

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

香港添馬添美道 2 號

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.: SBCR 6/2801/73

來函檔號 Your Ref.:

電話號碼 TEL. NO. : 2810 2632

傳真號碼 FAX. NO. : 2810 7702

18 August 2021

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

Dear Miss MA,

**Follow-up to the Meeting of the
Bills Committee on Crimes (Amendment) Bill 2021
on 16 July 2021**

Thank you for your letter dated 20 July 2021. In response to the major concerns expressed by Members at the Bills Committee meeting on 16 July 2021, I hereby provide supplementary information in the ensuing paragraphs, and also highlight other technical amendments proposed by the Government.

(a) *The offence element of “no consent to the conduct is given by the subject individual”*

2. As mentioned in paragraphs 5 to 9 of the Government’s letter to the Bills Committee dated 13 July 2021 (LC Paper No. CB(2)1295/20-21(02)], 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 amendments of the relevant provisions, **the prosecution will not have to prove the offence element of “no consent is given by the subject individual”, but will still have to 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”, while establishing other offence elements.

3. The proposed removal of the said offence element has not changed our legislative intent. Conduct such as voyeurism, clandestine photography and non-consensual publication of intimate images should be criminalised because the subject individuals do not consent to it. Our legislative intent is to protect the victims’ right to privacy and sexual autonomy. We do not intend to interfere with the private and voluntary conduct of members of the public. However, as the subject individual in individual cases may not be able to be brought before the court to give evidence for various reasons (e.g. facial features of the subject individuals are not captured in the images, their unwillingness to testify in court etc.), the prosecution may have certain difficulties in proving 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 public 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 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.

4. Under such circumstances, if the prosecution can prove that the defendant “disregarded whether the subject individuals consented to being observed or recorded” or “disregarded whether the subject individuals consented to the publication”, and can establish other offence elements, even though the subject individuals do not appear before the court to testify about their will, we consider that the defendant’s conduct is sufficient to constitute the relevant offences.

5. Some Members of the Bills Committee asked whether the threshold of conviction of the three proposed offences upon amendments of the relevant provisions would be lower than that of other existing sexual offences, given that the prosecution would not have to prove the absence of consent of the subject individual. As we explained during the meeting, the offences created under the Bill differ somewhat in nature from other existing sexual offences (e.g. rape, indecent assault, etc.). While the vast majority of the existing sexual offences involve actual physical contact and identifiable victims, the proposed offences

under the Bill do not necessarily involve physical contact and the intimate photos may not show the facial features of the victims. Therefore, when the prosecution brings the charges, the victims may not be identified to testify before the court. In some cases, they are not even aware of being recorded. That being said, it does not mean that the person doing the recording should be beyond the law. We are of the view that **amending the relevant provisions to retain the requirement of the prosecution to prove that the defendant “disregards whether consent is given by the subject individual” is appropriate, and can fully reflect our legislative intent.**

6. A Member asked whether the heading of section 159AAC “non-consensual recording of intimate parts” should be amended upon removal of the offence element of “no consent is given by the subject individual”. After consideration, we propose to amend the heading to “**unlawful recording or observation of intimate parts**” in order to express the nature of the offence more clearly and succinctly.

(b) Definition of “intimate image”

7. We suggest that reference be drawn to section 377BE(5) of the Penal Code of Singapore to expand the definition of an intimate image under section 159AA of the Bill 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 person would believe it shows an intimate part of the individual or the individual doing an intimate act. The relevant provisions of the Penal Code of Singapore are set out in **Annex 1**.

(c) Further amending section 159AAB(1)(a)(i) to express its meaning more clearly

8. Some Members of the Bills Committee requested that section 159AAB(1)(a)(i) of the Bill be further amended to express its meaning more clearly. In terms of English grammar, the phrase “can reasonably be expected to be nude...” in the section carries the meaning that “it **can** be reasonably expected that the individual **can** be nude...”. To convey the meaning more clearly, we suggest adding the appropriate wording in the Chinese text. As the word “can” in the phrase indicates possibility, we suggest adding “能” (meaning can) before “預期” (meaning expect) in the Chinese text. Besides, with the word “會” (meaning will) in the Chinese text, readers may misinterpret that “the individual will definitely be nude, reveal an intimate part, or be doing an intimate act”. To emphasise that the individual **will only possibly but not definitely** be nude, reveal an intimate part, or be doing an intimate act, thereby avoiding such

misinterpretation, we suggest adding “可能” (meaning possibly) before “會” (meaning will). Regarding the English text, amendments are not required as it is drafted in a way that clearly expresses our legislative intent.

