

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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Dear Miss CHAN,

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

Thank you for your letter dated 15 April 2021. Having consulted the Department of Justice and the Hong Kong Police Force, our reply is set out in the ensuing paragraphs.

#### Absence of consent

2. We are of the view that behaviors such as voyeurism, clandestine photography and non-consensual publication of intimate images should be criminalized because the subject individuals do not consent to the conduct. The Government's legislative intent is to protect the victims' right to privacy and sexual autonomy. It does not intend to interfere with the private and voluntary conduct of members of the public.

3. Regarding the "absence of consent" in the four offences under the Crimes (Amendment) Bill 2021 ("the Bill"), the prosecution shall prove that: (1) no consent is given by the subject individual to that conduct; and (2) the person engaging in that conduct disregards whether the subject individual consents to the conduct.

4. These two elements of the offences have different focuses. Element

(1) above centers on **whether the subject individual actually consents to the conduct**; while element (2) above centers on the **subjective criminal intent** of the person engaging in the conduct. Taking rape as an example, section 118(3) of the Crimes Ordinance (Cap. 200) (“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 the man **knows** that she does not consent to the intercourse or is **being reckless** as to whether she consents to it. As regards other sexual offences such as indecent assault, if the subject individual consents to the conduct, it will not constitute indecent assault (except when the subject individual is under the age of 16 or is mentally incapacitated). The prosecution is further required to prove that the defendant knows that the victim does not consent to the conduct, or is being reckless as to whether the victim consents to it.<sup>1</sup>

5. We note that the Report on Voyeurism and Non-consensual Upskirt-photography published by the Law Reform Commission (“LRC”) drew reference to the relevant provisions of the English Sexual Offences Act 2003, which only require the prosecution to prove that the person engaging in the conduct disregards whether the subject individual consents to it (i.e. element (2) above). That said, we consider that by including in the Bill an element of offence that no consent is given by the subject individual to the conduct (i.e. element (1) above), our legislative intent could be expressed more accurately.

#### The meaning of “recklessness”

6. 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.

7. 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**

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<sup>1</sup> See *HKSAR v Lam Ngai (transliteration)* HCMA 180/2016.

**whether she consents to it** (emphasis added). According to the Judiciary’s Specimen Directions in Jury Trials<sup>2</sup>, 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.

8. 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.

9. 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.

#### Observing “surreptitiously”

10. Under section 159AAB of the Bill, voyeurism has to be conducted “surreptitiously”. This element of offence is adopted with reference to section 162(1) of the Criminal Code of Canada. The word “surreptitiously” should be given its ordinary meaning. According to the Oxford English Dictionary, “surreptitiously” includes the meaning of “in an underhand way”, “secretly and without authority”, “clandestinely, by stealth” and “on the sly”.

11. In the Canadian case of *R v Trinchi* [2019] O.J. No.2278, the court explained the meaning of “surreptitiously” in the context of voyeurism as follows:

“46 I am satisfied that the ordinary meaning of the word “surreptitiously” does include intent as part of its meaning. A person

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<sup>2</sup> Page 111-9, 2020 Revision of Selected Topics.

*who observes or records with the intention that the subject not be aware that he is doing so, is attempting to avoid notice or attention. Moreover, I consider [R. v. M.E.N, 2014 ONCA 69]’s articulation of the mental element to be apt. The mental state required by the word “surreptitiously” in s.162(1) is the intent the subject not be aware that she is being observed or recorded. In a prosecution under s.162(1)(b), the Crown may prove the accused acted surreptitiously by proving that he observed or recorded the subject with the intention she be unaware he was doing so.*

*49 In Lebenfish, the trial judge found that the accused’s picture-taking was not “objectively surreptitious”. He found it unnecessary to consider whether the accused had acted “subjectively surreptitiously”. Such an analysis leads to unnecessary complication. The word “surreptitiously” refers not to what the accused does, but to the state of mind with which he does it. The required criminal intent for the “surreptitiously” element in s.162(1) has been proven where the Crown establishes that the accused intended the complainant be unaware he was observing or recording her.”*

