

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1557/20-21  
(These minutes have been seen  
by the Administration)

Ref : CB2/BC/7/20

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

**Minutes of fourth meeting**  
**held on Friday, 16 July 2021, at 10:30 am**  
**in Conference Room 2A 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 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

Ms Kiwi NG  
Legislative Assistant (2) 1

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## **I. Meeting with the Administration**

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

2. The Bills Committee requested the Administration to provide the following information before the next meeting:

- (a) in relation to the Administration's proposed amendments to remove the element of "no consent is given by the subject individual" from the offences under the proposed new sections 159AAB, 159AAC and 159AAD, (i) whether the prosecution would have to prove as a fact that no consent was given by the subject individual to the offence concerned; (ii) in view of the Administration's prior explanations as to the necessity for prosecution to prove the absence of consent as a fact, whether the proposed amendments reflected a change in the legislative intent; and (iii) if the prosecution would not bear the onus of proving that no consent was given by the subject individual, whether the prosecution threshold for the proposed new offences would be lower than that of other existing sexual offences;
- (b) in relation to the Administration's proposed amendments to expand the definition of "intimate image" in the proposed new

section 159AA to cover "altered image", providing relevant provisions of the Penal Code of Singapore with relevant court cases (if any) for members' reference;

- (c) considering revising the drafting of the Administration's proposed amendments to the proposed new section 159AAB(1)(a)(i);
- (d) in relation to the Administration's proposed amendments to the proposed new section 159AAC, considering (i) amending the heading of the proposed new section having regard to the proposed removal of the element of "no consent is given by the subject individual"; and (ii) whether it was necessary to include the elements of "sexual purpose" and "dishonesty" in the proposed offence;
- (e) in relation to the proposed new section 159AAI, considering whether there should be absolute liability where the relevant proposed offences involved children under the age of 16; and
- (f) providing written responses to various issues raised in the submission from Les Corner Empowerment Association (LC Paper No. CB(2)1301/20-21(01)) and further submission from the Association Concerning Sexual Violence Against Women (LC Paper No. CB(2)1310/20-21(01)) on the Bill.

## **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 continue the clause-by-clause examination of the Bill, together with consideration of the Administration's proposed amendments to the Bill. Members would be informed of the meeting arrangement in due course. The Chairman also welcomed further views from the public on the Bill.

4. There being no other business, the meeting ended at 12:39 pm.

**Proceedings of fourth meeting of the  
Bills Committee on Crimes (Amendment) Bill 2021  
held on Friday, 16 July 2021, at 10:30 am  
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject(s) / Discussion	Action Required
000813 - 003510	Chairman Admin ALA1 Deputy Chairman	<p>Opening remarks</p> <p>Briefing by the Administration on its response to issues raised at the meeting on 28 June 2021 (LC Paper No. CB(2)1295/20-21(02)).</p> <p>Assistant Legal Adviser 1 ("ALA1") referred to the Administration's proposed amendments regarding the element of "no consent is given by the subject individual to the conduct" in the proposed offences and sought clarifications as follows:</p> <p>(a) whether the prosecution would have to prove that no consent was given by the subject individual to the conduct in question in relation to the proposed offences under the proposed new sections 159AAB, 159AAC and 159AAD;</p> <p>(b) whether the Administration's proposed amendments reflected a change in the legislative intent of the Crimes (Amendment) Bill 2021 ("the Bill"); and</p> <p>(c) if the prosecution would not bear the onus of proving that no consent was given by the subject individual, whether the prosecution threshold for the proposed new offences would be lower than that of other existing sexual offences.</p> <p>The Administration responded that:</p> <p>(a) the legislative intent to protect the victim's right to privacy and sexual autonomy remained unchanged. It did not intend to interfere with the private and voluntary conduct of members of the public;</p> <p>(b) having regard to members' concerns raised at the last meeting, the element of "no consent is given by the subject individual" was proposed to be removed from the three proposed offences under the proposed new sections 159AAB, 159AAC and 159AAD. While the prosecution did not have to prove that no consent was given by the subject individual to the conduct in question under the proposed amendments, the consent</p>	

