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CRIMINALISATION OF VOYEURISM AND 'UPSKIRT-PHOTOGRAPHY' IN HONG KONG – THE NEED FOR A COHERENT APPROACH TO IMAGE BASED ABUSE

Thomas Crofts*

Abstract

Many jurisdictions have enacted laws in recent years to criminalise the use of image-based technologies to non-consensually observe a person's private parts or a person engaging in a private act (voyeurism), to record images of a person's private parts ('upskirt-photography'), or to possess, disseminate or threaten to disseminate intimate images ('revenge pornography'). No such offences have yet been adopted in Hong Kong and the 2019 decision of the Final Court of Appeal in *Secretary for Justice v Cheng Ka Yee* has closed the door on using the existing offence of access to computer with criminal or dishonest intent to prosecute some of these behaviours. In response the Law Reform Commission of Hong Kong expeditiously prepared a report in 2019 calling for the enactment of offences to cover voyeurism and 'upskirt-photography'. The report does not, however, consider the need for offences to cover the related behaviour of non-consensually possessing, distributing or threatening to distribute imitate images. This article therefore examines the need for, and advantages of, new offences to also cover such behaviours. Based on a review of newly created offences in various Australian jurisdictions, England and Wales and Singapore a recommendation for reform in Hong Kong is developed.

INTRODUCTION

New communication technologies are constantly re-shaping our lives and, in doing so, they are re-shaping societal expectations around communication.[1] Smart phones, online platforms and social media have created new opportunities to create, discover, gather and share information. In recent years attention has been paid particularly to the use of image-based technologies to non-consensually view a person's private parts (genitals, anal region or breasts of a female) or a person engaging in a private act (voyeurism), to record images of a person's private parts ('upskirt-photography'), or to possess, disseminate or threaten to disseminate intimate images ('revenge pornography'). Initially, such behaviours were either not seen as matters for the criminal law or it was thought that existing offences could be stretched to apply to this use of new technologies. More recently many jurisdictions have recognised the need for specific offences to combat such conduct and some have already begun to question whether such newly created offences are adequate to cover the range of abusive behaviours associated with the use of image-based technologies. The Law Commission for England and Wales, for instance, has launched a review with the observation that 'we have a patchwork of offences that have developed over time, most

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[1] Ferrell, J., Hayward, K. and Young, J. *Cultural Criminology* (Sage, 2008), 106.

of which existed before the rise of the internet and use of smartphones ... and there are some behaviours that are left unaddressed'.[2]

Currently, Hong Kong has no specific offences to deal with intimate image based abuse. Until 2019 it was largely thought that the offence of access to computer with criminal or dishonest intent[3] was the appropriate charge for some of these behaviours, such as where a person non-consensually recorded private images of a person. However, in *Secretary for Justice v Cheng Ka Yee*[4] the Court of Final Appeal closed the door on the use of this offence where a person uses their own device. To fill the legal gap left by this decision, the Law Reform Commission of Hong Kong issued a report recommending the introduction of new offences to specifically criminalise voyeurism and 'upskirt-photography'.[5] This builds on, but is different to, its earlier recommendation in 2012 to expand the definition of sexual assault to cover non-consensual 'upskirt-photography'[6] and a 2018 recommendation to criminalise voyeurism.[7] The 2019 recommendation is, however, surprisingly limited given that voyeurism and 'upskirt-photography' represent just a segment of behaviours in relation to intimate image based abuse. As argued by McGlynn, Rackley and Houghton, these behaviours can be seen on a spectrum alongside 'revenge porn', 'deep-fakes', sexual extortion and other forms of sexualised abuse.[8] In 2018 the Law Reform Commission of Hong Kong agreed in principle to examine the topic of 'revenge pornography' but as yet it has not made any substantial move forward because 'of a prioritisation of other matters'.[9] The issue was not addressed in the Law Reform Commission's report on voyeurism and non-consensual 'upskirt-photography' released in April 2019[10] nor in the report on reform of sexual offences released by the Law Reform Commission in December 2019.[11] In light of these developments this article will explore whether it is time for Hong Kong to consider the introduction of an offence or offences to address the non-consensual use of intimate images ('revenge pornography') alongside the criminalisation of voyeurism and 'upskirt-photography', and how such an offence or offences might be constructed. This discussion will also be useful for other jurisdictions which either have not yet introduced

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[2] The Law Commission (2020) is therefore currently conducting a pre-consultation: 'Reviewing the current range of offences which apply in this area, identifying gaps in the scope of the protection currently offered, and making recommendations to ensure that the criminal law provides consistent and effective protection against the creation and sharing of intimate images without consent', <https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/> accessed 27 July 2020.

[3] Crimes Ordinance (Cap 200), s 161.

[4] [2019] HKCFA 9.

[5] Law Reform Commission of Hong Kong, *Voyeurism and Non-Consensual Upskirt-Photography* (Report 2019), para 2.

[6] Law Reform Commission of Hong Kong, *Rape and Other Non-Consensual Sexual offences* (Consultation Paper 2012), para 6.26 and Recommendation 20, para 6.30.

[7] Law Reform Commission of Hong Kong, *Miscellaneous Sexual Offences* (Consultation Paper, 2018), para 3.22, Recommendation 3.

[8] McGlynn, C., Rackley, E. and Houghton, R. 'Beyond 'Revenge Porn': the continuum of image-based sexual abuse' (2017) 25 *Feminist Legal Studies* 25.

[9] Legislative Council Panel on Administration of Justice and Legal Services, Proposed Creation of one Permanent Post of Principal Government Counsel, one Permanent Post of Deputy Principal Government Counsel, one Supernumerary Post of Deputy Principal Government Counsel and Upgrading of one Assistant Principal Government Counsel Post to Deputy Principal Government Counsel in the Department of Justice, Appendix 5, Proposed distribution of Law Reform Commission LRC projects, 19 December 2018 (CB(4)323/18-19(03)) <https://www.legco.gov.hk/yr18-19/english/panels/ajls/papers/ajls20181219cb4-323-3-e.pdf> accessed 27 July 2020.

[10] Law Reform Commission of Hong Kong (n 5).

[11] Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report 2019).

offences to deal with these types of image based abuse or are contemplating reforms to achieve a consistent and up-to-date approach, such as England and Wales.

This article begins in with a brief discussion of the terms used to describe the behaviours under consideration. This is followed by an examination of why existing offences in Hong Kong are not adequate for responding to these behaviours and why is a gap in the criminal law. The article then assesses the case for criminalisation of image based abuse behaviours and the need to fill the gap in the criminal law. This involves brief consideration of the general principles of criminalisation, focusing on the harm and culpability involved in such conduct. There is also consideration of the alternatives to utilising criminal law and the advantages of a criminal law response from an educational-communicative perspective. Having identified the need for new criminal offences to address image based abuse there is consideration of whether the offences recently proposed by the Law Reform Commission of Hong Kong are sufficient to address the range of image based abuse behaviours. This analysis reveals that there is a justification and a need for new specific offences and that the offences proposed by the Law Reform Commission would only address some forms of problematic behaviour. Therefore the article considers how new offences addressing image based abuse are defined in other jurisdictions, including the Australian states of New South Wales (NSW), South Australia, Victoria and Western Australia, as well as England and Wales, and, most recently, Singapore. Based on a comparative analysis of the elements of these offences a model for criminalisation is proposed.

VOYEURISM, 'UPSKIRT-PHOTOGRAPHY' AND 'REVENGE PORNOGRAPHY'

Voyeurism generally refers to the non-consensual observation of, or use of a device to observe, for a sexual purpose, a person's private parts or a person engaged in a private act. This term may also be used to describe the manipulation of a device to observe or record an image of a person's private parts (genitals or anal region (also called 'upskirting' or 'upskirt-photography'), a female person's breasts (also called 'downblousing') or a person engaged in a private act where they would expect privacy, eg using a toilet, bathing etc. The terms 'upskirt-photography', 'upskirting' and 'downblousing' have become common in colloquial usage, as evidenced by the use of the former term in the name of the Law Reform Commission's Report.[12] However, these terms are problematic because even though they accurately package and label the behaviour there is concern that they trivialise the harms caused. As such 'the terminology itself works to hinder the understanding of these activities as harmful'.[13] Gillespie notes that there has been some debate about whether these terms should come under the umbrella of voyeurism or whether they are so distinct, especially from the legal definition of voyeurism, that they should have a separate label.[14] Arguably, now that the defining of voyeurism in England and Wales has been extended to cover these behaviours this objection is reduced.[15] Nonetheless, in awareness of the issues associated with these terms and without wishing to contribute to minimising of the harms of this behaviour, the term 'upskirt-photography' is used throughout this paper because it is the term used by the

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[12] Law Reform Commission of Hong Kong (n 5).
[13] McGlynn, Rackley and Houghton (n 8),
[14] Gillespie, A. '"Up-Skirts" and "Down-Blouses": Voyeurism and the Law' [2008] Criminal Law Review 370, 372.
[15] Sexual Offences Act 2003 (E & W), s 67A, inserted through Voyeurism (Offences) Act 2019 (E & W), ss. 1(2), 2(2).

Law Reform Commission of Hong Kong and in public discourse to distinguish this form of behaviour from the traditional understanding of voyeurism.

'Revenge pornography' is a term used to refer to the distribution of intimate images without the consent of the subject of that image. The term 'revenge pornography' comes from the association of this behaviour with a jilted lover who, at the breakdown of a relationship, distributes intimate images (which may or may not have been taken consensually during the relationship) to get back at their former partner. While 'revenge pornography' is often used colloquially, and is a convenient short-hand for discussing these behaviours, it is also problematic. The word 'revenge' does not accurately reflect the range of motivations or reasons why a person may non-consensually disseminate images. Images taken consensually may be distributed in an act of revenge, they may also be distributed or a threatened to be distributed as a means to coerce sexual behaviour, to maintain coercive control or prevent a person leaving an abusive relationship.[16] Images may be shared to ridicule, humiliate or shame. They may also be distributed in fun, to brag or show the type that a person is interested in without a realisation of the harm that the subject of the image may suffer. The word 'pornography' is also troublesome because the content of the image may not be popularly understood to be pornographic. It also suggests that the motivation of the perpetrator must be sexual.[17] More troubling is that reference to 'pornography' may suggest that the victim gave consent to the taking of the image and this can draw attention away from the behaviour of the perpetrator in non-consensually distributing the image. To avoid such an association the terms 'non-consensual pornography' or 'involuntary pornography' have been adopted.[18] A term which avoids both these problematic words and which indicates that this behaviour exists on a continuum with other forms of sexual violence is 'image-based sexual abuse'.[19] While there is no doubt that many behaviours do sit on a spectrum of sexual violence there may also instances where images are shared without consent which are problematic but which may not readily sit on this spectrum. For this reason the term 'image-based abuse' is preferred when referring to the broad range of behaviours, including voyeurism and 'upskirt-photography'. The more specific term 'non-consensual distribution of an intimate image', or related terms used in legislation, is preferred when referring specifically to 'revenge pornography' because this most accurately records and labels the actual form of harmful behaviour.

