

Submission of the Equal Opportunities Commission

Bills Committee on the Crimes (Amendment) Bill 2021

May 2021



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. This submission is in response to the invitation by the Bills Committee on the Crimes (Amendment) Bill 2021 (the "Bill") for written submissions on the content of the Bill. The EOC has made several submissions previously in relation to the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences. Firstly, in October 2020 the EOC made a submission in response to the Government's consultation on the proposed introduction of the offences.¹ Secondly, in March 2021 after examining the proposals in more detail, the EOC made a further submission to Government.² The EOC has a direct interest in the issues as some of the forms of conduct which are proposed to be made unlawful criminal offences, may also constitute forms of unlawful sexual harassment under the SDO.
3. The EOC welcomes and fully supports the proposed criminal offences in order to better protect people from such serious conduct which violate the sexual autonomy of the victims. 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.
4. In the EOC's submission of March 2021, the EOC made recommendations that the proposed offences should be strengthened in several respects to better protect the public from such serious conduct. The key areas in which the EOC recommended amendments to the proposed offences were:
 - 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.
5. The EOC is pleased that the Government has adopted some of these recommendations in the Bill, in particular: including in the offences of non-consensual

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 Further EOC Submission, Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual photography of intimate parts, and related offences, March 2021, <https://www.eoc.org.hk/eoc/upload/2021311142247865313.pdf>

recording and publication of intimate parts the recording a person's breasts;³ and including an offence of threatened publication of intimate images without consent.⁴ The EOC has examined the Bill in detail and believes there are a number of ways in which the Bill should be amended to improve the provisions in order that they: provide sufficient protection of the public from the serious conduct; that the offences are appropriate in terms of the scope of what is unlawful; and that the defences are reasonable and not unduly broad in their scope, burden and standard of proof.

6. The EOC makes submissions in relation to the following issues:
 - evidence of Image Based Sexual Violence (IBSV) from EOC work;
 - the Bill should cover situations where intimate images have been altered;
 - the Bill should include provisions providing courts the power to order deletion or take down of intimate images by a defendant, and where relevant an organisation hosting the images;
 - the content of the offence of non-consensual recording of intimate parts, and the element of proof of a purpose of obtaining dishonest gain;
 - the content and scope of the defence regarding age or mental capacity of a victim;
 - the content and scope of the defence regarding lawful authority or reasonable excuse; and
 - the proposals regarding the offences to be included in the Sexual Conviction Record Check Scheme.

2. Evidence of Image Based Sexual Violence from EOC work

7. There is a serious and increasing problem of IBSV in Hong Kong as in many parts of the world, which is often linked to increasing use (in relation to such conduct) of smartphones and other portable electronic devices, electronic communications such as social media, online forums and instant messaging applications.
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;

³ Proposed sections 159AAC and 159AAD of the Crimes (Amendment) Bill 2021, <https://www.legco.gov.hk/yr20-21/english/bills/b202103192.pdf>.

⁴ Proposed section 159AAE of the Crimes (Amendment) Bill 2021.

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. The EOC has evidence of the significant problem of IBSV from its work in relation to responding to enquiries and complaints of sexual harassment, conducting conciliation, and representing claimants in sexual harassment court proceedings. Some examples are described below.
10. The first sexual harassment court case in Hong Kong in 1997, was a case of voyeurism and intimate prying at a university dormitory.⁶ 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, and had videotaped her several times undressing and changing clothes. 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.
11. Another example from EOC 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

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.

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

⁶ Yuen Sha Sha v Tse Chi Pan, [1999] 2 HKLRD 28, District Court, https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=19849&QS=%2B&TP=JU

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.”⁷

12. Most recently, the EOC received two enquiries from our anti-sexual harassment hotline in February and March 2021 which related to IBSV. One enquiry concerned a female employee discovering a hidden camera in the female bathroom at her workplace; and the other concerned a female employee stating that a male colleague took up-skirting and down blousing photos of her and that she discovered a hidden camera in the female bathroom.

3. Lack of coverage of altered images

13. In the EOC’s submission from March 2021, it recommended that the definition of intimate images should include images that have been altered or modified to make it appear that the image is an intimate image of a person.⁸ The EOC notes that the definition of intimate image in the proposed section 159AA does not include altered or modified images. An intimate image is defined as:

“...in relation to an individual, means an image showing an intimate part of the individual, or showing the individual doing an intimate act”⁹

14. The EOC believes that the scope of protection in relation to the offences should include altered images to ensure that there is sufficient protection from the various forms of IBSV which includes altered images. Our position is based on the following factors: there is clear evidence of the practice of altering intimate images in Hong Kong; including altered images would be important to ensure that a defendant who has altered an image cannot avoid criminal liability; similar provisions regarding images of child pornography under the Prevention of Child Pornography Ordinance do include altered or modified images; and a number of other common law jurisdictions with similar offences do include altered images in relation to the offences. Each of these issues is examined below.

⁷ EOC website, Conciliated Cases: Sex Discrimination Ordinance, <https://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=settlement-sdo>

⁸ See pages 14-17 of the EOC submission, <https://www.eoc.org.hk/eoc/upload/2021311142247865313.pdf>

⁹ <https://www.legco.gov.hk/yr20-21/english/bills/b202103192.pdf>

(a) Evidence of the problem of altered images

15. 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. It is estimated that 90% of deep fake technology is used for pornography purposes and of that 90% is used against women.¹⁰

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

“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.”

