

Further Submission of the Equal Opportunities Commission

**Proposed Introduction of Offences of Voyeurism, Intimate
Prying, Non-consensual photography of intimate parts, and
related offences**

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平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

1. Introduction

1. The Equal Opportunities Commission (EOC) was established in 1996 and is Hong Kong's statutory body with responsibility for promoting equality and eliminating discrimination. It has duties and powers under four anti-discrimination Ordinances: the Sex Discrimination Ordinance (SDO); the Disability Discrimination Ordinance (DDO); the Family Status Discrimination Ordinance (FSDO); and the Race Discrimination Ordinance (RDO). In relation to the SDO, it prohibits discrimination on grounds of sex, pregnancy, breastfeeding, marital status, as well as sexual harassment in various public fields.
2. In October 2020, the EOC made a submission to the Government's consultation on the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences.¹ As stated in that submission, the EOC welcomes and is broadly in favour of the proposed criminal offences in order to better protect people from such serious conduct which violate the sexual autonomy of the victims, and sometimes constitute extreme forms of sexual harassment. Such offences are also important as women are disproportionately targeted, and therefore the conduct often constitutes a form of gender discrimination and gender based violence.
3. Since then, the Government published in January 2021 its report on the consultation which summarised the responses to the consultation and its proposals for the content of the legislative reforms.² The Legislative Council Panel on Security also conducted a session on the proposals in January 2021 at which the Government provided an overview of the proposals and responded to a number of questions of Legislative Council members.³ The Government also provided a paper for the Legislative Council which summarised consultation responses and the proposed legislative reforms.⁴
4. The EOC has further examined the consultation responses and the Government's latest proposals. It also has considered the issues in light of our further review of protections from sexual harassment in Hong Kong, which in addition to examining the protections from sexual harassment under the SDO, is also examining related laws where sexual harassment may be an element of conduct in other offences. This is of particular concern in relation to the increasing use of electronic communications

¹ EOC Submission, consultation on the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences, October 2020, <https://www.eoc.org.hk/eoc/upload/20201012155723523576.pdf>

² Report on the Consultation on Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences, Security Bureau, January 2021, https://www.sb.gov.hk/eng/special/voyeurism/Consultation_Report_on_Voyeurism_Eng.pdf

³ Legislative Council Panel on Security, 15 January 2021, <https://www.legco.gov.hk/yr20-21/english/panels/se/agenda/se20210115.htm>

⁴ Proposed introduction of offences on voyeurism and non-consensual photography of intimate parts, and related offences, Security Bureau, January 2021, <https://www.legco.gov.hk/yr20-21/english/panels/se/papers/se20210115cb2-580-4-e.pdf>

for the purpose of various forms of sexual violence, including Image Based Sexual Violence (IBSV) which are the subject of the proposed criminal offences.

5. On further examination of the Government's latest proposals, the EOC believes that there are several respects in which the proposed offences should be strengthened to better protect the public from such serious conduct, and particularly women who are disproportionately targeted. Where appropriate the EOC has made recommendations on the content of our proposals. The key areas the EOC has addressed are:
 - including in the offence of non-consensual photography of intimate parts, photography of the breasts of a person;
 - including in the definition of intimate parts altered images; and
 - introducing new offences of threats to distribute images of intimate parts.
6. We hope that the submission is helpful to the Government in developing the draft Bill, and the planned legislative process in the Legislative Council in the coming months. We also note that once the draft Bill is published and we have considered the complete draft of the proposed provisions, the EOC may wish to make further submissions to the Government and Legislative Council.

2. **Concerns with Image based sexual violence**

7. There is a serious and increasing problem of Image Based Sexual Violence (IBSV) in Hong Kong as in many parts of the world, which is often linked to increasing use of electronic communications such as social media, online forums and instant messaging applications for such conduct.
8. IBSV has been defined by the organisation Rainlily which works with victims of sexual violence in Hong Kong as:

“Taking intimate images without the person’s consent, sometimes involving voyeurism

(‘Intimate images’ means an image that shows the person’s genitals, buttocks or breasts whether exposed or covered with underwear);

Distributing, sharing, circulating and selling intimate images without the person’s consent, including images taken with or without consent;

Threatening, intimidating, blackmailing with distribution of intimate images, including images taken with or without consent;

Non-consensual sexualised photoshopping, also known as ‘morp porn’ or ‘deepfake porn’ in which software and/or artificial intelligence are used to splice image of an individual with nude or sexual material obtained elsewhere, generating nude or sexual images digitally.”⁵

9. Such conduct involves acts committed without the consent of the victim, violates their sexual autonomy; causes humiliation, intimidation and distress to the victim; often adversely affects the mental and physical health of the victim; and is sometimes an extreme form of sexual harassment. It also disproportionately affects women who are more often the targets of such conduct and therefore is often a form of gender based violence.
10. IBSV and sexual harassment is also increasingly perpetrated via electronic communications such as social media websites, instant messaging applications and online forums. In 2018 the General Assembly of the United Nations issued a specific resolution on eliminating sexual harassment.⁶ It recognised the continuing serious problem of sexual harassment as a form of gender based violence against women, including in digital contexts such as online sexual harassment, threats and other forms of harassment which could include IBSV:

“Recognizing that the growing impact of violence against women and girls, including sexual harassment, in digital contexts, especially on social media, its impunity and the lack of preventive measures and remedies underline the need for action by Member States, in partnership with relevant stakeholders, and that such violence may include stalking, death threats and threats of sexual and gender-based violence, as well as related trends against women and girls in digital contexts, such as trolling, cyberbullying and other forms of cyberharassment, including unwanted verbal or non-verbal conduct of a sexual nature, with a view to discrediting women and girls and/or inciting other violations and abuses against them...”

