(Translation)

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Dear Miss MA,

Bills Committee on Crimes (Amendment) Bill 2021
Response to Public Views

Thank you for your letters dated 4 May 2021 and 9 June 2021. Having consulted the Department of Justice and the Hong Kong Police Force, our response to the views put forward by members of the public/organisations on the Crimes (Amendment) Bill 2021 ("the Bill") is set out in the ensuing paragraphs.

I. Section 159AAB of the Bill – Voyeurism

(a) The offence element of "surreptitiously"

2. The offence of voyeurism under section 159AAB was drafted with reference to section 162(1) of the Criminal Code of Canada, which requires that the observation or recording be done "surreptitiously". As the word "voyeurism" connotes the meaning of "peeping" and "conducting in secret", we consider it appropriate to include "surreptitiously" as one of the elements of the offence.

3. Some members of the public consider that the word "surreptitiously" should be defined under the Bill. As mentioned above, the offence element of "surreptitiously" 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, the meaning of the word includes "in an underhand way", "secretly and without authority", "clandestinely, by stealth" and "on the sly". We are of the view that the drafting approach of section 159AAB allows the courts to consider flexibly whether the observation

or recording is done "surreptitiously" on a case-by-case basis, and there is no need to further define the word. The Court may also refer to the interpretation of the word by the Canadian court in cases such as *R. v. Trinchi* [2019] O.J. No. 2278 mentioned below.

4. At the meeting of the Bills Committee on Crimes (Amendment) Bill 2021 ("Bills Committee") on 10 May 2021, a Member asked whether the offence element of "surreptitiously" would be considered not fulfilled if the person making the recording did not hide the equipment for recording the intimate parts of others (e.g. the person walked into a changing room while holding a smartphone with recording function with an intent to record others who were changing clothes). The Canadian court explained in the case ***R. v. Trinchi*** [2019] O.J. No. 2278 that in the context of the offence of voyeurism, "surreptitiously" meant that the defendant observed or recorded the subject individual with the intent that the subject individual be unaware of the defendant's act. This offence element concerns the defendant's intent at the time of the observation or recording, rather than the defendant's manner or conduct of the observation or recording. For this offence element, the prosecution only has to prove that **the defendant observed or recorded the subject individual with the intent that the subject individual be unaware of the defendant's act**. Whether it can be proved that the person doing the recording has that intent depends on the evidence and circumstances of each case.

5. Some members of the public/organisations have pointed out that the proposed offence do not cover circumstances where the observation or recording is done openly. If a person **openly observes or records** the intimate parts of another person and intends to cause that person to apprehend immediate and unlawful physical contact, even if there is no actual physical contact, the person doing the observation or recording can be charged with "**indecent assault**" under section 122 of the Crimes Ordinance (Cap. 200), as the case may be. The offence elements of indecent assault are: (1) the accused intentionally assaulted the victim; (2) the assault and the circumstances accompanying it are capable of being considered by right-minded persons as indecent ; and (3) the accused intended to commit such an assault as is referred to in (2) above. The assault does not need to involve any physical contact but may consist merely of conduct which causes the victim to apprehend immediate and unlawful personal violence[1]. If the person doing the recording in a public place or in the common parts of a building continuously acts in a way that causes others to be reasonably concerned for their safety or well-being, the person may also contravene the offence of loitering under section 160 of the Crimes Ordinance[2].

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1 *HKSAR v Shek Kwok Ngai* [2017] 2 HKLRD 629

2 *HKSAR v Au Pak Chung* HCMA586/2009

(b) A place in which any individual can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act

6. Some members of the public have raised questions on the meaning of "a place in which any individual can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act" under section 159AAB of the Bill. Section 159AAB(1)(a) establishes three categories of conduct that possibly constitute voyeurism. The one under section 159AAB(1)(a)(i) is "observes (with or without the aid of equipment) or records an individual in a place in which any individual can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act". It emphasizes **the place that a subject individual is in**. In short, if the defendant observes or records a subject individual who is in a place where one can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act (e.g. a bathroom, a changing room, a toilet cubicle, etc.) without his or her consent, even if the subject individual was not nude, had not revealed an intimate part, or was not doing an intimate act, the defendant may still have committed the offence of voyeurism.

