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CLP/21/5795847

8 June 2021

Clerk to Bills Committee on Crimes (Amendment) Bill 2021
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

By Email (bc_57_20@legco.gov.hk)
& By Post

Dear Sir,

Crimes (Amendment) Bill 2021

In response to the Crimes (Amendment) Bill 2021, the Law Society offers its submission thereon.

Please find enclosed a copy of the above submission.

Thank you for your attention.

Yours faithfully,

Kenneth Fok
Director of Practitioners Affairs
The Law Society of Hong Kong

Encl.

c.c. (1) Security Bureau (By Email: sbenq@sb.gov.hk)
(Attn: Ms. Joceline Chui, Principal Assistant Secretary for Security)

(2) Department of Justice (By Email: ldd@doj.gov.hk)
(Attn: Mr. Jonathan Luk King Hang, Senior Government Counsel)

CRIMES (AMENDMENT) BILL 2021

PRELIMINARY COMMENTS

1. The Law Society has reviewed the Crimes (Amendment) Bill 2021 (the "Amendment Bill") and provides the following preliminary comments.

2. Our preliminary comments are organized into two sections. Section A sets out our specific comments on the clauses on the Amendment Bill, and Section B are on matters of general policy which the Hong Kong SAR Government and/or the Bills Committee of the Legislative Council reviewing the Amendment Bill should, in our view, consider.

GENERAL COMMENTS

3. To start with, we reiterate our agreement with, and also our support to, the policy proposal *"to introduce new offences of voyeurism and non-consensual recording of intimate parts, and related image publication offences"* (Explanatory Memorandum of the Amendment Bill)[1].

4. We consider that there is a critical need to legislate against voyeurism offences, given that the Court of Final Appeal in its judgment ruled that section 161 of the Crimes Ordinance Cap 200 could not be used to prosecute offences committed by a person using his or her own computer[2].

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[1] See Law Society Submission on Law Reform Commission consultation paper on *Miscellaneous Sexual Offences* of 24 July 2018 (§§26-43); see also the Law Society Submission *on Proposed Introduction Of Offences Of Voyeurism, Intimate Prying Non-Consensual Photography Of Intimate Parts, And Related Offences* of 29 September 2020

[2] In *Secretary for Justice v Cheng Ka Yee & 3 Ors*, FACC 22/2018, the Court of Final Appeal unanimously dismissed the Government's appeal and held that s.161(1)(c) of the

5. However, the drafting of the Amendment Bill could be improved, as we observe that, on some issues, the drafting misses the focus. On some other issues, the legislative amendments are not sufficiently clear and could create difficulties in the understanding of this law.

SECTION A - DRAFTING

6. It is trite that a piece of legislation needs to be clear, unambiguous and certain, particularly when that legislation aims to criminalize certain conducts and behaviors. If the law is not clear, it would fail to serve or protect the public, if at all.

7. In our views, certain parts of the Amendment Bill have been drafted in a complicated fashion; they lose the focus of the offences to be prohibited under the legislation.

8. In the following paragraphs, we set out our general observations on the drafting of the Amendment Bill. As for our specific comments on particular provisions, we have listed out those in an **Appendix** to this paper.

Undefined concept – "surreptitiously"

9. One of the essential elements for the offence of voyeurism is that the culprit must be *"surreptitiously"* doing a prohibited act e.g. observing or recording intimate parts of an individual (section 179AAB (1)(a)). This important concept of 'surreptitiously" is not defined in the Amendment Bill. We have tried to seek assistance from other local legislation[3], but find that this term does not appear in any.

Crimes Ordinance (Cap 200) does not apply to the use by a person of his own computer, not involving access to another's computer. As such, the authorities can no longer rely on s.161 to prosecute acts of voyeurism and non-consensual upskirt-photography which involved the use of one's own computer (whether in a public or private place) unless such use involves access to another's computer – see Footnote 2 to LRC Consultation Paper on *Sentencing and Related Matters in the Review of Sexual Offences* issued on November 2020

[3] The word "surreptitious" but not "surreptitiously" appears in item 5A002 on "Information security" systems sub-item (a)(8) of Schedule 1 (Strategic Commodities) to the Import and Export (Strategic Commodities) Regulations Cap 60G

10. The term *"surreptitiously* also does not appear in the English Sexual Offences Act 2003 which the Law Reform Commission of Hong Kong recommended to follow.[4] We have also looked to the Canadian Criminal Code but similarly cannot find any definition there.

