

I. Introduction

1 A series of voyeurism incidents on university campuses in 2019,¹ as well as recent news of Telegram chat groups set up to share obscene images,² have highlighted the prevalence of these offences³ and the need for the law to catch up. Following the passing of the Criminal Law Reform Act 2019,⁴ such situations will now be addressed by the incorporation of legislation criminalising voyeurism and related offences into the Penal Code.⁵ As such, it is an offence for any person to observe or record someone doing a private act, without that person's consent.⁶ It is also an offence to possess, gain access to, distribute, or threaten to distribute images so recorded.⁷

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¹ See, eg, Shaffiq Alkhatib, "NUS student charged over latest voyeurism incident on campus" *The Straits Times* (14 May 2019) <<https://www.straitstimes.com/singapore/courts-crime/nus-student-charged-over-latest-voyeurism-incident-on-campus>> (Accessed 5 July 2019); Samuel Sashant Devaraj, "Third Peeping Tom incident at NTU in three weeks" *The New Paper* (6 May 2019)

<<https://www.straitstimes.com/singapore/courts-crime/third-peeping-tom-incident-at-ntu-in-three-weeks>> (Accessed 5 July 2019); Shaffiq Alkhatib, "NTU student expelled for allegedly recording video of woman showering" *The Straits Times* (6 December 2019)

<<https://www.straitstimes.com/singapore/courts-crime/ntu-student-expelled-for-allegedly-recording-video-of-woman-showering>> (Accessed 9 December 2019).

² See, eg, Shaffiq Alkhatib, "2 teens among 4 charged with transmitting obscene materials in SG Nasi Lemak Telegram group chat" *The Straits Times* (15 October 2019)

<<https://www.straitstimes.com/singapore/courts-crime/2-teens-among-4-charged-with-circulating-obscene-materials-in-sg-nasi-lemak>>; Prisca Ang, "Police looking into another Telegram chat group allegedly circulating obscene materials" (20 October 2019)

<<https://www.straitstimes.com/singapore/police-looking-into-another-telegram-chat-group-allegedly-circulating-obscene-materials>>; Ilyas Sholihyn, "Hailed as a 'hero', SG Nasi Lemak's Leonard Teo was also involved in SharingIsCaring" *AsiaOne* (23 October 2019)

<<https://www.asiaone.com/digital/hailed-hero-sg-nasi-lemak-leonard-teo-was-involved-sharingiscaring>>; Shaffiq Alkhatib, "SG Nasi Lemak case: Man faces 5 more charges involving pornography" *The Straits Times* (29 October 2019) <<https://www.straitstimes.com/singapore/courts-crime/sg-nasi-lemak-case-man-faces-5-more-charges-involving-pornography>> (All accessed 9

December 2019).

³ The number of voyeurism cases involving hidden cameras rose from about 150 in 2013 to about 230 in 2017, with approximately a quarter of these prosecuted in court: *Singapore Parliamentary Debates, Official Report* (1 October 2018) vol 94 (Written Answers to Questions for Oral Answer Not Answered by 3.00pm) (K Shanmugam, Minister for Home Affairs and Law).

⁴ Act 15 of 2019.

⁵ (Cap 224, 2008 Rev Ed). Almost all the provisions will come into force from 1 January 2020: Criminal Law Reform Act 2019 (Commencement) Notification 2019.

⁶ Penal Code, s 377BB(1).

⁷ Penal Code, ss 337BC, 377BD and 377BE.

2 This paper will focus on the core offence of voyeurism, in particular how it may be
interpreted under the new laws. The first section of this paper briefly characterises
voyeurism as a privacy and sexual offence. The second section delineates the elements
of the proposed offence, and focuses on the requirement of a “reasonable expectation
of privacy.” Finally, this paper will conclude with a call for sensitivity in sentencing
the offender, given that voyeurism is also a recognised mental disorder.

