

(Translation)

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Dear Miss MA,

**Follow-up to the Meeting of the
Bills Committee on Crimes (Amendment) Bill 2021
on 28 June 2021**

Thank you for your letter dated 30 June 2021. In response to the major concerns expressed by Members at the Bills Committee meeting, I hereby provide supplementary information in the ensuing paragraphs.

A. Section 159AAB of the Bill – Voyeurism

2. As stated in the Government’s response to submissions from public organisations/members of the public (LC Paper No. CB(2)1222/20-21(01)), the offence of voyeurism under section 159AAB was drafted with reference to section 162(1) of the Criminal Code of Canada, which requires the observation or recording be done “surreptitiously”. The Canadian court had made an interpretation of the word “surreptitiously”¹, pointing out that in the context of the offence of “voyeurism”, “surreptitiously” meant that the defendant observed or recorded the subject individual with the intent to make the subject individual unaware of the defendant’s act. This offence element is concerned with 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

¹ See *R. v. Trinchi* [2019] O.J. No. 2278.

element, **the prosecution only has to prove that the defendant observed or recorded the subject individual with the intent to make the subject individual unaware of the defendant’s act.** Whether the relevant intent of the person doing the recording can be proved in individual cases depends on the evidence and circumstances of each case. We are of the view that the present drafting approach can clearly express the Government’s legislative intent.

3. Section 159AAB(1)(a) establishes three types of circumstances that may constitute voyeurism. The situation under section 159AAB(1)(a)(i) covers a person who “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”². Section 159AAB(1)(a)(i) emphasises **the place a subject individual is in.** If the defendant observes or records the subject individual, who is in a place where any individual can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act, and disregarding whether the subject individual consents to the conduct, the defendant may still have committed the offence of voyeurism, **even if the subject individual was not nude, had not revealed an intimate part, or was not doing an intimate act.** We consider the existing descriptions clear and flexible enough to cover different scenarios. Therefore, we do not see the need to include examples in the current provision for illustrative purposes.

4. Even if the circumstances of an individual case do not satisfy the requirements under section 159AAB(1)(a)(i), as long as the defendant surreptitiously observes or records an intimate part or intimate act of **a subject individual who is in circumstances that give rise to a reasonable expectation of privacy**, or observes or records a subject individual for a sexual purpose, such acts may still constitute voyeurism under the circumstances described in section 159AAB(1)(a)(ii) or (iii).

B. The offence element of “no consent is given by the subject individual to the conduct”

5. Regarding the element of “absence of consent” in the four specified offences under the Bill, the prosecution shall prove that: (1) no consent is given by the subject individual to the conduct; and (2) the person engaging in the conduct disregards whether the subject individual consents to the conduct.

6. These two offence elements have different focuses. While element (1) centers on **whether the subject individual actually consents to the conduct**,

² The quote is excerpted from section 159AAB(1)(a)(i) of the Bill gazetted. We have proposed technical amendments to the Chinese text of that section to make it more consistent with the English text. For details, please refer to paragraph 17 of this letter.

element (2) centers on the **subjective criminal intent** of the person engaging in the conduct. When drafting the Bill, the offence element of “no consent is given by the subject individual to the conduct” (i.e. element (1)) was included with the intention to more accurately express our legislative intent to protect the victim’s right to privacy and sexual autonomy, and not to interfere with the private and voluntary conduct of members of the public.

7. Nevertheless, at the meeting of the Bills Committee, Members asked whether prosecution would be affected if the subject individual did not testify in court. After careful consideration, we believe that in an individual case where the subject individual cannot be brought before the court to give evidence (e.g. failure to locate the subject individual as the facial features thereof were not captured in the image, subject individual is unwilling to testify in court etc.), there may be difficulty for the prosecution to prove beyond reasonable doubt that no consent is given by the subject individual to the conduct. For instance, the Police caught a man hiding in a female toilet and found intimate images of unknown subject individuals taken therein from his mobile phone. However, the Police could not locate the subject individuals to give evidence to prove the offence element of “no consent is given by the subject individuals to being observed or recorded” as the images did not capture their facial features. Under such circumstances, even if there is sufficient evidence to prove that the defendant recorded those intimate images and “disregarded whether the subject individuals consented to being observed”, as the subject individuals were not located to give evidence in court, the court might not accept, in light of the facts of the case and evidence, that the prosecution can prove no consent is given by subject individuals to the conduct, resulting in the acquittal of the defendant. This is not our desired result.