17. 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.¹¹

(b) Possible avoidance of liability by a defendant

18. The EOC believes that for the purposes of all the proposed offences, the definition of an intimate image should include altered images to prevent a perpetrator from possibly avoiding conviction. 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 proposed scope of protections.

(c) Provisions of the Prevention of Child Pornography Ordinance

19. The Prevention of Child Pornography Ordinance Cap.579 was enacted in 2003 and introduced new criminal offences relating to production, possession and publication of child pornography in Hong Kong.¹²

20. Significantly, its definitions of images of child pornography do include “modified” images, and where a person is not in fact engaged in explicit sexual conduct. Section 2 provides the following definitions:

¹⁰ 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/>

¹¹ Rainlily, Survey Report on Image Based Sexual Violence, January 2021, page 7, <https://rainlily.org.hk/publication/2020/ibsvsurvey#en>

¹² Prevention of Child Pornography Ordinance Cap.579, <https://www.elegislation.gov.hk/hk/cap579>

“child pornography” (兒童色情物品) means—

(a) a photograph, film, computer-generated image or other visual depiction that is a pornographic depiction of a person who is or is depicted as being a child, whether it is made or generated by electronic or any other means, **whether or not it is a depiction of a real person and whether or not it has been modified**; (emphasis added)

“pornographic depiction” (色情描劃) means—

(a) a visual depiction that depicts a person as being engaged in explicit sexual conduct, **whether or not the person is in fact engaged in such conduct;...**” (emphasis added)

21. These definitions would therefore include situations where an image or film has been altered to make it appear that a child is engaged in explicit sexual conduct, even if they have in fact not done so. The EOC believes that the same approach and elements should be included in the definition of intimate images in the Bill.

(d) The approach in similar common law jurisdictions

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

(i) Scotland

23. 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”.¹³

(ii) Australian States and Territories

24. 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.

25. There are relevant provisions regarding altered images in the following State and Territories: Australian Capital Territory;¹⁴ New South Wales;¹⁵ South Australia;¹⁶ Queensland;¹⁷ and the Northern Territory.¹⁸

¹³ Section 3(2) Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

¹⁴ Section 72A(b) Crimes Act 1900 (ACT).

¹⁵ Section 91N(1) Crimes Act 1900 (NSW).

¹⁶ Section 26A Summary Offences Act 1953 (SA).

¹⁷ Section 207A Criminal Code Act 1899 (QLD).

¹⁸ Section 208AA Criminal Code Act 1983 (NT).

(iii) Singapore

26. 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.”¹⁹

27. 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.
28. In light of the above evidence of the practice of taking and distributing altered images in Hong Kong; the fact that the similar provisions of the Prevention of Child Pornography Ordinance do include “modified” images; 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 images in proposed section 159AA. The EOC also believes that the language used in Singapore would be preferable, by including a provision that it excludes an image so altered that no reasonable person would believe that it depicts the person. This would ensure that the provision only covers appropriate images.

¹⁹ Section 377BE(5) Penal Code Singapore.

Recommendation 1

The definition of intimate images in section 159AA of the Bill should be amended to include:

- any image that has been altered or modified; and**
- whether or not the image is in fact showing an intimate part of the individual; but**
- excludes an image so altered that no reasonable person would believe that it depicts the individual.**

4. Powers to order deletion or take down of intimate images

29. The Bill does not currently have any provisions providing the courts with powers to make orders which require the defendant (or other relevant persons such as an organisation hosting the images) to delete and/or take down the intimate images if they are on an online content host. This is an important issue as without such orders being made by a court, there is the possibility that the intimate images will continue to be retained or circulated by the defendant or other persons. This is of particular concern given that with modern technology it is easy for images to be forwarded or shared very widely. If the images are not deleted or taken down there is the possibility of the harm and humiliation against the victim continuing indefinitely.
30. The EOC therefore believes that such express powers are important to ensure that the victim will be protected from further harm in the future. Further, where such court orders are not complied with, it would also be important to have appropriate sanctions of either a fine or imprisonment, if the breach of the orders is more serious.
31. We also note that the organisation Rainlily who works with victims of sexual violence, has referred to evidence from victims of IBSV. They stated that some of their greatest concerns are that intimate images of them will continue to circulate in public even if a person is convicted, given that such images may continue to be circulated on the internet, and an online content host may not agree to a request to take down such images. For those reasons, Rainlily has also made submissions that courts should be provided with powers to compel intimate images to be deleted and/ or taken down.²⁰
32. There are similar provisions in relation to powers of the courts to order forfeiture and deletion of child pornography under the Prevention of Child Pornography Ordinance.²¹ In particular there are provisions providing that:

²⁰ Pages 26-29, 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', Association Concerning Sexual Violence Against Women (Rainlily), 7 October 2020, <https://rainlily.org.hk/eng/news/2020/10/07/voycon>

²¹ Sections 9-13 of the Prevention of Child Pornography Ordinance Cap.579, <https://www.elegislation.gov.hk/hk/cap579>