II. Conceptualising Voyeurism

3 As an offence, voyeurism has been conceived as both a breach of privacy, as well as of
a person’s sexual or physical integrity.⁸

4 Voyeurism infringes on two types of privacy interests: first, the traditional ‘right to be
let alone’,⁹ and second, the right to control one’s personal information.¹⁰ The right to
be left alone is infringed at the point of observation, where the uninvited voyeur intrudes
into another person’s private space, such as by installing a camera where a victim does
not expect to be observed. The right to control one’s personal information is infringed
as the individual being observed does not know of the observation, and cannot adjust
his behaviour to “minimise the intrusion and control how (he is viewed).”¹¹ Further
infringement of this kind may occur when an image of the victim is subsequently
captured and disseminated.¹²

5 With regard to voyeurism being a breach of a person’s sexual or physical integrity,
there are at least two bases for voyeurism as a sexual offence:

- (a) First, the purpose for which the observation is made, such as the voyeur’s sexual
arousal; and;

⁸ Department of Justice, Canada, “Voyeurism as a Criminal Offence: A Consultation Paper” (2002)
<http://publications.gc.ca/collections/collection_2007/jus/J2-337-2002E.pdf> (Accessed on 5 July
2019) at p8.

⁹ Samuel D Warren and Louis D Brandeis, “The Right to Privacy” (1890) 4(5) H.L.R 193 at 195.

¹⁰ Professor Gary Chan notes that this is “intertwined with our desire to maintain particular relationships
with various people, essentially a consequentialist account of privacy.” *The Law of Torts in Singapore*
(Academy Publishing, 2nd Ed, 2016) at para 16.007.

¹¹ New Zealand Law Commission, “Study Paper 15: Intimate Covert Filming” (28 June 2004)
<<https://www.lawcom.govt.nz/our-projects/covert-filming>> (accessed 20 July 2019) at para 2.8.

¹² Clay Clavert and Justin Brown, “Video Voyeurism, Privacy and the Internet: Exposing Peeping Toms in
Cyberspace” (2000) 18 *Cardozo Arts & Ent.L.J.* 469 at 488.

(b) Second, the nature of what is observed, such as the fact that potential victims may be engaged in acts of intimacy.¹³

6 The prohibition against voyeurism thus seeks to prevent a person from sexually exploiting another.¹⁴ It has also been reported that victims of voyeurism may feel “intimidated, ashamed, angry or powerless” in the face of unwanted exposure,¹⁵ while victims of ‘revenge porn’ may be overwhelmed at seeing their images online.¹⁶

III. Interpreting the Voyeuristic Offence

A. *The Current State of Affairs*

7 Given the status of voyeurism as an offence, this paper will discuss how such behaviour has been dealt with thus far. Voyeuristic offences have been typically prosecuted under s 509 of the Penal Code, which prohibits the act of a “word or gesture intended to insult the modesty of any woman...(including intruding) upon the privacy of such woman.”¹⁷ Occasionally, these offences were also prosecuted under the Films Act for making or possessing an obscene film.¹⁸ Furthermore, the distribution of sexual images, in the vein of Telegram chat groups “SG Nasi Lemak” and “SharingIsCaring,” had been typically addressed under s 292(a) of the Penal Code for, *inter alia*, the transmission of obscene material by electronic means, s 383 for extortion and s 503 for criminal intimidation.¹⁹

¹³ Department of Justice, Canada, “Voyeurism as a Criminal Offence: A Consultation Paper” at p 8.

¹⁴ Department of Justice, Canada, “Voyeurism as a Criminal Offence: A Consultation Paper” at p 8.

¹⁵ Wong Pei Ting, “The Big Read: Singapore’s voyeurism problem – what’s wrong with men, or the world?” *ChannelNewsAsia* (30 April 2019) <<https://www.channelnewsasia.com/news/singapore/singapore-voyeurism-problem-spy-cam-sex-harassment-monica-baey-11487244>> (Accessed 9 December 2019).

¹⁶ *ChannelNewsAsia*, “Leaked sex tapes and child porn: A look into 13 illicit Telegram chat groups” (2 November 2019) (Accessed 9 December 2019).

