

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1127/20-21  
(These minutes have been seen  
by the Administration)

Ref : CB2/BC/7/20

**Bills Committee on Crimes (Amendment) Bill 2021**

**Minutes of first meeting**  
**held on Monday, 19 April 2021, at 9:00 am**  
**in Conference Room 3 of the Legislative Council Complex**

- Members present** : Hon Elizabeth QUAT, BBS, JP (Chairman)  
Hon YUNG Hoi-yan, JP (Deputy Chairman)  
Hon Paul TSE Wai-chun, JP  
Hon SHIU Ka-fai, JP  
Hon Vincent CHENG Wing-shun, MH, JP
- Member absent** : Dr Hon CHENG Chung-tai
- Public Officers attending** : Item II
- Mr Sonny AU Chi-kwong, PDSM, PMSM, JP  
Under Secretary for Security
- Miss Shirley YUNG Pui-man, JP  
Deputy Secretary for Security 1
- Ms Joceline CHUI Shih-yen  
Principal Assistant Secretary (Security) E
- Ms Yolanda YU Hoi-kwan  
Chief Superintendent of Police (Crime Support)  
(Crime Wing)
- Mr Raymond LAM Cheuk-ho  
Senior Superintendent of Police (Cyber Security,  
Forensics and Training) (Cyber Security and  
Technology Crime Bureau)

Mr Jonathan LUK King-hang  
Senior Government Counsel  
Law Drafting Division  
Department of Justice

**Clerk in attendance** : Miss Betty MA  
Chief Council Secretary (2) 1

**Staff in attendance** : Miss Joyce CHAN  
Assistant Legal Adviser 1

Ms Gloria TSANG  
Senior Council Secretary (2) 7

Miss Lulu YEUNG  
Clerical Assistant (2) 1

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## **I. Election of Chairman (and Deputy Chairman)**

Ms Elizabeth QUAT and Ms YUNG Hoi-yan were elected Chairman and Deputy Chairman of the Bills Committee respectively.

## **II. Meeting with the Administration**

2. The Bills Committee deliberated (index of proceedings attached at **Annex**).

3. The Bills Committee requested the Administration to provide the following information:

- (a) in relation to the proposed new section 159AAC, clarification as to the meaning of "dishonest gain", with (i) examples of the types of factual scenario that the proposed new section was intended to be applicable to, and (ii) reference to court cases involving section 161(1)(c) of the Crimes Ordinance (Cap. 200), i.e. obtaining access to a computer "with a view to dishonest gain for himself or another", in which there was judicial discussion and/or ruling on the meaning of "dishonest gain";

- (b) in relation to the proposed new section 159AAE(2), which sought to provide that a person would commit an offence if the person made a threat to publish an intimate image of an individual, whether it would be necessary for prosecution to prove the existence of an intimate image of the subject individual; and
- (c) in relation to the proposed new section 159AAD, clarification as to the meaning of "reckless", with examples of the types of factual scenario that the proposed new section was intended to be applicable to, and reference to court cases in which there was judicial discussion and/or ruling on the meaning of "reckless" in other contexts.

### **III. Any other business**

4. Members noted that the Government had launched a three-month public consultation exercise on the introduction of new offences on voyeurism, non-consensual recording of intimate parts or distribution of intimate images in July 2020, and had received a total of about 200 submissions, including submissions from major stakeholders. Members agreed that written views on the Crimes (Amendment) Bill 2021 would be invited by posting a notice on the website of the Legislative Council.

5. Members further agreed that the next meeting would be held on 11 May 2021 at 10:45 am to continue discussion with the Administration.

*(Post-meeting note: With the concurrence of the Chairman, the meeting was rescheduled for 10 May 2021 at 10:45 am. Relevant circular was issued to members vide LC Paper No. CB(2)1018/20-21 on 22 April 2021.)*

6. There being no other business, the meeting ended at 10:35 am.

**Proceedings of first meeting of the  
Bills Committee on Crimes (Amendment) Bill 2021  
held on Monday, 19 April 2021, at 9:00 am  
in Conference Room 3 of the Legislative Council Complex**

