# 有關引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行的建議的諮詢報告

# Report on the Consultation on Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences

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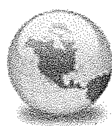
## Compendium of Written Submissions

第十四冊

Volume 14



香港青年協會青年違法防治中心就引入「窺淫、私密窺視、未經同意下拍攝私密處及相關罪行」公眾諮詢諮詢文件意見書
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2 Attachments

香港青年協會青年違法防治中心就香港法律改革委員會涉及雜 項 性 罪 行諮詢文件意見書.pdf

Response Form - Voyeurism (Chi) _final.pdf

致保安局

現附上香港青年協會青年違法防治中心就引入「窺淫、私密窺視、未經同意下拍攝私密處及相關罪行」公眾諮詢諮詢文件意見書和回應文件。

青年違法防治中心

## 諮詢文件

## 引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行的建議

## 回應表格

### 建議 1 及建議 2　新增罪行：*窺淫及私密窺視*

[諮詢文件第 11 及 12 段]

**1.** 你是否同意就窺淫訂立一項特定罪行(即建議 1)

(a) 是 ........................................ ☑
(b) 否 ........................................ ☐

| 註<br>按一下這裡以輸入文字 |
|---|

**2.** 你是否同意就私密窺視另訂一項罪行(即建議 2) 以作為擬議窺淫罪的法定交替罪行 同時也是一項獨立罪行

(a) 是 ........................................ ☑
(b) 否 ........................................ ☐

| 註<br>按一下這裡以輸入文字 |
|---|

**3.** 你是否同意建議 1(即窺淫)及建議 2(即私密窺視)所述行為的擬議涵蓋範圍

(a) 是 ........................................ ☑
(b) 否 範圍太廣 ........................................ ☐
(c) 否 範圍太窄 ........................................ ☐

註
按一下這裡以輸入文字

## 建議 3 及建議 4　新增罪行：*未經同意下拍攝私密處*

[諮詢文件第 13 至 15 段]

**4.** 你是否同意就未經同意下為了得到性滿足而拍攝私密處訂立一項罪行(即建議 3)

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註
按一下這裡以輸入文字

**5.** 你是否同意就未經同意下不論目的拍攝私密處另訂一項罪行　以作為擬議未經同意下為了得到性滿足而拍攝私密處罪行的法定交替罪行　同時也是一項獨立罪行(即建議 4)

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註
按一下這裡以輸入文字

**6.** 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)所述行為的擬議涵蓋範圍

(a) 是 ........................................................................ ☐
(b) 否　範圍太廣 .......................................................... ☐
(c) 否　範圍太窄 .......................................................... ☑

註
Q6 除以上提及的涵蓋情況外　我們留意到一些有關拍攝私密處的情境或不被納入定義以內　或會於定義上含糊　例如在扶

7. 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)不應包括由上而下拍攝衣領　的行為

(a) 是 ............................................................................ ☑
(b) 否 ............................................................................ ☐

| 註<br>按一下這裡以輸入文字 |
| --- |
| 手電梯由下而上觀察時　或會出現女生裙底　走光　情況　或是在女性靠近商場的玻璃圍欄出現走光情況等　這些情況下有關的私密處在　本來會被見到　或　本來不會被見到　之間定義含糊　我們建議考慮在涵蓋範圍內加入拍攝　走光　照片或影像的情況　以免出現爭拗 |

**建議 5 及建議 6　　新增罪行：*發放偷拍的私密影像及未經同意下發放私密影像***

[諮詢文件第 16 至 21 段]

**8.**　你是否同意針對發放偷拍的私密影像訂立一項罪行(即建議 5)

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

| 註<br>按一下這裡以輸入文字 |
|---|

**9.**　你是否同意建議 5(即發放偷拍的私密影像)所述行為的擬議涵蓋範圍

(a) 是 ........................................................................ ☑
(b) 否　範圍太廣 .............................................................. ☐
(c) 否　範圍太窄 .............................................................. ☐

| 註<br>按一下這裡以輸入文字 |
|---|

**10.**　你是否同意針對未經同意下發放可能或曾經獲得同意拍攝但未獲同意作其後發放的私密影像(包括照片和影片)訂立一項罪行(即建議 6)

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

| 註<br>按一下這裡以輸入文字 |
|---|

**11.**　你是否同意建議 6(即未經同意下發放私密影像)所述行為的擬議涵蓋範圍

(a) 是 ........................................................ ☑
(b) 否 範圍太廣 ........................................................ ☐
(c) 否 範圍太窄 ........................................................ ☐

| 註 |
| --- |
| 按一下這裡以輸入文字 |

**12.** 就建議 6 而言 你是否認為只應在發放者明知受害人沒有同意發放私密影像或罔顧受害人有沒有同意發放 才構成犯罪

(a) 是 ........................................................ ☑
(b) 否 ........................................................ ☐

| 註 |
| --- |
| 按一下這裡以輸入文字 |

**13.** 就建議 6 而言 你是否認為應在發放者意圖導致受害人受困擾 或明知或有理由相信發放私密影像會導致或可能導致受害人受侮辱 驚恐或困擾 才構成犯罪

(a) 是 ........................................................ ☑
(b) 否 ........................................................ ☐

| 註 |
| --- |
| 按一下這裡以輸入文字 |

## 私密行為及私密處

[諮詢文件第 22 至 24 段]

**14.** 你是否同意 私密行為 應指任何人身處有合理期望能提供私隱的地方時作出屬以下情況的行為 該人正露出或只以內衣遮蓋其私密處 或該人正在如廁 或該人正進行通常不會公開進行的涉及性的行為

(a) 是 ........ ☑
(b) 否 應包括較少元素 *請在下面方格註明* ........ ☐
(c) 否 應包括更多元素 *請在下面方格註明* ........ ☐

註
按一下這裡以輸入文字

**15.** 你是否同意某人的 私密處 應理解為其生殖器官 臀部或胸部 不論這些部位是外露或只以內衣遮蓋

(a) 是 ........ ☑
(b) 否 應包括較少元素 *請在下面方格註明* ........ ☐
(c) 否 應包括更多元素 *請在下面方格註明* ........ ☐

註
按一下這裡以輸入文字

**16.** 就擬議罪行而言 你是否同意 私密處 的定義應不論性別涵蓋女性胸部和男性胸部 或有關定義應只涵蓋女性的胸部

(a) 應不論性別涵蓋女性胸部和男性胸部 ........ ☐
(b) 應只涵蓋女性的胸部 ........ ☑

註
社會規範下，男性胸部較女性胸部較為大眾接受，而且男性胸部較多情況外露，故男性胸部是否介定為私密處或保護則可由受害者有否感受被侵犯感受而作決定。

## 建議 7：*免責辯護*

[諮詢文件第 25 至 28 段]

**17.** 你是否同意應就建議 2　建議 4　建議 5 及建議 6 的擬議罪行訂定基於合法權限或合理辯解的免責辯護

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

| 註<br>按一下這裡以輸入文字 |
|---|

**18.** 你是否認為也應就建議 1 及建議 3 的擬議罪行訂定基於合法權限或合理辯解的免責辯護

(a) 是 ........................................................................ ☐
(b) 否 ........................................................................ ☑

| 註<br>因建議 1、3 都含性滿足元素，故認為合法權限或合理辯解的免責辯護都不適合此情況。 |
|---|

**19.** 如訂定合適的免責辯護以涵蓋合法權限或合理辯解下作出的行為　合理辯解應包括哪些情景

| 註<br>免責辯護應考慮當時拍攝關係　目的　對象年齡而作出的合理辯解<br><br>所訂罪行的被告人　如證明以下情況　可以此作為免責辯護<br>a)　該行為是為真正的教育　科學或醫學的目的　或<br>b)　該行為一事在其他方面有利公益　且不超越有利公益的範圍　或 |
|---|

c) 該行為是為了法律訴訟的合理需要 或 該行為是為了媒體活動的目的 而有關活動無意對被拍攝者造成傷害 並合理地相信符合公眾利益 或

d) 一個合理的人(在相關範圍內)考慮下列每項因素後會認為該行為可以接受

(i) 影像或該行為的性質和內容 (ii) 影像或該行為在何種情況下發放 (iii) 被拍攝者的年齡 智力 易受傷害程度或其他相關情況 (iv) 被告人的行為影響被拍攝者私隱的程度 (v) 被告人與被拍攝者的關係 (vi)任何其他相關事宜 則可以此作為免責辯護

## 建議 8：*性罪行定罪紀錄查核機制*

[諮詢文件第 29 段]

**20.** 你是否同意建議 1 至建議 6 的擬議罪行應納入為性罪行定罪紀錄查核機制下指明列表中的性罪行

(a) 是 ………………………………………… ☐
(b) 否 ………………………………………… ☑
只應納入若干擬議罪行　*請註明(可選擇多於一項)*
(i) 窺淫 ………………………………………… ☑
(ii) 私密窺視 ………………………………………… ☑
(iii) 未經同意下為了得到性滿足而拍攝私密處 ………………… ☑
(iv) 未經同意下不論目的拍攝私密處 ………………… ☐
(v) 發放偷拍的私密影像 ………………………… ☐
(vi) 未經同意下發放私密影像 ………………………… ☐

註
性罪行定罪紀錄查核機制下的罪行應與性滿足的元素有直接關係，而窺淫　私密窺視　未經同意下拍攝私密處罪都顯示出犯案者有性滿足的情況。相比發放偷拍的私密影象及未經同意下發放私密影象未必與個人的性滿足有直接的關係，所以不建議納入在為性罪行定罪紀錄查核機制下的罪行。另外，亦有部分青少年或因好奇或貪玩，在未經同意下而拍攝私密處，其動機並非為了得到性滿足。故此，當局應考慮〝未經同意下不論目的拍攝私密處〞納入為性罪行定罪紀錄查核機制下指明列表中的性罪行上，需要將犯案動機納入考慮因素。

## 其他意見

除對上述問題作出回應外　亦可於下面方格註明其他意見(例如擬議罪行的罰則)

從本會前線經驗發現，不少青少年在熱戀期間拍攝一些私密照片和影像，到分手時，其中一方會利用這些私密照片和影像，並加上文字，在社交媒體中作出威嚇、侮辱等行為以要求復合。這些行為對受害人造成極大心理壓力、困擾、驚恐和傷害，但受害人往往無法要求有關社交媒體全面刪除相關影像、訊息和文字。我們相信如能夠在本港現行的法例中，加入規管發放偷拍的私密影像或在未經同意下發放私密影像的罪行，將有助阻嚇有關傷害性行為，從而減少受害者出現的機會。

此外，從不同文獻研究顯示，涉及窺淫、私密窺視的行為與心理學上的性滿足和性衝動有關，這些干犯罪行的人士不能只靠監禁制止相關行，必須接受心理治療和輔導。因此，我們建議可在新法例中考慮要求干犯相關罪行的人士，無論接受監禁或非監禁式刑責，必須接受具認可和專業的性心理輔導。這安排有助減少日後重犯或進一步干犯更嚴重的性罪行的機會。

| | |
|---|---|
| 團體名稱　姓名 | 香港青年協會 青年違法防治中心 |
| 電話號碼(可選擇填寫) | |
| 電郵地址(可選擇填寫) | |
| 日期 | 5/10/2020 |

## 何時及如何提交意見

請在諮詢期內(即 2020 年 10 月 7 日或之前)以郵寄　傳真或電郵方式提交意見

| | |
|---|---|
| 郵寄地址 | 香港添馬<br>添美道 2 號<br>政府總部東翼 10 樓<br>保安局　　引入窺淫　私密窺視　未經同意下拍攝私密處及相關罪行建議的諮詢 |
| 傳真號碼 | 2501 4281 |
| 電郵地址 | consultation@sb.gov.hk |

就本諮詢文件提交意見時　公眾人士可選擇是否提供個人資料　收集所得的意見和個人資料　或會轉交政府相關決策局和部門　用於與是次諮詢直接相關的用途　獲取資料的政府決策局和部門只可將有關資料作此用途

就本諮詢文件提交意見的個人及團體(　寄件人　)　其姓名　名稱及意見或會被公布以供公眾參閱　我們進行公開或內部討論時　或在其後發表的任何報告中　或會引用寄件人就本諮詢文件提交的意見

為了保障寄件人個人資料的私隱　我們公布其意見時會刪去其有關資料　例如聯絡資料　識別號碼和簽名

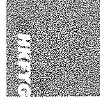
我們尊重寄件人不欲公開身份及　或將全部或部分意見保密的意願　寄件人如在意見書中表示不欲公開身份　我們公布其意見時會刪去其姓名　名稱　寄件人如要求將意見保密　我們將不會公布其意見

如寄件人並無要求不公開身份或將意見保密　我們會假設其姓名　名稱及其意見可予公布

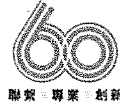
任何在意見書中向保安局提供個人資料的寄件人　均有權查閱和更正其個人資料　查閱和更正其個人資料的要求　應以書面方式寄交上文所述的通訊地址

保安局

**2020 年 7 月**



香港青年協會
the hongkong federation of youth groups



**香港青年協會**

**青年違法防治中心**

**就引入「窺淫、私密窺視、未經同意下拍攝私密處**

**及相關罪行」公眾諮詢**

**意見書**

**2020年10月5日**

香港青年協會(青協)一直致力為本港身處犯罪違規危機的青少年提供適切的輔導及服務。本會十分關注如何有效協助干犯窺淫、私密窺視、未經同意下拍攝私密處罪行或受害的兒童和青少年。過去曾於2017年2月就香港法律改革委員會性罪行檢討小組委員會的「涉及兒童及精神缺損人士的性罪行」諮詢文件，以及2018年8月的「雜項性罪行」諮詢文件提交意見書。青協「青年違法防治中心」亦先後推出多項創新服務計劃和研究，例如「愛·體驗」預防青少年性危機教育及輔導計劃等，為干犯性罪行或因性罪行而受害的兒童和青少年提供專業輔導。

法律改革委員會於本年7月發表的「窺淫、私密窺視、未經同意下拍攝私密處及相關罪行」諮詢文件，其主要目的是擬議引入窺淫、私密窺視、未經同意下拍攝私密處罪，及發放相關影像罪，並將罪行納入在性罪行定罪紀錄查核機制下的罪行。

由於現行香港法例並沒有針對窺淫或未經同意下拍攝私密處（例如拍攝裙底）而訂立特定罪行，有關行為目前只可以其他罪行提出檢控，案件均以遊蕩罪、公眾地方內擾亂秩序行為罪、破壞公眾體統罪及有犯罪或不誠實意圖而取用電腦罪作檢控。這些罪行的刑罰相對較輕，而關鍵是這些罪行的性質未能完全反映犯事者的違法行為，令起訴時罪行與實際犯罪行為不相稱；除未能反映罪行的嚴重性，也未能反映事件對受害者所造成的傷害、侮辱、騷擾和壓力。

從本會前線經驗發現，不少青少年在熱戀期間拍攝一些私密照片和影像，

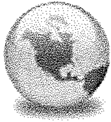
到分手時，其中一方會利用這些私密照片和影像，並加上文字，在社交媒體中作出威嚇、侮辱等行為以要求復合。這些行為對受害人造成極大心理壓力、困擾、驚恐和傷害，但受害人往往無法要求有關社交媒體全面刪除相關影像、訊息和文字。我們相信如能夠在本港現行的法例中，加入規管發放偷拍的私密影像或在未經同意下發放私密影像的罪行，將有助阻嚇有關傷害性行為，從而減少受害者出現的機會。

此外，從不同文獻研究顯示，涉及窺淫、私密窺視的行為與心理學上的性滿足和性衝動有關，這些干犯罪行的人士不能只靠監禁制止相關行為，必須接受心理治療和輔導。因此，我們建議可在新法例中考慮要求干犯相關罪行的人士，無論接受監禁或非監禁式刑責，必須接受具認可和專業的性心理輔導。這安排有助減少日後重犯或進一步干犯更嚴重的性罪行的機會。

另外，亦有部分青少年或因好奇或貪玩，在未經同意下而拍攝私密處，其動機並非為了得到性滿足。故此，當局應考慮在建議八，"未經同意下不論目的拍攝私密處" 納入為性罪行定罪紀錄查核機制下指明列表中的性罪行上，需要將犯案動機納入考慮因素。

任何法例均應與時並進，與世界接軌，並且應參考外國相關法例，選擇本港適用的法例作出修訂，讓法律條文更清晰明確，以加強對不同人士，尤其是兒童和青少年的保護。

總括而言，本會對涉及性的罪行及保護兒童及青少年的法例十分關注，尤其注重如何防止有關罪行發生。青協青年違法防治中心認為，當局有必要修補現行法例的漏洞，透過引入「窺淫、私密窺視、未經同意下拍攝私密處及相關罪行」，同時審慎考慮不同情況作出諮詢文件上的修改建議，以反映罪行的嚴重性、提升阻嚇作用，以及加強對兒童、青少年及不同人士的保護。藉着是次諮詢，本會期望香港能完善現時法例，進一步保障本地兒童及青少年的福祉。本會將按過去多年累積的服務經驗，提出意見，供當局考慮(詳細意見請參閱附件的回應表格)。



The Women's Foundation Response to the Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences
07/10/2020 18:47
Hide Details
From:
To: "consultation@sb.gov.hk" <consultation@sb.gov.hk>,

1 Attachment

Response Form - Voyeurism_The Womens Foundation.pdf

Dear Sir or Madam

Please find attached a response from The Women's Foundation to the 'Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences'.

Kindly be in touch with any questions or areas for clarification.

Warm regards

The Women's Foundation Limited

# Consultation Paper

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

# Response Form

## Proposals 1 and 2 – New offences: *Voyeurism and Intimate Prying*

[Paragraphs 11 – 12 of consultation paper]

**1.** Do you agree with the introduction of a specific offence of voyeurism (i.e. Proposal 1)?

(a) Yes .................................................................. ☑
(b) No .................................................................. ☐

Remarks:
Click here to enter

**2.** Do you agree with the introduction of a separate offence of intimate prying (i.e. Proposal 2), as a statutory alternative to the proposed offence of voyeurism, in addition to being a standalone offence?

(a) Yes .................................................................. ☑
(b) No .................................................................. ☐

Remarks:
We believe the maximum penalty should be the same as voyeurism – 5 years. From frontline NGOs, we know it is far more common in instances of intimate partner abuse, that the perpetrator will use intimate images for control, abuse, intimidation, domination, or manipulation to show power rather than sexual gratification. In either case – as a power move or for sexual gratification – the result is a violation of sexual autonomy of the victim. Therefore the maximum punishment

| should reflect this at 5 years for both. |
|---|

**3.** Do you agree with the proposed scope of acts for Proposals 1 (i.e. voyeurism) and 2 (i.e. intimate prying)?

(a) Yes .......................................................... ☐
(b) No, too wide ............................................... ☐
(c) No, too narrow ............................................ ☑

| Remarks: 'Non-consensual photography of intimate parts' is narrowly defined as "a person who… without the consent of the victim, operates equipment beneath the clothing of the victim" and does not cover other instances where non-consensual photos of intimate parts can be taken. We strongly recommend broadening the definition. |
|---|

## **Proposals 3 and 4 – New offences:** ***Non-consensual Photography of Intimate Parts***

[Paragraphs 13 – 15 of consultation paper]

**4.** Do you agree with the introduction of the offence of non-consensual photography of intimate parts for sexual gratification (i.e. Proposal 3)?

(a) Yes ............................................................ ☑
(b) No ............................................................ ☐

| Remarks: We do not think there should be any difference in the maximum punishment between proposals 3&4. Whether the intent is sexual gratification or another purpose like revenge, manipulation, control, etc the consequences to the victim are of the same gravity so the maximum penalty of both proposals should be the same – 5 years. |
| --- |

**5.** Do you agree with the introduction of a separate offence of non-consensual photography of intimate parts irrespective of the purpose, as a statutory alternative to the proposed offence of non-consensual photography of intimate parts for sexual gratification, in addition to being a standalone offence (i.e. Proposal 4)?

(a) Yes ............................................................ ☑
(b) No ............................................................ ☐

| Remarks: Please see remarks in Q4. |
| --- |

**6.** Do you agree with the proposed scope of acts for Proposals 3 and 4 (i.e. non-consensual photography of intimate parts)?

(a) Yes ............................................................ ☑
(b) No, too wide ............................................................ ☐
(c) No, too narrow ............................................................ ☐

Remarks:
Click here to enter

7. Do you agree that Proposals 3 and 4 (i.e. non-consensual photography of intimate parts) should not cover "down-blousing"?

(a) Yes ..................................................................... ☐
(b) No ...................................................................... ☑

Remarks:
The definition should be broadened so that it protects victims from non-consensual photography or recording of intimate parts irrespective of what that comprises (i.e. upskirting, down-blousing, or an as-yet unnamed form that violates sexual autonomy).

## Proposals 5 and 6 – New offences: *Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images*

[Paragraphs 16 – 21 of consultation paper]

**8.** Do you agree with the introduction of the offence against the distribution of surreptitious intimate images (i.e. Proposal 5)?

(a) Yes .......................................................... ☑
(b) No .......................................................... ☐

| Remarks: |
|---|
| Click here to enter |

**9.** Do you agree with the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images)?

(a) Yes .......................................................... ☐
(b) No, too wide .......................................................... ☐
(c) No, too narrow .......................................................... ☑

| Remarks: |
|---|
| The phrase 'the victim does not consent to the distribution' should be widened to ensure greater protection of the victim, e.g. 'distribution cannot take place without the active consent of the photographed / recorded person' or 'without reasonably believing that the person consents' |

**10.** Do you agree with the introduction of the offence against the non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (i.e. Proposal 6)?

(a) Yes .......................................................... ☑
(b) No .......................................................... ☐

Remarks:
Consent must be given separately and specifically for distribution of the images, irrespective of whether it was given for the taking of such images.

**11.** Do you agree with the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)?

(a) Yes .......................................................... ☑
(b) No, too wide .................................................. ☐
(c) No, too narrow ................................................ ☐

Remarks:
Click here to enter

**12.** Do you think that for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent?

(a) Yes .......................................................... ☑
(b) No ........................................................... ☐

Remarks:
To ensure stronger protections for the victim, active consent must be given for distribution.

**13.** Do you think that for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress?

(a) Yes .......................................................... ☐
(b) No ........................................................... ☑

Remarks:

The offence should be constituted irrespective of the intention to cause humiliation or distress.

## Intimate Acts and Intimate Parts

[Paragraphs 22 – 24 of consultation paper]

**14.** Do you agree that "intimate acts" should mean acts, in a place which would reasonably be expected to provide privacy, by a person when the person's intimate parts are exposed or covered only with underwear, or the person is using the toilet, or the person is doing a sexual act not ordinarily done in public?

(a) Yes ........................................................................ ☑
(b) No, should include fewer elements *(please specify below)*............ ☐
(c) No, should include additional elements *(please specify below)*......... ☐

Remarks:
Click here to enter

**15.** Do you agree that "intimate parts" should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear?

(a) Yes ........................................................................ ☑
(b) No, should include fewer elements *(please specify below)*............. ☐
(c) No, should include additional elements *(please specify below)*......... ☐

Remarks:
Click here to enter

**16.** Do you agree that for the purpose of the proposed offences, the definition of "intimate parts" should include breasts and chest, irrespective of gender, or should the definition include breasts of female only?

(a) Should include breasts and chest, irrespective of gender........... ☑
(b) Should include breasts of female only................................ ☐

Remarks:
The language should be non-binary and inclusive as possible so all

individuals, including sexual minorities, can be equally protected.

## Proposal 7: *Defence(s)*

[Paragraphs 25 – 28 of consultation paper]

**17.** Do you agree that a defence of lawful authority or reasonable excuse should be provided for the proposed offences under Proposals 2, 4, 5 and 6?

(a) Yes .......................................................... ☐
(b) No .......................................................... ☑

Remarks:
We believe there should be a separate consultation that clearly outlines what would constitute a 'reasonable excuse' not to gain consent from an individual to share intimate photos and videos.

**18.** Do you think that a defence of lawful authority or reasonable excuse should also be provided for the proposed offences under Proposals 1 and 3?

(a) Yes .......................................................... ☐
(b) No .......................................................... ☑

Remarks:
Click here to enter

**19.** If suitable defence(s) are made available covering acts done with lawful authority or reasonable excuse, what should be included as reasonable excuses?

Remarks:
Click here to enter

## Proposal 8: *Sexual Conviction Record Check Scheme*

[Paragraph 29 of consultation paper]

**20.** Do you agree that the proposed offences under Proposals 1 to 6 should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme?

(a) Yes .................................................................... ☑
(b) No .................................................................... ☐
Only some of the proposed offences – *please indicate (can pick more than one)* –
(i) Voyeurism.................................................................... ☐
(ii) Intimate prying.................................................................... ☐
(iii) Non-consensual photography of intimate parts for sexual gratification.................................................................... ☐
(iv) Non-consensual photography of intimate parts irrespective of the purpose.................................................................... ☐
(v) Distribution of surreptitious intimate images................ ☐
(vi) Non-consensual distribution of intimate images............ ☐

Remarks:
Click here to enter

## FURTHER VIEWS

Further to the responses above, additional views and comments (e.g. punishments of the proposed offences) can be set out below.

INCLUSION OF DEEP FAKES, ALTERED IMAGES IN DEFINITIONS

1. It is unclear whether non-consensual deep fake / altered photos of an intimate nature are included within the definition of an intimate image. Given the growing severity of this issue and the similar trauma it causes to the victim, these should be explicitly included and referenced in the proposals. This is included in other jurisdictions like Queensland's "Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2019".

THREAT TO SHARE

2. Threatening to share / distribute non-consensual intimate images and videos should similarly be treated as a punishable offence, even in the event that the actual ability to carry out the threat is found to be no feasible. Because the sharing of non-consensusal images and videos is irreversible, the victim's trauma begins when the image / video is threatened to be released and can be used for blackmail, harassment, manipulation, extortion, and control for long periods of time. to the distribution of images and there is a real impact on their social life, mental well being. Scotland's "Abusive Behaviour and Sexual Harm (Scotland) Act 2016" and Queensland's "Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2019".

MINORS

3. Specifications should be added around the age of consent. Taking note from the Queensland and New Territories laws, minors should be deemed incapable to be able give legal consent to the taking and distribution of intimate images.

4. If the offender is a minor, due consideration should be given around the extent to which the penalties should be adjusted in line with crimes of similar severity committed by minors in Hong Kong.

COURT POWERS TO ORDER REMOVAL OF IMAGES

5. Offender: To minimise trauma to the victim, courts should be granted the power to order any person convicted of voyeurism, intimate prying, non-consensual photography of intimate parts, and / or distribution of (or threatening to distribute) these images to take action to remove, delete, and destroy all non-consensual intimate images (including altered / deep-fake images). The failure to do so should be treated as an offence and punished accordingly. Queensland has enacted such legislation, please refer to their Criminal Code (Non-Consensual Sharing of Intimate Images) Amendment Act 2019.

6. Online Content Host: To further ensure the protection of the victim and so as not to continue the trauma aggravated by the online presence of these images, the courts should also be conferred power to order the removal of all images on websites or in related media / social media. Please refer to New Zealand's measures around this in their Harmful Digital Communications Act 2015.

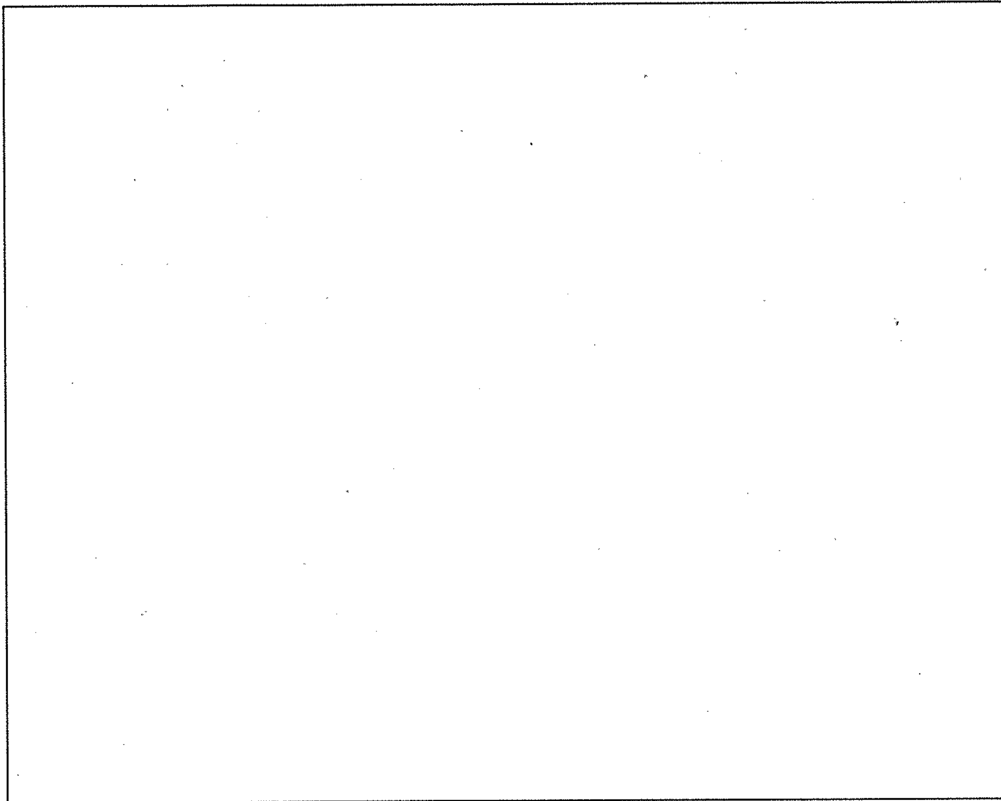
REFERENCED LEGISLATION

New Territories (Aus) "Criminal Code Act 1983": https://legislation.nt.gov.au/en/Legislation/CRIMINAL-CODE-ACT-1983

New Zealand "Harmful Digital Communications Act": http://www.legislation.govt.nz/act/public/2015/0063/latest/whole.html#DLM5711853

Queensland (Aus) Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2019: https://www.legislation.qld.gov.au/view/pdf/asmade/act-2019-001

Scotland "Abusive Behaviour and Sexual Harm (Scotland) Act 2016": https://www.legislation.gov.uk/asp/2016/22/contents



Name/Name of Organization: The Women's Foundation

Telephone No. (Optional): ____________________

Email Address (Optional): ____________________

Date: October 7, 2020

## WHEN AND HOW TO RESPOND

Please send your views to the Security Bureau by mail, facsimile or email on or before 7 October 2020 –

| | |
|---|---|
| Address: | Security Bureau<br>- Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences<br>Central Government Offices<br>10/F, East Wing<br>2 Tim Mei Avenue<br>Tamar, Hong Kong |
| Fax: | 2501 4281 |
| Email: | consultation@sb.gov.hk |

It is optional for members of the public to supply their personal data when providing views on this consultation paper. The submissions and personal data collected may be transferred to the relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data may only use the data for such purposes.

The names and views of individuals and organisations who/which put forth submissions in response to this consultation paper ("senders") may be published for public viewing. We may, either in public or private discussions, or in any subsequent report, cite comments submitted in response to this consultation paper.

To safeguard senders' personal data privacy, we will remove senders' relevant data, such as contact details, identification numbers, and signatures, where provided, when publishing their submissions.

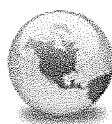
We will respect the wish of senders to remain anonymous and/or keep the views confidential in part or in whole. If the senders request anonymity in the submissions, their names will be removed when publishing their

views. If the senders request confidentiality, their submissions will not be published.

If the senders do not request anonymity or confidentiality in the submissions, it will be assumed that the senders can be named and the views can be published in their entirety.

Any sender providing personal data to the Security Bureau in the submission will have rights of access and correction with respect to such personal data. Requests for data access and correction of personal data should be made in writing to the same correspondence address as set out above.

**Security Bureau**
**July 2020**



AIDS Concern's response to "Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences"
07/10/2020 15:08
Hide Details
From:
To: "consultation@sb.gov.hk" <consultation@sb.gov.hk>,
Cc:

3 Attachments

(關懷愛滋遞交諮詢)Response Form - Voyeurism (Chi).pdf

(AIDS Concern) Response Form - Voyeurism (Eng) (1).pdf 公眾諮詢附加文件.pdf

To: Security Bureau

AIDS Concern submits the "Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences".

Both Chinese and English version of consultation are attached. For the Chinese version, some response boxes of consultation questions in the document was protected. So, the file "公眾諮詢附加文件" is also attached for Question 1 and 3.

Please kindly check with documents.

Thanks !

Best Regards,

AIDS Concern

## 諮詢文件

## 引入窺淫、私密窺視、未經同意下拍攝私密處
## 及相關罪行的建議

## 回應表格

### 建議 1 及建議 2 — 新增罪行：*窺淫及私密窺視*

[諮詢文件第 11 及 12 段]

**1.** 你是否同意就窺淫訂立一項特定罪行(即建議 1)？

(a) 是 .................................................................. ☑
(b) 否 .................................................................. ☐

| 註： |
| --- |
| 詳情請見附頁內容。 |

**2.** 你是否同意就私密窺視另訂一項罪行(即建議 2)，以作為擬議窺淫罪的法定交替罪行，同時也是一項獨立罪行？

(a) 是 .................................................................. ☑
(b) 否 .................................................................. ☐

| 註： |
| --- |
| |

**3.** 你是否同意建議 1(即窺淫)及建議 2(即私密窺視)所述行為的擬議涵蓋範圍？

(a) 是 .................................................................. ☐
(b) 否，範圍太廣 ...................................................... ☑
(c) 否，範圍太窄 ...................................................... ☐

註：

詳情請見附頁內容。

**建議 3 及建議 4 — 新增罪行：*未經同意下拍攝私密處***

[諮詢文件第 13 至 15 段]

4. 你是否同意就未經同意下為了得到性滿足而拍攝私密處訂立一項罪行(即建議 3)？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註：

按一下這裡以輸入文字

5. 你是否同意就未經同意下不論目的拍攝私密處另訂一項罪行，以作為擬議未經同意下為了得到性滿足而拍攝私密處罪行的法定交替罪行，同時也是一項獨立罪行(即建議 4)？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註：

按一下這裡以輸入文字

6. 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)所述行為的擬議涵蓋範圍？

(a) 是 ........................................................................ ☑
(b) 否，範圍太廣 ........................................................ ☐
(c) 否，範圍太窄 ........................................................ ☐

7. 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)不應包括由上而下“拍攝衣領”的行為？

(a) 是 ........................................................................ ☐

(b) 否 ........................................................................ ☑

註：

「拍攝衣領」的定義須清晰。如有人從高空拍攝他人胸部(屬私密處)，會否納入「建議 3」或「建議 4」的罪行?

「拍攝衣領」衣領中文意思是眼睛可以見到，衣物正常常識下可以暴露的地方，未能完整包含到私密處（胸部）連衣領部分被故意偷拍的定義。

註：

按一下這裡以輸入文字

## 建議 5 及建議 6 — 新增罪行：*發放偷拍的私密影像及未經同意下發放私密影像*

[諮詢文件第 16 至 21 段]

**8.** 你是否同意針對發放偷拍的私密影像訂立一項罪行(即建議 5)？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

| 註： |
|---|
| 按一下這裡以輸入文字 |

**9.** 你是否同意建議 5(即發放偷拍的私密影像)所述行為的擬議涵蓋範圍？

(a) 是 ........................................................................ ☐
(b) 否，範圍太廣 .......................................................... ☐
(c) 否，範圍太窄 .......................................................... ☑

| 註： |
|---|
| 建議澄清“自行建立、製作、取得或獲提供相關影像”的定義，例如：是否涵蓋“移花接木”而成的私密影像，是否涵蓋未經允許入侵他人的 google account 而盜取的私密影像。<br>另亦建議澄清是否涵蓋當事人售出的私密影像，例如把當事人的私密影像出售給 A 君，而 A 君把該私密影像發放給第三者。<br>發放定義需要詳細定義，未包含向他人展示受害者「私密處」與「私密行為」的行動， 或私下與朋友分享。 |

**10.** 你是否同意針對未經同意下發放可能或曾經獲得同意拍攝但未獲同意作其後發放的私密影像(包括照片和影片)訂立一項罪行(即建議 6)？

(a) <u>是</u> ........................................................................ ☑
(b) <u>否</u> ........................................................................ ☐

| 註：<br>按一下這裡以輸入文字 |
|---|

**11.** 你是否同意建議 6(即未經同意下發放私密影像)所述行為的擬議涵蓋範圍？

(a) <u>是</u> ........................................................................ ☐
(b) <u>否</u>，範圍太廣 .......................................................... ☐
(c) <u>否</u>，範圍太窄 .......................................................... ☑

| 註：<br>過往有受害人向團體表示，有人持有受害人的私密影像，用作威脅受害人以達到某些目的。每當團體陪同受害人或受害人自行報案時，警方卻因私密影像仍未被公開發佈，而不受理案件。因此，我們建議在諮詢文件的「行為」上，需加上「威脅發放受害人進行私密行為的影像」的內容，擴大定罪範圍。<br><br>另外，亦有受害人指出，曾經有人聲稱擁有其私密影像並作出威脅及勒索，要求受害人執行某些指令及行動等，但受害人未能判別真偽。我們建議無論影像是否真假，都絕不應該用作威脅他人。因此，「威脅發放受害人進行私密行為的影像」應同時適用於上述情況。 |
|---|

在「行為」上，內容只涵蓋「私密行為的影像(包括照片和影片)」，我們建議應同時涵蓋與「私密處」有關的影像。

**12.** 就建議 6 而言，你是否認為只應在發放者明知受害人沒有同意發放私密影像或罔顧受害人有沒有同意發放，才構成犯罪？

(a) 是 .................................................................... ☑
(b) 否 .................................................................... ☐

註：
按一下這裡以輸入文字

**13.** 就建議 6 而言，你是否認為應在發放者意圖導致受害人受困擾，或明知或有理由相信發放私密影像會導致或可能導致受害人受侮辱、驚恐或困擾，才構成犯罪？

(a) 是 .................................................................... ☐
(b) 否 .................................................................... ☑

註：
我們亦建議應不限於「發放者意圖導致受害人受困擾」，只要使發放者只是為了個人利益、興趣、貪玩或任何意圖，都可構成犯罪。

**私密行為及私密處**

[諮詢文件第 22 至 24 段]

**14.** 你是否同意"私密行為"應指任何人身處有合理期望能提供私隱的地方時作出屬以下情況的行為：該人正露出或只以內衣遮蓋其私密處，或該人正在如廁，或該人正進行通常不會公開進行的涉及性的行為？

(a) 是 ........................................................................ ☑

(b) 否，應包括較少元素 *(請在下面方格註明)* ................. ☐

(c) 否，應包括更多元素 *(請在下面方格註明)* ................. ☐

| 註： |
| --- |
| 按一下這裡以輸入文字 |

**15.** 你是否同意某人的"私密處"應理解為其生殖器官、臀部或胸部，不論這些部位是外露或只以內衣遮蓋？

(a) 是 ........................................................................ ☑

(b) 否，應包括較少元素 *(請在下面方格註明)* ................. ☐

(c) 否，應包括更多元素 *(請在下面方格註明)* ................. ☐

| 註： |
| --- |
| 按一下這裡以輸入文字 |

**16.** 就擬議罪行而言，你是否同意"私密處"的定義應不論性別涵蓋女性胸部和男性胸部，或有關定義應只涵蓋女性的胸部？

(a) 應不論性別涵蓋女性胸部和男性胸部 ...................... ☑

(b) 應只涵蓋女性的胸部 ............................................ ☐

| 註： |
| --- |

我們建議「不論性別」可清楚列明「跨性別人士」。

**建議 7：*免責辯護***

[諮詢文件第 25 至 28 段]

**17.** 你是否同意應就建議 2、建議 4、建議 5 及建議 6 的擬議罪行訂定基於合法權限或合理辯解的免責辯護？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註：
基於被拍攝私密處者與公眾知情權及公共利益並無關係，故我們不建議傳媒工作者予以不受限的免責條款。為免阻礙新聞自由，我們建議傳媒工作者在報導私密窺淫等罪行，及照片被廣傳的新聞等報導，可以運用文字表達照片，或以畫像仿造照片，其內容不可透露被拍攝者的個人私隱，亦不可清晰描繪被拍攝者的面貌。另外《Criminal Code》第 221BD(3)條：被拍攝者的年齡、智力、易受傷害程度或其他相關情況；(iv)被告人的行為影響被拍攝者私隱的程度；(v)被告人與被拍攝者的關係，以上考慮因素與被拍攝者的私密照被流傳所造成的傷害，不應作為免責辯護，如一個正常智力的成年人被拍攝私密照，相比較低智力的青少年所受的傷害不會較低。

**18.** 你是否認為也應就建議 1 及建議 3 的擬議罪行訂定基於合法權限或合理辯解的免責辯護？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

| 註： |
| --- |
| |

**19.** 如訂定合適的免責辯護以涵蓋合法權限或合理辯解下作出的行為，合理辯解應包括哪些情景？

| 註： |
| --- |
| 按一下這裡以輸入文字 |

**建議 8： *性罪行定罪紀錄查核機制***

[諮詢文件第 29 段]