(c) Suggestion to widen the definition of "structure" to cover permanent or non-temporary structure

7. The definition of "structure" under section 159AA of the Bill includes any aircraft, vehicle, vessel, tent and other temporary or movable structure. The word "includes" is used in the interpretation, which means that the word "structure" also includes the general meaning of "structure", such as permanent structure.

(d) Restricting any person from exposing an intimate part or intimate act of a person to a third party without the person's consent

8. There are views that the offence of voyeurism should restrict any person (A) from exposing an intimate part or intimate act of a person (B) to a third party (C) without the consent of the person (B). As such acts are mostly related to bullying and are different from voyeurism in nature, they should not be dealt with under the offence of voyeurism. Depending on the actual circumstances of the case, such acts may constitute other existing criminal offences, such as "indecent assault" under section 122 of the Crimes Ordinance.

II. Section 159AAC of the Bill - non-consensual recording of intimate parts

(e) Suggestion to add the phrase "the part would not otherwise be expected to be visible" to deal with the recording of accidental exposure

9. A key principle concerning criminal offences is the clarity of the elements of offence. Whether a subject individual **expects** that a certain intimate part would be visible involves the **subjective interpretation** of the subject individual. If this element of offence is added, the definition of the offence may become unclear, easily leading to arguments and misunderstandings, or making those without the *mens rea* break the law inadvertently.

10. If a person publishes photos of accidental exposure of an intimate part of a subject individual, that person may have committed the offence of non-consensual **publication** of intimate images, as the case may be.

(f) Suggestion to remove the element of "dishonesty" and include "to cause humiliation, alarm or distress" as the mens rea

11. Under section 159AAC(1)(b) of the Bill, non-consensual recording of intimate parts has to be made for: (1) a sexual purpose or (2) 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.

12. In *HKSAR v Tsun Shui Lun* ([1999] 3 HKLRD 215, [1999] 2 HKC 547), the Court of First Instance of the High Court ("CFI") pointed out that the objective of section 161 of the Crimes Ordinance was to impose sanctions against access to a computer with a specific intent or purpose (i.e. an intent to commit an offence or dishonest purpose), and consideration should be made to **the intent or purpose of the defendant at the moment of access to the computer** rather than subsequently. The CFI also held that "gain" included obtaining information that the defendant did not have prior to the access to the computer.

13. In the case above, the CFI also held that for the charge under section 161 of the Crimes Ordinance, a **two-stage test** laid down in *R v Ghosh* [1982] QB 1053 should be taken 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 standards of ordinary reasonable and honest people (an objective test).

The second stage of the test is to decide whether the defendant realised that ordinary reasonable and honest people would regard the conduct as dishonest (a subjective test). For instance, if an adult man of normal cognitive ability secretly places a smart phone under the skirt of a woman in front of him whom he does not know on an ascending escalator, and takes upskirt photos of her without her knowledge, his conduct may fall within the circumstances described in section 159AAC(1)(b)(ii) of the Bill. It is because he has obtained the photos, which is a gain, and the gain is obtained dishonestly.

14. In considering whether the defendant has obtained "dishonest" gain, the circumstances/manners in which the observation or recording is done, rather than the purpose of obtaining the photos, constitute the relevant evidence. Take the above-mentioned adult man as an example: by the standards of ordinary reasonable and honest people, his taking of upskirt photos of the woman unknown to him is a dishonest behaviour. With normal cognitive ability, he must have realised that his behaviour would be considered as dishonest by ordinary reasonable and honest people. As in *HKSAR v Ho Siu-Hei Jason* [2018] HKCFI 974, the CFI dismissed the appeal filed by the male defendant against his conviction of the offence under section 161 of the Crimes Ordinance, and held that his clandestine recording of a woman using the toilet with his smart phone was for the purpose of obtaining dishonest gain for himself.

15. As illustrated in the above example, given the circumstance in which the adult man takes the upskirt photos, there is sufficient evidence to prove that he has obtained dishonest gain for himself. Whether or not there is further evidence to prove his purpose of taking the photos (e.g. for a sexual purpose, for humiliating, alarming or distressing the subject individual, or for gain through resale), the premise that he has obtained dishonest gain (the photos) for himself at the time of the recording would not be undermined.

