For discussion on
7 July 2020

Legislative Council
Panel on Security

Proposed Introduction of Offences of Voyeurism, Non-consensual Photography of Intimate Parts, and Related Offences

INTRODUCTION

This paper seeks Members' views on the proposed introduction of new offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and the distribution of related images.

BACKGROUND

Voyeurism and non-consensual photography of intimate parts

2. There is currently no specific offence against voyeurism or non-consensual photography of intimate parts (such as upskirt photography). Depending on the circumstances of each case, such acts have been prosecuted with the following charges –

(a) "loitering" under section 160 of the Crimes Ordinance (Cap. 200) with a maximum penalty of imprisonment for two years;

(b) "disorder in public places" under section 17B of the Public Order Ordinance (Cap. 245) with a maximum penalty of a fine at level 2 (or $5,000 at the current level) and imprisonment for 12 months;

(c) "outraging public decency" under common law with a maximum penalty of imprisonment for seven years; or

(d) "access to computer with criminal or dishonest intent" under section 161 of the Crimes Ordinance with a maximum penalty of imprisonment for five years.

3. Between 2015 and 2018, out of 275 convicted cases under section 161 of the Crimes Ordinance, 73% of the convicted cases (i.e. around 200 cases) related to upskirt photography (including still and video recordings) using

mobile phones in both public and private places, as well as the uploading of intimate images without consent. The Court of Final Appeal ("CFA") held in its judgment laid down in April 2019[1] that section 161(1)(c) of the Crimes Ordinance[2] (obtaining access to a computer "with a view to dishonest gain for himself or another") does not extend to the use of the offender's own computer. In other words, section 161(1)(c) of the Crimes Ordinance does not apply to the use of a person's own computer only, while not involving access to another person's computer. CFA's judgment would equally apply to the construction of subsections (a) ("with intent to commit an offence"), (b) ("with a dishonest intent to deceive") and (d) ("with a dishonest intent to cause loss to another") of section 161(1) of the Crimes Ordinance.

4. In the light of the CFA judgment, it will no longer be appropriate for the prosecution to press charge under section 161 of the Crimes Ordinance against upskirt photography and the distribution of intimate images without consent, if the act involved only the use of the suspect's own computer.

5. There are also limitations in the other offences set out in paragraphs 2(a) to (c) above. Generally speaking, those offences are applicable only to acts that occur in a public place or a place where what is done is capable of public view, and thus may not be applicable to acts that occur in a private place. Furthermore, both "loitering" and "disorder in public place" are summary offences with relatively low levels of penalty. This is not commensurate with the severity of surreptitious intimate photography, which often violates the victim's right to privacy and sexual autonomy, and causes long-term distress, humiliation, harassment, and stress to the victim. There are strong sentiments in the community and a pressing need to address voyeurism and non-consensual photography of intimate parts with criminal sanctions.

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[1] *Secretary for Justice v Cheng Ka Yee & Others* [2019] HKCFA 9.

[2] Section 161 of the Crimes Ordinance reads as follows –

(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.

Review of Sexual Offences

6. The Law Reform Commission ("LRC") appointed a Review of Sexual Offences Sub-committee in July 2006 to conduct an overall review of the substantive sexual offences in Hong Kong. On 30 April 2019, LRC published the *Report on Voyeurism and Non-consensual Upskirt-Photography* ("the Report"). This is part of LRC's overall review of the law governing sexual offences and has been prepared expeditiously in the light of the strong sentiments received during the consultation process and the imminent need for the introduction of new offences. In the Report, LRC recommended the introduction of an offence of voyeurism[3]. It also recommended the introduction of a specific offence in respect of non-consensual upskirt-photography, while taking into account the following –

(a) an offence committed for the purpose of obtaining sexual gratification should be introduced;
(b) a separate offence irrespective of the purpose of the conduct should be introduced;
(c) that the offence (b) above should be a statutory alternative to (a) and also a "stand-alone" offence; and
(d) the offences in (a) and (b) should cover any place where the offence took place.

7. When formulating its recommendations, LRC had studied the offences of voyeurism and upskirt photography in a number of overseas jurisdictions. There are specific offences of voyeurism in Canada (which include an offence on the distribution of the voyeuristic images), England and Wales, New South Wales (covering only observation, where intimate visual recording is covered by separate offences), and New Zealand (which covers only visual recording but not observation). On non-consensual upskirt photography, there are similar offences in England and Wales, Scotland, and New Zealand.