**20.** 你是否同意建議 1 至建議 6 的擬議罪行應納入為性罪行定罪紀錄查核機制下指明列表中的性罪行？

(a) 是 ............................................................ ☑

(b) 否 ............................................................ ☐

只應納入若干擬議罪行 — *請註明(可選擇多於一項)*：

(i) 窺淫 ............................................................ ☐

(ii) 私密窺視 ............................................................ ☐

(iii) 未經同意下為了得到性滿足而拍攝私密處 ............. ☐

(iv) 未經同意下不論目的拍攝私密處 ............................ ☐

(v) 發放偷拍的私密影像 ............................................ ☐

(vi) 未經同意下發放私密影像 ..................................... ☐

| 註： |
| --- |
| 按一下這裡以輸入文字 |

## 其他意見

除對上述問題作出回應外，亦可於下面方格註明其他意見(例如擬議罪行的罰則)：

1.現時只有「遊蕩」、「公眾地方內擾亂秩序行為」、「破壞公眾體統」的罪行可用作檢控私密偷拍的行為，但刑罰較諮詢文件提出的為輕。因此，我們建議政府盡快進行引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行的建議」立法，提供更多保障。
2.現時受害人可向法庭申請「禁制令」，阻止公眾轉載已被發放的私密影像，惟成效一般。因此，我們建議在局方收到各團體所遞交的諮詢文件內容後，能於日後向立法會遞交的諮詢回應上，新增討論專為「窺淫、私密窺視、未經同意下拍攝私密處及相關罪行」的受害者申請「禁制令」，加快處理申請程序及考慮加重違反禁制令的刑罰。此外，當案件進行審訊前、審訊其間及完成審訊後，有關「禁制令」需仍然生效，以保障受害人。
3. 我們亦建議執法機構為是次諮詢所提及的罪行設立專責部門及報案熱線，專門處理相關罪行，一旦有受害人報案，可即時獲書面或電郵通知其個案正被跟進，此舉亦可向公眾表示繼續發放及分享這些私密影像可會觸犯法例，以保障受害人。
4. 過去亦有一些懷疑是愛滋病病毒感染者的個人相片甚至私密影像在未經同意下被發放及分享到網上。愛滋病只是一種長期病患，惟公眾對感染者仍存有一定歧視。我們建議個人資料私隱專員公署及警務處需緊密合作，加強執法相關個案。

| | |
|---|---|
| 團體名稱／姓名： | AIDS Concern |
| 電話號碼(可選擇填寫)： | |
| 電郵地址(可選擇填寫)： | |
| 日期： | 7/10/2020 |

## 何時及如何提交意見

請在諮詢期內(即 2020 年 10 月 7 日或之前)以郵寄、傳真或電郵方式提交意見：

| | |
|---|---|
| 郵寄地址： | 香港添馬<br>添美道 2 號<br>政府總部東翼 10 樓<br>保安局 — 引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行建議的諮詢 |
| 傳真號碼： | 2501 4281 |
| 電郵地址： | consultation@sb.gov.hk |

就本諮詢文件提交意見時，公眾人士可選擇是否提供個人資料。收集所得的意見和個人資料，或會轉交政府相關決策局和部門，用於與是次諮詢直接相關的用途；獲取資料的政府決策局和部門只可將有關資料作此用途。

就本諮詢文件提交意見的個人及團體(“寄件人”)，其姓名/名稱及意見或會被公布以供公眾參閱。我們進行公開或內部討論時，或在其後發表的任何報告中，或會引用寄件人就本諮詢文件提交的意見。

為了保障寄件人個人資料的私隱，我們公布其意見時會刪去其有關資料，例如聯絡資料、識別號碼和簽名。

我們尊重寄件人不欲公開身份及/或將全部或部分意見保密的意願。寄件人如在意見書中表示不欲公開身份，我們公布其意見時會刪去其姓名/名稱。寄件人如要求將意見保密，我們將不會公布其意見。

如寄件人並無要求不公開身份或將意見保密，我們會假設其姓名/名稱及其意見可予公布。

任何在意見書中向保安局提供個人資料的寄件人，均有權查閱和更正其個人資料。查閱和更正其個人資料的要求，應以書面方式寄交上文所述的通訊地址。

保安局

**2020** 年 **7** 月

**諮詢問題 1:**

附加內容:

- 「建議 1」的「為了得到性滿足」的目的難有清晰及客觀定義，例如男男性接觸者的受害人被其他男士窺淫後，難以向調查方(警察)證明對方是為了「性滿足」，而此舉亦會間接透露自己的性傾向。與此同時，具有較陰柔氣質的男士，於使用具「有合理期望能提供私隱的地方」時，或許會遭受到不合理的待遇。例如，於使用尿兜時，不小心瞥見了其他使用者一眼，會被誤會為了「性滿足」而作出該行為，誤墮法網，亦會同時加劇社會對同性戀者的歧視情況。
- 另外，在執行層面上，「為了得到性滿足」的目的較難定義與證明。 在現時交替罪行架構下，「建議 1」 與「建議 2 」最高刑罰相差兩年。若果「建議 1」的「性滿足」不被證實，便會由最高刑罰的監禁 5 年落入「建議 2」的 3 年。 「性滿足」一詞難以定義及證明，犯案者容易藉著「建議 2」的「不論目的」作辯護，最終只被判較短年期的監禁刑罰。
- 因此，我們建議可將「建議 1」的「為了得到性滿足」字眼刪除，統一「建議 1」及「建議 2」的「目的」為「不論目的」，亦應統一最高刑罰為監禁 5 年，讓法庭判案時更有靈活性，亦使得性傾向不會構成「有合理期望能提供私隱的地方」的差異。亦應就反性傾向歧視立法，以避免於此法例通過後，會因性傾向而遭受不合理及差別待遇，令性小眾可能因此未能於「有合理期望能提供私隱的地方」行使使用該空間的權利。

**諮詢問題 3:**

附加內容:

如「諮詢問題 1」提到，「為了得到性滿足」的目的難有清晰及客觀定義。因此，我們建議可將「建議 1」的「為了得到性滿足」字眼刪除，統一「建議 1」及「建議 2」的「目的」為「不論目的」。

另外，諮詢文件的「建議 1」及「建議 2」的「目的」提及「任何人在未經受害人同意下，不論有沒有設備輔助，觀察受害人進行私密行為或記錄受害人進行私密行為的影像(包括照片和影片)，或操作設備使人能夠觀察受害人進行私密行為或記錄該私密行為的影像(包括照片和影片)」，我們認為「同意」一詞需再多加解釋說明，例如:受害者在藥物影響下而向他人表示「同意」是否代表有效同意。

**Consultation Paper**

**Proposed Introduction of Offences of Voyeurism,<br>Intimate Prying,<br>Non-consensual Photography of Intimate Parts, and<br>Related Offences**

**Response Form**

## Proposals 1 and 2 – New offences: *Voyeurism and Intimate Prying*

[Paragraphs 11 – 12 of consultation paper]

**1.** Do you agree with the introduction of a specific offence of voyeurism (i.e. Proposal 1)?

(a) Yes .................................................... ☑
(b) No .................................................... ☐

Remarks:
It is difficult to establish a clear and objective definition of the purpose "to obtain sexual gratification" outlined under "proposal one". In the case of men who have sex with men (MSM) victims being voyeurised by other men, it is difficult to prove to investigating authorities (the police) that the defendant had the intent "to obtain sexual gratification", as this would also indirectly disclose the victim's sexual orientation as well. At the same time, a man with a more feminine temperament may suffer unreasonable treatment "in a place which would reasonably be expected to provide privacy". In the scenario of using a urinal, accidentally catching a glimpse of another user could potentially be mistaken as an intent "to obtain sexual gratification", accidentally criminalising the victim instead.
Thus, we propose to delete the purpose "to obtain sexual gratification" in "proposal one", and combine "proposal one" and "proposal two's" purpose as "irrespective of the purpose". This would ensure that sexuality does not constitute a difference "in a place which would reasonably be expected to provide privacy". It is also necessary to legislate against discrimination based on sexual orientation to avoid unreasonable and

differential treatment on such grounds after this law is passed - as such discrimination could mean that sexual minorities may not be able to enjoy rights provided "in a place which would reasonably be expected to provide privacy".

Moreover, it is difficult to define and prove the intent "to obtain sexual gratification" on the level of implementation. Under the framework of the statutory alternative, the difference in the maximum penalty between "proposal one" and "proposal two" is two years. If "proposal one's" purpose "to obtain sexual gratification" is not proved beyond reasonable doubt, the defendant's sentence would be reduced from five-year imprisonment to the recommended sentence in "proposal two" of three years. We think that the "purposes" should not be an excuse for committing such offences so we suggest combining the maximum penalty for both "proposal 1 and proposal 2" to five years for giving the flexibility to the court judgements.

Given the immense difficulty of defining and proving "to obtain sexual gratification" in "proposal one", offenders with the intent to harm may thus benefit from a more lenient sentence.

**2.** Do you agree with the introduction of a separate offence of intimate prying (i.e. Proposal 2), as a statutory alternative to the proposed offence of voyeurism, in addition to being a standalone offence?

(a) Yes .......................................................... ☑
(b) No .......................................................... ☐

Remarks:
Click here to enter

**3.** Do you agree with the proposed scope of acts for Proposals 1 (i.e. voyeurism) and 2 (i.e. intimate prying)?

(a) Yes .......................................................... ☐
(b) No, too wide .................................................. ☑
(c) No, too narrow ................................................ ☐

Remarks:
As society generally attaches negative labels to "sex", it is hard to establish a clear and objective definition for the purpose "to obtain sexual gratification" as outlined in "proposal one". In the case of men who have sex with men victims being voyeurised by other men, it would be hard to prove to investigating authorities (the police) that the defendant had the intent "to obtain sexual gratification" - this would also indirectly reveal their sexual orientation. Thus, we propose to delete the purpose "to obtain sexual gratification" in "proposal one", and instead to combine "proposal one's" purpose with "proposal two" to align as "irrespective of the purpose".
Additionally, the "act" defined under "proposal one" and "proposal two" in the consultation paper states that: "any person who, without the consent of the victim, with or without the aid of equipment, observes the victim doing an intimate act or records images (including stills and videos) of the intimate act, or operates equipment to enable the intimate act to be observed or images of the intimate act to be recorded".
We believe that the term "consent" requires more in-depth explanation, such as: whether the victim's "consent" to others whilst under the influence of drugs represents valid consent.

## Proposals 3 and 4 – New offences: *Non-consensual Photography of Intimate Parts*

[Paragraphs 13 – 15 of consultation paper]

**4.** Do you agree with the introduction of the offence of non-consensual photography of intimate parts for sexual gratification (i.e. Proposal 3)?

(a) Yes ........................................................ ☑
(b) No ........................................................ ☐

Remarks:
Similar to "Consultation Paper question 3", it is difficult to establish a clear and objective definition for the term "to obtain sexual gratification", as it could also have negative connotations. We recommend aligning "proposal three" and "proposal four's" "purpose" as "irrespective of the purpose".

**5.** Do you agree with the introduction of a separate offence of non-consensual photography of intimate parts irrespective of the purpose, as a statutory alternative to the proposed offence of non-consensual photography of intimate parts for sexual gratification, in addition to being a standalone offence (i.e. Proposal 4)?

(a) Yes ........................................................ ☑
(b) No ........................................................ ☐

Remarks:
Click here to enter

**6.** Do you agree with the proposed scope of acts for Proposals 3 and 4 (i.e. non-consensual photography of intimate parts)?

(a) Yes ........................................................ ☑
(b) No, too wide ........................................................ ☐
(c) No, too narrow ........................................................ ☐

Remarks:
Click here to enter

7. Do you agree that Proposals 3 and 4 (i.e. non-consensual photography of intimate parts) should not cover "down-blousing"?

(a) Yes .................................................................... ☐
(b) No ..................................................................... ☑

Remarks:
The definition of "down-blousing" requires further clarification. If someone photographs another person's breasts (classified as intimate parts) from a high altitude, will this be included in "proposal three" and "proposal four's" offences?
The chinese definition of "collar" in "down-blousing" means that it can be seen by the eye. Where clothing can expose body parts in a normal sense, this term does not entirely include the definition of intimate parts (breasts) and the collar area being deliberately photographed.

## Proposals 5 and 6 – New offences: *Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images*

[Paragraphs 16 – 21 of consultation paper]

**8.** Do you agree with the introduction of the offence against the distribution of surreptitious intimate images (i.e. Proposal 5)?

(a) Yes .......................................................... ☑
(b) No .......................................................... ☐

| Remarks: |
| --- |
| Click here to enter |

**9.** Do you agree with the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images)?

(a) Yes .......................................................... ☐
(b) No, too wide .......................................................... ☐
(c) No, too narrow .......................................................... ☑

| Remarks: |
| --- |
| We recommend clarifying the definition of "created, generated, obtained, or was provided with the images in question". For example, does it include intimate images produced through means of deception, does it include intimate images obtained through hacking into someone's google account? We suggest to clarify whether this offence includes intimate images sold by the party - for example, the party sells intimate images to party A, and party A sends the said images to a third party. The definition of distribution needs to be specified in detail, as it does not include showing other parties "intimate photographs" and "intimate acts" of the victim, or whether privately sharing such material with friends is included. |

**10.** Do you agree with the introduction of the offence against the non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images

(including stills and videos), but not for the subsequent distribution (i.e. Proposal 6)?

(a) Yes .................................................................. ☑
(b) No .................................................................. ☐

Remarks:
Click here to enter

**11.** Do you agree with the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)?

(a) Yes .................................................................. ☐
(b) No, too wide .......................................................... ☐
(c) No, too narrow ........................................................ ☑

Remarks:
In past experiences, victims have informed our organisation that parties have used the victim's intimate photographs to threaten the victim in order to achieve certain purposes. Whenever the group accompanies the victim or the victim files a report on their own, police have rejected the report on the basis that the intimate photograph has not been distributed publicly yet. Thus, we recommend adding "threatening to distribute intimate photographs or videos of the victim doing an intimate act" into the "act" aspect of the consultation paper, broadening the scope of the offence.
Moreover, victims have pointed out that they had previously been told that someone had access to their intimate photographs - using such material to threaten and blackmail victims into carrying out actions and instructions.
Though, often the victims did not know whether the intimate photographs were authentic or not. Thus, we propose that regardless of whether the intimate photographs are authentic or not, they should not be used to threaten others. In turn, the above recommendation of adding "threatening to distribute intimate photographs or videos of the victim doing an intimate act" could be applied to this situation. In terms of behavior, the term only includes "doing an intimate act or records images (includes stills and videos). We recommend that images related to "intimate parts" should also be included.

12. Do you think that for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent?

(a) Yes ..................................................................... ☑
(b) No ...................................................................... ☐

Remarks:
Click here to enter

13. Do you think that for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress?

(a) Yes ..................................................................... ☐
(b) No ...................................................................... ☑

Remarks:
We recommend that the offence should not be limited to "the distributor intends to cause the victim distress". As long as the distributor is also distributing intimate photographs for personal interest, entertainment, or any other intention, it should constitute a crime.

## Intimate Acts and Intimate Parts

[Paragraphs 22 – 24 of consultation paper]

**14.** Do you agree that "intimate acts" should mean acts, in a place which would reasonably be expected to provide privacy, by a person when the person's intimate parts are exposed or covered only with underwear, or the person is using the toilet, or the person is doing a sexual act not ordinarily done in public?

(a) Yes .............................................................. ☑
(b) No, should include fewer elements *(please specify below)*............. ☐
(c) No, should include additional elements *(please specify below)*......... ☐

| Remarks: |
| --- |
| Click here to enter |

**15.** Do you agree that "intimate parts" should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear?

(a) Yes .............................................................. ☑
(b) No, should include fewer elements *(please specify below)*.............. ☐
(c) No, should include additional elements *(please specify below)*......... ☐

| Remarks: |
| --- |
| Click here to enter |

**16.** Do you agree that for the purpose of the proposed offences, the definition of "intimate parts" should include breasts and chest, irrespective of gender, or should the definition include breasts of female only?

(a) Should include breasts and chest, irrespective of gender........... ☑
(b) Should include breasts of female only................................ ☐

| Remarks: |
| --- |
| We suggest "irrespective of gender" should also include "transgender persons". |

## Proposal 7: *Defence(s)*

[Paragraphs 25 – 28 of consultation paper]

**17.** Do you agree that a defence of lawful authority or reasonable excuse should be provided for the proposed offences under Proposals 2, 4, 5 and 6?

(a) Yes ........................................................ ☑
(b) No ........................................................ ☐

Remarks:
Yes, on the grounds that the depicted person who's intimate parts were photographed has no relationship with the public's right to know and public interest, we do not recommend that media-related workers are given unlimited exemption clauses. In order to avoid obstructing the freedom of press, we recommend that media works can use words to describe images or imitation drawings to substitute publishing intimate photographs when reporting crimes involving intimate parts and voyeurism - whilst simultaneously guaranteeing that the depicted person's privacy will not be disclosed at all. Apart from this, section 221BD(3) of Western Australia's Criminal Code states that: (iii) the age, mental capacity, vulnerability or other relevant circumstances of the depicted person; (iv) the degree to which the accused action's affect the privacy of the depicted person; (v) the relationship between the accused and the depicted person. The above considerations and the harm inflicted upon the depicted person in the intimate photographs should not be used as a defense. If an average-intelligence adult is the depicted person in intimate photographs, in comparison to a low-intelligence teenager, the harm inflicted will not be lower.

**18.** Do you think that a defence of lawful authority or reasonable excuse should also be provided for the proposed offences under Proposals 1 and 3?

(a) Yes ........................................................ ☑
(b) No ........................................................ ☐

Remarks:
Click here to enter

**19.** If suitable defence(s) are made available covering acts done with lawful authority or reasonable excuse, what should be included as reasonable excuses?

Remarks:
Click here to enter

## Proposal 8: *Sexual Conviction Record Check Scheme*

[Paragraph 29 of consultation paper]

**20.** Do you agree that the proposed offences under Proposals 1 to 6 should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme?

(a) Yes .................................................................... ☑

(b) No .................................................................... ☐

Only some of the proposed offences – *please indicate (can pick more than one)* –

(i) Voyeurism.................................................... ☐

(ii) Intimate prying.............................................. ☐

(iii) Non-consensual photography of intimate parts for sexual gratification.................................................. ☐

(iv) Non-consensual photography of intimate parts irrespective of the purpose.................................. ☐

(v) Distribution of surreptitious intimate images................ ☐

(vi) Non-consensual distribution of intimate images............ ☐

| Remarks: |
|---|
| Click here to enter |

## FURTHER VIEWS

Further to the responses above, additional views and comments (e.g. punishments of the proposed offences) can be set out below.

Currently, "loitering", "disorder in public places" and "outraging public decency" are the only crimes that prosecute upskirting acts. However, the penalty for the aforementioned acts are lighter than the penalty suggested by the consultation document. Thus, we suggest that the government should legislate laws and establish offences of voyeurism, intimate prying and non-consensual photography of intimate parts and related offences as soon as possible.

At present, victims are allowed to apply to the court for an "injunction order" to prevent the public from redistributing private images that have already been distributed - however the results are not effective enough. Thus, we hope that after you receive responses about the consultation document from various organisations, our responses will be submitted to the Legislative Council regarding the newly added discussion about "injunction orders" submitted by the victim relating to offences of voyeurism, intimate prying and non-consensual photography. We hope that the procedure of granting injunction orders can be sped up, and that increasing the penalty for violating an injunction order should be taken into consideration too.

Additionally, the "injunction order" should remain in effect before trial, during trial, and after the end of the trial in order to protect the victim. Apart from the "injunction order", we suggest government departments such as the Hong Kong Police Force to establish a team for handling the complaints on voyeurism, intimate prying and non-consensual photography of intimate parts.

Victims could report cases through provided direct hotlines and emails, and related departments can provide the record of allegation or interim reply in a short period of time after receiving complaints. This action is to let the victims know their cases have been followed and stop the public distributing the intimated images.

We heard that some profiles and imitated images of probable People Living with HIV have been disclosed in the internet without consensus in the past. HIV is still a highly stigmatized chronic illness where we should concern it. We suggest the Office of the Privacy Commissioner for Personal Data and the Hong Kong Police Force should closely work together for handling the reported cases.

Name/Name of Organization: AIDS Concern

Telephone No. (Optional):

Email Address (Optional):

Date: 7th October, 2020

## WHEN AND HOW TO RESPOND

Please send your views to the Security Bureau by mail, facsimile or email on or before 7 October 2020 –

| | |
|---|---|
| Address: | Security Bureau<br>- Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences<br>Central Government Offices<br>10/F, East Wing<br>2 Tim Mei Avenue<br>Tamar, Hong Kong |
| Fax: | 2501 4281 |
| Email: | consultation@sb.gov.hk |

It is optional for members of the public to supply their personal data when providing views on this consultation paper. The submissions and personal data collected may be transferred to the relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data may only use the data for such purposes.

The names and views of individuals and organisations who/which put forth submissions in response to this consultation paper ("senders") may be published for public viewing. We may, either in public or private discussions, or in any subsequent report, cite comments submitted in response to this consultation paper.

To safeguard senders' personal data privacy, we will remove senders' relevant data, such as contact details, identification numbers, and signatures, where provided, when publishing their submissions.

We will respect the wish of senders to remain anonymous and/or keep the views confidential in part or in whole. If the senders request anonymity in the submissions, their names will be removed when publishing their

views. If the senders request confidentiality, their submissions will not be published.

If the senders do not request anonymity or confidentiality in the submissions, it will be assumed that the senders can be named and the views can be published in their entirety.

Any sender providing personal data to the Security Bureau in the submission will have rights of access and correction with respect to such personal data. Requests for data access and correction of personal data should be made in writing to the same correspondence address as set out above.

**Security Bureau**
**July 2020**

香港性文化學會對引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行的建議
07/10/2020 14:51
Hide Details
From:
To: "consultation@sb.gov.hk" <consultation@sb.gov.hk>,

1 Attachment

Response Form - Voyeurism (Chi) (1).docx

本人代表「香港性文化學會」傳上諮詢回應表，請查閱附件。
如有查詢，可致電本會。

Hong Kong Sex Culture Society Limited

# 諮詢文件

## 引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行的建議

## 回應表格

### 建議 1 及建議 2 — 新增罪行：*窺淫及私密窺視*

[諮詢文件第 11 及 12 段]

**1.** 你是否同意就窺淫訂立一項特定罪行(即建議 1)？

(a) 是 ...................................................................... ☑

(b) 否 ...................................................................... ☐

| 註： |
|---|
| 按一下這裡以輸入文字 |

**2.** 你是否同意就私密窺視另訂一項罪行(即建議 2)，以作為擬議窺淫罪的法定交替罪行，同時也是一項獨立罪行？

(a) 是 ...................................................................... ☑

(b) 否 ...................................................................... ☐

| 註： |
|---|
| 按一下這裡以輸入文字 |

**3.** 你是否同意建議 1(即窺淫)及建議 2(即私密窺視)所述行為的擬議涵蓋範圍？

(a) 是 ...................................................................... ☑

(b) 否，範圍太廣 ...................................................... ☐

(c) 否，範圍太窄 ...................................................... ☐

| 註： |
|---|
| 按一下這裡以輸入文字 |

**建議 3 及建議 4 — 新增罪行：*未經同意下拍攝私密處***

[諮詢文件第 13 至 15 段]

**4.** 你是否同意就未經同意下為了得到性滿足而拍攝私密處訂立一項罪行(即建議 3)？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註：
香港一直沒有禁止偷拍私密處的罪行,但社會大眾一直及幾乎一致地對有關行為有強烈道德反感,也侵害人的私癮和對受害人有威脅性。制定有關法律能保護公眾（特別是女性和學生），也能向社會表達「尊重女性（或男性）」的信息，有教育公眾和下一代之效。

**5.** 你是否同意就未經同意下不論目的拍攝私密處另訂一項罪行，以作為擬議未經同意下為了得到性滿足而拍攝私密處罪行的法定交替罪行，同時也是一項獨立罪行(即建議 4)？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註：
按一下這裡以輸入文字

**6.** 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)所述行為的擬議涵蓋範圍？

(a) 是 ........................................................................ ☑
(b) 否，範圍太廣 ........................................................ ☐
(c) 否，範圍太窄 ........................................................ ☐

註：
按一下這裡以輸入文字

**7.** 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)不應包括由上而下“拍攝衣領”的行為？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註：
雖然本會不認同此行為，但在法律執行上有困難，因為有關行為難以清楚定義，不少行為如自拍也會由上以下，有可能不慎拍到途人的衣領，若因此犯法會導致過度立法。

**建議 5 及建議 6 — 新增罪行：*發放偷拍的私密影像及未經同意下發放私密影像***

[諮詢文件第 16 至 21 段]

**8.** 你是否同意針對發放偷拍的私密影像訂立一項罪行(即建議 5)？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註：

**9.** 你是否同意建議 5(即發放偷拍的私密影像)所述行為的擬議涵蓋範圍？

(a) 是 ........................................................................ ☑
(b) 否，範圍太廣 ........................................................ ☐
(c) 否，範圍太窄 ........................................................ ☐

註：

**10.** 你是否同意針對未經同意下發放可能或曾經獲得同意拍攝但未獲同意作其後發放的私密影像(包括照片和影片)訂立一項罪行(即建議 6)？

(a) 是 ........................................................................ ☑
(b) 否 ........................................................................ ☐

註：
本會同意訂立「未經同意下發放私密影像罪」，因為近年網絡上出現不少「報復色情」（Revenge porn）的性交短片，不論是受害人把自己的裸照發給陌生網友後被公開，或情侶分手後把性交短片公開，都愈來愈多。受害人很多十分年輕，深受困擾，有關法例一旦訂立，也能幫助老師及性教育工作者向學生講解其嚴重性，為社會定下道德規範。

11. 你是否同意建議 6(即未經同意下發放私密影像)所述行為的擬議涵蓋範圍？

(a) 是 ........................................................ ☑
(b) 否，範圍太廣 ........................................................ ☐
(c) 否，範圍太窄 ........................................................ ☐

註：
按一下這裡以輸入文字

12. 就建議 6 而言，你是否認為只應在發放者明知受害人沒有同意發放私密影像或罔顧受害人有沒有同意發放，才構成犯罪？

(a) 是 ........................................................ ☑
(b) 否 ........................................................ ☐

註：
按一下這裡以輸入文字

13. 就建議 6 而言，你是否認為應在發放者意圖導致受害人受困擾，或明知或有理由相信發放私密影像會導致或可能導致受害人受侮辱、驚恐或困擾，才構成犯罪？

(a) 是 ........................................................ ☐
(b) 否 ........................................................ ☑

註：
本會認為只要未得到受害人同意而發放相關影像，已構成罪行。

## 私密行為及私密處

[諮詢文件第 22 至 24 段]

**14.** 你是否同意“私密行為”應指任何人身處有合理期望能提供私隱的地方時作出屬以下情況的行為：該人正露出或只以內衣遮蓋其私密處，或該人正在如廁，或該人正進行通常不會公開進行的涉及性的行為？

(a) 是 ................................................................ ☑
(b) 否，應包括較少元素 *(請在下面方格註明)* .................. ☐
(c) 否，應包括更多元素 *(請在下面方格註明)* .................. ☐

| 註： |
|---|
| 按一下這裡以輸入文字 |

**15.** 你是否同意某人的“私密處”應理解為其生殖器官、臀部或胸部，不論這些部位是外露或只以內衣遮蓋？

(a) 是 ................................................................ ☑
(b) 否，應包括較少元素 *(請在下面方格註明)* .................. ☐
(c) 否，應包括更多元素 *(請在下面方格註明)* .................. ☐

| 註： |
|---|
| 按一下這裡以輸入文字 |

**16.** 就擬議罪行而言，你是否同意“私密處”的定義應不論性別涵蓋女性胸部和男性胸部，或有關定義應只涵蓋女性的胸部？

(a) 應不論性別涵蓋女性胸部和男性胸部 ...................... ☐
(b) 應只涵蓋女性的胸部 .............................................. ☑

| 註： |
|---|
| 本會相信男女平等(equal)，但不代表男女完全一樣(same)。在生理結構和社會文化上，男女的私密處有不同。此外，平機會及 |

終審法院曾有案例，從事體力勞動的男性沒有穿上衣是為了工作方便和舒適。他們露出胸部並非針對某人，也不涉及性，因此不構成性騷擾。

## 建議 7：*免責辯護*

[諮詢文件第 25 至 28 段]

**17.** 你是否同意應就建議 2、建議 4、建議 5 及建議 6 的擬議罪行訂定基於合法權限或合理辯解的免責辯護？

(a) 是 .................................................................... ☑
(b) 否 .................................................................... ☐

註：
按一下這裡以輸入文字

**18.** 你是否認為也應就建議 1 及建議 3 的擬議罪行訂定基於合法權限或合理辯解的免責辯護？

(a) 是 .................................................................... ☐
(b) 否 .................................................................... ☑

註：
按一下這裡以輸入文字

**19.** 如訂定合適的免責辯護以涵蓋合法權限或合理辯解下作出的行為，合理辯解應包括哪些情景？

註：
醫療、科學研究、學術教育目的，及收集犯罪證據，傳媒採訪等情況應屬合理辯解。

## 建議 8：*性罪行定罪紀錄查核機制*

[諮詢文件第 29 段]

**20.** 你是否同意建議 1 至建議 6 的擬議罪行應納入為性罪行定罪紀錄查核機制下指明列表中的性罪行？

(a) 是 ………………………………………………………… ☑
(b) 否 ………………………………………………………… ☐
只應納入若干擬議罪行 — *請註明(可選擇多於一項)*：
(i) 窺淫 ………………………………………………………… ☐
(ii) 私密窺視 …………………………………………………… ☐
(iii) 未經同意下為了得到性滿足而拍攝私密處 …………… ☐
(iv) 未經同意下不論目的拍攝私密處 ……………………… ☐
(v) 發放偷拍的私密影像 …………………………………… ☐
(vi) 未經同意下發放私密影像 ……………………………… ☐

註：
為更有效保護學童及精神上無行為能力人士，本會同意建議 1 - 6 列入性罪行列表。

## 其他意見

除對上述問題作出回應外，亦可於下面方格註明其他意見(例如擬議罪行的罰則)：

| 按一下這裡以輸入文字 |
|---|

團體名稱／姓名：香港性文化學會

電話號碼(可選擇填寫)：

電郵地址(可選擇填寫)：

日期：2020年10月6日

## 何時及如何提交意見

請在諮詢期內(即 2020 年 10 月 7 日或之前)以郵寄、傳真或電郵方式提交意見：

郵寄地址： 香港添馬
添美道 2 號
政府總部東翼 10 樓
保安局 — 引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行建議的諮詢

傳真號碼： 2501 4281

電郵地址： consultation@sb.gov.hk

就本諮詢文件提交意見時，公眾人士可選擇是否提供個人資料。收集所得的意見和個人資料，或會轉交政府相關決策局和部門，用於與是次諮詢直接相關的用途；獲取資料的政府決策局和部門只可將有關資料作此用途。

就本諮詢文件提交意見的個人及團體(“寄件人”)，其姓名／名稱及意見或會被公布以供公眾參閱。我們進行公開或內部討論時，或在其後發表的任何報告中，或會引用寄件人就本諮詢文件提交的意見。

為了保障寄件人個人資料的私隱，我們公布其意見時會刪去其有關資料，例如聯絡資料、識別號碼和簽名。

我們尊重寄件人不欲公開身份及／或將全部或部分意見保密的意願。寄件人如在意見書中表示不欲公開身份，我們公布其意見時會刪去其姓名／名稱。寄件人如要求將意見保密，我們將不會公布其意見。

如寄件人並無要求不公開身份或將意見保密，我們會假設其姓名／名稱及其意見可予公布。

任何在意見書中向保安局提供個人資料的寄件人，均有權查閱和更正其個人資料。查閱和更正其個人資料的要求，應以書面方式寄交上文所述的通訊地址。

保安局
**2020 年 7 月**

引入窺淫、秘密窺視、未經同意下拍攝私密處及相關罪行建議的諮詢
07/10/2020 14:39
Hide Details
From:
To: <consultation@sb.gov.hk>,

1 Attachment

AFRO submission - Voyeurism 20201007.pdf

敬啟者：
附件為本會就引入窺淫、秘密窺視、未經同意下拍攝私密處及相關罪行建議的諮詢之回應，
煩請查收。
青鳥　啟

諮詢文件

# 引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行的建議

## 回應表格

**建議 1 及建議 2 — 新增罪行：*窺淫及私密窺視***
[諮詢文件第 11 及 12 段]

**1.** 你是否同意就窺淫訂立一項特定罪行(即建議 1)？

(a) 是 ☑
(b) 否 ☐

| 註：<br>然而，如將最高刑罰提高至監禁 5 年，建議 2 中就不論目的之「私密窺視」的立法建議已能涵蓋有關「窺淫罪」之處理。 |
|---|

**2.** 你是否同意就私密窺視另訂一項罪行(即建議 2)，以作為擬議窺淫罪的法定交替罪行，同時也是一項獨立罪行？

(a) 是 ☑
(b) 否 ☐

| 註：<br>同意就「私密窺視」訂立一項罪行為獨立罪行。然而，如將最高刑罰提高至監禁 5 年，建議 2 中就不論目的之「私密窺視」的立法建議已能涵蓋有關「窺淫罪」之處理，則無需訂立「窺淫罪」。 |
|---|

**3.** 你是否同意建議 1(即窺淫)及建議 2(即私密窺視)所述行為的擬議涵蓋範圍？

(a) 是 ☑
(b) 否，範圍太廣 ☐
(c) 否，範圍太窄 ☐

| 註：<br>按一下這裡以輸入文字 |
|---|

**建議 3 及建議 4 — 新增罪行：*未經同意下拍攝私密處***
[諮詢文件第 13 至 15 段]

**4.** 你是否同意就未經同意下為了得到性滿足而拍攝私密處訂立一項罪行(即建議 3)？

(a) 是
(b) 否

> 註：
> 然而，如將最高刑罰提高至監禁 5 年，建議 4 中就「未經同意下不論目的拍攝私密處的罪行」的立法建議已能涵蓋建議 3 中有關「未經同意下為了得到性滿足而拍攝私密處罪」之處理。

**5.** 你是否同意就未經同意下不論目的拍攝私密處另訂一項罪行，以作為擬議未經同意下為了得到性滿足而拍攝私密處罪行的法定交替罪行，同時也是一項獨立罪行(即建議 4)？

(a) 是
(b) 否

> 註：
> 同意就「未經同意下不論目的拍攝私密處的罪行」訂立一項罪行為獨立罪行。然而，如將最高刑罰提高至監禁 5 年，建議 2 中就「未經同意下不論目的拍攝私密處的罪行」的立法建議已能涵蓋有關「未經同意下為了得到性滿足而拍攝私密處罪」之處理，則無需訂立「未經同意下為了得到性滿足而拍攝私密處罪」。

**6.** 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)所述行為的擬議涵蓋範圍？

(a) 是
(b) 否，範圍太廣
(c) 否，範圍太窄

> 註：
> 建議 3 及建議 4(即未經同意下拍攝私密處)所述行為的擬議涵蓋範圍應包括由上而下「拍攝衣領」的行為。

**7.** 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)不應包括由上而下"拍攝衣領"的行為？

(a) 是
(b) 否

註：
按一下這裡以輸入文字

**建議 5 及建議 6 — 新增罪行：*發放偷拍的私密影像及未經同意下發放私密影像***
[諮詢文件第 16 至 21 段]

**8.** 你是否同意針對發放偷拍的私密影像訂立一項罪行(即建議 5)？

(a) 是 ☑
(b) 否 ☐

| 註： 按一下這裡以輸入文字 |
|---|

**9.** 你是否同意建議 5(即發放偷拍的私密影像)所述行為的擬議涵蓋範圍？

(a) 是 ☐
(b) 否，範圍太廣 ☐
(c) 否，範圍太窄 ☑

| 註： 建議 5 所述行為的擬議涵蓋範圍應同時包括「要脅發放偷拍的私密影像」的行為 |
|---|

**10.** 你是否同意針對未經同意下發放可能或曾經獲得同意拍攝但未獲同意作其後發放的私密影像(包括照片和影片)訂立一項罪行(即建議 6)？

(a) 是 ☑
(b) 否 ☐

| 註： 按一下這裡以輸入文字 |
|---|

**11.** 你是否同意建議 6(即未經同意下發放私密影像)所述行為的擬議涵蓋範圍？

(a) 是 ☐
(b) 否，範圍太廣 ☐
(c) 否，範圍太窄 ☑

| 註： 建議 6 所述行為的擬議涵蓋範圍應同時包括「要脅在未經同意下發放私密影像」的行為 |
|---|

**12.** 就建議 6 而言，你是否認為只應在發放者明知受害人沒有同意發放私密影像

或罔顧受害人有沒有同意發放，才構成犯罪？

(a) 是 ☑
(b) 否 ☐

註：
按一下這裡以輸入文字

**13.** 就建議 6 而言，你是否認為應在發放者意圖導致受害人受困擾，或明知或有理由相信發放私密影像會導致或可能導致受害人受侮辱、驚恐或困擾，才構成犯罪？

(a) 是 ☑
(b) 否 ☐

註：
按一下這裡以輸入文字

**私密行為及私密處**
[諮詢文件第 22 至 24 段]

**14.** 你是否同意“私密行為”應指任何人身處有合理期望能提供私隱的地方時作出屬以下情況的行為：該人正露出或只以內衣遮蓋其私密處，或該人正在如廁，或該人正進行通常不會公開進行的涉及性的行為？

(a) 是 ☑
(b) 否，應包括較少元素*（請在下面方格註明）* ☐
(c) 否，應包括更多元素*（請在下面方格註明）* ☐

註：

**15.** 你是否同意某人的“私密處”應理解為其生殖器官、臀部或胸部，不論這些部位是外露或只以內衣遮蓋？

(a) 是 ☑
(b) 否，應包括較少元素*（請在下面方格註明）* ☐
(c) 否，應包括更多元素*（請在下面方格註明）* ☐

註：
按一下這裡以輸入文字

16. 就擬議罪行而言，你是否同意“私密處”的定義應不論性別涵蓋女性胸部和男性胸部，或有關定義應只涵蓋女性的胸部？

(a) 應不論性別涵蓋女性胸部和男性胸部 ☑
(b) 應只涵蓋女性的胸部 ☐

註：
按一下這裡以輸入文字

**建議 7：*免責辯護***
[諮詢文件第 25 至 28 段]

17. 你是否同意應就建議 2、建議 4、建議 5 及建議 6 的擬議罪行訂定基於合法權限或合理辯解的免責辯護？

(a) 是 ☐
(b) 否 ☑

註：
按一下這裡以輸入文字

18. 你是否認為也應就建議 1 及建議 3 的擬議罪行訂定基於合法權限或合理辯解的免責辯護？

(a) 是 ☐
(b) 否 ☑

註：

19. 如訂定合適的免責辯護以涵蓋合法權限或合理辯解下作出的行為，合理辯解應包括哪些情景？

註：

**建議 8：*性罪行定罪紀錄查核機制***
[諮詢文件第 29 段]

**20.** 你是否同意建議 1 至建議 6 的擬議罪行應納入為性罪行定罪紀錄查核機制下指明列表中的性罪行？

(a) 是 ☑
(b) 否 ☐
只應納入若干擬議罪行 — *請註明(可選擇多於一項)*：
(i) 窺淫 ☐
(ii) 私密窺視 ☐
(iii) 未經同意下為了得到性滿足而拍攝私密處 ☐
(iv) 未經同意下不論目的拍攝私密處 ☐
(v) 發放偷拍的私密影像 ☐
(vi) 未經同意下發放私密影像 ☐

| 註：<br>按一下這裡以輸入文字 |
|---|

**其他意見**

除對上述問題作出回應外，亦可於下面方格註明其他意見(例如擬議罪行的罰則)：

按一下這裡以輸入文字

1) 建議政府針對「要脅發放偷拍的私密影像」的行為訂定刑事法例，建議參考以下海外司法管轄區禁止「要脅發放私密影像」的行爲，包括：蘇格蘭 《Abusive Behaviour and Sexual Harm (Scotland) Act 2016》第 2 條，以及澳洲北領地《Criminal Code Act 1983 (NT)》第 208AC 條。

2) 建議法庭可要求觸犯擬議罪行（建議 1 至建議 6）之人士，採取合理步驟刪除影像，否則可增加刑罰，法庭也可頒布臨時命令，禁止犯事者進一步發佈私密影像或刪除影像。建議有關做法可參考新西蘭《Harmful Digital Communication Act 2015》第 18 和第 19 條，以及澳洲昆士蘭州《Criminal Code Act 1899》第 229AA 條。

團體名稱／姓名： 青鳥

電話號碼(可選擇填寫)：

電郵地址(可選擇填寫)：

日期： 按一下這裡以輸入聯文字 07 OCT 2020

**何時及如何提交意見**

請在諮詢期內(即 2020 年 10 月 7 日或之前)以郵寄、傳真或電郵方式提交意見：

郵寄地址： 香港添馬添美道 2 號政府總部東翼 10 樓保安局 — 引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行建議的諮詢

傳真號碼： 2501 4281

電郵地址： consultation@sb.gov.hk

就本諮詢文件提交意見時，公眾人士可選擇是否提供個人資料。收集所得的意見和個人資料，或會轉交政府相關決策局和部門，用於與是次諮詢直接相關的用途；獲取資料的政府決策局和部門只可將有關資料作此用途。

就本諮詢文件提交意見的個人及團體(“寄件人”)，其姓名／名稱及意見或會被公布以供公眾參閱。我們進行公開或內部討論時，或在其後發表的任何報告中，或會引用寄件人就本諮詢文件提交的意見。

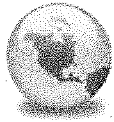
為了保障寄件人個人資料的私隱，我們公布其意見時會刪去其有關資料，例如聯絡資料、識別號碼和簽名。

我們尊重寄件人不欲公開身份及／或將全部或部分意見保密的意願。寄件人如在意見書中表示不欲公開身份，我們公布其意見時會刪去其姓名／名稱。寄件人如要求將意見保密，我們將不會公布其意見。

如寄件人並無要求不公開身份或將意見保密，我們會假設其姓名／名稱及其意見可予公布。

任何在意見書中向保安局提供個人資料的寄件人，均有權查閱和更正其個人資料。查閱和更正其個人資料的要求，應以書面方式寄交上文所述的通訊地址。

保安局
**2020 年 7 月**



Urgent
Submissions by ACSVAW on 'Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences'
07/10/2020 14:39
Hide Details
From:
To: <consultation@sb.gov.hk>,
Cc:

2 Attachments

Response Form_ by ACSVAW.pdf Further Views and Responses _by ACSVAW.pdf

**To: Security Bureau**
**From: Association Concerning Sexual Violence Against Women (ACSVAW)**

Attached please find the 2 response papers submitted by ACSVAW regarding 'Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences':

1) **Response Form**
2) **Further Views and Responses**

Hard copy of the above documents will be delivered to Security Bureau *by mail* accordingly. Should you have any questions, please contact

## Consultation Paper

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

## Response Form

### Proposals 1 and 2 – New offences: *Voyeurism and Intimate Prying*

[Paragraphs 11 – 12 of consultation paper]

**1.** Do you agree with the introduction of a specific offence of voyeurism (i.e. Proposal 1)?

(a) Yes ........................................................................ ☐
(b) No ......................................................................... ☐

Remarks:
- We suggest that there should be **one single offence** to penalize the acts of "voyeurism" (Proposal 1) and "intimate prying" (Proposal 2), regardless of purpose.
- Regardless as to whether the act is done for sexual gratification or other purposes, they should carry the same level of maximum penalty (5 years)

**2.** Do you agree with the introduction of a separate offence of intimate prying (i.e. Proposal 2), as a statutory alternative to the proposed offence of voyeurism, in addition to being a standalone offence?