16. As stated in paragraph 11 above, the concept and definition of dishonest gain are adopted with reference to the offence of access to a computer with criminal or dishonest intent under section 161 of the Crimes Ordinance. Prior to the ruling in 2019 that this section should not be extended to the use of the offender's own computer, it was used for prosecuting upskirt/clandestine photography. Case law is also available for reference in this connection. The present drafting approach facilitates the prosecution procedures, allowing the prosecution to refer to the case law and past experience in prosecuting upskirt/clandestine photography under section 161 of the Crimes Ordinance.

17. Some Members of the Bills Committee have requested the Government to provide information on the provisions regarding "non-consensual photography of intimate parts" in overseas jurisdictions for reference, particularly on the determination of the scope of *mens rea*. Under the newly added section 67A of

the English Act, one of the elements of the offence is that the accused commits the act for the purpose of: (a) obtaining sexual gratification (whether for own self or another person); or (b) humiliating, alarming or distressing the victim. Section 7 of the Scottish Act includes a similar purpose provision. On the other hand, the New Zealand Act stipulates that the prosecution needs not prove the observation or recording is for any particular purpose. Last year, we conducted a public consultation to gauge views on the introduction of related offences, including non-consensual photography of intimate parts irrespective of the purpose. Having considered the views of the public, we consider it necessary to include a provision on the purpose to confine the scope of the offence, so as to avoid casting too wide a net. The Government has eventually decided to confine the scope of the offence by adopting the *mens rea* element of "dishonest gain". Relevant justifications are detailed in paragraphs 14 to 16 above.

18. Taking into account the views of Members and the public, we agree that the drafting approach of section 159AAC(1)(b) of the Bill can be modified to clearly express that the term **"dishonest"** in the provision **refers to the circumstances or manner in which the observation or recording is done**. In order words, a defendant who observes or records in a dishonest way may have committed the offence irrespective of the purpose of the observation or recording. We will submit draft committee stage amendments to the Bills Committee for consideration in due course.

(g) Whether taking photos of intimate parts covered with clothing constitutes the offence of non-consensual photography of intimate parts

19. Some members of the public and Members have opined that shooting close-ups of a subject individual's sensitive parts covered with clothing deliberately in a public place will also cause the subject individual great distress and humiliation, even if the intimate parts are not captured. They suggest that such a scenario be covered by the proposed offence as well. Although the taking photos of intimate parts covered with clothing should not constitute the offence of non-consensual photography of intimate parts, acts of this kind may meet the elements of offence of voyeurism, depending on the actual circumstances of the case. If a person, for a sexual purpose, surreptitiously observes or records without consent a subject individual who is in circumstances that give rise to a reasonable expectation of privacy, the person may have committed the offence of voyeurism under section 159AAB of the Bill. If the person doing the recording in a public place or in the common parts of a building continuously acts in a way that causes others to be reasonably concerned for their safety or well-being, the person may have also committed the offence of loitering under section 160 of the Crimes Ordinance.

20. We must strike a careful balance when deciding on the scope of the Bill. While protecting people from falling victims of abuse, the scope of offence must not be overly wide to the extent that people without the relevant *mens rea* may break the law inadvertently. If it is extended to cover taking photos of others' intimate parts that are covered with clothing, the offence will become ill-defined and may easily lead to disputes and misunderstandings, thereby disturbing the daily lives of the general public.

(h) Whether section 159AAC of the Bill covers non-consensual recording of intimate images

21. There are queries from the public as to whether a person will have committed an offence if a person records an intimate image of the person's partner without the latter's consent, and the recording is not for a sexual purpose nor made in a dishonest way (such as for revenge porn), and the person has no intent to publish the image.

22. Depending on the circumstances, if the defendant surreptitiously records, without consent, an intimate image of the defendant's partner who is in circumstances that give rise to a reasonable expectation of privacy, the recording may constitute voyeurism under section 159AAB of the Bill.