INADEQUACY OF EXISTING OFFENCES IN HONG KONG

For some time it was thought that the offence of access to computer with criminal or dishonest intent, found in the Crimes Ordinance (Cap 200) s 161, was an appropriate offence in cases of non-consensually taking images of a person's private parts.[20] In *Secretary for Justice v Wong Ka Yip*

[16] See for instance, Bloom, S. 'No Vengeance for Revenge Porn Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense is Still Legal, and Why We Should Criminalize It' (2014) 42 Fordham Urban Law Journal 233.
[17] McGlynn, Rackley and Houghton (n 8), 3.
[18] Bloom (n 16); Citron, D. and Franks, M. 'Criminalizing revenge porn' (2014) 49 Wake Forest Law Review 345.
[19] McGlynn, Rackley and Houghton (n 8); Powell, A. and Henry, N. *Sexual Violence in a Digital Age* (Palgrave Macmillan, 2017).
[20] Lok-kei, S and Lau, C. 'Enact upskirting law to plug loophole, Hong Kong's Law Reform Commission tells government' South China Morning Post, 30 April 2019. Available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3008321/enact-upskirting-law-plug-loophole-hong-kongs-law>.

Ken,[21] despite the Magistrate's concern that considering a mobile phone to be a 'computer' under s 161 would cast the net of the offence too widely, it was found on appeal that a smartphone did fall within the definition of 'computer'. On this basis the Secretary for Justice argued in *Secretary for Justice v Cheng Ka Yee*[22] that the *actus reus* of obtaining access to a computer could apply 'in infinite ways, such as using a smartphone to take upskirt photos of females or using it to send confidential information to others'.[23] However, the Court of Final Appeal found that the central issue was whether the offence applied to a person using their *own* computer with the requisite intent. After analysing the text, context and purpose of the provision the Court found that as a matter of language one always 'obtains' access to something to which one did not have access before.[24] As a result it was held that the offence does not apply where a person uses their own device to take and disseminate images. This means that the offence will be of limited use in relation to the non-consensual taking and distribution of intimate images unless a person uses the device of another.

In some cases of intimate image recording, the offences of loitering[25] or disorder in a public place[26] may apply.[27] These offences are, however, limited because they only pertain to behaviours in public spaces. There has also been some consideration of whether the offence of outraging public decency can be used to criminalise placing materials on-line. In *Chan Yau Hei*[28] the Court of Final Appeal addressed what it considered to be a 'principal and novel question' of whether this offence could extend to cover allegedly inflammatory messages posted to an internet discussion forum. Ma CJ was not comfortable extending the reach of this common law offence, 'which has a history going back at least 350 years', into the modern internet age.[29] The Court found that internet postings did not satisfy the public element because, for the purposes of the offence, the internet is the medium though which decency might be outraged but not the place where it is outraged.[30] The Court acknowledged that this was unsatisfactory because 'there is room for arbitrariness between some internet content that will be open to prosecution for the offence and other content that will not simply because of where it is seen'.[31] Even if it were possible to regard the internet as a public place this offence does not adequately capture or reflect the wrongdoing in non-consensually observing, recording or distributing intimate images. Outraging public decency is primarily directed at preventing the public from witnessing obscenity. However, the harm caused by the behaviour is to subject of the image rather than to the public who see the image. These offences therefore fail to capture, or reflect, the violation of a person's sexual autonomy and dignity through these behaviours.[32]

[21] [2013] 4 HKLRD 604.
[22] [2019] HKCFA 9.
[23] *Secretary for Justice v Cheng Ka Yee* [2019] HKCFA 9 at [50].
[24] Ibid [38].
[25] Crimes Ordinance (Cap 200), s 160.
[26] Public Order Ordinance (Cap 245), s 17B(2).
[27] Law Reform Commission of Hong Kong (n 7) para 3.3.
[28] [2014] HKCFA 18.
[29] Ibid [1].
[30] Ibid [58].
[31] *Chan Yau Hei* [2014] HKCFA 18 at [90], [92].
[32] Law Reform Commission of Hong Kong (n 6) para 6.23.

In *Chan Yau Hei*[33] the Court of Final Appeal noted that the offence of sending by telegraph, telephone, wireless telegraphy or wireless telephony a message which is grossly offensive or of an obscene or menacing character may apply in some cases. However, this offence has not been updated and does not apply to messages posted on the internet.[34] Based on a lack of adequate offences to address offensive materials posted online the Court concluded that there was a strong case for the introduction of statutory provisions.[35]

The offences of criminal intimidation[36] and procurement by threats[37] could be applicable to some scenarios where there is distribution of intimate images or a threat thereof. However, in both cases there must be behaviour beyond mere non-consensual recording or dissemination. For criminal intimidation a person must threaten injury to another person (including to their reputation) in order to alarm them, cause them to do something they are lawfully entitled to not do or not do something they are lawfully entitled to do.[38] Procuring covers a person causing by threats or intimidation another person to do an unlawful sexual act. This offence was applied in *HKSAR v Wong Dawa Norbu Ching Shan*,[39] where a 16 year old girl had sex with the defendant in exchange for money but did not anticipate that the defendant would take photographs of her. Later the defendant messaged the girl on Facebook, sending her a nude picture of herself and implying that if she did not have sex with him again he would upload the nude photo on YouTube. She agreed to have sex with him because she was scared that the threat would be carried out.

Blackmail[40] may also apply where a person makes unwarranted demands with menaces with a view to make a gain for himself or another or to cause loss to another. In *HKSAR v Chai Mei Kwan*[41] the defendant video recorded herself engaging in sexual intercourse with a married man. A few days later she sent him an SMS disclosing that she had a video clip of them engaged in sexual intercourse. She provided her bank account details and demanded payment of HK$500,000 'to settle the matter'. When the defendant received no reply she sent an SMS asserting that her cousin had the video clip on a computer and could distribute it in a minute to everyone. In finding the defendant guilty, the court noted that 'it is common knowledge that the Internet knows no borders and once uploaded, information is difficult to erase' and as such the threat to disseminate via the computer was an aggravating factor.[42]

A range of other offences can apply to certain situations of imaged based abuse behaviours, such as criminal damage if a person's device is tampered with to obtain images or child pornography where the subject of the image is under 16.[43] This brief review of existing offences is sufficient to show that they all have limitations and inadequately address the harms associated with image based abuse. These offences were developed at a time before the advent of smart technology and so they require reinterpretation of their elements to fit new forms of behaviour. Even with reinterpretation much image based abuse remains outside the reach of the offences. It is therefore clear that existing

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[33] [2014] HKCFA 18
[34] *Chan Yau Hei* [2014] HKCFA 18 at [91].
[35] *Chan Yau Hei* [2014] HKCFA 18 at [88].
[36] Crimes Ordinance (Cap 200), s 24.
[37] Crimes Ordinance (Cap 200), s 119.
[38] See for example *HKSAR v Pearce Matt James* [2006] HKCFI 1481; *HKSAR v Ko Kam Fai* [2001] HKCA 221.
[39] [2013] HKDC 853.
[40] Theft Ordinance (Cap 210), s23.
[41] [2011] HKDC 1208.
[42] *HKSAR v Chai Mei Kwan* [2011] HKDC 1208 at [18].
[43] Prevention of Child Pornography Ordinance (Cap 579), s 3.

laws are not adequate to address image based abuse behaviours and that there is a gap in the criminal law. Before moving on to consider how this gap might be filled with new offences it is important to consider why there is a need to use criminal law to address image based abuse.

THE ARGUMENTS FOR CRIMINALISATION

Even though a range of jurisdictions have now enacted offences to deal with voyeurism, 'upskirt-photography' and the non-consensual possession, distribution and threat to distribute intimate images, it remains important to examine the need for criminalisation. This consideration is useful for a range of reasons: it can help clarify what behaviours the criminal law should aim to capture and on what basis; it can explain why a criminal law response is preferable to other possible responses; it can aid an assessment of whether existing or proposed offences are adequate and finally it can guide a proposal for how new offences, if created, should be formulated and structured.

Criminal law is a tool of social control, indicating behaviours that are to be avoided detailing what will happen if those behaviours are engaged in.[44] The prohibition on behaviour is backed up by the threat of punishment by the state for those who do engage in the behaviour. A conviction in criminal law represents a public condemnation of the accused.[45] In censuring the crime criminal law has a 'communicative function'.[46] This central censuring function of the criminal law and the opening of the door to punishment by the state marks its difference to other areas of law. As von Hirsch comments: 'Punishment involves blame; it is a defining characteristic of punishment that is not merely unpleasant (so are many other kinds of state intervention) but also characterizes the person punished as a wrongdoer who is being censured or reproved for his or her criminal act'.[47] This is the reason why there should be careful consideration of the need for a criminal law response to reduce the incidence of behaviours thought to be socially unacceptable. As Husak comments, criminal law must be evaluated 'by a higher standard of justification because it burdens interests not implicated by other modes of social control'.[48] Many criminal scholars generally agree that criminal law should be used as a last resort and only be used to censure people for serious wrong or substantial wrongdoing.[49] Substantial wrongdoing has two elements, harm and culpability.[50] An assessment of harm focuses on the impact that the behaviour has on individual or collective interests while culpability focuses on the perpetrator and their blameworthiness.[51]

Harm

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[44] Simester, A. and von Hirsch, A. *Crimes and Wrongs: On the Principles of Criminalisation* (Hart 2011), 4-5.
[45] Tadros, V. *Wrongs and Crimes* (OUP 2016) 12.
[46] Chalmers J. and Leverick, F. 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217.
[47] von Hirsch, A. 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale' (1983) 74 Journal of Criminal Law and Criminology 209, 211.
[48] Husak, D. 'The Criminal Law as a Last Resort' (2004) 24 Oxford Journal of Legal Studies 207, 234.
[49] For example, von Hirsch (n 47) 214; Ashworth, A. 'Is the criminal law a lost cause?' (2000) 116 LQR 225, 241, 253; Husak (n 48) 234.
[50] Ashworth (n 49) 241.
[51] von Hirsch (n 47) 214.