11. It emphasized and urged all Member States to enhance their work to prevent sexual harassment, including by strengthening legislation and policies to address sexual harassment in a comprehensive manner.
12. A survey conducted by Rainlily in 2020 highlights the prevalence of different forms of IBSV in Hong Kong. It surveyed 206 people (187 women, 18 men and one transgender person) that experienced IBSV in the past three years. Of those 151 cases related to taking intimate images without consent; 82 cases were private acts observed without consent; 62 cases were threats or blackmail in relation to the distribution of images; 60 cases related to distributing such intimate images without consent; 44 cases were of an intimate image being stolen; 25 cases were of a hidden

⁵ Rainlily, Survey Report on Image Based Sexual Violence, January 2021, page 5, <https://rainlily.org.hk/publication/2020/ibsvsurvey#eng>

⁶ Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment, 17 December 2018, A/RES/73/148, <https://undocs.org/pdf?symbol=en/A/RES/73/148>

camera being uncovered; and 16 cases related to altered images (sexualised photoshopping).⁷

3. Non-consensual photography of intimate parts

13. The EOC believes that there is a significant gap in the proposed protections from non-consensual photography of intimate parts, given the Government has stated it will not cover the non-consensual photography of breasts, whether women’s breasts or men’s breasts.
14. The Government stated that the Law Reform Commission’s recommendation was that “down-blousing” photography should not be included in the offence, that there should be a principle of gender neutrality in offences (ie both women and men should be protected), and that there would be a number of challenges of including a down-blousing offence:

“On the one hand, we are mindful of gender neutrality as one of the guiding principles laid down by LRC that any person should be rendered the same legal protection for any offensive acts irrespective of a person’s gender. On the other hand, there are several thorny issues to be addressed if the legislation is to cover ‘down-blousing’. Most importantly, the scope of the offence must be defined in clear terms to avoid inadvertent contravention of the law by innocent people, and to prevent the offence provision from being prone to abuse, difference in interpretation or false accusations. We appreciate that the society generally differentiates the exposure of male breasts from female breasts and the level of concerns is very different in general.”⁸
15. As a result the Government has stated that “intimate parts” would be defined as an individual’s genitals or buttocks, whether exposed or covered with underwear. It is not proposed to cover a person’s breasts at all, whether women or men.
16. The EOC believes there are major concerns with the above position, as it would mean the public is not protected from such serious conduct, which disproportionately affects and discriminates against women in society who are more likely to be subjected to such conduct.
17. The EOC believes that offence of non-consensual photography of intimate parts should include the photography of breasts for the following reasons: there is clear evidence of non-consensual photography of women’s breasts in Hong Kong; there is strong public support that the offence should cover non-consensual photography of breasts; the principle of gender neutrality should mean the offence is not only

⁷ Association Concerning Sexual Violence Against Women (2020). Survey Report on Image-based Sexual Violence, page 7. Retrieved from <https://rainlily.org.hk/publication/2020/ibsvsurvey>

⁸ Proposed introduction of offences on voyeurism and non-consensual photography of intimate parts, and related offences, Security Bureau, January 2021, paragraph 22, <https://www.legco.gov.hk/yr20-21/english/panels/se/papers/se20210115cb2-580-4-e.pdf>

introduced, but that it applies to all non-consensual photography of breasts irrespective of gender in situations of privacy; other similar common law jurisdictions with similar offences do include the non-consensual photography of breasts; and the definition of the offence, by requiring a person to intentionally take a photo would provide sufficient safeguards to possible unintended consequences. Each of these issues is examined below.

(a) Evidence of non-consensual intimate photography

18. From the research and complaints received by the EOC, there is clear evidence of the prevalence of non-consensual photography of intimate parts of persons, including of breasts and that such conduct disproportionately affects women as victims. Such conduct can occur in a range of situations of public life including employment, education or the provision of goods, facilities and services.
19. In relation to education, the EOC conducted comprehensive research on sexual harassment at universities in Hong Kong which was published in 2019.⁹ It found that 1,662 out of 14,442 (11.5%) surveyed university students were sexually harassed online within 12 months before the study was conducted, and 21% of whom said someone had posted indecent image(s) or video(s) of the student him/herself online without his/her consent.¹⁰ Similar to sexual harassment which occurred on campus, a higher proportion of female students (12.9%) encountered sexual harassment online than their male counterparts (9.8%).
20. In relation to employment, the EOC has a duty to investigate complaints of sexual harassment and attempt to conciliate such complaints. One example from conciliated complaints was a clear example of non-consensual photography of a woman's breasts. The employee was significantly affected by the conduct as she developed post-traumatic stress disorder and resigned from the company. The case was successfully conciliated with the respondent paying compensation to the complainant for medical expenses and injury to feelings:

"Employment field

Sexual harassment in the workplace

ss 2(5), 23 & 46 of SDO

⁹ 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%20ENG%20Full%20Report.pdf>

¹⁰ Ibid page 75.