8. To rectify the situation, we **propose to remove the offence element of “no consent is given by the subject individual” from the three proposed offences under sections 159AAB (voyeurism), 159AAC (non-consensual recording of intimate parts) and 159AAD (publication of images originating from commission of offence under section 159AAB(1) or 159AAC(1))**. Upon amendment, if the prosecution can prove that the defendant “disregards whether the subject individual consents to being observed or recorded” or “disregards whether the subject individual consents to the publication”, and can establish other offence elements, even though the subject individual does not testify in court as to their consent, we consider that the defendant’s conduct is sufficient to constitute the relevant offences. A marked-up copy of the proposed amendments to the provisions is at [Annex](#).

9. We propose to retain the offence element of “no consent is given by the individual to the publication” in section 159AAE (publication or threatened

publication of intimate images without consent) to avoid the scope of the offence being so wide that people without the relevant mens rea will inadvertently breach the law. Compared with the offence of publication of images originating from commission of voyeurism or non-consensual recording of intimate parts under section 159AAD, the publication in relation to the offence under section 159AAE may involve voluminous intimate images circulating on the internet. From the content of these images, an ordinary man may not know the background to their publication, such as whether the subjects of the images consent to the recording and publication. If the said offence element is removed, a person who publishes an image disregarding whether consent is given by the subject individual (e.g. in case they do not know each other at all) may have committed the offence, even though the subject individual indeed consents to the publication.

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

10. As stipulated in section 159AAC(1)(b) of the Bill, a person commits the offence of non-consensual recording of intimate parts if the person engages in the conduct 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.

11. As stated in the Government’s response to submissions from public organisations/members of the public (LC Paper No. CB(2)1222/20-21(01)), in considering whether the defendant has obtained dishonest gain, **the circumstances or manner in which the observation or recording is done** should be taken into consideration. Taking into account the views of Members of the Bills Committee and the public, we agree that the drafting approach of section 159AAC(1)(b) of the Bill can be adjusted to express our legislative intent more clearly. The marked-up copy of the proposed amendments to the provisions is at **Annex**.

12. At the meeting of the Bills Committee on 28 June 2021, a Member asked whether the proposed amendments would make it more difficult for the prosecution to prove the relevant offence elements.

13. Under section 159AAC(1)(b)(ii), upon amendment, the prosecution does need not to prove “obtaining gain” but only requires **to prove that the defendant does the recording or operates the equipment in a dishonest manner**. The proposed amendments should make the relevant offence elements clearer and more precise, and will not increase the difficulty of prosecution.

14. In deciding whether a defendant was “**dishonest**”, we consider that the

two-stage test laid down in *R v Ghosh* [1982] QB 1053 can be adopted. 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 his 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 (i.e. **taking photos of an intimate part of the woman dishonestly**). It is because 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 deemed dishonest by ordinary reasonable and honest people.

15. To decide whether a defendant engaged in the conduct dishonestly, the court can also refer to previous case laws in respect of the offence of access to computer with dishonest intent under section 161 of the Crimes Ordinance. As in *HKSAR v Ho Siu-Hei Jason* [2018] HKCFI 974, the Court of First Instance of the High Court dismissed the appeal filed by the male defendant against his conviction of the offence under that section, 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.

D. Expanding the definition of an “intimate image” to cover an “altered image”

16. As stated in the Government's response to submissions from public organisations/members of the public (LC Paper No. CB(2)1222/20-21(01)), we understand that with technological advancement, it is increasingly easy to make high-quality altered intimate images. The harm such altered images caused to the victims can be equally devastating as those of real intimate images. After careful consideration, we suggest that with reference to the definition of an intimate image in section 377BE(5) of the Penal Code of Singapore, **the definition of an intimate image in section 159AA of the Bill be expanded to include an image that has been altered to show an intimate part of an individual or an individual doing an intimate act, unless it has been so altered that no reasonable man would believe it shows an intimate part of the individual or the individual doing an intimate act.** The proposed amendments will enable the offence of publication or threatened publication of intimate images without consent to cover altered intimate images, thereby further protecting the victims while adopting the objective test of “a reasonable man” to

strike a balance and exclude images apparently not describing the victims for clear scoping of the offence. The marked-up copy of the proposed amendments to the provisions is at **Annex**.

E. Other technical amendments

17. We have also proposed technical amendments to the Chinese text of section 159AAB(1)(a)(i) to make it more consistent with the English text. The marked-up copy of the proposed amendments is at **Annex**.