(d) The provisions on non-consensual recording of intimate parts under section 159AAC(1)(b)

9. Last year, we conducted a public consultation on the introduction of relevant offences and proposed to accept the Law Reform Commission’s recommendations on the introduction of an offence in relation to non-consensual recording of intimate parts **for the purpose of obtaining sexual gratification**. As for the introduction of a separate offence in relation to such conduct engaged **irrespective of purpose**, having considered the views of the public, we find it necessary to clearly define the scope of the offence. As such, in submitting the Bill to the Legislative Council, references had been made to the existing section 161(1)(c) of the Crimes Ordinance (Cap. 200).

10. As stated in the Government’s letter to the Bills Committee dated 13 July 2021, **the term “dishonest” refers to the circumstances or manner in which the observation or recording is done, rather than the purpose of the observation or recording**. Taking into account the views of the Bills Committee and the public, we suggest that section 159AAC(1)(b) of the Bill be amended to express our legislative intent clearly. Upon the proposed amendments, the relevant provisions will read as follows:

“the person engages in the conduct described in paragraph (a)(i) or (ii)—

- (i) for a sexual purpose; or*
- (ii) dishonestly; and ...”*

11. We would like to emphasise that **the revised provisions still cover deliberate and clandestine upskirting or recording of breasts, and would not allow such criminals to be above the law**. 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. **recording of an intimate part of the woman dishonestly**). It is because by the standards of ordinary reasonable and honest people, his clandestine taking of upskirt photos of a woman unknown to him is a dishonest behaviour, and with normal cognitive ability, he must have realised that his behaviour would be deemed dishonest by such standards. Regardless of the purpose of clandestine recording, be it out of novelty, excitement or curiosity, or for bullying someone, or even in the absence of any specific purpose, a person who does the observation

or recording dishonestly may commit the offence of non-consensual recording of intimate parts under section 159AAC of the Bill.

12. As explained in LC Paper No. CB(2)1295/20-21(02), in deciding whether a defendant is “**dishonest**”, 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 is 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 realises that ordinary reasonable and honest people will regard the conduct as dishonest (a subjective test). Some members of the public pointed out that the test was overruled by the Supreme Court of the United Kingdom in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67*, and hence questioned its applicability in Hong Kong. However, as Hong Kong courts have not refuted the application of the *Ghosh* test in Hong Kong, it is still applicable locally according to case law¹.

13. Some Members of the Bills Committee and members of the public have suggested removing section 159AAC(1)(b) of the Bill altogether. The provisions on *mens rea* is paramount to confining the scope of the offence. Should section 159AAC(1)(b) be removed, under section 159AAC(1)(a)(i), a person may commit the offence if he “records an intimate part of an individual, in circumstances in which the intimate part would not otherwise be visible”. The removal of section 159AAC(1)(b) will thus easily lead to unnecessary arguments and make people who do not have the *mens rea* break the law inadvertently. Upon the proposed amendments, the provisions can strike a right balance. The Government does not intend to further amend the provisions.

(e) Making child-related offences absolute offences

14. At the meeting of the Bills Committee, a Member suggested that the Government should consider not providing a defence should the victim be a child under the age of 16.

15. We would like to emphasise that children and mentally incapacitated persons should be protected and legislation on criminal offences should protect these classes of vulnerable persons from sexual abuse or exploitation. As such, section 159AAG of the Bill provides that a person under the age of 16 or a mentally incapacitated person cannot give consent that would prevent the conduct from becoming an offence under Division 2 of the Bill. In other words, if the prosecution can prove that the subject individual is under the age of 16 or is mentally incapacitated when the conduct takes place, it needs not prove the

¹ Paragraphs 22-20, Archbold Hong Kong 2021.

offence elements of “no consent is given by the subject individual” and “the defendant disregards whether the subject individual consents to the conduct”. This provision specifically protects children and mentally incapacitated persons affected by conduct such as voyeurism, clandestine photography and non-consensual publication of intimate images.