The Complainant (C), was a manager of company X. One day, a colleague found out that Mr. Y, a co-worker sitting adjacent to C's work cubicle, secretly took photos of C. The incident was reported to the human resource manager by that colleague. The photos, taken by Mr. Y's smartphone, were all focused on the breasts and the upper parts of C's body. When confronted by the human resource manager, Mr. Y admitted his doing and said he did it "for fun". The human resource manager notified C about the incidents. After C found out the incident, she felt frustrated, humiliated and depressed. Eventually, C was diagnosed to have suffered post traumatic stress disorder. C also resigned from company X.

C lodged complaints of sexual harassment with the EOC against Mr. Y and against company X for being vicariously liable. The cases were settled through fast track conciliation after Mr. Y agreed to make a charity donation, to issue an apology letter and to make a monetary payment to C for her relevant medical expenses. At the same time, company X agreed to issue an apology letter and to make a monetary payment to C for her relevant medical expenses as well as for the injury to her feelings."¹¹

21. There is also clear evidence of the prevalence of non-consensual photography of intimate parts from the work of Rainlily, the sexual violence crisis centre. It reported that one in seven cases they received in 2019 was related to Image Based Sexual Violence (IBSV).¹²
22. As stated above, the 2020 survey conducted by Rainlily found that of 206 people (187 women, 18 men and one transgender person) that experienced IBSV in the past three years, 151 cases related to taking intimate images without consent, and 60 related to distributing such intimate images without consent.¹³
23. Their survey also highlighted the particular problem of non-consensual intimate photography of women's breasts in the form of "down-blousing". The survey referred to a case study of Florence, who experienced 'down-blousing' with someone taking photos of her breasts in a public place, her images were later uploaded and circulated on social media sites. She stated:

"...The photos of me leaning forward and of my breasts being exposed were all over the internet... These photos were all taken from the above or were focused on my breasts. The most hurtful part about 'down-blousing' is that the photos often include my face so it's easy for people who know me to recognise me from the photos. I was really worried that people would view me as the kind of person, who deliberately leaned forward to be filmed. That

¹¹ EOC website, Conciliated Cases: Sex Discrimination Ordinance,

<https://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=settlement-sdo>

¹² 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/hongkong/law-and-crime/article/3074103/concern-group-says-women-face-common-threat-nude>

¹³ Association Concerning Sexual Violence Against Women (2020). Survey Report on Image-based Sexual Violence. Retrieved from <https://rainlily.org.hk/publication/2020/ibsvsurvey>

shaped me as someone who intentionally attracted others' attention - that was the most damaging part."¹⁴

24. There is also recent evidence of a conviction for down-blousing photography of a woman's breasts in another jurisdiction of Singapore which has similar voyeurism related offences to those being proposed in Hong Kong.¹⁵ The successful conviction highlighted that such an offence would not create difficulties in terms of enforcement, so long as the offence is clearly defined. In Singapore the offence relating to intimate photography of private parts is defined as:

"377B...

(4) Any person (A) shall be guilty of an offence who —

- (a) operates equipment without another person's (B) consent with the intention of enabling A or another person (C) to observe B's genitals, breasts if B is female, or buttocks (whether exposed or covered) in circumstances where the genitals, breasts, buttocks or underwear would not otherwise be visible; and
- (b) knows or has reason to believe that B (whether B's image was recorded or not) does not consent to A operating the equipment with that intention."¹⁶

25. It should be noted that it includes intimate photography of a woman's breasts. Other jurisdictions which have similar protections are discussed further below.

(b) Public support for offence of non-consensual photography of breasts

26. The evidence from the Government's consultation on introducing an offence of non-consensual photography of intimate parts was that there was overwhelming support that the offence should cover "down-blousing" of women's breasts. Of 201 written responses received 86% supported the coverage of down-blousing with only 10% supported excluding it, and 4% did not offer a view.¹⁷

27. In addition, the EOC notes that during the Legislative Council Panel on Security hearing on 15 January 2021, a vast majority of the Legislative Council members who asked the Government questions and expressed their views, stated that the offence

¹⁴ Ibid Association Concerning Sexual Violence Against Women (2020). Survey Report on Image-based Sexual Violence, page 11, <https://rainlily.org.hk/publication/2020/ibsvsurvey#eng>

¹⁵ "Former lawyer at top firm jailed over upskirt and down-blouse photos", Yahoo News, 8 June 2020, <https://sg.news.yahoo.com/former-lawyer-at-top-firm-jailed-over-upskirt-and-downblouse-photos-124954213.html>

¹⁶ Singapore Penal Code, <https://sso.agc.gov.sg/Act/PC1871>

¹⁷ Report on the Consultation on Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences, Security Bureau, January 2021, paragraph 4.07, https://www.sb.gov.hk/eng/special/voyeurism/Consultation_Report_on_Voyeurism_Eng.pdf

of non-consensual photography of intimate parts should cover photography of breasts.

28. This evidence highlights that the vast majority of the public recognises the need to include photography of breasts in the offence, particularly to ensure women are protected since they are more often targeted by such conduct.