(i) Suggestion to exclude "down-blousing" activity from section 159AAC of the Bill

23. Some members of the public have opined that the definition of "down-blousing" has to be further deliberated as it is not as clear and direct as that of "upskirting" and may result in abuse. They have also suggested removal of the relevant provisions. In fact, taking into account the possibilities of inadvertent contravention and abuse of the offence provisions, as well as the different levels of concern about the exposure of female and male breasts, we had originally proposed to first deal with upskirting scenarios through legislative amendments. However, the Legislative Council Panel on Security was of the view that "down-blousing" should be dealt with as soon as possible given its prevalence. Therefore, upon careful consideration, we suggest the proposed offence to cover "down-blousing". Under the current section 159AAC, a person will commit the offence of "non-consensual recording of intimate parts" (including "upskirting" and "down-blousing") only if all of the following elements are met:

(a) the person actually records an image showing an intimate part of the subject individual or operates equipment with intent to observe or record an intimate part of the subject individual;
(b) the intimate part would not otherwise be visible;

(c) the person engages in the conduct for a sexual purpose, or for the purpose of obtaining dishonest gain (the draft provisions on dishonest gain will be fine-tuned as mentioned in paragraph 18 above); and
(d) no consent is given by the subject individual to the observing or recording, and the person disregards whether the subject individual gives such consent.

24. The delicate scoping of the offence should be sufficient to ring-fence against inadvertent contravention, abuse and false accusations.

(j) Suggestion to exclude male breasts from section 159AAC of the Bill

25. Some members of the public considered that given the inherent differences in the body structure between the two sexes, a wider acceptance of topless males, and a lack of evidence showing that males in Hong Kong nowadays consider their breasts should be given the same level of protection as female ones, male breasts should be excluded from the scope of section 159AAC of the Bill.

26. In line with the principle of gender neutrality, the proposed offence is equally applicable to all genders. Specifically, the definitions of "intimate acts" and "intimate parts" in the proposed offence cover breasts irrespective of gender. The purpose of section 159AAC is to deter non-consensual observing or recording of **intimate parts which would not otherwise be visible**. We consider that if a subject individual does not give consent to and a person deliberately operates equipment to observe an intimate part of the subject individual which would not otherwise be visible, such conduct infringes the right of privacy and sexual autonomy of the subject individual regardless of gender. We would like to emphasise that the offence does not seek to criminalise the observing or recording of intimate parts that are exposed voluntarily, but to specifically target the intrusive conduct of "upskirting" and "down-blousing" without consent.

III. Section 159AAD of the Bill - publication of images originating from commission of the offence under section 159AAB(1) or 159AAC(1)

(k) Whether a defendant charged under section 159AAD of the Bill is also to be charged under section 159AAB(1) or 159AAC(1)

27. Pursuant to section 159AAD of the Bill, a person commits an offence if the person publishes an image originating from the commission of an offence under section 159AAB(1) or 159AAC(1) (specified offence) without the subject individual's consent, knowing that or being reckless as to whether, the image originates from the commission of a specified offence, and disregarding whether the subject individual consents to the publication. Section 159AAD aims to

deter the continual circulation of an image obtained through voyeurism and non-consensual photography of intimate parts. Therefore, it is immaterial whether the publisher is the person taking the image or is also charged under section 159AAB(1) or 159AAC(1), as long as the publisher knows that, or is reckless as to whether, the image originates from the commission of a specified offence (and other elements of offence stated in section 159AAD can be proved).

28. Regarding the offence under section 159AAD, to prove that an image published originates from the commission of a specified offence, the prosecution has to prove that the circumstances of taking the image meet the elements of offence under section 159AAB(1) or 159AAC(1). The court will consider, on the basis of all evidence, including that of witnesses and the content of the image, whether the image is generated through the commission of a specified offence by the person capturing it (does not have to be the publisher or someone whose identity can be confirmed). Even if the person who captured the image has not been prosecuted (e.g. the person cannot be identified or has died), the consideration of whether the publisher has committed the offence under section 159AAD will not necessarily be affected.

IV. Section 159AAE of the Bill - Publication or threatened publication of intimate images without consent

(l) Suggestion to add provisions to clearly point out that the new offence regulates express or implied threats, with or without conditions

29. Section 159AAE of the Bill does not require that a threat has to be with conditions. To satisfy the requirements under that section, the court will decide if the defendant has made a threat on the basis of the material evidence of each case (whether the threat is made expressly or impliedly).

(m) Suggestion to amend the provision to stipulate that it is immaterial whether a specified intimate image can be identified or exists

30. Section 159AAE(2) of the Bill 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 publishing the image (say it does not exist or he does not possess it 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.

31. 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.