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		<p>of the subject individual was still important as the prosecution had to prove that the defendant "disregards whether the subject individual consents to being observed or recorded" or "disregards whether the subject individual consents to the publication"; and</p> <p>(c) the proposed amendments mainly sought to address cases in which the subject individual was unknown and/or could not give evidence, whereas for other sexual offences (such as rape), the subject individual would usually be identified to give evidence.</p> <p>The Administration was requested to provide a written response regarding the above clarifications to its proposed amendments to remove the offence element of "no consent is given by the subject individual".</p>	<p><b>Admin</b></p>
<p>003511 - 005640</p>	<p>Chairman Admin ALA1 Deputy Chairman Mr Paul TSE</p>	<p>The Chairman was concerned about the defence regarding age or mental capacity of the subject individual under the proposed new section 159AAI. She said that the Association Concerning Sexual Violence Against Women ("ACSVAW") had submitted a further submission (LC Paper No. CB(2)1310/20-21(01)) expressing the view that the proposed defence under the Bill was too simple, and suggested the Administration to make reference to the Prevention of Child Pornography Ordinance (Cap. 579) to enrich the content of the proposed statutory defence.</p> <p>The Administration explained that the scope of Cap. 579 was more specific and the nature of offences so covered were not similar to the new offences under the Bill. The Administration further said that, in drafting the Bill, it had made reference to the existing relevant provisions and the court's latest judgments.</p> <p>ALA1 further pointed out that the Equal Opportunities Commission ("EOC") had made two recommendations on the content and scope of the proposed defence under the Bill in its submission to the Bills Committee (LC Paper No. CB(2)1059/20-21(01)), which were recapitulated as follows:</p> <p>(a) "there should be no defence where it relates to persons between the ages of 13 and 16"; and</p> <p>(b) "there should be absolute liability and no defence for offences involving children under 13".</p>	

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		<p>The Chairman and the Deputy Chairman were of the view that children under the age of 16 should be duly protected, and that the Administration should make references to EOC's submission.</p> <p>The Administration agreed that legislation on criminal offences should protect vulnerable persons, including children and mentally incapacitated persons, from sexual abuse or exploitation. As such, the proposed new section 159AAG sought to provide that 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. That said, the Administration considered it appropriate to introduce a defence under the proposed new section 159AAI, allowing a defendant to prove, on a balance of probabilities, that he honestly believed that a consent was given by the subject individual, and he did not know and had no reason to suspect that the subject individual was an individual under the age of 16 or a mentally incapacitated person. Similar defence was also found in a number of common law jurisdictions.</p> <p>The Chairman considered that the proposed new sections 159AAG and 159AAI were contradictory. She said that there should be no defence if the subject individual was under the age of 16 or mentally incapacitated.</p> <p>Mr Paul TSE was of the view that a balance had to be struck between protecting children under the age of 16 and mentally incapacitated persons and the right to a fair trial for the defendant. As such, he was inclined to accept the Administration's proposal on defence under the proposed new section 159AAI.</p> <p>The Administration was requested to further consider members' views on defence, including whether there should be absolute liability where the relevant proposed offences involved children under the age of 16.</p>	<p><b>Admin</b></p>
005641 - 012613	<p>Chairman Admin Mr Paul TSE Deputy Chairman ALA1</p>	<p>Members agreed that the Bills Committee would examine the Bill clause-by-clause together with the Administration's proposed amendments to the Bill (Annex to LC Paper No. CB(2)1295/20-21(02)).</p> <p>Examination of the long title, clauses 1 and 2 of the Bill.</p> <p>Examination of the proposed new section 159AA under clause 3 of the Bill</p>	