¹⁷ Singapore Penal Code (Cap 224, 2008 Rev Ed). The offence at present provides for a punishment of up to one year’s jail, or a fine, or both. It is noted that the more severe offence of outraging modesty under s 354 of the Penal Code relates to where there is assault or use of criminal force, and has not been applied to such ‘Peeping Tom’ offences.

¹⁸ Section 29 of the Films Act (Cap 107, 1998 Rev Ed) provides that a first-time offender who makes or reproduces any obscene film, whether or not for the purposes of distribution, will be liable on conviction to a fine of \$20,000 to \$40,000 and a jail term of up to 2 years or both, with higher maximum sentences prescribed for subsequent offenders; while section 30 of the Act provides that a person who possesses an obscene film will be liable on conviction to a fine of at least \$500 for each obscene film in possession, or jail of up to six months, or both. The accused in *PP v Tay Beng Guan Albert* [2000] 2 SLR(R) 778 who used a video camcorder in his bathroom to film the private moments of two female colleagues while they used the bathroom was charged under s 509 of the Penal Code but not under s 29 or s 30 of the Films Act, while more recently, the accused in *PP v Chong Hou En* [2015] 3 SLR 222 (“*Chong Hou En*”) who filmed ‘up-skirt videos’ via a mini-camera attached to his shoe was charged under both s 509 of the Penal Code and s 30 of the Films Act.

¹⁹ Section 292(a) of the Penal Code provides for jail of up to three months or fine or both; while s 384 provides that extortion is to be punished with jail of 2 to 7 years with caning, and s506 provides that criminal intimidation is to be punished with jail of up to 2 years or fine or both, with other provisions

8 The Penal Code Review Committee opined that the use of a “patchwork” of laws to prosecute voyeurism was unsatisfactory, and highlighted that technology has made the offences even more pernicious.²⁰ The fact that the statutory offence of insulting modesty applied to only women was also said to be problematic.²¹ It stated that the ease with which images could be “created, uploaded, and downloaded on various platforms” – and the fact that it is very difficult to remove such images subsequently – meant a “stronger and consistent response” was needed to address both actual and threatened distribution of intimate images.²² Thus, the Committee recommended enacting specific penal provisions against voyeurism and the distribution of, or threat to distribute, intimate images.²³

B. Elements of the Proposed Offence

9 Focusing on voyeurism, the new offence prohibits a person from:

- (a) intentionally observing another person doing a private act, without that person’s consent; *and*

depending on the nature of the threat. The accused in *PP v Mohamed Hirwandie Mohd Hashim* who threatened to post nude photographs of a woman he met online was jailed four months for criminal intimidation (unreported; Elena Chong, “Designer jailed for threat to circulate woman’s nude photos, fined \$23k for obscene video films” *The Straits Times* (4 April 2017) <<https://www.straitstimes.com/singapore/courts-crime/designer-jailed-for-threat-to-circulate-womans-nude-photos-fined-23k-for>>), while the accused in *PP v Lu Yi* who uploaded his girlfriend’s nude photographs to a Tumblr-hosted website after their relationship was over was charged under s 292(a) and jailed for four weeks (unreported; Elena Chong, “Man sent ex-girlfriend’s nude photos to website” *The Straits Times* (4 April 2017) <<https://www.straitstimes.com/singapore/courts-crime/man-sent-ex-girlfriends-nude-photos-to-website>>) (Penal Code Review Committee Report at pp82-83). More recently, four persons were charged under s 292(a) for their alleged involvement in SG Nasi Lemak (Shaffiq Alkhatib, “2 teens among 4 charged with transmitting obscene materials in SG Nasi Lemak Telegram group chat” *The Straits Times* (15 October 2019) <<https://www.straitstimes.com/singapore/courts-crime/2-teens-among-4-charged-with-circulating-obscene-materials-in-sg-nasi-lemak>>); while a man who uploaded his victim’s nude photos onto social media platform Tumblr was jailed for 10 weeks for one count each of s 292(a) and s 503 (Kok Yufeng, “Man jailed 10 weeks for uploading revenge porn on Tumblr” *The New Paper* (8 October 2019) <<https://www.asiaone.com/digital/man-jailed-10-weeks-uploading-revenge-porn-tumblr>> (All accessed 9 December 2019).