(n) Consent withdrawn by the subject individual afterwards

32. Members of the public enquired whether a person who publishes an image of a subject individual commits an offence if the latter withdraws his/her consent after the publication under section 159AAE.

33. Regarding the offence under section 159AAE(1), the prosecution is required to prove that, when the publisher publishes the image, no consent is given by the subject individual to the publication, and the publisher disregards whether the subject individual consents to the publication or at least is reckless as to whether the publication is likely to cause humiliation, alarm or distress to the subject individual. In other words, the publication made does not constitute an offence if consent is given by the subject individual at the time of publication even if the consent is withdrawn afterwards.

(o) Suggestion to allow the court to order deletion and removal of an image

34. There are views that the court should be empowered to order deletion and removal of a relevant image, including:

(a) requiring the person convicted to take reasonable steps to delete or destroy the relevant image and impose heavier penalty should the person fail to do so;

(b) requiring the online content host to remove the image or disable the access thereto by the public; and

(c) providing options for an injunction application, including but not limited to freezing of the image at once and prohibiting the public from continuing to upload and circulate the image.

35. There are currently various means to stop illegal content from further circulating. According to section 102 of the Criminal Procedure Ordinance (Cap. 221), the court may order the forfeiture of any property that has been used in the commission of an offence, such as a mobile phone used for recording intimate parts and a computer used for distributing intimate images. At present, relevant parties can also initiate civil action to seek an injunction. According to Orders 45 and 52 of the Rules of the High Court, any person who violates an

injunction is punishable by imprisonment, sequestration of property and a fine for civil contempt of court.

36. At present, the Police has a well-established mechanism to request online content hosts to remove illegal content or images. The officer-in-charge of the case can request the relevant websites to remove the relevant posts, photographs and images through the Cyber Security and Technology Crime Bureau ("CSTCB"). The CSTCB will request for information or co-operation from the relevant persons or organisations (including information and communication technology companies) according to the type, nature and volume of the information requested for removal, and the reason for removal. The CSTCB will specify the reason, such as crime prevention and detection as well as law enforcement. In existing cases, some defendants delete the information on their own initiative as a plea for mitigation.

(p) Suggestion to expand the definition of "intimate image" to include "altered image"

37. There are views that the Bill should cover "altered image", where the subject individual's face is superimposed onto a pornographic photograph. We understand that with technological advancement, it is increasingly easy to make high-quality altered intimate images. The harm they cause to victims can be equally devastating as those caused by real intimate images.

38. The inclusion of "altered image" in the definition of intimate image of criminal offences in some overseas jurisdictions is a rather new construct. In considering whether we should include "altered image" in criminal offences, we have to take into account whether we could give a clear definition and whether it would be so onerous that people without the relevant *mens rea* will inadvertently breach the law.

39. After careful consideration, we suggest that with reference to the definition of intimate image in section 375BE(5) of the Penal Code of Singapore, expanding the definition of intimate image in section 159AA of the Bill to include **an image that has been altered to appear to show an intimate part of an individual or show an individual doing an intimate act, unless a reasonable man would not consider that the altered image describes that individual**. The newly added part will enable the offence of publication or threatened publication of intimate images without consent to be applicable to altered intimate images in order to protect victims, while adopting the objective test of a reasonable man to strike a balance and to exclude those images apparently not describing the victim for clear scoping of the offence. Draft **committee stage amendments** will be submitted to the Bills Committee for consideration in due course.

(q) The viewer of an intimate image should bear the same responsibility as the publisher

40. There are views that viewer of an intimate image should bear the same responsibility as the publisher if the intimate image is published without the consent of the subject individual and the viewer agrees and knows that the publisher has not obtained the consent of the subject individual for such publication. When drafting the offence of publication or threatened publication of intimate images without consent, we include into the offence the following element: "the publisher intends, knows or is reckless as to whether the publication will or is likely to cause humiliation, alarm or distress to the victim" for proper scoping. This will not only render effective legal remedy to subject individuals involved in cases such as "porn revenge", but will also exclude the mere forwarding or sharing of such images in the absence of the requisite *mens rea* from the scope of the offence. If the offence is expanded to cover viewers who may not have the relevant *mens rea*, the scope of the provision may be so broad that innocent people may be caught by the offence. Viewing is also not made an offence under the Control of Obscene and Indecent Articles Ordinance (Cap. 390).