11. In *R v Jarvis* [2019] 1 SCR 488, the Canadian Supreme Court discussed the circumstances that give rise to "reasonable expectation of privacy" in the voyeurism offence in s.162(1) of the Criminal Code. The Court stressed "surreptitiousness" and "reasonable expectation of privacy" are distinct concepts, but the two concepts could also be related:

> *"[138] The majority of the Court of Appeal reasoned that in order to give meaning to each word in the provision, the reasonable expectation of privacy must add something to the offence beyond that required by the surreptitiousness element: "[i]f the fact that [a person is] being surreptitiously recorded without their consent for a sexual purpose were enough to give rise to a reasonable expectation of privacy, that would make the privacy requirement redundant": para 108. This led the Court to conclude that a person will normally not be in circumstances that give rise to a reasonable expectation of privacy when they are in public, fully clothed, and not engaged in sexual activity: para 108.*
>
> *[139] For the reasons I have noted above, the reasonable expectation of privacy element should not be rendered redundant when considering observation or recording in a public place. I agree with the appellant Crown that while the surreptitiousness of the recording may signal circumstances that give rise to a reasonable expectation of privacy, the two elements remain distinct: A.F, at para. 71. Surreptitiousness relates to the actions of the observer, while the reasonable expectation of privacy pertains to the individual being observed or recorded. The two concepts are related in the sense that one informs the other; but the concepts are distinguishable. For example, one can imagine a person*

[4] See Recommendation 3 in the LRC Consultation Paper on *Miscellaneous Sexual Offences* dated May 2018

approaching a woman and pointing a camera at her body at close range. This behaviour would be reprehensible, and would invade the woman's reasonable expectation of privacy, but would fail the surreptitiousness requirement in s. 162(1). Similarly, a person in a shopping mall recorded by concealed security cameras cannot be said to have a reasonable expectation of privacy with regard to those images, even though they have been captured surreptitiously."

12. We ask that a proper definition on "surreptitiously" be supplied to the Amendment Bill, by reference to the above or otherwise.

Undefined concept – "intimate"

13. Another concept which is not defined in the Amendment Bill is *"intimate"* (*a fortiori, intimacy*).

14. We note in the Sexual Offence Act 2003, the UK legislation uses the concept of *private* and *privacy*. Privacy and intimacy are different.

15. In the above UK Consultation Paper (referred to in paragraph 3 above), the Law Commission states the following

"What is the definition of 'intimate'?

Understanding what is meant by the term 'intimate' will be crucial to our proposed offences. We have identified three categories of 'intimate'.

<u>Sexual by nature or circumstances</u>

something that a reasonable person would consider to be sexual because of its nature; or taken as a whole, is such that a reasonable person would consider it to be sexual. For the purposes of sharing this includes images which have been altered to appear sexual.

<u>Nude or semi nude</u>

this includes breasts, buttocks, genitals, whether exposed, covered by anything worn as underwear, or partially exposed (including

breastfeeding). For the purposes of sharing this also includes images that have been altered to appear nude or semi nude.

Private

this includes toileting which means urinating or defecating. For the purposes of sharing this also includes images that have been altered to appear private. We seek consultees' views on whether other private images should be included."[5]

16. As the matter now stands, it is not entirely clear to us as to whether our legislation is to protect privacy, or intimate moments, or both. We ask the Government to clarify the scope of protection.

17. In the Amendment Bill there is also a reference to an expectation of being nude (section 179AAB (1)(a)(i)). Expectation of being nude and expectation of privacy could in certain circumstances mean different matters. The latter embraces a wider and a better protection than the former.

18. We ask for the policy intents by singling out "nude" in certain section, and we suggest that that should be replaced by "privacy".