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		<p><u>Sexual purpose</u></p> <p>The Chairman said that ACSVAW had pointed out in its submission that the definition of sexual purpose in the proposed new section 159AA was unclear and vague, and expressed the view that in respect of the proposed new section 159AAC(1)(b) regarding the purpose/intent of non-consensual recording of intimate parts, the proposed element of the offence should be removed.</p> <p>The Administration responded that:</p> <ul style="list-style-type: none"><li>(a) it had made references to overseas jurisdictions and found that "sexual purpose" was always included as an element in sexual offences;</li><li>(b) "sexual purpose" as the <i>mens rea</i> was only one of the scenarios for the proposed offences of voyeurism and non-consensual recording of intimate parts. As the proposed offences were serious ones subject to imprisonment for up to five years, it was considered necessary for the prosecution to prove the defendant's <i>mens rea</i> in order to avoid inadvertent contravention by innocent people; and</li><li>(c) since the proposed defence regarding lawful authority or reasonable excuse did not apply to a person who committed voyeurism (section 159AAB) or non-consensual recording of intimate parts (section 159AAC) for a sexual purpose, a reasonable balance was struck by having the element of "sexual purpose" in the proposed offences under the proposed new sections 159AAB and 159AAC.</li></ul> <p><u>Intimate image</u></p> <p>In response to Mr Paul TSE's enquiry, the Administration clarified that "image" included only photographic records but not illustrations.</p> <p>Referring to the Administration's proposed amendments to the definition of "intimate image", the Chairman, the Deputy Chairman and Mr Paul TSE considered that "an image so altered that no reasonable person would believe" under paragraph (c) of the proposed amendments a bit vague, and sought relevant examples.</p> <p>The Administration said that the inclusion of "altered image" in the definition of intimate image in the context of</p>	

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		<p>criminal offences in overseas jurisdictions was a relatively new legislative development. Furthermore, with technological advancement, it might not be easy to give a precise definition of "altered image". Hence, the Administration suggested making references to the definition of "intimate image" in the Penal Code of Singapore by excluding an image so altered that a reasonable man would not consider that such images showed an intimate part of the subject individual in question or that individual doing an intimate act. It was pointed out that the application of the reasonable man test had been effective as a legal test in other offences.</p> <p>Mr Paul TSE expressed that he understood that the Administration had to strike a balance between protecting victims and excluding those images apparently not showing the victim from the scope of the Bill. He was inclined to accept the current proposal and called on the Administration to study relevant legislation in other jurisdictions, and conduct review as and when appropriate. The Administration noted and advised that it would keep in view relevant practice in other jurisdictions, and propose legislative amendments when needed.</p> <p>The Administration was requested to provide relevant provisions of the Penal Code of Singapore with relevant court cases (if any) for members' reference.</p>	<p><b>Admin</b></p>
<p>012614 - 013636</p>	<p>Chairman Admin ALA1 Mr Paul TSE</p>	<p>Examination of the proposed new section 159AAB under clause 3 of the Bill.</p> <p>ALA1's concern and the Administration's response regarding the drafting of the Administration's proposed amendments to the Chinese text of the proposed new section 159AAB(1)(a)(i).</p> <p>Mr Paul TSE considered that the proposed amendments was difficult to comprehend.</p> <p>The Administration was requested to consider revising the drafting of the proposed amendments to the proposed new section 159AAB(1)(a)(i).</p>	<p><b>Admin</b></p>
<p>013637 - 021235</p>	<p>Chairman Admin Mr Paul TSE Deputy Chairman ALA1</p>	<p>Examination of the proposed new section 159AAC under clause 3 of the Bill.</p> <p>The Chairman's concern and the Administration's response regarding the scenarios in which the proposed new section 159AAC(1)(a)(ii) would apply.</p>	