16. However, we are of the view that we should also take into account certain circumstances where the defendant **had no mens rea**, 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. In the *Choi Wai Lun* case, the defendant submitted a defence against the charge of indecent assault, stating that he honestly and reasonably believed that the girl was aged 16 or above. The defendant testified that the girl described herself as aged 17, and appeared to be relatively tall, with well-developed bodily features and spoke in a mature manner. The Court of Final Appeal (“CFA”) held in the *Choi Wai Lun* case that although the manifest intention of section 122(2) of the Crimes Ordinance was to confer special protection on a class of vulnerable persons (namely, the underage) who were potential objects of indecent acts, **absolute liability was not necessary to achieve** such statutory purpose. For indecent assault, the CFA considered it appropriate to require the defendant to prove, on the balance of probabilities, that the defendant honestly and reasonably believed that the alleged victim was aged 16 or over. The CFA was of the view that the requirement was suitably demanding, which not only better reflected the statutory purpose, but also helped encourage potential defendants to steer clear of indecent conduct with young persons who may fall within the protected class.

17. Section 159AAI of the Bill provides that **the defendant** submitting a defence **has a reverse onus** to prove the defence on a **balance of probabilities**. We are of the view that when considering sections 159AAG and 159AAI of the Bill in tandem, the “rationality” and “proportionality” tests can be passed, a rational connection with the legitimate aim of giving heightened protection to children or mentally incapacitated persons can be established, and no more than necessary is done to achieve such a level of protection, thereby striking a reasonable balance between enhancing the protection for children and ensuring fair trials for the defendants.

18. For recording involving children, depending on the circumstances, the person who does the recording may also commit other offences, such as publication or possession of child pornography under the Prevention of Child Pornography Ordinance (Cap. 579), in addition to those provided under the Bill. The Prevention of Child Pornography Ordinance criminalises the **publication or possession of child pornography**. Upon conviction, the offender is liable to a maximum penalty of imprisonment for 8 years and a fine of \$2,000,000 and

imprisonment for 5 years and a fine of \$1,000,000 respectively. The Police have been combating child-related sexual offences (e.g. private models) on various fronts. To effectively prevent, combat, and detect these crimes, the Police conduct cyber patrols to collect intelligence, exchange intelligence with Mainland and overseas law enforcement agencies, and conduct joint operations with them when appropriate. Meanwhile, the Police also make efforts on the education front, holding talks and workshops regularly to educate young people to be mindful of the traps of sexual offences, and disseminate relevant messages to parents, teachers and other community stakeholders. Efforts are made on various fronts to prevent children from getting hurt.

(f) Empowering the court to order any person to dispose of images involving the victims

19. As stated in the Government's reply earlier, 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 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 also initiate a civil action to seek an injunction. Some defendants will also delete related information on their own initiative as a plea for mitigation. The Police have a well-established mechanism to request online content hosts to remove illegal content or images as well.

20. At the meeting of the Bills Committee, a Member pointed out that the existing mechanism relied on the voluntary cooperation of the defendants and Internet service providers, and failed to provide adequate protection for the victims. Given the lasting harm caused to the victims by the further circulation of the intimate images, we consider it justified to provide a legal basis to the existing administrative mechanism and for the court to order the defendants or other persons (including individuals or Internet service providers) to remove, delete or destroy the intimate images as appropriate. The proposed amendments are detailed in **Annex II**.

21. We propose to add a Division 4 to the Bill to provide for the **disposal order**. Under the said Division, the Government may, upon the institution of prosecutions for the offences under section 159AAD or 159AAE of the Bill, apply in the name of the Secretary for Justice for the magistrate to order a person who has the possession or the means of control of the images relating to the case (whether the person is in or outside Hong Kong) **to take reasonable steps to remove, delete or destroy the images, or cause the images to be removed, deleted or destroyed, within a period to be specified by the magistrate** (the proposed section 159AAL(1)). To safeguard procedural justice, the magistrate shall, except for situations provided for under section 159AAM(4), issue a

summons to the subject person to summon him to appear before the court to make representations before making a disposal order (the proposed section 159AAM). Unless a reasonable excuse can be established, it is an offence for the subject person to breach the disposal order and the maximum penalty is a fine at level 6 (i.e. \$100,000) and imprisonment for 1 year (the proposed section 159AAO). After a disposal order is made, the magistrate may, on the magistrate's own motion, or on application in the name of the Secretary for Justice, or on application by the subject person or a concerned person, affirm, suspend, vary, cancel or revoke the disposal order as the magistrate considers appropriate (the proposed section 159AAL(5)).