Assessment of the seriousness of harm should take account of interferences with individual or collective interests.[52] In relation to individual harm von Hirsch and Jareborg find that it can be assessed on the basis of how much the behaviour under consideration impacts on the 'living standard'[53] of the individual victim. The living standard relates 'to the means and capabilities that would ordinarily help one achieve a good life'.[54] It encompasses the 'quality of a persons' existence in a sense that includes not only material support and amenity but other non-economic capabilities that affect the quality of a person's life'.[55] To address the issue of harm to collective interests Marshall and Duff find that harms suffered by an individual can be seen to be a collective harm because they are 'wrongs that are shared by other members of the community with which the victim is identified and by which her or his identity is partly constituted'.[56]

The behaviours under consideration can significantly impact on the 'living standards' of the individual and the collective. Images distributed without the consent of the subject (whether or not they are created with consent) can have significant negative impacts on the subject of the image, harming their capacity to achieve a good life by creating feelings of shame, distress, humiliation, breach of trust and powerlessness.[57] A person may retreat from social media to seek to avoid these harms.[58] However, not only does this cut a person off from positive social interactions[59] but it may not be effective. Once images are online it can be difficult to remove them and therefore these harms may linger well after the initial recording or dissemination and may be intensified due to a lack of control over how widely both geographically and temporally an image is possessed, viewed and circulated.[60] This can have negative mental health effects similar to those experienced by victims of sexual harassment and assault, 'such as PTSD, depression, anxiety, self-blame, substance abuse, and denial/avoidance'.[61] These harm an individual's 'living standards', including their social engagement, career prospects and ability to form or leave relationships.

These harms can be aggravated and entrenched by victim blaming and victimhood minimization.[62] Focusing blame on the victim and their management of risks, or perceived lack thereof, which is not uncommon in relation to image based abuse, 'obscures gendered differentials and inequities of interpersonal relations, [...] amplifying existing cultural logics that blame women who experience gendered violence'.[63] Victim blaming does not apply equally; it is embedded in, reflects and

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[52] Ashworth (n 49) 240.
[53] von Hirsch, A. and Jareborg, N. 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 Oxford Journal of Legal Studies 1, 10.
[54] Ibid. This criterion can still apply to collective interests, whereby the question becomes how much the behaviour impacts on the living standards of members of a class of people, 33.
[55] Ibid.
[56] Ashworth (n 49) 243.
[57] See for instance, Bates, S. 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2017) 12 Feminist Criminology 22; Henry, N. and Powell, A. 'Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women' (2015) 48 Australian and New Zealand Journal of Criminology 1; McGlynn, Rackley, and Houghton (n 8); Citron and Franks (n 18).
[58] Citron and Franks (n 18), 352.
[59] Bates (n 57), 23.
[60] For discussion see Salter, M. and Crofts, T. 'Responding to Revenge Porn: Challenges to Online Legal Impunity', in Comella, L. and Tarrant, S. (eds), *New Views on Pornography: Sexuality, Politics, and the Law* (Praeger Publishers, 2015) 239.
[61] Bates (n 57).
[62] Bates, ibid;; Salter and Crofts(n 60).
[63] Salter and Crofts ibid.

replicates a culture of masculine control and even shaming of women's bodies.[64] As McGlynn, Rackley and Houghton argue: 'harassment and abuse that typically accompanies these forms of abuse is predicated on gendered assumptions relating to women's sexual activity and agency'.[65] Women are shamed for creating images in the first place and told that if they do they are responsible for the ensuing abuse.[66] This attitude does not recognise the 'the importance of consensual production and sharing of private sexual images as a form of sexual expression, and the integral role which technology plays in contemporary sexual and social practices'.[67] It also fails to place criticism where it belongs, on 'the pernicious and damaging myths about women's sexuality and sexual expression, and the shaming and abuse of women who choose to exercise sexual agency in a way that is contrary to these myths'.[68] Gender is not, however, the only dimension in this imbalance. Research also finds that younger and non-heterosexual identifying adults are significantly more likely to experience offensive messages about their sexuality or sexual identity, as well as experience sexual harassment and abuse.[69] Research by Lenhart, Ybarra and Price-Feeney shows that 'LGB [Lesbian, gay and bisexual] internet users are five times as likely to report the detrimental exposure of sensitive personal information than heterosexual respondents'.[70]

It is not, however, just resulting feelings of shame or humiliation which form the basis of the harm inflicted by these behaviours. What is distinct about image based abuse behaviours is that they represent a violation of a person's privacy, dignity and sexual autonomy. Kelly argues that 'abuse, intimidation, coercion, intrusion, threat or force' exist on a continuum of sexual violence.[71] Adopting this understanding McGlynn, Rackley and Houghton argue that image-based abuse shares these common characteristics of 'gendered, sexualized forms of abuse'.[72] They argue that there is a continuum of image based abusive behaviours and that these behaviours should be understood as existing on a 'continuum with other forms of sexual violence'.[73] Such behaviours are harmful both to the individual and collective interests. They hinder individuals from achieving a good life due to the direct impact on the person's life. They also impact on the living standards collectively, particularly in replicating and reinforcing structured inequalities and vulnerabilities.

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[64] Hall, M and Hearn, J. 'Revenge pornography and manhood acts: a discourse analysis of perpetrators' accounts' (2017) 28(2) Journal of Gender Studies 158.
[65] McGlynn, Rackley and Houghton (n 8), 15.
[66] Ibid.
[67] Ibid
[68] Ibid.
[69] Powell, A. and Henry, N. 'Technology-Facilitated Sexual Violence Victimization: Results from an Online Survey of Australian Adults' (2016) 34(17) Journal of Interpersonal Violence 3637; Waldman, A. 'Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities' (2019) 44(4) Law & Social Inquiry 987.
[70] Lenhart, A., Ybarra, M. and Price-Feeney, M. 'Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn"', 2016 <https://datasociety.net/wp-content/uploads/2016/11/Online_Harassment_2016.pdf> accessed 27 July 2020. Waldman also finds that gay and bisexual men who use online dating apps were more frequently the victims of 'revenge pornography' than the general population and the broader LGB community (n 68).
[71] Kelly, L. *Surviving sexual violence* (Polity Press, 1988) 76.
[72] McGlynn, Rackley, and Houghton (n 8) 29 note that the common features of these behaviours are: '(i) the sexual nature of the imagery; (ii) the gendered nature of both perpetration and surviving the abuse (predominantly women as survivors of abuse and men as perpetrators); (iii) the sexualised nature of the harassment and abuse; (iv) the harms as breaches of fundamental rights to dignity, sexual autonomy and sexual expression; and, finally, (v) the minimisation of these forms of abuse in public discourse, law and policy'.
[73] McGlynn, Rackley and Houghton (n 8) 28.

Culpability

The issue of what state of mind on the part of the perpetrator should give rise to criminal liability is addressed by the second consideration; that a person should only be censured through the criminal law if they caused the harm culpably.[74] Allowing people to be convicted and sentenced to imprisonment without proof of fault would represent 'a negation the respect for individual autonomy that ought to be a foundational principle of the criminal law'.[75] This rule has long been incorporated into English law, as stated by Lord Russell CJ in *Williamson v Norris*: 'The general rule of English law is, that no crime can be committed unless there is *mens rea*'.[76] Indeed, it has been said that the general requirement for *mens rea* is 'one of the most fundamental protections in criminal law'.[77] This is because 'it is generally, neither fair, nor useful to subject people to criminal law for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness)'.[78] Furthermore, as Lacey notes, insistence on fault is connected to the legitimacy of criminal law: 'the idea that criminal liability must involve both conduct and responsibility or fault lies at the heart of contemporary criminal law's idea of itself not just as a system of state power and force, but a legitimate – even in some senses a moral – system'.[79]

In sum a case can be made for criminalisation of image based abuse because it causes substantial harm and where engaged in culpably it 'is of social importance that its incidence be reduced'.[80] However, Ashworth cautions that the aim of preventing conduct should not be seen as a sufficient reason for criminalisation and that it should not simply be assumed that criminal law is 'necessarily an effective means of prevention'.[81] The following therefore briefly explores whether there are alternatives to criminalising image based abuse and what advantages there are in utilising using criminal law rather than (or alongside) other areas of law or non-legal mechanisms.

Alternatives to Criminal Law

Criminal law is not the only means by which behaviour can be prevented, and alone it may not be sufficient to help model new ethics around new technologies. Furthermore, it may not be able to produce, or provide in a timely fashion, the result that a person whose image has been taken, disseminated or threatened to be disseminated wants. A person whose image has been non-consensually recorded, possessed or distributed will often be primarily interested in having the image removed and preventing its further circulation.[82] However, criminal law sanctions are usually directed at punishing the offender rather than directly providing a remedy to the victim.[83]

[74] Ashworth (n 49) 240-1
[75] Ibid.
[76] [1899] 1 QB 7 at 14.
[77] Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011).
[78] Ibid.
[79] Lacey, N. 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law' (2001) 64 Modern Law Review 350, 353.
[80] Ashworth (n 49) 253.
[81] Ibid.
[82] This is not to deny that alongside the desire for redress the victim (and the community) may also wish to see the perpetrator punished.
[83] Although some criminal systems provide compensation schemes, such as the Criminal and Law Enforcement Injuries Compensation (CLEIC) Scheme in Hong Kong.