PROPOSALS

8. In drawing up the legislative proposals, the Government is conscious of the guiding principles laid down by the LRC sub-committee, namely –

(a) clarity of the law;

(b) respect for sexual autonomy;

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[3] According to LRC, voyeurism refers to an act of non-consensual observation or visual recording (for example, of a photograph, videotape, or digital image) of another person for a sexual purpose.

(c) the protective principle;

(d) gender neutrality;

(e) avoidance of distinctions based on sexual orientation; and

(f) adherence to the human rights laws and practices guaranteed under the Basic Law.

9. Having regard to LRC's aforesaid review and consultation, and taking into account the pressing need to address the concerned acts with criminal sanctions, the Government accepts LRC's recommendations as set out in paragraph 6 above in full. In short, on the basis of LRC's recommendations, the Government proposes to introduce new criminal offences of –

(a) voyeurism (i.e. observing or recording of intimate acts for the purpose of obtaining sexual gratification); and

(b) non-consensual photography of intimate parts, both for the purpose of obtaining sexual gratification and irrespective of the purpose (the latter being a statutory alternative to the former).

10. In addition to taking on board LRC's recommendations, the Government also proposes to introduce new criminal offences on the following –

(a) in relation to paragraph 9(a) above, a corresponding offence for intimate prying, i.e. observing or recording of intimate acts but irrespective of the purpose, as a statutory alternative to the offence of voyeurism;

(b) distribution of photos or videos generated by acts in paragraphs 9(a), 9(b) and 10(a) above; and

(c) non-consensual distribution of other intimate photos or videos, where consent was previously given for the taking of such photos or videos.

Details of the proposals are set out in the ensuing paragraphs.

Proposals 1 and 2: Offences of Voyeurism and Intimate Prying

11. The Government accepts LRC's recommendations, and proposes to introduce an offence of voyeurism (i.e. observing or recording of intimate acts for the purpose of obtaining sexual gratification). However, the scope of the recommended voyeurism offence does not cover intimate prying (i.e. observing or recording of intimate acts irrespective of the purpose, which would include earning money, blackmailing or revenge, etc.) As such, we propose to introduce a corresponding offence of intimate prying, and we propose that it will be a statutory alternative to the offence of voyeurism, in addition to being a standalone offence (i.e. in the course of a prosecution of voyeurism, if the only element of offence that cannot be proved is the purpose of obtaining sexual gratification, then the accused may still be convicted of the alternative offence of intimate prying).

12. The above offences are proposed to be applicable to any person who, without the consent of the victim, with or without the aid of equipment, observes the victim doing an intimate act or records images (including stills and videos) of the intimate act, or operates equipment to enable the intimate act to be observed or images (including stills and videos) of the intimate act to be recorded to obtain sexual gratification (i.e. voyeurism) or irrespective of the purpose (i.e. intimate prying). It would also be an offence against a person who installs equipment, or constructs or adapts a structure or part of a structure with the purpose of enabling the person or another person to commit the offence of voyeurism or intimate prying.

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

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

(b) the person is using the toilet; or

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

Proposals 3 and 4: Offences of Non-consensual Photography of Intimate Parts

14. The Government accepts LRC's recommendation, and proposes to introduce an offence of non-consensual photography of intimate parts for sexual gratification, as well as a separate offence of non-consensual photography of

intimate parts irrespective of the purpose. The latter will be a statutory alternative to the former, in addition to being a standalone offence, similar to Proposals 1 and 2. These two proposed offences will cover acts commonly understood as "upskirt photography".

15. The offence of non-consensual photography of intimate parts is proposed to be applicable to any person who, without the consent of the victim, operates equipment beneath the clothing of the victim to enable the person or another person to observe the victim's intimate parts or record images (including stills and videos) of the victim's intimate parts or to have access to such recorded images, in circumstances where the intimate parts would not otherwise be visible. It does not matter whether the offending act took place in a public or private place.

16. LRC's recommendation on non-consensual photography of intimate parts does not cover "down-blousing". Considering that there are much stronger calls for criminalising "upskirt photography", and that the definition of "down-blousing" is not as clear and may indeed cover a very wide range of scenarios (e.g. the taking of selfies), we take the view that the proposed offences against non-consensual photography of intimate parts will not cover "down-blousing".

17. For the purpose of the proposed offences, a person's "intimate parts" mean the person's genitals, buttocks, or breasts, whether exposed or covered only with underwear.