V. Division 3 of the Bill – Consent and Defence

(r) Suggestion to require a defendant to clearly state the measures that the defendant has taken to confirm that the subject individual is neither under the age of 16 nor a mentally incapacitated person should the defendant raise a defence under section 159AAI(3)

41. According to section 159AAI of the Bill, it is a defence for the defendant to prove that the defendant: (a) honestly believed that a consent was given by the subject individual to the person's conduct that would constitute the offence under Division 2; and (b) 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. The burden of proving a defence lies on the person raising the defence.

42. We believe that it is more appropriate to allow the court to consider whether the evidence adduced by the defendant is credible according to the circumstances of the case, rather than to specify in the law that the defendant has to prove he/she has taken specific measures to confirm the age and capacity of the subject individual.

(s) Making an offence involving children an absolute offence

43. There are views that the Government should not provide a defence in respect of an offence committed against a child aged between 13 and 16 and should make an offence against a child under the age of 13 an absolute offence.

44. 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 aiming at protecting vulnerable persons under the Crimes 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, it needs not prove the offence elements of "the subject individual has not given consent" and "the defendant disregards whether the subject individual consents to the conduct".

45. There is no doubt that voyeurism, clandestine photography and non-consensual publication of intimate images involving children and mentally incapacitated persons exploit vulnerable persons and seriously infringe 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.

46. Similar defence is also found in a number of common law jurisdictions. The laws of Australia, Canada, Ireland and Scotland contain provisions that it is a defence in respect of a sexual offence if the defendant proves that he/she reasonably believed that the child concerned was over the age of consent. In England and Wales, one of the elements of offences involving children is that the accused did not reasonably believe that the child was over the age of consent. The relevant overseas provisions had been discussed in detail in the Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment published by the Law Reform Commission ("LRC")[3].

47. According to section 159AAI(3), the burden of proving a defence under section 159AAI(2) lies on the defendant. **The defendant needs** to prove the

[3] Paragraphs 4.7 to 4.34 of the Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment published by the LRC (https://www.hkreform.gov.hk/en/docs/sexoffchild_e.pdf)

defence **on a balance of probabilities**.

48. Regarding defence of similar nature to other sexual offences, it has been ruled by the court that the burden of proving a defence on a balance of probabilities lies on the defendant. In *HKSAR v Choi Wai Lun (蔡偉麟)* (2018) 21 HKCFAR 167, the defendant was charged with **indecent assault** on a girl aged 13 contrary to section 122(1) of the Crimes Ordinance. The Court of Final Appeal ("CFA") pointed out that the legislative intent of section 122 is to treat children under the age of 16 as a vulnerable class in need of a high degree of protection against sexual exploitation. Hence, section 122(2) deems them incapable of giving consent to indecent conduct and holds the defendant guilty even though he could prove that consent was, to his knowledge, in fact given. That said, the CFA held that the prosecution did not need to prove the *mens rea* as to the girl's age, but the accused had a good defence if he could prove on a balance of probabilities that he honestly and reasonably believed that the girl was 16 or over.

49. In the *Choi Wai Lun* case, the CFA took into consideration that Hong Kong courts have always construed age-related sexual offences as requiring potential defendants to take care to avoid what may be unlawful. The CFA held that by **imposing a persuasive burden on the accused for admission of his defence**, the legislative intent of section 122(2) was better achieved and the "rationality" and "proportionality" tests could be passed, striking a reasonable balance between protection of a vulnerable class and the right to a fair trial for the accused without breaching the presumption of innocence protected under Article 87 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights. The CFA considered it unnecessary to resort to absolute liability for achieving the legislative intent of section 122.

50. Taking into account the CFA's judgement on the *Choi Wai Lun* case and other relevant considerations, we are of the view that section 159AAI(3) of the Bill **requiring the defendant to prove on a balance of probabilities** a defence under section 159AAI(2) can pass the "rationality" and "proportionality" tests while striking a reasonable balance between protecting children under the age of 16 and mentally incapacitated persons from sexual exploitation and safeguarding the right to a fair trial for the defendant.