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s) / Discussion</b>	<b>Action Required</b>
000451 - 000651	Ms Elizabeth QUAT Ms YUNG Hoi-yan Mr Vincent CHENG	Election of Chairman	
000652 - 000737	Chairman Mr SHIU Ka-fai Mr Vincent CHENG Ms YUNG Hoi-yan	Election of Deputy Chairman	
000738 - 000903	Chairman	Opening remarks	
000904 - 001838	Chairman Admin	Briefing by the Administration on the Crimes (Amendment) Bill 2021 ("the Bill")	
001839 - 005556	Chairman Deputy Chairman Admin Mr SHIU Ka-fai	<p>The Deputy Chairman was glad to note that the Administration had taken into account members' views in finalizing the Bill. She expressed support for the Bill and sought details regarding:</p> <p>(a) the meanings of "sexual purpose" and "dishonest gain" under the proposed new section 159AAC(1)(b) about non-consensual recording of intimate parts;</p> <p>(b) the acts covered by "threatened publication of intimate images without consent" in relation to the proposed new section 159AAE; and</p> <p>(c) examples of statutory defence under the Bill.</p> <p>Given that the motives of non-consensual recording of intimate parts varied, the Chairman was concerned about the necessity of stipulating "the purpose of obtaining dishonest gain" under the proposed new section 159AAC(1)(b), instead of "irrespective of the purpose" in the consultation paper.</p> <p>The Administration responded that:</p> <p>(a) reference had been made to similar legislation in Canada when finalizing the legislative proposals. Under the proposed new section 159AA(1),</p>	

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		<p>"sexual purpose" included "the stimulation or satisfaction of the sexual desire of the person or any other person";</p> <p>(b) the meaning of "gain" was stipulated in the proposed new section 159AAC(3). As regards "dishonest", the courts had applied the two-stage test on "dishonesty" laid down in the case of <i>R v Ghosh</i> [1982] QB 1053, under which it must be considered: (i) whether the defendant's conduct was dishonest by the lay objective standards of reasonable and honest people; and (ii) whether the defendant himself realized that ordinary honest people would regard his behaviour as dishonest;</p> <p>(c) in court cases concerning section 161(1)(c) of the Crimes Ordinance (Cap. 200), i.e. obtaining access to a computer "with a view to dishonest gain for himself or another", the Court of First Instance had held that "gain" included obtaining information which the defendant did not have prior to the access to a computer. According to the Administration, the proposed new section 159AAC(1)(b)(ii) was formulated with reference to the existing section 161(1)(c) of Cap. 200 (previously applied in prosecutions against upskirt photography before the Court of Final Appeal's decision in <i>Secretary for Justice v Cheng Ka Yee &amp; Others</i> [2019] HKCFA 9), and "a gain by keeping what one has" and "a gain by getting what one has not" under the proposed new section 159AAC(3) broadly meant obtaining intimate images which the defendant did not have prior to non-consensual recording; and</p> <p>(d) having regard to the views collected during the public consultation exercise, the original proposal of non-consensual recording of intimate parts "irrespective of the purpose" was replaced by "for the purpose of obtaining dishonest gain", with a view to refining the scope of the offence and to minimizing the chance of inadvertent contravention.</p> <p>Mr SHIU Ka-fai was concerned about the circumstances under which one might inadvertently breach the law, such as inadvertent recording of male breasts. The Deputy Chairman asked whether non-consensual live streaming of intimate parts</p>	

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		<p>would contravene the offence of "non-consensual recording of intimate parts".</p> <p>The Administration pointed out that pursuant to the proposed new section 159AAC, one of the elements of the proposed offence of "non-consensual recording of intimate parts" was that an intimate part of an individual was recorded, in circumstances in which the intimate part would not otherwise be visible. In other words, if a man exposed his breasts in circumstances where such body parts would be visible to others, the person recording would not contravene the offence of "non-consensual recording of intimate parts". The Administration further said that pursuant to the proposed new section 159AA(4) and 159AA(5), live streaming should be regarded as "publication", and non-consensual live streaming of intimate parts could potentially be caught by the offence of section 159AAE(1) "publication of intimate images without consent". Having said that, the Administration added that whether certain act would contravene a specific offence depended on whether all the elements of the offence were present and could not be generalized.</p> <p>The Deputy Chairman asked whether consideration would be given to including "malicious intent" as an element of the proposed offence of "non-consensual recording of intimate parts".</p> <p>The Administration explained that the proposed offence of "non-consensual recording of intimate parts" mainly sought to address non-consensual recording in public places, unlike the proposed offence of voyeurism, under which the person observing or doing the recording must act "surreptitiously" and the recording had to be done in circumstances that gave rise to "a reasonable expectation of privacy". For offences committed in public places, the scope had to be more exact in order to avoid inadvertent contravention and false accusations. Hence, it was proposed that the offence would include the element of whether the act was done for a sexual purpose, or for the purpose of obtaining dishonest gain. "Malicious intent" might not be appropriate as it failed to cover non-consensual photography of intimate parts in the context of a "prank" (i.e. practical joke).</p>	

