

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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6 May 2021

Miss Betty MA
Council Business Division 2
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Miss MA,

**Follow-up to the Meeting of the
Bills Committee on Crimes (Amendment) Bill 2021
on 19 April 2021**

Thank you for your letter dated 20 April 2021. In response to the follow-up matters raised at the aforesaid meeting, I hereby provide supplementary information as set out in the ensuing paragraphs.

(a) Dishonest gain

2. Under section 159AAC(1)(b) of the Crimes (Amendment) Bill 2021 (“the Bill”), non-consensual recording of intimate parts has to be made for a sexual purpose or for the purpose of obtaining dishonest gain for the person, or for any other person. Section 159AAC(3) of the Bill stipulates that “gain” includes a gain in money or property, a temporary or permanent gain, a gain by keeping what one has and a gain by getting what one has not. This definition is made with reference to the definition of “gain” in relation to the offence of access to a computer with criminal or dishonest intent under section 161 of the Crimes Ordinance (Cap. 200) (“the Ordinance”).

3. In *HKSAR v Tsun Shui Lun* ([1999] 3 HKLRD 215, [1999] 2 HKC 547), the Court of First Instance of the High Court (“CFI”) held that “gain” included obtaining information which the defendant did not have prior to the access to a

computer. The court also held that a two-stage test should be adopted to decide whether the defendant was “dishonest”. The first stage of the test is to decide whether the defendant’s conduct was dishonest by the objective standards of reasonable and honest people (an objective test), and the second stage of the test is to decide whether the defendant himself realized that ordinary reasonable and honest people would regard his behaviour as dishonest (a subjective test).

4. Before the Court of Final Appeal (“CFA”) ruled in *Secretary for Justice v Cheng Ka Yee* [2019] HKCFA 9 that section 161 of the Ordinance should not be extended to the use of the defendant’s own computer (without involving access to another person’s computer), section 161(1)(c)¹ was often used for the prosecution against upskirt photography. In *HKSAR v Ho Siu-Hei Jason* [2018] HKCFI 974, the defendant reached out through the window of a female toilet and used a smart phone in his hand to record the subject individual clandestinely while she was using the toilet. The defendant was charged under section 161(1)(c) of the Ordinance. The CFI held that the defendant’s act of recording clandestinely was for the purpose of obtaining dishonest gain for himself.

5. For instance, if an adult man of normal cognitive ability secretly placed a smart phone under the skirt of a woman in front of him who he did not know on an ascending escalator, and took upskirt photos of her without her knowledge, the man’s conduct may fall within the situation described in section 159AAC(1)(b)(ii). It is because the man obtained the photo (a gain), and that gain was obtained dishonestly.

(b) Whether the prosecution is required to prove the actual presence of an intimate image in instituting prosecution for threatened publication under section 159AAE(2) of the Bill

6. Pursuant to section 159AAE(2) of the Bill, a person commits an offence if the person makes a threat to publish an intimate image of the victim without his or her consent, disregards whether the victim consents to the threatened publication, and intends the threat to cause humiliation, alarm or distress to the victim, or knows or is reckless as to whether the threat will or is likely to cause such to the victim.

7. Section 159AAE(2) focuses on the conduct of threatened publication. If a person threatens to publish an intimate image of a victim and intends to cause humiliation, alarm or distress to the victim, or knows or is reckless as to whether the victim will be humiliated, alarmed or distressed, even if he is not capable of

¹ Section 161(1)(c) of the Crimes Ordinance stipulates that –
“(1)Any person who obtains access to a computer—... (c)with a view to dishonest gain for himself or another; ...whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years.”

publishing the image (say he does not possess such an image at all), such conduct still seriously infringes the victim's right to privacy and sexual autonomy, potentially causing great harm and distress to the victim. To clearly express our legislative intent, section 159AAE(4) stipulates that it is immaterial whether the person who makes the threat is capable of publishing the intimate image. In other words, the prosecution is not required to prove the actual presence of an intimate image in instituting a prosecution under section 159AAE(2) of the Bill.

(c) The meaning of "reckless"

8. The CFA decides in *Sin Kam Wah and another v HKSAR* (2005) 8 HKCFAR 192 that, given the subjective interpretation of "recklessness", the prosecution shall prove that the defendant: (1) was aware of a risk which did or would exist, and acted recklessly in respect of the circumstances, or (2) knowing the consequences or the potential risk, acted recklessly, and it was, in the circumstances known to the defendant, unreasonable to take the risk. Conversely, the defendant could not be regarded as having the required mens rea of the offence and be convicted if, due to the defendant's age or personal characteristics, the defendant genuinely did not appreciate or foresee the risks involved in the defendant's actions.

9. The concept of "recklessness" is also seen in sexual offences in other existing legislation. For rape, section 118(3) of the Ordinance sets out that the offence involves: (a) a man having unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it and (b) at that time knowing that she does not consent to the intercourse **or being reckless as to whether she consents to it** (emphasis added). According to the Judiciary's Specimen Directions in Jury Trials, a fact finder (a jury) has to consider whether the defendant realized the risk that the subject individual may not consent to the intercourse, and carried on anyway when in the circumstances known to him it was unreasonable to do so. If so, the defendant would be considered as being reckless as to whether the subject individual consents to the sexual intercourse. However, if due to his age or personal characteristics the defendant genuinely did not appreciate or foresee the risk of his conduct (i.e. the subject individual may not consent to having sexual intercourse with him), he was then not being regarded as reckless.

10. In *HKSAR v Lim Wai Lung Patrick Christian* CACC 86/2012, the Court of Appeal explained that anyone who had sexual intercourse with a woman after knowing that she had been rendered unconscious by drugs would (at least) be reckless as to whether she would consent to having sexual intercourse.

11. For example, one of the elements of the offence of non-consensual recording of intimate parts under section 159AAC(1) is that the person disregards whether a subject individual consents to the person's conduct (section 159AAC(1)(d)). If an adult man of normal cognitive ability placed a smart phone under the skirt of a woman in front of him who he did not know on an ascending escalator to record her intimate parts, even if that man was never been told by the woman that she did not consent to the conduct of clandestine photography, generally speaking the man must have realized that the woman most likely would not consent to the conduct, and would be able to understand that clandestine photography was unreasonable under those circumstances. Therefore, the man would (at least) be reckless as to whether the woman consents to his conduct of clandestine photography.

12. We hope that the information above will facilitate the Bills Committee in its scrutiny of the Bill.

Yours sincerely,
(Signed)
(Ms Joceline CHUI)
for Secretary for Security

c.c.

Department of Justice

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