(g) Establishing a specific defence

22. Some members of the public opined that the provisions on defence under section 159AAJ of the Bill were too brief to enable an understanding of what constituted a defence of reasonable excuse. As explained in LC Paper No. CB(2)1065/20-21(03), with the elements of the offences clearly defined and relevant mens rea specified precisely, 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 provisions.

23. The statutory defence of “reasonable excuse” allows the defendant to submit 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.

(h) Responses to other public views

24. Some organisations expressed views on the Bill in respect of gender neutrality, and suggested that male breasts be excluded from the scope of the offence of non-consensual recording of intimate parts. In line with the principle of gender neutrality, the Government has drafted the Bill in a way so that the offence covers the intimate parts of people of all genders. We believe that the Bill is able to ensure fair and appropriate protection for people of different genders or sexual orientations.

25. As stated in paragraphs 25 to 26 of LC Paper No. CB(2)1222/20-21(01), section 159AAC seeks to criminalise non-consensual observing or recording of **intimate parts which would not otherwise be visible**. It targets the intrusive conduct of “upskirting” and “down-blousing” without consent, instead of

situations where intimate parts are exposed voluntarily. In our opinion, if a person deliberately operates equipment to observe or record an intimate part of the subject individual which would not otherwise be visible, disregarding whether the subject individual has given consent, the person's conduct infringes the right of privacy and sexual autonomy of the subject individual regardless of the gender thereof, and should therefore fall within the scope of section 159AAC.

(i) Other technical amendments

26. We have also proposed amendments to section 159AAD to express its meaning more clearly. The mens rea originally specified in section 159AAD(1)(d)(i) (i.e. the amended section (1)(c)(i)) is that the defendant "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". There are views that under the present drafting approach, if the defendant knows that the image was taken clandestinely, but is genuinely unaware that the conduct concerned constitutes an offence, the prosecution may not be able to prove the mens rea specified in section 159AAD(1)(d)(i). The Government's legislative intent is to impose penalty on a person who publishes an image of a subject individual, knowing that it was taken through voyeurism or non-consensual recording of intimate parts, or being reckless as to whether the image was so taken, and disregarding whether the subject individual consents to the publication. Even if the person is genuinely unaware that such conduct constitutes an offence, he would still commit an offence if he knows or is reckless as to under what circumstances the image was taken. For the avoidance of doubt, we have proposed amendments to section 159AAD. The proposed amendments are detailed in **Annex 2**.

Yours sincerely,

(Signed)

(Ms Joceline CHUI) for
Secretary for Security

c.c.

Department of Justice

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

Mr Charles LEE Sze-yin, Senior Public Prosecutor

Mr Sunny CHAN Sze-hoi, Government Counsel

(Constitutional Affairs Sub-Division)

Mr Kelvin CHEUNG Ka-wai, Senior Government Counsel
(Civil Division))

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))

Section 377BE(5) of the Penal Code of Singapore

377BE — Distributing or threatening to distribute intimate image or recording

- (1) Any person (A) shall be guilty of an offence who —
- (a) intentionally or knowingly distributes an intimate image or recording of another person (B);
 - (b) without B's consent to the distribution; and
 - (c) knows or has reason to believe that the distribution will or is likely to cause B humiliation, alarm or distress.
- (2) Any person (A) shall be guilty of an offence who —
- (a) knowingly threatens the distribution of an intimate image or recording of another person (B);
 - (b) without B's consent to the distribution; and
 - (c) knows or has reason to believe that the threat will or is likely to cause B humiliation, alarm or distress.
- (3) Subject to subsection (4), a person who is guilty of an offence under subsection (1) or (2) shall on conviction be punished with imprisonment for a term which may extend to 5 years, or with fine, or with caning, or with any combination of such punishments.
- (4) A person who commits an offence under subsection (1) or (2) against a person (B) who is below 14 years of age shall on conviction be punished with imprisonment for a term which may extend to 5 years and shall also be liable to fine or to caning.