(a) Yes ........................................................................ ☐
(b) No ......................................................................... ☐

Remarks:
- Same as Q1 above.

**3.** Do you agree with the proposed scope of acts for Proposals 1 (i.e. voyeurism) and 2 (i.e. intimate prying)?

(a) Yes ............................................................ ☑
(b) No, too wide ................................................ ☐
(c) No, too narrow ............................................. ☐

Remarks:
Click here to enter

## Proposals 3 and 4 – New offences: *Non-consensual Photography of Intimate Parts*

[Paragraphs 13 – 15 of consultation paper]

**4.** Do you agree with the introduction of the offence of non-consensual photography of intimate parts for sexual gratification (i.e. Proposal 3)?

(a) Yes ........................................................ ☐
(b) No ........................................................ ☐

Remarks:
- We suggest that there should be **one single offence** to penalize non-consensual photography of intimate parts, for sexual gratification (Proposal 3) or otherwise (Proposal 4).
- Regardless as to whether the act is done for sexual gratification or other purposes, they should carry the same level of maximum penalty (5 years)

**5.** Do you agree with the introduction of a separate offence of non-consensual photography of intimate parts irrespective of the purpose, as a statutory alternative to the proposed offence of non-consensual photography of intimate parts for sexual gratification, in addition to being a standalone offence (i.e. Proposal 4)?

(a) Yes ........................................................ ☐
(b) No ........................................................ ☐

Remarks:
- Same as Q4 above.

**6.** Do you agree with the proposed scope of acts for Proposals 3 and 4 (i.e. non-consensual photography of intimate parts)?

(a) Yes ........................................................ ☐
(b) No, too wide ........................................................ ☐
(c) No, too narrow ........................................................ ☑

Remarks:
We suggest that down-blousing should also be included.

7. Do you agree that Proposals 3 and 4 (i.e. non-consensual photography of intimate parts) should not cover "down-blousing"?

(a) Yes ............................................................ ☐
(b) No ............................................................ ☑

Remarks:
- The offence of non-consensual photography of intimate parts should cover 'down-blousing' because it intrudes one's sexual autonomy.
- In our experience, the seriousness of 'down-blousing' is the same as recording intimate image beneath one's clothing (i.e. 'upskirt photography'). The calls for criminalizing 'down-blousing' are as strong as criminalizing 'upskirt photography'.

## Proposals 5 and 6 – New offences: *Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images*

[Paragraphs 16 – 21 of consultation paper]

**8.** Do you agree with the introduction of the offence against the distribution of surreptitious intimate images (i.e. Proposal 5)?

(a) Yes .......................................................... ☑
(b) No .......................................................... ☐

Remarks:
Click here to enter

**9.** Do you agree with the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images)?

(a) Yes .......................................................... ☐
(b) No, too wide .......................................................... ☐
(c) No, too narrow .......................................................... ☑

Remarks:

- For the proposed scope of act for Proposal 5, it should be extended to cover:
  1) Distribution of pornographic or sexually explicit images that have been photoshopped, where a victim's head pasted on to a commercially produced pornographic image;
  2) Distribution of intimate images which show the victim's *intimate parts,* referencing to New South Wales[1] and Queensland[2] of Australia, in addition to 'images showing the victim doing an intimate act' as stated in the Consultation Paper;
  3) The act of 'threatening to distribute intimate images', referencing section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016[3]. Please refer to Section B of our 'Further Views and Responses' submitted along with this Response Form.

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[1] Section 91N Definitions of Division 15C Recording and distributing intimate images, *Crimes Act 1900 No 40 (NSW)*

[2] Section 207A Definitions of Chapter 22 Offences against morality, *Criminal Code Act 1899 (Qld)*

[3] Note: the name of the section is 'Disclosing, or threatening to disclose, an intimate photograph or film'

**10.** Do you agree with the introduction of the offence against the non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (i.e. Proposal 6)?

(a) Yes .................................................................... ☑
(b) No .................................................................... ☐

Remarks:
Click here to enter

**11.** Do you agree with the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)?

(a) Yes .................................................................... ☐
(b) No, too wide .......................................................... ☐
(c) No, too narrow ........................................................ ☑

Remarks:
- Same as Q9 above.

**12.** Do you think that for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent?

(a) Yes .................................................................... ☑
(b) No .................................................................... ☐

Remarks:
Click here to enter

**13.** Do you think that for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress?

(a) Yes ........................................................................ ☑
(b) No ........................................................................ ☐

| Remarks: |
| --- |
| Click here to enter |

## Intimate Acts and Intimate Parts

[Paragraphs 22 – 24 of consultation paper]

**14.** Do you agree that "intimate acts" should mean acts, in a place which would reasonably be expected to provide privacy, by a person when the person's intimate parts are exposed or covered only with underwear, or the person is using the toilet, or the person is doing a sexual act not ordinarily done in public?

(a) Yes .............................................................................. ☐
(b) No, should include fewer elements *(please specify below)*............ ☐
(c) No, should include additional elements *(please specify below)*......... ☑

| Remarks: Instances of changing clothes, showering or bathing in a place which would be reasonably be expected to provide privacy should be covered in the definition of "intimate acts" |
|---|

**15.** Do you agree that "intimate parts" should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear?

(a) Yes .............................................................................. ☑
(b) No, should include fewer elements *(please specify below)*............... ☐
(c) No, should include additional elements *(please specify below)*......... ☐

| Remarks: Click here to enter |
|---|

**16.** Do you agree that for the purpose of the proposed offences, the definition of "intimate parts" should include breasts and chest, irrespective of gender, or should the definition include breasts of female only?

(a) Should include breasts and chest, irrespective of gender............ ☑
(b) Should include breasts of female only................................. ☐

Remarks:

- We take the view that the definition of 'intimate parts' should include breasts and chest, irrespective of gender, including men, women, transgender people, intersex people etc., in allighment with the 'gender neutrality' principle laid down by the Law Reform Commission.
- We suggest that the wording of the legislation should be gender-neutral as well as sensitive to people of non-binary gender identity.

## Proposal 7: *Defence(s)*

[Paragraphs 25 – 28 of consultation paper]

**17.** Do you agree that a defence of lawful authority or reasonable excuse should be provided for the proposed offences under Proposals 2, 4, 5 and 6?

(a) Yes ............................................................ ☑
(b) No ............................................................ ☐

Remarks:
We agree that a defence provision is necessary, but emphasize that it is important to craft such provision with great care so that only the most compelling and justifiable circumstances can be excused; because above all, a person's consent is at the heart of the entire debate. To override a person's consent requires the most compelling justification and utmost scrutiny by the court.

**18.** Do you think that a defence of lawful authority or reasonable excuse should also be provided for the proposed offences under Proposals 1 and 3?

(a) Yes ............................................................ ☐
(b) No ............................................................ ☐

Remarks:
We are of the view that the proposed offences should encompass all purposes and make no distinction for an offence committed for sexual gratification (see our responses to questions 1, 2, 4, 5). Therefore, we are of the view that the defence provision should be open to the offences committed regardless of purposes. It will

however be quite clear that logically, someone who commits the offence out of sexual gratification would not, at the same time, be doing the act with lawful authority or reasonable excuse.

**19.** If suitable defence(s) are made available covering acts done with lawful authority or reasonable excuse, what should be included as reasonable excuses?

Remarks:
Specific defences to be provided could be made reference to section 221BD (3) of the Criminal Code of Western Australia, Australia.

## Proposal 8: *Sexual Conviction Record Check Scheme*

[Paragraph 29 of consultation paper]

**20.** Do you agree that the proposed offences under Proposals 1 to 6 should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme?

(a) Yes ........................................................ ☑

(b) No ........................................................ ☐

Only some of the proposed offences – *please indicate (can pick more than one)* –

(i) Voyeurism.................................................... ☐

(ii) Intimate prying.............................................. ☐

(iii) Non-consensual photography of intimate parts for sexual gratification.......................................... ☐

(iv) Non-consensual photography of intimate parts irrespective of the purpose.................................. ☐

(v) Distribution of surreptitious intimate images................ ☐

(vi) Non-consensual distribution of intimate images............ ☐

Remarks:

- The gravamen of a sexual offence that is based on sexual autonomy[4] is usually of two parts: (a) non-consensual (b) intrusion of a sexual nature.
- The extra proof of "sexual gratification" is not a necessary indicator in establishing a sexual offence.
- The existing sexual offences require no proof of sexual gratification on the part of the perpetrator. In the case of sexual assault (previously known as "indecent assault"), the element to prove is on whether the act is "sexual", not whether it's for "sexual gratification".
- All the new offences of Proposals 1-6 in this Consultation Paper, the requirement that some "intimate act" or "intimate parts" have been pried or photographed, has already

[4] In the Law Reform Commission's *Report on Review of Substantive Sexual Offences* (dated December 2019), sexual offences are classified into three categories: (1) offences based on sexual autonomy; (2) offences based on the protective principle; and (3) offences based on public morality (paras. 1.15-1.19). The new offences proposed in this Consultation Paper, would arguably fall under the first category.

sufficiently imbued with the sexual element and consent element to the offences.

- Therefore, we take the view that all proposed offences under Proposals 1-6 be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme.

## FURTHER VIEWS

Further to the responses above, additional views and comments (e.g. punishments of the proposed offences) can be set out below.

(Please refer to **Section B of the document 'Further Views and Responses'** submitted along with this Response Form)

We suggest that further legislation should be made:

1. **Legislation of a new offence on 'threatening to distribute intimate images'**

- We propose two alternative models for legislation:

*First*, to extend the proposed scope of acts for proposals 5 and 6 of the Consultation Paper (i.e. non-consensual distribution of intimate images) by including the act of threatening to distribute intimate images, referencing section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. *Second*, to create a standalone offence against threatening to distribute intimate images, referencing Section 208AC of Criminal Code Act 1983 of Northern Territory, Australia

2. **Relevant interim and image-removal orders made by the Court**

- We are of the opinion that the Court should be able to order an individual to remove the relevant images, if he/she/they found guilty of an offence against non-consensual observations/ recordings of intimate acts, non-consensual photography of intimate parts, non-consensual distribution of intimate images and threatening to distribute intimate images. The Court should also have the power to order the online content host to take down or disable the images.
- Furthermore, the court should be granted the jurisdiction to make interim orders, referencing section 18 of the Harmful Digital Communications Act 2015 of New Zealand. It should be noted that the criminal proceedings can be lengthy, and the publicity of a criminal case can bring further harm to the victim

if he/she/they have no relief to take down the intimate images pending trial. To provide comprehensive protection to the victim, interim orders should also be available.

Name/Name of Organization: **Association Concerning Sexual Violence Against Women (ACSVAW)**

Telephone No. (Optional): ____________

Email Address (Optional): ____________

Date: 7 October 2020

## WHEN AND HOW TO RESPOND

Please send your views to the Security Bureau by mail, facsimile or email on or before 7 October 2020 –

Address: Security Bureau
- Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences
Central Government Offices
10/F, East Wing
2 Tim Mei Avenue
Tamar, Hong Kong

Fax: 2501 4281

Email: consultation@sb.gov.hk

It is optional for members of the public to supply their personal data when providing views on this consultation paper. The submissions and personal data collected may be transferred to the relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data may only use the data for such purposes.

The names and views of individuals and organisations who/which put forth submissions in response to this consultation paper ("senders") may be published for public viewing. We may, either in public or private discussions, or in any subsequent report, cite comments submitted in response to this consultation paper.

To safeguard senders' personal data privacy, we will remove senders' relevant data, such as contact details, identification numbers, and signatures, where provided, when publishing their submissions.

We will respect the wish of senders to remain anonymous and/or keep the views confidential in part or in whole. If the senders request anonymity in the submissions, their names will be removed when publishing their

views. If the senders request confidentiality, their submissions will not be published.

If the senders do not request anonymity or confidentiality in the submissions, it will be assumed that the senders can be named and the views can be published in their entirety.

Any sender providing personal data to the Security Bureau in the submission will have rights of access and correction with respect to such personal data. Requests for data access and correction of personal data should be made in writing to the same correspondence address as set out above.

**Security Bureau**
**July 2020**

# Further Views and Responses on Security Bureau's Consultation Paper 'Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences'

(*This document is to be read together with the Response Form submitted by ACSVAW*)

Submitted by

**Association Concerning Sexual Violence Against Women**

07 October, 2020

關注婦女性暴力協會

**Association Concerning Sexual Violence Against Women**

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# Preface

Established on 8 March 1997, the Association Concerning Sexual Violence Against Women (ACSVAW) has been striving to promote women's rights and gender equity in Hong Kong. With particular focus on sexual violence, ACSVAW urges the Government to address relevant issues and provide victim support, mobilizes the public to join the fight for victim's rights, with a view to restore a life of confidence and dignity to the victims. In 2000, ACSVAW set up RainLily—the first ever one-stop sexual violence crisis centre in Hong Kong—to provide all-round services for survivors of sexual violence.

In recent years, we notice increasing prevalence of **image-based sexual violence**, including non-consensual taking, distribution and selling of intimate images, threats to distribute intimate images, and creating fake pornography ('deepfake'). We conducted a survey in 2019 on public's experiences of image-based sexual violence and published ***Survey Report on Image-based Sexual Violence*** in March, 2020 (see Appendix). Results show that image-based sexual violence brings lifelong trauma to victims. For victims who muster up and report, a majority of them were snubbed by the police, who often excuse themselves for having 'no legislation in place' to initiate investigation. Most respondents opine that it is necessary to legislate specific offences against image-based sexual violence.

We support the Security Bureau's proposals to create the offences set out in the Consultation Paper, subject to our specific responses stated below in **Section A** of this document. However, in order to fully address the myriad forms of image-based sexual violence, we contend that there is an urgent need to penalize the act of 'threatening to distribute intimate images', provide injunctive sanction against such act, and court orders for removal of images. **ACSVAW proposes to introduce a new offence on 'threatening to distribute intimate images' and relevant interim and removal orders**, further elaborated in **Section B** of this document. We hope the Government will adopt our views and carry out the legal reforms as soon as possible.

# Section A

Our Further Responses to Proposals in the Consultation Paper

## Responses to Proposals 1 and 2: Voyeurism and Intimate Prying

**Here are our further responses to Questions 1 and 2.**

1. We suggest that there should be one single offence with the maximum penalty of 5 years' imprisonment to penalize the acts of "voyeurism" (Proposal 1) and "intimate prying" (Proposal 2), regardless of purpose. The reasons are as follows.

2. ***Motive or purpose of perpetrator irrelevant.*** The motive or purpose of the perpetrator, whether for sexual gratification or not, is irrelevant to the gravamen of the offence. The gravamen of a sexual offence that is based on sexual autonomy[1] is usually of two parts: (a) non-consensual (b) intrusion of a sexual nature. Examples of such intrusion by *physical* contact include sexual assault (previously known as "indecent assault") and sexual assault by penetration (previously "rape"). The new offences proposed in the Consultation Paper purport to penalize *non-physical* intrusions of a sexual nature. The underlying principle of these offences is respect to one's sexual autonomy: all acts with a sexual denotation, physical or non-physical, should never be forced upon.

3. We submit that the issue is always, and should always be, whether *the complainant's* sexual autonomy has been violated. That is, whether there has been a sexual intrusion, physical or non-physical, and whether the complainant has given consent. These would sufficiently constitute the basis and elements of a sexual offence. It is neither conducive nor meaningful to divert the spotlight of inquiry towards *the perpetrator*, or to trace the motive or purpose of the perpetrator's conduct, for that could be wide-ranging and frivolous: out of curiosity, excitement to violate the law, retaliation, shaming of the victim, profit, or—sexual gratification. One may appropriate or weaponize sex for a million reasons; but the wrong is never in the purpose, it is in the very act of such appropriation or weaponization.

4. ***Other purposes are no less than a sexual purpose.*** To create two disparate classes of offences, merely by the distinction of sexual gratification, will lead to a foreseeable moot point in trial: is the defendant's conduct for satisfying

[1] In the Law Reform Commission's *Report on Review of Substantive Sexual Offences* (dated December 2019), sexual offences are classified into three categories: (1) offences based on sexual autonomy; (2) offences based on the protective principle; and (3) offences based on public morality (paras. 1.15-1.19). The new offences proposed in this Consultation Paper, would arguably fall under the first category.

his/her/their own subjective sexual desire, or something else? Such inquiry is not meaningful—why is it more blameworthy if one does that for private sexual consumption? Yet again, the overarching wrong, is always the *appropriation or weaponizing of sex* to benefit oneself or to harm others, which can be achieved out of a sexual or non-sexual motive, damage done by one is no graver than the other.

5. Did a group of bullies, who watched the victim shower on livestream from another room, allegedly out of mischief and shaming, commit a crime less wrong than people who admittedly did the same for sexual desire? Why should an offender, backed by a psychiatric report stating that he/she/they broke the law for pathological thrill, get away with a graver offence? What is the reason for disparage in treatment? These futile threads of inquiries in court stray away from the true focus, which should be on the complainant—whether he/she/they have been non-consensually and sexually violated.

6. ***Level of culpability can be reflected in sentencing.*** To put down in black and white that "to obtain sexual gratification" attracts graver penalty than other purposes, alludes that "sexual gratification" is a meaningful "blameworthiness calibrator" of the array of purposes that can emerge, while it is not. Examples above demonstrate how non-sexual purposes can be as shaming and harmful, if not more shaming and harmful in some cases. The relative culpability behind each motive or purpose can instead be sufficiently reflected in the mitigation and sentencing process, tailoring to each case's specific factual matrix.

7. ***No requirement of sexual gratification in existing sexual offences.*** The offences of "sexual assault" and "sexual assault by penetration" require no proof of sexual gratification on the part of the perpetrator. In the case of sexual assault, the element to prove is on whether the act is "sexual", not whether it's for "sexual gratification". In the case of the new offences proposed in this Consultation Paper, the requirement that some "intimate act" or "intimate parts" have been pried or photographed, has already sufficiently imbued a sexual element to the offences. The extra proof of "sexual gratification" is not a necessary indicator in establishing a sexual offence.

8. ***Evidential hurdle in proving sexual gratification.*** The prosecution has to prove beyond reasonable doubt that the defendant committed the offence for subjective sexual gratification. Or, the court has to draw the only irresistible inference. For the wide-ranging possible purposes listed above, it may not be too difficult to raise

a reasonable doubt. Sexual gratification is also hard to define. It will be rather hard to collect relevant circumstantial evidence; the most concrete evidence will inevitably come from an admission. We have looked into English case law on "sexual gratification", and also the latest UK *Archbold*, the leading authority on criminal law, both avenues provide no definition, except that in *R. v Abdullahi* [2006] EWCA Crim 2060, it is ruled that "the defendant's purpose could be any form of sexual gratification and it did not matter whether it was short-term or long-term, immediate or deferred, or immediate and deferred" (para. 17); and in *R v Court* [1989] AC 28, the court took the approach that indecent intention can be inferred from the circumstances. In other words, it requires some guesswork and pick-and-choose of evidence from the bench.

9. ***Putting the defendant's sexual identity and orientation at trial.*** It is highly foreseeable that the perpetrator's sexual orientation will be a contentious issue at trial. For example, a man who surreptitiously observes a woman in shower may raise the defence that he is gay, and therefore impossible to obtain sexual gratification from the prying. The prosecution will inevitably need to challenge his evidence by suggesting that he's not telling the truth. By present day's standard, such line of inquiry is considered intrusive to one's private life. It also defies the concept that a person's sexual orientation and identity may be fluid, and such inquiry is unfair to a defendant who embraces a fluid sexual orientation and identity. If the law recognizes that non-consensual intimate prying is a wrong, does it matter if, say, a man is pried by another straight, gay, bisexual, pansexual, asexual, or transgender man, or even an intersex person? The law may intend to penalise sexual disorders or sexually deviant behaviour, but as discussed above, the harm and danger of such behavior for non-sexual purposes can be as grave; and an offender of the later type is no less a sexual predator because it is the *appropriation or weaponizing of sex* to benefit oneself or to harm others that truly defines a sexual predator. **By suggesting to do away with the sexual gratification requirement, we are not downplaying the gravity of a wrongful act for one's sexual desire, instead, we are emphasizing that appropriation or weaponizing of sex for non-sexual purposes are equally damaging and blameworthy.**

10. ***Lack of convincing justification for the sexual gratification element.*** With due respect, a careful inspection of the Law Reform Commission's *Report on Voyeurism and Non-Consensual Upskirt-Photography* dated April 2019 and *Report on Review of Substantive Sexual Offences* dated December 2019 reveal

little or no justification on introducing a purpose element to the voyeurism offence, and there was almost no discussion or analysis on the necessity of the same. It seems that the proposed offences are modelled after those in overseas jurisdictions without detailed analysis on the rationales behind.

11. The explanatory notes[2] accompanying section 67 of the *Sexual Offences Act 2003* (England and Wales), on the offence of Voyeurism, did not illustrate the rationale behind the need for a sexual gratification. That of the New Zealand and New South Wales equivalents are also unclear. The relevant discussion in the Scottish Parliament[3] offers no explanation on the sexual gratification requirement.

12. Rather, some guidance might be sought in the Canadian Consultation Paper: Voyeurism as a Criminal Offence. In Part One of the Paper[4], under the heading "Defining Voyeurism", a "voyeur" is, defined under the *Canadian Oxford Dictionary*, as "a person who derives sexual gratification from the covert observation of others as they undress or engage in sexual activities". The need for an element of sexual gratification follows from this purely lexical and literary interpretation of the word "voyeur".

13. In Part Two[5] of the same paper, under the heading "Rationale", the policy rationale is set out as follows:

> "The policy intent is to create two alternative ways in which a criminal voyeurism offence could be committed. The first branch of the offence would involve surreptitious viewing or recording of another person for a sexual purpose while that person is in a place and in circumstances where there is a reasonable expectation of privacy. By this formulation of the offence, as long as the viewing or recording is done for a sexual purpose, it does not matter whether or not the victim was naked, engaged in explicit sexual activity, etc. when the viewing or recording took place. The second branch of the offence would recognize that it may be difficult to establish that the viewing or recording was done "for a sexual purpose" in circumstances where the victim

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[2] https://www.legislation.gov.uk/ukpga/2003/42/notes/division/5/1/53

[3] Scottish Parliament Justice Committee, Official Report of Meeting 17 March 2009 (Consideration ofamendments, Day 1) see: http://archive.scottish.parliament.uk/s3/committees/justice/or-09/ju09-0902.htm

[4] Department of Justice, Canada (2015). Voyeurism as a Criminal Offence: A Consultation Paper. See: https://justice.gc.ca/eng/cons/voy/part1_context.html#def

[5] Department of Justice, Canada (2015). Voyeurism as a Criminal Offence: A Consultation Paper. See: https://justice.gc.ca/eng/cons/voy/part2_crim.html

and the offender do not have physical contact. This formulation recognizes that the viewing or recording may be done for other purposes, such as to generate visual representations for commercial sale, to harass or intimidate the victim, or to amuse others at the victim's expense. If the policy rationale for the creation of an offence is to protect persons from sexual exploitation, it can be argued that this rationale is relevant whether the accused committed the offence for a sexual purpose or for some other purpose. As with the first branch of the voyeurism offence, the Crown would have to prove beyond a reasonable doubt that the viewing or recording was done surreptitiously, in circumstances where the victim had a reasonable expectation of privacy. In the second branch of the criminal voyeurism offence the mental element and the physical element of the offence would "match up" in the sense that the viewing or recording would have to have been done for the purpose of viewing the victim in a state of nudity, or undress where the breast, sexual organs or anal region are exposed, or while the victim is engaged in explicit sexual activity. Furthermore, the actual observations or recordings of the victim must also have captured the victim in one of the physical states mentioned in the offence or engaged in explicit sexual activity. Both branches of the criminal voyeurism offence, therefore, would create specific intent offences."

14. In other words, the Canadian policy rationale is that some "sexual" nature has to be proved; therefore, in the case where a sexual purpose is present, the victims does not have to be exposed or engaging in a sexual activity; but in the case where the victim is in a state of nudity or undressing, or engaging in a sexual activity, a sexual purpose is not necessary.

15. The proposed Hong Kong model is different in this regard—as aforementioned, the elements of "intimate parts" or "intimate act" already imbue a sexual nature to the prying. Therefore, non-physical intrusion is not any less sexual than a physical one. In some cases of sexual assault (formerly known as indecent assault), it may be even harder to prove a sexual nature if the touching seems innocuous.

**Here is our further response to Question 3.**

16. We agree with the proposed scope of acts for Proposals 1 and 2.

## Responses to Proposals 3 and 4: Non-consensual Photography of Intimate Parts

**Here are our further responses to <u>Questions 4 and 5</u>.**

17. We suggest that there should be one single offence with the maximum penalty of 5 years' imprisonment to penalize non-consensual photography of intimate parts, for sexual gratification (Proposal 3) or otherwise (Proposal 4), for reasons illustrated in paras. 2-15 above.

18. Additionally, the element of 'to obtain sexual gratification' as a purpose is not necessary for constituting similar offences in some overseas jurisdictions, such as New Zealand, Australian Capital Territory New South Wales, Victoria, South Australia and Queensland (see **Table 1** Comparison of offences of voyeurism and non-consensual photography of intimate images of overseas jurisdictions, on pp.14-15).

**Here are our further responses to <u>Question 6</u>.**

19. We think that the proposed scope of acts for Proposals 3 and 4 is too narrow, because it fails to cover the act of 'down-blousing'. Below are our arguments for supporting the inclusion of 'down-blousing'.

**Here are our further response to <u>Question 7</u>, concerning down-blousing.**

20. We are of the opinion that the offence of non-consensual photography of intimate parts should cover 'down-blousing'. In our experience, the seriousness of 'down-blousing' is the same as recording intimate image beneath one's clothing (i.e. 'upskirt photography'). Different from the Government's views, we notice that the calls for criminalizing 'down-blousing' are as strong as criminalizing 'upskirt photography'. One female interviewee of *Survey Report on Image-based Sexual Violence* (see Appendix), Florence[6], who experienced 'down-blousing' and a stranger taking photo of her breasts in a public occasion, expressed tremendous distress as she felt a loss of control over her bodily expression and sexual autonomy:

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[6] Pseudonym

*Case study: down-blousing*

Florence, who experienced 'down-blousing' with someone taking photos of her breasts in public places, her images were later uploaded onto and circulated on social media sites. Through the sneak shots, the perpetrator attempted to portray Florence as someone who shows off her breasts on purpose, intentionally solicits attention to her breasts by wearing a spaghetti strap dress and deliberately leans down to attract people filming her.

She saw for herself how her body expression was arbitrarily distorted while the photos were circulated, but she was unable to do anything about it. Florence expressed that the perpetrator deprived her of the right to express and control her body.

Source:
*Survey Report on Image-based Sexual Violence* (ACSVAW 2020) (see Appendix)

21. The Government put forward in the Consultation Paper (on p.7) that the definition of 'down-blousing' is unclear such that it will constitute a barrier in law enforcement. However, we take the view that the definition is clear, because one of the elements is the *recording of image is taking place in circumstances where the intimate parts would not otherwise be visible to the public*. If someone(A) takes picture of another person's(B) breasts from the top angle such that A can view the part of breasts that B does not suppose others could see and above all, B does not consent to A's act, then it will fall into the definition of non-consensual 'down-blousing'.

## Responses to Proposals 5 and 6: Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images

**Here are our further responses to Questions 8 and 10.**

22. We agree with the introduction of the offence against the distribution of surreptitious intimate images (Proposal 5).

23. We agree with the introduction of the offence against the non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (Proposal 6).

**Here are our further responses to Questions 9 and 11, concerning the scope of act of Proposals 5 and 6.**

24. For the proposed scope of act for Proposals 5 and 6, it is too narrow. We propose to the Government that the offence should extend its scope to cover distribution of pornographic or sexually explicit images that have been photoshopped, where a victim's head being pasted on to a commercially produced pornographic image. The definition of 'intimate image' of overseas jurisdictions, such as New South Wales[7] and Queensland[8] of Australia, includes images that have been altered to appear to show a person's private parts or show a person engaged in a private act. Therefore, we suggest the offences of Proposals 5 and 6 should also cover distribution of 'deepfake' pornography or photoshopped explicit images.

25. For the proposed scope of act for Proposal 6, we recommend that it be extended to cover distribution of intimate images which show the victim's *intimate parts,* in addition to 'images showing the victim doing an intimate act' as stated in the Consultation Paper.

26. Furthermore, we suggest extending the proposed scope of acts for both Proposals 5 and 6 by including the act of 'threatening to distribute intimate images', referencing section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016[9]. **Legislation of new offence on 'threatening to distribute intimate**

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[7] Section 91N Definitions of Division 15C Recording and distributing intimate images, *Crimes Act 1900 No 40 (NSW)*

[8] Section 207A Definitions of Chapter 22 Offences against morality, *Criminal Code Act 1899 (Qld)*

[9] Note: the name of the section is 'Disclosing, or threatening to disclose, an intimate photograph or film'

**images'** of Section B entails our detailed submission in this regard.

**Here are our further responses to Questions 12 and 13.**

27. For Proposal 6, we agree that the offence should be constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent.

28. For Proposal 6, we agree that the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress.

## Responses to the definitions of Intimate Acts and Intimate Parts

**Here are our further responses to Questions 14 to 16.**

29. We take the view that "intimate acts" should mean acts, in a place which would reasonably be expected to provide privacy, by a person when the person's intimate parts are exposed or covered only with underwear. Instances of a person changing clothes, showering or bathing also be included in the definition.

30. We agree that "intimate parts" should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear.

31. We agree that the definition of "intimate parts" should include breasts and chest, *irrespective of gender,* including men, women, transgender people, intersex people, etc. in alignment with "gender neutrality" principle laid down by the Law Reform Commission. We suggest that the wording of the legislation should be gender-neutral as well as sensitive to people of non-binary gender identity. Para.20 of the above illustrates the reasons for covering non-consensual observation and/or photography of one's breasts by presenting its harms done to victims.

## Responses to Proposal 7: Defence(s)

**Here are our further responses to Question 17.**

32. We agree that a defence of lawful authority or reasonable excuse should be provided for the proposed offences under Proposals 2, 4, 5, 6. But we emphasize

that it is important to craft such provision with great care so that only the most compelling and justifiable circumstances can be excused; because above all, a person's consent is at the heart of the entire debate. To override a person's consent requires the most compelling justification and utmost scrutiny by the court.

**Here is our further response to <u>Question 18</u>.**

33. We are of the view that the proposed offences should encompass all purposes and make no distinction for an offence committed for sexual gratification. Therefore, we are of the view that the defence provision should be open to the offences committed regardless of purposes. It will however be quite clear that logically, someone who commits the offence out of sexual gratification would not, at the same time, be doing the act with lawful authority or reasonable excuse.

**Here is our further response to <u>Questions 19.</u>**

34. Specific defences to be provided could be made reference to section 221BD (3) of the Criminal Code of Western Australia, Australia.

## Responses to Proposal 8: Sexual Conviction Record Check Scheme

**Here is our further response to <u>Question 20</u>.**

35. We take the view that the *all* proposed offences under Proposals 1 to 6 should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme.

**Table 1** Comparison of offences of voyeurism and non-consensual photography of intimate images of overseas jurisdictions

| | | **Offence(s)** | **Obtaining sexual gratification required as an element** |
|---|---|---|---|
| **England and Wales** | | Voyeurism[10]<br>Voyeurism: Additional offences[11] | For the purpose of obtaining sexual gratification and humiliating, distressing or alarming B |
| **Scotland** | | Voyeurism[12] | For the purpose of obtaining sexual gratification and humiliating, distressing or alarming B |
| **New Zealand** | | Prohibition on making intimate visual recording[13] | ✗ |
| **Australia** | **Australian Capital Territory** | Intimate observations or capturing visual data etc[14] | ✗ |
| | **New South Wales** | Voyeurism[15];<br>Filming a person engaged in private act[16];<br>Filming a person's private parts[17] | For the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification |
| | | Record intimate image without consent[18] | ✗ |

[10] *Sexual Offences Act 2003,* s 67
[11] *Sexual Offences Act 2003,* s 67A
[12] *Sexual Offences (Scotland) Act 2009*, s 9
[13] *Crimes Act 1961 (New Zealand)*, s 216H
[14] *Crimes Act 1900 (Australian Capital Territory)*, s 61B
[15] *Crimes Act 1900 (NSW)*, s 91J
[16] *Crimes Act 1900 (NSW)*, s 91K
[17] *Crimes Act 1900 (NSW)*, s 91L
[18] *Crimes Act 1900 (NSW)*, s 91P

| | | Offence | Obtaining sexual gratification required as an element |
|---|---|---|---|
| **Australia** | **Victoria** | Observation of genital or anal region[19]; Visually capturing genital or anal region[20] | ✗ |
| | **South Australia** | Indecent filming[21] | ✗ |
| | **Queensland** | Observations or recordings in breach of privacy[22] | ✗ |

[19] *Summary Offences Act 1966 (Victoria)*, s 41A
[20] *Summary Offences Act 1966(Victoria)*, s 41B
[21] *Summary Offences Act 1953 (South Australia)*, s26D
[22] *Criminal Code Act 1899 (Queensland)*, s 227A

# Section B

Further views on

Legislation of new offence on 'threatening to distribute intimate images'; Interim and image-removal orders made by the Court

## Legislation of new offence on 'threatening to distribute intimate'

36. It is noted that the act of 'threatening to distribute intimate images' is not included in the proposed offences of the Consultation Paper and we propose to the Government the introduction of a new offence of 'threatening to distribute intimate images'.

**The inseparable nature of 'threatening to distribute intimate image' and non-consensual taking and distributing intimate images**

37. According to the service data of RainLily, it came to our attention that victims who suffered from non-consensual taking or distribution of intimate images usually succumb to threats to distribute intimate images at the same time. Among the three kinds of image-based sexual violence, the most common form is non-consensual *taking* of intimate images, followed by threats to distribute and non-consensual distribution sequentially. **In other words, threatening to distribute intimate images is more ubiquitous than distribution.** In some cases, it is unclear if the perpetrator does take hold of the intimate images—the victim, being in an intimate relationship with the perpetrator, cannot be sure if any intimate images had been taken unbeknownst to him/her/them.

38. The same pattern is also observed in the survey results published in the *Survey Report on Image-based Sexual Violence* ('the survey report') (ACSVAW, 2020) (see Appendix). It is found that non-consensual taking of intimate images and observation of private acts were the most common and then followed by threats or blackmail to distribute intimate images.

**Table 2** Image-based sexual violence experienced in the past 3 years (N=206) (multiple choices allowed)

| Type of image-based sexual violence | Frequency |
|---|---|
| Intimate images being taken without consent | 151 |
| Private acts being observed without consent/voyeurism | 82 |
| Threatened or blackmailed with distribution of intimate images | 62 |
| Intimate images being distributed without consent | 60 |
| Intimate images being stolen | 44 |
| Hidden cameras uncovered | 25 |
| Sexualised photoshopping | 16 |
| Source: *Survey Report on Image-based Sexual Violence* (ACSVAW, 2020)(see Appendix) | |

39. The victims' experience where non-consensual *taking*, non-consensual *distribution* of intimate images and *threatening* to distribute intimate images are happening as continuous events, is theorized to be a continuum of practices that form the concept of 'image-based sexual abuse' (McGlynn et al. 2017, p.27). Addressing them as a 'continuum' is to reveal the common characters

underpinning these seemingly disparate phenomena, which are coercion, intimidation, abuse, threat and force used to manipulate victims, and to also emphasize the close connections among the acts such that they are 'a series of elements or events that pass into one another and which cannot be easily distinguished' (Kelly 1988, p.76).

40. Therefore, not criminalizing the act of threatening to distribute intimate images fails to adequately address the breadth of the victim's experience. It fails to offer comprehensive protection to victims such that they are unable to seek help from the judicial system when they face destructive threats from perpetrators.

**Harms of 'threatening to distribute intimate image' from a victim's perspective**

41. Before the actual distribution of the intimate images, perpetrators often exert threats for a persisting period of time in order to impose control, manipulate, intimidate, harass and/or blackmail the other person. Threatening to distribute intimate images is a common means to force the person to stay in a violent relationship and compel them to acquiesce to unreasonable demands.

42. In our experience, the harms and fears caused by the threat to distribute intimate images are as significant as actual distribution. The destructive power of threats and extortion on a person's life cannot be overlooked. In the survey report, which included in-depth interviews with victims who experienced the threats to share intimate images, shows that perpetrators are often known to the victims, such as their intimate partners. In our observation, the perpetrators' motives are usually unrelated to sexual desires, but often arise out of the desire to control and dominate their partners. By using intimate images as a tool of control, perpetrators manipulate their partners by threatening to spread their intimate images to their families and friends.

43. One interviewee of the survey report, Rain,[23] received threats from her ex-partner to spread her intimate videos her friends and family, if not, to the internet. Rain's case demonstrates a typical scenario for victims of coercions of such nature: they live in constant fear and yet feel utterly powerless in stopping the perpetrator or seeking help from a third party:

> *Case study: threats to distribute intimate images*
>
> Rain received threats from her ex-partner to post her intimate videos to a social media page related to the company she works for and to send the videos to her close friends, in order to ruin Rain's reputation. In face of such extortion, Rain was worried that any tiny act of hers may trigger her ex-partner and that he really would send the photos to her colleagues. Therefore, Rain succumbed to the unreasonable requests from her ex-partner for more than half a year.
>
> Since then, Rain was reluctant to join gatherings organized by her friends for a long period of time, worrying that her friends might suddenly tell her that they had received her nude photos from an unfamiliar Facebook account. Rain was also afraid of going to the internet, fearing that she might see her own nude images when browsing certain websites.
>
> Source:
> *Survey Report on Image-based Sexual Violence* (ACSVAW 2020) (Appendix)

44. Intimate images are like ticking time bombs that haunt every second of the victims' lives. The fact that the images may be distributed at any time exerts immense pressure on the victims. Like the dilemma faced by Rain, the victims are often too afraid to take any actions because they fear any resistance may agitate the perpetrators, and they would put the threats into action and distribute the images for real. Once the images are uploaded onto the internet or sent to others' phones, it is virtually impossible to completely remove the relevant images and the victims therefore feel that things are irreversible.

45. The genuine stress caused by these threats may paralyze the lives of the victims, causing them to lose their jobs and unable to support their living, and worse still, severely affect their mental wellbeing. According to the survey report, among those who reported to have experienced threats of distributing intimate images, 63% reported feelings of helplessness and alarmingly, 29% of them 'had the thought of committing suicide or had committed suicide' (ACSVAW, 2020). The impacts of threatening to distribute intimate images must not be underestimated.

**Necessity to introduce a specific offence**

46. It is necessary to create a specific offence against the act of 'threatening to

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[23] Pseudonym

distribute intimate image' for the following reasons.

47. ***Existing criminal offences are insufficient to address the situation.*** Currently, instances of threatening to distribute intimate image may be prosecuted under the offences of 'blackmail' (Section 23 of the Theft Ordinance), 'criminal intimidation' (Section 24 of the Crimes Ordinance) and 'procuring another person to do an unlawful sexual act by threats or intimidation' (Section 119 of the Crimes Ordinance). However, these three offences are coined in general and broad terms, not specifically intended nor envisioned to deal with threats to distribute intimate images. This leads to the following problems: no suitable legal remedies in place to deal with the harm of distribution, and defendants convicted of these existing offences will not be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme.

48. ***Incentivizing police investigation.*** The survey report investigates an example of threat to distribute intimate images in which the victim reported to the police after being threatened by his ex-partner. However, the police refused to follow up and even persuaded him to find a way to deal with it on his own and via interpersonal negotiations (ACSVAW, 2020) (see Section 4.5.of the survey report of Appendix). Without specific laws in place, the police might not be aware of the severity of such behavior and would simply classify these incidents as private disputes. They believe that private disputes are not be resolved by resorting to the judicial system, rather, communication and reconciliation on a personal level is sufficient. An offence for threats to distribute intimate images in criminal system will provide a pivotal guidance to police in addressing the severity of the act and enhance their incentive in initiating investigation.

