



Voyeurism as a Criminal Offence:

A Consultation Paper

(Abridged Version)

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VOYEURISM AS A CRIMINAL OFFENCE: A CONSULTATION PAPER (Abridged Version)

The invention of new technology such as Web cameras, which can transmit live images over the Internet, and the abuse of this technology to view or record citizens have raised serious concerns about privacy. Currently, there is no specific offence dealing with voyeurism in the *Criminal Code*. The Government of Canada is therefore considering creating an offence of criminal voyeurism and an offence of distributing visual representations obtained through voyeurism.

The purpose of this consultation by the Department of Justice is to seek the views of Canadians on this issue and on the related questions of possible defences and appropriate penalties.

This document is essentially an abridged version of a longer consultation paper issued by the Department of Justice Canada. This shorter version omits most of the technical details and references, which are more likely to be of interest to legal professionals and other specialists in the field. Nonetheless, the issue of voyeurism is one of broad public concern, and the Department welcomes the views of any member of the general public who is interested in responding to the consultation questions. A copy of the full document may be obtained from the Department of Justice by calling (613) 957-4752 or faxing (613) 941-9310 or by visiting the Justice Web site at: <http://www.canada.justice.gc.ca/en/cons/voy>

1. The Concept of Voyeurism

Voyeurism may be considered in two ways. *The Canadian Oxford Dictionary* defines a voyeur as “a person who derives sexual gratification from the covert observation of others as they undress or engage in sexual activity.”

Voyeurism may also refer to a sexual disorder or paraphilia. Voyeurism paraphilia is characterized by :

- (a), recurrent, intense sexually arousing fantasies, sexual urges or behaviours involving voyeuristic activity, and (b), the fantasies, sexual urges, or behaviours cause clinically significant distress or impairment in social, occupational, or other important areas of functioning... Many individuals include voyeuristic fantasy or behaviour in a repertoire of sexual fantasies. It is only when these fantasies become a focus for an extended period of time (six months or more)

and cause distress or impairment in one's life that this would be diagnosable as a paraphilia.¹

The voyeurism paraphilia often accompanies other personality disorders such as exhibitionism.² According to some psychiatric studies, 20% of people involved in voyeurism will go on to commit more serious sexual assault offences.³

2. Concerns about Voyeurism

Concern about voyeurism has increased in light of recent incidents for which the Criminal Code provided no appropriate responses. The discovery in December 1999 of a video camera hidden inside a garbage can in the unisex washroom of the provincial Department of Justice in Fredericton, New Brunswick, raised questions about protecting the privacy rights of Canadians.

In February 2001, the media reported on a case of voyeurism at the Military College in Kingston. A video recording, made without the victim's consent while she engaged in a sexual act with an officer cadet, was later shown at several parties at the military base. The Crown Attorney advised police that the facts of the case did not disclose any offence under the *Criminal Code* and charges were therefore not laid under the Code. Of the three individuals involved in the case, one was acquitted of various offences under the *National Defence Act*. One individual pleaded guilty to two counts of disgraceful conduct and to one count of engaging in conduct to the prejudice of good order and discipline pursuant to sections 93 and 129, respectively, of the *National Defence Act*. He received a severe reprimand and a fine. Prior to trial he was administratively released from the Canadian Forces. The cadet who actually engaged in the sexual activity with the victim was found guilty of two counts of disgraceful conduct, was fined and was dismissed from the Canadian Forces.

On February 19, 2001, *Maclean's* magazine highlighted the degree to which new technologies, such as Web cameras and cameras hidden in everyday items, create a potential threat to privacy.

On February 12, 2002, the Federal, Provincial and Territorial Ministers responsible for Justice identified a need to create a voyeurism offence to protect victims of voyeurism and to address a "serious gap in the criminal law."

One justification for creating a voyeurism offence is that the secret viewing or recording of another person, which is done for a sexual purpose or which captures images of sexual organs, the anal region or explicit sexual activity, is a breach of that person's privacy to such a degree that it may undermine basic notions of the right to freedom and privacy in a democratic society.

¹The American Psychiatric Association's Diagnostic and Statistical Manual on Mental Disorders quoted in Meg S. Kaplan and Richard B. Krueger, "Voyeurism: Psychopathology and Theory" in *Sexual Deviance: Theory, Assessment and Treatment* (New York: The Guilford Press, 1997), pp. 297-310, at p. 297.

²Hanson, R. Karl and Andrew J.R. Harris, "Voyeurism: Assessment and Treatment," in *Sexual Deviance: Theory, Assessment and Treatment* (New York: The Guilford Press, 1997), pp. 311-331, at pages 313 and 314.