(c) Principle of gender neutrality

29. The Government and the Law Reform Commission have both referred to the principle of “gender neutrality” as a guiding principle in relation to introducing new or amending existing sexual offences. This is the principle that, unless there are justified reasons, all offences should apply equally to women and men. This applies both in terms of whether an offence exists, as well as to the penalties being equal for offences against people irrespective of their gender.
30. The EOC agrees with this principle, as it is intended to ensure that criminal offences protect everyone in society, without discrimination between gender, gender identity or sexual orientation. There should be equal treatment in terms of protection between men and women or boys and girls, as well as their being equal treatment of people based on their gender identity such as transgender people, as well as intersex people. The EOC stated this position in its submission to the consultation.¹⁸ As a result the EOC believes that unless there are clear justified reasons for doing so, all the sexual offences including voyeurism and non-consensual photography of intimate parts should protect all persons irrespective of gender.
31. In relation to the consultation question on whether “intimate parts” should include both female and male breasts irrespective of gender rather than female breasts only, the vast majority of 90% of responses agreed, with only 5% opposed and 5% did not provide any comment. It is also noteworthy that some of the respondents highlighted that the principle of gender neutrality was important to also protect transgender people:

“...as many transgender persons have sex characteristics of both genders, and if ‘intimate parts’ for the purpose of the proposed offences only include female breasts, the legislation would be unable to keep pace with the times.”¹⁹

32. The position of the Government is also inconsistent between its proposals regarding the offence of voyeurism, and the offence of non-consensual photography of intimate parts. In relation to the proposed offence of voyeurism, it would be a crime to surreptitiously observe or record a person engaged in an intimate act where the

¹⁸ EOC Submission, consultation on the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences, October 2020, paragraph 16, <https://www.eoc.org.hk/eoc/upload/20201012155723523576.pdf>

¹⁹ Ibid paragraph 6.06.

person's genitals, buttocks or breasts are exposed or only covered with underwear. The Government has specifically stated that:

*"...in line with the principle of gender neutrality, breasts of both genders (as opposed to 'female breasts' in the Canadian model) should be covered."*²⁰

33. The EOC does not consider it logical or consistent that for the purpose of voyeurism there would be protection regarding recording or observing a person's breasts during an intimate act, but for the purpose of non-consensual photography of intimate parts there would be no such protection.
34. Further, the EOC does not believe that the principle of gender neutrality should be applied in such a way as to completely deny any protection from serious misconduct of non-consensual photography of breasts. As stated previously, there is clear evidence of problems of non-consensual photography of women's breasts in society which should be addressed by introducing a criminal offence which covers such conduct.
35. Such non-consensual photography of men's breasts should also be unlawful in situations where the person's breasts would not otherwise be visible, which is a required element of the proposed offence. This would mean that in situations where a man voluntarily exposed his breasts in public and someone took a photo of them, they would not be protected by the offence. For example, in situations where a man exposed his breasts being topless while sunbathing at the beach, running in a public area, or voluntarily doing a photo shoot for a magazine, they would not fall within the scope of such an offence.

(d) Approach in other similar common law jurisdictions

36. From the analysis carried out by the EOC, it is clear that in most similar common law jurisdictions which have offences relating to non-consensual photography of intimate parts, the definition of intimate parts includes breasts. In Scotland the definition of breasts is not restricted in terms of gender or gender identity, in a number of other jurisdictions the protections are limited to intimate images of a female's breasts, and some jurisdictions of Australia the definition of breasts covers females as well as transgender and intersex people.

²⁰ Proposed introduction of offences on voyeurism and non-consensual photography of intimate parts, and related offences, Security Bureau, January 2021, paragraph 20, <https://www.legco.gov.hk/yr20-21/english/panels/se/papers/se20210115cb2-580-4-e.pdf>

(i) Scotland

37. In Scotland there is an offence for disclosing a video or photograph of a person in an intimate situation.²¹ An intimate situation is defined to include if “the person’s genitals, buttocks or breasts are exposed or covered only with underwear.”²² The definition is not limited by gender in terms of the meaning of “breasts” and therefore would cover both a woman’s breasts and a man’s breasts.

(ii) New Zealand

38. In New Zealand the offence of intimate visual recording covers situations including videos or photographs of a woman’s breasts whether nude or in underwear, or through outer clothing when it is unreasonable to do so:

“(a) a person who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and that person is—

(i) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or

(ii) engaged in an intimate sexual activity; or

(iii) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or

(b) a person’s naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—

(i) from beneath or under a person’s clothing; or

(ii) through a person’s outer clothing in circumstances where it is unreasonable to do so.”²³

(iii) Canada

39. The Canadian offence of voyeurism covers visual recording or photography of a person in circumstances that give rise to a reasonable expectation of privacy. It covers in particular recording or photography of his or her genital organs or anal region or “her” breasts.²⁴ This means the offence applies to female breasts.

²¹ Section 2 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, <https://www.legislation.gov.uk/asp/2016/22/section/2/enacted>

²² Ibid section 3.