F. Empowering the court to order anyone to dispose of images involving the victims

18. As stated in the Government's response to submissions from public organisations/members of the public (LC Paper No. CB(2)1222/20-21(01)), there are various means to stop illegal content from further circulating. According to section 102 of the Criminal Procedure Ordinance (Cap. 221), the court may make an order for the forfeiture of any property that has been used in the commission of an offence. A party to the proceedings can initiate a civil action to seek an injunction. Some defendants will also delete related information on their own initiative to plead mitigation.

19. At present, the Police have a well-established mechanism to request online content hosts to remove illegal content or images. The Cyber Security and Technology Crime Bureau will request for information or co-operation from the persons or organisations concerned (including information and communication technology companies) according to the type, nature and volume of the information requested for removal, and the reason for removal (e.g. for crime prevention and detection as well as law enforcement). According to the Police's experience, online content hosts are generally receptive to requests involving intimate images.

20. At the meeting of the Bills Committee, a Member pointed out that the existing mechanism relied on the voluntary cooperation of defendants and Internet service providers, and failed to provide adequate protection for victims. We are exploring the feasibility and effectiveness of such a mechanism with relevant stakeholders, and will report to the Bills Committee separately.

21. 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

(Attn: Mr Jonathan LUK, Senior Government Counsel (Law Drafting Division))

Mr Charles LEE, Senior Public Prosecutor

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Hong Kong Police Force

(Attn: Ms YU Hoi-kwan, Chief Superintendent of Police (Crime Support) (Crime Wing))

Mr Raymond LAM Cheuk-ho, Senior Superintendent of Police (Cyber Security and Technology Crime Bureau)

**Discussion Draft for Bills Committee on
Crimes (Amendment) Bill 2021 -
(Subject to revisions and refinements)**

Crimes (Amendment) Bill 2021

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Part XIIAA

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A BILL

To

Amend the Crimes Ordinance to provide for new offences of voyeurism, non-consensual recording of intimate parts, publication of images originating from voyeurism or non-consensual recording of intimate parts and publication or threatened publication of intimate images without consent; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Crimes (Amendment) Ordinance 2021.

2. Crimes Ordinance amended

The Crimes Ordinance (Cap. 200) is amended as set out in section 3.

3. Part XIIAA added

After Part XII—

Add

“Part XIIAA

Voyeurism, Non-consensual Recording of Intimate Parts and Related Image Publication Offences

Division 1—Interpretation

159AA. Interpretation

(1) In this Part—

breasts (胸部) means the breasts of an individual regardless of the individual’s sex;

disregard (不理會), in relation to a consent, see section 159AAH;

image (影像) means—

- (a) a photograph, video recording or film; or
- (b) a static or moving visual record;

intimate image (私密影像), in relation to an individual, ~~—~~

~~(a) means an image showing—~~

~~(i) an intimate part of the individual; or~~

~~(ii) ~~showing~~ the individual doing an intimate act; and~~

~~(b) includes an image that has been altered to appear to show—~~

~~(i) an intimate part of the individual; or~~

~~(ii) the individual doing an intimate act,~~

regardless of whether any intimate part shown in an image described in subparagraph (i) or (ii) is in fact that of the individual; but

(c) does not include an image so altered that no reasonable person would believe that it shows—

(i) an intimate part of the individual; or

(ii) the individual doing an intimate act;

intimate part (私密部位), in relation to an individual, means—

- (a) the individual's genitals, buttocks, anal region or breasts (whether exposed or only covered with underwear); or
- (b) the individual's underwear covering genitals, buttocks, anal region or breasts;

record (拍攝)—

- (a) means creating or generating an image; and
- (b) includes any act of making a visual record that is transmitted in real time with or without retention or storage in—
 - (i) a physical form; or
 - (ii) an electronic form from which the record is capable of being reproduced with or without the aid of any device;

sexual purpose (性目的), in relation to a person, includes the stimulation or satisfaction of the sexual desire of the person or any other person;

structure (構築物) includes any aircraft, vehicle, vessel, tent and other temporary or movable structure.

(2) For the purposes of this Part, an individual is doing an intimate act if—

- (a) the individual is using the toilet in a manner that an intimate part of the individual is likely to be revealed; or

- (b) the individual is doing a sexual act that is not of a kind ordinarily done in public.
- (3) 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.
- (4) For the purposes of this Part, a person publishes an image if the person, whether or not for any form of reward—
 - (a) distributes, circulates, makes available, sells, hires, sends, gives or lends the image to another person; or
 - (b) shows the image in any manner to or for another person (including showing, playing or projecting the image to or for another person using any machinery or apparatus and publicly displaying the image).
- (5) For the purposes of subsection (4), a reference to distributing, circulating, making available or sending an image to a person includes a reference to—
 - (a) making available to the person any data from which the image is capable of being reproduced; and
 - (b) making available to the person any hyperlink, or location on an electronic platform, that gives access to the image or any data from which the image is capable of being reproduced.