²⁰ As people may now “make images not readily accessible to the eye,” such as through long-range lenses or camera placed below women’s skirts, and “repeatedly scrutinize” and disseminate these images: Penal Code Review Committee Report at p 75.

²¹ Thus the accused in *PP v Colin Teo Han Jern* [2017] SGMC 74 who surreptitiously took videos and photos of other men engaged in various bathroom-related activities in bathroom cubicles was charged under s29 and s30 of the Films Act for making and possessing obscene films respectively, but could only be found liable under s268 of the Penal Code for causing a public nuisance, which carries the punishment of a fine of up to \$1,000 under s 290 of the Code. Following the Criminal Law Reform Act 2019, the offence of insulting modesty now applies to “any person”: Penal Code, s 377BA.

²² Penal Code Review Committee Report at p 82.

²³ Penal Code Review Committee Report at pp 75-76, 83.

(b) with knowledge or reason to believe that that person did not consent to being observed.²⁴

10 Further, a person is said to be doing a private act where he is under circumstances in which:

- (a) he has a reasonable expectation of privacy, *and*;
- (b) is in a state where his private parts are exposed or covered only in underwear;
- (c) using a toilet, showering or bathing; or
- (d) doing a sexual act “not of a kind ordinarily done in public.”²⁵

11 Additionally, in relation to the element of non-consent, the Government has introduced a presumption to the effect that where a person is proven to have made a recording of another person doing a private act or his or her private parts, in circumstances where such parts “would not otherwise be visible,” it is presumed that the person depicted had not consented to being recorded.²⁶ The burden would then be on the recorder to prove that the subject of the recording had consented. The presumption is intended to overcome the evidential difficulties in identifying or locating victims.²⁷

12 That said, this does not foreclose the possibility of such attempts being prosecuted as “inchoate offences” under s 511 of the Penal Code – which provision itself has been clarified in the upcoming Penal Code amendments.²⁸ In relation to the second element

²⁴ Penal Code, s 377BB(1).

²⁵ Penal Code, s 377C(3)(f).

²⁶ Penal Code, s 377BB (9); Penal Code Review Committee Report at p 77.

²⁷ Penal Code Review Committee Report (August 2018) < <https://www.mha.gov.sg/docs/default-source/default-document-library/penal-code-review-committee-report3d9709ea6f13421b92d3ef8af69a4ad0.pdf> > (Accessed 5 July 2019) at p77; *Singapore Parliamentary Debates, Official Report* (6 May 2019) vol 94 (Second Reading for the Criminal Law Reform Bill) (Amrin Amin, Senior Parliamentary Secretary to the Minister for Home Affairs).

²⁸ That said, the voyeurism provision here does largely resemble that of other common law jurisdictions. For example, s 67 of UK’s Sexual Offences Act 2003 (Cap 42) provides that it is an offence where, *inter alia*, a person (i) observes another person doing a private act (ii) for the purposes of obtaining sexual gratification, and (iii) knowing that the other person does not consent to so being observed. Whether a person is doing a private act is in turn determined by whether the person is in a place which would reasonably be expected to provide privacy, *and* that person’s private parts are exposed or covered only with underwear, that person is using a lavatory, or doing a sexual act “not of a kind ordinarily done in public.” Similarly, s 216G of the New Zealand Crimes Act 1961 prohibits a person from (i) making a visual recording (ii) without the knowledge or consent of the human subject being recorded; (ii) the subject in a place which would reasonably be expected to provide privacy in the circumstances; *and* (iii) the subject is naked, partly exposed or in underwear, engaged in sexual activity, or other personal bodily activities involving dressing or undressing.