SECTION B – POLICY CONSIDERATION

19. The Amendment Bill has not adequately or at all addressed some matters which should merit thorough deliberations before legislating. These matters are *gender equality*, the proposed offence of "*down-blousing*", and the rapid developments in and the use of *social platforms*.

Gender Equality

20. According to a background brief prepared by the Legislative Council Secretariat on the Amendment Bill (LC Paper No. CB(2)984/20-21(03)) dated 16 April 2021,

> "… one of the guiding principles laid down by the LRC sub-committee was gender neutrality. The law on sexual offences should, as far as possible, not to make distinctions based on

[5] See page 23 of the Summary of the Intimate Image Abuse Consultation Paper (ditto)

gender. A gender neutral definition would also better cater for the needs of gender minorities. For the purpose of the proposed offences, it was proposed that, among others, the definition of "intimate acts" and "intimate parts" should include breasts irrespective of gender" (para 7).

21. We generally agree to the above guiding principle in legislative exercises. However, for the legislation against voyeurism, the inherent and in-born differences between the physiques of people of different genders ought to be appreciated, and those differences should be reflected in the legislation carefully and in a balanced manner. As an inflexible or indiscriminate approach giving people of different genders identical treatment may actually prejudice them, a *gender-sensitive approach* that embraces the consideration of *the characteristics and circumstances of genders* should be taken to achieve *genuine* fairness.[6]

22. The current formulation under the Amendment Bill, e.g. *"the definition of "intimate parts" to include breasts irrespective of individual's set"*, is a one-size-fit-all approach. We have reservations as to whether this is appropriate in all circumstances, and importantly whether this accords with the expectation of the society on protection from voyeurs.

23. In a judgment in the UK (*R v Bassett*, [2009] 1 W.L.R. 1032), the UK Court of Appeal had a discussion on the protection of privacy from voyeurs on "breasts" under the UK legislation. The UK Court considered that among other things there must be a private act in order for offences of voyeurism to be committed, and that for the consideration of meaning of "private acts", the UK legislation

> ' … [brings] within the concept of "private act" not body parts but *functions* for which people conventionally expect privacy, namely the use of the lavatory and sexual acts not ordinarily done in public. In each case it remains necessary to show

[6] Instead of Gender Equality, a more relevant approach in the legislation may be "gender mainstreaming". See the website of the Labour and Welfare Bureau website: https://www.lwb.gov.hk/Gender_Mainstreaming/en/background/index.html#background_qa_1
See also https://www.women.gov.hk/en/enabling_envir/gender_mainstreaming/index.html.

> that there was in the particular place and circumstances a reasonable expectation of privacy. However, since the purpose is to bring prima facie within the meaning of "private act" those parts of the body for which people conventionally expect privacy, it is clear to us that the intention of Parliament was to mean female breasts and not the exposed male chest. The former are prima facie still private in 21st century Britain; the second is not.' (Emphasis supplied).

24. It is clear that the Court in the UK placed emphasis on people's expectation of own privacy (vis-a-vis voyeurism offences), and for that, acknowledged the differences between male breasts and female breasts (by reference to the *functions* and not body parts per se). At this moment, we have not been advised that Hong Kong males are all expecting the same degree of protection of privacy for their exposed chests as their female counterparts are. There seems to be no evidence in support of such a proposition on the protection sought.

25. To the contrary, in a local judgment *鄭燕芳訴兆安苑業主立案法團及另二人* HCA 5975/1999 (which is sexual harassment case), the plaintiff saw several shirtless men around a wet market and an adjacent sports ground. She confronted these men about their attire. They responded with vulgar and abusive language. The plaintiff filed a sexual harassment claim against three defendants. Her claim was struck out by the Registrar of the High Court and she appealed the decision. The Court of First Instance upheld the Registrar's decision to strike out the plaintiff's claim. Among other things it acknowledged the state of undress of certain men in the vicinity of the market and sports ground who were engaging in physical labour. That the defendants were shirtless was easily explained by the desire for increased convenience and comfort while working. It was not directed at the plaintiff and importantly does not involve a sexual nature.