Division 2—Offences

159AAB. Voyeurism

- (1) A person commits an offence if—
 - (a) the person surreptitiously—
 - (i) 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;
- (ii) observes (with or without the aid of equipment) or records an intimate part of an individual, or an individual doing an intimate act, for the purpose of observing or recording an intimate part or an intimate act, of any individual; or
 - (iii) observes (with or without the aid of equipment) or records an individual for a sexual purpose;
- (b) the individual who is being observed or recorded as described in paragraph (a)(i), (ii) or (iii) (***subject individual***) is in circumstances that give rise to a reasonable expectation of privacy; and
- ~~(c) no consent is given by the subject individual to being observed or recorded by the person; and~~
- (dc) the person disregards whether the subject individual consents to being observed or recorded by the person.
- (2) A person commits an offence if the person—
- (a) installs or operates equipment; or
 - (b) constructs or adapts a structure or a part of a structure,
- for the purpose of enabling the person or any other person to commit an offence under subsection (1).
- (3) A person who commits an offence under subsection (1) or (2) is liable on conviction on indictment to imprisonment for 5 years.

159AAC. Non-consensual recording of intimate parts

- (1) A person commits an offence if—
- (a) the person—
 - (i) records an intimate part of an individual, in circumstances in which the intimate part would not otherwise be visible; or
 - (ii) with intent to observe or record an intimate part of an individual—
 - (A) operates equipment for the purpose of observing or recording an intimate part of the individual from beneath the clothing of the individual; or
 - (B) 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,

in circumstances in which the intimate part would not otherwise be visible;
 - (b) the person engages in the conduct described in paragraph (a)(i) or (ii) ~~for~~—
 - (i) for a sexual purpose; or
 - (ii) dishonestly; and the purpose of obtaining dishonest gain for the person, or for any other person;
 - ~~(c) no consent is given by the individual referred to in paragraph (a)(i) or (ii) (**subject individual**) to the person's conduct described in that paragraph; and~~
 - ~~(d)~~ (dc) the person disregards whether the subject individual referred to in paragraph (a)(i) or (ii) consents to the

person's conduct described in that paragraph~~in paragraph (a)(i) or (ii).~~

- (2) A person who commits an offence under subsection (1) is liable on conviction on indictment to imprisonment for 5 years.

~~(3) In subsection (1)(b)(ii) —~~

~~*gain* (獲益) includes —~~

- ~~(a) a gain in money or property;~~
- ~~(b) a temporary or permanent gain;~~
- ~~(c) a gain by keeping what one has; and~~
- ~~(d) a gain by getting what one has not.~~

159AAD. Publication of images originating from commission of offence under section 159AAB(1) or 159AAC(1)

(1) A person commits an offence if—

- (a) the person publishes an image of an individual (*subject individual*);
- (b) the image originates from the commission of an offence under section 159AAB(1) or 159AAC(1) (*specified offence*); and
- ~~(c) no consent is given by the subject individual to the publication; and~~
- (~~c~~) the person—
 - (i) knows that the image originates from the commission of a specified offence, or is reckless as to whether the image originates from the commission of a specified offence; and
 - (ii) disregards whether the subject individual consents to the publication.

- (2) For subsection (1)(b), it is immaterial whether the specified offence is committed by the person.
- (3) A person who commits an offence under subsection (1) is liable on conviction on indictment to imprisonment for 5 years.

159AAE. Publication or threatened publication of intimate images without consent

- (1) A person commits an offence if—
 - (a) the person publishes an intimate image of an individual;
 - (b) the person—
 - (i) intends the publication to cause humiliation, alarm or distress to the individual; or
 - (ii) knows or is reckless as to whether the publication will or is likely to cause humiliation, alarm or distress to the individual;
 - (c) no consent is given by the individual to the publication; and
 - (d) the person disregards whether the individual consents to the publication.
- (2) A person commits an offence if—
 - (a) the person makes a threat to publish an intimate image of an individual;
 - (b) the person, when making the threat—
 - (i) intends the threat to cause humiliation, alarm or distress to the individual; or
 - (ii) knows or is reckless as to whether the threat will or is likely to cause humiliation, alarm or distress to the individual;