of a private act, the fact that the victim is required to have been exposed in some manner suggests that the Government is concerned only with instances where damage has actualised. Thus, situations without any actual damage or invasion of privacy will not constitute an offence. For example, where a person installed concealed cameras in circumstances where another person might reasonably expect privacy, but failed to observe any activities of that nature, there will be no offence.²⁹

- 13 As for the distribution of voyeuristic images or recordings, the new s 337BC of the Penal Code criminalises the distribution of (or possession in order to distribute) these images, “knowing or having reason to believe” that they were obtained via a voyeuristic offence, and that the subject of the image or recording does not consent to distribution.³⁰ Additionally, the amendments criminalise the gaining of access to “intimate image(s) or recording(s)” of another person, “know(ing) or (with) reason to believe that this was without the consent of the subject of the image or recording and that such access would

²⁹ The new offence is therefore different from, for example, its Canadian counterpart, which does not require proof that one’s privacy has been invaded. It is sufficient if the observation was in circumstances where privacy was reasonably expected and the observation was for a sexual purpose (Criminal Code of Canada (RSC, Cap 46, 1985), s 162(1) makes it an offence where person observes another in circumstances where privacy can reasonably be expected, *and* (i) the person is in a place where he can reasonably be expected to be nude, partly exposed or engaged in sexual activity; or (ii) is so exposed or engaged in such an activity; or (iii) the observation or recording is done for a sexual purpose). Other culpable purposes that have been discussed elsewhere include that of “humiliating, alarming or distressing the victim,” to address instances where the voyeur intends to shame, possibly via ‘revenge porn’ by circulating any images made, or claims that it is ‘for fun’. For example, in *R v Desilva* (2011) ONCJ 133, when the accused made a sexually explicit video while he was in a relationship with the complainant girlfriend, his subsequent motive of circulating the video after their relationship went sour was not sexual, but “to embarrass and humiliate the complainant.” (As noted by The Law Reform Commission Ireland in its “Report on Privacy: Surveillance and the Interception of Communications” (June 1998) <http://www.lawreform.ie/_fileupload/Reports/rPrivacy.pdf> (Accessed on 5 July 2019) at para 2.122). It is recognised that concerns were expressed at the House of Commons Public Bill Committee debates on an upcoming ‘up-skirting’-related bill on 10-12 July 2018 that the two proposed specified purposes of sexual gratification and humiliation, distress or alarming of the victim may not always be easy to prove, for example, where done for financial gain or “simply having a bit of fun.” Further, if the individual is not recognisable, humiliation might not be caused. However, Justice Minister Lucy Frazer expressed confidence that the purposes of sexual gratification and humiliation were familiar to criminal justice agencies and were used in current legislation, and it would be difficult to imagine circumstances other than the two purposes set out. For example, if a voyeur hoped to sell these videos for financial gain, the sexual gratification would likely be that of a third party’s: Voyeurism (Offences) (No. 2) Bill Second and Third Readings <<https://www.parliament.uk/business/news/2018/september-2018/voyeurism-offences-no-2-bill-commons-stages/>> (Accessed 5 July 2019).

³⁰ Penal Code, s 377BC(1) and (2).

likely “cause humiliation, alarm or distress” to the person depicted,³¹ as well as the threatening to distribute or actual distribution of such images.³²

C. *A Reasonable Expectation of Privacy?*

14 In relation to the voyeuristic offence, the term “circumstances in which the person (doing a private act) has a reasonable expectation of privacy” has been left “open-ended,” as recommended by the Penal Code Review Committee.³³ Nonetheless, a few observations may be made.

15 First, the concept of “circumstances” expresses that an act done in a public place may nevertheless be done in circumstances giving rise to a reasonable expectation of privacy. The classic example is the ‘up-skirt’ video taken in public: a reasonable expectation of privacy exists in relation to areas of the body that are covered or hidden.³⁴ Indeed, the increasing availability of filming devices³⁵ has “disrupted normal expectations of public privacy,”³⁶ such that it is not meaningful to maintain any binary distinction between public and private places in privacy law generally.