²³ Section 216G(1) Crimes Act 1961, New Zealand, <https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

²⁴ Section 162(1) Criminal Code Canada, <https://laws-lois.justice.gc.ca/eng/acts/C-46/>

(iv) Australian States and Territories

40. Most of the Australian States and Territories have offences relating to taking and distributing intimate images of persons. All of those States and Territories which have such offences cover intimate images of women's breasts, and some also cover breasts of transgender or intersex people.
41. In the Australian Capital Territory the offence covers photography of breasts of females or transgender people and whether the breasts are covered or bare;²⁵ in New South Wales the offence covers photography of breasts of a female, transgender or intersex person where the person would be expected privacy;²⁶ in South Australia the offence covers photography of the private region which includes the breasts of a female and whether the breasts are covered or bare;²⁷ in Queensland the offence covers photography of the bare breasts of a woman, transgender or intersex person;²⁸ in Victoria the offence covers intimate images of breasts of a female;²⁹ and in the Northern Territory the offence covers intimate images of the breasts of a female, or a transgender or intersex person who identifies as female and whether the breasts are bare or covered by underwear.³⁰

(v) Singapore

42. In Singapore the offence of voyeurism covers recording or photography of a person without their consent, including a woman's breasts:

"...intentionally or knowingly records without another person's (B) consent an image of B's genitals, breasts if B is female, or buttocks (whether exposed or covered), in circumstances where the genitals, breasts, buttocks or underwear would not otherwise be visible..."³¹

(e) Safeguards by requirement of an intention to take photographs of intimate parts

43. One of the Government's stated reasons for not wishing to include in the offence the photography of breasts, is to avoid possible unintended consequences. An example was provided of the possible inadvertent contravention of the law by innocent people, such as persons taking selfies and accidentally including in the photograph a down-blousing view of a person's breasts.

²⁵ Section 72A(a), Crimes Act 1900 (ACT), http://www5.austlii.edu.au/au/legis/act/consol_act/ca190082/

²⁶ Section 91N(1), Crimes Act 1900 (NSW), <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1900-040>

²⁷ Section 26A, Summary Offences Act 1953 (SA), <https://www.legislation.sa.gov.au/LZ/C/A/SUMMARY%20OFFENCES%20ACT%201953/CURRENT/1953.55.AU.TH.PDF>

²⁸ Section 207A, Criminal Code Act 1899 (QLD), <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1899-009>

²⁹ Section 40, Summary Offences Act 1966 (VIC), <https://www.legislation.vic.gov.au/in-force/acts/summary-offences-act-1966/131>

³⁰ Section 208AA, Criminal Code Act 1983 (NT), <https://legislation.nt.gov.au/en/Legislation/CRIMINAL-CODE-ACT-1983>

³¹ Section 377BB(5) Penal Code Singapore, <https://sso.agc.gov.sg/Act/PC1871>

44. However, we believe that the definition of the offence would avoid such concerns, by clearly requiring as an element of the definition of the offence that the person photographing intentionally takes a photo or video of the person's intimate parts.
45. In fact it appears from the Government's proposals that it would include in the offences of voyeurism and non-consensual photography on intimate parts a requirement of an intention. The Law Reform Commission's recommendation was that the offences should be modelled on section 67A of the English Sexual Offences Act 2003.³² Those offences include in the definition a requirement of an intention. Section 67A provides:

“(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—

³² Law Reform Commission Report, Review of Substantive Sexual Offences, December 2019, pages 105-106, https://www.hkreform.gov.hk/en/docs/rsubstantive_sexual_offences_e.pdf

(i) without B's consent, and

*(ii) without reasonably believing that B consents.*³³ *(emphasis added)*

46. The Government has agreed with the LRC's recommendations, and therefore we would expect that the definition of the offences of voyeurism and non-consensual photography of intimate parts will include that element of an intention.
47. The effect of such a requirement would mean that where a person accidentally and without an intention to photograph a person's intimate parts, for example by taking a selfie, they would have a valid defence to the offence. This would be a matter to determine on the facts of any particular case as to whether the intention element is established. The EOC therefore believes that this would provide sufficient safeguards to avoid possible unintended consequences of the offences.

(f) Recommendation by the EOC

48. In light of all the above factors, the EOC believes that it is vital that the criminal offence of non-consensual photography of intimate parts include the photography of the breasts of a person. This is necessary given there is evidence of such conduct in Hong Kong, and that it clearly violates the human rights relating to sexual autonomy of the victims of such conduct.
49. The Government has already indicated that for the offence of voyeurism it will cover the observation or recording of the breasts of a person, irrespective of their gender, and that it would apply to bare breasts and where they are only covered by underwear. The EOC agrees with such an approach and considers that the same approach should be applied to offence of non-consensual photography of intimate parts to ensure that all persons are protected irrespective of their gender.
50. The current proposal which excludes altogether the non-consensual photography of breasts would have a disproportionately discriminatory effect on women, given there is clear evidence in Hong Kong that they are often the victims of such conduct.
51. The definition of intimate parts should apply to all the relevant offences relating to photography of intimate parts: non-consensual photography of intimate parts for the purpose of obtaining sexual gratification; non-consensual photography of intimate parts irrespective of purpose; distribution of such images of intimate parts; and non-consensual distribution of intimate images where consent was previously given for taking the images but not for subsequent distribution.

³³ Section 67A Sexual Offences Act 2003, <https://www.legislation.gov.uk/ukpga/2003/42/section/67A>

Recommendation 1

The offence of non-consensual photography of intimate parts should include in its definition of intimate parts:

“the breasts of a person, whether the breasts are bare or covered by underwear”

The above definition of intimate parts should apply to all the relevant offences relating to photography of intimate parts: non-consensual photography of intimate parts for the purpose of obtaining sexual gratification; non-consensual photography of intimate parts irrespective of purpose; distribution of such images of intimate parts; and non-consensual distribution of intimate images where consent was previously given for taking the images but not for subsequent distribution.

