

15<sup>th</sup> July 2021

**Association Concerning Sexual Violence Against Women's  
 Further Response to the Government's proposed revisions of  
*Crimes Amendment Bill 2021***

1. Established on 8 March 1997, Association Concerning Sexual Violence Against Women (ACSVAW) has been striving to advocate for law reform on sexual offences in Hong Kong. We are writing to submit our further views and suggestions with regard to the *Administration's response to issues raised at the meeting on 28 June 2021* ('Administration's response'), and the revisions of the Bill<sup>1</sup>. In this submission, we would like to recommend the Government to –

- (A) Remove section 159AAC(1)(b) of 'Non-consensual recording of intimate parts' offence; and**
- (B) Include provisions regarding image-removal orders made by the Court; and**
- (C) Provide more specific defences (s.159AAJ).**

Below are our detailed suggestions and justifications.

**(A) Remove section 159AAC(1)(b) of 'non-consensual recording of intimate parts' offence**

2. According to the Administration's response, s. 159AAC(1)(b) will be revised as below:
- (b) the person engages in the conduct described in paragraph (a)(i) or (ii)*
    - (i) for a sexual purpose; or*
    - (ii) dishonestly;*
3. We hereby suggest removing the provision of 159AAC(1)(b) because of four reasons. Firstly, similar local provisions and overseas legislation on intimate image offence do not require proof of intent; secondly, the element of dishonesty is problematic to be applied in intimate image offence; thirdly, the definition of sexual purpose is unclear and vague; lastly, the element of dishonesty is redundant as other elements are sufficient to constitute that the defendant's conduct is against the standard of an ordinary reasonable man.

<sup>1</sup> *Administration's response to issues raised at the meeting on 28 June 2021* (LC Paper No. [CB\(2\)1295/20-21\(02\)](#)), see: <https://www.legco.gov.hk/yr2021/chinese/bc/bc57/papers/bc5720210716cb2-1295-2-c.pdf>

4. **Similar local provisions and overseas legislation on intimate image offence do not require proof of intent.** For instance, under section 3 of the *Prevention of Child Pornography Ordinance* (Cap. 579), proof of the defendant's criminal intent is not required for the offence of printing, making and producing child pornography. In overseas jurisdictions, the defendant's criminal intent is also not a fault element in the offence of non-consensual recording of intimate parts. Such jurisdictions include but is not limited to: New Zealand (s 216H. Prohibition on making intimate visual recording, *Crimes Act 1961* (NZ)), Victoria (s 41B. Visually capturing genital or anal region, *Summary Offences Act 1966* (Vic)) and Australian Capital Territory (s 61B. Intimate observations or capturing visual data etc, *Crimes Act 1900* (ACT)).
5. As to England and Wales<sup>2</sup> and Singapore<sup>3</sup>, their legislative model is different from that proposed by Security Bureau: they regard non-consensual recording of intimate parts as a criminal act under the offence of voyeurism, rather than make a separate specific offence for the act. Therefore, same as 'recording of private act', proof of criminal intent for 'recording of intimate parts', such as sexual purpose, is needed. However, due to the fact that their legislative framework is different from ours, it is problematic take the English and Singaporean provisions as reference, for the drafting of the offence of non-consensual recording of intimate parts.
6. **The element of dishonesty is problematic to be applied in intimate image offence. The case law prosecuted under s.161 of the *Crimes Ordinance* (Cap. 200) may not be applicable.** The proof of dishonesty is proposed with reference to s.161(1)(c) of the *Crimes Ordinance* (Cap. 200). The government expects that, making reference to this offence can help with the prosecution of the non-consensual recording offence.
7. However, under the judgement of *Cheng Ka Yee* [2019] HKCFA 9, s. 161 is inapplicable to the criminal acts done by the defendant with his/her own computer. Although s.161 was once used to prosecute upskirting, the purpose of the offence was not so. *Cheng* at [45]-[47], also rejected the argument for the wider construction of s.161 to cover more crimes (in which one of the examples raised was uploading sex

<sup>2</sup> *Sexual Offences Act 2003* (England and Wales), s. 67 Voyeurism

<sup>3</sup> *The Penal Code* (Singapore), s. 377BB Voyeurism

videos on to the Internet) because it is beyond the scope of the provision’s intent<sup>4</sup>. In the light of CFA’s judgement, the case laws of s. 161 could unlikely be a reference to the new offence.

