

**PCPD’s submission in response to the consultation paper on proposed
introduction of offences of voyeurism, intimate prying, non-consensual
photography of intimate parts and related offences**

This submission is made by the Office of the Privacy Commissioner for Personal Data (“**PCPD**”) in response to the consultation paper published by the Security Bureau (“**SB**”) on the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences (“**Consultation Paper**”) in July 2020. We understand that upon the review by the Review of Sexual Offences Sub-committee appointed by the Law Reform Commission (“**LRC**”) on the substantive sexual offences in Hong Kong, the Government took on-board LRC’s recommendations and proposes to introduce various governing sexual offences having particular regard to overseas jurisdictions.

2. As the regulator to protect individuals’ privacy in relation to personal data under the Personal Data (Privacy) Ordinance (Cap. 486) (“**PDPO**”), the PCPD offers comments on selected consultation questions in the Consultation Paper that may raises concern from the perspective of personal data privacy protection.

3. We note that the Consultation Paper aims at safeguarding victims against acts which may constitute the proposed offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and the distribution of related images. In this connection, we wish to point out that the “interests” intended to be protected by the PDPO was succinctly summarised by the LRC’s report on “Reform of the Law Relating to the Protection of Personal Data” in 1994¹ which cited four different forms of privacy interests including:

- (i) the interest of the person in controlling the information held by others about him (*i.e.* information privacy);

¹ <https://www.hkreform.gov.hk/en/docs/rdata-e.pdf>

- (ii) the interest in controlling entry to the personal place (*i.e.* territorial privacy);
- (iii) the interest in freedom from interference with one's person (*i.e.* personal privacy); and
- (iv) the interest in freedom from surveillance and from interception of one's communications (*i.e.* communications and surveillance privacy).

4. In this connection, the LRC made it clear that it was only concerned in the aforesaid report with information privacy; and protection of that particular interest is plainly also the aim of the PDPO.

5. To such end, we note that the proposed offences do not confine to the protection of an individual's information privacy and stem into other aspects of privacy interests. Insofar as these other aspects of privacy interests are concerned, we do not have any useful views to offer relating to the proposed offences as they do not by themselves fall within the purview of the PDPO in protecting individuals' information privacy.

6. That being said, we would like to provide our observations concerning Proposal 6, *i.e.* the creation of statutory offence for non-consensual distribution of intimate images as this may, in certain contexts, relate to personal data privacy.

7. We note that the acts intended to be curbed under Proposal 6 relates to images "*showing the victim doing an intimate act*"; and "*it does not matter whether the image was taken with the victim's consent in the first place*".² In this regard, we have the following observations.

² Paragraph 21 of the Consultation Paper.

(I) Identity of the victim as his/her “personal data”

8. According to section 2(1) of the PDPO, “personal data” means any data: (a) relating directly or indirectly to a living individual; (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and (c) in a form in which access to or processing of the data is practicable.

9. Intimate images constitute an individual’s personal data if it is reasonably practicable for the identity of the data subject concerned to be directly or indirectly ascertained from the image(s). For instance, even though the image(s) may not of itself contain any personal identifier of the victim, a combination of other information (e.g. personal data possessed by “*the person created, generated, obtained, or was provided with the image in question*”³) that enables positive identification of the data subject concerned renders the image(s) to be the victim’s personal data.

(II) Consent from the victim

10. If the image(s) constitute a victim’s personal data, the data user(s)⁴ concerned (i.e. the person who created, generated, obtained or was provided with the image(s)) must comply with the PDPO, including the Data Protection Principles (“DPPs”) under Schedule 1 thereof. The DPPs constitute the pillar stone for protecting individuals’ personal data privacy regarding collection, use, processing, retention and destruction of personal data.

11. Further, we consider that the proposed criminality for the act (referred to in paragraph 7 above) which is premised on the lack of consent for the distribution of intimate images in the first place is consistent with DPP 3 of the PDPO. Under DPP3, a data user shall not, without the prescribed consent of the data subject, use the personal data collected for a new purpose. “New purpose”, in relation to the use

³ *Ibid.*

⁴ Under section 2(1) of the PDPO, a “data user” in relation to personal data, means a person who, either alone or jointly or in connection with other persons, controls the collection, holding, processing or use of the data.

of personal data, means any purpose other than (a) the purpose for which the data was to be used at the time of the collection of the data; or (b) a purpose directly related to the purpose referred to in paragraph (a).

12. As illustrated in paragraph 19 of the Consultation Paper, we note that the original purpose of collection of such image(s) might only be confined to self-use (and this is the basis where the victim's consent has been given for taking such intimate images, including stills or videos). Any subsequent distribution amounts to a new purpose which would probably exceed the scope of the victim's consent. In other words, further dissemination would not be within the victim's consent in the first place. This amounts to a contravention of the requirement of DPP3 by the data user(s).

13. Moreover, we also note that the proposed offence intends to cover the person who created, generated, obtained or was provided with the image(s). This is in line with the PDPO as there is no public domain exception. In this connection, a common misconception is that personal data collected from the public domain or which is made publicly available (for example, from the internet), is free to be used for whatever purpose the data user wishes. However, the PDPO does not differentiate or exempt from its application personal data collected or made available in the public domain. A data subject's personal data that can be obtained from the public domain should not be taken to mean that the data subject has given blanket consent for re-use of his personal data for whatever purposes. The relevant factors to be considered in assessing the permitted purposes of use of the personal data may include (non-exhaustive):

- (i) ascertaining the original purpose for which the personal data was placed in the public domain;
- (ii) the restrictions on use, if any, imposed by the data user who made the data available on the public domain; and
- (iii) the reasonable expectation of the personal data privacy of the data subjects.

14. In other words, even though the intimate image(s) concerned was obtained from a netizen online (which was not originally taken by him/her), further dissemination of the said image(s) render the netizen concerned as a “data user” under the PDPO as he/she “controls” the collection, holding, processing or use of the data. It must be emphasised that personal data retrievable from public domain is also protected under the PDPO.

15. The views contained in the above submission are given without prejudice to the performance of the functions or exercise of the powers of the Privacy Commissioner for Personal Data, Hong Kong under the Personal Data (Privacy) Ordinance (Cap. 486).

Office of the Privacy Commissioner for Personal Data, Hong Kong

7 October 2020