26. We ask the Government and the Bills Committee to consider the expectation of privacy and the protection therefor, in the light of the functions and not mere body parts to be protected. A blanket and an across-the-board application of the gender equality principle,

in our view, may be misconceived and is not appropriate; in certain situations that could send a confusing message to the community.

27. From a policy perspective, there are also issues with the current draft provision in the Amendment Bill:

(a) the policy intent underlining the Amendment Bill seems to us to be unclear – instead of laying down protection for victims of voyeurism offences, the Government seems to be setting a new social norm (without consultation) for the community, mandating that exposed male chests be protected under the law;

(b) the policy intent has also been confused in certain provisions. An example is on section 159AAC of the Amendment Bill:

"159AAC. Non-consensual recording of intimate parts

(1) A person commits an offence if—

(a) the person—

(i) …

(ii) with intent to observe or record an intimate part of an individual —

(A) … or

(B) operates equipment in an unreasonable manner for the purpose of observing or recording an intimate part of the individual <u>through an opening or a gap in the outer clothing of the individual</u>,

in circumstances in which the intimate part would not

The reference to "*an opening or a gap in the outer clothing"* in the above section is inexact and could easily be misunderstood. For example, it is arguable that an oversized vest worn by a male basketball player during a match has a "gap" (for the purpose of the above section).

Our other comments on the drafting of the Amendment Bill are set out in <u>Section A</u> and the <u>Appendix</u> of this paper.

Down-blousing

28. In the Amendment Bill we note that the draft legislation also attempts to deal with '*down-blousing'*. 'Down-blousing' refers to the observation or taking of an image from above, down (we say) a female's top in order to capture their brassiere, cleavage and/or breasts. We have in our previous submission of September 2020 stated that *"the issue of "down-blousing" could be reserved for the next legislative amendment, not because that is a lesser evil, but mainly because the issues involved are less straightforward and require more deliberation. The discussion on the problem of upskirt photography on the other hand seems to be more mature and readily available. The legislative exercise should be proceeded with expeditiously*"[7]. We repeat our above position.

29. We notice from the LegCo Brief (SBCR 6/2801/73) dated 17 March 2021 that *"Members of the LegCo Panel on Security ("the Panel") had raised objections to [the Government's] earlier proposal to proceed with the legislative amendments to deal with upskirt photography first, and to tackle the issue of down-blousing as appropriate in the future having regard to enforcement experience of the offence and overseas legislation*."[8] At this stage, we have not been advised of the problems, and if so, the severity of such problems, caused to males by down-blousing. As no convincing case has been put forward one way or the other, any elaborate commentary on the down-blousing provisions could be premature.

30. By way of passing remarks, we repeat our queries on the expectation of privacy (if any) for male breasts, in respect of the proposed offence of down-blousing for males.

31. There could also be abuses of the provision of down-blousing by a litigious female or a misuse by an over-sensitive female, and if so there should be remedies or defences specifically available (for

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[7] See paragraph 37 of the Law Society Submission on *Proposed Introduction of Offences of Voyeurism, Intimate Prying Non-Consensual Photography Of Intimate Parts, And Related Offences* of 29 September 2020.

[8] See para 12 of the LegCo paper SBCR 6/2801/73

down-blousing). We are keen to see more discussions with e.g. law enforcement agencies, and also the community, in these regards.

32. If, notwithstanding our above views, the legislature is to proceed with the legislation for the offence of down-blousing, we ask that that section on down-blousing which we believe should be 159AAC(1)(a)(ii)(B) be removed or not to be put into effect, pending fuller debates and consultations.

Publication of intimate images

33. Subject to our comments on drafting (see Section A above), we in principle welcome inclusion in the Amendment Bill the offences on publication of intimate images (section 159AAD and section 159AAE of the Amendment Bill). In this regard we note with agreement the view that *"the increased use of smartphones and online platforms has made it easier to take photographs or film, alter or create images and send images to our family and friends or the public at large. However, this also means that it is now easier to take or make images of others or to distribute images of others without their consent (whether the images were taken consensually or non-consensually in the first place). This is particularly concerning when those images are 'intimate' in nature, such as where the person is naked, engaging in a sexual act or when the image is taken up a person's skirt or down a female's blouse."*[9] The above, including threats to share intimate images, must be criminalized.

