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Bills Committee on Crimes (Amendment) Bill 2021

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information and summarizes discussions by the Panel on Security ("the Panel") on the Administration's proposed introduction of offences on voyeurism and non-consensual recording of intimate parts, and related offences.

Background

2. There is currently no specific offence against voyeurism or non-consensual recording of intimate parts (such as upskirt photography). Depending on the circumstances of each case, such acts have been prosecuted with the following charges:

- (a) "loitering" under section 160 of the Crimes Ordinance (Cap. 200) with a maximum penalty of imprisonment for two years;
- (b) "disorder in public places" under section 17B of the Public Order Ordinance (Cap. 245) with a maximum penalty of a fine at level 2 (or \$5,000 at the current level) and imprisonment for 12 months;
- (c) "outraging public decency" under common law with a maximum penalty of imprisonment for seven years; or
- (d) "access to computer with criminal or dishonest intent" under section 161 of the Crimes Ordinance with a maximum penalty of imprisonment for five years.

3. According to the Administration, out of 275 convicted cases under section 161 of the Crimes Ordinance between 2015 and 2018, 73% of the convicted cases related to upskirt photography (including still and video recordings) using mobile phones in both public and private places, as well as the uploading of intimate images without consent. In the light of the Court of Final Appeal ("CFA") judgment,¹ it will no longer be appropriate for the prosecution to press charge under section 161 of the Crimes Ordinance against upskirt photography and the distribution of intimate images without consent, if the act involved only the use of the suspect's own computer. Depending on the circumstances, there are also limitations in instituting prosecution against voyeurism or non-consensual recording of intimate parts under other offences set out in paragraph 2 above. Generally speaking, those offences are applicable only to acts that occur in a public place or a place where what is done is capable of public view, and thus may not be applicable to acts that occur in a private place.

4. As a related development, the Law Reform Commission ("LRC") appointed a Review of Sexual Offences Sub-committee in July 2006 to conduct an overall review of the substantive sexual offences in Hong Kong. In April 2019, LRC published the *Report on Voyeurism and Nonconsensual Upskirt-Photography* ("the Report"), which is part of LRC's overall review of the law governing sexual offences. In the Report, LRC recommended the introduction of an offence of voyeurism; an offence of non-consensual upskirt photography committed for the purpose of obtaining sexual gratification, as well as a separate offence committed irrespective of the purpose.

The Crimes (Amendment) Bill 2021

5. The Crimes (Amendment) Bill 2021 ("the Bill") was published in the Gazette on 19 March 2021 and received its First Reading at the Council meeting of 24 March 2021. The purpose of the Bill is to amend the Crimes Ordinance to introduce new offences of voyeurism and non-consensual recording of intimate parts, and related image publication offences.

¹ CFA held in its judgment laid down in April 2019 that section 161(1)(c) of the Crimes Ordinance (obtaining access to a computer "with a view to dishonest gain for himself or another") does not extend to the use of the offender's own computer. In other words, section 161(1)(c) of the Crimes Ordinance does not apply to the use of a person's own computer only, while not involving access to another person's computer. CFA's judgment would equally apply to the construction of subsections (a) ("with intent to commit an offence"), (b) ("with a dishonest intent to deceive") and (d) ("with a dishonest intent to cause loss to another") of section 161(1) of the Crimes Ordinance.

Deliberations of the Panel

6. The Panel discussed the Administration's proposed introduction of offences on voyeurism and non-consensual recording of intimate parts, and related offences respectively at the meetings on 7 July 2020 and 15 January 2021, and the deliberations are summarized below.

Guiding principle of gender neutrality laid down by the Law Reform Commission

7. Members noted that one of the guiding principles laid down by the LRC sub-committee was gender neutrality. The law on sexual offences should, as far as possible, not to make distinctions based on gender. A gender neutral definition would also better cater for the needs of gender minorities. For the purpose of the proposed offences, it was proposed that, among others, the definition of "intimate acts" and "intimate parts" should include breasts irrespective of gender.

8. Some members cautioned that the legislative proposals should be drafted clearly to avoid members of the public breaching the laws inadvertently. According to the Administration, the Government attached great importance to the guiding principles laid down by LRC, including the issue of gender neutrality. The proposed offences would be equally applicable to all genders.

Voyeurism

9. Members noted the Administration's proposal of introducing an offence of voyeurism, contravention of which would be liable on conviction on indictment to imprisonment for five years. They sought clarifications as to whether the proposed offence would be constituted regardless of sexual purposes, and the places that would "reasonably be expected to provide privacy".