49. ***Clear message of deterrence to the public.*** Creating an offence of threatening to distribute intimate images will have a deterrent effect as it sends a clear message that such behavior is no longer tolerated or considered a grey area of the law, but is instead criminalized by the laws of Hong Kong. Labelling it as a legal wrong in a clear way would deter the public from committing such act and reduce crimes.

50. ***Keeping up with overseas standards.*** There is already a global trend to legislate against threats to distribute intimate images in many overseas jurisdictions, and Hong Kong is recommended to keep up with overseas practices. Common law jurisdictions, including Scotland, New Zealand and six states of Australia, have already established specific offences targeting threats to distribute intimate images without consent (see **Table 3** Offence against 'threats to distribute intimate images' of overseas jurisdictions):

**Table 3** Offences against 'threats to distribute intimate images' in overseas jurisdictions

| Jurisdiction | Offence |
|---|---|
| Scotland | *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*<br>Section 2 Disclosing, or threatening to disclose, an intimate photograph or film |
| Australian Capital Territory, Australia | *Crimes Act 1900* (Australian Capital Territory)<br>Section 72E Threaten to capture or distribute intimate images |
| New South Wales, Australia | *Crimes Act 1900 No. 40* (NSW)<br>Section 91R Threaten to record or distribute intimate image |
| South Australia, Australia | *Summary Offences Act 1953* (SA)<br>Section 26DA Threat to distribute invasive image or image obtained from indecent filming |
| Queensland, Australia | *Criminal Code Act 1899* (Qld)<br>Section 229A Threats to distribute intimate image or prohibited visual recording |
| Victoria, Australia | *Summary Offences Act 1966* (Vic)<br>Section 41DB Threat to distribute intimate image |
| Northern Territory, Australia | *Criminal Code Act 1983* (NT)<br>Section 208AC Threaten to distribute intimate images |
| New Zealand | *Harmful Digital Communications Act 2015* (NZ)<br>Principles 1- 5 |

51. Governments around the world have long been aware of its prevalence and make legal remedies available to tackle intimate image extortion. It is therefore necessary for the law in Hong Kong to keep up with the latest global developments. The following part will illustrate our concrete recommendations for the legislation.

**Our recommendations for the legislation**

52. With reference to the relevant offences in overseas jurisdictions listed in Table 3, we propose two ways for Hong Kong to legislate for threatening to distribute intimate images:

    (1) First, to **extend the proposed scope of acts for proposals 5 and 6** of the Consultation Paper (i.e. Non-consensual Distribution of Intimate Images) by including the act of threatening to distribute intimate images, referencing section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

    (2) Second, to **create a standalone offence** against threatening to distribute intimate images, referencing section 208AC of Criminal Code Act 1983 of Northern Territory, Australia.

<u>Scotland</u>

Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016:
*'A person ("A") commits an offence if—*

*(1) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation,*
*(2) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and*
*(3) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.'*

Northern Territory, Australia

Section 208AC of the Criminal Code Act 1983 (NT):
*'(1) A person commits an offence if the person:*
*(a) intentionally threatens to distribute an intimate image of another person; and*
*(b) intends the other person to fear that the threat would be carried out.*
*(2) In a prosecution for an offence against this section:*
*(a) a threat may be made by any conduct, whether explicit, implicit, conditional or unconditional; and*
*(b) it is not necessary to prove that the other person actually feared that the threat would be carried out; and*
*(c) a person may be found guilty even if carrying out the threat is impossible.*
*Examples for subsection (2)(c)*
*1 The image does not exist*
*2 Technical limitations prevent the person from distributing the image'*

53. Whether or not 'threatening to distribute intimate image' is established as a standalone offence or incorporated into the scope of the offences under Proposals 5 and 6, we recommend following the framework of the *Criminal Code Act 1983* of Northern Territory, Australia because: 1) it contains detailed provisions on the definition of threat; 2) it provides threats can be carried out whether or not the image exists and; 3) there is no requirement to prove whether the victim actually feared that the threat would be carried out.

54. It is crucial to have an inclusive definition of threat such as that of Northern Territory's, i.e. the threat can be verbal or physical, explicit or implicit, and conditional or unconditional because it encompasses all types of threats and leaves no grey area for dispute. The offence should apply regardless of whether the intimate images exist or not: in our dealings with cases involving threats to distribute intimate image, it is true that some do not know whether or not the intimate images are actually in existence, especially in situations where the perpetrator threatened to share images that are filmed without the person's knowledge. As the intention to cause fear is an important element in establishing culpability, the focus should not be on whether the intimate images actually exist, but whether the perpetrator intends to cause harm.

55. Furthermore, we also recommend following the Abusive Behaviour and Sexual

Harm (Scotland) Act 2016 and include an element of recklessness – *'by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress'* – as the *mens rea* element of this particular offence. The inclusion of reckless intention will thus be able to encompass situations where the perpetrator may not intend to make a threat, but ought to know he/she/they has made one.

## Interim and image-removal orders made by the Court

56. We are of the opinion that the Court should be able to order an individual to remove the relevant images, if he/she/they is found guilty of an offence against voyeurism, intimate prying, non-consensual photography of intimate parts, non-consensual distribution of intimate images and threatening to distribute intimate images. The Court should also have the power to order the online content host to take down the images. A failure to comply with the order by the convicted person should be enforceable.

### Importance of Court-mandated removal of intimate images and interim orders

57. For victims who experienced intimate image sexual violence, the source of their worries stems from the existence of the images. As long as the images are still in the perpetrator's possession, the victim will live in perpetual fear. The distress will not dissipate until the image is deleted or destroyed.

58. For victims whose intimate images were distributed to the internet or sent to the others, they are terrified that the images will be re-posted by netizens and circulated widely. While victims can request the online content hosts to take down the images, the hosts still have the discretion to decide whether or not to take down the images. Therefore, it is of paramount importance for the Court to intervene in this process. The Court should be empowered to make orders to remove the intimate images in order to minimize the traumas suffered by the victims and offer meaningful protection to them.

59. It should be noted that the criminal proceedings can be lengthy, and the publicity of a criminal case can bring further harm to the victim if he/she/they have no relief to take down the intimate images pending trial. To provide comprehensive protection to the victim, interim orders should also be available.

### Similar provisions in overseas jurisdictions

60. There are similar provisions regarding orders of removal and takedown in overseas jurisdictions such as New Zealand and Queensland, which are of probative value to Hong Kong.

61. Section 19 of the *Harmful Digital Communications Act 2015* (HDC Act) of New Zealand provides that the court has power to make orders against the defendant:

    <u>New Zealand</u>

    Section 19 of the HDC Act (NZ) outlines a variety of orders that can be made by the court against a defendant:

    '*(a) an order to take down or disable material:*

    *(b) an order that the defendant cease or refrain from the conduct concerned:*

*(c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual:*
*(d) an order that a correction be published:*
*(e) an order that a right of reply be given to the affected individual:*
*(f) an order that an apology be published.'*[24]

62. Section 19 of the HDC Act (NZ) also empowers a court to make the following orders against an online content host:
*'(a) an order to take down or disable public access to material that has been posted or sent:*
*(b) an order that the identity of the author of an anonymous or pseudonymous communication be released to the court:*
*(c) an order that a correction be published in any manner that the court specifies in the order:*
*(d) an order that a right of reply be given to the affected individual in any manner that the court specifies in the order.'*[25]

63. Non-compliance with the a court order will commit an offence and the offender is liable on conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding $5,000 for a natural person and a fine not exceeding $20,000 for a body corporate.[26]

64. Section 18 of the HDC Act (NZ) provides for the court to grant interim orders for relief set out in section 19.
*'18 Interim orders*
*(1) The District Court may, if the court considers it is desirable to do so, grant any interim orders pending the determination of the application for orders under section 19.*
*(2) An interim order under this section may do anything that may be done by order under section 19 and expires when the application under that section is determined.'* [27]

65. In Queensland, section 229AA of the Criminal Code Act 1899 (Qld) provides a rectification order in which the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image, if the person is convicted of an offence against non-consensual distribution of intimate images, observations or recordings in breach of privacy and threats to distribute intimate image:

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[24] *Harmful Digital Communications Act 2015 (NZ)*, s 19(1)
[25] *Harmful Digital Communications Act 2015 (NZ)*, s 19(2)
[26] *Harmful Digital Communications Act 2015 (NZ)*, s 21
[27] *Harmful Digital Communications Act 2015 (NZ)*, s 18

Queensland, Australia

*'229AA Rectification order*

*(1) If a person is convicted of an offence against section 223 (1) [Distributing intimate images], 227A (1) or (2) [Observations or recordings in breach of privacy], 227B (1) [Distributing prohibited visual recordings] or 229A (1) or (2) [Threats to distribute intimate image or prohibited visual recording] the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording involved in the offence within a stated period.*

*(2) A person who fails to comply with an order made under subsection (1) commits a misdemeanor*

*Maximum penalty—2 years imprisonment.'*[28]

66. However, the rectification order in Queensland applies to the convicted person only, but not the online content host. The HDC Act (NZ), therefore, includes a more comprehensive set of orders targeting both the defendant and the online content host and the interim orders to be made by the court. Below are our recommendations for the constituents of the image-removal orders and interim orders, made by the Courts in Hong Kong.

**Orders can be made by the Court**

67. The order should include a time frame (such as three weeks) in which the defendant must take action to remove the images distributed without consent. Whether the defendant has taken actions to remove the images should have bearing on sentencing. In other words, non-compliance with a court order may lead to heavier penalty or amount to a further offence, similar to the Queensland Act and the HDC Act (NZ). Sanctions for non-compliance should be stated in the order as a warning to the perpetrators of the consequences for failure to comply.

68. The HDC Act (NZ) empowers the Court to make orders against an online content host, including takedown or disabling public access to the material. We are of the opinion that Hong Kong Courts should have the same power because it can effectively cease the online circulation of the intimate images shared without consent. Some victims may find it empowering to take the initiative to contact websites and social media platforms to request the removal of images distributed without consent. The Court should therefore support these victims in this process by handing them an enforceable order to compel takedowns of the intimate images from websites.

69. We concern, the criminal proceedings are lengthy, and the publicity of a criminal

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[28] *Criminal Code Act 1899 (Qld),* s 229AA

case can bring further harm to the victim if he/she/they have no relief to take down the intimate images pending trial. To provide comprehensive protection to the victim, interim orders should also be available. In this regard, we recommend Hong Kong make reference to Section 18 of the HDC Act (NZ) in this regard.

## References

Association Concerning Sexual Violence Against Women (ACSVAW). (2020). *Survey Report on Image-based Sexual Violence*. (see Appendix) https://rainlily.org.hk/publication/2020/ibsvsurvey

Kelly, Liz. (1988). *Surviving sexual violence*. Cambridge: Polity Press

McGlynn, C., Rackley, E., Houghton, R. (2017). 'Beyond 'Revenge Porn': the continuum of image-based sexual abuse'. *Feminist legal studies*, 25(1). pp.25-46. https://doi.org/10.1007/s10691-017-9343-2

# Appendix: *Survey Report on Image-based Sexual Violence*

# 影像性暴力經驗調查報告

Survey Report on
Image-Based Sexual Violence

2020年3月

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

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# 前言

關注婦女性暴力協會鼓勵更多幸存者打破沉默，讓社會人士更關注婦女遭受性暴力的問題，我們分別成立服務單位風雨蘭（全港首間性暴力危機中心），以及教育中心，分別在校園及社區推動社會關注性暴力議題。

近期冒起的性暴力問題—**影像性暴力**—備受社會關注，影像性暴力的獨特之處在於受害人的私密影像可能會被繼續散佈，在網絡上永久留存，而受害人即使報警，在未有法律規範下，至今仍無法阻止私密照在網上停止散佈。為了堵塞法例的漏洞，我們於2018年將建議書遞交法律改革委員會（法改會），建議政府在訂立窺淫罪之上，補足有關漏洞：即是針對未經同意下，為了性目的而對另一人進行視像記錄的行為刑事化。去年，我們又與法律界人士、社福團體、以及商業團體舉辦多個研討會，促使政府盡快修例。在我們努力下，法改會於2019年就「窺淫及未經同意下拍攝裙底」發表報告，加快立法進程。

教育方面，很多人對影像性暴力的問題認知不足，特別是當遇到影像性暴力的行為如何作出反擊、旁觀者可以如何制止事件發生。有見及此，我們亦與偵探社、律師、大專院校、藝術家、及民間團體合作，舉辦藝術展覽及大專巡迴教育，用輕鬆及貼近年輕人的手法逐步改變社會文化。當然，加強專業人士對影像性暴力的敏感度，也是十分重要的，因為這可以減少受害人揭發事件是引致的二度傷害。在提供服務方面，我們提供輔導，也會陪同受害人報警、處理有關報警程序及教導他們如何蒐集證據，也嘗試尋找不同的方法停止私密照繼續散佈。

現時，首要是鼓勵受害人求助，我們了解到，影像性暴力受害人因為怕被人責怪或者過於自我責備的緣故，未必敢於求助。況且，現時香港並未對影像性暴力這問題有深入認識，也沒有這方面的專門服務支援，所以期望這個調查報告能讓公眾對影像性暴力的問題有較詳盡了解。

關注婦女性暴力協會

2020年3月7日

# 報告摘要

關注婦女性暴力協會於2019年展開「偷拍+未經同意散佈私密影像經驗問卷調查」（調查），收集公眾的「影像性暴力」經歷。這類的性暴力行為包括：未經同意下拍攝性私密影像、未經同意下散佈、分享、售賣性私密影像；要脅、恐嚇、勒索散佈性私密影像；以及，將當事人的樣子移花接木至色情影像。

本次調查以問卷調查和深入訪談作爲研究方法，研究對象是過去三年內曾遭遇影像性暴力的公眾人士。問卷收集到206個有效回應；另外，我們和通過問卷接觸到11位受害人進行深入訪談，也有和1位社福機構同工進行訪談。是次研究的目標包括：收集描述公眾遭遇不同類別的影像性暴力的普遍程度之數據；收集描述公眾遇到的影像性暴力形態之數據，包括常見的發生地點或空間、侵犯者身份；探討公眾遭遇影像性暴力的具體處境和感受、對他/她們的影響；探討影像性暴力受害人面對暴力時的反應、採取的行動和原因；以及，就著社會如何減少及預防影像性暴力、減低對受害人的傷害，提出具體建議。

根據問卷調查的結果，受訪者的影像性暴力經驗中，最普遍是偷拍，其餘的依次是：偷窺、被威脅或勒索、被散佈私密影像、被盜取私密影像、發現隱藏鏡頭和移花接木。大部分的受害人的年齡介乎24歲或以下；最常見的發生地點是交通工具、街道、通訊應用程式、家居；侵犯者最多是陌生人，其次是伴侶和朋友。大部分人經歷了影像性暴力後感到憤怒、驚慌、擔心，值得留意的是，有受害人表示曾想過自殺或曾經自殺。

關於面對影像性暴力的反應，大部分人表示不知如何反應、假裝若無其事、離開該地方，相對較少人表示有報警、向身邊的人求助、向社會服務機構求助和通知負責職員/人士。對於從未向他人求助或提及的人而言，最常見的原因是：怕麻煩或不想把事情搞大、覺得求助沒用、不知道如何反應、憂慮別人認為自己小題大作。在曾經求助的受害人中，有受害者報警，然而，結果遭受拒絕落案的佔多數，常見的拒絕原因包括證據不足、無法例、案情不嚴重。關於減少影響性暴力的建議，最多人認為設立針對影像性暴力的特定法例。

根據個人訪談的結果，受訪者認為影像性暴力的行爲是漠視或違背自己的意願，令自己的性自主權受損。影像性暴力對他/她們帶來的傷害持續很長的時間，影像被散佈的後果對他/她們而言更是難以逆轉。有受訪者除了被人散佈私密影像到網絡，同時遭侵犯者公開自己的私人資訊、及後被陌生網友騷擾，有受訪者則同時遭受網絡欺凌，這些網絡現象進一步加劇了對當事人的傷害。面對深遠的傷害，受訪者卻抗拒向他人透露自己的經歷或求助，認為別人會責備自己而不敢出聲。有受訪者嘗試報警，卻遭警察以錯誤的準則判斷是否落案，最終案件不被受理。加上警察對影像性暴力缺乏認識，現行的司法程序增加了受害人求助的困難。

就著社會如何減少及預防影像性暴力、減低對受害人的傷害，報告提出以下建議：一、推行法例改革：設立針對影像性暴力的特定法例，傳遞行爲的嚴重性；二、加強公眾教育：教育公眾不要成為侵犯者；三、加強公眾教育：強調旁觀者在減少影像性暴力的責任；四、建議網絡平台負責人訂立相關的使用政策和檢舉機制；五、為警察提供有關親密關係暴力及影像性暴力的培訓。

# Executive Summary

The Association Concerning Sexual Violence Against Women launched the survey 'Taking and Distributing Intimate Images Without Consent' in 2019 to collect the public's experiences in 'Image-Based Sexual Violence (IBSV)'. These experiences include: taking intimate images without consent; distributing, sharing, circulating and selling intimate images without consent; threatening or extorting to distribute intimate images; and creating fake pornography.

The research is comprised of a questionnaire survey and in-depth interviews to collect both quantitative and qualitative data. The target population is people who have experienced any kind(s) of IBSV in the past 3 years. A total of 206 people have filled in the questionnaire. Through the questionnaire, we got in touch with 11 victims and conducted in-depth interviews with them. We also conducted an in-depth interview with 1 co-worker of social welfare organization. The research aims to delineate the prevalence of different kinds of IBSV encountered by the public; to collect the data of the forms of IBSV experienced by the public, including the common places of occurrence and identities of the perpetrators; to study victims' situations and feelings when facing IBSV and the impacts of IBSV on them; to study victims' responses and actions taken when facing IBSV and the reasons; and, to give concrete recommendations on reducing and preventing IBSV from happening and minimizing the harms brought to victims.

According to the key findings of the questionnaire, non-consensual taking of intimate images was the most common form of IBSV. It is then respectively followed by voyeurism, threats or extortion, distribution of intimate images without consent, theft of intimate images, discovery of hidden cameras, and creation of fake pornography. Most respondents were aged 24 or below. The most common places of occurrence were public transports, streets, mobile messaging apps and homes. Most perpetrators were strangers, partners and friends of victims. Most respondents felt angry, frightened and worried, while some disclosed that they have thought to commit suicide or had committed suicide, which is noteworthy. When facing IBSV, most respondents revealed that they did not know how to react, pretended that nothing had happened and left the place; relatively fewer respondents have reported the case to the police, sought help from people around them, sought help from social service organizations or notified the staff. As for the respondents who never sought help from or mentioned to others, the common reasons are 'don't want to make trouble or make things worse', 'deemed help-seeking to be useless', 'don't know how to respond' and 'afraid of blaming of hypersensitivity from others'. For respondents who had reported the case to the police, the majority of them were rejected. The common reasons of rejection include insufficiency of evidence, lack of laws and the police deeming the case to be not serious. For recommendations on reducing IBSV, most respondents agreed to have specific legislation.

According to the key findings of individual in-depth interviews, the respondents felt violated in terms of sexual autonomy from the perpetrator's behaviors that disregarded or violated their will. IBSV brought continuous impacts that lasted for long time. It brought irreversible consequences for respondents whose intimate images were distributed on the internet. Apart from intimate images being distributed on the internet, some respondents experienced doxing while some experienced cyber bullying, which aggravated the harms. Regarding the far-reaching harm, the respondents refused to disclose their experiences or ask for help, worrying that others would blame

themselves. A respondent tried to report to the police, but the police judged whether the case should be filed based on wrong criteria, and the case was ultimately rejected. Coupled with the police's lack of knowledge on handling IBSV cases, current judicial structures have increased the difficulty for victims to seek help.

The report makes the following recommendations on how society can reduce and prevent IBSV and harms to victims: first, to establish specific sexual offences in Hong Kong to tackle different forms of IBSV; second, to strengthen public education which teaches people not to commit IBVS; third, to strengthen public education which stresses the responsibilities of bystanders in reducing IBSV; fourth, internet platform providers to establish users' guide and removal mechanisms regarding non-consensual distribution of intimate images; fifth, to provide training on intimate partner violence and IBSV for law enforcement agencies.

# 1 甚麽是影像性暴力

**影像性暴力是指：**

- **未得當事人同意下拍攝**私密影像*，有時則牽涉偷窺的行爲。*「私密影像」指含有裸露或以內衣遮蓋私密部位（生殖器官、臀部、女性胸部）的影像；
- **未得當事人同意下散佈、分享、傳閱、售賣**私密影像，包括經當事人同意或不同意拍攝的影像；
- **要脅、恐嚇、勒索**對方散佈其私密影像，包括經當事人同意或不同意拍攝的影像；
- **未取得同意下**將當事人的樣子**移花接木**至色情影像。

**常見例子：**

- 偷拍更衣或沐浴；
- 偷拍裙底；
- 偷錄影性愛過程；
- 被對方强逼拍攝私密影像；
- 對方將私密照上載至網上論壇、分享到社交群組、私訊給朋友；
- 伴侶以性愛片進行要脅；
- 朋友未經同意下登入我的google賬號，盜取私密影像；
- 私影攝影師未得我的同意將私影照散佈到網上論壇；
- 對方將自己的樣子移花接木到色情影像，以勒索金錢。

**「影像性暴力」屬連續體行爲**

「影像性暴力（image-based sexual abuse）」一詞的來源是英國學者Clare McGlynn，Erika Rackley, Ruth Houghton在2017年發表在學刊*Feminist Legal Studies*的論文 Beyond 'Revenge Porn': The Continuum of Image-based Sexual Abuse。作者認爲，影像性暴力所囊括的行爲—拍攝、散佈、傳閱、要脅、移花接木—是一個「連續體（continuum）」，這些行爲之間有緊密的關係、難以分割：散佈的私密影像可能是偷拍得來的，將影像移花接木之後用來要脅對方或散佈到網絡。此外，影像性暴力和其他的性暴力，擁有相似的特徵，包括：這些行爲均未獲得當事人的同意；它們侵犯了一個人的性自主權；而侵犯者常見的動機是羞辱、威嚇、控制、騷擾、支配對方。基於上述原因，Clare McGlynn等人建立了「影像性暴力」概念，以準確描述和傳遞行爲的本質和影響。

「影像性暴力」此概念有足夠的寬度去囊括我們較認識的概念：偷拍、偷窺、偷拍裙底、床照流出、裸照外流、復仇色情；它串連起上述的行爲，呈現它們的共同特徵。與此同時，它是一個有用的工具，不但幫助我們瞭解及分析這一連串與影像有關的性暴力，也幫助社會整全地思考政策和法律改革。

考慮到公眾對「影像性暴力」的概念或許感到陌生，本會將問卷調查命名爲**「偷拍+未經同意散佈私密影像經驗問卷調查」**，讓他們第一眼就掌握是次問卷調查所針對的行爲；然而，調查實際涵蓋所有影像性暴力行爲。

# 2 影像性暴力經驗調查

## 研究背景

近年有通訊程式被揭發有大量有關偷拍、散佈私密影像的群組，成員在群組內分享私密照片，並針對相中人士發表侮辱性的言論[1]；同時，網上論壇亦冒起很多以偷拍爲主題的討論區[2]。

上述現象警惕我們影像性暴力的普遍性，同時亦説明有很多人正在經歷影像性暴力，然而，本港未有描述及分析這類受害人經驗的數據。有鑒於此，本會於2019年開展「偷拍+未經同意散佈私密影像經驗問卷調查」，以收集公眾的影像性暴力經驗。

## 研究目標

- 描述公眾遭遇不同類別的影像性暴力的普遍程度；
- 描述公眾遇到的影像性暴力之形態，包括常見的發生地點或空間、侵犯者身份；
- 探討公眾遭遇影像性暴力的具體處境和感受，這些遭遇對他/她們的影響；
- 探討影像性暴力受害人面對暴力時的反應、採取的行動和原因；
- 就減少及預防影像性暴力的發生提出具體建議。

## 研究方法

本次調查採取混合式的研究方法，結合問卷調查和個人深入訪談，從而檢視公眾遭遇影像性暴力的經驗。

**問卷調查**方面，本會設計了一份網上問卷，上載到關注婦女性暴力協會的官方網站，目標對象是過去三年內曾遭遇影像性暴力的人士。數據採集工作於2019年5月6日至2020年1月31日期間進行。最後，我們收集到206個有效回應，包括187位女性、18位男性及1位跨性別人士。

至於**深入訪談**，由於問卷的其中一道題目詢問填寫人士是否有興趣作進一步個人訪談以及留下聯絡，負責職員最後成功以電郵及電話成功接觸到11個受害人，包括2位男性、8位女性、1位跨性別人士。有關訪問形式，其中1個女受訪者以視頻方式進行訪談、1個女受訪者以電話通話進行訪談，其餘均爲會面訪談。除此之外，本次調查也訪問了1名曾協助受害人的社福機構女性同工。

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1 例如通訊軟件Telegram被揭發內有大量關於偷拍的群組，包括有「街拍谷」、「校服谷」、「黑絲/腳腳谷」、「制服谷」等等，每個群組成員由1000至逾3000人不等，成員在群組內討論偷拍話題、散佈偷拍照。參考：香港01（2017年07月29日）「Telegram偷拍群組湧現，成員逾千分享黑絲短裙照」：https://www.hk01.com/熱爆話題/106789/telegram偷拍群組湧現-成員逾千分享黑絲短裙照-警-適時執法。

2 例如香港一世發hk148forum、VooHK討論區、貓壇。

# 3　問卷調查結果

## 3.1.　受訪者背景

有關受訪者的性別，187人是女性、18人是男性、1人是跨性別（圖1），受訪者的年齡最多介乎20-24歲（n=71）、15-19歲（n=51）以及25-29歲（n=30）（圖2）。

**圖1：性別 (N=206)**

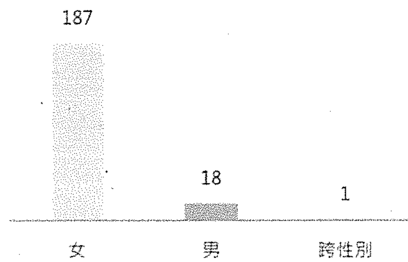



**圖2：年齡 (N=206)**

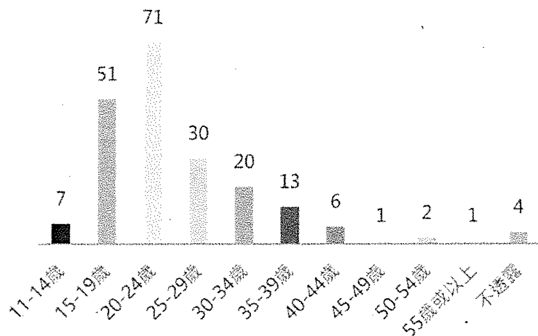



**圖3：過去三年遭遇的影像性暴力 (N=206)**
（可選多項）

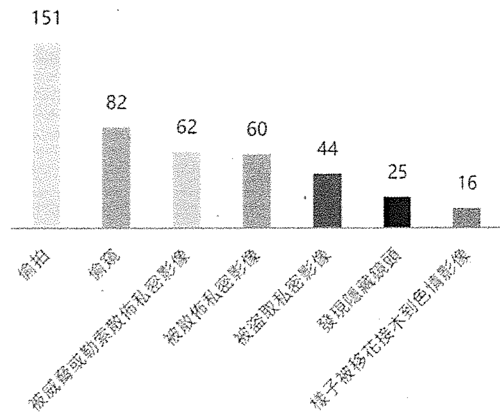
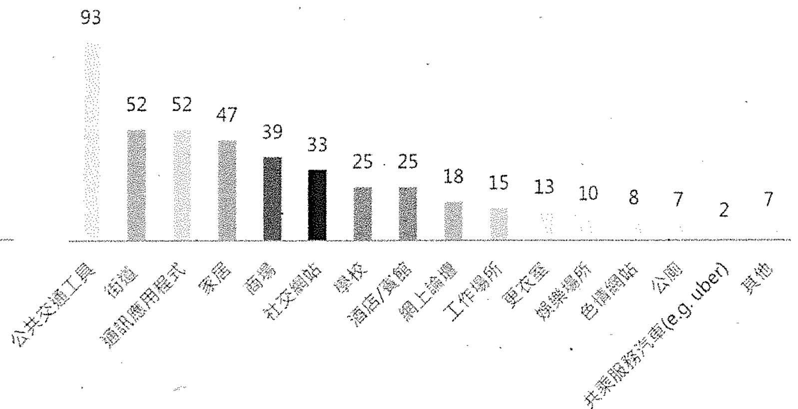



**圖4：影像性暴力發生的地點/空間 (N=206)**
（可選多項）




## 3.2.　受訪者的影像性暴力經驗之形態

最多受訪者在過去三年遭遇偷拍（n=151）、偷窺（n=82）、被威脅或勒索散佈私密影像（n=62）（圖3）；關於事發地點或空間，最常見是公共交通工具（n=93）、街道（n=52）、通訊應用程式（n=52）（圖4）；有關侵犯者的身份，最多受訪者表示是陌生人（n=116）、伴侶（n=47）（圖5），而侵犯者的性別絕大多數是男性（n = 178）（圖6）。

**圖5：侵犯者的身份 (N=206)**
（可選多項）

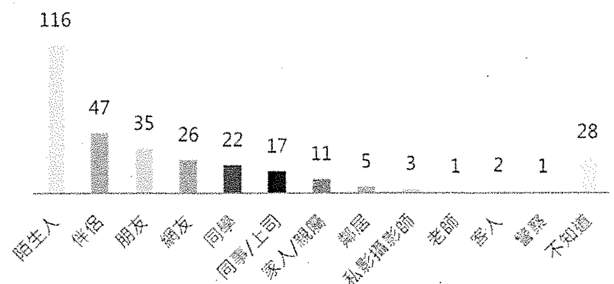


圖6：侵犯者的性別 (N=206)
（可選多項）

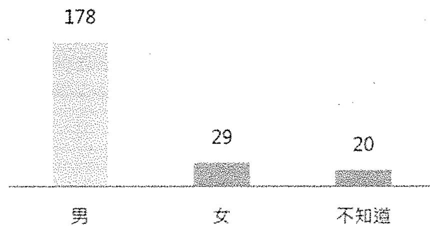
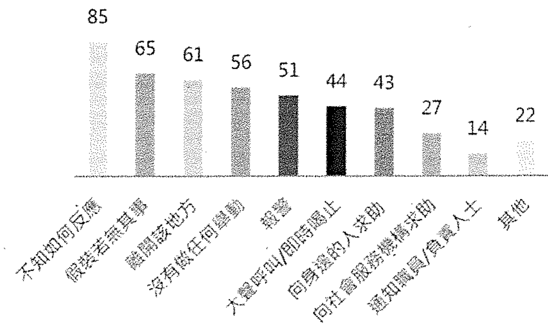



圖8：反應 (N=206)
（可選多項）




### 3.3. 受訪者面對影像性暴力的處境

面對影像性暴力，最多受訪者感到憤怒（n=128）、驚慌（n=119）、擔心（n=112），值得留意的是，有29個受訪者想過自殺/曾自殺（圖7）。至於受訪者的反應，最多人表示自己不知如何反應（n=85）、假裝若無其事（n=65）、離開事發地方（n=61）、沒有做任何舉動（n=56）（圖8）。在206個受訪者當中，有106人從來沒有向他人求助或提及自己的經歷，最常見的原因是怕麻煩/不想把事情搞大（n=48）、覺得求助無用（n=48）、不知如何反應（n=43）、憂慮別人覺得自己小題大作（n=38）（圖9）。

圖9：從未向任何人求助或提及的原因 (N=106)
（可選多項）

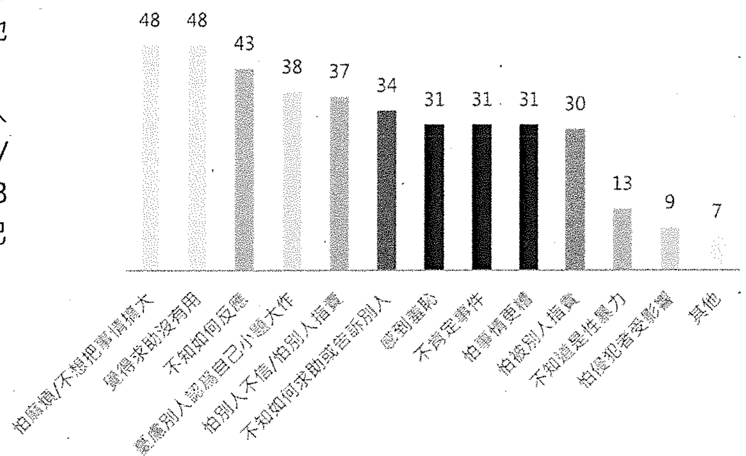
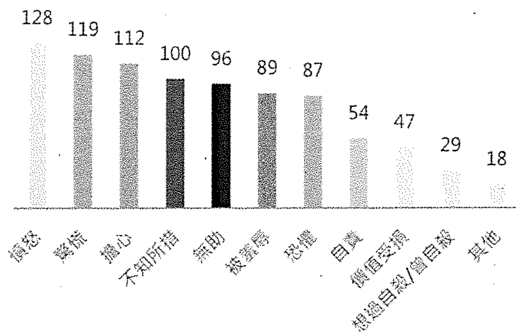



圖7：感受 (N=206)
（可選多項）




### 3.4. 受訪者尋求司法制度援助的情況

圖8顯示，有51個受訪者曾就著影像性暴力的遭遇報警求助，其中35人遭警察拒絕落案，15人獲得到警察落案跟進（圖10）；這35個遭警察拒絕落案的受訪者的回應反映，警察拒絕的原因最普遍是證據不足（n=23）、無法例（n=20）（圖11）。

**圖10：報警的結果 (N=51)**

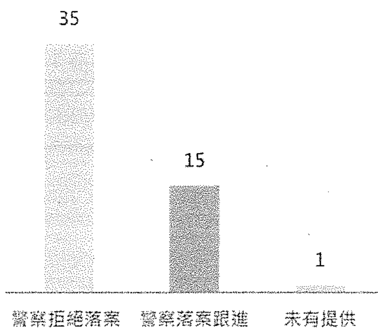
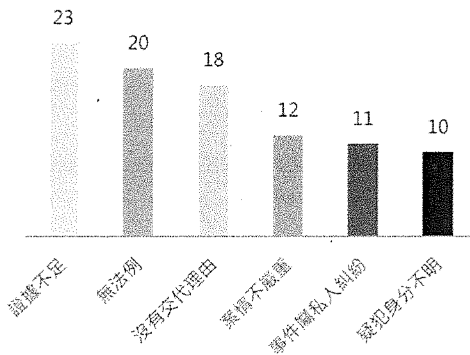


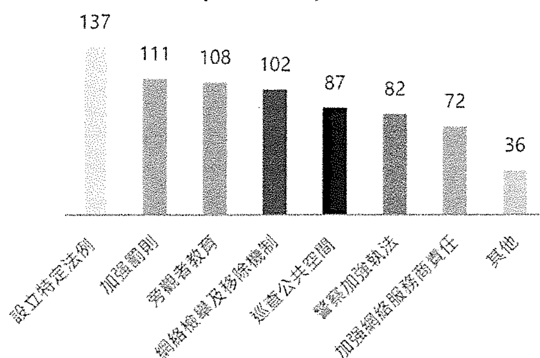

**圖11：警察拒絕落案的原因 (N=35)**
**（可選多項）**




## 3.5. 受訪者認爲有效減少影像性暴力的建議

關於社會減少影像性暴力的建議措施，最多受訪者認爲是要設立針對影像性暴力的特定法例（n=137）、加強罰則（n=111）、推行旁觀者教育（n=108）、建立網絡檢舉及移除機制（n=102）（圖12）。

**圖12：建議 (N=206)**
**（可選多項）**



# 4 深入訪談結果

我們通過問卷調查接觸到11位影像性暴力受害人，包括2位男性、8位女性、1位跨性別人士。有關他/她們的年齡，其中2個受訪者介乎15-19歲、5個介乎20-24歲、1個介乎25-29歲、2個介乎30-34歲、1個介乎35-39歲。爲了解受害人在求助、報警時的處境和困難，是此研究亦訪問了1位曾經支援女受害人的社福機構同工。`

此部分根據與上述人士深入訪談的結果，從以下面向進行分析及闡述：未經同意的拍攝或散佈屬性暴力、影像性暴力對人帶來的傷害、阻礙受害人求助的社會因素、現行司法制度令受害人受挫的原因。

## 4.1. 未經同意的拍攝、散佈屬性暴力

偷拍、散佈、移花接木、要脅、恐嚇散佈私密影像等的行爲之所以是「性暴力」，是因爲這些行爲漠視或違背當事人的意願，以及侵犯了當事人對性的自主權。

### 漠視或違背意願

受訪者的經歷當中，大部分的情況是在未經同意下被偷拍，侵犯者繼而在受訪者不知情的情況下將偷拍的影像散佈出去。無論是拍攝、還是散佈的行爲，侵犯者均未詢問過當事人的意願，漠視了當事人的意願。以受訪者Rain[3]爲例，她被朋友告知網絡流傳一段有她在內的性愛片段，她才發現自己被之前交往的對象偷拍了性愛過程、該人亦瞞著Rain散佈了該性愛片段。Rain對此完全不知情，得知自己被偷拍、散佈私密影像的一刻，Rain感到驚慌：

*「跟住佢［即Rain的朋友］話係網上有一段片，覺得係我……我覺得點解可以咁樣，點會係AV網有我呢？跟住，佢播咗俾我睇，到最後我就認得係我……嗰一刻我就喊，好驚，覺得點解會咁樣。」*

(受訪者Rain)

另一個情況是，當事人在知情、並同意的情況下拍攝私密影像，但不同意對方散佈；然而，對方卻違背他/她的意願將影像散佈出去，這樣的情況尤其能反映在參與「私影」[4]的受害人的經驗。

問卷的回應者裏面有3位是私影模特兒，侵犯者均是攝影師，其中1位模特兒Rebecca參與了深入訪談。Rebecca在剛加入私影行業的時候遭遇攝影師違反協議，對方擅自將她的裸照放上論壇。Rebecca當時只是同意拍攝所得的私密照供攝影師一人觀看和收藏，並且雙方已有共識，攝影師卻瞞著她上載至網上論壇，Rebecca才發現原來網絡有不少專門用來散佈私影照片的論壇。Rebecca堅定地認爲，模特兒參與私影，只是允許特定的攝影師看見自己私密的身體部位，並不意味將私密的部分分享給公眾，攝影師的散佈行爲是違反了她的意願和雙方協議：

*「……嗰個感覺好唔同，係未經我嘅同意底下俾人見到，唔係我想要嘅嘢。」*

(受訪者Rebecca)

### 侵犯性自主權

Rebecca的私影照被散佈後，其他未合作過的攝影師表示已經看過她的裸照，令她感覺，已經無法選擇如何及向誰人展現自己私密的身體：

*「通常，係攝影師同埋model溝通嘅過程入面，佢會問『你可唔可以俾自己嘅作品相我睇下啊？』，咁我會俾一啲例如有著衫、時裝，或者尺度冇咁大嘅相俾佢睇。其中一個攝影師咁樣回應我：『其實我有睇過你俾人流出嘅相，你流出嘅相同你俾我嘅好唔同喔！』 我嗰刻嘅感覺就覺得有啲價值受損，根本唔係我想展現嘅嘢，竟然有人可以係另外一種情況下睇到。」*

(受訪者Rebecca)

3 爲保障受訪者的私隱和安全，報告引用的名字均爲化名

4 「私影」或私人攝影活動：業餘攝影愛好者通過網絡尋找拍攝對象，雙方約定地點和時間進行拍攝活動。

一個人的性自主權，體現在他/她能決定和控制：在什麽情況下、以何形式、向誰人展現自己身體。而影像性暴力的發生則是因爲侵犯者漠視或否定了當事人上述權利，令受害者感到憤怒、被羞辱、價值受損。

以受訪者Florence爲例，她曾經在公衆場所被人以相機「高炒」拍攝胸部，相片隨後被散佈到社交網站，後來朋友傳來流傳的照片才發現自己被偷拍了。令Florence感到最傷害的是，偷拍者剝奪了她表達自己的身體的控制權，偷拍者通過偷拍所得的影像，將她的形象塑造成故意賣弄身材、浪蕩的女性：相中她仿佛是故意炫耀自己的身材、想吸引別人注視自己的胸部而穿吊帶裙，更刻意俯下身體吸引別人偷拍。她眼看照片被廣傳、身體表達被肆意扭曲，卻無法控制：

*「......網上就有好多我烏低身、見到我心口嘅相流出......全部都係從上面影落黎，或者對住我嘅心口影。我覺得影心口對我黎講最傷害性嘅野就係佢會連埋我個樣一齊post，亦都被認識我嘅人見到我呢啲相，我好怕佢哋會覺得我係一個咁嘅人，即係我專登烏低身俾人影，咁就真係塑造到我好特登去吸引人去望咁。我覺得這是最傷害性的。」*

(受訪者Florence)

其中一個受訪者Candy在問卷寫道偷拍讓她「感覺價值受損」，Candy在訪問中解釋，被偷拍讓她覺得不被當作一個人那樣看待，她甚至感覺自己的意願對於侵犯者而言並不重要，自己更像一個物件，被人用來滿足性幻想：

*「之所以覺得價值受損就係，俾人偷拍完之後我覺得自己成為一件物品咁俾人去影，其實我唔想，唔知點解啲人係覺得ok就可以去隨便影我......我覺得佢哋【偷拍者】係唔識點樣去將佢哋嘅性幻想擺係啱嘅地方......佢哋【偷拍者】會覺得『我幻想咋嘛，唔需要你同意』。」*

