

立法會
Legislative Council

LC Paper No. CB(2)1545/20-21
(These minutes have been seen
by the Administration)

Ref : CB2/BC/7/20

Bills Committee on Crimes (Amendment) Bill 2021

Minutes of third meeting
held on Monday, 28 June 2021, at 4:30 pm
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 SHIU Ka-fai, JP
Hon Vincent CHENG Wing-shun, MH, JP
- Members absent** : Hon Paul TSE Wai-chun, JP
Dr Hon CHENG Chung-tai
- 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:
 - (a) in relation to the proposed new section 159AAB, which sought to introduce an offence of voyeurism, advise on whether the provision as presently drafted would hinder prosecution of the offence, since prosecution was required to prove: (i) the person acted "surreptitiously"; and (ii) no consent was given by the subject individual, even where the actual identity of the subject individual might not be known and thus it was unlikely for any evidence of consent to be found;
 - (b) in respect of the place in which a subject individual could reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act under the proposed new section 159AAB, consider whether the provision as presently drafted was clear as to the types of places where one could reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act, and whether it was necessary to provide more illustrative examples;

- (c) in relation to the Administration's proposed amendments to the proposed new section 159AAC, address some members' concern about the proposed removal of the element of "gain" from the proposed new offence of non-consensual recording of intimate parts; and
- (d) consider adding new provisions to the Crimes (Amendment) Bill 2021 ("the Bill") regarding interim image-removal order and forfeiture order to be made by the court for taking down intimate images pending trial.

II. Any other business

3. The Chairman said that another meeting would be scheduled to discuss the Administration's response to issues raised at the meeting and consider the Administration's proposed amendments to the Bill. Members would be informed of the meeting arrangement in due course.

4. There being no other business, the meeting ended at 6:33 pm.

Council Business Division 2
Legislative Council Secretariat
11 October 2021

**Proceedings of third meeting of the
Bills Committee on Crimes (Amendment) Bill 2021
held on Monday, 28 June 2021, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex**

Time marker	Speaker	Subject(s) / Discussion	Action Required
000430 - 000630	Chairman	Opening remarks	
000631 - 002218	Chairman Admin Deputy Chairman	<p>Discussion on point (a) of the Administration's response to submissions on the Crimes (Amendment) Bill 2021 ("the Bill") (LC Paper No. CB(2)1222/20-21(01)).</p> <p>The Chairman and the Deputy Chairman were concerned that the proposed new section 159AAB, as presently drafted, would hinder prosecution of the offence of voyeurism, since the prosecution was required to prove (i) the person acted "surreptitiously"; and (ii) no consent was given by the subject individual, even where the actual identity of the subject individual might not be known and hence unlikely for any evidence of consent to be found.</p> <p>The Administration explained that, for the element of "surreptitiously" under the offence of voyeurism, the prosecution only had to prove that the defendant observed or recorded the subject individual with the intent that the subject individual not be aware of what the defendant was doing. Normally the subject individual should be present to give evidence. In the event the subject individual was not found, depending on the circumstances of specific case, circumstantial evidence might be sufficient for the purpose of prosecuting a case. The Administration was requested to consider the circumstances where the actual identity of the subject individual was unknown, and whether the Bill in its present form would make prosecution in certain cases difficult.</p>	Admin
002219 - 004737	Chairman Admin Deputy Chairman Mr SHIU Ka-fai	<p>Discussion on point (b) of the Administration's response to submissions on the Bill.</p> <p>The Chairman and the Deputy Chairman expressed concern that the proposed new section 159AAB(1)(a)(i), as presently drafted might not be clear as to what types of places (such as a hotel room, or the living room of a residential apartment) where a person could reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act.</p> <p>The Administration advised that the proposed new section 159AAB(1)(b) emphasized the circumstances a subject</p>	