10. The Administration explained that under the proposed offence of voyeurism, the person observing or recording a subject individual engaged in an intimate act must act "surreptitiously". Besides, the person being observed or recorded must be in the circumstances that gave rise to a "reasonable expectation of privacy". Whether a place was expected to provide privacy depended on the specific circumstances and could not be generalized.

Non-consensual recording of intimate parts

11. While supporting the proposed offence of non-consensual recording of intimate parts, some members expressed concern at the meeting on 15 January 2021 about excluding "down-blousing"² from the scope of the legislative amendments. They considered that "down-blousing" was in fact as serious as "upskirting" and not seeking to address the problem in the current legislative exercise amounted to negligence. They urged the Administration to reconsider including "down-blousing", such that non-consensual recording of the breasts of females, males and transgender persons would also be covered.

12. Members were advised that there were different views as to whether the proposed offence should cover "down-blousing". It was mindful of the possibilities of inadvertent contravention of abuse, as well as the different levels of concern regarding the exposure of female and male breasts. Hence, it was proposed to proceed with the legislative amendments to deal with upskirt photography first, and to tackle the issue of down-blousing as appropriate in the future.

13. As stated in the Legislative Council ("LegCo") Brief on the Bill, it was now proposed that "upskirting" and "down-blousing" would be covered under the scope of the offence of non-consensual recording of intimate parts.³ According to the Administration, the delicate scoping of the offence should be sufficient to ring-fence against inadvertent contravention, abuse and false accusations.

Publication of intimate images

14. While welcoming the two proposed offences concerning publication of intimate images (i.e. the distribution of surreptitious images obtained from committing the offence of voyeurism or non-consensual photography of intimate parts, and the distribution of intimate images where consent might have been given or was given for the taking of such intimate images (including still images and videos), but not for the subsequent distribution), some members expressed concern that threatening to publish intimate

² "down-blousing" generally refers to the taking of photos down the top of a person's blouse to capture an image of his/her breast.

³ A person would be contravened of the offence only if all of the following elements are met: (a) the person actually records an image showing an intimate part of an individual, or the person operates an equipment with intent to observe or record an intimate part; (b) the intimate part would not otherwise be visible; (c) the act is done for a sexual purpose, or for the purpose of obtaining dishonest gain; and (d) no consent is given by the individual to being observed or recorded, and the person disregards whether such consent is given.

images was not covered under the proposed offences. These members pointed out that blackmailing and threatening to distribute intimate images would cause undue distress and pressure on the victims and took the view that threat to distribute non-consensual intimate images should also constitute an offence. As stated in the LegCo Brief on the Bill, the Administration also proposed to introduce another offence to, among others, prohibit threatened publication without consent of intimate images (including still images and videos) where consent might have been given, or was given, for the taking of such intimate images, but not for the publication or threatened publication.

15. Some members queried why the mere forwarding or sharing of intimate images in the absence of the requisite *mens rea* would be excluded from the scope of the proposed offences. According to the Administration, the construct of the offence would include the element that "the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress". It was highlighted that the scope of the proposed offences had to be precise to specifically target at the act of "publication", and would render effective legal remedy to individuals involved in cases such as revenge porn.

16. Some members were concerned about the Administration's proposal that the two proposed offences on the publication of intimate images would not be covered under the Sexual Conviction Record Check ("SCRC") Scheme.⁴ According to the Administration, as it was observed that offences related to the distribution of obscene and indecent articles under the Control of Obscene and Indecent Articles Ordinance (Cap. 390) were currently not included in the list of sexual offences under the SCRC Scheme, it was proposed that the two offences on the publication of intimate images should by the same token not be covered.

Relevant papers

17. A list of the relevant papers on the LegCo website is in the **Appendix**.

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⁴ The SCRC Scheme is an administrative scheme established in 2011 to enable employers of persons undertaking child-related work and work relating to mentally incapacitated persons to check whether eligible applicants have criminal conviction records against a specified list of sexual offences.

**Relevant papers on
Proposed introduction of offences on voyeurism and
non-consensual sexual photography of intimate parts**

Committee	Date of meeting	Paper
Legislative Council	8.5.2019	Official Record of Proceedings (Question 20)
Panel on Security	7.7.2020 (Item IV)	Agenda Minutes CB(2)1334/19-20(01)
	15.1.2021 (Item IV)	Agenda Minutes

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