

立法會
Legislative Council

LC Paper No. CB(2)1209/20-21
(These minutes have been seen
by the Administration)

Ref : CB2/BC/7/20

Bills Committee on Crimes (Amendment) Bill 2021

Minutes of second meeting
held on Monday, 10 May 2021, at 10:45 am
in Conference Room 2 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
Dr Hon CHENG Chung-tai
Hon Vincent CHENG Wing-shun, MH, JP

Public Officers attending : Item I

Miss Shirley YUNG Pui-man, JP
Deputy Secretary for Security 1

Ms Joceline CHUI Shih-yen
Principal Assistant Secretary (Security) E

Ms Michelle CHOI Wai-ting
Assistant Secretary (Security) E2

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

I. Meeting with the Administration

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

2. The Bills Committee requested the Administration to provide written responses to various issues raised in the submissions received from organizations/individuals on the Crimes (Amendment) Bill 2021 before the next meeting. The Bills Committee also requested the Administration to incorporate the following information in the written responses:

- (a) examples of scenarios in which "dishonest gain" under the proposed new section 159AAC was intended to be applicable to;
- (b) rationale for including the element of "dishonesty" in the proposed new section 159AAC;
- (c) similar legislation concerning "non-consensual recording of intimate parts" in overseas jurisdictions; and
- (d) with reference to relevant court cases (if any), similar statutory defence provisions relating to the age or mental capacity of subject individual in the context of sexual

offences in overseas jurisdictions (including Australia, Canada, Ireland and Scotland) as well as similar existing statutory defences in Hong Kong, in particular details on the burden of proof for the defendant.

II. Any other business

3. The Chairman said that another meeting would be scheduled to continue discussion with the Administration. Members would be informed of the meeting date and time in due course.
4. There being no other business, the meeting ended at 11:59 am.

Council Business Division 2
Legislative Council Secretariat
21 June 2021

**Proceedings of second meeting of the
Bills Committee on Crimes (Amendment) Bill 2021
held on Monday, 10 May 2021, at 10:45 am
in Conference Room 2 of the Legislative Council Complex**

Time marker	Speaker	Subject(s) / Discussion	Action Required
000707 - 001105	Chairman	<p>Opening remarks</p> <p>The Chairman said that it was agreed at the last meeting that written views on the Crimes (Amendment) Bill 2021 be invited by posting a notice on the website of the Legislative Council. Six submissions were received which had been issued to members and forwarded to the Administration for written responses. The Administration was requested to provide relevant responses before the next meeting.</p>	Admin
001106 - 001718	Chairman Admin	Briefing by the Administration on its response to issues raised at the meeting on 19 April 2021 (LC Paper No. CB(2)1065/20-21(02))	
001719 - 003558	Chairman Deputy Chairman Admin ALA1	<p>The Deputy Chairman was of the view that "dishonest gain" under the proposed new section 159AAC had set the prosecution threshold too high as a defendant could claim that he/she did not regard his/her behaviour as dishonest. She said that "obtaining gain", irrespective of honest or dishonest, should be an element of the proposed offence of "non-consensual recording of intimate parts".</p> <p>The Chairman was concerned that specifying "dishonest gain" in the proposed new section might have the effect of excluding some behaviour (e.g. practical joke) from the scope of the offence. She said that there was a written submission suggesting that the consequences of "non-consensual recording of intimate parts", rather than the purposes of such behaviour, should be regarded as the element of the proposed offence.</p> <p>The Chairman and the Deputy Chairman called on the Administration to reconsider the necessity of specifying "dishonest" in the proposed new section.</p> <p>The Administration explained that criminal offences should be clearly defined to minimize the chance of inadvertent contravention. When finalizing the legislative proposals, reference had been made to section 161(1)(c) of the Crimes Ordinance (Cap. 200) and the judgment in relevant court cases. The views</p>	