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		<p>individual was in. This element would apply to all three scenarios under section 159AAB(1)(a). Taking the scenario of 159AAB(1)(a)(i) as an example, if the subject individual was in a place where one could reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act, and he or she was in "circumstances that give rise to a reasonable expectation of privacy", even if the subject individual was not nude, had not revealed an intimate part, or was not doing an intimate act, the defendant might still have committed the offence of voyeurism if the defendant observed or recorded without consent. As it would be impossible to give out an exhaustive list of places that would be covered under the proposed new section 159AAB(1)(a)(i), the Administration considered that it would be more appropriate to set out various conditions for the court to determine whether the elements of the offence of voyeurism were met based on the evidence and circumstances of the case.</p> <p>Mr SHIU Ka-fai expressed concern on the meaning of "observation" and enquired whether a person would commit the offence of voyeurism under various hypothetical scenarios. The Administration reiterated that the person's intent at the time of the observation was an offence element, i.e. the person observed the subject individual with the intent that the subject individual, who was in circumstances that gave rise to a reasonable expectation of privacy, not be aware of being observed or recorded.</p> <p>The Administration noted members' concern and advised that, upon passage of the Bill, it would launch publicity activities to raise public understanding on the Bill.</p> <p>The Administration was requested to consider whether the provision as presently drafted under the proposed new section 159AAB(1)(a)(i) provided a clear description as to the types of places where one could reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act, and whether it was necessary to provide more illustrative examples.</p>	<p>Admin</p>
004738 - 005050	Chairman Admin	Points (c) to (e) of the Administration's response to submissions on the Bill.	
005051 - 010746	Chairman Admin Deputy Chairman	Discussion on point (f) of the Administration's response to submissions on the Bill.	

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		<p>The Deputy Chairman was concerned whether the Administration's proposed removal of the element of "gain" from the proposed new section 159AAC would render the prosecution threshold of the offence of non-consensual recording of intimate parts even higher.</p> <p>The Administration explained that in considering whether the defendant had engaged in the conduct dishonestly, the circumstances/manners in which the conduct was done, rather than the purpose, constituted the relevant evidence. Section 159AAC(1)(b) on the <i>mens rea</i> of the person was essential in preventing inadvertent contravention by innocent people. Furthermore, the Administration referred to the prosecution of upskirt/ clandestine photography under section 161 of the Crimes Ordinance (Cap. 200) in the past, and explained that there was ample case law involving various scenarios where the element of "dishonesty" was involved. Hence, the Administration considered that the proposed amendments to the proposed new section 159AAC, in which a defendant who observed or recorded in a dishonest way might have committed the offence irrespective of the purpose of the observation or recording, would facilitate prosecution.</p> <p>The Administration further stressed that it had struck a balance in ring-fencing the scope of the Bill. While the Bill has the purpose of protecting people from falling victim to abuse, the scope of offence could not be so wide such that people without the requisite <i>mens rea</i> might inadvertently break the law.</p> <p>The Administration was requested to consider the Deputy Chairman's concern about the proposed removal of the element of "gain" from section 159AAC(1)(b), and provide members with the relevant draft proposed amendments to the Bill before the next meeting.</p>	<p>Admin</p>
010747 - 011239	Chairman Admin	<p>Discussion on point (g) of the Administration's response to submissions on the Bill.</p> <p>The Administration was requested to consider the Chairman's concern about how prosecution would prove the element of "no consent is given by the subject individual" under the proposed new section 159AAB(1)(c).</p>	<p>Admin</p>
011240 - 011323	Chairman Admin	<p>Point (h) of the Administration's response to submissions on the Bill.</p>	