8. **Other elements of this offence are sufficient to show that the defendant’s conduct is against the standard of an ordinary reasonable man. There is no further need to prove a dishonest intent.** To prosecute a defendant under s. 159AAC, the prosecutor needs to prove that the defendant: (1) disregards whether the individual consents; (2) records an intimate part of an individual, in circumstances in which the intimate part would not otherwise be visible, such as intentional upskirting; or (3) operates equipment in an unreasonable manner for the purpose of observing or recording intimate parts. The above elements, particularly (1), are sufficient to prove that, the defendant’s conduct is against contemporary standard of an ordinary and reasonable man. It is reasonable to say that any ordinary person would agree, recording intimate parts ignoring his/her will is a dishonest act.
  
9. **Noteworthy is, since *Ghosh* test was overruled by *Ivey* in the UK, the applicability of the test of dishonesty remains uncertain.** The *Ghosh* test<sup>5</sup> was overruled by the UKSC in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67<sup>6</sup>. In *Ivey* at [58], the UK Supreme Court criticized the second limb of *Ghosh* test, as it leads to the effect that “the less the defendant’s standards conform to what society in general expects, the less likely he is to be held criminally responsible for his behavior”. For instance, if the perpetrator records intimate images of the victim-survivor in order to make fun of him/her, even when the act is *objectively* dishonest, as long as the defendant *subjectively* thinks that his/her conduct would not be regarded as dishonest by the society, he would be acquitted. This is undesirable.
  
10. The test of dishonesty in civil and criminal cases are realigned at [74], “...first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the

<sup>4</sup> *Cheng Ka Yee* at [45]-[47]

<sup>5</sup> First, whether the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people. If yes, secondly, whether the defendant must have realized that ordinary honest people would regard his behavior as dishonest.

<sup>6</sup> *Ivey* was a civil case hence *Ghosh* was technically overruled in *obiter dictum*.

facts...[once established]...the question whether his conduct was honest or dishonest is to be determined ...by applying the (objective) standards of ordinary decent people”<sup>7</sup>.

11. In Hong Kong, the two criminal cases<sup>8</sup> that mentioned *Ivey* did not discuss its local application. Besides, the *Ghosh* test was overruled in the UK. Given the above, it remains uncertain if the test of dishonesty could be applied to s. 159AAC.

12. **The definition of sexual purpose is unclear. Its interpretation will lead to inconsistency.** Although sexual purpose is defined in s. 159AA as ‘includes the stimulation or satisfaction of the sexual desire of the person or any other person’. Different persons have different ways to stimulate their sexual desires. There are varied extents by which sexual satisfaction made explicit. Whether the defendant observes and records intimate images out of sexual purpose depends on the jury’s understandings and perceptions. Despite the CA ruled in *R v Curtis (Malcolm Robert)* [2010] EWCA Crim 1778 that, whether D had intended to derive sexual gratification is a matter for the jury to decide, case laws show that the ambiguous term of sexual gratification often ended up in rulings at higher courts<sup>9</sup>. Worse still, the court is unable to prove the defendant’s intent if he/she refuses to testify.

13. It is reflected in our and other concern groups’ previous submissions that, the purposes and intents of perpetrators are wide-ranging. Some perpetrators do not have any specific intents. For example, some people imitate the acts of non-consensual recording with the influence of online chat groups that circulate sneak-shots. Regardless of the abuser’s intent, non-consensual recording of intimate parts is definitely an act that violates

<sup>7</sup> Test first set out in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] UKPC 4 by Lord Nicolls, which is widely accepted in Hong Kong civil cases.

An example of the test given by the court in *Ivey* is “Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying and had no intention of paying. He genuinely believes that public transport is free.” The first step would be ascertaining his subjective knowledge as to fact, i.e. public transport is free. The second step will be in the context of his knowledge, whether his standard of behavior (i.e. does not pay) is honest or dishonest by applying the objective standards of ordinary decent people.

<sup>8</sup> *Secretary for Justice v Cheng Ka Yee & Ors* [2018] 5 HKC 257 and *HKSAR v Lai Kin Hang Erwin and others* [2019] HKCA 547.

<sup>9</sup> *R v Richards (Allan)* [2018] EWCA Crim 2374; *R v Lee (Stuart)* [2010] EWCA Crim 2984

sexual autonomy. ‘Intent’ is neither a relevant or important issue in intimate image abuse. Therefore, we suggest that s. 159AAC(b) should be removed.