Time marker	Speaker	Subject(s) / Discussion	Action Required
		<p>gauged during the public consultation exercise had been considered as well. The Administration further pointed out that the court held that a two-stage test should be adopted to decide if the defendant was "dishonest". In addition to the objective test, the subjective test of "whether the defendant himself realized that ordinary reasonable and honest people would regard his behaviour as dishonest" would be applied. Whether the defendant considered himself dishonest or not was irrelevant.</p> <p>Assistant Legal Adviser 1 ("ALA1") enquired about the need for the Administration to make reference to section 161(1)(c) of Cap. 200, which was previously applied in prosecutions against upskirt photography, in formulating the proposed new section 159AAC, and in the light of members' express concerns, whether the Administration would consider adopting alternative ways to better define the scope of the proposed offence of "non-consensual recording of intimate parts".</p> <p>The Administration undertook to incorporate the following information in its written responses to submissions on the Bill:</p> <p>(a) examples of scenarios in which "dishonest gain" under the proposed new section 159AAC was intended to be applicable to;</p> <p>(b) rationale for including the element of "dishonesty" in the proposed new section 159AAC; and</p> <p>(c) similar legislation concerning "non-consensual recording of intimate parts" in overseas jurisdictions.</p>	<p>Admin</p>
003559 - 004552	Chairman Admin	Briefing by the Administration on its reply to the letter dated 15 April 2021 from the Assistant Legal Adviser (LC Paper No. CB(2)1065/20-21(03))	
004553 - 010321	Chairman Deputy Chairman Admin ALA1	<p>The Deputy Chairman was concerned about the necessity of specifying "surreptitiously" under the proposed new section 159AAB. She said that "surreptitiously" was not stipulated in similar legislation in the United Kingdom ("UK") and Australia.</p> <p>The Chairman was concerned that "surreptitiously" would indirectly hinder the prosecution of the offence of voyeurism.</p>	

Time marker	Speaker	Subject(s) / Discussion	Action Required
		<p>The Administration pointed out that the proposed offence of voyeurism was formulated with reference to the relevant provision in the Criminal Code of Canada. The ordinary meaning of voyeurism was normally regarded as "acting surreptitiously". Although "surreptitiously" was not stipulated in similar legislation in UK, the element of "sexual satisfaction" had to be proved (rather than "sexual purpose" in the current legislative proposals), making the prosecution threshold in UK even higher.</p> <p>The Administration further pointed out that under the proposed offence of voyeurism, apart from observing or recording "surreptitiously", it was necessary to prove that no consent was given by the subject individual. In accordance with relevant court cases in Canada, "surreptitiously" referred "not to what the accused does, but to the state of mind with which he does it" (i.e. the defendant's intention that the subject individual not be aware of the act).</p> <p>Under the present law, where a person openly recorded an intimate part of an individual, the Administration said that depending on the circumstances, such behaviour might be in contravention of the offence of indecent assault.</p>	
010322 - 011729	Chairman ALA1 Admin	<p>With reference to the Administration's written response to the enquiry on the proposed new section 159AAI, ALA1 further enquired about the burden of proof for the defence under the proposed new section 159AAI(3). The Administration advised that it was proposed that the burden would be on the defendant to prove, on a balance of probabilities, the matters referred to in subsection (2) (i.e. a persuasive burden, as opposed to an evidential burden).</p> <p>ALA1 requested the Administration to consider providing the Bills Committee with information (such as relevant court cases) on similar statutory defence provisions relating to the age or mental capacity of subject individual in the context of sexual offences in overseas jurisdictions (including Australia, Canada, Ireland and Scotland as stated in the Administration's reply to ALA1's letter seeking clarifications), as well as similar existing statutory defences in Hong Kong, and also providing details of those provisions, in particular the burden of proof for the defendant, with reference to relevant court cases (if any).</p>	

Time marker	Speaker	Subject(s) / Discussion	Action Required
		The Administration undertook to incorporate the above information in its written responses to submissions on the Bill.	Admin
011730 - 011838	Chairman	Arrangement of next meeting and closing remarks	

Council Business Division 2
Legislative Council Secretariat
21 June 2021