Unlike criminal law civil law is not primarily condemnatory and punitive in nature, rather it aims to redress harms that have occurred. As such civil actions (in tort, equity, breach of confidence or copyright law, etc) can provide better remedies for an individual, such as an injunction ordering a person to remove images and not to distribute them further.[84] Compensation for emotional harm or a loss of earnings because of an inability to work due to the non-consensual distribution of an intimate image can also be awarded in civil law proceedings.[85] Furthermore, civil proceedings put the person bringing the case in control of the proceedings because they decide whether and how to bring an action, what remedy to seek and whether to agree to any settlement.[86] Having control over the proceedings means, however, that that a person must have the financial and emotional resources to pursue a cause of action. Civil proceedings can be very lengthy and costly, all of which can reduce the usefulness of these remedies.[87]

To address these concerns some jurisdictions now allow a court in criminal proceedings to order a person to take reasonable steps to remove, retract, recover, delete or destroy an intimate image where the person is found guilty of an image based abuse offence.[88] Another reform has been to develop alternative proceedings to provide an easier and quicker system for making complaints and providing remedies. In Australia, for example, complaints can be made to the Office of the e-Safety Commissioner, which can assist with the removal of images from social media.[89] Other non-criminal law mechanisms include encouraging social media and mobile providers to be swifter and more diligent in enforcing the terms of their contracts, which usually allow for termination where services are used for illegal or offensive behaviour.[90]

Public education campaigns are also important in helping to develop new ethics in the use of new communication technologies. These technologies are re-shaping societal practices and expectations and ‘interactional codes and symbolic manners appropriate to the technology’.[91] Like the technology itself ‘these codes and manners do not come fully formed’ they must evolve with the technology.[92] Public education campaigns are important to help shape ethics and practices around the use of such technologies. As the Australian Legal and Constitutional Affairs References Committee comments, it is hoped,

> ‘that by educating young people about appropriate online behaviour, those messages will filter through to their parents, wider family and friends; similarly, today's young people are Australia's future leaders and decision makers and instilling in them the importance of appropriate online behaviour will only become more beneficial as time passes’.[93]

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[84] For further discussion of civil law responses see Kirchengast, T. and Crofts, T. ‘The legal and policy contexts of “revenge porn” criminalisation: the need for multiple approaches’ (2019) Oxford University Commonwealth law Journal 1, 17-24; McGlynn, C. and Rackley, E. ‘Image-Based Sexual Abuse’ (2017) 37 Oxford Journal of Legal Studies 534.
[85] See for instance *Wilson v Ferguson* [2015] WASC 15.
[86] Kirchengast and Crofts (n 84).
[87] Although interim injunctions can be ordered in civil proceedings.
[88] See for example Crimes Act 1900 (NSW), s 91S.
[89] Commonwealth Parliament of Australia, The Senate Legal and Constitutional Affairs Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016).
[90] See, Parliament of Victoria, Law Reform Committee, Inquiry into Sexting (Parliamentary Paper No 230, 2013) 7.3.1.
[91] Ferrell, Hayward and Young (n 1).
[92] Crofts T., Lee, M. McGovern, A. and Milivojevic, S. *Sexting and Young* People (Palgrave, 2015), 12.
[93] Commonwealth Parliament of Australia (n 89) para 5.34

Public education campaigns alone may, however, not be enough and criminal law can have an important role to play in educating and communicating community values. Thus, while criminal law alone is not the only tool for shaping social behaviour it does have an important role to play.

Advantages of Criminal Law

The advantage of using criminal law over other fields of law or mechanisms to prevent behaviour is its deterrent effect. Criminal law aims to prevent conduct that is substantially wrong from occurring through threatening the infliction of sanctions. This threat of punishment of wrongdoers has 'educative, moralizing and habituative' functions.[94] Punishment send a message that the behaviour is wrongful and strongly disapproved of by society.[95] This helps to shape society's moral code and 'with fear or moral influence as an intermediate link, it is possible to create unconscious inhibitions against crime, and perhaps to establish a condition of habitual lawfulness'.[96]

New offences directed at image based abuse can strengthen community recognition of the wrongfulness of such behaviour. This was noted by the Australian Legal and Constitutional Affairs References Committee, which commented that it 'believes that non-consensual sharing of intimate images offences, while but one way in which the community's opposition to it can be communicated, are an important way of doing so'.[97] A key factor in the effectiveness of criminal law in communicating societal values is the way in which offences are 'packaged', i.e. what behaviours are targeted in each offence and how they are labelled. Offence labels operate as short-hand communicators. As noted by Wilson: 'Precise, meaningful offence labels are as important as justice in the distribution of punishment. These labels help us to make moral sense of the world'.[98] Offence labels stand as a 'moral and legal record, as a testimony to the precise respect in which the defendant failed in her or his basic duties as a citizen'.[99] They identify how the offender should be regarded by society and how much condemnation they deserve.[100] Fair labelling therefore requires that distinctions between offences and their proportionate wrongfulness should be indicated by the label attached to the offence.[101] This is about more than just the name attached to an offence, but also about the need to distinguish different forms of harm and levels of culpability.[102]

Offence labels have a symbolic and educational function in society, informing the community of behaviours that should not be engaged in and how society will react if they do engage in that behaviour. They thus communicate society's core values in a digestible way and seeing

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[94] Hawkins, G. 'Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects' (1969) *Wisconsin Law Review* 550.
[95] Andenaes, J. 'The General Preventive Effects of Punishment' (1966) 114 *University of Pennsylvania Law Review* 950.
[96] Ibid 951
[97] Commonwealth Parliament of Australia (n 89) 50.
[98] Wilson, W. 'What's wrong with murder?' (2007) Criminal Law and Philosophy 157, 162.
[99] Horder, J. 'Rethinking Non-Fatal Offences' (1994) 14 Oxford Journal of Legal Studies 335, 339.
[100] Chalmers and Leverick (n 46) 226. They also convey information to operators within the criminal justice system about how the offender should be dealt with, for instance, a person's past criminal record may be drawn on in determining a future sentence, 231.
[101] A. Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th ed, 2006) 88.
[102] Chalmers and Leverick (n 46) note that the principle forms two functions; it distinguishes and it describes, 222.

convictions for these offences affirms in the public's mind the wrongfulness of the behaviour.[103] Appropriate labels are important because, '[a] criminal provision is better able to communicate the boundaries of socially acceptable behaviour if it packages crimes in morally significant ways'.[104] The social importance of labelling is highlighted by discussion around the appropriate label for sexual offences, particularly in the 1980s and 1990s. In Australia there was much discussion about whether the offence of 'rape' should be re-labelled to reflect the significant reforms that were undertaken to move the offence away from the narrow traditional common law definition. It was decided by some jurisdictions that despite reforms this label should be retained because of the significance of the label to the community and to the victim.[105] For the victim it was felt that the label 'rape' was preferable because 'a conviction for sexual assault does not adequately reflect the harm that has been suffered'.[106] This confirms the importance of offences labels from the perspective of the victim because 'she deserves to have her suffering reflected by an offence of appropriate seriousness'.[107] A broad offence label or a conviction for an existing offence that is not designed to cover that behaviour can make the victim feel that the harm done to them was not adequately recorded or taken seriously.

Ashworth notes that while offence labels should broadly reflect public opinion, fair labelling does not require that they must slavishly do so.[108] Rather, 'the primary argument should be about what it is right to do, not what it is politically prudent to do'.[109] Chalmers and Leverick similarly note that, given the symbolic function of labels, 'it may be legitimate for the law to seek to shape public opinion rather than be subservient to it'.[110] Creating a new offence and giving it a distinct label can show that the law treats that behaviour especially seriously.[111] This confirms the importance of creating a new offence or offences to address image based abuse rather than stretching existing offences to cover these behaviours. Convicting people who engage in image based abuse under offences developed to deal with different forms of behaviour risks undermining the communicative-educative function of the criminal. New offences, with appropriate labels, can better communicate a need to revise attitudes towards the behavior subject to criminalisation. This is especially important in relation to the use of new technologies where there is a need to develop

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[103] See Mitchell, B. 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64 Modern Law Review 393, 398.
[104] Wilson (n 98).
[105] For instance, the Law Reform Commission of Victoria noted in *Rape and Allied Offences: Substantive Aspects* (Discussion Paper No 2 1986) 51 that '"rape" is synonymous in our culture with a particularly heinous form of behaviour. The application of the term 'rapist' to a person is a particularly effective and appropriate form of stigma. It is claimed that removal of the label would inevitably detract from the image of the behaviour in the public mind, especially over a period of time'. There is also an argument that the label 'rape' may actually stigmatise the victim and lead to a reluctance to report, see Model Criminal Code Officers Committee, *Model Criminal Code: Chapter 5 – Sexual Offences Against the Person* (1999) 55 – 65. Several jurisdictions have replaced the label rape with other labels, such as 'sexual assault' (NSW), sexual penetration without consent (WA), Sexual intercourse without consent (NT).
[106] Chalmers and Leverick (n 46) 236. See also Loh, W. 'What Has Reform of Rape Legislation Wrought? A Truth in Criminal labelling' (1981) 37 Journal of Social Issues 28, 37.
[107] Chalmers and Leverick (n 46) 238.
[108] Ashworth (n 101) 88. Although, in systems with jury trials there is a possibility that juries will not convict of offences if the label of the offence does not coincide with community values. See Wilson (n 98) 162.
[109] Ashworth (n 101) 88.
[110] Chalmers and Leverick (n 46) 241.
[111] Ibid, 241, 243.

'interactional codes and symbolic manners appropriate to the technology'.[112] The difficulty is that offences should neither be too narrow nor too broad or they run the risk of 'particularism' or 'moral vacuity'.[113] Particularism refers to defining offences with such precision that they are inflexible and invite technical argument. At the other extreme is the danger that offences are defined so broadly that they are morally vacuous. Yet, if packaged and labelled appropriately new offences can perform an important educative-communicative function. The following will therefore assess the appropriateness of offences that have been proposed in Hong Kong, then offences that have been adopted in other jurisdictions before making recommendations for how new offences should be formulated.

ADEQUACY OF PROPOSED OFFENCES IN HONG KONG

Immediately following the Court of Final Appeal's decision in *Secretary for Justice v Cheng Ka Yee* the Law Reform Commission of Hong Kong expeditiously prepared a report recommending the creation of offences to fill the gap left by this case.[114] These offences would have an important symbolic-educative function. The question, however, which will be addressed in the following, is what behaviours these offences would cover and whether these offences would leave some image based abusive behaviours unaddressed.

