

**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.

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](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

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](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*

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.

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 KANG, 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】 丞上酒店玩成人直播 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

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](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.

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

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 liability 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.

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