- an application can be made to a magistrate for the forfeiture of any child pornography in the possession of the Police: section 10(1);
 - a magistrate may make an order, including as to the manner in which the child pornography should be disposed of: section 10(4);
 - if the child pornography is publicly displayed on any building or structure, the magistrate may make an order, that the owner or occupier of the building or structure remove or efface the child pornography: section 12(1); and
 - where a person fails to comply with the above order, the Commissioner of Police may apply to the magistrate for an order for the expenses incurred by the Police in executing the order to be paid by the person: section 12(4).
33. There are also similar provisions in relation to powers of the courts to order forfeiture and deletion of obscene and indecent articles under the Control of Obscene and Indecent Articles Ordinance.²² This Ordinance restricts the publication of obscene or indecent articles (which includes video recording and photographs) which are defined as including those that portray violence, depravity and repulsiveness.²³ Obscene articles are not suitable to be published to anyone, and indecent articles are not suitable to be published to juveniles.²⁴ Similarly to the Prevention of Child Pornography Ordinance, the provisions provide for an application that can be made to a magistrate for the forfeiture of any obscene or indecent articles²⁵, any publicly displayed articles can be ordered to be removed or effaced,²⁶ and where a person fails to comply with an order to remove publicly displayed items, the Commissioner of Police may apply to the magistrate for an order for the expenses incurred by the Police in executing the order to be paid by the person.²⁷
34. There are also provisions providing the courts with powers to order deletion and take down of intimate images in equivalent legislation in a number of similar common law jurisdictions. Further, a failure to comply with such orders is an offence, with penalties of either fines or imprisonment which can be imposed.
35. In Australia, the State and Territory legislation relating to recording and distributing intimate images in New South Wales, the Northern Territory and Queensland all have provisions providing the courts with the power to order a person convicted of the offences, to delete or remove an intimate image. Maximum penalties for failure to comply are 2 years imprisonment.²⁸

²² Control of Obscene and Indecent Articles Ordinance,
https://www.elegislation.gov.hk/hk/cap390?xpid=ID_1438403141385_003

²³ See section 2(3), *ibid.*

²⁴ See section 2(2) *ibid.*

²⁵ See section 39 *ibid.*

²⁶ Section 42(1) *ibid.*

²⁷ Section 42(5) *ibid.*

²⁸ Section 91S of the Crimes Act 1900 (NSW),
http://www5.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s91s.html; section 208AE of the

36. For example, section 91S of the Crimes Act 1900 (NSW) provides:

“(1) A court that finds a person guilty of an offence against section 91P or 91Q may order the person to take reasonable actions to remove, retract, recover, delete or destroy any intimate image recorded or distributed by the person in contravention of the section within a period specified by the court.

(1A) A court that finds a person guilty of an offence against section 91R may order the person to take reasonable actions to remove, retract, recover, delete or destroy any intimate image threatened to be distributed by the person in contravention of the section within a period specified by the court.

(2) A person who, without reasonable excuse, contravenes an order made under this section is guilty of an offence.

: Maximum penalty--50 penalty units or imprisonment for 2 years, or both.

(3) An offence against this section is a summary offence.”

37. There are also comprehensive provisions providing the courts with powers regarding deletion and take down of intimate images in New Zealand under the recently enacted Harmful Digital Communications Act 2015, as well as provisions providing for the forfeiture and destruction of intimate images under the Crimes Act 1961 (New Zealand). The provisions of the Crimes Act 1961 are similar to the powers regarding forfeiture under the Prevention of Child Pornography Ordinance and the Control of Obscene and Indecent Articles Ordinance in Hong Kong referred to above.²⁹ The Crimes Act 1961 provides:

“Where any person is convicted of an offence against section 216H or section 216I or section 216J, the court may, in addition to or instead of passing any other sentence or making any other order in respect of the offence, order that the intimate visual recording be destroyed within 10 working days from the making of the order, and that the recording in the meantime be impounded.”

38. The advantages of the provisions under the Harmful Digital Communications Act 2015 are that: the court may make an order not just in relation to a defendant, but also an

Criminal Code Act 1983 (Northern Territory) <https://legislation.nt.gov.au/en/Legislation/CRIMINAL-CODE-ACT-1983>; and section 229AA of the Criminal Code Act 1899 (QLD)

<https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1899-009>

²⁹ Harmful Digital Communications Act 2015, <https://www.legislation.govt.nz/act/public/2015/0063/latest/whole.html>; and Section 216L Crimes Act 1961, New Zealand, <https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

online content host relating to any images on its site;³⁰ that an order can be made against an Internet Protocol Address Provider that the identity of an anonymous communicator is released to the court;³¹ and interim orders can be made if necessary, for example in situations of urgency and pending the final determination of the application for orders.³² Failure to comply with the orders is an offence and penalties can either be a fine (maximum \$5000 New Zealand Dollars for a person and \$20,000 for a corporation), or imprisonment for up to 6 months for a person.³³

39. The Harmful Digital Communications Act 2015 also sets out who can apply for the relevant orders by the court. Section 11 of the Act states that orders can only be applied for by specified persons including the affected individual whose image has been published, or the person's parent or guardian.³⁴ The EOC believes that any similar legislation in Hong Kong should take the same approach of indicating who can apply for such orders, to ensure there are safeguards that the powers are only exercised in appropriate situations.