(受訪者Candy)

從受訪者的經歷可見，影像性暴力剝奪了一個人表達自己身體的自由，令受害人的自我價值受貶。

## 4.2. 傷害具持續性及難以逆轉

大部分受訪者遭受的影像性暴力由伴侶施行，伴侶通過要脅散佈而施行控制。受訪者的擔心並未隨著分手而消失，他/她們表示只要私密影像還在對方手上，情緒還會被牽動，他/她們害怕對方隨時會散佈到網絡。有受訪者的影像則已被上載到網絡，她們感覺事情已經難以逆轉。

### 以私密影像操控伴侶

與遭受伴侶威脅的受害人訪談過後，我們發現侵犯者的動機往往與性欲無關，而是出於權力控制、支配的欲望，而私密影像則成爲伴侶實現操控的工具，通過作出威脅、恐嚇，以控制對方順從自己的要求。最常見的操控目的是要求復合：

*「講翻佢偷拍嗰陣時，咁其實佢原本都係想留個底有啲咩係可以要脅到我嘅，嗰陣時我已經同佢講分手，佢係想用呢樣嘢箝住我…或者用另外一個講法係病嬌【意即：對配偶有極大的佔有欲，爲了避免失去對方而不擇手段】，咁佢就係想自己得唔到嘅寧願係毀滅咗佢，咁樣要脅我同佢係翻埋一齊。」*

（受訪者Benjamin）

由於侵犯者是伴侶，他/她們認識受害者的社交圈子，因而通過威脅散佈給對方的朋友、同事、家人，令對方感到驚恐，受訪者Rain則遭遇對方要脅散佈給自己同事：

*「我只是公司裏面的小員工，但公司很多傳聞或醜聞可以發佈出去，大家是有興趣知道，因此很好容易產生傳言。而我公司又真的有傳過一些被偷拍的片子，或一些女生自拍的片子也上傳到互聯網。他對我表示我公司有一個secret page，經常有這些事情發生，因此，他利用這點要脅我，我亦都透過我們之間的共同朋友知道，他亦都保存那段片......」*

（受訪者Rain）

面對威脅，Rain提心吊膽，怕自己的一舉一動會刺激到對方，有一天真的把照片傳送給自己的同事。除了擔心和驚慌、卻不知可以做甚麼。

**影響具持續性：仿如計時炸彈**

這類暴力對人帶來的影響具延續性，只要對方還未完全刪除影像，當事人的情緒都會持續被牽動。

遭前伴侶以私密影像威脅的受訪者Benjamin說，知道對方還持有之前偷拍自己的私密影像，雖然她的威脅行爲目前暫停下來，但難保有一天她會突然又拿出來威脅自己，或者毫無預告便傳送給自己的朋友。

縱然事隔五年，Benjamin他的不安和恐懼並沒有隨著時間而消失，至今仍然受影響，私密影像仿佛計時炸彈，隨時爆發的壓力纏繞著他：

*「......once佢不爽，都又可能揼出嚟【意即：發佈】。所以真係會驚，就算件事過咗成五年都好，其實我都仲驚緊。」*

（受訪者Benjamin）

Benjamin的心情是不少受伴侶威脅的受害人的寫照。另一個受訪者Rain說，自從發現之前的交往對象原來擁有自己的私密照、一度拿出來嚇唬自己會傳送給她的朋友和同事後，她有好長一段時間抗拒參與朋友舉辦的聚會，怕朋友突然告訴自己：有個陌生的臉書賬號傳了自己的裸照給他；也害怕上網，怕瀏覽某個網站時見到自己的裸照......影像性暴力的陰影不會隨著時間消失，而是持續地存在。

**一旦上載便難以逆轉**

網絡資訊的流傳度高，對於被人威脅散佈私密影像的受害者而言，他/她們的恐懼正是擔心侵犯者「付諸行動」，一旦將影像上載到網絡，要徹底清除相關影像存在極大困難，感到事情將無法挽回。的確，當資訊散佈到網絡，短時間內便有衆多網友瀏覽、轉發、分享至其他社交網絡或頁面，有的甚至下載、截圖至自己的電子設備，繼而分享給身邊的好友，難以估量接觸私密影像的人數。

網路讓影像可以長時間地流傳，對受訪者Rain和Rita而言，自己那被散佈的性愛片仿佛將永遠存在於網絡世界。就算知道某個網站已經刪除了，也並不代表它真正消失，它可能早已被轉發到網路世界的其他地方、或存在於某陌生人的電腦硬碟。但茫茫大海，根本無法逐一搜尋、檢舉，受害人除了被不安感纏繞，也感到消極、無力：

*「條片已經上了網，有咁多人看過，我自己的感受是，多一個不多少一個不少是沒有分別。而我沒可能永遠刪除一些已流出的東西。正如想當年，某明星的電腦在修理時，被人發現有很多女星的照片，其實事件就算淡化了，你現在還可以找到。而很明顯，他們亦都報了警。所以，我覺得沒有東西有可以永久消失的可能性。我覺得已經沒可能解決到。」*

（受訪者Rain）

*「上咗去【網絡】就搞唔到。我覺得一定唔會剩係得一個網站有，話唔定仲有其他。我無report過個網，覺得無咩用，就算呢個刪左，其他地方都可能仲有，始終覺得唔secured。」*

（受訪者Rita）

受訪者Rebecca被人散佈了私密照在網上論壇之後，向網站舉報，網站負責人卻以不受本地法例監管爲由，拒絕採取任何措施，以至照片繼續流傳：

*「佢話佢個網站setup、server都唔係香港，所以唔會受香港法例限制，跟住我睇到勁驚。」*

（受訪者Rebecca）

「只是一張相而已，不要小題大作」— 這是旁觀者很容易說出口的話，我們以爲是小事；但只要相片被散佈到網絡，將會廣泛流傳，加上網絡平台疏於監管散佈私密影像的行爲，難以鏟除影像，對受害人的傷害持續不斷。

### 4.3. 網絡欺凌和「起底」加劇傷害

影像性暴力和網絡欺凌（cyber bullying）有千絲萬縷的關係。對遭受要脅、散佈的受害者而言，其中一個最大的恐懼便是，來自網友的接踵而來的欺凌和攻擊性評論。

網絡的匿名性（anonymity）讓網民得以隱藏個人的身份，無須負責地發佈任何資訊和言論，對受害者毫無節制地進行羞辱、欺侮、騷擾、謾罵和嘲弄，包括對身材和外貌評頭品足、責怪他/她們行爲「隨便」、認爲是他/她們想出位、刻意招惹別人拍自己，等等。

受訪者Florence被陌生人偷拍胸部後，照片被上載到社交網站，遭網民留言抨擊：認爲她是刻意擺出性感姿勢、招徠別人拍自己。被問到有沒有反擊網民的言論，Florence話寧願扮作看不到、不作聲，因爲如果自己出聲反擊的話，反而越會成爲網民的焦點，到時自己和照片被進一步炒作，需要承受的傷害更多，選擇保持沉默，等事件丟淡：

*「我選擇咗扮睇唔到。因為我知道網上嘅文化係，你越出聲呢件事就會炒得越熱，而我唔想做主角，亦都想過咗就算，希望佢哋過兩三日就唔記得，所以我就冇出聲。」*

（受訪者Florence）

更嚴重的情況是，有受訪者遭侵犯者散佈照片的同時，公開了自己的私人資訊（doxing），例如社交網絡賬戶名稱、電話號碼、個人電郵等等，之後被陌生人被騷擾，包括具性意味的騷擾：

*「我印象中有一次有一組相係有包含我嘅IG【即Instagram】名，因為係咁一組相流出咗之後嘅三個月內我大概有4到5個人去direct我嘅IG，我有改過自己IG名，但係我發現冇用。我幾肯定有一組相包含我的個人資訊......*

*有人拎到呢啲相之後，去我嘅IG或者facebook direct我同我講『小妹妹有影相wor，要唔要出黎同哥哥見下面呀』。」*

（受訪者Rebecca）

有時就算侵犯者只是上傳照片，沒有公開個人資料，網民卻會透過蛛絲馬跡將受害者「起底」（human flesh search），將其真實姓名、個人手提號碼、地址公開，導致受害者在現實生活中受騷擾。有受訪者的私密照被上載到網上論壇後，每日收到幾十通匿名電話，讓她情緒瀕臨崩潰，一聽到電話響就會心跳加速，嚴重影響工作、生活，最後只能轉換號碼，才能正常生活。可見網絡「起底」現象對受害人的影響可能滲透至現實世界，影響日常生活。

### 4.4. 指責受害人的文化阻礙求助

大部分受訪者表示，遭遇影像性暴力後抗拒對身邊的人提及或求助，因為他 / 她們擔心，說出來以後會被對方指責自己。這樣的想法尤其凸顯在女受訪者當中。

她們的擔心和瀰漫於社會的「指責受害人（victim blaming）」文化有莫大關係：一旦性暴力發生，社會傾向不指責侵犯者，反而將過錯歸咎於受害者，認為受到傷害一定是因為受害人本身有錯。當中對女性的指責尤其嚴重，包括認爲她們衣着有暴露才會被偷拍，或被批評和陌生人胡亂發生性關係、不帶眼識人才會被偷拍、散佈私密影像，等等。社會對女性的性的污名，令她們容易感到羞恥，不知道如何告訴別人才不會被指責。

#### 責怪受害人的衣著

受訪者Candy深感指責受害人的現象嚴重，她曾遭陌生人偷拍，但不選擇告訴身邊的人。她認爲，假如女性把偷拍的經歷告訴身邊的人，反而會被指責，例如被質疑「為什麼要穿那麼少？那麼露？」、「如果你穿褲，就不會有人拍你」；或者，認爲是她們不懂保護自己才會被人拍到：「是你自己不夠小心吧？」、「你應該好好保護自己啊」，這些責難的話語令自己更難受：

*「如果同屋企人講，因為我屋企人係好傳統嗰啲，佢就會話『肯定係你著短褲』......啲人第一件事會〔評論〕『佢一定係著短褲喇』、『佢一定係著短裙喇』、『走光嘅話你咪著裙，著長啲囉，著褲囉，解決到㗎』......」*

(受訪者Candy)

譴責的聲音背後，假設了女性可以控制自己的行為—她可以選擇穿長褲，或是把自己包得密不透風，只要受害者控制好自己的打扮和行爲，似乎就可以避免侵犯的行為。然而，Candy認爲，其實無論穿褲子還是短裙也解決不了侵犯者千奇百怪的欲望和念頭，更無法控制這些念頭被加諸於自己的身上：

*「受害人本身就係受害，你唔好再講呢件事鬧落去，唔關佢事㗎。啲人話偷拍，『你包到伊斯蘭咁咪得囉！』唔關事㗎，你包到咁都係有人影......可能除咗教人唔好偷拍之外，都講話其實偷拍係同你著咩無關，你著到好似木乃伊咁......總會有人覺得值得影，總會有人覺得我可以將我嘅性慾擺上去，唔會因為你著得密實咗而去改變。」*

(受訪者Candy)

**指責受害者對性的態度**

假如遭遇伴侶在發生性行爲期間偷拍自己、或是散佈自己的私密影像，受害者的性生活則會成爲評論的焦點，尤其是女性。女性在性方面遭受各種偏見（bias）和污名（stigma），假如她們被發現在性方面表現主動，會被標籤爲不檢點、隨便、浪蕩，認爲是她們的操守先出了問題，才會令侵犯者得以下手。受訪者Betty在外地旅行期間，在交友軟體認識了男網友，第一次約會期間，雙方發生性行爲，後來發現該男生原來在性行爲的過程偷拍了自己，事後還用那些照片威脅自己與他見面。

社會期待女性對性的態度保守，期待她們的性是乾淨的，就算發生性行爲也只能與固定的伴侶。Betty在訪問中慨嘆，縱然女性上網找性伴侶是正常不過的事，但人們還是難以宣之於口，並且對女性做出這樣的選擇帶有偏見。她認爲，假如把網友偷拍和威脅自己的經歷告訴朋友，她擔心話題的焦點不會是對方施行影像性暴力，而是她在交友軟體找性伴侶這件事，朋友會隨之責怪她對性的態度隨便、不帶眼識人，才會導致性暴力發生。因此，Betty抗拒告訴朋友或報警：

*「我不想身邊的人知道，自己有『呢啲』行爲，之後有偷拍同威脅嘅事情發生......不選擇報警其中一個原因係，我知道報警的話，會被人challenge、質疑，要重複講發生了什麼事，你會被認爲是不檢點所以才會發生這個情況。佢地會 at the very beginning覺得係你錯左先！」*

(受訪者Betty)

利用大衆對女性的性的污名，私密影像成爲侵犯者實現操控伴侶的工具，侵犯者深信一旦私密照被散播出去，女性受到的責難必定比自己多，令「威脅」得以成立：

*「......佢再approach我，佢都是話做番朋友。直至到佢覺得我唔願意理佢的時候，佢就用條片威脅我。佢就提番幾年前係網上搵到個prove我係蕩婦嘅證據去威脅我。」*

（受訪者Rain）

當性暴力發生時，若我們只會檢討受害者的穿著和操守，漠視或淡化侵犯者的錯，傳達給受害者的訊息只會是：「性暴力之所以發生，必定是你自身的問題！」，令受害者不敢向任何人提及自己的經歷，窒礙求助。

## 4.5. 現行司法制度令受害人受挫

目前香港沒有針對影像性暴力的特定罪行（specific offence），司法部門只能運用現行法例處理，包括：《防止兒童色情物品條例》、《淫褻及不雅物品管制條例》、公眾地方內擾亂秩序行為[5]、遊蕩導致他人擔心[6]、作出有違公德的行為[7]、恐嚇罪[8]、勒索罪[9]。

5 《公安條例》第17B（2）條
6 《刑事罪行條例》第160（3）條
7 普通法罪名
8 《刑事罪行條例》第24條
9 《盜竊罪條例》第23條

然而，以這些條例處理影像性暴力的案件卻不倫不類，出現「四不像」的情況。上述條例並非爲了規管影像性暴力而制定，而是針對其他目的而設立，例如，《淫褻及不雅物品管制條例》本意是規管破壞社會道德風氣的刊物；《防止兒童色情物品條例》是禁止兒童色情物品、兒童色情表演或將兒童色情發展成旅遊事業；公眾地方擾亂秩序行為罪、遊蕩罪及有違公德罪，本意則是維護公衆秩序。它們與規管侵犯性自主的行爲完全無關，用它們控告性暴力行爲是捉錯用神。

最能闡述上述現象的例子便是「不誠實使用電腦罪」[10]。律政司過去常用這條罪行檢控任何使用電腦、或智能電話相關的罪行，故此，除了檢控電腦駭客類的案件外，亦常用於手提電話偷拍裙底的案件。然而，2018年的時候，高等法院的法官認爲，這條法例的立法原意是針對電腦駭客，即侵入別人的電腦，並竄改或偷取資料的行爲，而不是用以指控任何以電腦干犯而不是用以指控任何以電腦干犯的罪行，包括手機偷拍案件。[11]。然而，2018年的時候，高等法院的法官認爲，這條法例的立法原意是針對電腦駭客，即侵入別人的電腦，並竄改或偷取資料的行爲，而不是用以指控任何以電腦干犯的罪行，包括手機偷拍案件。　雖然現時無任何法例可以用來檢控偷拍案件，出現了法律真空，卻凸顯了以現行條例檢控影像性暴力案件並不合適的問題。

缺乏針對影像性暴力的法例，容易引導公衆理解這類行爲不嚴重、無需法律約束。加上，社會受性暴力的迷思影響，認爲性暴力是由陌生人施行，如果侵犯者是認識的人，警察傾向定性它們為私人糾紛、個人爭執，並且認爲司法制度無法解決個人糾紛，因而需要以個人層面的溝通、和解來處理。以威脅散佈私密影像爲例，被前度威脅的受訪者Benjamin曾經報警，警察拒絕受理，更勸諭他自己想辦法處理：

*「（訪問員：另外你話去報警，警察話唔得，其實成個求助過程，你覺得最難係咩？）*

*其實我就唔覺得有咩特別難位，只係覺得無奈。我俾人咁樣要脅、仲係用片。啲警察都話你咁樣係報唔到警，落唔到案，咁我真係冇辦法，個警察都建議我：你自己諗下點樣去處理呢件事。所以成件事都拗曬頭，只係無奈。」*

（受訪者Benjamin）

當Benjamin詢問警察，如果對方把私密影像傳送給自己的朋友，是否構成刑責？警察認爲傳送給朋友不算，公佈出去才算；換言之，公開發佈才有可能驅使警察落案。這樣看來，警察在斷定個案是否屬於私人糾紛的準則，似乎在於案件是否發生在「公衆領域」：

*「（訪問員：就住佢send出去呢件事？）警察講，佢係send俾朋友嗰下，就真係冇得搞。（訪問員：警察詳細係點講？）因為佢講緊佢個動作係send俾朋友，佢唔係publicise【中：公佈】出去，publicise出去就有事，但係朋友之間……大家朋友開心share就冇事，所以就真係搞佢唔掂。」*

（受訪者Benjamin）

然而，網絡的「公衆領域」難以定義。以通訊軟體程式Telegram爲例，雖然有的群組裏面只有幾十個成員，但只要有群組的連結（link）便可加入，認證的門檻不高，那麼，這些網絡群組算是私人群組、還是公衆群組？

正如這個報告一直強調，未經同意散佈私密影像對人的傷害，在於它違背了當事人的意願、侵害性自主權，這個事實不會因爲私密照片只傳送給一個認識的朋友而被否定。以散佈行爲是否牽涉「公衆領域」作爲準則決定是否落案，是對錯焦點。

除了執法部門未能辨別行為的本質，因而用錯準則來判斷是否落案，社福機構同工Jade表示警察在處理影像性暴力案件是受性暴力迷思影響、缺乏敏感度，令求助人在報案過程感到挫折。Jade曾陪同被男朋友偷拍裸照、威脅的女受害人報警，她表示當受害人向警察表示自己當時是不情願的時候，警察會對此提出大量質疑，「可惜，這些質疑來自警

10　《刑事罪行條例》第161條

11　香港01（2019-04-04）。「不誠實取用電腦案律政司敗訴，一文看清甚麼罪受影響」，取自：https://www.hk01.com/社會新聞/301123/不誠實取用電腦案-律政司敗訴-一文看清甚麼罪受影響

察對性暴力的想象狹窄，認爲受害人作出激烈的反抗、甚至雙方有肢體衝突才稱得上是不情願」。然而，伴侶之間的權力關係、兩人之間的複雜情感，很難令受害者做出這些反應。她認爲警察可能不掌握這類受害者的處境，難以站在她們的角度思考：

*「警察會質疑佢地：如果真係唔想對方影嘅話，點解唔用力反抗？點解唔即刻搶咗佢部電話？點解你之後仲見對方？點解仲繼續同佢拍拖？警察似乎認爲，你要好激烈打對方、要搶佢部手機、嗌曬交，先覺得你真係唔情願。但情侶之間好難咁樣直接反抗，而且好多發生偷拍、威脅嘅個案裡面，佢哋段關係本身就存在權力不平等，可能侵犯者長期都操控住另一半。*

*警察將佢哋對性暴力嘅刻板印象放係親密關係、又未必明白私密影像對女性所造成的壓力同困擾。面對警察的質問，受害人好多都唔識答、口啞啞。有女仔聽到警察咁樣質問自己，會變得無自信，可能會想放棄，打擊佢哋繼續司法程序嘅信心。」*

（受訪者Jade）

# 5 總結和建議

未經同意的拍攝或散佈、要脅散佈私密影像的行為之所以構成性暴力，因為侵犯者漠視當事人的意願，認為無必要徵詢當事人的同意；或是明知當事人的意願卻違背，令受害人感到失去表達身體的自由。

根據問卷結果，最多人表示侵犯者是陌生人，其次是伴侶。從訪談結果可見，伴侶施行影像性暴力是權力支配的表現，侵犯者以為是短暫的操控遊戲，但受訪者的經歷反映，一旦影像被散佈到網絡則難以刪除，有受訪者表示網絡平台拒絕採取措施制止影像擴散，令影像無法被清除，對受害人帶來不可逆轉的後果，帶來的影像持續不斷。社會需要意識到這類性暴力的深遠後果。

面對暴力，受害者多數傾向不出聲或向人求助。問卷結果反映，選擇報警、向身邊的人求助、向社會服務機構求助的人相對較少。受訪者也表示，暴力發生的時候，抗拒告訴身邊的人或報警，背後的原因主要是認為社會傾向將責任放在受害者身上，繼而說出責怪受害人的話語。

問卷結果反映，選擇了報警的人，遭拒絕落案的佔多數，主要的拒絕原因是證據不足、無法例、認為案情不嚴重、認為事件屬私人糾紛。這些原因互相影響著案件受理的可能性，其中，無特定法例使警察缺乏執法的基礎。無特定法例難以幫助執法者理解這些行爲侵犯性自主權的本質，容易令執法者輕視案件的嚴重性，將它當作私人爭執處理。除了缺乏法例基礎，警察對親密關係暴力及影像性暴力的認識不足、受迷思影響，也構成受害人在司法制度受挫的原因。

問卷的結果顯示，最多人認為「設立針對影像性暴力的特定法例」可以減少暴力發生，其次是增加罰則，可見公眾認為社會需要以立法確認行為的錯誤和嚴重性。

就著社會可以如何減少及預防影像性暴力、減低對受害人的傷害，餘下部分將從「法律改革」、「公衆教育」、「網絡平台責任」和「警察培訓」的面向提出具體的建議。

**法律改革：設立特定法例**

法律改革委員會性罪行檢討小組委員會於2019年4月30日發表《窺淫及未經同意下拍攝裙底》報告書，建議本港新增兩項特定罪行：窺淫罪、未經同意下拍攝裙底罪。[12]然而，這兩項改革並不能規管所有影像性暴力的行爲。拍攝、移花接木、散佈、要脅的行爲是一個「連續體」，它們可能同時發生、互爲因果，如果只是涵蓋偷拍，而不涵蓋其他的行爲，漠視了受害人的現實處境，建議法例應該全面涵蓋影像性暴力。

有普通法地區已經設有針對散佈和要脅的特定法例，其中，澳洲昆士蘭州的法律較全面。當地政府在2019年的4月於刑事法Criminal Code Act 1899新增並落實以下條例：散佈私密影像（s.223[13]、要脅散佈私密影像（s.229A）[14]，最高刑罰監禁三年；法例所指的「私密影像」除了涵蓋拍攝所得的影像，還涵蓋移花接木的影像。改革同時新增了糾正令（s.229AA）[15]：一經定罪，法院可要求該人士採取合理步驟刪除影像，否則要多面臨兩年的監禁。

在英國，當地設有窺淫罪[16]，並在2019年初改革罪行令它得以涵蓋拍攝裙底[17]。然而，政府認爲僅是窺淫罪並不足夠，當地沒有任何特定條例全面地規管未經同意拍攝、製作、散佈私密影像的行為，於是，政府在同年7月要求法律委員會（Law

12 目前兩項法例在建議階段，尚未落實

13 s223: Distributing intimate image, Criminal Code Act 1899 (Queensland)

14 s229A: Threats to distribute intimate image or prohibited visual recording, Criminal Code Act 1899 (Queensland)

15 s229AA:Rectification order, Criminal Code Act 1899 (Queensland)

16 s67: Voyeurism, Sexual Offences Act 2003 (England and Wales)

17 s67A Voyeurism: additional offences, Sexual Offences Act 2003 (England and Wales)

Commission）檢討現行法例及推行公眾諮詢，目的是爲了確保法律與新興技術保持同步，報告將於不久後公布。[18]

由此可見，各地政府早已意識影像性暴力的普遍、嚴重性，法律需要與時並進，我們建議香港政府和法律改革委員會是時候開展立法工作：參考海外的法例提出改革建議，並將特定法例訂爲性罪行條例。

**公衆教育：不要成爲侵犯者**

「偷拍+未經同意散佈私密影像經驗問卷調查」發現影像性暴力多發生在熟悉的人之間，情侶間的尤其嚴重。可見，親密關係教育、性同意（sexual consent）的教育很重要。即便雙方是情侶，發生性行爲、拍攝私密影像、散佈，均需要「分別」詢問、並遵從當事人的意願，這些行爲之間并沒有所謂默許或暗示的空間，也並非理所當然。雙方是情侶，也並不等於對方必須服從所有的要求，每個人都有自己的界線和表達意願的自由，不要剝奪對方的權利，一意孤行，成爲侵犯者。

同時，我們也需要教育大衆影像性暴力對人的傷害，避免成爲侵犯者。有人可能覺得散佈私密影像很好玩、或者認爲「一張相而已，沒有什麽大不了」，沒有思慮後果便上載到網絡，可是，只要一旦上載，要徹底清除相關影像存在極大困難，事情將無法挽回。受害者除了出現常見的負面情緒，有29個人表示曾經自殺或有自殺念頭，可見這類暴力的創傷十分大，不可忽視。

**公衆教育：強調旁觀者責任**

除了侵犯者有責任，在影像性暴力的個案中，旁觀者的觀看、下載、轉發、均是有份參與和助長暴力的發生，甚至影響當事人是否求助的決定。

18 Law Commission, UK. 'Taking, making and sharing intimate images without consent', see: https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/

影像性暴力每天發生，受害者可能是我們的朋友、家人、同事。我們每個人都可能成爲被傾訴的對象、被求助的人；此外，作爲網民，我們也很習慣對事情作出各式各樣的意見、評論、判斷。我們可能以爲自己微不足道，但與受害者的傾談後發現，旁觀者的一字一句影響著受害人是否向他人傾訴、求助的決定。

因此，我們的公衆教育需要強調旁觀者的角色，教育每個人反思「指責受害人」的現象，避免說出傷害受害者的説話，這些都是協助受害者的關鍵：

*「因為我知身邊好多女仔佢哋最怕嗰個位就係身邊嘅人點睇，佢哋未必係怕影佢嗰個人。但佢哋可能係會俾身邊嘅人影響，人哋同佢講係佢嘅問題，佢就真係信，唔敢做任何嘢……*

*同埋可能係因為我自己個性比較開放可以願意同身邊朋友討論。佢哋自己都會開始留意到，其實好多時真係無必要去怪責受害者。當身邊嘅朋友都有一個正確嘅觀念、大家都去互相影響，對我嘅傷害就冇咁大。」*

（受訪者Florence）

除了教育旁觀者改變自己的言論，也可以從行爲入手，教育他/她們可以主動出手，介入影像性暴力事件。曾經遭遇陌生人偷拍的Florence認爲，被偷拍的時候，心裏都很希望旁觀者可以挺身而出，令受害者不需要單獨面對：

*「（訪問員：如果有旁觀者，你覺得佢哋做啲咩可以幫到你？）我覺得佢可以行埋嚟問我：小姐你有冇事？。咁我覺得你對嗰個人做最大嘅support係行埋去好大聲問佢o唔ok，除咗係安慰嗰個人之外，可以俾隔離嘅人知佢唔係自己一個，所以有時我係地鐵度見到我懷疑係偷拍緊，我都會即刻行埋去大聲問：小姐你有冇事？其實我主要嘅用意係嚇走嗰個男人，所以我嗰刻係好想有人咁樣同自己講。」*

（受訪者Florence）

除此之外，當網民在網上看到未經散佈的私密影像、相關的貼文或是欺凌受害人的文章，除了不看、不下載、不讚好、不分享、不轉發，網民可多做一步：主動檢舉，要求網站移除，停止對受害者的傷害。

我們的公眾教育可以多強調：旁觀者是有能力去改變的，可以選擇積極介入，阻止影像性暴力的發生。

**網絡平台責任：訂立使用政策和檢舉機制**

各類網絡平台，包括網上論壇、交友軟件、社交網站，都可能出現影像性暴力的情況，我們建議這些平台可以針對影像性暴力訂立使用守則、舉報機制。

影像性暴力侵犯了一個人的侵犯性自主權，問卷調查的結果也反映，影像性暴力影響著受害者的身心健康。網民在享有言論自由的前提是不傷害他人。尊重私隱、尊重他人意願是倡議網絡平台訂立政策的前提。

我們建議網絡平台明確地禁止網民散佈未取得當事人同意的私密影像、禁止網民對影像的主角發表欺凌的言論、禁止網民公開當事人的個人資料；網絡平台並應嚴格執行守則，如果發現違反守則的影像、貼文，平台負責人主動刪除相關貼文，並對發佈者提出警告。

與此同時，建議網絡平台訂立的指引列明舉報的途徑，並提供舉報的表格，供網民可以方便地檢舉違反指守則的貼文；為保障舉報者的安全，網絡平台允許舉報者以匿名及不透露個人資訊的方式舉報。

當收到網民檢舉和投訴，網絡平台應該積極跟進，儘快移除相關內容和影像，減少內容被轉載或下載的可能性。如果不同的網絡平台可以就影像性暴力訂立政策和具體執行措施，將有效減少影像性暴力的發生。

**警察培訓：認識親密關係暴力及影像性暴力**

警察對性暴力的認識狹窄，認爲性暴力只發生在陌生人之間，缺乏對親密關係暴力的瞭解。假如警察更好地掌握這類受害者的處境，站在她們的角度思考，可減少求助人在報案過程遭遇的挫折。

因此，建議培訓警察認識親密關係暴力及影像性暴力的課題，瞭解受害人的處境，增加他們在處理這類性暴力的敏感度，建立對受害人的同理心，才能幫助受害人在取得司法公義的路走得更順暢。

# 参考資料

McGlynn, C., Rackley, E. & Houghton, R. Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse. *Feminist Legal Studies* 25, 25–46 (2017).
https://doi.org/10.1007/s10691-017-9343-2

McGlynn, C., Rackley, E. & Kelly, J.(2019, July 1). S*hattering Lives and Myths: A Report on Image-based Sexual Abuse.*
http://dro.dur.ac.uk/28683/

State of Queensland (2018). *Criminal Code (Nonconsensual Sharing of Intimate Images) Amendment Bill 2018.*
https://www.legislation.qld.gov.au/view/pdf/bill.first/bill-2018-050

香港法律改革委員會（2019年4月30日）。《窺淫及未經同意下拍攝裙底》：
https://www.hkreform.gov.hk/tc/publications/rvoyeurism.htm

推動性別平等
締造零性暴力社會

rainlily.org.hk
@acsvaw

香港公益金
The Community Chest
會員機構 Member Agency

Response to Public Consultation Paper on Offences of Voyeurism, Intimate Prying and Non-Consensual Photography of Intimate Parts and Related Offences (Zonta CLub of Kowloon)
05/10/2020 10:53
Hide Details
From:
To: "consultation@sb.gov.hk" <consultation@sb.gov.hk>,
Cc:

2 Attachments

Response to Consultation on the Proposed Introduction of Offences of Voyeurism 2020 09 18 A.pdf

IMG_20200930_0003.pdf

By email : consultation@sb.gov.hk
Security Bureau
Central Government Offices
10/F, East Wing,
2 Tim Mei Avenue,
Hong Kong

5 October 2020

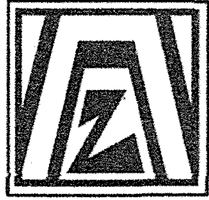
Dear Sirs

**Consultation Paper on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences**

We refer to the above Consultation. In response to your invitation for comments, on behalf of the Zonta Club of Kowloon, we set out our response as attached.

Zonta Club of Kowloon, established in 1977, is a member of Zonta International, a global organization of executives and professionals working together to advance the status of women worldwide through service and advocacy. Since its establishment, as a registered non- profit organization in Hong Kong, Zonta Club of Kowloon has worked to achieve the objectives of Zonta International. We have supported a variety of community projects through partnership with service organizations that will benefit women in distress, abuse victims, the elderly, handicapped and underprivileged. We share a commitment to helping our communities and to improving the legal, political, economic, educational, health and professional status of women worldwide. We advocate for issues relating to, or affecting the welfare and wellbeing and women.

President, Zonta Club of Kowloon 2020-22



ZONTA 九龍崇德社
CLUB OF
KOWLOON
MEMBER OF ZONTA INTERNATIONAL
EMPOWERING WOMEN
THROUGH SERVICE & ADVOCACY

By email: consultation@sb.gov.hk

Security Bureau
Central Government Offices
10/F, East Wing,
2 Tim Mei Avenue,
Hong Kong

5 [7] October 2020

Dear Sirs

**Consultation Paper on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences**

We refer to the above Consultation. In response to your invitation for comments, on behalf of the Zonta Club of Kowloon, we set out our response as attached.

Zonta Club of Kowloon, established in 1977, is a member of Zonta International, a global organization of executives and professionals working together to advance the status of women worldwide through service and advocacy. Since its establishment, as a registered non- profit organization in Hong Kong, Zonta Club of Kowloon has worked to achieve the objectives of Zonta International. We have supported a variety of community projects through partnership with service organizations that will benefit women in distress, abuse victims, the elderly, handicapped and underprivileged. We share a commitment to helping our communities and to improving the legal, political, economic, educational, health and professional status of women worldwide. We advocate for issues relating to, or affecting the welfare and wellbeing and women.

Zonta Club of Kowloon

# Consultation Paper

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

# Response Form

## Proposals 1 and 2 – New offences: *Voyeurism and Intimate Prying*

[Paragraphs 11 – 12 of consultation paper]

**1.** Do you agree with the introduction of a specific offence of voyeurism (i.e. Proposal 1)?

(a) Yes ........................................................ ☑
(b) No ........................................................ ☐

Remarks:
Yes, but the victim's "consent" should not be required as an element of the offence. Moreover, consent could have been obtained by coercion etc.
The victim's consent should not be raised as a defence.

Also, we should convict offenders 'irrespective of the purpose' This is for the simple reason that no matter what the purpose is, harm is already done on the victims. The government should reconsider why it is necessary to include the purpose of "sexual gratification".

**2.** Do you agree with the introduction of a separate offence of intimate prying (i.e. Proposal 2), as a statutory alternative to the proposed offence of voyeurism, in addition to being a standalone offence?

(a) Yes ........................................................ ☑
(b) No ........................................................ ☐

Remarks:
Yes, but if the offence Is constituted irrespective of the purpose or lack of purpose, and that it is not necessary for there to different penalties for voyeurism

and intimate prying, then it should reconsider whether it is necessary to keep separate offences.

**3.** Do you agree with the proposed scope of acts for Proposals 1 (i.e. voyeurism) and 2 (i.e. intimate prying)?

(a) Yes .......................................................... ☐
(b) No, too wide .............................................. ☐
(c) No, too narrow ............................................ ☑

Remarks:
As presented in the Consultation Paper, the offences of voyeurism and intimate prying are identical except that the former offence is only constituted when it can be proven that the purpose of the act was for sexual gratification. Consequently, the penalty for the former offence is heavier than the latter. However, we believe that the purpose of the offence is to protect the victim. Since the victim is offended whatever the purpose of the offender, we believe that there should not be any difference in penalties between the 2 offences. Blackmailing or revenge as a purpose of the act should be given a lower penalty.

## Proposals 3 and 4 – New offences: *Non-consensual Photography of Intimate Parts*

[Paragraphs 13 – 15 of consultation paper]

**4.** Do you agree with the introduction of the offence of non-consensual photography of intimate parts for sexual gratification (i.e. Proposal 3)?

(a) Yes ............................................................ ☑
(b) No ............................................................ ☐

Remarks:
Same reasons as for Question 1, the victim's consent and the wrongdoer's purpose should not be a factor in the constituting of the offence. We suggest removal of offence as a "non-consensual" as a description and an element of the offence.

Same reasons as for Question 1, we should convict offenders 'irrespective of the purpose' This is for the simple reason that no matter what the purpose is, harm is already done on the victims. Yes, but if the government reconsiders that it is an offence irrespective of the purpose or lack of purpose, and that it is not necessary for there to different penalties for voyeurism and intimate prying, then it should reconsider whether it is necessary to keep separate offences.

**5.** Do you agree with the introduction of a separate offence of non-consensual photography of intimate parts irrespective of the purpose, as a statutory alternative to the proposed offence of non-consensual photography of intimate parts for sexual gratification, in addition to being a standalone offence (i.e. Proposal 4)?

(a) Yes ............................................................ ☑
(b) No ............................................................ ☐

Remarks:
Yes, but if the offence is constituted irrespective of the purpose or lack of purpose, and that it is not necessary for there to different penalties for voyeurism and intimate prying, then it should reconsider whether it is necessary to keep separate offences.

**6.** Do you agree with the proposed scope of acts for Proposals 3 and 4 (i.e. non-consensual photography of intimate parts)?

(a) Yes .................................................... ☐
(b) No, too wide .................................................... ☐
(c) No, too narrow .................................................... ☑

Remarks:
Similar comments as for Proposals 1 and 2.

7. Do you agree that Proposals 3 and 4 (i.e. non-consensual photography of intimate parts) should not cover "down-blousing"?

(a) Yes .................................................... ☐
(b) No .................................................... ☑

Remarks:
"Downblousing" should not be excluded.

## **Proposals 5 and 6 – New offences:** ***Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images***

[Paragraphs 16 – 21 of consultation paper]

**8.** Do you agree with the introduction of the offence against the distribution of surreptitious intimate images (i.e. Proposal 5)?

(a) Yes .................................................................. ☑
(b) No .................................................................. ☐

Remarks:
"Consent to distribution " should not be included as a defence to the offence. Whether the victim has knowledge of the distribution should not be an element of the offence.

**9.** Do you agree with the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images)?

(a) Yes .................................................................. ☐
(b) No, too wide .................................................................. ☐
(c) No, too narrow .................................................................. ☑

Remarks:
The offence should be constituted regardless of whether the original images were obtained through a commitment of the offences of voyeurism or inteimate prying, and whether or not the victim has consented to the act.

**10.** Do you agree with the introduction of the offence against the non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (i.e. Proposal 6)?

(a) Yes .................................................................. ☐
(b) No .................................................................. ☑

Remarks:
It is necessary to cover subsequent distribution. The harm caused is equally severe.

**11.** Do you agree with the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)?

(a) Yes ............................................................ ☑
(b) No, too wide ................................................ ☐
(c) No, too narrow .............................................. ☐

Remarks:
Please see however our answers to questions 8 – 10.

**12.** Do you think that for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent?

(a) Yes ............................................................ ☑
(b) No ............................................................. ☐

Remarks:
Yes but wider so that the offence should be constituted no matter whether the distributor knows whether the victim has consented or not.

**13.** Do you think that for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress?

(a) Yes ............................................................ ☑
(b) No ............................................................. ☐

Remarks:
Yes but should be wider so that the offence should be constituted irrespective of whether or not the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress.

## Intimate Acts and Intimate Parts

[Paragraphs 22 – 24 of consultation paper]

**14.** Do you agree that "intimate acts" should mean acts, in a place which would reasonably be expected to provide privacy, by a person when the person's intimate parts are exposed or covered only with underwear, or the person is using the toilet, or the person is doing a sexual act not ordinarily done in public?

(a) Yes .................................................................. ☑
(b) No, should include fewer elements *(please specify below)*............ ☐
(c) No, should include additional elements *(please specify below)*......... ☐

Remarks:
However ,please delete "when the person's intimate parts are exposed or covered only with underwear". The offence should not depend on whether the wrongdoer was able to see the victim's intimate parts.

**15.** Do you agree that "intimate parts" should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear?

(a) Yes .................................................................. ☑
(b) No, should include fewer elements *(please specify below)*.............. ☐
(c) No, should include additional elements *(please specify below)*......... ☐

Remarks:
Yes. However, please see answer to Question 14.

**16.** Do you agree that for the purpose of the proposed offences, the definition of "intimate parts" should include breasts and chest, irrespective of gender, or should the definition include breasts of female only?

(a) Should include breasts and chest, irrespective of gender........... ☑
(b) Should include breasts of female only................................ ☐

Remarks:
We suggest a unified approach for both genders.

## Proposal 7: *Defence(s)*

[Paragraphs 25 – 28 of consultation paper]

**17.** Do you agree that a defence of lawful authority or reasonable excuse should be provided for the proposed offences under Proposals 2, 4, 5 and 6?

(a) Yes .......................................................... ☑
(b) No .......................................................... ☐

No. The government should not allow offenders to argue on ground of reasonable excuse. Such would create another area of ambiguity that allow offenders to escape conviction.

**18.** Do you think that a defence of lawful authority or reasonable excuse should also be provided for the proposed offences under Proposals 1 and 3?

(a) Yes .......................................................... ☑
(b) No .......................................................... ☐

Remarks:
No. There should not be such defence for any offences committed for the purpose of obtaining sexual gratification.

**19.** If suitable defence(s) are made available covering acts done with lawful authority or reasonable excuse, what should be included as reasonable excuses?

No. The government should not allow offenders to argue on ground of reasonable excuse. Such would create another area of ambiguity that allow offenders to escape conviction.

## Proposal 8: *Sexual Conviction Record Check Scheme*

[Paragraph 29 of consultation paper]

**20.** Do you agree that the proposed offences under Proposals 1 to 6 should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme?

(a) Yes ........................................................... ☑

(b) No ........................................................... ☐

Only some of the proposed offences – *please indicate (can pick more than one)* –

(i) Voyeurism........................................................ ☐

(ii) Intimate prying.................................................. ☐

(iii) Non-consensual photography of intimate parts for sexual gratification.................................................. ☐

(iv) Non-consensual photography of intimate parts irrespective of the purpose.................................. ☐

(v) Distribution of surreptitious intimate images................ ☐

(vi) Non-consensual distribution of intimate images............ ☐

| Yes. Offenders should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme. |
|---|

## FURTHER VIEWS

Further to the responses above, additional views and comments (e.g. punishments of the proposed offences) can be set out below.