## **(B) Include provisions regarding image-removal orders made by the Court**

14. What makes the harms of intimate image abuse persistent is the out-of-control circulation of the images. As long as the images are still in the perpetrator’s possession or circulated on cyber space, the victim will live in perpetual fear. **To render full protection to victim-survivors, we contend that it is necessary to grant the court power to issue image-removal order against ‘online content hosts’. We suggest the Government could make reference to the proposal of the *Personal Data (Privacy) (Amendment) Bill 2021*<sup>10</sup>. In the Administration’s response<sup>11</sup> (see para. 35), the Government has cited below court orders that might be able to stop the images from circulating — s.102 of *Criminal Procedure Ordinance (Cap. 221)* and o.45 and o.52 of *The Rules of the High Court (Cap. 4A)*, however, the above orders are inapplicable in the cases where the defendants have uploaded the intimate images to online platforms.**

15. **The *Personal Data (Privacy) (Amendment) Bill 2021* submitted to the Legislative Council on 13<sup>th</sup> July includes new provisions on the cessation notice made to overseas internet service providers for removal of the doxxing content (see para. 15 of the Legislative Council Brief):**

“..... Given the boundless nature of the Internet, an extra-territorial effect is also introduced such that a cessation notice can be served by the Commissioner regardless of whether the disclosure is made in Hong Kong or not (**new section 66K**). To ensure cessation actions are taken, a cessation notice may be served on a person in Hong Kong (e.g. an individual in Hong Kong and an internet service provider having a place of business in Hong Kong) or, in relation to an electronic message, a service provider outside Hong Kong (e.g. an overseas social media platform) that is able to take a cessation action. A cessation notice will require cessation actions to be

<sup>10</sup> *Personal Data (Privacy) (Amendment) Bill 2021* (Legislative Council Brief: Paper No: CMAB/CR/7/22/45), see: [https://www.legco.gov.hk/yr20-21/english/brief/cmabcr72245\\_20210714-e.pdf](https://www.legco.gov.hk/yr20-21/english/brief/cmabcr72245_20210714-e.pdf)

<sup>11</sup> *Administration's response to submissions on the Bill* (LC Paper No. CB(2)1222/20-21(01)), see: <https://www.legco.gov.hk/yr20-21/chinese/bc/bc57/papers/bc5720210628cb2-1222-1-c.pdf>

taken within a designated timeframe to reflect the urgency of doxxing cases. The Commissioner will identify in the cessation notice the concerned doxxing content, notify the person what specific cessation actions to take for removal of the doxxing content, as well as the deadline for complying with the cessation notice, etc. (**new section 66M**). If the person who receives the cessation notice fails to comply with the notice, that person commits an offence unless the person can establish a defence (e.g. a reasonable excuse for such failure) (**new section 66O**).”<sup>12</sup>

16. Be it doxxing or non-consensual sharing of intimate images, the solution to the root of the problem is to order online content hosts to immediately remove content that violates the laws. Since the Government require online service providers, including overseas providers, to remove content in the *Personal Data (Privacy) (Amendment) Bill 2021*, the same can be done in the *Crimes (Amendment) Bill 2021*. As there is no authority specializing in investigation on intimate image abuse, we propose to include provisions that empower the court to directly issue an order to the online content hosts. Legislative model can be made with reference to sections 19(2)<sup>13</sup> and 18<sup>14</sup> of the *Harmful Digital Communications Act 2015* of New Zealand.

**17. The court orders provided by s. 102 of *Criminal Procedure Ordinance (Cap. 221)* and o.45 and o.52 of *The Rules of the High Court (Cap. 4A)* are not applicable to**

<sup>12</sup> *Personal Data (Privacy) (Amendment) Bill 2021* (Legislative Council Brief: Paper No: CMAB/CR/7/22/45), see: [https://www.legco.gov.hk/yr20-21/english/brief/cmabcr72245\\_20210714-e.pdf](https://www.legco.gov.hk/yr20-21/english/brief/cmabcr72245_20210714-e.pdf)

<sup>13</sup> ‘19. Orders that may be made by court

(2) *The District Court may, on an application, make 1 or more of the following orders against an online content host:*

- (a) *an order to take down or disable public access to material that has been posted or sent:*
- (b) *an order that the identity of the author of an anonymous or pseudonymous communication be released to the court:*
- (c) *an order that a correction be published in any manner that the court specifies in the order:*
- (d) *an order that a right of reply be given to the affected individual in any manner that the court specifies in the order.’*

