

The Law Reform Commission of Hong Kong
Review of Sexual Offences Sub-Committee
Consultation Paper on Miscellaneous Sexual Offences

Comments of the Hong Kong Bar Association

1. The Law Reform Commission has issued a consultation paper on the captioned topic. The Hong Kong Bar Association (“**the Bar**”) has been invited to comment and has arrived at the following views.

2. Looking at the proposals overall, the majority of them seem to us to make powerful common sense. The issues touched on by the LRC Sub-Committee carries important social implications in Hong Kong. The problems that the area of law seeks to address are indeed mostly social problems and not strictly legal problems. Be that as it may, there are some matter which are worthy of comment.

3. **Recommendation 1** (On the offence of Incest):
 - a. The Bar would first point out that the distinction of severity of the acts between vaginal penetrative acts and non-vaginal penetrative acts has been well defined by the distinct offences of rape and indecent assault. The recommendation of expanding the offence of incest to cover all penile penetration of the mouth, vagina and anus would introduce different regimes of sexual offences between people with and without the prescribed family ties. The Bar is not particularly leaning towards supporting or against the expansion as we also see the force of the having proper protection and stigma that comes with the proposed expansion.

- b. The Bar appreciated there is a concern regarding the close caring relationship between adoptive parents and children. Given a marriage between an adoptive parent and child is unlawful (ref: s.27(1) and Sch. 5 to the Marriage Ordinance (Cap. 181)) sexual acts between an adoptive parent and child should also be outlawed.
- c. The Bar is also of the view that such protection should be expanded to cover step parents and foster parents for the reason that persons assumption of these roles in familial relationships are in the positions of intimate care. Such positions of intimate care justifies the inclusion of the serious sexual abuse in these relationships to be covered by the offence of incest.

4. **Recommendation 3** (voyeurism)

- a. It is our view that the current regime is inadequate to deal with the serious and endemic criminal act of “up-skirt photograph/video taking”. As a result of a recent judgment of DHCJ CP Pang in *Secretary For Justice v. Cheng Ka-Yee and Ors* HCMA 466/2017, the learned DHCJ allowed an appeal concerning ‘dishonest use of computer’. Although the case is not dealing with offence of taking upskirt photo, it has ramifications on this type off offence as the learned DHCJ interpreted “dishonest use of computer” narrowly.
- b. The learned DHCJ referred to the judgment of *SJ v. Chong Yao Long Kevin*, in which the Court of Appeal also queried whether a person using a smartphone to take immoral or indecent photographs commits an offence under s.161(1)(c) (see para. 43 of his judgment). The learned DHCJ also mentioned the

sentiments made by Yeung VP in that case and by the CFA in another case of *Li Man Wai* (see paras. 44 and 45 of his judgment).

- c. This judgment has created public concerns recently, with reference to articles published on SCMP and Oriental Daily on 10/8/2018. The Bar takes the view that the LRC should consider creating a new offence for this type of conduct and have the offender's name registered.
 - d. The Bar also takes the view that what is recommended cannot effectively cover such acts as the proposed offence only covers private acts.
5. **Recommendation 8** (On the offence of trespass with intent to commit a sexual offence):
- a. The Bar takes the view that the intent requirement should cover the time of before, during and after the entry so that the offence will not too limiting.

Dated this the 16th day of August 2018

HONG KONG BAR ASSOCIATION