4. Proposed inclusion of altered images in offences

52. The EOC notes that with advances in technology there has been increasing use of practices of altering images of persons to make it appear for example that a person is nude and showing their intimate parts in videos or photographs. Such conduct can have a substantial negative impact on the victim in a similar way as images which have not been altered, as the images deliberately make it appear that the intimate parts of a person are exposed.

53. The EOC believes that for the purposes of all the proposed offences, the definition should include altered images to ensure there is sufficient protection, and prevent a perpetrator from possibly avoiding conviction. In relation to the second point, if the definition of intimate image only covered unaltered images, in a situation where a defendant had altered an image, they could for example argue that although the face of the person in the image was that of the victim, the intimate parts was of another person and therefore the offence is not made out. This would therefore create a serious loophole in the protections.

54. It is also clear that there is evidence of the making and distribution of altered images of persons' intimate parts in Hong Kong, as well as evidence that in a number of similar common law jurisdictions there is coverage of altered images in the relevant equivalent offences. These issues are examined below.

(a) Evidence of the problem of altered images

55. It is estimated that 90% of deep fake technology is used for pornography purposes and of that 90% is used against women.³⁴

56. Rainlily notes such practices by including altered images in the definition of Image Based Violence as discussed above:

³⁴ Deepfake porn is ruining women's lives. Now the law may finally ban it, Technology Review, 12 February 2021, <https://www.technologyreview.com/2021/02/12/1018222/deepfake-revenge-porn-coming-ban/>

“Non-consensual sexualised photoshopping, also known as ‘morp porn’ or ‘deepfake porn’ in which software and/or artificial intelligence are used to splice image of an individual with nude or sexual material obtained elsewhere, generating nude or sexual images digitally.”

57. The Rainlily Survey of 206 victims of IBSV also identified such altered images as a problem in Hong Kong as 16 people said that they had experienced such conduct in the last three years.³⁵

(b) The approach in similar common law jurisdictions

58. A number of similar common law jurisdictions which have criminal offences relating to taking and distributing non-consensual photography of intimate parts, already include in the definition of intimate parts any images that have been altered. This takes into account the practice described above of altering images of persons to make them appear to expose their intimate parts.

(i) Scotland

59. In Scotland, in relation to the offences of photography of intimate parts the definition of films and photography includes the term “whether or not the image has been altered in any way”.³⁶

(ii) Australian States and Territories

60. Most of the Australian States and Territories have offences relating to taking and distributing intimate images of persons. And of the States and Territories that have such legislation, almost all of them include in the definition of intimate image, an image that has been altered.

61. There are relevant provisions regarding altered images in the following State and Territories: Australian Capital Territory;³⁷ New South Wales;³⁸ South Australia;³⁹ Queensland;⁴⁰ and the Northern Territory.⁴¹

³⁵ Rainlily, Survey Report on Image Based Sexual Violence, January 2021, page 7, <https://rainlily.org.hk/publication/2020/ibsvsurvey#en>

³⁶ Section 3(2) Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

³⁷ Section 72A(b) Crimes Act 1900 (ACT).

³⁸ Section 91N(1) Crimes Act 1900 (NSW).

³⁹ Section 26A Summary Offences Act 1953 (SA).

⁴⁰ Section 207A Criminal Code Act 1899 (QLD).

⁴¹ Section Section 208AA Criminal Code Act 1983 (NT).

(iii) Singapore

62. In Singapore there are equivalent offences relating to taking or distribution of intimate images or recordings of persons. In relation to the offence of distributing or threatening to distribute an intimate image or recording, it is defined as:

“(5) In this section, “intimate image or recording”, in relation to a person (B) —

(a) means an image or recording —

(i) of B’s genital or anal region, whether bare or covered by underwear;

(ii) of B’s breasts if B is female, whether bare or covered by underwear; or

(iii) of B doing a private act; and

(b) includes an image or recording, in any form, that has been altered to appear to show any of the things mentioned in paragraph (a) but excludes an image so altered that no reasonable person would believe that it depicts B.

Illustrations

(a) A copies, crops, and pastes an image of B’s face onto the image of a body of a person who is engaging in a sexual act. This image has been altered to appear to show that B actually engaged in a sexual act. This is an intimate image.

(b) A pastes an image of B’s face on a cartoon depicting B performing a sexual act on C. No reasonable person would believe that B was performing the sexual act depicted on C. This is not an intimate image.”⁴²

63. The definition of an image or recording is specifically defined to include altered images and recordings of a person, unless no reasonable person would believe that it depicts the person. The legislation also provides helpful examples of what would and wouldn’t be unlawful.

64. In light of the above evidence of the practice of taking and distributing altered images in Hong Kong, the humiliation and other serious damage that can cause to a victim, and that many other similar jurisdictions do provide protections in relation to altered images, the EOC recommends that altered images be included in the definition of intimate parts of all the proposed offences.

⁴² Section 377BE(5) Penal Code Singapore.

Recommendation 2

For all the proposed offences, the definition of intimate images (whether photographs or videos), should include any image that has been altered to appear to show a person's intimate parts.