16 Second, the inquiry should be into the nature of the observation, rather than its purpose.³⁷ As emphasized by the English Court of Appeal in *R v Bassett*, “it is clear from the statute that it is not voyeurism to derive sexual gratification from observing something which is not a private act.”³⁸ For example, in *R v Swyer*,³⁹ a voyeurism case, some marathon runners went behind a hedge to urinate. They would not have any

³¹ Penal Code, s 377BD(1). Intimate image(s) or recording(s) are further defined as those of, *inter alia*, a person’s private parts, or of the person doing a private act, but excludes “an image so altered that no reasonable person would believe that it depicts (the purported victim)”: Penal Code, s 377BE(5).

³² Penal Code, s 377BE(1) and (2).

³³ Penal Code, s 377C(3)(f); Penal Code Review Committee Report at p 76. Just one illustration has been offered: where a person is showering in an open-concept shower cubicle at the changing room of a swimming pool, he or she cannot reasonably expect not to be casually observed. However, that person can reasonably expect that he or she will not be surreptitiously recorded by a video camera.

³⁴ *R v Jarvis* at [96].

³⁵ *Singapore Parliamentary Debates, Official Report* (6 May 2019) vol 94 (Second Reading for the Criminal Law Reform Bill) (Yip Pin Xiu, Nominated Member of Parliament).

³⁶ Elizabeth Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places.” (2000) 50(3) U.T.L.J. 305 at 18, as noted by the British Columbia Supreme Court in *R v Rudiger* (2011) BCSC 1397 at [97].

³⁷ Thus the three factors identified by the Penal Code Review Committee (as mentioned in [14]) rightly focus on the nature of the observation: here, the state that the person being observed is in.

³⁸ *R v Bassett* [2008] EWCA Crim 1174 (“*R v Bassett*”). Similarly, the Ontario Court of Appeal in *R v Jarvis* held that if the fact that a subject was being surreptitiously recorded without his or her consent for a sexual purpose was enough to give rise to a reasonable expectation of privacy, the privacy requirement of the offence would be redundant.

³⁹ [2007] EWCA Crim 204.

expectation of privacy from someone like a dog walker who might chance upon them, and there would not be any voyeurism even if he derived sexual gratification from what he saw. But if the dog walker loitered for many minutes and closely watched the runners relieving themselves, the runners could subsequently have a reasonable expectation of privacy from that nature of observation.⁴⁰

17 The author therefore proposes that a subject’s reasonable expectation of privacy for the offence should be determined by the totality of circumstances,⁴¹ including:

- (a) the nature of the person being observed (such as the degree of privacy that might be reasonably be expected by, for example, hiding behind a bush), and
- (b) nature of the observer and his observation (such as whether he loitered to watch or, to take another example, used the zoom feature of a video camera to concentrate on the genital area and buttocks of young girls at a playground).⁴²

Such an assessment, involving the nature of both the observed and observer, would substantiate what is ultimately a normative inquiry.⁴³

18 As a final note, although the concept of a “reasonable expectation of privacy” has been employed elsewhere – predominantly in claims of misuse of private information⁴⁴ and search and seizure contexts⁴⁵ – caution must be sounded against applying the same analysis. This is as the former considers not just the circumstances, but the information

⁴⁰ As noted by the English Court of Appeal in *R v Bassett* at [9].

⁴¹ *R v Lebenfish* (2014) ONCJ 130 (“*R v Lebenfish*”) at [35]. In Canada, the term “totality of the circumstances” was first used in assessing a person’s reasonable expectation of privacy in the search and seizure cases of *R v Edwards* [1996] 1 SCR 128 and *R v Gomboc* [2010] 3 SCR 211 and have been mentioned in cases of voyeurism there (eg. *R v Lebenfish*), without further elaboration on the factors to be considered in the context of voyeurism. In the search and seizure context, the relevant factors have been said to include (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access, including the right to admit or exclude others from the place; (vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation. (*R v Edwards* at [45]).