40. Section 19(1), (2) and (3) provide:

“(1)The District Court may, on an application, make 1 or more of the following orders 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.

(2)The District Court may, on an application, make 1 or more of 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.

(3)The District Court may, on application, make an order against an Internet Protocol Address Provider (IPAP) that the identity of an anonymous communicator be released to the court.”

³⁰ See section 19(1) and (2) *ibid*.

³¹ Section 19(3) *ibid*.

³² Section 18 *ibid*.

³³ Section 21 *ibid*.

³⁴ Section 11(1) of the Harmful Digital Communications Act 2015, <https://www.legislation.govt.nz/act/public/2015/0063/latest/DLM5711845.html>

41. The EOC believes that in order to better protect victims of Image Based Sexual Violence, it is important that there be provisions giving the court a power to order that intimate images be deleted and/or taken down. Such provisions could be developed by taking reference from the existing legislation of the Prevention of Child Pornography Ordinance and the Control of Obscene and Indecent Articles Ordinance, as well as similar legislation relating to recording and publishing intimate images in Australia and New Zealand. The EOC submits that the approach of provisions in the New Zealand Harmful Digital Communications Act 2015 are preferable, given they provide a more comprehensive scope regarding possible orders against both a defendant and online content hosts.

Recommendation 2

There should be new provisions introduced to the Bill to provide individuals affected (and any other specified persons) to apply to the court, and powers for the court to make orders relating to the deletion and/or take down of intimate images. In particular the EOC recommends that the powers cover:

- which persons are able to apply for orders;**
- making orders to delete and/ or take down intimate images against the defendant and any online content host (where relevant);**
- making an order that identity of an anonymous communicator in relation to online content be released to the court;**
- the ability to make interim orders in situations of urgency;**
- sanctions for failure to comply with the orders to delete or take down intimate images, being either a fine or imprisonment.**

5. The content of the offence of non-consensual recording of intimate parts

42. The EOC believes that there several ways in which the content of the offence relating to non-consensual recording of intimate parts (section 159AAC) should be improved. The first issue relates to the element of intent to record or observe an intimate part, and the second issue relates to the requirement of a purpose of obtaining dishonest gain. Each of these issues is discussed below.

(a) Element of intent to record or observe an intimate part

43. Firstly, there is an issue with section 159AAC(1)(a)(i) and (ii) in terms of the element of intent. The EOC believes that for both limbs of the offence there should be a required element of an intent to record or observe an intimate part. However, currently the wording only requires an intention in relation to section 159AAC(1)(a)(ii), and not section 159AAC(1)(a)(i). The EOC previously made submissions to the Government on this in March 2021.³⁵ The EOC submitted that it would be an important safeguard to avoid unintended consequences of the legislation to require an intention to record or observe an intimate part. In particular, it would address situations where a person accidentally records an image of a person's intimate parts. This would avoid for example a person being liable for taking selfies and accidentally including in the photograph a down-blousing view of a person's breasts. It would also be consistent with the construction of offences relating to recording of intimate parts in some other similar jurisdictions (in a number of Australian States, New Zealand and Singapore) which require an element of an intention to do the recording or observing of intimate parts.³⁶ The EOC therefore recommends that the issue be rectified by an amendment to section 159AAC(1)(a)(i) to include an element of intent.

(b) Element of purpose of obtaining dishonest gain

44. Secondly, there is an issue with section 159AAC(1)(b) which requires that the conduct of recording or observing a person's intimate parts must be done for the purpose either of a sexual purpose, or the "purpose of obtaining dishonest gain for the person, or any other person". The EOC believes that this proposed element raises significant concerns as it unnecessarily narrows the scope of what would be an offence, would

³⁵ See paragraphs 43-47 of the Further EOC Submission, Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual photography of intimate parts, and related offences, March 2021, <https://www.eoc.org.hk/eoc/upload/2021311142247865313.pdf>

³⁶ See section 91P of the Crimes Act 1900 (NSW), <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1900-040>; section 26B(4)(c) of the Summary Offences Act 1953(SA), <https://www.legislation.sa.gov.au/LZ/C/A/SUMMARY%20OFFENCES%20ACT%201953/CURRENT/1953.55.AUT.H.PDF>; sections 41A, 41B and 41C of the Summary Offences Act 1966 (VIC), <https://www.legislation.vic.gov.au/in-force/acts/summary-offences-act-1966/131>; Section 216H Crimes Act 1961, New Zealand, <https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>; Section 377BB, Penal Code Singapore, <https://sso.agc.gov.sg/Act/PC1871>

not provide sufficient protections to victims of such conduct, is not consistent with the Government's previous proposals regarding the same proposed offence, and it is not consistent with the approach in similar common law jurisdictions with similar offences.