The above definition should apply to all the relevant offences relating to: voyeurism; intimate prying; non-consensual photography of intimate parts for the purpose of obtaining sexual gratification; non-consensual photography of intimate parts irrespective of purpose; distribution of such images of intimate parts; and non-consensual distribution of intimate images where consent was previously given for taking the images but not for subsequent distribution.

5. Proposed inclusion of additional offences of threatening to distribute images

65. Threatening to distribute images of a person's intimate parts is one form of IBSV which in itself can cause significant distress and harm to the victims of the threats. The Government has not proposed to introduce offences of threatening to distribute images of a person's intimate parts, despite some organisations calling for the introduction of such offences, including Rainlily which has done specific research on these issues.

66. The EOC believes that it is appropriate to introduce specific offences relating to threats to distribute intimate images given there is evidence of the prevalence of such conduct in Hong Kong; that it often causes significant distress and damage to victims; many other similar jurisdictions provide specific offences of threatening to distribute intimate images; and the EOC does not consider that it is sufficient to rely on existing criminal offences relating to other forms of threats. Each of these issues is examined below.

(a) Evidence of threats to distribute images of intimate parts

67. As stated previously in relation to the survey of IBSV conducted by Rainlily, of the 206 people that had experienced IBSV in the last three years, a very large proportion of 62 cases (30%) were of threats or blackmail regarding the distribution of images. The survey reports some examples of threats made and that those threats can have a long lasting and major impact on the victims. The report states:

*"Their partners threatened to distribute intimate images in order to exert manipulation. However, the interviewees' fears did not dissipate upon break-up. The interviewees said, as long as their intimate images were still in their partners' hands, their emotions would still be affected for fear that the images may be distributed online at any time."*⁴³

⁴³ Rainlily, Survey Report on Image Based Sexual Violence, January 2021, page 12, <https://rainlily.org.hk/publication/2020/ibsvsurvey#eng>

68. The survey report provides some specific examples of such threats, such as:

“The ex-partner of Rain (interviewee) had threatened to distribute Rain’s intimate images to her colleagues.

‘I’m just an insignificant staff in my company but rumours and scandals can be easily spread within the office, especially people are really interested in these stuff. Coincidentally, some secretly filmed videos had been circulated in our company and also, some videos taken by the girls themselves had been uploaded onto the internet. He (i.e. ex-partner of Rain) said that he knew a “secret page” of our company and similar things often happened there. So he threatened me with this. I also learnt from mutual friends that he keeps that video...’ (Rain, interviewee)”⁴⁴

“Benjamin, who was threatened by his ex-partner, mentioned that he knew that his ex-partner still kept the secretly filmed intimate videos of him. Although she ceased her threats at that moment, it was hard to predict whether she would suddenly bring up the videos and threaten him again, or that she would send the videos to Benjamin’s friends without any notice.”⁴⁵

69. The particular problem of threats to distribute images as a form of IBSV has been highlighted in other jurisdictions such as Australia. In a research paper published by the Australian Government’s Australian Institute of Criminology in 2019, reference was made to a survey in 2017 of 2,956 people which indicated that 10% of them had been threatened that a nude or semi-nude image of them would be distributed.⁴⁶

(b) Approach in similar common law jurisdictions

70. Most similar common law jurisdictions which prohibit the videoing or photography of intimate parts, as well as the distribution of such videos or photographs, also prohibit as a discrete offence the threat to distribute or publish the images.

(i) Scotland

71. In Scotland the criminal offence includes threats as it is unlawful to a person who *“...discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation.”⁴⁷*

⁴⁴ Ibid page 12

⁴⁵ Ibid page 12.

⁴⁶ Image Based Sexual Abuse, Australian Institute of Criminology, No. 572 March 2019, page 6, https://www.aic.gov.au/sites/default/files/2020-05/imagebased_sexual_abuse_victims_and_perpetrators.pdf

⁴⁷ Section 2(1) Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

(ii) Australian States and Territories

72. All Australian States and Territories that have laws prohibiting the videoing or photography or intimate parts, as well as the distribution of such, also prohibit threats to distribute those videos or photographs. In particular, the Australian Capital Territory;⁴⁸ New South Wales;⁴⁹ South Australia;⁵⁰ Queensland;⁵¹ Victoria;⁵² and the Northern Territory⁵³ all have offences relating to threats.

(iii) Singapore

73. In Singapore there is also a separate and additional offence of threatening to distribute intimate images:

“(2) Any person (A) shall be guilty of an offence who —

- (a) knowingly threatens the distribution of an intimate image or recording of another person (B);*
- (b) without B’s consent to the distribution; and*
- (c) knows or has reason to believe that the threat will or is likely to cause B humiliation, alarm or distress.”⁵⁴*

(c) The insufficiency of existing criminal offences relating to threats

74. There are several existing criminal offences relating to making threats to a person, however the EOC does not consider that any of them provide appropriate and sufficient protection from threats to distribute images.

75. Under the Crimes Ordinance there is an offence of criminal intimidation. Section 24 provides:

“Any person who threatens any other person—

- (a) with any injury to the person, reputation or property of such other person; or*
- (b) with any injury to the person, reputation or property of any third person, or to the reputation or estate of any deceased person; or*
- (c) with any illegal act, with intent in any such case—*
 - (i) to alarm the person so threatened or any other person; or*

⁴⁸ Section 72E Crimes Act 1900 (ACT).