⁴² As in *R v Rudiger*, where a reasonable expectation of privacy from such enhanced observation was found.
⁴³ According to the Ontario Court of Appeal in *R v Jarvis*, to grant that a person has a reasonable expectation of privacy in a situation “is to conclude that his or her interest in privacy *should* be prioritized over other interests.” Thus the question of whether a person has a reasonable expectation of privacy is said to be a normative rather than descriptive one: “concerned with identifying a person’s legitimate interests and determining whether they should be given priority over competing interests.” (at [117]).

⁴⁴ Such as in *Campbell v MGN Ltd* [2003] QB 633 and ECtHR 24 June 2004, Appl. 59320/00 (*Caroline von Hannover v Germany*).

⁴⁵ As first articulated by the United States Supreme Court in *Katz v United States* 389 U.S. 347 (1967).

concerned as well.⁴⁶ The latter has even less relevance as there are no compelling state interests here which justify compromising privacy rights.⁴⁷

D. *Sentencing Considerations*

19 As some voyeurs may well have offended due to a mental disorder,⁴⁸ sentencing for the voyeuristic offence may engage additional considerations concomitant with sentencing mentally disordered offenders. In sentencing such offenders, there is “generally a tension between the sentencing principles of specific and general deterrence on the one hand, and the principle of rehabilitation on the other.”⁴⁹

20 Furthermore, where the disorder is one which “invariably manifests itself in the doing of the very act which is criminalised,” the High Court (“HC”) in *PP v Chong Hou En* held that the nature of the mental disorder would first have to be examined, in terms of how it would affect the individual’s capacity for self-control, and “whether punishment will be able to instil fear and deter him from committing the same criminal acts in future.”⁵⁰ The HC considered that if the nature of the mental disorder was such that the individual significantly retained such capacity for self-control, and if punishment would

⁴⁶ And “whether the facts in issue are indeed ‘private’”: Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013) ch 6 at p 174-175. There would further be the issue of balancing, at least in the European context, the right to respect for private life and right to freedom of expression, as respectively enshrined in Arts 8 and 10 of the European Convention on Human Rights.

⁴⁷ As pointed out by the British Columbia Supreme Court *R v Rudiger*: “the expectation of privacy under (the voyeurism offence) relates not to the accused but to a complainant (at [85]).

⁴⁸ Voyeurs may have acted on impulse, such as under the influence of alcohol or peer pressure; or may have an “antisocial personality disorder” which makes them disregard the rights of others; or may have Compulsive Sexual Behaviour Disorder (CBSD) (Shabana Begum, “Some Peeping Tom cases may be due to sex addiction disorders, say experts” *The Straits Times* (20 May 2019)

<<https://www.straitstimes.com/singapore/what-makes-people-peep>>). CBSD, which was officially recognised as a mental disorder by the World Health Organisation in 2018, is “characterised by a persistent pattern of failure to control intense, repetitive sexual impulses or urges resulting in repetitive sexual behaviour.” (World Health Organisation, *ICD-11 for Mortality and Morbidity Statistics*, “6C72 Compulsive sexual behaviour disorder” <<https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/1630268048>> (both accessed 27 December 2019).

⁴⁹ As stated by the Court of Appeal in *Lim Ghim Peow v PP* [2014] 4 SLR 1287 at [26]. Further, the High Court in *PP v Chong Hou En* [2015] 3 SLR 222 distilled the following principles: (i) general deterrence may be accorded full weight where the mental disorder is not serious or is not causally related to the commission of the offence, and the offence is serious; (ii) despite the existence of a mental disorder, specific deterrence may remain relevant where the offence is premediated or where there is a conscious choice to commit the offence; (iii) where a serious psychiatric condition renders deterrence less effective, rehabilitation may take precedence; however, (iv) in cases involving particularly heinous crimes, the retributive and protective principles of sentencing should prevail over the principle of rehabilitation (at [24]); these observations were endorsed by the Court of Appeal in *PP v Kong Peng Yee* [2018] 2 SLR 295.

