列出了蘇格蘭針對涉及不同年齡作出檢控的條例：

	干犯者年齡（甲）	受害者年齡（乙）	露體行為是否未得乙的同意?	干犯《性罪行（蘇格蘭）法令》的條例	最高刑期
a.	任何年齡	<13	無關；甲負上絕對刑責	第 25 條	監禁 10 年

[9] 《刑事罪行條例》第 148 條，任何人「無合法權限或辯解，在公眾地方或公眾可見的情況下，猥褻暴露其身體任何部分」，即屬犯罪。

b.	13 - <16	13 - <16	是	沒有干犯任何條例，因為獲得乙同意	/
c.	13 - <16	13 - <16	否	第 8 條	監禁 5 年
d.	>16	13 - <16	無關；甲負上絕對刑責	第 35 條	監禁 5 年
e.	任何年齡	>16	是	沒有干犯任何條例，因為獲得乙同意	/
f.	任何年齡	>16	否	第 8 條	監禁 5 年

小組委員會在諮詢文件並未提及新罪行對於兒童的保護，建議香港可以參考蘇格蘭的做法，以便明確地警戒人們避免對兒童作出可能非法的行為，加強對兒童的保護。

5.3. 關於窺淫罪(建議 3)之回應

我們同意在香港有必要訂立特定的窺淫罪，但我們不同意小組委員會的建議：參照英格蘭《2003 年性罪行法令》第 67 條，因為英格蘭的法例並不涵蓋俗稱「裙底偷拍」的行為，即放置電子設備於某人裙底以窺視或拍攝其私處的行爲，受害者多爲穿裙的女性。新罪行的其中一個要素是，受害人「身處在當時的情況下可被人合理地期望能提供私隱的地方」。然而，「裙底偷拍」大多發生在公共交通工具、商場扶手電梯等並不可能被人合理地期望能提供私隱的地方。因此，新的窺淫罪無法捕捉到大部分「裙底偷拍」的行為。

有鑑於此，協會進行了一項全面的的研究，名為「**以特定罪行刑事化『裙底偷拍』行為（Establishing Specific Offences to Criminalize 'Upskirting' Acts）**」，以遊說小組委員會在窺淫罪下涵蓋裙底偷拍的具體做法。詳細研究請參閱本文件乙部（即 Section B）。

研究中參閱不同司法管轄區針對「裙底偷拍」的法例，我們建議香港應參照《2009 年性罪行（蘇格蘭）法令》第 9 條「窺淫罪」，因為這是綜觀所有地區中最全面的法例，除了涵蓋偷窺私人行爲，亦涵蓋「裙底偷拍」；就正如不同的普通法司法管轄區都有將「裙底偷拍」歸類於

窺淫罪之下。我們注意到，英國政府今年 6 月向下議院呈交名爲 “Voyeurism (Offences) (No. 2) Bill”（見附錄 1/ appendix1)的法案，建議修訂第 67 條，建議將「裙底偷拍」納入於窺淫罪下，其重要元素包括：（1）某人在另外一個人（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。[10] 法案尚在審議中，協會將會繼續跟進。

英國法案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。

5.4. 關於諮詢文件的其他建議

建議 4： 獸交罪應由與動物性交罪所取代。

協會同意上述建議。

建議 5： 建議新訂罪行：與死人進行涉及性的行為。

協會同意上述建議。

建議 6： 施用藥物以獲得或便利作非法的性行為罪，應由為性目的而施用物質罪所取代。

協會同意上述建議。

建議 7： 意圖作出肛交而襲擊罪，應由意圖犯性罪行而犯罪這項新罪行所取代

協會同意上述建議。

建議 8： 入屋犯法（意圖強姦）罪，應由意圖犯性罪行而侵入這項新的性罪行所取代

協會同意上述建議。

建議 9： 我們建議廢除以下罪行：(i) 意圖作出肛交而襲擊（《刑事罪行條例》（第 200 章）第 118B 條）；(ii) 促致他人作出同性肛交（《刑事罪行條例》（第 200 章）第 118G 條）；(iii) 男子與男子非私下作出的嚴重猥褻作為（《刑事罪行條例》（第 200 章）第 118J 條）；(iv) 促致男子與男子作出嚴重猥褻作為（《刑事罪行條例》（第 200 章）第 118K 條）。

協會同意上述建議。

[10] The UK Parliament (2018). *Voyeurism (Offences) Bill 2017-19. https://services.parliament.uk/bills/2017-19/voyeurismoffences.html*

Section B

Establishing Specific Offences to Criminalize 'Upskirting' Acts

以特定罪行刑事化「裙底偷拍」行為

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[11]

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 now?

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

[11] "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*[12], 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:

[12] [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.[13] In *HKSAR v Ma Kei Wing*[14], 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.[15] The first element relates to the nature of the act which has to be proved to be of such a lewd, obscene[16] or disgusting[17] 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*[18], 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.