⁴⁹ Section 91R Crimes Act 1900 (NSW).

⁵⁰ Section 26DA Summary Offences Act 1953 (SA).

⁵¹ Section 229A Criminal Code Act 1899 (QLD).

⁵² Section 41DB Summary Offences Act 1966 (VIC).

⁵³ Section 208AC Criminal Code Act 1983 (NT).

⁵⁴ Section 377BE(2) Penal Code Singapore.

- (ii) *to cause the person so threatened or any other person to do any act which he is not legally bound to do; or*
- (iii) *to cause the person so threatened or any other person to omit to do any act which he is legally entitled to do,*

*shall be guilty of an offence.*⁵⁵

76. In the context of threats to distribute intimate images of a person, it is possible that could constitute a threat to the “reputation” of a person under section 24(a) or a threat to do an illegal act (distribution of intimate images) to cause alarm to the person under section 24(c). However this offence is often likely to be more difficult to prove than for the offences of threats in similar jurisdictions, given one possible ground of the offence requires proof of a threat to a person’s reputation, whereas the threat offences in other jurisdictions don’t require that. In Hong Kong there have been limited numbers of prosecutions for criminal intimidation given the high thresholds required.⁵⁶
77. Further, the maximum penalty for such criminal intimidation is only a maximum of either 2 years imprisonment or a fine of \$2000. It is notable that for the offences for threats of distributing intimate images in the other similar jurisdictions, the maximum penalties are mostly higher, in six out of eight of the other jurisdictions the maximum penalty is 3-5 years with only two jurisdictions having a maximum penalty of 1 or 2 years. The EOC believes that a penalty of only a maximum of 2 years for threats to distribute intimate images is insufficient, given the substantial damage it can cause victims.
78. In addition, this offence is of a general nature and does not clearly and specially refer to the offences of distribution of intimate images. The EOC believes that, as in similar common law jurisdictions it is appropriate to have specific offences relating to threats to distribute intimate images. This would also provide clarity and a deterrent to all stakeholders that such threats are unlawful.
79. Secondly, under the Theft Ordinance there is an offence of blackmail. Section 23 provides:
- “(1) A person commits blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—*
- (a) that he has reasonable grounds for making the demand; and*

⁵⁵ Section 24 Crimes Ordinance, https://www.elegislation.gov.hk/hk/cap200?xpid=ID_1438402821709_001

⁵⁶ See for example, HKSAR v Peace, Matt James MAGISTRACY APPEAL NO. 635 OF 2006, <https://www.hklii.hk/en/cases/hkcfi/2006/1481>

(b)that the use of the menaces is a proper means of reinforcing the demand.”⁵⁷

80. A person convicted of the offence of blackmail can be imprisoned for up to 14 years. An example of such a case involved a defendant woman who after having sexual intercourse with the victim, sent him SMS messages demanding \$500,000. As the victim ignored her, in another SMS, she told him there was a video of their intimacies, which could be distributed to “everyone”. Then as the defendant was ignored again the defendant demanded the sum of \$1 million.⁵⁸ The defendant was sentenced to an imprisonment of 20 months.
81. The offence of blackmail however requires an element of an intention to make some form of financial or similar gain as the above case demonstrates. In a situation where there is no attempt to make a financial or similar gain it is unlikely the offence would be established. In relation to the distribution of intimate images, there often may not be any attempt by the perpetrator to make a financial gain.
82. Thirdly, under the Crimes Ordinance there is also an offence of procurement by threats. Section 119 provides:

“(1) A person who procures another person, by threats or intimidation, to do an unlawful sexual act in Hong Kong or elsewhere shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years.”⁵⁹
83. The offence only applies where a person procures another by threats, to do an unlawful sexual act. So it would not apply where a person does not procure a person to engage in an unlawful sexual act, and only threatens to distribute images.
84. The EOC notes that the Law Reform Commission recommended as part of its review of sexual offences, that the above offence be repealed and replaced with a new criminal offence of causing a person to engage in sexual activity without consent.⁶⁰ However, the new offence would also only apply where a person actually causes another to engage in sexual activity without their consent. Threats to distribute intimate images often would not involve causing a person to engage in sexual activity.
85. As a result, the EOC believes that additional offences should be introduced relating to threats to distribute intimate images (whether videos or photographs), either where they were taken without consent, or where taken with consent initially but not for subsequent distribution.

⁵⁷ Section 23 Theft Ordinance, https://www.elegislation.gov.hk/hk/cap210?xpid=ID_1438402833456_003

⁵⁸ HKSAR v Chai Mei-kwan DCCC412/2011, <https://www.hklii.hk/en/cases/hkdc/2011/1208>

⁵⁹ Section 119 Crimes Ordinance.

⁶⁰ Law Reform Commission Report, Review of Substantive Sexual Offences, December 2019, pages 38-39, https://www.hkreform.gov.hk/en/docs/rsubstantive_sexual_offences_e.pdf

Recommendation 3

Additional offences should be introduced relating to threats to distribute intimate images (whether videos or photographs) in situations where the intimate images:

- **were taken without consent, or**
- **were taken with consent initially, but not for subsequent distribution.**