Proposals 5 and 6: Offences of Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images

18. At present, there is no specific legislation dealing with the act of publishing, circulating, selling, or in any other way distributing the photos or videos generated by acts of the proposed offences in paragraphs 11 to 17 above. The Control of Obscene and Indecent Articles Ordinance (Cap. 390) only regulates the publication of obscene and/or indecent articles[4], and as such, may not be applicable to, for instance, the transmission of upskirt images among several individuals privately using mobile phones. While there is no available information on the extent of the circulation or distribution of such images on the Internet or other means, the Police do from time to time receive reports from

[4] Under the Control of Obscene and Indecent Articles Ordinance –
(a) a person "publishes" an article if he, whether or not for gain, distributes, circulates, sells, hires, gives or lends the article to the public or a section of the public;
(b) a thing is obscene if by reason of obscenity it is not suitable to be published to any person; and
(c) a thing is indecent if by reason of indecency it is not suitable to be published to a juvenile.

victims complaining that their nude images, whether taken with or without consent, were distributed on the Internet by a former partner in an intimate relationship.

19. In a case[5] concerning upskirt photography, the Court of Appeal noted 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." The act of distributing such images is a serious violation of the victim's right to privacy and sexual autonomy, and should be subject to criminal sanctions.

20. Whilst LRC did not address this issue and make any recommendation on the criminalisation of such acts in the Report, we propose to introduce a specific offence to prohibit the distribution of surreptitious sexual images for the protection of victims. The proposed offence will be applicable to any person who distributes images (including stills and videos) that they know to have been obtained from voyeurism, intimate prying or non-consensual photography of intimate parts (for sexual gratification or irrespective of the purpose). There are similar offences in overseas jurisdictions (e.g. Canada[6], New Zealand[7] and Singapore[8])

21. We also propose to introduce a specific offence to prohibit the non-consensual distribution of images of intimate acts, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (e.g. revenge porn). There are similar offences in overseas jurisdictions. In some jurisdictions (e.g. Canada[9] and New South Wales[10]), the offence is constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent. In some other jurisdictions (e.g. England and Wales[11] and Singapore[12]), the offence is constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim humiliation, alarm or distress. Reference will be drawn to overseas jurisdictions including the above when defining the precise scope of the proposed offence.

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5 *Secretary for Justice v Chong Yao Long Kevin* [2013] 1 HKLRD 794.
6 See Criminal Code, section 162(4).
7 See Crimes Act 1961, section 216J.
8 See Penal Code, section 377BC.
9 See Criminal Code, section 162.1.
10 See Crimes Act 1900 No. 40, section 91Q.
11 See Criminal Justice and Courts Act 2015, section 33.
12 See Penal Code, section 377BE(1).

Proposal 7: Defence(s)

22. We propose that suitable defence(s) should be made available for the offence of intimate prying (i.e. Proposal 2), non-consensual photography of intimate parts irrespective of the purpose (i.e. Proposal 4), as well as the offences related to the distribution of intimate images (i.e. Proposals 5 and 6). The defence could cover acts done with lawful authority or reasonable excuse (e.g. law enforcement, journalistic work, etc.)

23. It is observed that statutory defences have been provided for similar offences in overseas jurisdictions. In some jurisdictions (e.g. Canada[13]), a more generic defence of "public good" is provided. In some other jurisdictions (e.g. Western Australia[14]), more specific defences are provided, such as if the distribution of the intimate image was for a genuine scientific, educational or medical purpose; was reasonably necessary for the purpose of legal proceedings; or was for media activity purposes, which did not intend to cause harm to the depicted person and was reasonably believed it to be in the public interest, etc. If considered appropriate, similar statutory defences or reasonable excuses could be set out for our proposed offences, subject to the views from the public.

Proposal 8: Sexual Conviction Record Check Scheme

24. If the proposed offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and the distribution of related images as described in paragraphs 11 to 21 above are to be introduced, we propose that all these offences should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check ("SCRC") Scheme[15]. While the proposed offences under Proposals 2, 4, 5 and 6 do not require the proof that the offences were committed for the purpose of obtaining sexual gratification, we consider it justifiable for the inclusion of the offences under the SCRC Scheme for the sake of protecting vulnerable persons.

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[13] See Criminal Code, section 162(6) and section 162.1(3).

[14] See Criminal Code, section 221BD(3)

[15] The SCRC Scheme is an administrative scheme introduced in 2011 to enable employers of persons undertaking child-related work and work relating to mentally incapacitated persons to check whether eligible applicants have any criminal conviction records against a specified list of sexual offences.

PUBLIC CONSULTATION

25. After consulting the Legislative Council Panel on Security, we will conduct a three-month public consultation exercise to invite views from the public on the proposals set out in the paper. We will report to the Panel on the views collected in the public consultation exercise and our analysis, as well as the proposed way forward.

ADVICE SOUGHT

26. Members are invited to offer views on the proposals set out in the paper and the proposed public consultation exercise.

Security Bureau
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