Voyeurism and 'Upskirt-photography'

The 2019 Report of the Law Reform Commission of Hong Kong recommends the introduction of offences to cover voyeurism and non-consensual 'upskirt-photography'.[115] In relation to voyeurism this repeats, and expands on, the recommendation made by the Commission in its 2018 Consultation Paper where it called for the creation of an offence to specifically criminalise acts of non-consensual observation or visual recording of another person where this is done for a sexual purpose.[116] The Commission's recommendations for voyeurism are based on s 67 of the English Sexual Offences Act 2003. The offence in s 67 criminalises a person who observes, or operates equipment enabling the person (or another person) to observe or record, another person doing a private act. In all instances, the behaviour must be done with the intention of obtaining sexual gratification and knowing that the person does not consent to the observation or recording being done for sexual gratification. A private act is defined as where a 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'.[117]

In relation to 'upskirt-photography' the 2019 recommendation deviates from the position in the Commission's 2012 Consultation Paper where it proposed that the offence of sexual assault be

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[112] Ferrell, Hayward and Young (n1) 106.
[113] Horder (n 99) 339.
[114] Law Reform Commission of Hong Kong (n 5) paras 1 and 2.
[115] Ibid para 64.
[116] Law Reform Commission of Hong Kong (n 7) Recommendation 3.
[117] Sexual Offences Act 2003 (E&W), s 68.

extended to cover 'upskirt-photography'. Under the 2012 recommendation, sexual assault would 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, irrespective of whether it was known to the other person'.[118] The Commission considered that this would highlight 'the sexual nature of such activity and need for respect for sexual autonomy'.[119] It was acknowledged that other jurisdictions (e.g. Canada and New Zealand) had dealt with invasions of privacy by means of photography through the creation of offences of voyeurism. However, the Commission noted that its remit did not extend to 'address whether conducts other than "under-the-skirt" photography which involve an infringement of privacy should be covered by the criminal law'.[120] In its 2019 Report the Commission moved away from its 2012 position and instead recommended the creation of two new offences alongside voyeurism because 'it became apparent through our interaction with the public … that the majority of the responses was not in support of expanding the scope of sexual assault to include non-consensual upskirt-photography'.[121] The respondents generally did not see upskirt-photography as a form of sexual assault.[122] However, there was strong support for a new offence in addition to the recommended offence of voyeurism to cover acts which were not done in private.[123]

The Commission now recommends alongside a voyeurism offence other offences to cover non-consensual upskirt-photography based on an addition made to the English Sexual Offences Act 2003 through the Voyeurism (Offences) (No. 2) Act 2019. In support of this new offence the Law Commission for England and Wales noted that the offence of outraging public decency was inadequate because it requires the behaviour to be in public while voyeurism in s 67 was limited because it only covered situations where a person has an expectation of privacy.[124] In contrast, 'upskirt-photography' may occur in spaces that are neither public nor private, such as schools or workplaces.[125] The new offence, recommended by the Hong Kong Law Reform Commission, is based on s 67A Sexual Offences Act 2003 (E&W) and would cover the operation of equipment for observing or recording a person's genitals or buttocks (or underwear covering the person's genitals or buttocks) where this is done for the purpose of obtaining sexual gratification or humiliating, alarming or distressing the person. It requires that the genitals, buttocks (or underwear covering the genitals or buttocks) would not normally be visible, but does not require a reasonable expectation of privacy. The perpetrator must act without the consent of the person and without reasonably believing that the person consents. The Commission considered whether it should be necessary to establish that a person acted with one of the purposes detailed in the English Act. It concluded that the behaviour should be criminalised irrespective of the person's purpose, because this would enable the offence to cover people who commit these acts under the employ of a third party, for example for financial gain.[126] However, it was recommended that an additional offence

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[118] Law Reform Commission of Hong Kong (n 6) para 6.26 and Recommendation 20, para 6.30.
[119] Law Reform Commission of Hong Kong (n 6) para 6.25.
[120] Ibid para 6.27.
[121] Law Reform Commission of Hong Kong (n 5) para 42.
[122] Ibid para 42.
[123] Ibid para 46.
[124] Parliamentary Debates (HC), 2 July 2018, Voyeurism (Offences)(No. 2) Bill, Second Reading, The Parliamentary Under-Secretary of State for Justice (Lucy Frazer), col. 4
[125] Ibid. See also Gillespie (above n14)
[126] Law Reform Commission of Hong Kong (n 5) para 62.

should be created if the non-consensual upskirt-photography is done for the purpose of sexual gratification.[127]

Other Image Based Abuse ('Revenge Pornography')

The Commission's 2019 Report and earlier Consultation Papers address only some image based abusive behaviours and as such they would still leave a gap in the law, a gap which preceded *Cheng Ka Yee*[128]. For instance, the proposed offences do not extend to down-blousing, where an image is taken down a blouse of a woman's breasts. This omission was questioned by the Executive Director of RainLily (Association Concerning Sexual Violence Against Women), Linda Wong Sau-yung, who asked why the recommended offence only covers lower and not upper parts of the body.[129] Wong also noted that 'the proposal failed to lawfully protect victims from having their photos shared or uploaded online' and called for the criminalisation of the distribution of intimate images.[130]

It is somewhat disappointing that the Commission did not grasp the opportunity to engage in a broader review and examine the need for offences to cover other forms of image based abuse such as non-consensual possession, distribution or threats to distribute, intimate images. This may be explained by several factors: there was no consensus about whether to criminalise some forms of behaviour (such as downblousing);[131] the Commission were not in a position to conduct a broader review because of the scramble to release recommendations to fill the gap left by *Cheng Ka Yee*;[132] and the Commission may still have felt constrained because its remit did not extend to whether invasions of privacy should be covered by the criminal law.[133] The Commission does see the non-consensual distribution of intimate images as a separate issue worthy of an independent investigation but has not yet undertaken a review because it has prioritised other matters.[134] Nonetheless, it would have been preferable to include these matters in its review of voyeurism and upskirt-photography given that their inclusion would lead to a more coherent and effective structure of offences.

The proposals by the Commission for offences covering voyeurism and upskirt-photography, discussed above, should be endorsed. However, they are not adequate to cover the range of non-consensual behaviours related to intimate images. Criminalising only voyeurism and upskirt-photography while leaving other related behaviours for later review could lead to a system, as in

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[127] Ibid para 63. This offence would then qualify as a sexual offence and be covered by the Sexual Conviction Record Check Scheme.
[128] [2019] HKCFA 9.
[129] Linda Wong Sau-yung, cited in Cited in Chris Lau 'The legal back-and-forth over upskirt pictures in Hong Kong' (*South China Morning Post*, 2 May 2019) <https://www.scmp.com/news/hong-kong/law-and-crime/article/3008460/legal-back-and-forth-over-upskirt-pictures-hong-kong> accessed 27 July 2020.
[130] Ibid.
[131] Eric Cheung Tat-ming, a member of the sub-committee reviewing sexual offences, noted that 'there was not as strong a consensus about downblousing, compared to upskirting among panel members. The group held different views and thresholds as to what kind of photos depicting breasts would be regarded as unacceptable'. Cited in Chris Lau (n 129).
[132] [2019] HKCFA 9.
[133] Law Reform Commission of Hong Kong (n 6) paras 6.27 for terms of reference see para 2; see also Eric Cheung Tat-ming cited in Lau (n 129).
[134] Legislative Council Panel on Administration of Justice and Legal Services (n 9).

England and Wales, with piecemeal offences that lacks coherence.[135] The following sections therefore consider which further new offences should be adopted. The primary focus of the following discussion will be on possession, dissemination and threats to disseminate (those often referred to as 'revenge pornogrpahy'), starting with a comparative review of how these offences have been constructed in other jurisdictions.

'REVENGE PRONOGRPAHY' OFFENCES IN OTHER JURISDICTIONS

Image based abuse can cause substantial harm to both individual and collective interests but, as discussed above, the seriousness of wrongdoing is determined not just by an assessment of the harm caused but also of the culpability of the perpetrator. This requires a consideration of what material and what behaviours (physical or actus reus elements) should be criminalised, upon what basis (mental or mens rea elements) and what factors should negate liability. The following will draw primarily, but not exclusively, on offences created in England and Wales, the Australian jurisdictions of NSW, South Australia, Victoria and Western Australia, as well as Singapore, to comparatively and critically assess how offences have been defined.

Material Criminalised

Most jurisdictions define the material covered by the offences as 'intimate (or invasive[136] or private sexual[137]) images', whether moving or still, and as such cover photographs and recordings.[138] Some jurisdictions have a narrower definition of 'intimate images' and include only those of a sexual nature, while others are more expansive and include images of a private, sexual or intimate nature. An example of the former approach is Victoria, where an 'intimate image' is defined as one showing a person engaged in sexual activity, or a person in a sexual context or manner, or the genital or anal region of a person (whether bare or covered by underwear), or the breasts of a female.[139] England and Wales also has a relatively narrow definition that covers a 'private sexual photograph'.[140] 'Private' refers to something that is not of a kind ordinarily seen in public and 'sexual' means showing: all or part of an individual's exposed genitals or pubic area; something that a reasonable person would consider to be sexual because of its nature; or something that, taken as a whole, has a content that a reasonable person would consider to be sexual.[141]

Jurisdictions which take a broader definition of intimate images include Singapore, NSW, South Australia and Western Australia. In Singapore an intimate image or recording is one which shows a person's genital or anal region (whether covered by underwear or not), the breasts of a female (whether covered by underwear or not) or a person doing a private act.[142] A person is doing a private act where they have a reasonable expectation of privacy and they are in a state where their genitals, buttocks or breasts (if the person is a female) are exposed or covered only in underwear,

[135] Law Commission (n 2).
[136] South Australia, *Summary Offences Act 1953* (SA), ss 26A, 26C.
[137] England and Wales, *Criminal Justice and Courts Act 2015* (E&W), ss 33, 35.
[138] *Crimes Act 1900* (NSW), s 91N; *Summary Offences Act 1953* (SA), s 26A; *Summary Offences Act 1966* (Vic), s 40; *Criminal Code* (WA), s 221BA; *Criminal Justice and Courts Act 2015* (E&W), s 34.
[139] *Summary Offences Act 1966* (Vic), s 40.
[140] *Criminal Justice and Courts Act 2015* (E&W), s 33.
[141] *Criminal Justice and Courts Act 2015* (E&W), s 35.
[142] *Penal Code* (Sing), s 377BE

they are using the toilet, shower or are bathing, or they are doing a sexual act that is not of a kind ordinarily done in public.[143] The definition in NSW is similar to Singapore and covers intimate images of a person's private parts (the genital or anal area whether bare or covered by underwear or the breasts of a female, or transgender or intersex person identifying as female) or images of a person engaged in a private act (in a state of undress, using the toilet, showering or sunbathing, engaged in a sexual act of a kind not ordinarily done in public or a similar activity) in circumstances in which a reasonable person would expect to be afforded privacy.[144] The definitions in South Australia and Western Australia are similar to NSW.[145] Importantly, the definitions in Singapore, NSW and WA also includes images which are altered to appear to show an intimate image of a person.[146] This is appropriate given that harm may still be caused even if the image is not actually of a person but appears to be that person.[147]

Adopting broad definitions has the effect that these offences can apply to a wide range of situations and could lead to potential overreach of the criminal law. A limitation in Singapore, NSW and Western Australia which can guard against this is the requirement that the image must show a private act in circumstances in which the reasonable person would expect privacy.[148] Other Australian jurisdictions require an objective assessment of whether the images are contrary to community standards, which could also prevent overreach of the criminal law. For instance, in South Australia, an image of a person will not be regarded as invasive where it 'falls within the standards of morality, decency and propriety generally accepted by reasonable adults in the community'.[149]