Click here to enter

Name/Name of Organization: Click here to enter

Telephone No. (Optional): Click here to enter

Email Address (Optional): Click here to enter

Date: Click here to enter

## WHEN AND HOW TO RESPOND

Please send your views to the Security Bureau by mail, facsimile or email on or before 7 October 2020 –

| | |
|---|---|
| Address: | Security Bureau<br>- Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences<br>Central Government Offices<br>10/F, East Wing<br>2 Tim Mei Avenue<br>Tamar, Hong Kong |
| Fax: | 2501 4281 |
| Email: | consultation@sb.gov.hk |

It is optional for members of the public to supply their personal data when providing views on this consultation paper. The submissions and personal data collected may be transferred to the relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data may only use the data for such purposes.

The names and views of individuals and organisations who/which put forth submissions in response to this consultation paper ("senders") may be published for public viewing. We may, either in public or private discussions, or in any subsequent report, cite comments submitted in response to this consultation paper.

To safeguard senders' personal data privacy, we will remove senders' relevant data, such as contact details, identification numbers, and signatures, where provided, when publishing their submissions.

We will respect the wish of senders to remain anonymous and/or keep the views confidential in part or in whole. If the senders request anonymity in the submissions, their names will be removed when publishing their

views. If the senders request confidentiality, their submissions will not be published.

If the senders do not request anonymity or confidentiality in the submissions, it will be assumed that the senders can be named and the views can be published in their entirety.

Any sender providing personal data to the Security Bureau in the submission will have rights of access and correction with respect to such personal data. Requests for data access and correction of personal data should be made in writing to the same correspondence address as set out above.

**Security Bureau**
**July 2020**

同志團體回應《保安局 — 引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行建議的諮詢》之 意見書
06/10/2020 13:09
Hide Details
From:
To: consultation@sb.gov.hk,

1 Attachment

同志團體回應 窺淫等罪行建議諮詢 20201006.pdf

致： 保安局（電郵：consultation@sb.gov.hk）

我們是關注本地性別及性傾向小眾平等的團體，十分關注現時香港法例未有特定罪行針對窺淫、私密窺視、未經同意下拍攝私密處及未經同意發放性影像等行為。

附件中是我們就諮詢文件的詳細意見，望 貴局採納。

女角平權協作組 Les Corner Empowerment Association
性別製造 Made in Gender
大同 Gay Harmony
彩虹行動 Rainbow Action
PrideLab

致：　　　保安局（電郵：consultation@sb.gov.hk）

寄件人：　女角平權協作組 Les Corner Empowerment Association

性別製造 Made in Gender

大同 Gay Harmony

彩虹行動 Rainbow Action

PrideLab

# 同志團體回應《保安局 — 引入窺淫、私密窺視、未經同意下拍攝私密處及相關罪行建議的諮詢》之意見書

我們是關注本地性別及性傾向小眾平等的團體，十分關注現時香港法例未有特定罪行針對窺淫、私密窺視、未經同意下拍攝私密處及未經同意發放性影像等行為。我們認為這是法例上的漏動，使到性小眾未能在面對性暴力及網絡性別暴力時受到保護，因此現在促請當局立即訂立新的刑事罪行，以保障市民及性小眾群體的性自主。

我們十分認同諮詢文件中所述，訂立有關新法例時，必需跟從法改會小組委員會訂立的指導原則，特別是尊重性自主權、性別中立、避免基於性傾向作出區分，以確保不同的性別或性傾向人士，在新法例下都能受到平等及適切的保障。

值得一提的是，性小眾社群會面對不同類型的網絡性別暴力，例如：親密伴侶復仇式散佈性影像、網絡性別騷擾、基於性影像的性勒索及利用性影像公開性傾向或性別認同等。此等性別暴力於網絡上快速傳遞、散佈層面廣闊，加上網絡使用便利、加害者易於隱匿身份等的特性，使受害者會造成更嚴重傷害。

此外，由於現時本港未有「性別承認」立法，對於跨性別者而言，擬議法例的「性別中立」原則更為重要，以免跨性別者遭受到歧視及差別待遇。

以下是我們就諮詢文件的 8 項建議及 20 條諮詢問題的詳細意見，望 貴局採納。

意見重點：

1. 同意訂立窺淫、私密窺視、未經同意下拍攝私密處、發放偷拍的私密影像及未經同意下發放私密影像的罪行
2. 我們認為窺淫、私密窺視的最高刑罰應同為監禁 5 年；未經同意下為了得到性滿足而拍攝私密處罪、未經同意下不論目的拍攝私密處的罪行的最高刑罰亦應同為監禁 5 年
3. 我們認為應跟從性別中立及避免基於性傾向作出區分的指導原則，所以私密處的定義應不論性別涵蓋任何人的胸部，包括跨性別者。

**聯署團體**

女角平權協作組 Les Corner Empowerment Association
性別製造 Made in Gender
大同 Gay Harmony
彩虹行動 Rainbow Action
PrideLab

## 建議 1 及建議 2 — 新增罪行:窺淫及私密窺視

[諮詢文件第 11 及 12 段]

**1. 你是否同意就窺淫訂立一項特定罪行(即建議 1)？**

是。

註: 促請當局立即展開立法程序。

**2. 你是否同意就私密窺視另訂一項罪行(即建議 2)，以作為擬議窺淫罪的法定交替罪行，同時也是一項獨立罪行?**

是。

註:

我們認為建議 2 的私密窺視罪的最高刑罰為「監禁 3 年」太低，建議與擬議的窺淫罪的最高刑罰的差距減少，最好是同樣為「監禁 5 年」。原因有以下幾點：

1. 對於受害人而言，其受侵犯的傷害是在於被窺視的行為，不論對方有何目的受傷害的程度亦相約，非為性滿足的目的，例如報復、恐嚇受害人等，對受害人的傷害可能更深。
2. 以我們理解，「法定交替罪行」即類近現時法例中列明之「轉以他罪裁決」的情況。跟據上述情況，最高刑罰不一定要比原本控罪為低。
   a. 我們參考了香港法律第 210 章《盜竊罪條例》作為例子，其中第 9 條的「盜竊罪」最高刑罰為監禁 10 年，法例附表中列明「盜竊罪」的轉以他罪裁決中第 17 條「以欺騙手段取得財產」、第 18 條「以欺騙手段取得金錢利益」等，其最高刑罰同樣為監禁 10 年；第 14 條之「處理贓物罪」最高刑罰是高於原控罪為監禁 14 年。
   b. 我們另外參考了香港法律第 212 章《侵害人身罪條例》之中，第 2 條「謀殺」與第 7 條的「誤殺」，最高刑罰亦同是終身監禁。
3. 窺淫罪中的建議範圍是「目的為了得到性滿足」，而性滿足作為一個目的，實為難以證實。如擬議的私密窺視罪與窺淫罪的最高刑罰相差為 2 年之多，恐怕否認以「性滿足為目的」將成為涉嫌犯人在法庭上用以減刑的漏洞。

總而言之，我們認為擬議的私密窺視罪作為窺淫罪的法定交替控罪，其最高刑罰同樣是「監禁 5 年」會較為穩妥。促請當局立即展開立法程序。

我們認為另一個可以處理建議 1 及 2 這兩項擬議罪行之間的最高刑罰差距的方法，是將建議 1 及 2 合併為一項「窺淫及私密窺視」罪行，其目的可以是不論目的，則「得到性滿足」亦可包括在其中，而此罪行的最高刑罰可定為 5 年，讓法官考慮每件案的嚴重情況、其目的是否為得到性滿足、對受害人的傷害而量刑。再加上建議 1 及 2 的內容除目的外機本上完全重疊，合併為一項罪行亦可使法例更簡潔。

**3. 你是否同意建議 1(即窺淫)及建議 2(即私密窺視)所述行為的擬議涵蓋範圍?**

是。

## 建議 3 及建議 4 — 新增罪行:未經同意下拍攝私密處

[諮詢文件第 13 至 15 段]

**4. 你是否同意就未經同意下為了得到性滿足而拍攝私密處訂立一 項罪行(即建議 3)?**

是。

註: 促請當局立即展開立法程序。

**5. 你是否同意就未經同意下不論目的拍攝私密處另訂一項罪行， 以作為擬議未經同意下為了得到性滿足而拍攝私密處罪行的法 定交替罪行，同時也是一項獨立罪行(即建議 4)?**

是。

註: 但我們認為建議 3 的不論目的拍攝私密處罪的最高刑罰為「監禁 3 年」是太低，建議與為了得到性滿足而拍攝私密處罪的差距減少，最好是同樣為「監禁 5 年」，原因與上述「諮詢問題 2」相同，不另重覆。

同樣地，我們認為建議 3 及 4 這兩項擬議罪行可合併為一項「經同意下拍攝私密處」罪行， 原因與上述「諮詢問題 2」相同，亦不另重覆。

促請當局立即展開立法程序。

**6. 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)所述行 為的擬議涵蓋範圍?**

否，範圍太窄。

註: 就我們所理解，「未經同意下拍攝私密處」這個行為重點在於「拍攝在受害人的衣服下面」的私密處，而該私密處在當時情況下本來不會被見到。但我們認為問題在於受害者的衣服當時是一般穿衣的狀態，還是因另一人的行為，例如掀起衣服而將私密處外露。我們認為如由另一人掀起受害者的衣服，而引至受害者的私密處有機會能被其他人拍攝的話，這個行為本身亦應為建議 3 及建議 4 的未經同意下拍攝私密處的擬議罪行所涵蓋。

**7. 你是否同意建議 3 及建議 4(即未經同意下拍攝私密處)不應包括由上而下“拍攝衣領”的行為?**

否。

註：
因為在衣服有各式各樣的剪裁，拍攝角度多樣化，由哪一個角度可拍攝到衣服下面的哪一個部位，有機會引起不必要的法律爭議。例如大“V”字形的衣領可在則拍攝到的“私密處”、連身衣裙的衣領可拍攝到的“私密處”，又或者拍攝者使用環境（例如水窪、鏡面地磚、不知可故出現在地面上的反光物等）的反映，在衣服上方操作設備亦可以拍攝到受害人的“私密處”，其拍攝到的性影像，皆有可能達致引起受害人傷害與「在受害人的衣服下面操作設備」拍攝到的“私密處”有相同的傷害程度。
我們認為建議3及建議4不應規限設備及拍攝器材的角度，以及其相對於衣物的位置是上方或下方或其他方向，單以「當時情況下有關的私密處本來不會被見到」便可。
至於如何避免多個情景（例如自拍）引致的誤墮法網，我們將在下列第19題諮詢問題中表達意見。

## 建議5及建議6 — 新增罪行:發放偷拍的私密影像及未經 同意下發放私密影像

[諮詢文件第16至21段]

**8. 你是否同意針對發放偷拍的私密影像訂立一項罪行(即建議5)?**

是。
註: 促請當局立即展開立法程序。

**9. 你是否同意建議5(即發放偷拍的私密影像)所述行為的擬議涵蓋範圍?**

大致上同意，希望澄清涵蓋範圍詳情。
註: 我們認為從偷拍得來的私密影像，受害人可能尚未知悉有該等影像的存在，所以我們希望澄清，本諮詢文件內涵蓋範圍中「受害人不同意發放」，是指發放人沒有徵得被拍攝者的同意，而非被拍攝者須明示不同意發放。

**10. 你是否同意針對未經同意下發放可能或曾經獲得同意拍攝但未獲同意作其後發放的私密影像(包括照片和影片)訂立一項罪行 (即建議6)?**

是。
註: 促請當局立即展開立法程序。

11. 你是否同意建議 6(即未經同意下發放私密影像)所述行為的擬議涵蓋範圍?

是。

12. 就建議 6 而言，你是否認為只應在發放者明知受害人沒有同意發放私密影像或罔顧受害人有沒有同意發放，才構成犯罪?

是。

13. 就建議 6 而言，你是否認為應在發放者意圖導致受害人受困擾，或明知或有理由相信發放私密影像會導致或可能導致受害人受侮辱、驚恐或困擾，才構成犯罪?

是。

## 私密行為及私密處

[諮詢文件第 22 至 24 段]

14. 你是否同意“私密行為”應指任何人身處有合理期望能提供私隱的地方時作出屬以下情況的行為:該人正露出或只以內衣遮蓋其私密處，或該人正在如廁，或該人正進行通常不會公開進行的涉及性的行為?

是。

15. 你是否同意某人的“私密處”應理解為其生殖器官、臀部或胸部，不論這些部位是外露或只以內衣遮蓋?

是。

16. 就擬議罪行而言，你是否同意“私密處”的定義應不論性別涵蓋女性胸部和男性胸部，或有關定義應只涵蓋女性的胸部?

我們認為“私密處”的定義應不論性別涵蓋女性胸部和男性胸部。因為如果“私密處”的定義只是涵蓋女性的胸部的話，將有機會引起更多法律上的爭議，例如：

1. 跨性別女性的胸部是否“私密處”？

1.1. 跨性別女性（即男跨女的跨性別者）在完成性別重置手術並將身份證上的性別欄改為“女”之後，她在香港法律中是否被定義為女性呢？由於現時香港仍未有「性別承認法」，所以我們認為本諮詢問題中“女性的胸部”未必能涵蓋跨性別女性的胸部。然而跨性別女性的日常打扮絕大部份亦與一般女性無異，胸部亦與一般女性相當，所以亦應該受到保障。

1.2. 跨性別女性（即男跨女的跨性別者）在未完成性別重置手術及未更改身份證的性別欄的時候，她們的身份證上仍會顯示為“男”，但很多跨性別女性在此階段中已開始以女性的身份生活，更有很多已在「性別認同障礙診所」中就診並開始使用荷爾蒙治療，或已進行胸部整形手術（即隆胸），胸部會呈現與一般女性相當的外形；她們會醫生的指示下以女性的打扮生活。如果擬議罪行中“私密處”的定義不包括男性胸部的話，她們將未能受到保障。

2. 跨性別男性的胸部是否“私密處”？
跨性別男性（即女跨男的跨性別者）在未完成性別重置手術及未更改身份證的性別欄的時候，她們的身份證上仍會顯示為“女”。但他們當中很多人在此階段已完成平胸手術，胸部與一般男性相當。一般人未必能夠從外觀分辨出跨性別男性的胸部及一般男性胸部，而未知道當下拍攝的行為是否為擬定的法律所容許。

3. 就我們所理解，在本諮詢文件中之所以問及“私密處”應否涵蓋男性胸部，可能是因為現時男性在公眾地方坦露胸部並不違法，而大致上在香港本地文化中為人所接受。我們的意見書中的第 19 題回應中，會提及我們認為何如何處理此情況，以使本諮詢文件擬定的罪行，與現時在其他法例上對待男性胸部的精神相容。但如因此而將本諮詢文件所擬罪行中“私密處”的定義剔除“男性胸部”，可能引致其他性別上的問題。

4. 男性亦不一定認為其胸部為「不私密」及可供拍攝，尤其是當該位男性並沒有在公眾地方坦露其胸部時，不能排除他會視他的胸部為“私密處”。我們認識到部分男性，也會不願意在公眾地方暴露其胸部，或對於被他人要求在公眾地方坦露胸部感到不安。一律將男性胸部剔除於“私密處”定義之外，將剝奪男性對其自身胸部的性自主，甚至對男性造成歧視。

總括而言，我們認為“私密處”的定義如以性別區分，或是定義只涵蓋某女性胸部的話，對跨性別者來說有機會引致不必要的差別待遇，及法律上的爭議。尤其是因為本港尚未為「性別承認」立法，跨性別者即使修改了身份證上的性別標示，法律上如何

定義其性別仍存有爭議。故此，我們認為“私密處”的定義應涵蓋不論性別者的胸部是較為穩妥。

## 建議 7:免責辯護

[諮詢文件第 25 至 28 段]

**17. 你是否同意應就建議 2、建議 4、建議 5 及建議 6 的擬議罪行 訂定基於合法權限或合理辯解的免責辯護?**

是。

**18. 你是否認為也應就建議 1 及建議 3 的擬議罪行訂定基於合法權限或合理辯解的免責辯護?**

是。

**19. 如訂定合適的免責辯護以涵蓋合法權限或合理辯解下作出的行為，合理辯解應包括哪些情景?**

註:

我們同意應參考其他司法管轄區訂定合適的免責辯護。包括以下範圍：

1. 為了真正的科學、教育或醫學目的
2. 為了法律訴訟的合理需要
3. (i)為了媒體活動的目的而發放影像；及(ii)無意通過發放影像對被拍攝者造成傷害；及(iii)合理地相信發放影像符合公眾利益
4. 一個合理的人(在相關範圍內)考慮下列每項因素後會認為發放影像可以接受：(i)影像的性質和內容；(ii)影像在何種情況下發放；(iii)被拍攝者的年齡、智力、易受傷害程度或其他相關情況；(iv)被告人的行為影響被拍攝者私隱的程度；(v)被告人與被拍攝者的關係；(vi)任何其他相關事宜

我們就著上列的第 4. 點，認為可以就此項免責辯護可處理多種不同的處境，所以有其必要。以下為我們認為可處理的處境：

處境 A：拍攝及或發放男性或身份證上性別標示為“男”的跨性別男性，合法地在公眾地方坦露胸部的影像。在此處境下，可以假定“有關的私密處”並非“本來不會被見到”。
處境 B：沒有意圖而意外拍攝到“私密處”的影像，例如在“自拍”或是各種角度的拍攝。
處境 C： 沒有意圖或意外地發佈了“私密處”的影像，例如一時錯手按錯了本來不應發佈的影像。
處境 D：發佈者或轉發者被誤導該影像為得到同意下拍攝的影像。
就處境 B、C 及 D 的情況，在現今的社交媒體科技中，拍攝及發放可以是同一時間出現，所以該等意外拍攝到的影像，有機會同時已發佈。即使拍攝者第一時間刪除該影像，因互聯網科技傳播快速的特性，亦未能逆轉已發佈甚至廣傳的事實。
總括而言就諮詢問題第 17-19 而言，我們應為本諮詢文件擬議的罪行皆為一般情況之下，必須證實有其意圖，而意外地作出了該行為亦是抗辯之理由。

## 建議 8：性罪行定罪紀錄查核機制

[諮詢文件第 29 段]

**20. 你是否同意建議 1 至建議 6 的擬議罪行應納入為性罪行定罪紀錄查核機制下指明列表中的性罪行？**

否。
只應納入若干擬議罪行 — 請註明(可選擇多於一項)：
我們認為以下擬議罪行應納入為性罪行定罪紀錄：
窺淫、未經同意下為了得到性滿足而拍攝私密處。

寄件人： 女角平權協作組 Les Corner Empowerment Association
性別製造 Made in Gender
大同 Gay Harmony
彩虹行動 Rainbow Action
PrideLab

聯絡：

電話號碼：

電郵地址：

日期：　2020年10月6日

Anti480反性暴力資源中心就保安局「引人窺淫、私密窺視、 未經同意下拍攝私密處及相關罪行的建議」諮詢文件之意見書
07/10/2020 16:06
Hide Details
From:
To: <consultation@sb.gov.hk>,
Cc:

1 Attachment

2020.10.07就引人窺淫、私密窺視、未經同意下拍攝私密處及相關罪行的建議的諮詢之意見書.pdf

**Anti480**反性暴力資源中心
就
保安局「引人窺淫、私密窺視、 未經同意下拍攝私密處及相關罪行的建議」
諮詢文件之意見書

本會同意應盡快設立相關法例，以規管未經同意下拍攝、散佈私密影像、要脅散佈私密影像的影像性暴力（image-based sexual violence）行爲，以突顯行為的嚴重性，並保障影像性暴力的受害人。此外，我們亦要求設立罪行以規管是次諮詢並未有涵蓋的要脅發放私密影像的行為。詳情的意見如下：

一、有關新增罪行：窺淫罪（建議**1**）和私密窺視罪（建議**2**）
本會同意訂立以性滿足為目的的「窺淫罪」（建議1）及新增一條不論目的的「私密窺視罪」（建議2），以作為窺淫罪的交替罪行，同時又可作獨立罪行。

而由於無論窺視或偷拍行爲是爲了得到性滿足、或基於其他目的（例如：謀取利益），均侵犯了當事人的性自主權，且具同樣程度的嚴重性，因此本會認爲建議1和建議2的罪行應處以相同的最高刑罰（5年）。

二、有關新增罪行：未經同意下拍攝私密處罪（建議**3**和建議**4**）
本會同意就未經同意下為了得到性滿足而拍攝私密處訂立一項罪行（建議3）及就未經同意下不論目的拍攝私密處另訂一項罪行，以作為建議3的法定交替罪行，同時也是一項獨立罪行（建議4）。

而由於無論拍攝私密處的行爲是爲了得到性滿足、或基於其他目的（例如：謀取利益），均侵犯了當事人的性自主權，且同樣程度的嚴重性，因此本會認爲建議3和建議4的罪行應處以相同的最高刑罰（5年）。

本會認爲建議3和建議4的涵蓋範圍太窄，應包括「拍攝衣領」－即由高至下角度拍攝胸部的行為，因其嚴重性並不低於由下而上偷拍私密處的行為。

三、有關新增罪行：發放偷拍的私密影像罪（建議**5**）及未經同意下發放私密影像罪（建議**6**）
本會同意針對發放偷拍的私密影像訂立一項罪行（建議5）及其涵蓋範圍，以及同意針對發放獲得同意拍攝、但未獲同意發放的私密影像訂立一項罪行（建議6），但本會認為建議6應要同時涵蓋顯示受害人私密處的影像。

本會對於諮詢問題12：「就建議6而言，你是否認為只應在發放者明知受害人沒有同意發放私密影像或罔顧受害人有沒有同意發放，才構成犯罪？」有所保留。因本會憂慮按現時法例對意願的理解會影響以上法例的執行，出現漏洞。按觀察所得，有些受害人在受壓下或受威脅下未必能夠明確表示不同意，本會擔心條例未能處理這情況下的「未經同意下發放私密影像」。此外，即使受害人已表明不同意，發放者亦可以「真心相信受害人是同意」作為辯護

理由，就此，我們建議要求發放者提供認為受害人是同意的原因及舉證證明曾採取行動去確認當事人是同意。

此外，就建議5和建議6，本人建議罪行應同時涵蓋要脅發放私密影像的行為。（詳見「其他意見：建議設立針對要脅發放私密影像行為的罪行」的部份）

四、有關私密行為及私密處的定義
本會同意「私密處」和「私密行為」的定義，然而本會認為應摒棄二元性別的框架，將「私密處」的定義涵蓋為「所有」性別人士（包括：跨性別人士、雙性人）的胸部、生殖器官、臀部，以保障所有性別人士，並符合性別中立的原則。

五、有關免責辯護
本會認為須仔細考慮清楚豁免媒體活動的背後理據及實際用途。由於涉及影像皆為私密行為或私密部位，因此大部份情況而言，直接公開影像難以與公眾利益掛鈎。相反，過往媒體以公眾利益名義發放私密影像，會急促加快外流速度，往往會對影像中的當事人們造成不同程度的負面影響。

六、有關性罪行定罪紀錄查核機制
本會同意所有擬議罪行（建議1至建議6）均應納入為性罪行定罪紀錄查核機制下指明列表中的性罪行。

七、其他意見：建議設立針對「要脅發放私密影像」行為的罪行
本會建議設立針對「要脅發放私密影像」行為的法例，可參考以下海外司法管轄區禁止「要脅發放私密影像」的行爲，包括：蘇格蘭《Abusive Behaviour and Sexual Harm (Scotland) Act 2016》第2條＊及澳洲北領地《Criminal Code Act 1983 (NT)》第 208AC條＃。

＊ 蘇格蘭《Abusive Behaviour and Sexual Harm (Scotland) Act 2016》第2條：
*'2 Disclosing, or threatening to disclose, an intimate photograph or film*

*(1) A person ("A") commits an offence if—*
*(a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation,*
*(b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and*
*(c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.'*

＃澳洲北領地《Criminal Code Act 1983 (NT)》第 208AC條：
*'208AC Threaten to distribute intimate images*

*(1) A person commits an offence if the person:*
*(a) intentionally threatens to distribute an intimate image of another person; and*
*(b) intends the other person to fear that the threat would be carried out.*

*(2) In a prosecution for an offence against this section:*
*(a) a threat may be made by any conduct, whether explicit, implicit, conditional or unconditional; and*
*(b) it is not necessary to prove that the other person actually feared that the threat would be carried out; and*
*(c) a person may be found guilty even if carrying out the threat is impossible.*
*Examples for subsection (2)(c)*
*1 The image does not exist.*
*2 Technical limitations prevent the person from distributing the image.'*

八、其他意見：建議法庭可提供申請禁制令的選項：
鑒於性暴力受害人於報案後常會成為社會的焦點，加上一旦警方為事件立案，代表事件中具

有可能觸犯法律的成份，因此為加強對當事人的保障，應提供申請禁制令的選項。禁制令內容包括但不限於立刻把相關影像凍結，禁止公眾繼續上載、傳閱，最大程度地減少外流的狀況，此舉既能鼓勵受害人舉報，亦能保障受害人在審訊其間不受公眾目光影響。

九、其他意見：建議法庭可要求觸犯條例之人士採取合理步驟刪除影像
本會建議法庭可要求觸犯擬議罪行（建議1至建議6）之人士，採取合理步驟刪除影像，否則可增加刑罰，建議有關做法可參考澳洲昆士蘭州《Criminal Code Act 1899》第229AA條：修正令（Rectification order）：

澳洲昆士蘭州《Criminal Code Act 1899》第229AA條修正令（Rectification order）：

*'229AA Rectification order—offence against s 223, 227A, 227B or 229A*

*(1) If a person is convicted of an offence against section 223 (1) [Distributing intimate images] , 227A (1) or (2) [Observations or recordings in breach of privacy], 227B (1) [Distributing prohibited visual recordings] or 229A (1) or (2) [Threats to distribute intimate image or prohibited visual recording] the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording involved in the offence within a stated period.*

*(2) A person who fails to comply with an order made under subsection (1) commits a misdemeanor.'*

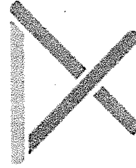
十、其他意見：建議訂立保護性罪行受害人的相應措施
為了避免在審訊過程期間對受害人造成二度創傷，本會建議法庭就「窺淫、私密窺視、未經同意下拍攝私密處及發放相關影像」相關罪行的審訊，訂立保護受害人的相應措施，包括考慮進行非公開的聆訊、在庭上播放有關的呈堂影像(包括涉及私密行為或私密處的照片 、影片)時，考慮頒令清堂、在庭上播放有關的呈堂影像(包括涉及私密行為或私密處的照片 、影片)時，相關影像將不會向公眾席上旁聽人士(包括新聞界及其他公眾人士)公開。

此外，本會建議法庭就「窺淫、私密窺視、未經同意下拍攝私密處及發放相關影像」相關罪行所訂立的保護受害人措施，新增至「實務指示」中。有關做法可參考「實務指示9.10：裁判法院在性罪行案件中使用屏障」及「實務指示15.15：婚姻和家事法律程序 — 雜項」。

十一、其他意見: 建議以積極同意權取代違反意願原則
諮詢文件中的建議罪行是基於「違反對方意願原則」，即被告要在明知對方沒有同意的情況下，仍違反對方意願行事才構成犯罪。但在此標準下，被告能以「不知道受害人不同意」作為辯護理由，造成法律漏洞，對部份因受到威脅與壓迫，而無法直接說不的受害人造成不公，或對受害人造成二度傷害。

因此，建議參考瑞典的法例，把「積極同意原則」引入以上性罪行，即如被告未取得對方同意下行事，就構成性侵，即是當被告主張自己有取得明確同意時，檢方必須證明被告沒有取得同意，或者當下無法取得同意。

二零二零年十月七日



**Anti480 反性暴力資源中心**
**就**
**保安局「引入窺淫、私密窺視、 未經同意下拍攝私密處及相關罪行的建議」**
**諮詢文件之意見書**

本會同意應盡快設立相關法例，以規管未經同意下拍攝、散佈私密影像、要脅散佈私密影像的影像性暴力（image-based sexual violence）行爲，以突顯行為的嚴重性，並保障影像性暴力的受害人。此外，我們亦要求設立罪行以規管是次諮詢並未有涵蓋的要脅發放私密影像的行為。詳情的意見如下：

**一、有關新增罪行：窺淫罪（建議 1）和私密窺視罪（建議 2）**

本會同意訂立以性滿足為目的的「窺淫罪」（建議 1）及新增一條不論目的的「私密窺視罪」（建議 2），以作為窺淫罪的交替罪行，同時又可作獨立罪行。

而由於無論窺視或偷拍行爲是爲了得到性滿足、或基於其他目的（例如：謀取利益），均侵犯了當事人的性自主權，且具同樣程度的嚴重性，因此本會認爲建議 1 和建議 2 的罪行應處以相同的最高刑罰（5 年）。

**二、有關新增罪行：未經同意下拍攝私密處罪（建議 3 和建議 4）**

本會同意就未經同意下為了得到性滿足而拍攝私密處訂立一項罪行（建議 3）及就未經同意下不論目的拍攝私密處另訂一項罪行，以作為建議 3 的法定交替罪行，同時也是一項獨立罪行（建議 4）。

而由於無論拍攝私密處的行爲是爲了得到性滿足、或基於其他目的（例如：謀取利益），均侵犯了當事人的性自主權，且同樣程度的嚴重性，因此本會認爲建議 3 和建議 4 的罪行應處以相同的最高刑罰（5 年）。

本會認爲建議 3 和建議 4 的涵蓋範圍太窄，應包括「拍攝衣領」－即由高至下角度拍攝胸部的行為，因其嚴重性並不低於由下而上偷拍私密處的行為。

**三、有關新增罪行：發放偷拍的私密影像罪（建議 5）及未經同意下發放私密影像罪（建議 6）**

本會同意針對發放偷拍的私密影像訂立一項罪行（建議 5）及其涵蓋範圍，以及同意針對發放獲得同意拍攝、但未獲同意發放的私密影像訂立一項罪行（建議 6），但本會認為建議 6 應要同時涵蓋顯示受害人私密處的影像。

本會對於諮詢問題 12：「就建議 6 而言，你是否認為只應在發放者明知受害人沒有同意發放私密影像或罔顧受害人有沒有同意發放，才構成犯罪？」有所保留。因本會憂慮按現時法例對意願的理解會影響以上法例的執行，出現漏洞。按觀察所得，有些受害人在受壓下或受威脅下未必能夠明確表示不同意，本會擔心條例未能處理這情況下的「未經同意下發放私密影像」。此外，即使受害人已表明不同意，發放者亦可以「真心相信受害人是同意」作為辯護理由，就此，我們建議要求發放者提供認為受害人是同意的原因及舉證證明曾採取行動去確認當事人是同意。

此外，就建議 5 和建議 6，本人建議罪行應同時涵蓋要脅發放私密影像的行為。（詳見「其他意見：建議設立針對要脅發放私密影像行為的罪行」的部份）

**四、有關私密行為及私密處的定義**

本會同意「私密處」和「私密行為」的定義，然而本會認為應摒棄二元性別的框架，將「私密處」的定義涵蓋為「所有」性別人士（包括：跨性別人士、雙性人）的胸部、生殖器官、臀部，以保障所有性別人士，並符合性別中立的原則。

**五、有關免責辯護**

本會認為須仔細考慮清楚豁免媒體活動的背後理據及實際用途。由於涉及影像皆為私密行為或私密部位，因此大部份情況而言，直接公開影像難以與公眾利益掛鈎。相反，過往媒體以公眾利益名義發放私密影像，會急促加快外流速度，往往會對影像中的當事人們造成不同程度的負面影響。

**六、有關性罪行定罪紀錄查核機制**

本會同意所有擬議罪行（建議 1 至建議 6）均應納入為性罪行定罪紀錄查核機制下指明列表中的性罪行。

**七、其他意見：建議設立針對「要脅發放私密影像」行為的罪行**

本會建議設立針對「要脅發放私密影像」行為的法例，可參考以下海外司法管轄區禁止「要脅發放私密影像」的行爲，包括：蘇格蘭《Abusive Behaviour and Sexual Harm (Scotland) Act 2016》第 2 條＊及澳洲北領地《Criminal Code Act 1983 (NT)》第 208AC 條＃。

＊ 蘇格蘭 《Abusive Behaviour and Sexual Harm (Scotland) Act 2016》第 2 條：

'2 *Disclosing, or threatening to disclose, an intimate photograph or film*

*(1) A person ("A") commits an offence if—*

*(a) A discloses, or threatens to disclose, a photograph or film which shows, or*

*appears to show, another person ("B") in an intimate situation,*
*(b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and*
*(c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.'*

# 澳洲北領地《Criminal Code Act 1983 (NT)》第 208AC 條：

*'208AC Threaten to distribute intimate images*

*(1) A person commits an offence if the person:*
*(a) intentionally threatens to distribute an intimate image of another person; and*
*(b) intends the other person to fear that the threat would be carried out.*

*(2) In a prosecution for an offence against this section:*
*(a) a threat may be made by any conduct, whether explicit, implicit, conditional or unconditional; and*
*(b) it is not necessary to prove that the other person actually feared that the threat would be carried out; and*
*(c) a person may be found guilty even if carrying out the threat is impossible.*
*Examples for subsection (2)(c)*
*1 The image does not exist.*
*2 Technical limitations prevent the person from distributing the image.'*

**八、其他意見：建議法庭可提供申請禁制令的選項：**
鑒於性暴力受害人於報案後常會成為社會的焦點，加上一旦警方為事件立案，代表事件中具有可能觸犯法律的成份，因此為加強對當事人的保障，應提供申請禁制令的選項。禁制令內容包括但不限於立刻把相關影像凍結，禁止公眾繼續上載、傳閱，最大程度地減少外流的狀況，此舉既能鼓勵受害人舉報，亦能保障受害人在審訊其間不受公眾目光影響。

**九、其他意見：建議法庭可要求觸犯條例之人士採取合理步驟刪除影像**
本會建議法庭可要求觸犯擬議罪行（建議 1 至建議 6）之人士，採取合理步驟刪除影像，否則可增加刑罰，建議有關做法可參考澳洲昆士蘭州《Criminal Code Act 1899》第 229AA 條：修正令（Rectification order）：

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*'229AA Rectification order—offence against s 223, 227A, 227B or 229A*

*(1) If a person is convicted of an offence against section 223 (1) [Distributing intimate images] , 227A (1) or (2) [Observations or recordings in breach of privacy], 227B (1) [Distributing prohibited visual recordings] or 229A (1) or (2) [Threats to distribute intimate image or prohibited visual recording] the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording involved in the offence within a stated period.*

*(2) A person who fails to comply with an order made under subsection (1) commits a misdemeanor.'*

**十、其他意見：建議訂立保護性罪行受害人的相應措施**

為了避免在審訊過程期間對受害人造成二度創傷，本會建議法庭就「窺淫、私密窺視、未經同意下拍攝私密處及發放相關影像」相關罪行的審訊，訂立保護受害人的相應措施，包括考慮進行非公開的聆訊、在庭上播放有關的呈堂影像(包括涉及私密行為或私密處的照片、影片)時，考慮頒令清堂、在庭上播放有關的呈堂影像(包括涉及私密行為或私密處的照片 、影片)時，相關影像將不會向公眾席上旁聽人士(包括新聞界及其他公眾人士)公開。

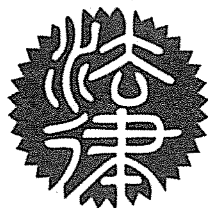
此外，本會建議法庭就「窺淫、私密窺視、未經同意下拍攝私密處及發放相關影像」相關罪行所訂立的保護受害人措施，新增至「實務指示」中。有關做法可參考「實務指示 9.10：裁判法院在性罪行案件中使用屏障」及「實務指示 15.15：婚姻和家事法律程序 — 雜項」。

**十一、其他意見: 建議以積極同意權取代違反意願原則**

諮詢文件中的建議罪行是基於「違反對方意願原則」，即被告要在明知對方沒有同意的情況下，仍違反對方意願行事才構成犯罪。但在此標準下，被告能以「不知道受害人不同意」作為辯護理由，造成法律漏洞，對部份因受到威脅與壓迫，而無法直接說不的受害人造成不公，或對受害人造成二度傷害。

因此，建議參考瑞典的法例，把「積極同意原則」引入以上性罪行，即如被告未取得對方同意下行事，就構成性侵，即是當被告主張自己有取得明確同意時，檢方必須證明被告沒有取得同意，或者當下無法取得同意。

二零二零年十月七日



THE LAW SOCIETY OF HONG KONG
香港律師會

Our Ref :
Your Ref :
Direct Line :

29 September 2020

Security Bureau
10th Floor, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

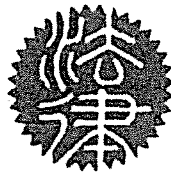
By Email: consultation@sb.gov.hk
& By Post

Dear Sir,

**Public Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences**

We refer to the captioned consultation and attach the Law Society's submission for your attention.

Encl.



THE
LAW SOCIETY
OF HONG KONG
香 港 律 師 會

**PROPOSED INTRODUCTION OF OFFENCES OF VOYEURISM, INTIMATE PRYING, NON-CONSENSUAL PHOTOGRAPHY OF INTIMATE PARTS, AND RELATED OFFENCES**

**SUBMISSIONS**

1. By this submission, the Law Society is responding to a consultation paper issued by the HKSAR Government in July 2020 on the proposed introduction of the *Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences* (the "Consultation Paper").

2. Instead of using the "Response Form" attached to the Consultation Paper (which mostly requires a yes/no answer), we prefer to provide a submission to reply.

3. Some of the views expressed in this Submission can only be preliminary, as the position to a certain extent depends on the actual wordings of the legislation. In our views, it is more desirable if a draft legislation could be produced with this consultation.

4. For those consultation questions where we have not in this submissions provided any or any full answers thereto, it should not be construed that we at this stage endorse or object to those proposals.

**General Comments**

5. In our submission of 24 July 2018 rendered in response to a consultation by the Law Reform Commission ("LRC") on its consultation on *Miscellaneous Sexual Offences*, we have already pointed out the deficiency of the current criminal justice system in

combating the sexual offences of voyeurism and upskirt photography. The need for reform is underscored by the recent Court of Final Appeal judgment in *Secretary for Justice v Cheng Ka Yee & Others* [2019] HKCFA 9 whereby, according to the Consultation Paper, the Court took the views that it will no longer be appropriate for the Prosecution to press charge under section 161 of the Crimes Ordinance (Cap 200) against upskirt photography and the distribution of intimate images without consent, if the act involves only the use of the suspect's own computer.

6. We agree that a new specific offence of voyeurism should be introduced and that this (or another) new offence should also address the offence of taking upskirt photograph.

   Our further views on those issues raised in the Consultation Paper are set out in the following paragraphs.

**Voyeurism**

7. The Government is proposing to introduce new offences on (a) *voyeurism* and (b) *intimate prying*. These proposals (Proposals 1 and 2) are tabulated in § 12 of the Consultation Paper. They are excerpted below.

| | **Proposal 1** | **Proposal 2** |
|---|---|---|
| **Offence** | Voyeurism | Intimate prying<br>(statutory alternative to Proposal 1, in addition to being a standalone offence) |
| **Purpose** | To obtain sexual gratification | Irrespective of the purpose |
| **Act** | • Any person who, without the consent of the victim, with or without the aid of equipment, observes the victim doing an intimate act or records images (including stills and videos) of the intimate act, or operates equipment to enable the intimate act to be observed or images of the intimate act to be recorded. | |

| | Proposal 1 | Proposal 2 |
|---|---|---|
| | • Any person who installs equipment, or constructs or adapts a structure or part of structure, with the purpose of enabling, without the consent of the victim, the person or another person to observe the victim doing an intimate act or record images (including stills and videos) of the intimate act, or operate the equipment for observation of the intimate act or recording of images (including stills and videos) of the victim doing an intimate act. | |
| **Maximum Penalty** | Imprisonment for 5 years | Imprisonment for 3 years |

We have the following comments on the above two proposals.

Voyeurism (Proposal 1)

8. We agree that sexual gratification (or arousal) is the central component and purpose of the offence. It does not need to be the defendant's own gratification or arousal, but the alleged act must have a sexual aspect to it.

9. In our submission to the LRC's abovementioned consultation paper, we have said we agreed that the offence of voyeurism be formulated along the lines of section 67 of the English Sexual Offences Act 2003 (see our above submission rendered to the LRC's consultation on Miscellaneous Sexual Offences (excerpts on **Appendix 1** herein)). We repeat our agreement thereto in reply to the Government's Consultation Paper, with additional comments in the following.

10. For the offence of voyeurism to have taken place, the accused should know, first, that they are viewing or recording another person (when that person is engaged in an intimate act), and second, that they do not have that person's consent to do so, or that the person is unaware of the defendant's actions.

11. For the meaning of "intimate act" in the above, the Consultation Paper explains (in §22) in the following

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

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

*(b) the person is using the toilet; or*

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

The above is not too helpful. We consider that, among other things, the reference to "*reasonably be expected to provide privacy*" in the above should refer to a place *where the person believes* he or she is safe from surveillance or other observation, or specifically *where the person believes* he or she can undress or engages in any specific conduct, without being watched or filmed. There should be a subjective and objective consideration.