12. The element of “surreptitiously” concerns about the defendant’s intent at the time of the observation or recording, rather than the defendant’s manner or conduct of observation or recording. For this element of offence, the prosecution only has to prove that **the defendant observed or recorded the subject individual with an intent that the subject individual not be aware of what the defendant was doing.**

13. Depending on the circumstances and evidence of the case, the following situations may satisfy the “surreptitiously” element:

- (1) the defendant used a pinhole camera hidden in the bedroom of the defendant’s home to record an intimate act with the subject individual, with an intent that the subject individual be unaware of being recorded;
- (2) in a school, the male defendant covertly used his smart phone to take photographs of a female subject individual changing clothes in the female changing room through an inconspicuous ventilation window thereof from outside, with an intent that the subject individual be unaware of being recorded.

14. Regarding the offence of voyeurism under section 159AAB, apart from the “surreptitiously” element mentioned above, the prosecution will also need to prove that no consent is given by the subject individual to being observed or

recorded by the defendant (section 159AAB(1)(c)), and that the defendant disregards whether the subject individual consents to such conduct (section 159AAB(1)(d)).

15. We note that although the relevant Canadian laws have not incorporated the absence of the subject individual's consent as an element of offence, in *R v Jarvis* [2019] 1 S.C.R. 488, the Canadian court held that in determining whether the subject individual was in circumstances that would give rise to a reasonable expectation of privacy, the court could consider a number of factors, including but not limited to whether the subject individual consented to some degree of observation/recording. It follows that under the relevant Canadian laws, consent of the subject individual could be one of the considerations to be taken into account by a court to decide whether a particular conduct constitutes an offence. As mentioned in paragraph 2 above, voyeurism is proposed to be criminalized because the subject individual does not consent to the conduct. Therefore, to clearly reflect the legislative intent, the Government considers it necessary to stipulate clearly in the offence provisions that "no consent is given by the subject individual" is an element of offence.

#### "Intimate act"

16. Under section 159AA(2) of the Bill, a person is doing an intimate act if the person is using the toilet in a manner that an intimate part of the person is likely to be revealed; or the person is doing a sexual act that is not of a kind ordinarily done in public. Whether a particular conduct constitutes a sexual act that falls within the definition of "intimate act" depends on the actual circumstances of the case. The definition adopted in the Bill provides certain degree of flexibility to allow the court to decide by common sense of what constitutes a sexual act that is not of a kind ordinarily done in public. As a matter of fact, public acceptance changes with time and social atmosphere. Generally speaking, acts of affection that may reasonably be seen in public occasions, such as ordinary kissing and hugging, will not be considered as "intimate acts". "Not of a kind ordinarily done in public" must also be given its ordinary and natural meaning.

17. An "act that is not of a kind ordinarily done in public" in the definition of "intimate act" and "circumstances that give rise to a reasonable expectation of privacy" represent two different concepts. The latter refers to circumstances under which the subject individual may reasonably expect not to be observed/recorded by the defendant as in the case. According to the Canadian case of *R v Jarvis* [2019] 1 S.C.R. 488, in determining whether the subject individual was in circumstances that would give rise to a reasonable expectation of privacy, the court may consider a number of considerations, including, among others, the location the subject individual was in, whether the conduct was

observation or recording, whether the subject individual consented to some degree of observation/recording, the nature of the observation/recording, whether there were any regulations prohibiting the observation/recording, as well as the relationship between the person who did the observing/recording and the subject individual.

### Non-consensual recording of intimate parts

18. Section 159AAC of the Bill provides for the offence of non-consensual recording of intimate parts. The section is drafted mainly with reference to section 67A of the Sexual Offences Act 2003 of the United Kingdom regarding the offence of clandestine photography. On this basis, reference is also made to section 216G of the Crimes Act 1961 of New Zealand regarding “down-blousing”. Section 159AAC(1)(a)(ii)(B) of the Bill covers cases where a person with intent to observe or record an intimate part of the victim operates equipment in an unreasonable manner for the purpose of doing so through an opening or a gap in the outer clothing of the victim. For instance, if a man on a bus holds his smart phone in front of the neck of a sleeping woman sitting next to him, with the phone’s camera persistently aiming at an opening in her blouse to take photographs of her breasts, then he may have “operated equipment in an unreasonable manner”.