It is easy to justify defining intimate images to include those showing private parts or sexual activity because non-consensual recording and the use of such images invades a person's most intimate sphere. It may also be argued that a new offence should also extend to cover audio recordings of sexual activity, given that this also violates a person's sexual autonomy. As with intimate images, such recordings might be used to threaten, coerce, harass, humiliate or intimidate a person. An example of such criminalisation is Arkansas, USA, where the offence of unlawful distribution of sexual images or recordings covers voice or audio recordings of a sexual nature.[150] More controversial is whether the definition should extend to other images which may be regarded as private 'because of the particular circumstances or cultural beliefs of the person featured in it (e.g. an image of a person who would always choose to wear a headscarf in public who is not wearing a headscarf, or an image of a transgender person prior to that change)'.[151] While this extension was considered by the Scottish Government it was decided that including such images

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[143] *Penal Code* (Sing), s 377C(3)(f).
[144] *Crimes Act 1900* (NSW), s 91N.
[145] Although a private act in South Australia does not extend to showering or bathing, *Summary Offences Act 1953* (SA), s 26A(3); *Criminal Code* (WA), s 221BA.
[146] *Penal Code* (Sing), s 377BE(5)(b); *Crimes Act 1900* (NSW), s 91N; *Criminal Code* (WA), 221BA .
[147] For discussion of the manipulation of images ('deep-fakes') and the need for criminalisation, see Kirchengast, T. 'Deepfakes and Image Manipulation: Criminalisation and Control' (2020) 29 Information and Communications Technology Law 308.
[148] *Penal Code* (Sing), s 377C(3)(f); *Crimes Act 1900* (NSW), s 91N; *Criminal Code* (WA), 221BA
[149] *Summary Offences Act 1953* (SA), s 26A(3).
[150] Arkansas Code § 5-26-314 (2015). This offence is, however, limited to situations of domestic violence and only covers the person's current or former dating partner.
[151] Abusive Behaviour and Sexual Harm (Scotland) Bill Policy Memorandum at [37] <https://www.parliament.scot/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20(Scotland)%20Bill/SPBill81PMS042015.pdf> accessed 27 July 2020.

within the definition of intimate images would cause ambiguity and 'it may be very difficult for police and prosecutors to establish that such a shared understanding, that a particular image was "intimate", actually existed between the person featured in the image and the person sharing the image'.[152] Concern that including such images may lead to an overreach of the criminal law could be addressed by adopting a requirement that the images are contrary to standards of community decency, as is the case in South Australia. It could, however, be argued that extending the definition of intimate to such images would expand the offence beyond imaged based abuse as violations of sexual autonomy and dignity to invasions of privacy more generally. This might require a deeper consideration of the role that criminal law should play more generally in regulation of privacy invasions.

Behaviours Criminalised

Distribution (or disclosing[153]) is the most typical behaviour subject to criminalisation (alongside voyeurism offences, which generally cover recording, observing or manipulating a device to observe or record images). This is usually defined widely to cover making images available to a person other than the victim. For instance, in NSW 'distribute' is defined to include sending, supplying, exhibiting, transmitting, communicating or making available for access by any other person, whether in person or by electronic, digital or other means.[154] Distribution covers not just passing possession of the image to another but also showing the image to another. It could be argued that this represents an overreach of criminal law because showing an image without relinquishing control is different to disseminating an image online. Once online there is little control over how widely the image is disseminated geographically and temporally. The image may then form part of a person's digital footprint, haunting their future because they do not know when it might reappear. Such harms may not occur where an image is shown to another without relinquishing control. However, even without relinquishing control showing an image is an affront to the sexual autonomy of the subject.

Several Australian jurisdictions, as well as Singapore, have also criminalised the threat to distribute an intimate image. In Victoria a threat to distribute may be made by any conduct, and may be explicit or implied.[155] Similarly, in NSW a threat to distribute an image can be made by any conduct, be explicit or implicit, and conditional or unconditional.[156] There is no need for proof that the person actually feared that the threat would be carried out.[157] In NSW it is also an offence to record an intimate image[158] or threaten to record an intimate image of a person without that person's consent [159] (these offences sit alongside the criminalisation of voyeuristic type observation and recording).[160]

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[152] Ibid.
[153] *Criminal Justice and Courts Act 2015* (E&W), ss 33, 34.
[154] *Crimes Act 1900* (NSW), s 91N; see also *Summary Offences Act 1966* (Vic), s40; *Penal Code* (Sing), s 377C.
[155] *Summary Offences Act 1966* (Vic), s 41DB(3).
[156] *Crimes Act 1900* (NSW), s 91R(3).
[157] *Crimes Act 1900* (NSW), s 91R(5).
[158] *Crimes Act 1900* (NSW), s 91P.
[159] *Crimes Act 1900* (NSW), s 91R(1).
[160] Voyeurism, s 91J; filming a private act, s 91K; filming private parts, s 91L; installing a device to facilitate observation or recording, s 91M.

More recently attention has also been paid to the criminalisation of possession of intimate images. In Singapore it is an offence to possess or gain access to an intimate image (or a voyeuristic image[161]) of another person.[162] A person possesses an image in an electronic form if they control access to the image whether or not they have physical possession.[163] This acknowledges that harm may be caused to a person who knows that another person possess or controls access to intimate images of them. It may cause a person distress and fear not knowing what a person may do with the images and even without a threat being made this could induce the person to behave in certain ways. Merely having access to an image should not be considered possession because this could extend liability very widely and include a person who views an image online.

In all these situations (distribution, threat to distribute, possession and access) the behaviour must generally occur without the consent of the subject of the image. When discussing how an offence should be defined the Australian Legal and Constitutional Affairs References Committee found that consent should be the central feature of 'any non-consensual sharing of intimate images offences'.[164] Australian jurisdictions tend to include provisions which define, in varying degrees of detail, the meaning of consent and when consent is considered not present in relation to these offences. NSW and Western Australia require that consent is freely given and is given for the particular way in which the image is distributed and to whom it is distributed.[165] The NSW provision also clarifies that consent to recording or distribution on one occasion is not to be taken as providing consent to the distribution of that, or any other, image on another occasion.[166] Furthermore, where consent is given to distribution in a particular way or to a particular person, that is expressly deemed not to constitute consent to distribution in any other way or to any other person.[167] The fact that a person distributes the image themselves does not mean that they consent to any other distribution.[168]

Further factors which are taken to indicate that a person does not consent to distribution closely follow some of the factors which negate consent in relation to sexual assault.[169] These include that the person is under 16 or does not have the cognitive capacity to consent; the person has no opportunity to consent due to unconsciousness or sleep; the person consents because of threats of force or terror; or the person consents because of being unlawfully detained.[170] Such express definition of consent is useful to give clarity and increases the educative function of the law. It can also avoid objective interpretations of consent. Victoria takes a different approach to consent. Its offence provision does not apply if the subject of the image is 18 or over and has expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented

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[161] That is an image obtained through committing an offence of voyeurism under *Penal Code* (Sing) s 377BB. This offence covers observing, operating equipment to observe or recording a private act or operating equipment in order to observe or record the genitals, breasts (of a female) or buttocks of a person.
[162] *Penal Code* (Sing), s 377BD(1)(b).
[163] *Penal Code* (Sing), s 377BD(4).
[164] Commonwealth Parliament of Australia (n 51) 51.
[165] *Crimes Act 1900* (NSW), s 91O (3). In relation to the recording see *Crimes Act 1900* (NSW), s 91O(2); *Criminal Code* (WA), s 221BB
[166] *Crimes Act 1900* (NSW), s 91O(4).
[167] *Crimes Act 1900* (NSW), s 91O(5).
[168] *Crimes Act 1900* (NSW), s 91O(6).
[169] *Crimes Act 1900* (NSW), s 61HE. This definition applies to sexual offences, including sexual assault, sexual touching (indecent assault) and sexual act (act of indecency) as well as the aggravated forms of these offences.
[170] *Crimes Act 1900* (NSW), s 91O(7).

to the distribution and the manner in which it was distributed.[171] This allows the court to determine whether there is an objective basis to infer consent and as such could allow certain, particularly gendered and heterocentric, attitudes and stereotypes to enter the assessment. Requiring actual, rather than implied consent, is preferable. Whether the perpetrator knew or believed there was consent is a matter for the mental element of the offence.

A further condition in Victoria is that the distribution, or threat to distribute an intimate image, must be done in a manner that is contrary to community standards of acceptable conduct.[172] In assessing community standards the following are to be taken into account: the nature and content of the image; the circumstances in which the image was captured; the circumstances in which the image was distributed; the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image; and the degree to which the distribution of the image affects the privacy of a person depicted in the image.[173] This element helps address potential overreach of the criminal law by introducing an objective control mechanism that can eliminate inoffensive conduct (as viewed by the community) from the reaches of criminal law. The detailed list of elements to be considered should help prevent problematic attitudes and stereotypes from influencing the assessment. Other jurisdictions while not requiring proof of this element by the prosecution have created a defence for conduct of the accused where a reasonable person would consider the behavior acceptable.[174] Negations of liability are discussed below.

Basis for liability

As discussed above it is not only the harm that the victim (individual or collective) suffers that should determine whether behaviour is criminalised but the culpability of the offender. This turns attention to the mental element for any offence or offences. There is significant variance between jurisdictions with regard to the mental state required for offences.

Most offence provisions require that distribution of an intimate image occurs intentionally (NSW and Victoria),[175] or intentionally or knowingly (Singapore).[176] While the requirement of an intention to distribute is in line with the requirement that the perpetrator should be sufficiently culpable to warrant being subject to the criminal law consideration could be given to extending the offence to reckless distribution, assessed subjectively, given that intention or recklessness ‘would be the requirement of the paradigm crime’.[177] The South Australian and Western Australian provision make no mention of a mental element in relation to distribution. This may be tempered by requiring a mental element in relation to other elements, eg the lack of consent in South Australia (discussed below), but this is not the case in Western Australia, where liability is wholly objective.[178] The Western Australian offence has no mental element, instead provisions are

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[171] *Summary Offences Act 1966* (Vic), s 41DA(3).
[172] *Summary Offences Act 1966* (Vic), ss 41DA(1)(b), 41DB(1)(b).
[173] *Summary Offences Act 1966* (Vic), s 40.
[174] *Crimes Act 1900* (NSW), s 91T(1)(d), see also *Criminal Law Amendment (Intimate Images) Bill 2018* (WA), s 4, inserting s 221BD(3)(d).
[175] *Crimes Act 1900* (NSW), s 91Q; *Summary offences Act 1966* (Vic), s 41DA.
[176] *Penal Code* (Sing), s 377BE(1).
[177] Ashworth (n 49) 241.
[178] This is consistent with the approach in Western Australia in relation to sexual penetration without consent, *Criminal Code* (WA), s 325. See Crofts, T. ‘Rape, the mental element and consistency in the Codes’ (2007) 7(1) Queensland University of Technology Law and Justice Journal 1; Blackwood, J. ‘The Mental Element in Rape in the

made for negations of liability (which are discussed below) but these are assessed objectively. While harm may be caused whether or not the distributor intentionally or recklessly distributes the image a concern is that this approach could extend criminal liability significantly to cases in which a person is significantly less culpable.