34. The Law Commission of England and Wales has just closed a consultation[10] on the problem of "intimate images abuses". They have meticulously classified the harmful conducts of perpetrators into three separate categories of taking, making and sharing an intimate image, the common thread being that the conduct takes place without the consent of the person in the image and violates their sexual privacy, autonomy and freedom, their bodily privacy and their dignity:

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[9] See page 1 of the Summary of the Intimate Image Abuse Consultation Paper published by the Law Commission of England and Wales on 26 February 2021

[10] See footnote 9 above

(a) the UK Law Commission looked into four types of non-consensual '**taking**': voyeurism, upskirting, down-blousing and the recording of rapes and sexual assaults. They set out the various ways in which an 'image' may be taken, including the use of 'smart home' devices, CCTV, installing cameras in toilets and changing rooms and the use of drones.[11]

(b) On the **making** of intimate images, the UK Law Commission looked into issues such as sexualised photoshopping and deepfakes. Sexualised photoshopping very often involves the victim's head being superimposed onto the body of someone engaging in a sexual act (usually a porn actress) so that it looks like the victim is engaging in a sexual act. Deepfakes currently include either 'mapping' a victim's face onto a porn actress's face to make it appear as though the porn actress's body is the victim's body, or where the victim is stripped of their clothes to make it appear as though the victim is naked.[12]

(c) As for the **sharing** of intimate images the UK Law Commission looked into methods through social media sites such as Facebook, Instagram, Twitter or channels (e.g. YouTube and commercial pornography sites). Images are also routinely shared via private messaging services, emails, Snapchat or simply shown to others. The behaviours most prevalent under non-consensual sharing are sharing following a relationship breakdown, coerced sharing in the context of an abusive relationship, celebrity 'leaks', hacking devices and taking content from the victim's private accounts.[13]

(d) The UK Law Commission lastly considered **threats** to take, make or share intimate images. Threats to share intimate

[11] See page 7, ditto

[12] See page 7, ditto

[13] See page 7, ditto

images are by far the most common type of threat in their country.[14]

35. Compared to the UK proposals, the offences in our Amendment Bill refer only to "*publishes*" or "*publication*" of the intimate images, but these terms are undefined in the Amendment Bill. In the light of the wide use of social chatrooms and online platforms, and also in the view of evolving technology, the question as to whether we should have a similar categorization in our voyeurism offences merits a full discussion.

36. At the very least, we ask that the words "*publish*" or "*publication*" in section 159AAD and section 159AAE of the Amendment Bill be defined and/or be replaced by defined terms of *taking* and/or *making* and/or *sharing* of images (or words to that effect).

CONCLUSION

37. The Amendment Bill in our views seems to be too ambitious. It includes offences of *not only* upskirting *but also* down-blousing, the latter seemingly has been drawn up without (at the moment) solid societal consensus.

38. Additionally, the drafting of the Amendment Bill could in our views be improved and that the definitions for some key concepts as well as protection against intimate images abuses should be included. Committee stage amendments to the Amendment Bill on the above obviously would be helpful.

The Law Society of Hong Kong
8 June 2021

[14] See page 7, ditto

PRELIMINARY COMMENTS ON SOME CLAUSES OF THE CRIMES (AMENDMENT) BILL 2021

	Sections	Comments
1)	**159AA. Interpretation** ***breasts*** (胸部) means the breasts of an individual regardless of the individual's sex;	We suggest to replace the word "sex" with "gender", as the law should address not physiological but the whole person; also transgender community would be covered by the law.
2)	***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);	The inclusion of 'breast' in the definition complicates the amendment exercise (see comments in Section A above)
3)	**159AA. Interpretation** **…** (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 …	What is exactly meant by "using the toilet" – does it mean urinating or defecating? Is toilet the same as bathroom? Is bathing intended to be caught in this sub-section (and if so do we need another clause "using the bathroom")? Is this clause setting a requirement for a physical environment as a *pre-requite* for the offence, i.e. the act must take place within a structure, viz. toilet, before that conduct could criminalized? What if a victim is not "using" the toilet, but is urinating in a corner of a basketball court / behind the bush and in open space and is secretly and without consent pictured in the process? Apparently the words are adopted from section 68(1) English Sexual Offences Act 2003 ("using a lavatory"). However, in the UK legislation, this phrase "using a lavatory" is used as one of the conditions *for the meaning of* private act, and is prefixed with a requirement for expectation. *"68 Voyeurism: interpretation*