- (c) no consent is given by the individual to the threatened publication; and
 - (d) the person disregards whether the individual consents to the threatened publication.
- (3) For subsections (1) and (2), it is immaterial whether the intimate image is—
- (a) created, generated or obtained in Hong Kong or elsewhere;
 - (b) created, generated or obtained by—
 - (i) the individual referred to in subsection (1) or (2), as the case may be (*subject individual*); or
 - (ii) the person;
 - (c) created, generated or obtained with or without the consent of the subject individual;
 - (d) created, generated or obtained before, on or after the day on which the Crimes (Amendment) Ordinance 2021 (of 2021) comes into operation; or
 - (e) provided to the person by the subject individual.
- (4) For subsection (2), it is immaterial whether the person is capable of publishing the intimate image.
- (5) A person who commits an offence under subsection (1) or (2) is liable on conviction on indictment to imprisonment for 5 years.

Division 3—Consent and Defence

159AAF. Interpretation

In this Division—

subject individual (事主) means an individual whose intimate act, intimate part or intimate image is the subject of a person's conduct.

159AAG. Who cannot give consent that would prevent conduct from becoming offence under Division 2

A subject individual cannot give a consent that would prevent a person's conduct from becoming an offence under Division 2 if, at the time when the conduct takes place, the subject individual—

- (a) is under the age of 16; or
- (b) is a mentally incapacitated person as defined by section 117(1).

159AAH. Disregard whether consent is given

For the purposes of Division 2, a person disregards whether a subject individual consents to the person's conduct if the person—

- (a) knows that the subject individual does not consent to the conduct; or
- (b) is reckless as to whether the subject individual consents to the conduct.

159AAI. Defence regarding age or mental capacity of subject individual

- (1) This section applies to proceedings against a person charged with an offence under Division 2 if the subject individual—
 - (a) is under the age of 16; or
 - (b) is a mentally incapacitated person as defined by section 117(1).

- (2) It is a defence for the person to prove that the person—
 - (a) honestly believed that a consent was given by the subject individual to the person's conduct that would constitute the offence; and
 - (b) did not know and had no reason to suspect that the subject individual was an individual falling within subsection (1)(a) or (b).
- (3) The burden of proving a defence under subsection (2) lies on the person.

159AAJ. Defence regarding lawful authority or reasonable excuse

- (1) Subject to subsection (3), it is 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.
- (2) A person is taken to have established that the person had lawful authority or reasonable excuse referred to in subsection (1) if—
 - (a) there is sufficient evidence to raise an issue with respect to the lawful authority or reasonable excuse; and
 - (b) the contrary is not proved by the prosecution beyond reasonable doubt.
- (3) Subsection (1) does not apply to—
 - (a) a person charged with an offence under section 159AAB(1) that relates to section 159AAB(1)(a)(iii);
 - (b) a person charged with an offence under section 159AAB(2) that relates to section 159AAB(1)(a)(iii); and

- (c) a person charged with an offence under section 159AAC(1) in respect of the conduct described in section 159AAC(1)(a)(i) or (ii) that was engaged in by the person for a sexual purpose.”
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Explanatory Memorandum

The purpose of this Bill is to amend the Crimes Ordinance (Cap. 200) (*Ordinance*) to introduce new offences of voyeurism and non-consensual recording of intimate parts, and related image publication offences.

2. Clause 1 sets out the short title.
3. Clause 3 adds a new Part XIIAA (new sections 159AA to 159AAJ) to the Ordinance. The new Part XIIAA contains 3 Divisions.
4. Division 1 defines and provides for the meaning of certain terms for the purposes of the new Part XIIAA (new section 159AA).
5. Division 2 introduces the following new offences—
 - (a) voyeurism (new section 159AAB);
 - (b) non-consensual recording of intimate parts (new section 159AAC);
 - (c) publication of images originating from the commission of the offence under the new section 159AAB(1) or 159AAC(1) (new section 159AAD);
 - (d) publication or threatened publication of intimate images without consent (new section 159AAE).
6. Division 3 contains provisions to—
 - (a) provide that a subject individual who is under the age of 16 or is a mentally incapacitated person (as defined by section 117(1) of the Ordinance) cannot give a consent that would prevent a conduct from becoming an offence (new section 159AAG);
 - (b) set out the circumstances under which a person is to be taken to disregard whether a subject individual consents to the person's conduct (new section 159AAH); and

- (c) provide for statutory defences (new sections 159AAI and 159AAJ).

7. Each of the new offences introduced in the Bill carries with it a maximum penalty of 5-year imprisonment.