45. Previously, in the Government's consultation on the introduction of the proposed offences, as well as in the Government's report following the consultation, the Government proposed that the offence of non-consensual photography of intimate parts would cover situations either where it was done for a sexual purpose, or alternatively irrespective of the purpose. The Government stated in the consultation document:

*"The Government accepts LRC's recommendation, and proposes to introduce an offence of non-consensual photography of intimate parts for sexual gratification, as well as a separate offence of non-consensual photography of intimate parts **irrespective of the purpose.**"* (emphasis added)³⁷

46. The Government maintained the same position that the offence would be made out irrespective of the purpose of the photography, in its report following the consultation.³⁸
47. The EOC considers that the previous position of the Government was appropriate, in order to ensure that there is sufficient protection of victims of such recording and observing of their intimate parts. The EOC believes there are a number of reasons why it is appropriate to include as an element that an offence will be made out irrespective of purpose. Firstly, the harm to the victim is caused irrespective of the purpose for which the recording or observing was done. The focus following the "protection principle" should be on protecting victims of such serious conduct which humiliates them and violates their sexual autonomy. As a result, establishing a particular purpose should not be a required element to prove the offence, and could make the offence more difficult to establish.
48. Secondly, it should be also noted that the offence of non-consensual recording of intimate parts already contains a series of safeguards as required elements to ensure that only in appropriate circumstances would a person be liable. These elements are: that a person intentionally does the recording or observing; in circumstances where the intimate part would not otherwise be visible; no consent is given to the conduct by the victim; and the perpetrator disregards whether the victim gave consent. The EOC does not believe that it is therefore appropriate or necessary to have an additional

³⁷ Paragraph 13, Security Bureau Consultation Paper, Proposed Introduction of offences of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences, July 2020, https://www.sb.gov.hk/eng/special/voyeurism/Consultation_Paper_Voyeurism_Eng.pdf

³⁸ Paragraphs 3.01 and 3.02, Security Bureau Report on the Consultation on Proposed Introduction of offences of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences, January 2021, https://www.sb.gov.hk/eng/special/voyeurism/Consultation_Report_on_Voyeurism_Eng.pdf

element that the acts were done for the purpose of either a sexual purpose or a dishonest gain.

49. Thirdly, as there is a proposed defence of acting under statutory authority or reasonable excuse, this would provide an additional safeguard as for example acts done for the purposes of prevention and detection of crime; when required by legal proceedings; or for a scientific medical or educational purpose would not be unlawful. As discussed below in relation to recommendation 5, the proposed defence of statutory authority or reasonable excuse could set out the situations in which a lawful authority or reasonable excuse would be established.

50. Fourthly, the inclusion of the element of a dishonest gain purpose is drawn from the wording of section 161 of the Crimes Ordinance.³⁹ This was previously used in relation situations of voyeurism and up-skirt photography, before the Court of Final Appeal decided that it was not applicable to persons using their own devices such as mobile phones, as opposed to accessing other persons' computers.⁴⁰ However, the focus of that provision is on gaining access to another person's computer with an intent to commit an offence or obtain a dishonest gain. In particular it states:

“(1)Any person who obtains access to a computer—

(a)with intent to commit an offence;

(b)with a dishonest intent to deceive;

(c)with a view to dishonest gain for himself or another; or

(d)with a dishonest intent to cause loss to another,

whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years.”⁴¹

51. The EOC believes that using similar language in relation to the offence of non-consensual recording of intimate parts would not be appropriate as gaining access to another person's computer (eg to steal personal data or other sensitive information) is very different factually from a person recording another person's intimate parts with their own devices.

52. Fifthly, there may be many reasons or purposes for which a person does recording or observing of a person's intimate parts such as sexual purposes, to take revenge against a former partner, to make a financial gain, for fun or personal entertainment, to enhance the person's reputation amongst peers, as an act done out of boredom, or as a personal challenge. A defendant may argue that they did not have any purpose to obtain a dishonest gain such as money or property, but only did the act for their own personal non material reasons. It should not be possible for a person to avoid liability

³⁹ Crimes Ordinance, https://www.elegislation.gov.hk/hk/cap200?xpid=ID_1438402824377_003

⁴⁰ Secretary for Justice v Cheng Ka Yee and others, FACC 22/2018

⁴¹ Section 161(1) *ibid*.

in such circumstances, given as previously stated the harm would be caused irrespective of the purpose for doing the acts.

53. Finally, it should be noted that in other similar common law jurisdictions there is either no requirement of a purpose at all, or the requirement of a purpose is broader than the current proposed provisions. No jurisdiction has an element of a purpose similar to “dishonest gain”. In the equivalent Australian State provisions, most do not contain an element in the offences requiring that a purpose for the recording be established.⁴² In New Zealand, equivalent provisions have not purpose element.⁴³ In Singapore, equivalent provisions have no purpose element.⁴⁴ In Canada, the relevant offences do have a requirement either of a sexual purpose, or a purpose of recording or observing a person (which is similar to the current wording of section 159AAC(1)(a)(ii)(B)). However there is no additional required purpose of a dishonest gain or something similar.
54. In light of all the above considerations the EOC believes that section 159AAC(1)(b)(ii) of the proposed offence of non-consensual recording of intimate parts should be amended to remove the requirement of a “purpose of obtaining dishonest gain for the person, or for any other person”, and replaced with “for any other purpose”. This would also be consistent with the Government’s previous proposals.