19. We consider the recording from above of intimate parts (including breasts) is more likely to give rise to misunderstanding than recording from below a skirt, and it is difficult to present all possible scenarios in the provision. Therefore, we include the element of operating equipment “in an unreasonable manner” to ensure that the scope of the offence is clear enough to avoid inadvertent contravention of the law by innocent people.

### “Operates equipment”

20. Under section 159AA(3) of the Bill, a person operates equipment even if the person merely enables or secures its activation by another person without that other person’s knowledge. For instance, if a person installs in a public toilet cubicle a hidden camera that will be automatically activated by someone entering the cubicle, even though the person entering the cubicle is unaware about the activation of the camera, the person who installs the hidden camera is deemed to have operated it.

### Defences

*Defence regarding the age or mental capacity of the subject individual*

21. Based on the protective principle, legislation on criminal offences should protect vulnerable persons, including children and mentally impaired persons, from sexual abuse or exploitation. The rationale behind this is that the law recognises that such persons may not be able to give informed and meaningful consent to a sexual act and understand its consequences, thus exposing themselves to the risk of being exploited. There are a number of sexual offences<sup>3</sup> aiming at protecting vulnerable persons under the Ordinance. Whether the subject individual has given consent or not is not an element of those offences. Similar to those offences, section 159AAG of the Bill provides that a person cannot give a consent that would prevent the conduct from becoming an offence under Division 2 of the Bill if the person is under the age of 16 or is mentally incapacitated. In other words, if the prosecution proves that the subject individual is under the age of 16 or is mentally incapacitated when the conduct took place, the prosecution does not need to prove the offence elements of “the subject individual has not given consent” and “the defendant disregards whether the subject individual consents to the conduct”.

22. There is no doubt that voyeurism, clandestine photography and non-consensual publication of intimate images involving children and mentally incapacitated persons exploits vulnerable persons and seriously infringes victims’ right to privacy and sexual autonomy. However, we consider that if the defendant honestly believed that consent was given by the subject individual, and did not know and had no reason to suspect that the subject individual was a child or a mentally incapacitated person, the defendant should not be subject to criminal punishment. Under the child-related sexual offence provisions in various overseas jurisdictions, it is a defence if the defendant proves that he/she reasonably believed that the child concerned was over the age of consent.<sup>4</sup> This is consistent with the rationale of section 159AAI of the Bill, which allows the defendant to use the same as a defence.

23. According to section 159AAI(3), the burden of proving a defence under section 159AAI(2) lies on the defendant.

#### *Defence regarding lawful authority or reasonable excuse*

24. It is a defence for a person charged with any of the proposed offences to establish that the person had lawful authority or a reasonable excuse for the contravention, except when the offence is committed for a sexual purpose. Lawful authority mainly targets at the conduct of law enforcement agencies in

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<sup>3</sup> Including “indecent assault” on a person under the age of 16 or a mentally incapacitated person (section 122), “intercourse with girl under 13” (section 123), “intercourse with girl under 16” (section 124) and “intercourse with mentally incapacitated person” (section 125).

<sup>4</sup> Including Australia, Canada, Ireland, Scotland, etc.

accordance with the relevant laws. Such defence is also common in other offences in Hong Kong<sup>5</sup>.

25. With the elements of the offences clearly defined and relevant *mens rea* precisely specified, the Bill should be able to eliminate most cases of inadvertent contraventions. This approach is clearer and more precise than listing out in detail the specific circumstances that could be a defence in the provision. Nevertheless, the Bill provides statutory defence based on “reasonable excuse”, so that a defendant can serve a defence to the court in light of the circumstantial evidence and facts of the case. Whether a particular situation constitutes lawful authority or reasonable excuse depends on the actual circumstances of the case as well as the relevant evidence, and is to be decided by the court upon consideration. The matter cannot be generalized.

26. 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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<sup>5</sup> Under section 13A(1) of the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F), a person charged with contravening regulations related to catering business premises may rely on lawful authority or reasonable excuse as defence.