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011324 - 011622	Chairman Admin	<p>Points (i) and (j) of the Administration's response to submissions on the Bill.</p> <p>The Chairman supported the Administration's proposal to include "down-blousing" under the proposed new section 159AAC.</p>	
011623 - 011756	Chairman Admin	Point (k) of the Administration's response to submissions on the Bill.	
011757 - 012239	Chairman Admin Deputy Chairman	<p>Points (l) and (m) of the Administration's response to submissions on the Bill.</p> <p>The Deputy Chairman's concern and the Administration's response regarding whether a threat to publish an intimate image had to be made with conditions under the proposed new section 159AAE.</p> <p>The Chairman's view and the Administration's response regarding the meaning of "whether the person is capable of publishing the intimate image" under the proposed new section 159AAE(4).</p>	
012240 - 012608	Chairman Admin	<p>Point (n) of the Administration's response to submissions on the Bill.</p> <p>The Chairman's enquiry and the Administration's response regarding whether it would constitute an offence under the proposed new section 159AAE if the consent to publish an intimate image was later withdrawn by the subject individual.</p>	
012609 - 013408	Chairman ALA1 Admin Deputy Chairman	<p>Point (o) of the Administration's response to submissions on the Bill.</p> <p>Assistant Legal Adviser 1 ("ALA1") referred to the Control of Obscene and Indecent Articles Ordinance (Cap. 390) and asked whether consideration would be given by the Administration to introducing new provisions to the Bill regarding image-removal or forfeiture order for the purpose of taking down intimate images.</p> <p>The Chairman requested the Administration to consider adding provisions regarding interim image-removal order and forfeiture order to the Bill.</p> <p>The Deputy Chairman expressed a similar view, adding that the court should be empowered to make image-removal order to take down intimate images pending trial.</p>	

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		<p>The Administration noted members' views and undertook to take a careful consideration on the matter. When necessary, draft amendments to the Bill would be submitted for members' consideration.</p>	<p>Admin</p>
<p>013409 - 014222</p>	<p>Chairman Admin ALA1</p>	<p>Point (p) of the Administration's response to submissions on the Bill.</p> <p>The Chairman welcomed the Administration's proposal to expand the definition of "intimate images" to cover "altered images".</p> <p>ALA1's enquiry and the Administration's response regarding whether the Bill was applicable to the publication or threatened publication of intimate images originating from other sexual offences.</p>	
<p>014223 - 014446</p>	<p>Chairman Admin</p>	<p>Point (q) of the Administration's response to submissions on the Bill.</p> <p>The Chairman's enquiry and the Administration's response regarding the scenario when a person published an intimate image of a subject individual whom the person did not know.</p>	
<p>014447 - 020338</p>	<p>Chairman Admin ALA1</p>	<p>Points (r) to (t) of the Administration's response to submissions on the Bill.</p> <p>ALA1 asked about the standard of proof for the defence regarding age or mental capacity of subject individual under the proposed new section 159AAI(2), as well as the required standard of proof under the proposed new section 159AAJ(2)(a) in relation to the defence regarding lawful authority or reasonable excuse.</p> <p>The Administration said that a persuasive burden would be imposed on a defendant relying on the defence under the proposed new section 159AAI of the Bill. Such burden of proof was more onerous than that of establishing a defence regarding lawful authority or reasonable excuse under the proposed new section 159AAJ, which imposed an evidential burden on a defendant. The Administration considered that the drafting of the proposed new sections 159AAI and 159AAJ was clear enough for interpretation of the standard and burden of proof by the court.</p> <p>The Chairman was concerned that the proposed new section 159AAI would create a loophole and afford insufficient protection to children under the age of 16.</p>	

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		<p>The Administration advised that, under the proposed new section 159AAG, a person could not give a consent that would prevent the conduct from becoming an offence under Division 2 of the Bill if the person was under the age of 16 or was mentally incapacitated. The Administration further stressed that, while legislation on criminal offences should protect vulnerable persons from sexual abuse or exploitation, a reasonable balance had to be struck between protection of a vulnerable class and the right to a fair trial for the accused. Besides, reference was made to a Court of Final Appeal decision on a case involving indecent assault of a girl under 16. The Court of Final Appeal held that the offence of indecent assault was not an offence of absolute liability, and that the imposition of a burden on the defendant to prove on the balance of probabilities that he honestly and reasonably believed that the girl in question was aged 16 or above passed the rationality and proportionality tests. Furthermore, the Law Reform Commission ("LRC") had published a report on Review of Substantive Sexual Offences in 2019, and it was the Government's plan to consider LRC's recommendations on the review of sexual offences, including statutory defences, in tandem.</p> <p>Extension of the meeting by 15 minutes</p>	
020339 - 020610	Chairman Admin	Points (u) to (w) of the Administration's response to submissions on the Bill	
020611 - 020747	Chairman	<p>The Administration was requested to provide draft proposed amendments to the Bill as soon as practicable.</p> <p>Arrangement of next meeting and closing remarks</p>	Admin