³*Ibid.*

Another justification for creating a voyeurism offence is that it would address emerging forms of crime made possible by new technologies (a priority identified in the last Speech from the Throne). A review of Internet sites that advertise voyeuristic materials confirms that there is a market for these images.

3. Voyeurism and the *Criminal Code*

The *Criminal Code* does not currently contain any specific provisions to address voyeurism. However, the offences of mischief and trespassing at night have been successfully used in some cases to convict voyeurs. These provisions are of limited scope and do not cover all situations. For example, the scope of the trespassing at night offence is quite narrow, as it applies only to persons who loiter or prowl at night near a dwelling house on the property of another person. A mischief offence is only committed if the voyeur obstructs, interrupts or interferes with a person in the lawful use, enjoyment or operation of property. In most cases, though, victims do not know that they are being observed or recorded by voyeurs.

It should also be noted that the distribution and transmission of pictures or videos obtained through voyeurism are currently not offences under the *Criminal Code* unless they fall under the child pornography or obscenity provisions. The creation of a voyeurism offence and an offence of distributing or transmitting voyeuristic materials would help to fill this gap in the law.

4. Voyeuristic Behaviours Targeted by the Proposed Offences

The proposed criminal voyeurism offence would include two alternative branches.

The first branch would criminalize the secret viewing or recording of another person for a sexual purpose while that person is in a place and in circumstances where there is a reasonable expectation of privacy. If the viewing or recording is done for a sexual purpose, it does not matter whether or not the victim was naked or engaged in explicit sexual activity when the viewing or recording took place.

The second branch would recognize that it might be difficult to establish that the viewing or recording was done “for a sexual purpose” in circumstances where the victim and the offender do not have physical contact. It would recognize that the viewing or recording might be done for other purposes, such as to sell voyeuristic images or to harass or embarrass the victim. If the reason for creating the offence is to protect people from sexual exploitation through a serious breach of privacy, it could be argued that it does not matter whether the accused committed the offence for a sexual purpose or for some other purpose.

In the second branch of the criminal voyeurism offence the mental element and the physical element of the offence would “match up”:

- the viewing or recording would have to be done for the purpose of viewing the victim in a state of nudity, or undress where the breast, sexual organs or anal region are exposed, or while the victim is engaged in explicit sexual activity; and

- the actual observations or recordings of the victim must also have captured the victim in one of the physical states mentioned in the offence or engaged in explicit sexual activity.

Building on the definition of a voyeurism offence, a distribution offence would prevent the intentional distribution to other people of one or more pictures or videos obtained through voyeurism. In order to be found guilty of the offence of distribution, the distributor would have to have known that the material was obtained through voyeurism.

The intent of the proposed criminal voyeurism offences is not to criminalize secret surveillance that is done for legitimate purposes, such as for security, though surveillance for security purposes is not justified in any and all circumstances. However, it does raise the question of whether there are circumstances in which what would otherwise be considered voyeurism should be allowed (as an exemption or a defence) because it serves a greater social purpose, and whether there should be other defences available for the offences of voyeurism or distribution of voyeuristic images.

5. Consultation Questions

As part of the consultation, Canadians are being asked to consider the following questions:

- **Is it necessary to create an offence of criminal voyeurism?**
- **Is it necessary to create an offence of distributing pictures or videos obtained through voyeurism?**
- **What elements should be included in the definition of these offences?**
- **Are there any circumstances under which secret surveillance of people should be allowed, even if it means that the viewing or recording may involve exposure of sexual organs, the anal region or explicit sexual activity?**
- **Should committing voyeurism *by recording* be considered more serious than voyeurism committed *by viewing*?**
- **Should the *distribution* of voyeuristic images be considered more serious than committing voyeurism?**
- **Do you have any suggestions for appropriate penalties or sentences for each of these offences?**
- **Do you have any other suggestions about the voyeurism scheme?**

By sending us your written comments, by whatever means you wish, you are participating in the development of criminal policy on this important issue. After the public consultations have concluded, a summary of the results will be made available on the Department of Justice Web site at <http://www.canada.justice.gc.ca/en/cons/voy>. Please send your comments to:

Public Consultation on Voyeurism
Criminal Law Policy Section
284 Wellington St., 5th Floor
Ottawa, Ontario, K1A 0H8

The Department of Justice must receive all responses at the postal address indicated above, or by e-mail at Voyeurism-Consultation-Voyeurisme@justice.gc.ca, by Monday, September 30, 2002. You may also fax your comments to (613) 941-9310.

Thank you for your assistance on this important issue.