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		<p>The Administration was requested to provide clarification as to the meaning of "dishonest gain" under the proposed new section 159AAC(1)(b)(ii) with (a) examples of the types of factual scenario that the proposed new section was intended to be applicable to, and (b) reference to court cases involving section 161(1)(c) of Cap. 200, in which there was judicial discussion and/or ruling on the meaning of "dishonest gain".</p>	<p><b>Admin</b></p>
<p>005557 - 011459</p>	<p>Chairman Admin Deputy Chairman</p>	<p>The Chairman and the Deputy Chairman sought details regarding the acts covered by, and the evidence required for prosecuting the proposed offence of "threatened publication of intimate images without consent" under the proposed new section 159AAE. The Deputy Chairman asked whether it would be necessary for the prosecution to prove the existence of an intimate image of the subject individual in relation to the proposed new section 159AAE(2).</p> <p>The Administration said that any forms of threat, including words, texts, speech, etc, were covered under the proposed new section 159AAE. During investigation, the Police would take into account a number of factors, including circumstantial evidence and witness statements, to assess whether an act would contravene the proposed offence. Pursuant to the proposed new section 159AAE(4), whether the person was capable of publishing the intimate image was immaterial. The Administration also highlighted that under the proposed sub-section 2(b), the person's intention to cause humiliation, alarm or distress to the subject individual when making the threat (instead of whether the subject individual was really being humiliated, alarmed or distressed) would be an element of the offence.</p> <p>The Administration was requested to provide a written response regarding whether it would be necessary for prosecution to prove the existence of an intimate image of the subject individual in relation to the proposed new section 159AAE(2).</p>	<p><b>Admin</b></p>
<p>011500 - 013739</p>	<p>Chairman Mr SHIU Ka-fai Admin ALA1</p>	<p>Mr SHIU Ka-fai sought clarification as to whether possession and forwarding of intimate images would contravene any of the proposed offences.</p> <p>The Administration said that mere possession of an intimate image would not contravene the proposed</p>	

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		<p>legislation. In terms of publication of intimate images, whether an act would contravene the proposed new sections 159AAD and 159AAE depended on the actual circumstances and could not be generalized. Having said that, the Administration highlighted that the proposed offence of "publication of intimate images without consent" under the proposed new section 159AAE included the mental element (i.e. intent/<i>mens rea</i>) that the publisher intended, knew or was reckless as to whether the publication would or was likely to cause humiliation, alarm or distress to the subject individual. The prosecution threshold was set high to minimize chances of inadvertent contravention. In other words, mere forwarding or sharing of intimate images in the absence of the requisite <i>mens rea</i> would not contravene the proposed new section 159AAE.</p> <p>Assistant Legal Adviser 1 sought clarification as to the meaning of "reckless" under the proposed new section 159AAD (1)(d)(i), and in that connection, the meaning of "disregard" under the proposed new section 159AAH. Clarification was also sought from the Administration regarding the factual scenario posed by Mr SHIU, whether the mere dissemination of intimate images in such circumstances would be caught by the proposed new sections 159AAD or 159AAE.</p> <p>In response, the Administration highlighted that the proposed new section 159AAD was intended to prevent the publication of images originating from the commission of offence under the proposed new section 159AAB(1) or 159AAC(1). The Administration also referred to the test for recklessness laid down in the case of <i>Sin Kam Wah v HKSAR (2005) 8 HKCFAR 192</i>.</p> <p>The Administration would provide supplementary information regarding the meaning of "reckless" with examples of the types of factual scenario that the proposed new section 159AAD was intended to be applicable to, and reference to court cases in which there was judicial discussion and/or ruling on the meaning of "reckless" in other contexts.</p>	<p><b>Admin</b></p>



<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s) / Discussion</b>	<b>Action Required</b>
013740 - 013914	Chairman	Invitation for public views on the Bill  Date of next meeting	

Council Business Division 2  
Legislative Council Secretariat  
31 May 2021