In contrast, a much higher degree of culpability is required in England and Wales, where the image must be disseminated with the intention to humiliate, or cause emotional harm or distress to the victim.[179] This is assessed entirely subjectively and the fact that distress is a natural and probable consequence of disclosure cannot be taken to indicate that a person did have this intention.[180] Similarly, in Singapore, alongside the requirement that a person intentionally or knowingly distributes or threatens to distribute the perpetrator must also know, or have reason to believe, the distribution or threat will, or is likely to, cause humiliation, alarm or distress to the subject of the image. This requirement of establishing an ulterior intention (an intention going beyond the physical act) captures the most culpable forms of non-consensual distribution of an intimate image. A problem with this approach is that it may be difficult to establish that a person actually had the requisite intention to cause harm etc and thus it may be difficult to secure convictions.[181] Furthermore, harm may be caused whether or not it was intended and so such an ulterior mental state should not be required provided the perpetrator had the requisite mental elements in relation to the distribution or threat and the lack of consent. The Australian Legal and Constitutional Affairs References Committee considered whether an intent to harm the victim should be required but decided against this because it could allow an accused to argue that they did not turn their mind to the harm to the victim. This could lead to difficulty where the image was distributed for no reason other than 'for a laugh' or 'that they were trying to entertain their mates'.[182] The Office of the Department of Public Prosecutions in NSW similarly submitted that no further intention should be required, commenting that, 'there can be no innocent intent. The only inference available is that the person intends to do the harm, there can be no other reason for distributing the image'.[183] While the concerns expressed about requiring such an ulterior mental state have merit it may be appropriate to include an offence with such a requirement if a hierarchy of offences addressing image based abuse is adopted. This offence as the most culpable form of behaviour (where harm

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Criminal Codes' (1982) Australian Law Journal 474.

[179] *Criminal Justice and Courts Act 2015* (E&W), s 33(1). Such an approach can also be found in California, where it is an offence to distribute an image of an intimate part of a person's body with the intention of causing serious emotional distress, in circumstances where there is an agreement or understanding that the image will be kept private, Californian *Penal Code* § 647(j)(4). Also in North Dakota it is an offence to distribute or publish a sexually expressive image of a person who has a reasonable expectation of privacy, with the intent to cause emotional harm or humiliation to the person depicted in the image, North Dakota *Century Code* § 12.1-27.1-03.3(1)(b). Without this intention to cause harm a person can also be liable for an offence if they knowingly distribute a sexually expressive image that was created without the consent of the subject of the image, where the person knows its character and content, § 12.1-27.1-03.3(2).

[180] *Criminal Justice and Courts Act 2015* (E&W), s 33(8).

[181] See Dymock, A. and Van Der Westhuizen, C. 'A Dish Served Cold: Targeting Revenge in Revenge Pornography' (2019) 39 Legal Studies 361; Flynn, A. and Henry, N. 'Image-Based Sexual Abuse: An Australian Reflection' (2019) Women & Criminal Justice ; A Gillespie '"Trust Me, It's Only for Me": Revenge Porn' and the Criminal Law' (2015) Criminal Law Review 866.

[182] Submission by the Sexual Assault Support Services, cited in Commonwealth Parliament of Australia (n 51) paras 34-35.

[183] Submission by the Office of the Department of Public Prosecutions in NSW, cited in Commonwealth Parliament of Australia (n 89) para 35.

is intended or knowingly caused), would sit at the apex of the hierarchy, with a lower level offence where the image is distributed without such ulterior intention.

Those jurisdictions which criminalise threats to distribute usually require some form of subjective mental state in relation to the threat. In NSW the threat must made with the intention to cause the other person to fear that the threat will be carried out.[184] There is no need for a corresponding physical element, ie. the person need not actually be put in fear.[185] The situation is similar in Victoria, where the threat must be made intending that the person will believe, or believing that the person will probably believe, that the threat will be carried out.[186] In Singapore, the threat must be made knowingly and, in addition, the offender must know or have reason to believe that the threat will or is likely to cause the other person humiliation, alarm or distress.[187] Requiring proof of this ulterior mental state could, as noted above, make it more difficult to secure a conviction. Similarly, in relation to possession or accessing of intimate images the Singaporean provision requires that the person knows or has reason to believe the image is an intimate image and knows or has reason to believe that possessing or accessing the image will or is likely to cause humiliation, alarm or distress to the person depicted in the image.[188]

A varied approach is taken as to what mental state is required on the part of the perpetrator regarding the lack of consent of the subject of the image. In NSW the person must know that the person did not consent to distribution or recording or be reckless as to whether the person consented.[189] Similarly, in South Australia the person must know or have reason to believe that the person does not consent to distribution.[190] Neither England and Wales nor Singapore mention any specific mental state in relation to the lack of consent, presumably because the requirement that the behaviour is done intending to cause distress (E & W) or knowing or having reason to believe it was likely to cause humiliation, alarm or distress (Singapore) make such a requirement redundant. In Victoria and Western Australia there is no requirement that the perpetrator knew or realised that there was no consent. Rather in both jurisdictions a person will not be liable where it could be reasonably considered that the subject of the image expressly or impliedly consented (Vic)[191] or where a reasonable person would regard the distribution of an image as acceptable (WA).[192] Such negations of liability are discussed next.

Negations of liability

In several Australian jurisdictions a person will not be liable for distribution if a reasonable person would consider the conduct of the accused acceptable.[193] In NSW and Western Australia this issue is determined by reference to a range of specified factors, including: the nature and content of the image, the circumstances in which the image was recorded or distributed, the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted in the image, the

[184] *Crimes Act 1900* (NSW), s 91R(2)(b)
[185] *Crimes Act 1900* (NSW), s 91R(5).
[186] *Summary Offences Act 1966* (Vic), s 41DB(1).
[187] *Penal Code* (Sing), s 277BE(2).
[188] *Penal Code* (Sing), s 277BD(1)(b).
[189] *Crimes Act 1900* (NSW), s 91P and 19Q.
[190] *Summary Offences Act 1953* (SA), s 21C(1).
[191] *Summary Offences Act 1966* (Vic), s 41DA(3)(b).
[192] *Criminal Code* (WA), s 221BD(3)(d), among other negations of liability.
[193] *Crimes Act 1900* (NSW), s 91T(1)(d), Criminal Code (WA), s 221BD(3)(d).

degree to which the accused person's actions affect the privacy of the person depicted in the image, and the relationship between the accused person and the person depicted in the image.[194] These factors are similar to those to be considered in Victoria in order to assess whether the image was distributed in a manner contrary to community standard of acceptable conduct.[195] The main difference between these approaches is that in Victoria this is an element of the offence whereas in NSW and Western Australia this is a defence. These provisions, whether as constituent elements of the offence or as defences, curtail the reach of the criminal law by preventing conviction where a reasonable person would regard the distribution of an image as acceptable. This is a particularly important condition on liability under the Western Australian offence because it lacks a mental element.[196] A concern is, however, as already discussed, assessments based on community values can perpetuate certain attitudes, stereotypes and assumptions. However, specifying the factors to be assessed in making this assessment could reduce this possibility. Furthermore, jury directions, could be adopted. Jury directions, particularly in relation to consent, are noted to be an important way of addressing 'stereotypical views of sexual roles' which can play a role in judge's and jury's assessment of consent.[197] If these directions 'are directly responsive to continuing myths and misconceptions about sexual violence'[198] they can perform 'an educative function by clarifying the law and establishing standards of behaviour'.[199]

Other exceptions to liability include, for instance, the dissemination of an image for medical or scientific purposes, where done by law enforcement officers for a genuine law enforcement purpose, or where required by a court or reasonably necessary for legal proceedings.[200] In England and Wales, a defence is also available if the disclosure was for journalistic purposes and the person reasonably believed that, in the circumstances, publication would be in the public interest.[201] A further defence in England and Wales applies where the person reasonably believed the image had been disclosed for reward and had no reason to believe the subject had not consented to the release for reward.[202]

The above review has shown that there is considerable variance in what behaviours have been subject to criminalisation, particularly in relation to the conditions for liability. Based on this comparative analysis of offences enacted in other jurisdictions the following section proposes how a new offence or offences might best be defined in Hong Kong or other jurisdictions considering reform.

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[194] see also *Criminal Law Amendment (Intimate Images) Bill 2018* (WA), s 4, inserting s 221BD(3)(d).
[195] *Summary Offences Act 1966* (Vic), s 40.
[196] This approach is consistent with the basic approach to liability in the traditional state codes of Australia, whereby unless an offence provision mentions a mental state none needs to be established. However, an accused can reply on general provisions in Chapter 5/V of the Criminal Codes of Queensland and Western Australia, alongside any specific or general defences. See Crofts, T. and Tarrant, S. 'Criminal Law pedagogy and the Australian state codes' in Gledhill, K. and Livings, B. *The Teaching of Criminal Law: The pedagogical imperatives* (Routledge, 2017) 99.
[197] Victorian Law Reform Commission, Sexual Offences: Interim Report (2003), para 7.3. See Jury Directions Act 2015 (Vic), s 46.
[198] Australian Law Reform Commission, Family Violence – A National Legal Response (Report 114, 2010) para 25.167.
[199] Victorian Law Reform Commission (n 197) para 7.61
[200] *Crimes Act 1900* (NSW), s 91T(1)(a)-(c), *Criminal Justice and Courts Act 2015* (E&W), s 33(3).
[201] *Criminal Justice and Courts Act 2015* (E&W), s 33(4).
[202] *Criminal Justice and Courts Act 2015* (E&W), s 33(5).