12. The issue "*reasonable expectation to provide privacy*', as well as the issue of *consent*, received judicial scrutiny in the UK Court of Appeal. In a recent decision by the UK Court of Appeal [1], the Court considered an appeal by a man who was convicted of filming his sexual activity with two women with whom he had had sexual intercourse in their bedrooms in return for payment. The appellant accepted that the complainants had an expectation of privacy, but contended that s.67(3) and s.68 of the UK Sexual Offences Act 2003 would only provide protection if the filming occurred in a place which could reasonably be expected to provide privacy, and that his presence and participation with the complainants' consent precluded that. His above arguments failed. The Court reportedly held that *"A defendant can be guilty of an offence of voyeurism in relation [to having sex] even when he is a participant ... section 67 of the [2003 Sexual Offences Act] which protects individuals against the recording of any person involved in a private act is not limited to protecting the complainant from someone not present during the act."*

[1] *R v Richards* [2020] EWCA Crim 95. See also the report of *the Guardian* of 28 Jan 2020: https://www.theguardian.com/law/2020/jan/28/filming-partner-without-their-consent-during-sex-ruled-a-criminal-offence

13. According to the UK Court of Appeal, a participant to certain activity could be guilty of a s.67(3) offence if he or she secretly records what is otherwise a lawful event in which he or she has participated. Consent to be present does not by itself amount to consent to be videoed. We in principle agree to this view.

14. There is no discussion in the Consultation Paper on the above issues. We expect a fuller discourse when the draft legislation is issued for consultation in due course.

15. Like other criminal offences, the burden of proof of the above offence must remain with the Prosecution and the offences must be proved beyond reasonable doubt.

16. The sentence for the proposed offence is 5 years. For comparison purpose, we note that in the UK, under the Section 67A(4) of the Sexual Offences Act 2003,

    - the maximum penalty for summary conviction of voyeurism offences: imprisonment for a term not exceeding 12 months, or to a fine, or to both;

    - the maximum penalty for conviction on indictment of voyeurism offences: imprisonment for a term not exceeding 2 years.

    In the Scotland, according to Schedule 2 of the Sexual Offences (Scotland) Act 2009,

    - the maximum penalty for summary conviction of voyeurism offences: Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)

    - the maximum penalty for conviction on indictment of voyeurism offences: Imprisonment for a term not exceeding 5 years or a fine (or both)

    We are not at this stage expressing views that the proposed sentence for the offence (5 years) is or is not appropriate, or whether it should be heavier or lighter. We invite views as to whether this proposed sentence is proportionate with other sexual offences.

Intimate prying (Proposal 2)

17. We do not agree that the "purpose" of the offence is "irrespective of the purpose". This proposed scope is too wide and is unreasonable. It goes beyond those suggested by the LRC, which do not cover crimes that lack a sexual element or the sharing of intimate videos and images online. At the same time, the scope could render the proposed offence prone to mistakes, misunderstandings, false accusations or misuses.

18. For instance, on suspicion of the husband committing an adultery, if the wife hides herself in a wardrobe and observes the husband having sex with a female, or the wife installs a camera to collect evidence for the purpose of her subsequent matrimonial proceedings, would the wife have committed the offence of intimate prying on the basis of the present proposal (although she herself is a victim of adultery)?

19. A video camera intended for security surveillance may unintentionally capture a person in a private moment, but without sexual intent. Would a security guard installing and viewing the surveillance footage be caught by the offence?

20. The answers to the above should be no, but the wife and the security guard in the above examples could be guilty of intimate prying, under the current proposal.

21. *A fortiori*, the current proposal could similarly have adverse implications to law enforcement agencies in the course of their surveillance.

22. The second bullet point under "Act" (or *actus reus*) in the table in paragraph 7 above refers to the installation of a camera or recording equipment, to enable the accused to observe or to record another person doing an intimate act. It covers the preparation for the proposed offence and thereby widens the scope of the offence of intimate prying. That heightens our concerns on misuse of this offence as, in some cases, there could be legitimate purpose for the installation of the camera or recording equipment (as in the above examples of a wife collecting evidence in her adultery case, the security guard and the law enforcement agencies in performing their lawful duties).

23. We suggest that the purpose of this offence of intimate prying (if so created) should be *for unlawful purposes (such as humiliating, alarming or distressing the other person).*

24. Our above comments rendered in respect of voyeurism (§§ 10 – 15) apply *mutatis mutandis* to this proposed offence of intimate prying.

25. By way of a passing remark we note the *actus* includes "constructs or adapts a structure or part of structure". It is not clear to us as to whether and if so how this *actus* captures the use of modern technology and equipment such as drones covertly deployed to peep and to take recordings of intimate acts. In our views, in an era when technology is developing so quickly the legislation should not be limited by a narrow definition. In the UK, Section 68 of the Sexual Offences Act 2003 (voyeurism: interpretation) provides that *'operating equipment includes enabling or securing its activation by another person without that person's knowledge.'* This includes automated equipment that has been installed without a victim's knowledge. When the Government is to draft the legislation, it should draw reference from the above.

26. We note the Government proposes that this offence *"will be a statutory alternative to the offence of voyeurism, in addition to being a standalone offence (i.e. in the course of a prosecution of voyeurism, if the only element of offence that cannot be proved is the purpose of obtaining sexual gratification, then the accused may still be convicted of the alternative offence of intimate prying)"* (§11 of the Consultation Paper). At the moment, we do not have a draft legislation for review or comment, and we do not know how this proposed alternative is to be applied.

27. As the matter now stands, we have reservation. Seemingly this proposal could duplicate with other offences. For example, according to the Government, the offence of intimate prying could attract blackmailing (§11 of the Consultation Paper). Is intimate prying for blackmailing the same as blackmailing by intimate prying?

28. As the elements of this proposed offence are not precisely defined, and there is not any detailed discussion in the Consultation Paper on the need to have an alternative offence of "intimate prying", it seems to us that this offence as proposed is framed only as a matter of convenience for the Prosecution.

29. On the sentencing for intimate prying, if the purpose of intimate prying is for blackmailing, then that offence of intimate prying by itself should be a more serious offence than voyeurism itself (which is for sexual gratification). However, the maximum sentence for intimate prying is only *3 years* (compared to 5 years for voyeurism). In Hong Kong, any person who commits blackmail shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for *14 years* (see Section 23(3) of Cap. 210 Theft Ordinance).

30. In the above case, the proposed level of sentence by itself does not reflect the gravity of the offence committed. It is also confusing the general public on the nature of the offence or the policy intent of creating this offence. We seek clarifications.

31. In passing, we have a quick research into other common law jurisdictions, but could not find a comparable criminal offence of "intimate prying". If the Government has any research on this proposed offence, we are pleased if the research papers can be shared.

**Offences of Non-consensual Photography of Intimate Parts**

32. The Consultation Paper has the following proposals on non-consensual photography or upskirt photographing (§15, Consultation Paper):

| | **Proposal 3** | **Proposal 4** |
|---|---|---|
| **Offence** | Non-consensual photography of intimate parts for sexual gratification | Non-consensual photography of intimate parts irrespective of the purpose (statutory alternative to Proposal 3, in addition to being a standalone offence) |
| **Purpose** | To obtain sexual gratification | Irrespective of the purpose |
| **Act** | • Any person who, without the consent of the victim, operate equipment beneath the clothing of the | |

| | Proposal 3 | Proposal 4 |
|---|---|---|
| | victim to enable the person or another person to observe the victim's intimate parts or record images (including stills and videos) of the victim's intimate parts or to have access to such recorded images.<br>• In circumstances where the intimate parts would not otherwise be visible<br>• Applicable in both (sic) public or private place. | |
| **Maximum Penalty** | Imprisonment for 5 years | Imprisonment for 3 years |

Non-consensual photography of intimate parts *for sexual gratification* (Proposal 3)

33. We agree there should be an offence to criminalize the act of non-consensual upskirt-photography done for the purpose of obtaining sexual gratification. Such an offence would then qualify as a sexual offence and be covered by the Sexual Conviction Record Check Scheme. The offence should cover any place (i.e. irrespective of whether the act took place in public or private).

34. For the "Act" (*actus reus*), we repeat that our observation on technology (§ 25) is applicable *mutatis mutandis* to the offence of upskirt photography.

35. In the drafting of the legislation, we invite the Government to look into the latest legislative amendments in the UK's *Voyeurism (Offences) Act 2019*. That creates 2 new offences criminalizing someone who operates equipment or records an image under another person's clothing (without that person's consent or a reasonable belief in their consent) with the intention of viewing, or enabling another person to view, their genitals or buttocks (with or without underwear), where the purpose is to obtain sexual gratification or to cause humiliation, distress or alarm (see new *Section 67A (Voyeurism: additional offences)* and *Section 68(1A)*

*(Interpretation))*[2]. The provisions came into effect on 12 April 2019[3] and may not be reviewed by the LRC's Review of Sexual Offences Sub-committee and thereby may not be included in their study and the related Report[4].

36. For ease of reference, section 67A (Voyeurism: additional offences) is excerpted on **Appendix 2** to this Submission.

37. We agree that the issue of "down-blousing" could be reserved for the next legislative amendment, not because that is a lesser evil, but mainly because the issues involved are less straightforward and require more deliberation. The discussion on the problem of upskirt photography on the other hand seems to be more mature and readily available. The legislative exercise should be proceeded with expeditiously.

Non-consensual photography of intimate parts *irrespective of the purpose* (Proposal 4)

38. We also agree that the act of non-consensual upskirt-photography should be outlawed irrespective of its purpose (a "catch-all" provision). Same as Proposal 3, this offence should cover any place (public or private).

39. Subject to the comments on sentencing canvassed in the ensuing paragraphs, we echo the views of the LRC in this regard[5]:

- a catch-all provision would have the advantage of criminalizing acts of non-consensual upskirt-photography which are committed by persons under the employment of a third party and may do so for the purpose of obtaining a monetary return rather than for the purpose of obtaining sexual gratification or for humiliating, alarming or distressing the victim.

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[2] See https://www.cps.gov.uk/legal-guidance/voyeurism

[3] See Circular No. 2019/01: Implementation of the Voyeurism (Offences) Act 2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790549/circular-voyeurism-offences-act-2019.pdf

[4] See the LRC Report on Voyeurism and Non-consensual upskirt-photography published in April 2019 https://www.hkreform.gov.hk/en/docs/rvoyeurism_e.pdf

[5] See footnote 4 above

- the catch-all provision would be a statutory alternative offence if the purpose of obtaining sexual gratification cannot be proved at trial.

40. On the sentencing for Proposal 4, we note the offence of Proposal 4 attracts a maximum sentence of 3 years. This compares to the maximum penalty of 5 years for Proposal 3. Yet the offence of Proposal 4 needs not be less heinous than the offence of Proposal 3 - for Proposal 3, the offence is for sexual gratification only, but for Proposal 4, that could be a predisposition for other more serious crimes. E.g. a person who takes upskirt photographs not for sexual gratification (or not only for that) but for sale, or for revenge porn. Victims are thereby subject to immense shame, confidence and emotional stress and their feelings of personal security can be compromised. Considering the offence from the above, the penalty should be comparable if not heavier than that for Proposal 3.

41. The circumstances envisaged in the above may (or may not) be relevant to those offences caught under Proposals 5 and 6 below. We invite discussions as to how Proposal 4 relates itself to the Proposals 5 and 6.

**Offences of Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images**

42. The proposed offences are summarized in the Consultation Paper in the following (§21 of the Consultation Paper):

| | **Proposal 5** | **Proposal 6** |
|---|---|---|
| **Offence** | Distribution of surreptitious intimate images | Non-consensual distribution of intimate images |

| | Proposal 5 | Proposal 6 |
|---|---|---|
| **Act** | • Any person who distributes images (including stills and videos) that the person knows to have been obtained from voyeurism, intimate prying or non-consensual photography of intimate parts (for sexual gratification or irrespective of the purpose) (i.e. proposed offences in Proposals 1 to 4)<br>• Regardless of whether the person created, generated, obtained, or was provided with the images in question<br>• Covers distribution through whatever means<br>• The victim does not consent to the distribution | • Any person who distributes images (including stills and videos) showing the victim doing an intimate act<br>• Regardless of whether the person created, generated, obtained, or was provided with the image in question<br>• It does not matter whether the image was taken with the victim's consent in the first place<br>• Covers distribution through whatever means<br>• The victim does not consent to the distribution |
| **Maximum Penalty** | Imprisonment for 5 years | Imprisonment for 5 years |

43. We are in full agreement with the view of the Court of Appeal canvassed in an upskirt photograph case[6] (as quoted in the Consultation Paper (§ 17)) that *"the indecent photos taken by the defendant could be kept permanently, exchanged, circulated, sold as commodities, or even used to threaten the victim, and that therefore the victim could be subjected to harassment over a long period of time. Such conduct is an affront to the dignity of the female victim."*

[6] *Secretary for Justice v Chong Yao Long Kevin* [2013] 1 HKLRD 794.

44. We are in support of

(a) the introduction of the offence against the distribution of surreptitious intimate images (i.e. Proposal 5) - we add that this offence should be gender-neutral;

(b) the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images);

(c) the introduction of the offence against non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (i.e. Proposal 6) – we add that this offence should be gender-neutral;

(d) the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)

(e) for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution. As to whether the offence could also be constituted when the accused is reckless as to whether the victim gave such consent, we receive mixed views. We envisage situations where it is difficult to ascertain consent; we could as well think of cases where the unintentional forwarding of intimate pictures could attract criminal sanctions. On the other hand, this proposal could also be relevant to the crime of revenge porn, which potentially could be more problematic, as the receiver of intimate pictures could not ascertain consent.

All the above issues merit further discussion and elaboration.

(f) for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress.

45. We have in the above paragraphs alluded to the various issues including expectation of privacy, knowledge and consent etc (see § 12 above). Apart from these, complications could also arise in the case of a subsequent withdrawal of the consent for distribution. If a

person initially consents to the distribution of his or her intimate photos but later withdraws his or her consent, would the distributor be caught by the above offences, notwithstanding the prior agreement? These matters require further discussion and clarifications

46. As for the sentencing level, save and except our observations in the paragraph below, we express no comments at this stage and await clarifications on the above paragraphs.

47. In this day and age, technology is easily accessible and social platforms are popular. It is not difficult to envisage that youngsters would frequently receive intimate photos and videos from groups of friends[7]. They could naively think that these are funny and would, without serious thoughts or simply being reckless, forward those to another circle of friends. The chain of forwarding could easily continue, with no one checking for consent, and the "forwarding" could be within the meaning of "distribution".

48. The Consultation Paper is not clear as to whether the Government, in offering Proposal 6, has taken into account such mode of non-consensual "distribution" of intimate pictures on social media platforms. While we are not advocating a separate sentencing regime for this sexual offence for a particular group of offenders (e.g. youngsters), we seek a thorough policy deliberation on the above situation.

**Intimate acts and Intimate parts**

49. For the consultation question on "intimate act", please see our views in paragraph 11 in the above.

50. For the consultation question on "intimate parts" i.e. whether it should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear, without prejudice to our answer in paragraph 37 in the above, we suggest to delete the reference to "breasts and chests" for the purpose of the proposed offences.

[7] E.g. see the news article "Why an explicit picture on your child's phone could wreck their career: Lockdown saw the number of sex texts sent by teenagers rocket. Now, a leading expert sends parents a disturbing message of his own" The Daily Mail of 5 Aug 2020

## Defences

51. In principle, we agree that a defence of lawful authority or reasonable excuse be provided for all the proposed offences under Proposals 1, 2, 3, 4, 5 and 6. We reserve our further comments until we are to review the draft legislation.

## Sexual Conviction Record Check Scheme

52. As to whether the offences under Proposals 1 to 6 as described in the Consultation Paper be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme (the "Scheme"), we receive mixed views. Some of the offences e.g. blackmailing or revenge porn arguably might not fall within the four corners of the Scheme which is for sexual crimes. Yet, we acknowledge the underlining nature of the criminal offences (e.g. see paragraph 33 above). We are thinking whether the placing of the offenders of these offences into the Scheme should explicitly be directed by the trial judge, and invite deliberations.

## Conclusion

53. We note with concern that currently there is no specific offence against voyeurism or upskirt photography. At the moment, these acts can be prosecuted only with other charges such as loitering and disorder in public places. These are of little assistance, if any. These criminal offences violate the victim's right to privacy and sexual autonomy; they cause long-term distress, humiliation, harassment and stress to the victim. We acknowledge the efforts to as soon as practicable plug the loophole for these offences. We are prepared to be engaged in further consultation on and in deliberation of the relevant draft legislation, which we keenly await.

**The Law Society of Hong Kong**
**29 September 2020**

(For Reference)

**APPENDIX 1**

## EXCERPTS FROM LAW SOCIETY SUBMISSION IN RESPONSE TO LRC CONSULTATION ON MISCELLANENOUS OFFENCES IN APRIL 2018

### VOYEURISM

> ***Recommendation 3:* Proposed new specific offence of voyeurism**
>
> *[The LRC] recommend introducing a new specific offence of voyeurism.*
>
> *[The LRC] recommend that such an offence be along the lines of section 67 of the English Sexual Offences Act 2003*

**Law Society's Response:**

26. We note under the current law, acts of voyeurism could be prosecuted for loitering (section 160, Crimes Ordinance) or for disorder in public place (section 70B(2), Public Order Ordinance); both of these offences require however the element of "public" (paragraph 3.3). If the act concerns the use of computer, the offenders may be prosecuted under section 161 of the Crimes Ordinance (paragraph 3.4). The LRC asserts that there are limitations with the above and proposes a new offence of voyeurism.

27. In formulating its proposal, the LRC takes on board the English approach (paragraph 3.22), and follows section 67 of the English Sexual Offences Act 2003:

**Section 67 of the English Sexual Offences Act 2003**

"*(1) A person commits an offence if—*

*(a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and*

*(b) he knows that the other person does not consent to being observed for his sexual gratification.*

*(2) A person commits an offence if—*

*(a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and*

*(b) he knows that B does not consent to his operating equipment with that intention.*

*(3) A person commits an offence if—*

(a) *he records another person (B) doing a private act,*

(b) *he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and*

(c) *he knows that B does not consent to his recording the act with that intention.*

*(4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).*"

An offence under section 67 in the UK is triable either way (i.e. in the magistrates' court or the Crown court, depending on seriousness). The maximum sentence on conviction in the magistrates' court is six months and/or a fine. The maximum sentence on conviction in the Crown court is two years imprisonment.

28. In certain circumstances a person convicted of a section 67 offence will be made subject to the notification requirements set out in Part 2 of the Sexual Offences Act 2003 (i.e. the sex offenders register).

29. We support the two Recommendations in the above box, subject to the caveat that in considering the reform on voyeurism, the new offence should also address the offence of taking upskirt photograph ("upskirting").

30. Section 67 of the English Act currently covers four types of activity. They are set out in section 67(1), (2), (3) and (4) (see above). A key requirement of the above section 67 offences is that the person being observed or recorded must be doing a "private act". "Private act" is defined in section 68 of the 2003 Act – a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and

- the person's genitals, buttocks or breasts are exposed or covered only with underwear;
- the person is using a lavatory, or
- the person is doing a sexual act that is not of a kind ordinarily done in public.

31. The current requirement in the UK for a section 67 offence to involve a "private act" creates problems in the context of upskirting, which by its nature tends to take place when the victim is in a public place.

32. Taking intimate videos without consent in upskirting cases often does not fall within the above offence, even when done for sexual gratification. The offence requires the victim to be doing a private act, or to be in a place such as a lavatory

or a changing room where some degree of exposure or nudity may occur but one can reasonably expect privacy. Neither of these conditions is fulfilled when the victim is fully dressed in a public place. (The UK Law Commission in its report[3] commented that this is the reason why the relevant criminal charge would usually be made out not under voyeurism but another offence (viz. outraging public decency[48])).

33. The above shortcomings have been addressed in Scotland which introduced legislative amendments to make specific provision to cover upskirting.

34. New sections (viz. subsections 9(4A) and (4B)) have been introduced in 2010 to the Sexual Offences (Scotland) Act 2009. They provide that a person ("A") will commit the offence of voyeurism if they do any of the following:

*"(4A) The fourth thing is that A —*

*(a) without another person ("B") consenting, and*

*(b) without any reasonable belief that B consents, operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.*

*(4B) The fifth thing is that A—*

*(a) without another person ("B") consenting, and*

*(b) without any reasonable belief that B consents, records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.*

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[3] Law Commission, Simplification of Criminal Law: Public Nuisance and Outraging Public Decency, Law Com No 358, June 2015. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/438194/50076_Law_Commission_HC_213_bookmark.pdf

[4] See *R v Hamilton* [2007] EWCA Crim 2062. In that case a barrister was convicted of outraging public decency after filming underneath the clothes of women and a 14 year old girl while they shopped in supermarkets.

35. Subsection 9(7) (as above-mentioned) provides that these things must be done for the purposes of "obtaining sexual gratification (whether for A or C)", or "humiliating, distressing or alarming B". There is deliberately no requirement for the victim to have been doing a private act at the time they are observed or recorded. The offence is triable either way. The maximum penalty following summary conviction is 12 months and/or a fine. The maximum penalty following conviction on indictment is five years and/or a fine.

36. The Scottish Government' explained that:
    - subsection 9(4A) offence is intended to cover cases such as "where a person uses a hidden video camera to view the buttocks or genitals of passers-by".
    - The subsection 9(4B) offence is intended to cover cases such as "where a person uses a hidden camera to record so-called 'up-skirt' photographs of people".
    - In all cases, the offence is committed where it may reasonably be inferred that A acted for the purpose of obtaining sexual gratification, or for the purpose of humiliating, distressing or alarming B. As such, these provisions would not apply where, for example, a shop fitted CCTV in changing rooms for security purposes (though an offence under this section may be committed by someone who subsequently misused the CCTV for voyeuristic purposes).
    - Anyone convicted of a section 9 offence is placed on the sex offenders register.

37. The UK is also taking steps to legislate against upskirting, as a result of a campaign by a Ms Gina Martin. In that case, police declined to prosecute a man accused of taking underskirt pictures of Ms Martin on the man's phone at a music festival in July 2017 in London. As a victim of upskirt photography, Ms Martin launched a petition for upskirting to be made illegal under the Sexual Offences Act 2003. Her petition received enthusiastic support from the community[5].

38. The above campaign was backed by Government[6] - the Justice Minister Lucy Frazer introduced a public bill as the Voyeurism (Offences) (No. 2) Bill[9] to the House of Commons. It was given its First Reading on 21 June 2018.

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[5] The Petition Site, I had upskirt photos taken of me – please sign to make this illegal under the Sexual Offences Act of 2003: https://www.thepetitionsite.com/takeaction/887/239/401/

See also the Petition Site, Email your MP: Make upskirt photos a specific sexual offence, whenMarin started another petition asking people to support the bill https://www.thepetitionsite.com/takeaction/569/552/828/

[6] Theresa May Prime Minister of the UK had said: "Upskirting is an invasion of privacy which leaves victims feeling degraded and distressed" : https://www.thesun.co.uk/news/6560079/gina-martin-victim-upskirting-change-law/

39. The second reading of the bill took place on 3 July 2018 and the Bill was committed to a Public Bill Committee for further scrutiny[10].

40. The Bill adopts a similar approach to that taken in Scotland, adding a new section 67A to the Sexual Offences Act 2003, which sets out two new voyeurism offences aimed at tackling "upskirting".

*"67A Voyeurism: additional offences*

*(1) A person (A) commits an offence if—*

*(a) A operates equipment beneath the clothing of another person (B),*

*(b) A does so with the intention of enabling A or another person (C), for a purpose mentioned in subsection (3), to observe—*
*(i) B's genitals or buttocks (whether exposed or covered with underwear), or*
*(ii) the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and*

*(c) A does so—*
*(i) without B's consent, and*
*(ii) without reasonably believing that B consents.*

*(2) A person (A) commits an offence if—*

*(a) A records an image beneath the clothing of another person (B),*

*(b) the image is of—*

*(i) B's genitals or buttocks (whether exposed or covered with underwear), or*
*(ii) the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible."*

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[9] The Bill is available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0235/cbill_2017-20190235_en_2.htm#l1g1

[10] See https://www.parliament.uk/business/news/2018/july/have-your-say-on-the-voyeurism-offences-no2-bill/ and https://www.gov.uk/government/publications/voyeurism-offences-no-2-bill

41. Two new forms of voyeurism would cover the operation of equipment or recording of an image under another person's clothing with the intention of viewing their genitals or buttocks (with or without underwear), and without that person's consent. The offences would apply where the perpetrator had a motive of either obtaining sexual gratification, or causing humiliation, distress or alarm to the victim. The new offences would be triable either way. The maximum sentence following summary conviction would be 12 months imprisonment and/or a fine. The maximum sentence following conviction on indictment would be two years and/or a fine.

42. Hong Kong does not have a specific law criminalizing upskirting. Moreover, since upskirting has not been made a sexual offence, offenders of this crime in Hong Kong might not be placed on the Sexual Conviction Record Check administered by the Hong Kong Police[11].

43. We ask the LRC to duly consider the above developments in the Scotland and in the UK.

...

**CONCLUDING REMARKS**

59. This Consultation Paper of the LRC is said to be the third and "the final" part of the overall of the substantive sexual offences (paragraph 18 of the Preface to the Consultation Paper). However, in the course of our preparation of this submission, we note that other jurisdictions have already been proceeding with their reviews of some other sexual offences not currently canvassed by the LRC. E.g. in the UK and also in Scotland, there have been legislation against the offence of what is colloquially called "revenge porn". This refers to the situation when a person shares or distributes intimate private videos or photographs of another person without their prior permission. This type of activity is usually conducted by an ex-partner or jealous person from a prior relationship by way of punishing, tarnishing, embarrassing and attacking the victim. In the vast majority of cases, the victim is female, and the perpetrator is male, though this offence can occur in the opposite way or with both the victim and perpetrator being of the same sex.

60. The UK has legislated against revenge porn. *Section 33 of the Criminal Justice and Courts Act 2015*[12] makes it a criminal offence for a person to 'disclose a private sexual photograph or film if the disclosure is made (a) without the consent of the individual who appears, and (b) with the intention of causing that individual distress'.

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[11] See https://www.police.gov.hk/ppp_en/11_useful_info/eta.html

[12] See http://www.legislation.gov.uk/ukpga/2015/2/section/33/enacted

61. For Scotland, section 2 of the *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*[13]provides for an offence against revenge porn:

*"A person ("A") commits an offence if—*

*(a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation,*

*(b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and*

*(c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent."*

62. The above should be considered by LRC as part of the overall review of sexual offences, or as a separate or extended study. A timely review is justified and required, given the popularity of and the access to chat rooms and social platforms nowadays.

63. For the avoidance of doubt, we are not at this stage expressing views on whether Hong Kong should or should not legislate against revenge porn. We are also not saying that the above-mentioned is the only other sexual offences that the LRC should additionally consider[14]. We raise the above as we consider that, if another sub-committee under LRC is to be set up only years later to review this (or other) sexual offence(s), the updating process would take a very long period of time. This would leave significant legislative gaps in the protection of vulnerable persons.

A modern and a comprehensive criminal justice system protecting victims of all forms of sexual offences is important to Hong Kong.

**The Law Society of Hong Kong**
**24 July 2018**

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[13] See http://www.legislation.gov.uk/asp/2016/22/section/2/enacted

[14] See our earlier comments on upskirting. Other examples that we could suggest the LRC to consider could be law reforms relating to the offences of
(a) exposure where there is no intention to cause alarm or distress and
(b) masturbation or other sexual activity in public that does not involve exposure.

## UK SEXUAL OFFENCES ACT 2009 - EXCERPTS

### 67AVoyeurism: additional offences

(1) A person (A) commits an offence if—

(a) A operates equipment beneath the clothing of another person (B),

(b) A does so with the intention of enabling A or another person (C), for a purpose mentioned in subsection (3), to observe—

(i) B's genitals or buttocks (whether exposed or covered with underwear), or

(ii) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and

(c) A does so —

(i) without B's consent, and

(ii) without reasonably believing that B consents.

(2) A person (A) commits an offence if —

(a) A records an image beneath the clothing of another person (B),

(b) the image is of —

(i) B's genitals or buttocks (whether exposed or covered with underwear), or

(ii) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible,

(c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and

(d) A does so —

(i) without B's consent, and

(ii) without reasonably believing that B consents.

(3) The purposes referred to in subsections (1) and (2) are —

(a) obtaining sexual gratification (whether for A or C);

(b) humiliating, alarming or distressing B.

(4) A person guilty of an offence under this section is liable —

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.

(5) In relation to an offence committed before the coming into force of section 154(1) of the Criminal Justice Act 2003 (increase in maximum term that may be imposed on summary conviction of offence triable either way), the reference in subsection (4)(a) to 12 months is to be read as a reference to 6 months

# HONG KONG BAR ASSOCIATION

7 October 2020

Security Bureau
Central Government Offices
10/F, East Wing
2 Tim Mei Avenue
Tamar, Hong Kong
Hong Kong

**Re: Public Consultation on the
Proposed Introduction of Offences of Voyeurism,
Intimate Prying, Non-consensual Photography of
Intimate Parts and Related Offences**

I refer to your letter dated 8 July 2020 addressed to the Hong Kong Bar Association regarding the captioned topic.

The Bar Council of the Hong Kong Bar Association invited its Committee on Criminal Law and Procedure to study the consultation paper. We have prepared a paper answering the questions raised by your Department with reasons and also voicing concerns. The paper is enclosed with this letter.

I need to point out that definitional clarity, width of coverage of the proposed offences as well as the proposed statutory defences are important aspects warranting careful considerations

... / P.2

so as to minimise unintended consequences. I would be grateful if your Department would circulate to us the draft legislation when it is prepared for another round of consultation if such is to be carried out.

Yours faithfully,

***Encl.***
PJD/MH/KC/ct

**Public Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, No-consensual Photography of Intimate Parts, and Related Offences**

**Comments of the Hong Kong Bar Association**

## Introduction

1. Pursuant to a three-month public consultation launched by the HKSAR Government, the Security Bureau (SB) has invited the Hong Kong Bar Association (HKBA) to give its views and comments on the proposed new offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences.
2. The HKBA has duly considered the matter and has gathered views of its members. In short, we generally welcome the SB's proposals and are glad to see that the Law Reform Commission (LRC)'s recommendations are accepted. The HKBA also notes the introduction of other related offences proposed by the Government and supports such endeavours that aim to render further protection to victims.
3. That said, we would like to sound a note of caution and point out that definitional clarity, width of coverage of the proposed offences as well as the proposed statutory defences are very important aspects warranting careful considerations so as to minimise unintended consequences.
4. Below are the responses to the individual consultation questions/proposals:

| **Consultation question 1**<br>*Do you agree with the introduction of a specific offence of voyeurism (i.e. Proposal 1)?*<br><br>Answer: Yes |
|---|
| **Consultation question 2** |

*Do you agree with the introduction of a separate offence of intimate prying (i.e. Proposal 2), as a statutory alternative to the proposed offence of voyeurism, in addition to being a standalone offence?*

Answer: Yes

**Consultation question 3**

*Do you agree with the proposed scope of acts for Proposals 1 (i.e. voyeurism) and 2 (i.e. intimate prying)?*

Answer: For Proposal 1, yes. For Proposal 2, we note that the mental element is not spelt out clearly. We would ask the Government to specify what the mental element of this offence is or if it is intended that the offence is a strict liability one.

**Consultation question 4**

*Do you agree with the introduction of the offence of the non-consensual photography of intimate parts for sexual gratification (i.e. Proposal 3)?*

Answer: Yes

**Consultation question 5**

*Do you agree with the introduction of a separate offence of non-consensual photography of intimate parts irrespective of the purpose, as a statutory alternative to the proposed offence of non-consensual photography of intimate parts for sexual gratification, in addition to being a standalone offence (i.e. Proposal 4)?*

Answer: Yes

**Consultation question 6**

*Do you agree with the proposed scope of acts for Proposals 3 and 4 (i.e. non-consensual photography of intimate parts)?*

Answer: For Proposal 3, yes. For Proposal 4, we note that the mental element is not spelt out clearly. We would ask the Government to specify what the

mental element of this offence is or if it is intended that the offence is a strict liability one.

**Consultation question 7**

*Do you agree that Proposals 3 and 4 (i.e. non-consensual photography of intimate parts) should not cover "down-blousing"?*

Answer: No. Given that the offence is premised on the "non-consensual" nature of photography and that images caught by down-blousing may also fall within the definition of "intimate parts" as outlined in the later part of the consultation paper, we do not see a viable and proper way to exclude "down-blousing" from the proposed offences.

**Consultation question 8**

*Do you agree with the introduction of the offence against the distribution of surreptitious intimate images (i.e. Proposal 5)?*

Answer: Yes

**Consultation question 9**

*Do you agree with the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images)?*

Answer: Yes

**Consultation question 10**

*Do you agree with the introduction of the offence against the non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for subsequent distribution (i.e. Proposal 6)?*

Answer: Yes

**Consultation question 11**

*Do you agree with the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)?*

| Answer: Yes |
|---|
| **Consultation question 12**<br>*Do you think that for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent?*<br><br>Answer: We take the view that recklessness currently defined under common Law (per *R v. G*, being Subjective Recklessness) provides better coverage than if there is the need to prove the distributor's knowledge of a lack of consent. |
| **Consultation question 13**<br>*Do you think that for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress?*<br><br>Answer: We take the view that all three elements should be included in the offence in order to achieve proper coverage. The difference should properly be reflected in sentencing based on the particulars of the charge and the actual circumstances of the case. |
| **Consultation question 14**<br>*Do you agree that "intimate acts" should mean acts, in a place which would reasonably be expected to provide privacy, by a person when the person's intimate parts are exposed or covered only with underwear, OR the person is using the toilet, OR the person is doing a sexual act not ordinarily done in public?*<br><br>Answer: The definition should be sufficiently wide in scope to cover the ever-changing societal understanding of "intimate acts". Hence, the "reasonable expectation test" is preferred. |
| **Consultation question 15**<br>*Do you agree that "intimate parts" should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear?* |

Answer: Yes. We would also refer back to our answer to consultation question 7 and invite the Government to explain how the inclusion of "breasts, whether exposed or covered only by underwear" as "intimate parts" can be reconciled with the exclusion of "down-blousing" from the offences proposed in Proposals 3 and 4.

**Consultation question 16**

*Do you agree that for the purpose of the proposed offences, the definition of "intimate parts" should include breasts and chest, irrespective of gender, or should the definition include breasts of female only?*

Answer: It should include breasts and chest, irrespective of gender.

**Consultation question 17**

*Do you agree that a defence of lawful authority or reasonable excuse should be provided for the proposed offences under Proposals 2, 4, 5 and 6?*

Answer:
For Proposals 2 & 4: No. The offence is by nature directly committed against the victim and we can see no justification for a statutory defence thereof. It is reasonable that only factual defences are available to Defendants. However, our concern remains as to whether the offences to be created under Proposals 2 and 4 are meant to be strict liability and what the mental elements for these offences are.
For Proposals 5 & 6: Yes. For these distribution offences, there may well be a need for such statutory defences that are based on academic, scientific and educational purposes especially in areas such as criminology, psychology, ethics, sex education etc. It is questionable if there can ever be a need to distribute such images etc. for journalistic purposes.

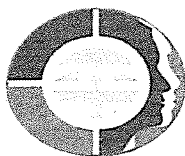
(Note: Views are also expressed that reasonable excuse defence should be available to private investigators who investigate family related cases especially when adultery is suspected.)

**Consultation question 18**

| |
|---|
| *Do you think that a defence of lawful authority or reasonable excuse should also be provided for the proposed offences under Proposals 1 and 3?*<br><br>Answer: No |
| **Consultation question 19**<br>*If suitable defence(s) are made available covering acts done with lawful authority or reasonable excuse, what should be included as reasonable excuses?*<br><br>Answer: Scientific, educational or academic purposes only.<br><br>(Note: Views are also expressed that reasonable excuse defence should be available to private investigators who investigate family related cases especially when adultery is suspected.) |
| **Consultation question 20**<br>*Do you agree that the proposed offences under Proposals 1 to 6 should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme?*<br><br>Answer: Yes |

Dated this 5th day of October 2020

Hong Kong Bar Association



平 等 機 會 委 員 會

EQUAL OPPORTUNITIES COMMISSION

本函檔號 OUR REF. :
電 話 TEL. NO. :
圖文傳真 FAXLINE :

(By post and email: consultation@sb.gov.hk)

6 October 2020

Secretary for Security
10/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

**Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences — Submission from the Equal Opportunities Commission**

I am writing to give views of the Equal Opportunities Commission (EOC) responding to the consultation on the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences.

The EOC welcomes the captioned public consultation conducted by the Security Bureau of the Government, and is broadly in favour of the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences. Furthermore, the EOC would

take this opportunity to put forward some recommendations for reviewing and potentially expanding the scope of the Sexual Conviction Record Check Scheme. For details, please refer to the enclosed full submission.

Encl.: EOC's submission for the Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences

# Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences

## Submission from the Equal Opportunities Commission

### Introduction

Established in 1996, the Equal Opportunities Commission (EOC) is a statutory body tasked with promoting equal opportunities and eliminating discrimination in Hong Kong. The EOC is responsible for implementing the Sex Discrimination Ordinance (SDO),[1] which prohibits discrimination on the ground of sex, pregnancy and marital status, as well as sexual harassment in various public fields.

2. The EOC welcomes the captioned public consultation conducted by the Security Bureau (SB) of the Government,[2] and is broadly in favour of the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences. Instead of responding to each and every consultation question which involves technical details about the proposed criminal provisions, this submission only focuses on particular issues and recommendations which are relevant to EOC's role of promoting equality and eliminating harassment and discrimination in society.

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[1] The EOC is also responsible for implementing three other Discrimination Ordinances, namely the Disability Discrimination Ordinance, Family Status Discrimination Ordinance, and Race Discrimination Ordinance.

[2] Security Bureau (2020). *Consultation Paper: Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences*. Retrieved from https://www.sb.gov.hk/eng/special/voyeurism/Consultation%20Paper%20-%20Voyeurism%20(Eng).pdf

3. Furthermore, the EOC would also take this opportunity to put forward some recommendations for reviewing and potentially expanding the scope of the Sexual Conviction Record Check Scheme (SCRC Scheme), which is touched upon in one of the consultation questions.

**Voyeurism, Intimate Prying, Non-Consensual Photography of Intimate Parts (Up-skirting)**

4. According to police figures, around 300 cases of clandestine taking of indecent photos were reported every year between 2016 and 2018. With the widespread availability and development of smartphones and hidden cameras, the problem of up-skirting and related offences would only worsen as it is ever easier for perpetrators to conduct such activities covertly.

5. The EOC believes the offences of voyeurism and up-skirting—which constitute severe forms of sexual harassment—could cause the victim immense distress and even significant adverse psychological impact. In fact, the first sexual harassment court case in Hong Kong, *Yuen Sha Sha v Tse Chi Pan*,[3] was a case of voyeurism and intimate prying occurred in a university dormitory in 1997. Assisted by the EOC, the plaintiff brought proceedings against the defendant under the SDO after she discovered that the defendant had covertly placed a camcorder inside her room for an extended period of time, which had videotaped several undressing and cloth-changing scenes of her.

6. The plaintiff said she was shocked, upset, distressed and literally trembling upon discovery of the camcorder, and she was not even able to attend classes for a few weeks afterwards. The Court awarded the plaintiff a total of HK$80,000, including exemplary and aggravated damages, as well as the compensation for her injury to feelings. While *Yuen's* case was resolved under civil proceedings of the SDO, it actually showcased that voyeurism can seriously violate one's privacy and dignity, as well as

[3] [1999] 2 HKLRD 28, DC.

tremendously degrade and humiliate the victim. Judgements of similar cases in Hong Kong concurred with such views.[4]

7. After conducting a five-month-long consultation that was completed in September 2018, the Law Reform Commission (LRC) published a report in April 2019 with its final recommendation of introducing the offences of voyeurism and non-consensual upskirt-photography irrespective of their purposes.[5] The report was published expeditiously in response to the *Secretary for Justice v Cheng Ka Yee and others* case,[6] which the Court decided that the offence of "access to a computer with dishonest or criminal intent"—an offence commonly used by the Government previously to charge people who committed voyeurism or up-skirting—should not be applied to acts without involving access to another's computer. A legal gap was thus created with an imminent need of introducing the proposed offences.

8. The SB shared a similar view and stated in paragraphs 2 to 5 of its consultation paper that the existing laws are neither adequate nor appropriate to deal with the severe and endemic offences of voyeurism and up-skirting.[7] The EOC, therefore, fully agrees that there is a pressing need to introduce the proposed criminal offences of voyeurism, intimate prying and non-consensual photography of intimate parts.

**Distribution of Surreptitious Intimate Images and Non-consensual Distribution of Intimate Images**

9. The consultation paper also proposed to criminalise the distribution of surreptitious intimate images (e.g. up-skirt pictures). In addition, it proposed to introduce a specific offence to prohibit the non-consensual

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[4] *SJ v Yeung Wing Hong* [2013] 3 HKLRD 800, *HKSAR v Kim Eung-who* [2015] 4 HKC 293, *SJ v Chong Yao Long Kevin* [2013] 1 HKLRD 786, etc.
[5] The Law Reform Commission of Hong Kong (2019). *Report on Voyeurism and Non-consensual Upskirt-photography.* Retrieved from https://www.hkreform.gov.hk/en/docs/rvoyeurism_e.pdf
[6] FACC 22/2018
[7] Security Bureau (2020). *Consultation Paper: Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences.* Retrieved from https://www.sb.gov.hk/eng/special/voyeurism/Consultation%20Paper%20-%20Voyeurism%20(Eng).pdf

distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including still and videos), but not for the subsequent distribution. The aim of the proposed latter offence is to address reported cases of victims complaining that their nude images were distributed on the Internet by a former partner in an intimate relationship (commonly known as revenge porn), as mentioned in paragraph 16 of SB's consultation paper.[8]

10. In addition, in the *Secretary for Justice v Chong Yao Long Kevin* case concerning upskirt-photography,[9] the Court proclaimed that the defendant's conduct of clandestine taking of indecent photos was an affront to the victim's dignity, as those photos "could be kept permanently, exchanged, circulated, sold as commodities, or even used to threaten the victim, and that therefore the victim could be subjected to harassment over a long period of time." This illustrated that the true vice of image-based sexual violence (IBSV)—sex crimes which involve the use of intimate images (whether taken voluntarily or not)—is the prolonged disturbance caused to the victim, which violates one's privacy and sexual autonomy substantially for a significant, or even indefinite, period of time.

