



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

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15 April 2021

Ms Joceline CHUI  
Principal Assistant Secretary (Security) E  
Security Bureau  
E Division  
10th Floor, East Wing  
Central Government Offices  
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Ms CHUI,

### **Crimes (Amendment) Bill 2021**

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, we should be grateful if you could clarify the following issues.

#### Absence of consent

Under the proposed new sections 159AAB, 159AAC, 159AAD and 159AAE of the Crimes Ordinance (Cap. 200), in relation to the issue of consent, it is proposed that it must be proved that:

- (a) no consent is given by the subject individual to the conduct in question (see the proposed new sections 159AAB(1)(c), 159AAC(1)(c), 159AAD(1)(c) and 159AAE(1)(c)); and
- (b) the person disregards whether the subject individual consents to the conduct in question (see the proposed new sections 159AAB(1)(d), 159AAC(1)(d), 159AAD(1)(d)(ii) and 159AAE(1)(d)).

Please clarify whether the legislative intent is that in proving the elements of the offence, it is necessary, in addition to proving that the person either has knowledge that the subject individual does not consent to the conduct or is reckless as to whether the subject individual consents to the conduct, that it must also be proved that as a matter of fact no consent has been given by the subject individual to the conduct. If that is the legislative intent, please also clarify the rationale for requiring standalone proof of absence of consent. Based on the Law Reform Commission's Report on Voyeurism and Non-Consensual Upskirt-Photography issued in April 2019, our understanding is that the proposed new section 159AAB of Cap. 200 is based on section 67 of the Sexual Offences Act 2003 of the United Kingdom, which only requires proving that the person "knows that the other person does not consent to being observed for his sexual gratification".

#### Meaning of "disregard"

Under the proposed new section 159AAH of Cap. 200, "disregard" is proposed to mean that either the person "knows that the subject individual does not consent to the conduct", or "is reckless as to whether the subject individual consents to the conduct". Please clarify (with examples and relevant court cases) what "reckless" in the context of a person being "reckless as to whether the subject individual consents to the conduct" is intended to mean.

#### Observing "surreptitiously"

Under the proposed new section 159AAB of Cap. 200, it is proposed that it would be an offence for a person to "surreptitiously" observe or record an individual in a place in which any individual can reasonably expected to be nude, to reveal an intimate part, or to be doing an intimate act. Please clarify the use of the expression "surreptitiously" by providing examples of the types of conduct that the proposed new section is meant to be applicable to.

Please also clarify, in the context of a person observing or recording another person "surreptitiously", whether it would still be necessary to require proof that no consent is in fact given by the subject individual, and that the person secretly observing or recording another person either has knowledge that there is no consent or is reckless as to whether consent is given. In this regard we note that the proposed new section 159AAB is partly based on section 162 of Part V of the Criminal Code of Canada. In the Canadian provision, the expression "surreptitiously" is used in an identical fashion as in the proposed new

section 159AAB. However, it appears that absence of consent is not an element of the offence in the Canadian provision.

### "Intimate act"

Under the Bill, it is proposed in the proposed new section 159AA(2) of Cap. 200 that an individual is doing an intimate act if "the individual is using the toilet in a manner that an intimate part of the individual is likely to be revealed; or the individual is doing a sexual act that is not of a kind ordinarily done in public." We note that the terms "sexual act" and "in public" are not defined under Cap. 200 and the Bill. Please clarify (with examples and relevant court cases (if any)) what is intended to be covered by "sexual act" and "in public" under the Bill.

Please also clarify what is the intended meaning of the phrase "not of a kind ordinarily done in public". For instance, whether it is intended to refer to sexual acts that normally take place in circumstances where individuals have reasonable expectation of privacy (see the proposed new section 159AAB(1)(b) of Cap. 200 in relation to the use of the phrase "reasonable expectation of privacy").

### Non-consensual recording of intimate parts

Under the proposed new section 159AAC of Cap. 200, a person would commit an offence if the person with intent to observe or record an intimate part of an individual "operates equipment in an unreasonable manner for the purpose of observing or recording an intimate part of the individual through an opening or a gap in the outer clothing of the individual". Please clarify (with examples) the types of conduct that would fall within the intended meaning of "operates equipment in an unreasonable manner".

### "Operates equipment"

In the proposed new section 159AA(3) of Cap. 200, it is proposed that "For the purposes of this Part, a person operates equipment even if the person merely enables or secures its activation by another person without that other person's knowledge" (underline added). Please clarify whether the following is a correct understanding of the proposed section: "For the purposes of this Part, person A operates equipment even if person A merely enables or secures its activation by person B without person B's knowledge" (underline added). If so, please also clarify (with examples) the types of factual scenario that the proposed section is intended to be applicable to.

Defences

Under the proposed new section 159AAI of Cap. 200, it would be a defence for a person charged with an offence under Division 2 to prove that the person did not know and had no reason to suspect that the subject individual was under 16 or a mentally incapacitated person. With reference to other existing sexual offences under Cap. 200, please clarify the rationale for providing such a defence under the Bill.

Under the proposed new section 159AAJ of Cap. 200, it would be a defence for a person charged with an offence under Division 2 to establish that the person had lawful authority or reasonable excuse for the contravention. Please clarify (with examples and relevant court cases (if any)) what such "lawful authority or reasonable excuse" would be.

Please let us have your response by email in both English and Chinese as soon as practicable, preferably before the second meeting of the Bills Committee.

Yours sincerely,



(Joyce CHAN)

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