In terms of physical elements it is appropriate to incorporate still or moving images as well as audio recordings of a sexual nature that are of a person or appear to be of a person. 'Intimate' should be defined as in NSW, SA, Western Australia and Singapore, and include images showing private body parts (genital or anal region whether covered by underwear or not), breasts of a female and private acts (a person using the toilet, showering or bathing or engaged in a sexual act not usually performed in public or a similar act) where a reasonable person would expect to be afforded privacy. While it is clear that recording, distribution and threats to distribute or record should be criminalised, possession is more problematic. It could be argued that possession should be criminalised because knowing that a person possesses an image and not knowing what they might do with it could cause alarm and distress to the subject of the image and violates the person's sexual autonomy. There may also be no innocent reason for a person to retain possession of an image, particularly if there has been a request that they return or destroy the image. However, there may be situations where a person comes into possession of an image by innocent means (for instance where the subject originally consented to possession or a third party passes on the image), they take no steps to return or destroy the image and they are unaware that this is causing distress to the subject of the image. Such concerns could be addressed, as in Singapore, at the mental element stage (discussed below). In all instances the behaviours should be criminalised where they occur without the actual consent of the subject. There is no reason to include implied consent, if a perpetrator makes any mistakes about whether the subject consented or not this can be addressed through the mental element or a defence. Listing factors to be taken to indicate consent or lack of consent would enhance the educative effect of the law in relation to what is considered to amount to free and voluntary agreement. Jury directions on consent would also enhance the educative effect of the law.

In terms of mental elements the approaches taken in England and Wales and Singapore, on the one hand, and Western Australia, on the other, sit at opposite extremes. Requiring that the behaviour is done with an intention to cause harm to a person captures the most culpable forms of behaviour. However, this may mean that the offence is only available for the most egregious cases and it may make prosecutions difficult where such ulterior intention cannot be established. At the other extreme not requiring any subjective mental element in relation to any elements of the offence, as is the case in Western Australia, lowers the bar for culpability to an objective standard. The very nature of the distribution of intimate images through new technologies means that in an instant, with the swipe or tap of a finger, images can be distributed widely with potentially little possibility of recall. This does not detract from the substantial harms that may result from the non-consensual distribution of an intimate image but there is a lesser degree of culpability where distribution is thoughtless or careless.

The approaches taken in England and Wales and Singapore as well as Western Australia may be acceptable if a tiered or ladder[203] approach is taken adopting a range of offences with scaffolded penalties reflecting different levels of culpability. The ladder approach was employed by the English Law Commission to develop recommendations for a new tiered structure of homicide

[203] See Crofts, T. and Kirchengast, T. 'A Ladder Approach to Criminalising Revenge Pornography' (2019) 83 Criminal Law Journal 87.

offences for England and Wales.[204] This principle requires that offences are divided and constructed in a way that ensures 'there is an ascending order of gravity of a clear and just kind'.[205] The principles of subjectivity and correspondence help determine the 'rungs' of the ladder. The principle of subjectivity requires that 'the fault element should be concerned with the defendant's state of mind at the time of his or her actions'.[206] The correspondence principle requires that 'the fault element should relate to the harm done for which someone is being held liable'.[207] According to the Law Commission 'the more serious the crime, the more important it is, and the more one is likely to find, that one or both of the principles is respected in the definition of the fault element'.[208]

The Law Commission rejected arguments that a single homicide offence could adequately reflect the degrees of harm and culpability associated with different types of homicide. It was argued that 'there is a need for different offences to reflect the different circumstances in which killings are perpetrated and, in particular, the fact that the culpability of those who kill unlawfully is not uniform'.[209] Support for this approach was found in the comment of Lord Bingham:

> 'The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment that his crime deserves. The object must be that defendants are neither over-convicted not under-convicted'.[210]

Adopting a ladder approach with a hierarchy of offences would reflect the wide range of behaviours that can amount to image based abuse and the varying degrees of harm and culpability. Some are skeptical of this approach in relation to image based abuse. For instance, Flynn and Henry argue that this would 'create not only a hierarchy of offenses, but a hierarchy of victimization and perpetration based largely on the victim's experience, as opposed to the perpetrator's actions'.[211] They prefer the Australian approach of a single offence on the basis that 'distress is difficult to define or quantify, and people differ considerably within the community about what would and would not cause distress'.[212] They also note that requiring this element may mean that cases could not be prosecuted where a victim was not aware that the image had been distributed.[213] Furthermore, Flynn and Henry argue that 'removal of an intent to cause distress allows for these diverse motivations to still be captured in the laws'.[214]

While these objections have some merit it should be emphasised that the suggestion is not that only one offence be adopted which requires proof of an intention to cause distress etc. Rather, it is suggested that a hierarchy of offences could be adopted with an offence requiring this ulterior

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[204] Law Commission, *A New Homicide Act for England and Wales* (CP No. 177, 2005) para 1.31. See also Tadros, V. 'The Homicide Ladder' (2006) 69 Modern Law Review 601; Crofts, T 'Labelling Homicides' (2009) 17 Annual Review of Law and Ethics 355.
[205] Law Commission (n 204), *A New Homicide Act for England and Wales* (CP No. 177, 2005) para 2.103.
[206] Ibid, para 2.101.
[207] Ibid, para 2.101
[208] Ibid, para 2.103.
[209] Ibid, para 1.45.
[210] *Coutts* [2006] 1 WLR 2154 at [12], cited by the Law Commission, ibid, para 1.64.
[211] Flynn, A. and Henry, N. 'Image-Based Sexual Abuse: An Australian Reflection' (2019) Women & Criminal Justice 1, 7.
[212] Ibid, 7.
[213] Ibid.
[214] Ibid, 8.

intention alongside proof of other elements sitting at the apex of the hierarchy and representing the most egregious forms of behaviour. This would mean that the ladder of offences would be able to capture, and reflect in the offence for which a person is convicted, a range of behaviours, motivations and intentions. A perpetrator who did not have the intention to cause distress could still be prosecuted of a lower level offence (provided of course the other elements are established). Furthermore, the fact that a victim did not feel distress would not hinder prosecution even under the most serious offence because the focus is on the intention of the perpetrator not whether the victim felt distress. It is acknowledged that it could be difficult to secure prosecutions under the most serious offence because of the difficulties proving that a person had the requisite specific intention.[215] However, this criticism would be lessened, as already noted, if other offences not requiring this specific intention are available and under which the perpetrator could be convicted in the alternative. The point of a ladder of offences is to accurately reflect the harm done and the culpability of the offender. The criminal law has many examples of offences which are divided upon the basis of whether or not a specific intention can be established (such as common assault or assault with intent,[216] inflicting grievous bodily harm or causing grievous bodily harm with intent[217]). The point of such division is explained by the comment of Lord Bingham above: 'The objective must be that defendants are neither over-convicted nor under-convicted'.[218]

Whether or not such a ladder approach is taken, the core offence or offences should focus on correspondence between the physical element and the mental element, with intention or subjective recklessness as the mental elements. As such for the offence of distribution this should require that there was intentional or reckless distribution with knowledge or belief the subject of the image had not consented to the actual mode of distribution or recklessness as to whether there was consent. For threats, there seems little reason to require, as is the case in Singapore, that alongside knowingly making a threat the person knew or had reason to believe that harm would or was likely to be caused to the subject. It is difficult to see how a threat made with the intention of making the subject believe it would be carried out would not be culpable. The situation is different in relation to possession where there could be an innocent explanation for possession. In order to limit criminalisation to culpable cases it would be appropriate, as in Singapore, to require that the person knew that possession would or was likely to cause alarm, distress or humiliation to the subject. Finally, provision should be made for negations of liability. The model adopted in NSW seems appropriate here. It allows a defence where the behaviour was done for a genuine medical or scientific purpose, was done by law enforcement or in the context of legal proceedings or where a reasonable person would consider the conduct acceptable having regard to expressly listed factors. This would prevent overreach of the criminal law, while listing factors to be taken into consideration would reduce the risk of stereotypes and problematic attitudes entering the assessment.

CONCLUSION

New technologies have profoundly changed the way in which social interaction takes place, creating new avenues for recording and sharing information, including intimate images.. It has

[215] See for example, Flynn and Henry, ibid..
[216] Offences Against the Person Ordinance (Cap 212), ss 40, 36.
[217] Offences Against the Person Ordinance (Cap 212), ss 19, 17.
[218] *Coutts* [2006] 1 WLR 2154 at [12].

taken some time for the harms associated with the non-consensual observing or recording of a person's private parts or a person engaged in a private act and possession, dissemination or threats to disseminate intimate images to be fully appreciated. As evidence has mounted that existing offences are inadequate to deter and prosecute these behaviours, many jurisdictions began to develop specific offences tailored to these behaviours. While some jurisdictions have created new offences to cover image based abuse behaviours, some, such as England and Wales, are already grappling with whether these offences are adequate cover the full range of problematic behaviours and are considering further reforms. Others, for example Hong Kong, have not yet created any specific offences but had continued to use existing offences to cover some problematic behaviours. The 2019 decision of the Court of Final Appeal *in Secretary for Justice v Cheng Ka Yee*,[219] highlights the inadequacy of the existing criminal law in Hong Kong.

A review of the reasons for criminalising image based abuse behaviours has shown that there are good reasons to create specific offences. These behaviours create significant harm by hindering individuals from achieving a good life and impacting on living standards collectively. When engaged in culpably they constitute substantial wrongdoing deserving of punishment. It is evident that existing offences in Hong Kong are not adequate to address the range of related problematic behaviours and this has been further exposed by the decision in *Cheng Ka Yee*. Even though the Commission was under pressure to release its 2019 Report to fill the gap left by *Cheng Ka Yee* it is disappointing that little attention has been paid in this, or the earlier Commission papers of 2012 and 2018, to the related behaviours of possession, dissemination and threats to disseminate intimate images. While the recommendations of the Commission to introduce offences to cover voyeurism and 'upskirt-photography' are commendable they would lead to the situation facing England and Wales of a patchwork of offences which do not address related image based abuse behaviours.[220] Enacting new offences covering possession, dissemination and threats to disseminate intimate images, defined as suggested above, is important to help shape manners and ethics around the use of new communication technologies. This occurs not just through the specific and general deterrent effect of censuring and punishing those who engage in image based abusive behaviours but also through the criminal laws moralising and habit forming functions,[221] which can create 'unconscious inhibitions' against committing the criminalised behaviour.[222] It is therefore recommended that alongside offences of voyeurism and 'upskirt-photography' other offences are adopted to cover possession, dissemination and threats to disseminate intimate images.

[219] [2019] HKCFA 9.
[220] Law Commission (n 2).
[221] Hawkins (n 94).
[222] Andenaes (n 95).