(5) In this section, “intimate image or recording”, in relation to a person (B) —

- (a) means an image or recording —
 - (i) of B's genital or anal region, whether bare or covered by underwear;
 - (ii) of B's breasts if B is female, whether bare or covered by underwear; or
 - (iii) of B doing a private act; and
- (b) includes an image or recording, in any form, that has been altered to appear to show any of the things mentioned in paragraph (a) but excludes an image so altered that no reasonable person would believe that it depicts B.

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

[Note: For the sake of the completeness, all Committee Stage amendments (CSAs) proposed by the Government are marked up in the document. CSAs included in the previous letter to LegCo dated 13 July 2021 (LC Paper No. CB(2)1295/20-21(02)) which Members have already considered are shaded in grey for easy reference.]

Crimes (Amendment) Bill 2021

A BILL

To

Amend the Crimes Ordinance to provide for new offences of voyeurism, ~~non-consensual~~ unlawful recording or observation of intimate parts, publication of images originating from voyeurism or ~~non-consensual~~ unlawful recording or observation 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 XIII A added

After Part XII—

Add

“Part XIIAA

Voyeurism, ~~Non-consensual~~Unlawful Recording or Observation of Intimate Parts, Related Image Publication Offences and Disposal Order

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 ~~showing the individual doing an intimate act;~~

(ii) 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 the 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~~
- ~~(c)~~ 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~~ Unlawful recording or observation 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~~

(~~c~~) 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) For subsection (1)(c)(i)—

(a) the person is taken to know a specified offence has been committed if the person is aware of all the matters that must be established in order to prove the specified offence; and

(b) the person is taken to be reckless as to whether a specified offence has been committed if the person is reckless as to the existence of all those matters.

(34) 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.”.

Division 4—Disposal Order

159AAK. Interpretation

In this Division—

Cap. 227 (《第 227 章》) means the Magistrates Ordinance (Cap. 227);

concerned person (相關人士) in relation to a disposal order, means the person described in section 159AAM(3)(a) or (b);

criminal proceedings (刑事法律程序), in relation to a specified offence—

(a) means proceedings, before any court or magistrate, in which a person is charged with the specified offence; and

(b) includes proceedings on appeal against conviction or sentencing (or both) before any court and proceedings under section 104 of Cap. 227, in relation to the person for the specified offence;

disposal order (處置令) means an order made under section 159AAL(1);

specified offence (指明罪行) means an offence, or an alleged offence, under section 159AAD or 159AAE;

subject person (處置令對象), in relation to a disposal order, means the person described in section 159AAM(2);

summons (傳票) means a summons issued under section 159AAM(2).

159AAL. Disposal order

(1) A magistrate may, on application made in the name of the Secretary for Justice any time during any criminal proceedings in relation to a specified offence concerning an image and subject to subsections (3) and (4) and section 159AAM, order a person, whether in Hong Kong or elsewhere, to take reasonable steps to remove, delete or destroy, or to cause the removal, deletion or destruction of, the image within a period to be specified by the magistrate.

(2) A magistrate may still deal with an application under subsection (1) and make the disposal order even if the

criminal proceedings to which the application relates do not take place before a magistrate.

(3) In an application made under subsection (1)—

(a) in relation to an image proposed to be made subject to the disposal order—

(i) the image must be identified;

(ii) it must be proved that the image is an intimate image of an individual; and

(iii) it must be proved that the image is a subject of the criminal proceedings; and

(b) in relation to a person who is proposed to be made subject to the disposal order—

(i) the person must be identified by stating the person's particulars;

(ii) it must be proved that the person has the means to control, or is in possession, of an image; and

(iii) it must be proved that the person is able to take the actions required under the terms proposed in the application to be specified in the disposal order.

(4) A magistrate must not make a disposal order against a person in relation to an image unless the magistrate is satisfied that all matters that are required to be proved for the purposes of the application have been proved on a balance of probabilities.