2.1.4 Access to computer with criminal or dishonest intent

[13] *R v Ng Chun Yip* [1985] HKLR 427
[14] HCMA 1260/2003
[15] *R v Hamilton* [2008] QB 224
[16] 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
[17] A disgusting act is one which fills the onlooker with loathing or extreme distaste or causes annoyance: *R v Choi* (unreported)
[18] HCMA 524/2007

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'[19]:

> *(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*[20], 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*[21] opined that upskirting amounted to a serious violation of privacy, '*and the obscenity and sense of*

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

humiliation such conduct entailed are definitely no less than that of an indecent assault.' Upskirting is an affront to the dignity of the victim[22]. 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*[23] that 'obtaining access to a computer' and 'using a computer' have different meanings. He adopted the statement in *Li Man Wai*[24] 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 in *Cheng Ka Yee,* whose acts of using their own smartphones to take photographs were not

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

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,*[25] 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.

[25] 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."[26]

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]*."[27] 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[28] 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

[26] "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/
[27] "Upskirting – how one victim is fighting back", *BBC*, 9 August 2017, available at https://www.bbc.co.uk/news/magazine-40861875
[28] 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.[29] 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.[30] 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*".[31]

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.[32]

3.2.2 Legal Background

[29] "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_/

[30] "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

[31] 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

[32] See Part 3.2.4 below.

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.[33]

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.[34]

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

[34] 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.[35]

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."[36]

[35] 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

[36] 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."[37]

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.*"[38]

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.*"[39]

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."*[40]

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 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.*"[41]

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[37] 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

[38] n 25 above (Voyeurism (Offences) (No. 2) Bill Explanatory Notes), para 9

[39] n 21 above ("Government acts")

[40] *Ibid*.

[41] *Ibid*.

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.*"[42]

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.[43]

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.[44]

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.

According to the Hong Kong Police Force (HKPF), there were a total of 327 reported cases of upskirting in the MTR during 2015 –2017.[45] Statistics from the Railway District of the HKPF for the years 2011 – 2015 shows that victims included females aged 8 to 54, while the

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[42] *Ibid*.

[43] "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

[44] ""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

[45] "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

perpetrators were all male, aged 12 to 65.[46] 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.[47]

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]*."[48]

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*."[49]

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.

[46] "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

[47] "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

[48] 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

[49] *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
- 4.1.2. Background of creating a specific offence to deal with upskirting
  - *4.1.2a) Inclusion of the offence of voyeurism*
  - *4.1.2b) Amendment of the Act to include the offence of upskirting*
- 4.1.3. Section 9 of Sexual Offences (Scotland) Act 2009
- 4.1.4. Offence of voyeurism targeting "private acts"
- 4.1.5. Elements of the specific upskirting offences
  - *4.1.5a) Purpose of performing the listed acts: obtaining sexual gratification / humiliating, distressing or alarming another person ("B")*
  - *4.1.5b) Consent*
- 4.1.6. Difference with the English Act
  - *4.1.6a) Coverage of "upskirt" observation and photography*
  - *4.1.6b) The element of consent*
- 4.1.7. Protection of children (sections 26 and 36)
- 4.1.8. Penalty

4.2Voyeurism in New Zealand

4.3Voyeurism in Australia

- 4.3.1 Australian Capital Territory
- 4.3.2 New South Wales
  - *4.3.2a) General offence*
  - *4.3.2b) Aggravated offence*
  - *4.3.2c) Installing device to facilitate observation or filming*
- 4.3.3 Victoria
- 4.3.4 South Australia

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'[50] 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.

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

[50] 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).

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[51] 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).

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

(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.[52]

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.

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

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

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[53]:-

(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;

(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.

[53] 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).

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"[54]. 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."[55]

The Scottish Act also provides circumstances where consent is considered to be absent[56]. 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)).

(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

[54] Section 12, Sexual Offences (Scotland) Act 2009.
[55] 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).
[56] Section 13, Sexual Offences (Scotland) Act 2009.

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" [57].

(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"[58] and "avoids the use of complex terminology"[59]. 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.

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

[57] 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).

[58] 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).

[59] ibid.

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.[60] 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 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

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

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*"[61]. 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[62]. 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)

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—

(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

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

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

(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).

provided he or she is no more than 2 years older than the child.

4.1.8. Penalty[63]

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).

[63] 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) [64], making an intimate visual recording of another person [65] 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."*[66]

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[67], save in certain situations[68]. Anyone who publishes, imports, exports and sells the intimate visual recording is liable to a maximum of 3 years' imprisonment.

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

4.3Voyeurism 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[69], 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.

[69] 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[70].

"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[71] or imprisonment for 2 years, or both[72].

[70] Section 91L(1), Crimes Act 1900 (New South Wales)
[71] 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)
[72] 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.[73]

"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.[74]

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. [75]

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.[76] 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.[77] The maximum penalty for this offence is 2 years' imprisonment.

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

"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*".[79]

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.[80]

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.*

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

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

[80] 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. [81]

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.[82]

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*".[83] 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*".[84] 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.[85] This would address the growing social issue without sacrificing the clarity of the law.

5.3 Promote Certainty of the Law

[81] 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

[82] See Part 2 above.

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

[84] "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

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

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).[86] 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.

[86] '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.[87] 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.

6.2.1 Possible inclusion of female breasts

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

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[88] 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. [89]

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.

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

[88] Archbold 2018, 21-158.

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

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

CONTENTS

A

B I L L

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

A

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.

Ordered, by The House of Commons,
to be Printed, 21 June 2018.

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