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		<p>While expressing an understanding of the Administration's objective to clearly define the proposed offence, Mr Paul TSE pointed out that the proposed provision might be too technical and might hinder prosecution. He further asked about the rationale for singling out the element of "dishonesty" and removing the element of "gain" under the Administration's proposed amendment.</p> <p>The Administration responded that:</p> <ul style="list-style-type: none"> <li>(a) it was considered necessary to be more precise in defining the scope of the proposed offence of non-consensual recording of intimate parts, especially when the proposed offence would also cover "down-blousing" scenarios which were less straightforward than "upskirting";</li> <li>(b) in relation to whether a person under prosecution for the proposed offence was "dishonest", the two-stage test laid down in <i>R v Ghosh</i> [1982] QB 1053 would be applied by the courts;</li> <li>(c) the prosecution had to prove that the defendant did the recording or operated the equipment in a dishonest manner/under dishonest circumstances. Case law in respect of the offence of access to computer with dishonest intent under section 161 of the Crimes Ordinance (Cap. 200) could be relevant in determining the issue of dishonesty; and</li> <li>(d) a balance had to be struck in dealing with the scope to avoid people without the requisite <i>mens rea</i> being caught by the offence. Hence, the element of "dishonesty" was considered appropriate to ring fence against inadvertent contravention.</li> </ul> <p>The Chairman and the Deputy Chairman expressed concern about the elements of "sexual purpose" and "dishonesty" in the proposed offence, and asked whether it was necessary to include them.</p> <p>ALA1 remarked that in the <i>Report on Voyeurism and Non-consensual Upskirt-Photography</i> published by the Law Reform Commission ("LRC"), it had recommended the introduction of an offence of non-consensual upskirt photography committed for the purpose of obtaining sexual gratification, as well as a separate offence of non-consensual recording committed irrespective of the purpose. ALA1 suggested the Administration to provide</p>	

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		<p>their rationale for not adopting LRC's recommendation for members' consideration.</p> <p>The Administration responded that:</p> <ul style="list-style-type: none"><li>(a) having regard to the views collected during the public consultation exercise (including views that non-consensual recording of intimate parts was equally heinous whether it was for a sexual purpose or for other purposes, that it should be punishable at the same penalty level, and that the scope of the offence might be too wide if it could be committed "irrespective of the purpose"), the Administration proposed in the draft Bill to introduce one single offence of non-consensual recording of intimate parts and the element of "engaging in the conduct dishonestly" was introduced, with a view to refining the scope of the offence;</li><li>(b) as the proposed offence constituted a serious sexual offence, it was considered necessary to define the requisite <i>mens rea</i> so that the proposed offence would not be too wide in scope;</li><li>(c) "dishonestly" referred to the manner and circumstances in which the observation or recording is done, rather than the purpose of the conduct. The prosecution would have to prove that the defendant did the recording or operated the equipment in a dishonest manner, which should not be a particularly onerous burden for the prosecution;</li><li>(d) the Police and the Department of Justice had been consulted, and were of the view that the Administration's proposed amendments were appropriate, having regard to case law in respect of the offence of access to computer with dishonest intent under section 161 of Cap. 200; and</li><li>(e) the proposed defence regarding lawful authority or reasonable excuse would be more complicated if the proposed new section 159AAC(1)(b) (i.e. the offence elements of "sexual purpose" and "dishonesty") were removed.</li></ul> <p>Extension of the meeting by 15 minutes</p> <p>In response to the Deputy Chairman's suggestion on the heading of the proposed new section 159AAC having regard to the proposed removal of "no consent is given</p>	

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		<p>by the subject individual" from the section, the Administration was requested to consider introducing further amendment(s) accordingly.</p> <p>Mr Paul TSE reminded the Administration to be cautious in making adaptation to overseas legislation in drafting the Bill. He was of the view that the proposed new section 159AAC(1)(a), in some ways, might suffice. The proposed new section 159AAC(1)(b) might be too restrictive and failed to reflect the legislative intent. The Chairman expressed a similar view.</p> <p>The Administration reiterated that the proposed new section 159AAC was drafted taking into consideration similar legislation in other jurisdictions, the views collected during public consultation, as well as the situation in Hong Kong.</p> <p>The Administration was requested to consider whether it was necessary to include the elements of "sexual purpose" and "dishonesty" in the proposed offence of non-consensual recording of intimate parts.</p>	<p><b>Admin</b></p> <p><b>Admin</b></p>
021236 - 021306	Chairman	Closing remarks.	