11. Meanwhile, IBSV has become increasingly prevalent in Hong Kong. The sexual violence crisis centre, RainLily, said every one in seven cases they received in 2019 was related to IBSV.[10] A 2020 survey conducted by them found that 206 people experienced IBSV in the past three years and 29% of those were related to the distribution of intimate images without consent.[11]

12. The above findings were echoed by EOC's large-scale study, *Break the Silence: Territory-Wide Study on Sexual Harassment of University*

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[8] *Ibid.*
[9] [2013] 1 HKLRD 794.
[10] ZHANG, Karen (2020). "Concern Group Says Women Face Common Threat of Nude Photos Taken without Their Consent", *South China Morning Post*. Retrieved from https://www.scmp.com/news/hong-kong/law-and-crime/article/3074103/concern-group-says-women-face-common-threat-nude
[11] Association Concerning Sexual Violence Against Women (2020). *Survey Report on Image-based Sexual Violence*. Retrieved from https://rainlily.org.hk/publication/2020/ibsvsurvey

*Students in Hong Kong*, conducted in 2019.[12] It found that 1,662 out of 14,442 surveyed university students were sexually harassed online within 12 months before the study was conducted, and 21% of which said someone had posted indecent image(s) or video(s) of the student him/herself online without his/her consent.[13] Both studies indicated that revenge porn and non-consensual distribution of intimate images are not uncommon in the territory, or even among the higher education community.

13. Sex crimes involving IBSV also made the headlines from time to time. For instance, it was reported in 2017 that thousands of people used the private-messaging app Telegram to disseminate, circulate and comment on photos of women that were taken surreptitiously.[14] Moreover, similar to the notorious Korea's "Nth Room sex scandal",[15] the "A/B Room incident" was uncovered in Hong Kong in 2020, which over 300 victims were first lured to a hotel room and had intimate images being taken, and those nude photos were later used for extortion to force them to perform degrading sexual acts on tapes.[16]

14. Hence, the EOC in principle agrees that the abovementioned sex crimes involving IBSV should be outlawed by the Government. Yet, wordings of the provisions should be carefully drafted to precisely target the above acts, without prohibiting other unintended scenarios, such as the distribution of intimate images among relevant staff or parties in a sexual harassment case investigation conducted by the EOC or internally by a company or an institution.

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[12] CHAN, James K.S., LAM, Kitty K.Y., CHEUNG, Christy C.M., LO. Jimmy T.Y. (2019) *Break the Silence: Territory-wide Study on Sexual Harassment of University Students in Hong Kong*. Hong Kong: Equal Opportunities Commission. Retrieved from https://www.eoc.org.hk/eoc/Upload/ResearchReport/SH2018/ENG/SH%20University%20Report_ENG_Full%20Report.pdf

[13] Association Concerning Sexual Violence Against Women (2020). *Survey Report on Image-based Sexual Violence*. Retrieved from https://rainlily.org.hk/publication/2020/ibsvsurvey

[14] HK01 (2017). *Telegram 偷拍群組湧現　成員逾千分享黑絲短裙照　警：適時執法*. Retrieved from https://www.hk01.com/熱爆話題/106789/telegram 偷拍群組湧現-成員逾千分享黑絲短裙照-警-適時執法

[15] KUNG, H. (2020). "South Korea's 'nth rooms' are toxic mixture of tech, sex and crime", *Nikkei Asian Review*. Retrieved from https://asia.nikkei.com/Opinion/South-Korea-s-nth-rooms-are-toxic-mixture-of-tech-sex-and-crime

[16] Apple Daily (2020). *【港版 N 號房】氹上酒店玩成人直播 300 受害人捲最大性侵案*. Retrieved from https://hk.appledaily.com/breaking/20200615/J7LBHJ45BXK6ERZZLIVCPFRNSY/

**The Principle of Gender Neutrality and Avoidance of Distinctions Based on Sexual Orientation**

15. For the purpose of the various offences proposed in the consultation paper, the question of whether the definitions of "intimate acts" and "intimate parts" should cover breasts and chest irrespective of gender is specifically raised (paragraphs 22 to 24 of the consultation paper)[17] for the following proposed provisions/definitions:

Intimate acts

> *A person is doing an "intimate act" if the person is in a place which would reasonably be expected to provide privacy, and –*
> *(a) the person's genitals, buttocks, or breasts are exposed or covered only with underwear;*
> *(b) the person is using the toilet; or*
> *(c) the person is doing a sexual act that is not a kind ordinarily done in public.*

Intimate parts

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

16. On this note, the EOC entirely concurs with the LRC's guiding principle of gender neutrality and affirms that sexual offences should, as far as possible, not make distinctions based on gender or sexual orientation.[18] Furthermore, the EOC holds strongly the view that the proposed sexual offences should protect each and every one in society, including intersex and transgender people, who are more prone to sexual

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[17] Security Bureau (2020). *Consultation Paper: Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences.* Retrieved from https://www.sb.gov.hk/eng/special/voyeurism/Consultation%20Paper%20-%20Voyeurism%20(Eng).pdf

[18] Review of Sexual Offences Sub-committee, the Law Reform Commission of Hong Kong (2019). *Consultation Paper on Interim Proposals on a Sex Offender Register.* Retrieved from https://www.hkreform.gov.hk/en/docs/sexoff_e.pdf

harassment and IBSV in particular. Therefore, it is strongly recommended that the Government should use gender neutral definitions in the proposed law, instead of terms like "female breasts", to better cater for the needs of gender minorities.

**Reviewing and Reforming the SCRC Scheme**

17. Before drilling into the question of whether all the proposed offences should be included in the SCRC Scheme, the EOC would like to take this opportunity to provide our views and recommendations on potentially reviewing and reforming the Scheme itself—which has been implemented for nearly a decade—in order to better protect the vulnerable groups and contribute to the cultivation of an inclusive and harassment-free society.

18. Since its introduction in December 2011, the SCRC Scheme has been gradually seen as one of the preventive measures for schools, sports organisations, non-governmental organisations, and other companies or institutions to assess the risk of the candidates with criminal sexual conviction to perform work that involves contact with children and mentally incapacitated persons (MIPs). For instance, EOC's 2018 survey found 64% of the responded National Sports Associations "required the prospective employees and coaches to verify nil criminal conviction records against a specified list of sexual offences under the SCRC Scheme", as compared to 26% in a similar survey conducted in 2014.[19]

19. Under the SDO, employers will be vicariously liable for their employees' unlawful conducts like sexual harassment at the workplace or in the course of service provision, whether or not the act was done with the knowledge or approval of the employers.[20] Yet, the law provides a defence for the employers, as long as they can prove that they had taken reasonably practicable steps to prevent their employees from conducting the unlawful act.[21] The EOC, thus, has long been recommending different sectors

[19] Equal Opportunities Commission (2018). *Sexual Harassment – Questionnaire Survey for Sports Sector 2018*. Retrieved from https://www.eoc.org.hk/eoc/upload/ResearchReport/2019225125649737709.PDF
[20] *Sex Discrimination Ordinance*, s 46(1).
[21] *Sex Discrimination Ordinance*, s 46(3).

consider conducting the SCRC for their prospective staff, which can serve as one of the possible measures to prevent sexual harassment.[22]

20. However, the coverage of the SCRC Scheme is limited in its scope. The Scheme only enables employers of persons undertaking child-related work or MIP-related work to check whether eligible applicants have any criminal conviction records against a specified list of sexual offences. Persons with disabilities (PWDs) and elderly people are not under the protection of the Scheme if they are not MIPs. Also, the Scheme only covers prospective employees, contract renewal staff, as well as staff assigned by outsourced service providers to organisations or enterprises, but is not applicable to volunteers, existing employees or private tutors who have contact with children or MIPs.

21. In fact, the LRC's 2010 report on the introduction of the SCRC Scheme recommended that the Scheme should cover "employees, *volunteers*, *trainees* and self-employed persons undertaking child-related work or MIP-related work (emphasis added)".[23] However, the Government did not fully adopt the recommendations and the current Protocol of the Scheme specifically states that it is "not applicable to private tutors and volunteers".[24]

22. Moreover, there are long-standing concerns regarding the Scheme for not covering sexual offences like voyeurism and up-skirting that are proposed in this consultation, as those conducts were usually charged with offences like "loitering", "disorder in public places", or "access to computer with criminal or dishonest intent"[25] previously, which are not included in the specified list of sexual offences under the SCRC Scheme.

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[22] *See* the Frameworks for Sexual Harassment Policy the EOC drafted for different sectors: https://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/framework/frameworklist.aspx

[23] The Law Reform Commission of Hong Kong (2010). *Report on Sexual Offences Records Checks for Child-related Work: Interim Proposals.* Retrieved from https://www.hkreform.gov.hk/en/docs/rsexoff_e.pdf

[24] Security Bureau & Hong Kong Police Force (2019). *Sexual Conviction Record Check Scheme Protocol.* Retrieved from https://www.police.gov.hk/info/doc/scrc/SCRC_Protocol_en.pdf

[25] As mentioned in paragraph 7, the charge "access to computer with criminal or dishonest intent" is no longer used after the *Secretary for Justice v Cheng Ka Yee and others* case.

23. Also, suggestions for implementing the scheme through legislative rather than executive means, has been raised by different stakeholders since the launch of the Scheme in 2011.[26] The LRC's proposal in 2010 indeed stated clearly that the administrative SCRC Scheme is supposed to be an interim measure, pending to the launch of a comprehensive legislative scheme, which may take considerable time to be implemented.[27]

*Views of the EOC on the SCRC Scheme*

24. Therefore, in connection to the above background, the EOC would like to express the following views and recommendations to the Government for potentially reviewing and reforming the existing SCRC Scheme:

i. First, the EOC would like to reiterate our stance regarding the Scheme, which we raised in 2010 when it was first introduced.[28] While the Government has a constitutional duty to protect children and vulnerable groups, we believe it is equally important to recognise the rights and public interest of having former sex offenders to rehabilitate and reintegrate in the community. A delicate balance should, thus, be struck between both while implementing any changes to the Scheme. Bearing that in mind, the EOC in principle agrees to include most of the proposed offences in the specified list of sexual offences under the SCRC Scheme, saving the offence of non-consensual distribution of intimate images which may need further deliberation and discussion with relevant stakeholders, as some cases of revenge porn may likely include first-time offender at a young age, whose offences may have no connection to children, MIPs or other vulnerable groups.[29]

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[26] Many of the views are raised by NGOs or stakeholders from time to time, e.g. Meeting of the Legislative Council Panel on Security on 4 June 2013: https://www.legco.gov.hk/yr12-13/english/panels/se/minutes/se20130604.pdf
[27] The Law Reform Commission of Hong Kong (2010). *Report on Sexual Offences Records Checks for Child-related Work: Interim Proposals*. Retrieved from https://www.hkreform.gov.hk/en/docs/rsexoff_e.pdf
[28] *See* https://www.legco.gov.hk/yr09-10/english/panels/se/papers/se0302cb2-1073-1-e.pdf
[29] It is noted that the SCRC Scheme will not disclose sexual offences that are regarded as "spent" under

ii. Second, given that the administrative Scheme has already been implemented for a decade and some of the said concerns or suggestions will affect a significant number of stakeholders, it is recommended that the Government should consider holding a comprehensive public consultation for the Scheme and embarking on the preparatory work for implementing the Scheme via legislative means in the long run.

iii. Third, as abuse cases of residents of residential care homes for the elderly and for PWDs by care homes' personnel are reported from time to time in recent years,[30] the EOC recommends that the Government should consider exploring the feasibility of expanding the SCRC Scheme to cover prospective employees who have contact with PWDs and elderly people that are not MIPs as well.

iv. Fourth, the EOC recommends that the Government should consider expanding the scope of the existing Scheme to cover volunteers who will involve regular contact with children, MIPs, PWDs and elderly people. In June 2020, the Government gazetted the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020,[31] which made amendments to the four Discrimination Ordinances, including the SDO, in Hong Kong. The latest law amendments made not only volunteers liable for engaging in sexual harassment at workplaces and other public fields, but also persons who engage the volunteers, similar to the existing vicarious lability borne by employers as mentioned in paragraph 19 of this submission. Hence, the EOC believes that the recommended expansion to cover volunteers who have regular contact with children and other vulnerable

section 2 of the Rehabilitation of Offenders Ordinance, yet some NGOs criticised that the Ordinance's scope is too narrow, *see*: https://www.thestandnews.com/society/監獄改革-四-改革罪犯自新條例助更生/

[30] South China Morning Post (2016). *Calls for Action after Hong Kong Care Home Sexual Assault Claims.* Retrieved from https://www.scmp.com/news/hong-kong/education-community/article/2028820/calls-action-after-hong-kong-care-home

[31] *See* https://www.gld.gov.hk/egazette/pdf/20202425/es1202024258.pdf

groups can provide one extra step that companies or organisations can opt to prevent sexual harassment.

v. Last but not least, the Government should consider waiving the administrative fees for volunteers under the SCRC Scheme. In the same vein, the EOC suggests that the Government should also consider waiving administrative fees for interns who are currently covered by the SCRC Scheme.

***Equal Opportunities Commission***
***October 2020***

香港女會計師協會有限公司
*Association of Women Accountants (Hong Kong) Limited*

**PRIVATE AND CONFIDENTIAL**

Security Bureau
Central Government Office 10/F, East Wing
2 Tim Mei Avenue, Tamar, Hong Kong
By mail & email: consultation@sb.gov.hk

6 October 2020

Dear Sir/Madam,

**Re: Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences**

We, Association of Women Accountants (Hong Kong) Limited, welcome the proposals set out in the Consultation Paper. While we understand that the proposed Introduction of Offences is gender-neutral, there should be no doubt that female generally face higher risk of becoming victims of the captioned offences. Accordingly, the proposals are extremely relevant to our Association as a promoter of women rights.

Association of Women Accountants (Hong Kong) Limited was established in 2006 and has been striving to promote women rights, gender equality and board diversity in Hong Kong as part of our key missions. Being a professional accountancy body with approximately 70% being women fellow members while more than half of the population in the accounting profession are female accountants, we strongly support the captioned proposed Introduction of Offences, and all the proposals set out in the Consultation Paper.

Women have been facing increasing challenges given our multifaceted roles in families, at work and in the society as a whole. The stakeholders of the community should join hands to embrace and empower women in upholding Hong Kong as an international city.

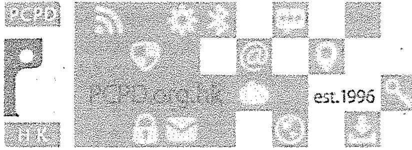
We agree that there are strong sentiments in the community and a crucial need to address the issues with more stringent criminal sanctions to be imposed.

Concerning Proposal 7 in relation to Defence, we propose that media activities should not be taken legal defence and that specific defences should be provided for.

In addition, we also wish to draw particular attention to online cyber-crimes when the offenders conducting the acts are physically outside Hong Kong especially in other jurisdictions where the related issues may not be legally addressed. The victims in such cases would probably be left unprotected lawfully and/or emotionally harmed with long term impact. Any forms of disrespectful acts and behaviours towards women, both online and offline, would potentially cause long term severe distress, humiliation, harassment and stress to the victims.

We believe our view above would be in line with the community's view in general and hopefully arouse public awareness towards the issues. We are grateful for introduction of any schemes promoting women rights, human equality and different forms of discrimination against women.

Women Accountants (Hong Kong) Limited




香港個人資料私隱專員公署
Privacy Commissioner
for Personal Data, Hong Kong

Your Ref:
Our Ref:

7 October 2020

**(BY POST and BY FAX (2501 4281))**

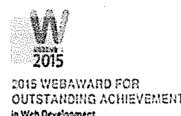
The Security Bureau
The Government of HKSAR
Central Government Offices,
10/F, East Wing,
2 Tim Mei Avenue, Tamar, Hong Kong

**Re: Consultation Paper – proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts and related offences**

We refer to your letter dated 8 July 2020 addressed to the Privacy Commissioner for Personal Data on the captioned consultation paper.

2 We enclose herewith "*PCPD's submission in response to the consultation paper on proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts and related offences*" for your consideration.

3. Please note that the comments in our submission are given without prejudice to the performance of the Commissioner's functions and the exercise of her powers under the Personal Data (Privacy) Ordinance (Cap. 486).



4. We hope that our comments in the submission will be of assistance to you. Should you have any enquiry on the content of this submission or require further information, please feel free to contact the undersigned at

Yours sincerely,

for Privacy Commissioner for Personal Data, Hong Kong

Encl.

**PCPD's submission in response to the consultation paper on proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts and related offences**

This submission is made by the Office of the Privacy Commissioner for Personal Data ("**PCPD**") in response to the consultation paper published by the Security Bureau ("**SB**") on the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences ("**Consultation Paper**") in July 2020. We understand that upon the review by the Review of Sexual Offences Sub-committee appointed by the Law Reform Commission ("**LRC**") on the substantive sexual offences in Hong Kong, the Government took on-board LRC's recommendations and proposes to introduce various governing sexual offences having particular regard to overseas jurisdictions.

2. As the regulator to protect individuals' privacy in relation to personal data under the Personal Data (Privacy) Ordinance (Cap. 486) ("**PDPO**"), the PCPD offers comments on selected consultation questions in the Consultation Paper that may raises concern from the perspective of personal data privacy protection.

3. We note that the Consultation Paper aims at safeguarding victims against acts which may constitute the proposed offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and the distribution of related images. In this connection, we wish to point out that the "interests" intended to be protected by the PDPO was succinctly summarised by the LRC's report on "Reform of the Law Relating to the Protection of Personal Data" in 1994[1] which cited four different forms of privacy interests including:

(i) the interest of the person in controlling the information held by others about him (*i.e.* information privacy);

[1] https://www.hkreform.gov.hk/en/docs/rdata-e.pdf

(ii) the interest in controlling entry to the personal place (*i.e.* territorial privacy);

(iii) the interest in freedom from interference with one's person (*i.e.* personal privacy); and

(iv) the interest in freedom from surveillance and from interception of one's communications (*i.e.* communications and surveillance privacy).

4. In this connection, the LRC made it clear that it was only concerned in the aforesaid report with information privacy; and protection of that particular interest is plainly also the aim of the PDPO.

5. To such end, we note that the proposed offences do not confine to the protection of an individual's information privacy and stem into other aspects of privacy interests. Insofar as these other aspects of privacy interests are concerned, we do not have any useful views to offer relating to the proposed offences as they do not by themselves fall within the purview of the PDPO in protecting individuals' information privacy.

6. That being said, we would like to provide our observations concerning Proposal 6, *i.e.* the creation of statutory offence for non-consensual distribution of intimate images as this may, in certain contexts, relate to personal data privacy.

7. We note that the acts intended to be curbed under Proposal 6 relates to images "*showing the victim doing an intimate act*"; and "*it does not matter whether the image was taken with the victim's consent in the first place*".[2] In this regard, we have the following observations.

[2] Paragraph 21 of the Consultation Paper.

*(I)* *Identity of the victim as his/her "personal data"*

8. According to section 2(1) of the PDPO, "personal data" means any data: (a) relating directly or indirectly to a living individual; (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and (c) in a form in which access to or processing of the data is practicable.

9. Intimate images constitute an individual's personal data if it is reasonably practicable for the identity of the data subject concerned to be directly or indirectly ascertained from the image(s). For instance, even though the image(s) may not of itself contain any personal identifier of the victim, a combination of other information (e.g. personal data possessed by "*the person created, generated, obtained, or was provided with the image in question*"[3]) that enables positive identification of the data subject concerned renders the image(s) to be the victim's personal data.

*(II)* *Consent from the victim*

10. If the image(s) constitute a victim's personal data, the data user(s)[4] concerned (i.e. the person who created, generated, obtained or was provided with the image(s)) must comply with the PDPO, including the Data Protection Principles ("**DPPs**") under Schedule 1 thereof. The DPPs constitute the pillar stone for protecting individuals' personal data privacy regarding collection, use, processing, retention and destruction of personal data.

11. Further, we consider that the proposed criminality for the act (referred to in paragraph 7 above) which is premised on the lack of consent for the distribution of intimate images in the first place is consistent with DPP 3 of the PDPO. Under DPP3, a data user shall not, without the prescribed consent of the data subject, use the personal data collected for a new purpose. "New purpose", in relation to the use

[3] *Ibid.*

[4] Under section 2(1) of the PDPO, a "data user" in relation to personal data, means a person who, either alone or jointly or in connection with other persons, controls the collection, holding, processing or use of the data.

of personal data, means any purpose other than (a) the purpose for which the data was to be used at the time of the collection of the data; or (b) a purpose directly related to the purpose referred to in paragraph (a).

12. As illustrated in paragraph 19 of the Consultation Paper, we note that the original purpose of collection of such image(s) might only be confined to self-use (and this is the basis where the victim's consent has been given for taking such intimate images, including stills or videos). Any subsequent distribution amounts to a new purpose which would probably exceed the scope of the victim's consent. In other words, further dissemination would not be within the victim's consent in the first place. This amounts to a contravention of the requirement of DPP3 by the data user(s).

13. Moreover, we also note that the proposed offence intends to cover the person who created, generated, obtained or was provided with the image(s). This is in line with the PDPO as there is no public domain exception. In this connection, a common misconception is that personal data collected from the public domain or which is made publicly available (for example, from the internet), is free to be used for whatever purpose the data user wishes. However, the PDPO does not differentiate or exempt from its application personal data collected or made available in the public domain. A data subject's personal data that can be obtained from the public domain should not be taken to mean that the data subject has given blanket consent for re-use of his personal data for whatever purposes. The relevant factors to be considered in assessing the permitted purposes of use of the personal data may include (non-exhaustive):

(i) ascertaining the original purpose for which the personal data was placed in the public domain;

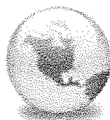
(ii) the restrictions on use, if any, imposed by the data user who made the data available on the public domain; and

(iii) the reasonable expectation of the personal data privacy of the data subjects.

14. In other words, even though the intimate image(s) concerned was obtained from a netizen online (which was not originally taken by him/her), further dissemination of the said image(s) render the netizen concerned as a "data user" under the PDPO as he/she "controls" the collection, holding, processing or use of the data. It must be emphasised that personal data retrievable from public domain is also protected under the PDPO.

15. The views contained in the above submission are given without prejudice to the performance of the functions or exercise of the powers of the Privacy Commissioner for Personal Data, Hong Kong under the Personal Data (Privacy) Ordinance (Cap. 486).

Office of the Privacy Commissioner for Personal Data, Hong Kong
7 October 2020



Consultation Paper on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences
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From:
To: consultation@sb.gov.hk,

2 Attachments

FIDA on proposed offences of voyeurism, intimate prying and others submission 7 October 2020.pdf

Consultation paper - Voyeurism etc 20201007.pdf

Dear Sirs

Please see the attached.

Law Reform Committee
Hong Kong Federation of Women Lawyers Limited

Date: 7 October 2020

By email : consultation@sb.gov.hk

Security Bureau
- Consultation on the Proposed Introduction of
Offences of Voyeurism, Intimate Prying, Non-consensual
Photography of Intimate Parts, and Related Offences
Central Government Offices
10/F, East Wing,
2 Tim Mei Avenue,
Hong Kong

Dear Sirs

**Consultation Paper on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences ("Consultation")**

We refer to the above Consultation and our previous submissions on 22 February 2013, 12 March 2017 and 15 August 2018 in response to the Law Reform Commission's previous consultations on the review of sexual offences.

Hong Kong Federation of Women Lawyers has since its inception in 1975 been working closely and keeping in close contact with local and international associations and entities on matters relating to women, family and children. We advocate understanding and respect between the genders and safety of women and children. We also believe that men and women are different in nature and their needs should be appropriately addressed. Although there have been immense improvements in recent years, women are still put in disadvantaged position because of biological, socio-economic and cultural reasons. With the prevalence of social media, new challenges arise and women and children can be placed in an even more vulnerable position. More concerted and targeted efforts should be made to rectify such disadvantaged position. Improving the law to provide more protection to them is one. However, as the review has since taken close to 15 years to the current stage, and only a small portion from the review is now going through the initial legislative process, we strongly advise the Government to invite the various departments and statutory bodies, if not done so before, to put more concerted efforts now in education to enhance public awareness on sexual crimes.

We were disappointed to see that there has yet to be a review on sentencing, which was the original fourth part of the consultation on the overall review of sex crimes by the Law Reform Commission. It is more than ever important to consider new sentencing orders for managing sex offenders. More severe sentencing terms for perpetrators that target youth should be introduced. The Bureau may note that the Sentencing Council in England reviewed the sentencing for sexual offences in 2013 to toughen the sentencing guidelines, taking into account the technologies used by the perpetrators, as well as the long-term damage done to victims. However, such efforts are constrained by the statutory terms for some cases. As the recommendations from the Law Reform Commission are

largely following the UK tracks, reviewing the existing offences and creating new ones without reviewing their sentencing terms will be short changing the entire reform. For the purpose of the current Consultation, with offences relating to voyeurism and upskirting, we suggested in our submission to the Law Reform Commission that consideration should be given as to whether upskirting acts targeting youths and children would bear more severe penalties. Further, we also suggested that for sentencing, every sex offender must be issued with a mandatory order on counseling. Locking up sex offenders without helping them recognize the harm they have caused to others or changing their behavior does not help the community or the offenders themselves. As we are not sure when review on sentencing will take place, we take this opportunity to raise it with the Bureau and implore with the Government to actively follow up on this aspect.

Another comment we must keep pounding on is this. Any amendment or introduction of new sex offences is half-baked without looking into the offences on pornography, prostitution and trafficking. There has been numerous literature on the link between pornography/prostitution and sex offences. Any film, movie, clip or video showing any of the acts punishable under the reformed ordinance should be an offence. Pornography should be eradicated. While we disagree with the assessment and ranking of US TIP report on Hong Kong, all neighbouring jurisdictions such as Macau, Taiwan, Japan, Singapore, Vietnam, Thailand, Philippines, Cambodia etc have enacted specific human trafficking laws and PRC also enacted a 10 years national plan back in 2013 to deal with human trafficking. The 2000 UK Home Office paper referenced in this and earlier consultation papers, Setting the Boundaries: Reforming the Law on Sex Offences, not only dedicated a whole chapter on prostitution and trafficking and making various recommendations but also ended by recommending that there be further review of the law on prostitution. We believe it is high time for Hong Kong to review its laws against prostitution, particularly when women are still smuggled into Hong Kong for prostitution during COVID mandatory quarantine. Similarly, despite Police's continuous unwavering investigations and actions against vice establishments, rarely are ring leaders arrested and prosecuted and often times one vice establishment is shut down, another one springs up next to it, not to mention the difficulties in prosecuting those found in old tenements where ownership or possession of the premises are hard to establish. Guides, in whatever format and media including the internet, websites and social media such as WeChat, to locate prostitutes should be listed as obscene articles, and publishing them should be an punishable act, and anyone convicted under such should be placed on the Sex Offenders Register.

In general, we agree with many of the recommendations made in the Consultation. Our specific comments on the Consultation are provided in the attached.

Yours faithfully

Law Reform Committee
Hong Kong Federation of Women Lawyers Limited

**Consultation Paper - Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences**

The Hong Kong Special Administrative Region Government announced on July 8 2020 the launch of a three-month public consultation on the proposed introduction of offences against voyeurism, intimate prying, non-consensual photography of intimate parts and the distribution of related images.

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**1.** The Government proposes to introduce separate offences of voyeurism (i.e. observing or recording of intimate acts for the purpose of obtaining sexual gratification) and intimate prying.

| | **Proposal 1** | **Proposal 2** |
|---|---|---|
| Offence | Voyeurism | Intimate prying<br><br>(statutory alternative to Proposal 1, in addition to being a standalone offence) |
| Purpose | To obtain sexual gratification | Irrespective of the purpose |
| Act | Any person who, without the consent of the victim, with or without the aid of equipment, observes the victim doing an intimate act or records images (including stills and videos) of the intimate act, or operates equipment to enable the intimate act to be observed or images of the intimate act to be recorded<br><br>Any person who installs equipment, or constructs or adapts a structure or part of structure, with the purpose of enabling, without the consent of the victim, the person or another person to observe the victim doing an intimate act or record images (including stills and videos) of the intimate act, or operate the equipment for observation of the intimate act or recording of images (including stills and videos) of the victim doing an intimate act | |

| **Consultation question 1** |
|---|
| Do you agree with the introduction of a specific offence of voyeurism (i.e. Proposal 1)?<br><br>Yes.<br><br>However, we do not agree that "consent" should be an element of the offence. Whether or not the victim has consented to such an action hinges on the age and capacity of the victim. It is wrong in the first place to oberve or record any intimate act or images of the intimate act. Further, it is difficult to prove or disprove consent. Does consent in writing by a victim who may have been incapacitated for example by date drug be a valid consent ? How about those who consented thinking that they were recruited as actors or models ? How about those who consented at the time but the recording or images are published as revenge ? The list goes on.<br><br>We would also add that the offence could be committed with or without the knowledge of the victim.<br><br>The other issue on the offence is "observe". How will observing the victim doing an intimate act be proved ?<br><br>There is a difference between an intimate act and a sexual assault. In the latter case, would it be an offence for a person observing the sexual assault taking place without calling for assistance or preventing such an act taking place ?<br><br>The current wording seems to focus on one victim. What happens if there are multiple victims ? Does the victim have to be identified ? What happen if the recording or the images are blurred but victim can |

still be identified by voice or body marks etc ?

What about those who "observe" on live stream on the internet ? Considering the jurisdictional limitations, how would the offence be pursued if the live stream platform locates outside Hong Kong ? For example, during COVID, live streaming of sexual assault on children in Philippines has heightened. How would the offence protect the victim (in this example, children outside Hong Kong) ? How would the offence be enforced against a person who observes such an action in Hong Kong ?

Also what does it mean by "obtaining sexual gratification" ? How would or could that be proved ? At the moment of observing or recording or thereafter ?

What amounts to an "equipment" ?

Please also see below our comments on intimate act and defence.

Overall we would invite the government to reconsider any elements in the offence which are open to different interpretations and capable of being used as defences indiscriminately.

**Consultation question 2**

Do you agree with the introduction of a separate offence of intimate prying (i.e. Proposal 2), as a statutory alternative to the proposed offence of voyeurism, in addition to being a standalone offence?

Yes but would it be more straight forward if they are combined in the sense that it is an offence irrespective of the purpose or lack of purpose ? Wouldn't that give the widest protection to the victim ? We invite the government to reconsider why it is necessary to have different penalties for these offences based on the purpose of the perpetrator.

**Consultation question 3**

Do you agree with the proposed scope of acts for Proposals 1 (i.e. voyeurism) and 2 (i.e. intimate prying)?

As discussed in question 1.

2. The Government proposes to introduce separate offences:

- non-consensual photography of intimate parts for sexual gratification, and
- non-consensual photography of intimate parts irrespective of the purpose. This is a statutory alternative to the former, in addition to being a standalone offence.

| | **Proposal 3** | **Proposal 4** |
|---|---|---|
| Offence | Non-consensual photography of intimate parts for sexual gratification | Non-consensual photography of intimate parts irrespective of the purpose<br>(statutory alternative to Proposal 3, in addition to being a standalone offence) |
| Purpose | To obtain sexual gratification | Irrespective of the purpose |

| Act | Any person who, without the consent of the victim, operates equipment beneath the clothing of the victim to enable the person or another person to observe the victim's intimate parts or record images (including stills and videos) of the victim's intimate parts or to have access to such recorded images<br><br>In circumstances where the intimate parts would not otherwise be visible<br><br>Applicable in both public or private place | |
|---|---|---|
| Maximum Penalty | Imprisonment for 5 years | Imprisonment for 3 years |

| **Consultation question 4** |
|---|
| Do you agree with the introduction of the offence of non-consensual photography of intimate parts for sexual gratification (i.e. Proposal 3)?<br><br>Yes<br><br>Similar to proposals 1 and 2, we think that the element of "consent" should be removed for the same reasons discussed above. The offence is also committed with or without the knowledge of the victim as many of the upskirting cases are without the knowledge of the victim.<br><br>Same issue on "obtaining sexual gratification" as discussed in Proposals 1 and 2.<br><br>What does it mean by "equipment" ?<br><br>When does it mean by "operates equipment" ?<br><br>In what circumstances would it be considered "beneath the clothing of the victim" ? What about the report on upskirt photos be taken at an angle without the "equipment" being "beneath the clothing of the victim" ? We see no difference when, with technology available to mobile phones, phones held at a distance could easily zoom into a close up underneath clothing. For the equipment to have to be beneath the clothing of the victim does not make sense.<br><br>Please see further comments on the intimate parts below. |

| **Consultation question 5** |
|---|
| Do you agree with the introduction of a separate offence of non-consensual photography of intimate parts irrespective of the purpose, as a statutory alternative to the proposed offence of non-consensual photography of intimate parts for sexual gratification, in addition to being a standalone offence (i.e. Proposal 4)?<br><br>Yes but would it be more straight forward if they are combined in the sense that it is an offence irrespective of the purpose or lack of purpose ? Wouldn't that give the widest protection to the victim ? |

| **Consultation question 6** |
|---|
| Do you agree with the proposed scope of acts for Proposals 3 and 4 (i.e. non- consensual photography of intimate parts)?<br><br>As discussed in question 4. |

| |
|---|
| **Consultation question 7** |
| Do you agree that Proposals 3 and 4 (i.e. non-consensual photography of intimate parts) should not cover "down-blousing"?<br><br>We do not agree that "down-blousing" should be excluded. Simply because that the Law Reform Commission's recommendation on non-consensual photography of intimate parts did not cover "down-blousing" does not mean that we should not have one. We also find it hard to understand how taking of selfies could fall within "down- blousing". Obviously it will not cover the person who is taking a selfies on himself or herself. For those who take selfies with others in the pictures where it captures the intimate part of the victim or in the circumstances where the intimate part of the victim would be visible should still be punishable. We suggest instead that if selfies (only in the instance when the photographer is the same person whose intimate parts are exposed) should be a specific exception, the legislation should not exclude different parts of the body, which, from the point of view of the victim, can be equally offensive. |

3. The Government proposes to introduce specific offences to prohibit:

- the distribution of surreptitious sexual images for the protection of victims. There are similar offences in overseas jurisdictions (e.g. Canada, New Zealand and Singapore)
- non-consensual distribution of images of intimate acts, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (e.g. revenge porn).

| | Proposal 5 | Proposal 6 |
|---|---|---|
| Offence | Distribution of surreptitious intimate images | Non-consensual distribution of intimate images |
| Act | • Any person who distributes images (including stills and videos) that the person knows to have been obtained from voyeurism, intimate prying or non-consensual photography of intimate parts (for sexual gratification or irrespective of the purpose) (i.e. proposed offences in Proposals 1 to 4)<br>• Regardless of whether the person created, generated, obtained, or was provided with the images in question<br>• Covers distribution through whatever means<br>• The victim does not consent to the distribution | • Any person who distributes images (including stills and videos) showing the victim doing an intimate act<br>• Regardless of whether the person created, generated, obtained, or was provided with the image in question<br>• It does not matter whether the image was taken with the victim's consent in the first place<br>• Covers distribution through whatever means<br>• The victim does not consent to the distribution |
| Maximum Penalty | Imprisonment for 5 years | Imprisonment for 5 years |

| **Consultation question 8** |
|---|
| Do you agree with the introduction of the offence against the distribution of surreptitious intimate images |

(i.e. Proposal 5)?

We have long advocated for an overhaul of the Control of Obscene Articles Ordinance and we take the opportunity to request the Government to do so.

We agree with the introduction of the offence against the distribution of intimate images BUT:

- The offence must be constituted irrespective of whether the person who distributes such images or recordings knows that such images or recordings were obtained in contravention of proposals 1 to 4 above.
- It does not even matter whether those images or recordings were obtained in contravention of proposals 1 to 4 above.
- It also does not matter whether such distribution is for sexual gratification (which is hard to prove anyway) or other purpose or no purpose.
- Similar to Proposals 1 to 4, the element of "consent" should be removed and it also does not matter whether the victim has knowledge of the distribution.

**Consultation question 9**

Do you agree with the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images)?

Please see discussion in question 8.

**Consultation question 10**

Do you agree with the introduction of the offence against the non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for the subsequent distribution (i.e. Proposal 6)?

We do not agree that the offence does not cover subsequent distribution. The Consultation cited an example of revenge porn as subsequent distribution which we find it questionable. Revenge porn is the distribution of sexually explicit images or videos of individuals without their consent where such images or videos may be made by a partner in an intimate relationship with or without the knowledge and/or consent of the subject. This falls squarely within Proposals 1 to 4. We therefore do not see why subsequent distribution by, in the above example, the partner in an intimate relationship or any other person who obtains or receives such images or videos should not be covered by Proposal 6.

We also think that the offence should be constituted irrespective whether the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim humiliation, alarm or distress.

**Consultation question 11**

Do you agree with the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)?

As discussed in questions 8-10

**Consultation question 12**

Do you think that for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent?

| As discussed in question 10, we think that the offence should be constituted no matter whether the distributor knows the victim has consented or not. |
|---|
| **Consultation question 13** |
| Do you think that for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress?<br><br>As discussed in question 10, we think that the offence should be constituted irrespective of whether or not the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress. |

4. Intimate act and intimate parts

For the purpose of the proposed offences above, a person is doing an "intimate act" if the person is in a place which would reasonably be expected to provide privacy, and

(a) the person's genitals, buttocks or breasts are exposed or covered only with underwear;
(b) the person is using the toilet; or
(c) the person is doing a sexual act that is not a kind ordinary done in public.

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

The Government proposes that the definitions of "intimate acts" and "intimate parts" should cover breasts and chest irrespective of gender. A gender neutral definition would also better cater for the needs of gender minorities.

| **Consultation question 14** |
|---|
| Do you agree that "intimate acts" should mean acts, in a place which would reasonably be expected to provide privacy, by a person when the person's intimate parts are exposed or covered only with underwear, or the person is using the toilet, or the person is doing a sexual act not ordinarily done in public?<br><br>Largely yes but how about when a person is bathing, showering or changing where privacy is expected but the intimate parts are not exposed ? Certainly observing or recording person bathing, showering or changing even when the intimate parts are not exposed is a crime.<br><br>The definitaton on "intimate acts" cover only a sexual act that is a kind not ordinary done in public. So sexual act in private would be covered. What about a sexual act that is not private but also not done in public places ? This could happen in a date rape scenario. Also what amounts to a sexual act ? |
| **Consultation question 15** |
| Do you agree that "intimate parts" should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear?<br><br>Yes. However, what happen if the images or recording are taking separate part of the victim's body ? For example, one image with the face and one image with the breasts but no image with both the face and breast. Or what about the image is on a mother breast feeding ? We think that even in either |

circumstance, the offence under Proposals 1 to 4 is still constituted.

**Consultation question 16**

Do you agree that for the purpose of the proposed offences, the definition of "intimate parts" should include breasts and chest, irrespective of gender, or should the definition include breasts of female only?

We think that irrespective of gender, privacy and dignity to one's body is expected and should be protected. This is how we teach children since they are of a young age and we do not see why it would not be the same for any age.

5. Defences

The government proposes that suitable defence(s) should be made available for :

- offence of intimate prying (i.e. Proposal 2),
- non-consensual photography of intimate parts irrespective of the purpose (i.e. Proposal 4),
- offences related to the distribution of intimate images (i.e. Proposals 5 and 6).
- The defence could cover acts done with lawful authority or reasonable excuse (e.g. law enforcement, journalistic work, etc.)

**Consultation question 17**

Do you agree that a defence of lawful authority or reasonable excuse should be provided for the proposed offences under Proposals 2, 4, 5 and 6?

Yes. If Proposals 2 and 4 remain as alternative offences to Proposals 1 and 3, there has to be some discussion on what would amount to reasonable excuse or with lawful authority. Images of the intimate parts taken for the purpose of medical examination, medical record or education could be acceptable. It is however far less acceptable on recording taken on initimate act (as defined in the Consultation or as discussed in question 14 above) with the exception of may be movies but then it would still beg the question as to what is an acceptable extent ?

We do however ask for a blanket ban on pornography whether it is commercially or artfully produced with or without the consent of the actors of the acts to be acted on.

**Consultation question 18**

Do you think that a defence of lawful authority or reasonable excuse should also be provided for the proposed offences under Proposals 1 and 3?

No. We see no plausible defence of lawful authority or reasonable excuse if such act is committed for the purpose of obtaining sexual gratification.

**Consultation question 19**

If suitable defence(s) are made available covering acts done with lawful authority or reasonable excuse, what should be included as reasonable excuses?

See discussion in question 17.

6. Sexual Conviction Record Check Scheme

The government proposes that the proposed offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and the distribution of related images should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check ("SCRC") Scheme.

| **Consultation question 20** |
| --- |
| Do you agree that the proposed offences under Proposals 1 to 6 should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme?<br><br>Yes. This is particularly important not only against those who observe or record images or video of intimate parts or intimate acts but those who distribute such images or video.<br><br>But as mentioned in our cover letter, we think a review on sentencing together with introduction on mandatory counselling to sex offenders are necessary. |