<sup>14</sup> ‘18 Interim orders

- (1) *The District Court may, if the court considers it is desirable to do so, grant any interim orders pending the determination of the application for orders under section 19.*
- (2) *An interim order under this section may do anything that may be done by order under section 19 and expires when the application under that section is determined.’*

**cases where the intimate images having been shared on the internet.** S.102 of *Criminal Procedure Ordinance (Cap. 221)* empowers the courts to make an order for the forfeiture of the property that has been used in the commission of an offence, such as the smartphone or computer. For cases where the defendants who may violate ss. 159AAD and 159AAE, they have already uploaded the image to pornographic sites; or sent to friends via messaging apps; or distributed in Telegram channels. The images are no longer solely possessed by the defendant, but also the *content hosts of pornographic sites, friends of defendant* and *netizens*. It is not feasible for the court to forfeit the property of the above-mentioned parties/people based on s. 102. Therefore, the images will keep being spread online. These limitations also apply to o.45 of *The Rules of the High Court (Cap. 4A)*.

18. Besides, to apply o.45 and o.52 of *The Rules of the High Court (Cap. 4A)*, an interlocutory injunction shall come into effect in the first place. However, it is extremely difficult to obtain an interlocutory injunction that aims to stop people from spreading intimate images online, for it is difficult to name a particular group of persons as defendants in the cyber world. How to notify online platforms users not to re-share an intimate image? How to forbid all users from reposting? How can the victim-survivors know who owns his/her intimate images? How can we make sure that the order is effectively executed in the cyber space? Not only is it difficult to obtain an injunction, but it is also unfair to shift the burden to the victim to stop the act through civil action. Asking the victim of an offence to stop the act through civil action is transferring the burden to them. This will also increase the second-traumas suffered by victims in the pursuit of civil action to stop the act.

**19. It is clear that there is a lack of effective and efficient legal actions to stop intimate images from being spread online. Granting the court the power to order online content hosts to remove the content is therefore necessary and crucial.**

**(C) Provide more specific defences (s.159AAJ)**

20. Current provisions regarding defences in the Bill are too simple. There is a lack of clear guidance for the public to understand under what circumstances are regarded as “reasonable excuses”. **We suggest the Government to make a reference to**

**s.221BD(3) of the *Criminal Code* of Western Australia, Australia, and s.4(3) of the *Prevention of Child Pornography Ordinance* (Cap. 579), to enrich the content of the defence section. For instance, it is a defence if the distribution is for a genuine purpose of scientific, educational or medical purpose; for a reasonably necessary purpose of legal proceeding; or for media activity purposes, and such conduct is not intended to cause harm to the depicted person, etc.**

**Section 221BD(3) of *Criminal Code*, Western Australia:**

*It is a defence to a charge under subsection (2) [Distribution of intimate image] to prove that –*

- (a) *the distribution of the image was for a genuine scientific, educational or medical purpose; or*
- (b) *the distribution of the image was reasonably necessary for the purpose of legal proceedings; or*
- (c) *the person who distributed the image (i) distributed the image for media activity purposes; and (ii) did not intend the distribution to cause harm to the depicted person; and (iii) reasonably believed the distribution to be in the public interest; or*
- (d) *a reasonable person would consider the distribution of the image to be acceptable, having regard to each of the following (to the extent relevant)*
  - (i) *the nature and content of the image;*
  - (ii) *the circumstances in which the image was distributed;*
  - (iii) *the age, mental capacity, vulnerability or other relevant circumstances of the depicted person;*
  - (iv) *the degree to which the accused's actions affect the privacy of the depicted person;*
  - (v) *the relationship between the accused and the depicted person;*
  - (vi) *any other relevant matters.*

**Section 4(3) of *Prevention of Child Pornography Ordinance* (Cap. 579):**

*It is a defence to a charge under section 3(3) for the defendant to establish—*

- (a) *that his possession of the child pornography was for a genuine educational, scientific or medical purpose;*
- (b) *that his possession of the child pornography otherwise served the public good and did not extend beyond what served the public good;*
- (c) *that he had not seen the child pornography and did not know, nor did he suspect, it to be child pornography;*
- (d) *that he had not asked for any child pornography and, within a reasonable time after it came into his possession, he endeavoured to destroy it; or*
- (e) *that he believed that the person pornographically depicted in the child pornography was not a child when originally depicted and that the person was not depicted as a child.*