(5) After a disposal order is made, a magistrate may—

(a) on the magistrate's own motion;

(b) on application in the name of Secretary for Justice;
or

- (c) on application by the subject person, or a concerned person,
review the disposal order and affirm, suspend, vary, cancel or revoke the disposal order as the magistrate considers appropriate.
- (6) Subject to section 159AAM, a magistrate may determine an application under subsection (1) or review a disposal order under subsection (5) based on written materials without calling any witness.
- (7) The Secretary for Justice may appoint a person or class of persons to make an application under subsection (1) or (5)(b).
- (8) To avoid doubt—
- (a) the validity of a disposal order is not affected only by—
- (i) the verdict of acquittal or quashing of conviction on appeal, of the specified offence to which the disposal order relates;
- (ii) proceedings under section 104 of Cap. 227, in relation to the specified offence;
- (iii) the discontinuation of the prosecution of the specified offence; or
- (iv) the termination of the criminal proceedings; and
- (b) the time limit of 14 clear days under section 104 of Cap. 227 does not apply in relation to a magistrate’s power to review a disposal order under subsection (5).

159AAM. Procedures in relation to disposal order

- (1) An application under section 159AAL(1) or (5)—

- _____ (a) must be made in writing; and
 - _____ (b) must be filed with a magistrate.
- _____ (2) Subject to subsection (4), before making a disposal order against a person in relation to an image, or reviewing a disposal order made against a person in relation to an image, a magistrate must issue a summons to the person to appear on a day specified in the summons to make representations.
- _____ (3) If a person, other than the subject person, claims that the person—
 - _____ (a) has an interest in an image that is, or is proposed to be, made subject to a disposal order; or
 - _____ (b) would be directly affected by the making or review of the disposal order,
the person may also appear on the day specified in the summons to make representations.
- _____ (4) If—
 - _____ (a) a summons has not been served on the subject person named in the summons and the magistrate is satisfied that all reasonable efforts have been made to serve the summons on that person;
 - _____ (b) the subject person named in the summons cannot for any reason be found;
 - _____ (c) the subject person named in the summons has refused to accept the service of the summons; or
 - _____ (d) the summons has been served on the subject person named in the summons but that person has not attended the hearing on the day specified in the summons,

the magistrate may still make or review the disposal order based on written materials without calling any witness and without a hearing.

159AAN. Service of summons and disposal order

- (1) The service of a summons or disposal order in Hong Kong is to be made by a police officer.
- (2) A summons must be served together with a copy of the application to which the summons relates.
- (3) A summons or disposal order is to be regarded as having been duly served in Hong Kong on a person if—
 - (a) it is served by hand on the person;
 - (b) it is left at the person's last known address; or
 - (c) it is sent by registered post addressed to the person at the person's last known address.
- (4) The service of a summons or disposal order under this Division out of the jurisdiction is permissible with the leave of a magistrate.
- (5) The service of a summons or disposal order out of the jurisdiction is effected if the summons or disposal order is served on the person in accordance with the law of the jurisdiction in which the service is effected.
- (6) If a magistrate grants leave to serve a summons or disposal order out of the jurisdiction, the magistrate may give directions in relation to the service, having regard to the procedures set out in Order 11, rule 5A or 6 of the Rules of the High Court (Cap. 4 sub. leg. A), as if the procedures were applicable, with necessary modifications, to the service.

(7) If the service of a summons or disposal order has been effected, the proof of service must be filed with a magistrate.

(8) In this section—

proof of service (送達證明), in relation to service of any summons or disposal order, means—

(a) for service in Hong Kong—statutory declaration as to service made by the police officer who effected the service;

(b) for service out of the jurisdiction—applicable proof of service in accordance with the applicable law of the jurisdiction in which the service is effected.

159AAO. Offence relating to disposal order

(1) A person commits an offence if the person—

(a) has been made subject to a disposal order;

(b) has been served with the disposal order; and

(c) fails to comply with the disposal order.

(2) A person who commits an offence under subsection (1) is liable on conviction on indictment to a fine at level 6 and to imprisonment for 1 year.

(3) It is a defence for a person charged with an offence under subsection (1) to establish that the person had a reasonable excuse for not complying with the disposal order.

(4) The person is taken to have established that the person had reasonable excuse referred to in subsection (3) if—

(a) there is sufficient evidence to raise an issue with respect to the reasonable excuse; and

(b) the contrary is not proved by the prosecution beyond reasonable doubt.