51. We note that in the report on Review of Substantive Sexual Offences published by the LRC in late 2019, it is recommended that absolute liability should apply to sexual offences involving children between 13 and 16 years old. In view of the differences in gravity and nature of offence between recording intimate images and other sexual conduct (e.g. sexual intercourse), we consider it appropriate to impose a **persuasive burden** on a defendant who put forward a defence under section 159AAI of the Bill, thereby offering adequate protection

to children under the age of 16 and mentally incapacitated persons while balancing the interests of a defendant who honestly believed that a consent was given by the subject individual and had no reason to suspect that the subject individual was an individual under the age of 16 or a mentally incapacitated person. **The defendant shall prove his defence on a balance of probabilities**. Such burden of proof is higher than that of establishing a defence regarding lawful authority or reasonable excuse under section 159AAJ, which only imposes an evidential burden on a defendant.

(t) Scope and content of the defence regarding lawful authority or reasonable excuse

52. According to section 159AAJ of the Bill, it is a defence for a person charged with any of the proposed offences to establish that the person had lawful authority or reasonable excuse for the contravention, except when the offence was committed for a sexual purpose. Lawful authority mainly targets at the conduct of law enforcement agencies in accordance with the relevant laws. Such defence is also common in other offences in Hong Kong[4].

53. 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 contravention. 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 the 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 generalised.

VI. Other proposals

(u) Suggestion to include the four new offences as "specified sexual offence'" to protect the anonymity of victims

54. Section 156(1) of the Crimes Ordinance provides that unless under the circumstances allowed by that Ordinance, the media, when reporting news related to a "specified sexual offence", should not report any matter which is likely to

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[4] 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**.

lead members of the public to identify the complainant. Section 117 of the Crimes Ordinance defines "specified sexual offence"[5], which includes serious sexual offences, such as rape and indecent assault. A public organisation has requested to specify the four new offences as "specified sexual offence" to protect the anonymity of victims.

55. At present, apart from taking measures under the "specified sexual offence" of the Crimes Ordinance to protect the anonymity of victims, the court may adopt measures under the Criminal Procedure Ordinance[6] and its inherent jurisdiction to ensure that the victims of sexual offence cases are provided with the necessary privacy and protection in the course of the legal proceedings. These measures include issuing an Anonymity Order, placing a screen around a witness when he/she gives evidence, providing a special passageway for entering/leaving the court building and court room, and prohibiting the taking of photographs in court. We consider that it is not necessary to specifically include the four new offences as "specified sexual offence".

(v) Proposals relating to other sexual offences

56. The submissions also include proposals relating to other sexual offences, for example:

(a) creating a statutory definition of "consent"/introducing the principle of affirmative consent;

(b) making sexual offence provisions under the Crimes Ordinance gender-neutral; and

(c) revising the Sexual Conviction Record Check Scheme, such as changing the scheme into a mandatory one, and expanding its scope to cover all existing employees, self-employed persons and volunteers.

57. In late 2019, the LRC published a report on Review of Substantive Sexual Offences, making some 70 final recommendations for reforming the substantive sexual offences in the Crimes Ordinance. Some of the recommendations are principle-based, while some involve making substantive legislative amendments.

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[5] Specified sexual offence means any of the following, namely, rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences, and incitement to commit any of those offences.

[6] According to **Criminal Procedure Ordinance** (Cap. 221), the court may, if it considers it necessary in the interests of justice or public order or security, exclude the public from criminal courts (section 122); and the court may order that any appropriate part of criminal proceedings shall take place in a closed court, and order that no question shall be put to any specified witness if the answer thereto would lead, or tend to lead, to disclosure of the name or address of any witness (section 123).

The LRC also completed a consultation on the sentencing of sexual offences and related matters (including the Sexual Conviction Record Check Scheme) in February 2021. The Government will consider the LRC's recommendations on the review of sexual offences in tandem.

(w) Proposals relating to other legislations

58. The submissions also put forward proposals relating to the Control of Obscene and Indecent Articles Ordinance (Cap. 390) and the Personal Data (Privacy) Ordinance (Cap. 486). The proposals cover matters such as composition of the Obscene Articles Tribunal, its transparency and relevant educational efforts, and privacy protection measures. We have conveyed the views to the Commerce and Economic Development Bureau and the Constitutional and Mainland Affairs Bureau for their reference.

59. 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.
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