Recommendation 3

The proposed offence of non-consensual recording of intimate parts be amended by:

- **including in section 159AAC(1)(a)(i) an element of intent;**
- **amending 159AAC(1)(b)(ii) to remove the requirement of a “purpose of obtaining dishonest gain for the person, or for any other person”, and replaced with “for any other purpose”.**

⁴² See section 72C of the Crimes Act 1900 (ACT), http://www5.austlii.edu.au/au/legis/act/consol_act/ca190082/; section 26C of the Summary Offences Act 1953(SA), <https://www.legislation.sa.gov.au/LZ/C/A/SUMMARY%20OFFENCES%20ACT%201953/CURRENT/1953.55.AUT.H.PDF>; section 223 of the Criminal Code Act 1899 (QLD), <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1899-009>; section 41A and B of the Summary Offences Act 1966 (VIC), <https://www.legislation.vic.gov.au/in-force/acts/summary-offences-act-1966/131>; section 208AB of the Criminal Code Act 1983 (NT), <https://legislation.nt.gov.au/en/Legislation/CRIMINAL-CODE-ACT-1983>.

⁴³ Section 216G(1) Crimes Act 1961, New Zealand, <https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

⁴⁴ Section 377BB, Penal Code Singapore, <https://sso.agc.gov.sg/Act/PC1871>

6. The content and scope of the defence regarding age or mental capacity of a victim

55. Proposed section 159AAI of the Bill provides a defence to a defendant on any of the offences, where the offences relate to either a victim under the age of 16, or is a mentally incapacitated person as defined in section 117(1) of the Crimes Ordinance. It is a defence for the defendant to prove that they:

- honestly believed that a consent was given by the victim to the person's conduct that would constitute the offence; and

- did not know and had no reason to suspect that the subject individual was under 16 or a mentally incapacitated person.⁴⁵

The burden of proving that defence lies on the defendant.⁴⁶

56. It should also be noted that section 159AAG provides that persons under the age of 16 and mentally incapacitated persons cannot give consent that would prevent a person's conduct from becoming an offence.

57. In relation to the proposed defence regarding children under the age of 16, the issues of liability and defences for sexual offences against children under 16 has been examined in detail by the Law Reform Commission (LRC) in its review of sexual offences.⁴⁷ The issues have also been examined by the Court of Final Appeal in several key decisions of *So Wai Lun v HKSAR*⁴⁸ and *HKSAR v Choi Wai Lun*.⁴⁹

58. In relation to the LRC review of sexual offences involving children under 16, the LRC examined the case law in Hong Kong, the provisions in similar common law jurisdictions, and the arguments against and in favour of having absolute liability for such offences. In relation to the arguments against absolute liability, the LRC highlighted factors including: genuine mistakes by the defendant as to the victim's age should be recognised; many overseas jurisdictions have defences where the defendant believed that the victim was over a certain age; and situations may involve conduct between children experimenting. In relation to the arguments in favour of absolute liability, the LRC highlighted factors including: absolute liability may act as a deterrent effect to encourage people to avoid acts towards children which may be unlawful; the protective principle by which children are vulnerable to sexual exploitation and should be protected; and a successful prosecution may become more difficult. The LRC decided that the issue of whether there should be absolute liability for offences involving children aged between 13 and 16 should be considered by the

⁴⁵ Section 159AAI(2) of the Crimes (Amendment) Bill 2021.

⁴⁶ Section 159AAI(3) *ibid*.

⁴⁷ Pages 38-49, Consultation Paper, Sexual Offences Involving Children and Persons with Mental Impairment, Law Reform Commission, November 2016, https://www.hkreform.gov.hk/en/docs/sexoffchild_e.pdf

⁴⁸ *So Wai Lun v HKSAR* [2006] 3 HKLRD 394.

⁴⁹ *HKSAR v Choi Wai Lun* [2018] HKCFA 18.

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=115035&currpage=T

public in responding to the consultation. For offences involving children under 13, the LRC stated that such offences should always be absolute liability given children of that age are even more vulnerable.⁵⁰

59. The Court of Final Appeal considered the issues of absolute liability in the context of the interpretation of whether there were defences to two sexual offences involving children under 16. In *So Wai Lun v HKSAR* the court examined section 124 of the Crimes Ordinance which concerns sexual intercourse with a child under 16. It has no defence that the defendant did not know and had no reason to suspect that the child was under 16. The court held that the provision was constitutional and that having absolute liability is a choice open to the legislature having regard to the vital importance of protecting children.
60. In *HKSAR v Choi Wai Lun* the Court of Final Appeal considered a different offence of indecent assault under section 122(1) of the Crimes Ordinance. The case involved sexual conduct which was consensual, the victim was 13, but the defendant claimed he believed the victim was over 16. The court observed that as absolute liability departed from the normal principles of criminal responsibility regarding some degree of knowledge, it should not be lightly inferred that the legislature intended to create an offence of absolute liability. It went on to decide in that case that as a matter of statutory interpretation the offence was not one of absolute liability, and that a defendant would have a good defence if they can prove on the balance of probabilities that they honestly and reasonably believed that the victim was 16 or over. The court considered that such an approach struck the right balance between giving heightened protection to vulnerable children, and ensuring a fair trial for the defendant.
61. The LRC reconsidered the issues in its final report on its review of sexual offences in December 2019.⁵¹ The LRC noted that in response to the consultation on whether there should be absolute liability for sexual offences against children between 13 and 16, there was overwhelming support for absolute liability from the public. Further it took into account the decision of *HKSAR v Choi Wai Lun* and considered that it was restricted to interpreting section 122(1) of the Crimes Ordinance and did not prevent the Government from deciding to create any new legislative regime relating to liability for offences against children. In light of all the above, the LRC recommended that for sexual offences relating to children between the ages of 13-16, there should be absolute liability for such offences. The LRC recommended in particular:

“Final Recommendation 6

⁵⁰ Page 49, Consultation Paper, Sexual Offences Involving Children and Persons with Mental Impairment, Law Reform Commission.

⁵¹ Page 6, Review of Substantive Sexual Offences, Law Reform Commission Report, December 2019, https://www.hkreform.gov.hk/en/docs/rsubstantive_sexual_offences_e.pdf

We are of the view that absolute liability should apply to offences involving children between 13 and 16 years and there should not be a distinction between penetrative and non-penetrative sexual activity.”⁵²

62. The EOC notes the reasoning in the relevant court decisions. It also notes the position of the LRC that it recommended that for all sexual offences involving children under 16 there should be absolute liability. The EOC believes that it is important that there is sufficient protection of vulnerable children in relation to situations of Image Based Sexual Violence. In situations where non-consensual videos or photos are taken of children’s intimate parts this could cause significant psychological damage to the victim. Such conduct could also be a form of child pornography when such images are published or distributed, and therefore such conduct may in some situations be particularly serious in nature. It should also be noted that the proposed defence does not take into account offences relating to children under 13, which the LRC recommended should always be absolute liability given they are even more serious. As a result the EOC recommends that the Government should carefully consider whether consistent with LRC recommendations, there should be no defence available under section 159AAI, where it relates to persons between the ages of 13 and 16. In relation to offences against children under 13, the EOC recommends that there definitely should be absolute liability, consistent with the position of the LRC.
63. On the other hand, in relation to the proposed defence regarding mentally incapacitated persons, the EOC believes that this would be consistent with existing defences under the Crimes Ordinance, and with the LRC recommendations regarding sexual offences relating mentally incapacitated persons from December 2019.
64. In relation to existing sexual offences relating to mentally incapacitated persons, there are a number of offences which have a defence that a defendant is not liable if they did not know or had no reason to suspect that a person was mentally incapacitated. For example in relation to indecent assault, section 122(4) of the Crimes Ordinance provides:

“A woman who is a mentally incapacitated person cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of indecently assaulting a mentally incapacitated person by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a mentally incapacitated person.”

Similar defences exist in relation to intercourse with a mentally incapacitated person,⁵³ and prostitution with mentally incapacitated persons.⁵⁴

⁵² Ibid page 48.

⁵³ Section 125(2) of the Crimes Ordinance.

⁵⁴ Section 136(2) of the Crimes Ordinance.

65. The proposed defence relating to mentally incapacitated persons is also consistent with the LRC recommendations regarding all sexual offences involving them, by requiring that a defendant had actual or constructive knowledge that the victim was a person with mental impairment:

“Final Recommendation 33

We recommend that it should be a requirement of the proposed new offences involving persons with mental impairment that the accused had actual or constructive knowledge that the victim was a person with mental impairment.”⁵⁵

66. As a result, the EOC believes that the proposed defence regarding mentally incapacitated persons is reasonable.

Recommendation 4

The EOC recommends that in relation to the defence concerning persons under the age of 16 under section 159AAI:

- the Government consider whether, consistent with LRC recommendations, there should be no defence where it relates to persons between the ages of 13 and 16; and**
- that there should be absolute liability and no defence for offences involving children under 13.**

⁵⁵ Page 82, Review of Substantive Sexual Offences, Law Reform Commission Report, December 2019, https://www.hkreform.gov.hk/en/docs/rsubstantive_sexual_offences_e.pdf

7. The content and scope of the defence regarding lawful authority or reasonable excuse

67. Section 159AAJ provides a further defence where a defendant establishes that they had lawful authority or reasonable excuse for the contravention. Such a defence is consistent with similar exceptions under section 4 of the Prevention of Child Pornography Ordinance, as well as some similar common law jurisdictions.⁵⁶
68. The EOC believes that it is appropriate to include such a defence to cover various situations where such recordings or observing would be lawful such as in relation to the prevention and detection of crime; when required by legal proceedings; or for a scientific medical or educational purpose. However, unlike for example section 4 of the Prevention of Child Pornography Ordinance, or other similar common law jurisdictions, the current wording of section 159AAJ(1) does not provide a list of what would constitute lawful authority or a reasonable excuse. The EOC believes that including provisions on what constitutes lawful authority or reasonable excuse would ensure that the law is clearer and easier to understand. Any concern of not wishing to have a finite list of permissible situations of lawful authority or reasonable excuses, could be alleviated by including a provision of “...or any other lawful authority or reasonable excuse” after the listed areas.
69. In addition, the EOC believes that there are concerns with the proposed structure of the burden and standard of proof in section 159AAJ(2). It states that a person (defendant) is taken to have established that they had lawful authority or reasonable excuse if:
- “(a) there is sufficient evidence to raise an issue with respect to the lawful authority or reasonable excuse; and*
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.”*
70. This structure places a different burden of proof, and a lower standard of proof than the other defence under section 159AAI regarding children under 16 and mentally incapacitated persons which places the burden of proving the defence on the defendant. It is also not consistent with similar defence provisions under section 4 of the Prevention of Child Pornography Ordinance. Section 4(4) states:
- “Unless subsection (5) applies, a defendant is to establish any fact that needs to be established for the purpose of a defence under this section on the balance of probabilities.”