⁵⁰ [2015] 3 SLR 222 at [26]-[27].

be so effective, then there could be very little or no mitigating weight ascribed to the presence of the disorder. Conversely, if the disorder significantly impaired the individual's capacity for self-control and punishment was unlikely to be so effective, then the principle of deterrence could be given less weight and rehabilitation could take precedence. The court also recognised that if the offences committed were "just too serious in nature," the principle of rehabilitation could have to give way to the principle of retribution and protection of the public.⁵¹

- 21 In *PP v Chong Hou En*, the respondent affixed a mini-camera to his shoe and used it to film 'up-skirt' videos in a mall. Despite the expert evidence which suggested that the respondent suffered from a condition of "voyeurism," the HC found that this was "merely a clinical description of...a perverse behavioural option." Thus, the HC concluded the respondent was not deprived of self-control, and thus held that his condition should not be given significant weight such as to override sentencing principles of deterrence.⁵²
- 22 In light of the ubiquity of mobile phones with camera functions and cameras with recording functions coming in "all shapes, sizes and disguises and...getting cheaper to acquire," as well as the ease of transmitting these recordings, the court found general deterrence particularly relevant. Specific deterrence was also warranted given the court's finding of the nature of voyeurism.⁵³ While rehabilitation was relevant as well, there was no suggestion that treatment could not still take place in prison, although care would have to be taken with the overall sentence such that it was not so "crushing" as to "deter any hope of recovery and reintegration."⁵⁴
- 23 Despite these findings, the courts should bear in mind comments by the Court of Appeal that "the moral culpability of mentally disordered offenders (lie) on a spectrum," with the same type of mental disorder afflicting different people in varying degrees.⁵⁵ Moreover, it has been observed elsewhere that "symptoms of impulsivity and compulsivity are usually present (for the voyeuristic disorder), which may take away a

⁵¹ [2015] 3 SLR 222 at [29].

⁵² [2015] 3 SLR 222 at [64].

⁵³ [2015] 3 SLR 222 at [65]-[66].

⁵⁴ [2015] 3 SLR 222 at [67].

⁵⁵ [2018] 2 SLR 295 at [60] & [65].

sufferer’s full control over his action,” and that with appropriate treatment, most voyeurs would be able to manage their inappropriate behaviour.⁵⁶ The appropriate sentencing principles should be balanced for each case, with true voyeuristic sufferers granted a sentence conducive to their treatment and rehabilitation.

IV. Conclusion

24 The new offence of voyeurism directly targets an increasingly prevalent offence. As drafted, it is relatively in line with equivalent provisions in other jurisdictions. This paper has sought to articulate how the offence may be conceived as an infringement on privacy interests and a sexual offence. Additionally, it has outlined the elements of the offence, and suggested an approach to interpreting its requirement for circumstances in which the alleged victim has a reasonable expectation of privacy.⁵⁷ Lastly, it has emphasised that despite the High Court’s finding that voyeurism does not deprive a person of his self-control to the same extent as an impulse control disorder⁵⁸ (and would therefore have less significant mitigating value),⁵⁹ the impact of a potential mental disorder on individual offenders remain highly fact-specific, and should be considered accordingly.

This article does not constitute legal advice or opinion. SMU Lexicon and its members do not accept or assume responsibility, and will not be liable, to any person in respect of this article.

⁵⁶ Dr Julia Lam, “Fifty Shades of Sexual Offending – Part I” *Singapore Law Gazette* (July 2017) <https://www.lawsociety.org.sg/portals/0/Media%20Centre/Law%20Gazette/pdf/SLG_JUL_2017.pdf> (Accessed on 6 July 2019).

⁵⁷ Penal Code, s 377C(3)(f).

⁵⁸ [2015] 3 SLR 222 at [61].

⁵⁹ [2015] 3 SLR 222 at [33].