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7 May 2019

Mr Lemuel Woo
Clerk to Panel on Administration of
Justice and Legal Services
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Mr Woo,

Panel on Administration of Justice and Legal Services

**Letter from Hon Elizabeth QUAT on
combating clandestine photo-taking and
joint letter from Hon Charles MOK, Hon Alvin YEUNG and
Hon Dennis KWOK on prosecutions instituted under
“access to computer with criminal or dishonest intent” and
legislating against the offence of voyeurism**

I refer to your letter dated 23 April 2019 enclosing the letter of Hon Elizabeth QUAT dated 11 April 2019 and the joint letter of Hon Charles MOK, Hon Alvin YEUNG and Hon Dennis KWOK dated 17 April 2019, requesting the Panel on Administration of Justice and Legal Services and the Panel on Security to arrange a joint meeting to discuss how to institute effective prosecutions in cases of clandestine photo-taking, legislating against the offence of “voyeurism”, reviewing “access to

computer with criminal or dishonest intent” under section 161 of the Crimes Ordinance (Cap. 200), and the handling of prosecutions instituted under that provision, etc.

The Ordinances in respect of sexual offences and technology crimes fall under the policy purview of the Security Bureau (SB). The Department of Justice (DoJ) is responsible for making prosecutorial decisions based on the existing applicable law, relevant facts, evidence and the Prosecution Code. If it is necessary to amend the relevant laws, the SB will formulate relevant legislative proposals, and the DoJ will provide legal advice to the Bureau on such intended legislative proposals.

Our reply in consultation with the SB and the Law Reform Commission (LRC) Secretariat is set out as follows.

Section 161 of the Crimes Ordinance provides that any person who obtains access to a computer –

- (a) With intent to commit an offence;
- (b) With 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.

On 4 April 2019, the Court of Final Appeal (CFA) held in *Secretary for Justice v Cheng Ka Yee & 3 Others* [2019] HKCFA 9 that the text, context and purpose of section 161(1)(c) of the Crimes Ordinance pointed towards construing the provision so that it does not extend to the use of the offender’s own computer. In other words, on its proper construction, section 161(1)(c) of the Crimes Ordinance does not apply to the use by a person of the person’s own computer, not involving access to another’s computer.

The Government respects the CFA’s ruling. The judgment helps clarify the relevant statutory provision and points of law. The DoJ has been in close liaison with the law enforcement agencies to ensure that other

relevant cases are handled appropriately, such as examining whether to proceed with prosecution with the charge of “access to a computer with criminal or dishonest intent”, or considering the feasibility of laying alternative charge(s). As mentioned above, in the consideration of each case, the DoJ will make the relevant prosecutorial decision based on the existing applicable law, relevant facts, evidence and the Prosecution Code.

Most legislation targeting the real world (such as theft, fraud, etc.) also applies to crimes committed through the Internet or by means of technology. Focusing on obtaining access to a computer with dishonest or criminal intent, section 161 of the Crimes Ordinance remains effective against unlawful acts such as illegal computer intrusion and obtaining access to another’s computer for committing other criminal offence(s).

Concerning the impact brought about by the CFA’s judgment handed down on 4 April 2019 with regard to section 161 of the Crimes Ordinance, the SB is looking into the judgment with relevant departments and proactively examining any legislative amendment to be made to the offence, with a view to introducing relevant legislative proposal(s) as soon as possible. Simultaneously, in light of the rapid developments associated with information technology, computer and the Internet, coupled with the potential for them to be exploited for carrying out criminal activities, an LRC sub-committee commenced its study on the topic of cybercrime this January. The SB will also closely monitor the progress of the sub-committee’s study.

The Government understands the public’s concern about such acts as clandestine upskirt-photography. The LRC released a report on “Voyeurism and Non-consensual upskirt-photography” on 30 April this year recommending the introduction of a new and specific offence of voyeurism to deal with an act of non-consensual observation or visual recording of another person for a sexual purpose; and a new and specific offence in respect of non-consensual upskirt-photography. We understand that the SB welcomes the LRC’s recommendations and will carefully study and follow up the report, so as to put forward relevant legislative proposal(s) as soon as possible.

We believe that the SB will consult the relevant Panel(s) of the Legislative Council on its legislative proposal(s) in due course after

completion of its legislative review.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Hinz Chiu', written in a cursive style.

(Hinz Chiu)

Administrative Assistant to
Secretary for Justice

c.c. Secretary for Security
Panel on Security, Legislative Council