⁵⁶ See for example, sections 216K and 216N of the New Zealand Crimes Act 1961 <https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>; section 162(6) and 487 of the Criminal Code Canada, <https://laws-lois.justice.gc.ca/eng/acts/C-46/>; section 377BM of the Penal Code of Singapore <https://sso.agc.gov.sg/Act/PC1871>; section 72G of the Crimes Act 1900 in the Australian Capital Territory Australia http://www5.austlii.edu.au/au/legis/act/consol_act/ca190082/; and section 208AB(2) of the Criminal Code Act 1983 Northern Territory Australia <https://legislation.nt.gov.au/en/Legislation/CRIMINAL-CODE-ACT-1983>.

71. Only the defence relating to some forms of “possession” of pornographic material has the same test as in section 159AAJ(2). Section 4(5) Prevention of Child Pornography Ordinance provides:

“(5)A defendant charged with an offence under section 3(3) is to be taken to have established any fact that needs to be established for the purpose of a defence under subsection (3)(c), (d) or (e) if—

(a)sufficient evidence is adduced to raise an issue with respect to the fact; and

(b)the contrary is not proved by the prosecution beyond reasonable doubt.”

72. Given the offences relating to intimate images are not of possession, but are for proactive offences relating to recording, publishing or threatened publication images (similar to offences of publication of child pornography under the Prevention of Child Pornography Ordinance), the EOC believes that a wording similar to section 4(4) of the Prevention of Child Pornography Ordinance should be used which states that it is for the defendant to prove the defence, and on the balance of probabilities. This would also be consistent with the other proposed defence of section 159AAI regarding child under 16 and mentally incapacitated persons, and ensure that the burden and standard of proof of the defence are set at an appropriate level.

Recommendation 5

The EOC recommends that the defence of section 159AAJ be amended by:

- including in section 159AAJ(1) a non-exhaustive list of situations which would constitute lawful authority or a reasonable excuse; and**
- amending section 159AAJ(2) by repealing the existing provision and replacing it with language that a defendant is to establish any fact that needs to be established for the purpose of a defence under the section on the balance of probabilities.**

8. Proposals regarding the offences to be included in the Sexual Conviction Record Check Scheme

73. The Government has stated in its brief to the Legislative Council on the Bill that it proposes to include the offences of voyeurism and non-consensual recording of intimate parts in the list of specified sexual offences, under the Sexual Conviction Record Check Scheme (SCRC Scheme). The Government does not propose to cover the two offences of publication of intimate images, since the purpose of the publication may vary and may not be a sexual one.⁵⁷ The EOC agrees that it is appropriate to include the offences of voyeurism and non-consensual recording of intimate parts in order to better protect children and mentally incapacitated people from such conduct, by allowing employers working with those persons to check for previous convictions.
74. The EOC notes however that it has made detailed submissions to the Government on the proposed offences which included proposals on improving the SCRC Scheme.⁵⁸ The EOC also made submission to the Law Reform Commission in response to its consultation on improving the SCRC Scheme.⁵⁹ For example the EOC has made recommendations that the SCRC Scheme be improved, by:
- making the scheme a mandatory legislative scheme;
 - covering existing employees;
 - covering self employed persons, volunteers and all types of interns;
 - covering sectors and groups not currently covered including all persons working in healthcare, social care and residential care homes for the elderly and disabled.⁶⁰
75. The EOC requests the Government to consider those recommendations regarding the SCRC Scheme, which in our view would improve protections relating to sexual offences and sexual harassment, given some forms of criminal sexual offences (eg voyeurism and non-consensual recording of intimate parts) may also be extreme forms of sexual harassment.

⁵⁷ Paragraphs 21 and 22, Legislative Council Brief, Crimes (Amendment) Bill 2021, 17 March 2021, https://www.legco.gov.hk/yr20-21/english/bills/brief/b202103192_brf.pdf

⁵⁸ Paragraphs 17-24 of the Equal Opportunities Commission 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>

⁵⁹ Law Reform Commission of Hong Kong, Consultation paper on Sentencing and Related Matters in the Review of Sexual Offences, published November 2020, https://www.hkreform.gov.hk/en/docs/sentencing_related_matters_e.pdf

⁶⁰ See pages 10-20 of the EOC Submission, Law Reform Commission Consultation on Sentencing and related matters in the review of sexual offences, February 2021, <https://www.eoc.org.hk/eoc/upload/202128191246906356.pdf>