	Sections	Comments
		(1) For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and— *(a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,* *(b) the person is using a lavatory, or* *(c) the person is doing a sexual act that is not of a kind ordinarily done in public".* Our Amendment Act singles out "using the toilet" as a defining criterion. This is not helpful and is also too restrictive.
4)	**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;	○ The term "surreptitiously" is undefined in the legislation, and it carries a subjective connotation. This is not seen in the UK; the English Sexual Offences Act 2003 uses languages which are easier to be understood and followed. ○ … *"can reasonably be expected to be nude"* – does the law also cover and prohibit situations when the victim is partially nude? What is intended to be covered by this part of the Amendment Bill – taking a bath or changing clothes? As a matter of concept, would it be easier for both the profession and the public to understand the law, if the concept of "nude" is replaced by the concept of "privacy"? ○ Should there be an "or" after this sub-paragraph?
5)	(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	While this part covers a 'peeping Tom', in situations where a female's skirt is blown up by wind, and a passer-by accidentally but 'surreptitiously' 'observes' the intimate part of that female, would the passer-by be caught?

	Sections	Comments
	or recording an intimate part or an intimate act, of any individual; or	
6)	(e) observes (with or without the aid of equipment) or records an individual for a sexual purpose;	This could be problematic with section 159AAD offences – see below.
7)	**159AAB. Voyeurism** … (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).	The corresponding provision in the English Sexual Offences Act 2003 is easier to be understood with each element of the offences clearly defined. *"Section 67:* *(2) A person commits an offence if—* *(a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and* *(b) he knows that B does not consent to his operating equipment with that intention.* *(3) A person commits an offence if—* *(a) he records another person (B) doing a private act,* *(b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and* *(c) he knows that B does not consent to his recording the act with that intention.* *(4) A person commits an offence if he instals equipment, or constructs or adapts a*

	Sections	Comments
		structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).” Among other things, subsection 4 in the UK Act above addresses the question in cases where a person installs an equipment *knowing, or believing, or being reckless* as to whether the equipment could be used for the offences. This is clear. Compare this with the Amendment Bill, the position is not entirely clear – e.g. a plumber drilled a hole in the wall for the purpose of a renovation project. Another person ‘adapts’ and uses the hole to observe or record intimate acts of people in the other room. The plumber is ‘reckless’. Would his recklessness be caught under the Amendment Bill?
8)	**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) … (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;	○ Subsection (1)(a)(ii) makes reference to “observe or record” but the title of the section 158AAC sets out the offences of *recording* (but not observing). Why did the draftsman put down the word “observe” here? The same drafting enigma appears in other sub-sections of section 159AAC. ○ Subsection (1)(a)(i) however refers only to the offence of “recording”. ○ So if one secretly puts a camera in a bathroom, switches on the camera to observe *but not to record* a female taking a bath, he would not be liable under subsection (1)(a)(i). He would not be liable under subsection (1)(a)(ii) too (as he would not be observing through an opening or a gap in the outer clothing of the female). Is that what the law wants? ○ Another person uses a long-range telescope with recording function to observe a female changing clothes in a room few blocks away. So long as he has not switched on the recording function with his telescope or other devices to record his observation, or he has not taken still pictures, he could walk free??

	Sections	Comments
		○ What is to be meant by "*operates equipment in an unreasonable manner*" for the purpose of this offence? If a person operates a hidden camera "*in a reasonable manner*" to surreptitiously and without consent record an intimate part of another person through the opening of the clothing, would he be free from criminal sanction? ○ The formulation of observing or recording an intimate part through "an opening or a gap in the outer clothing of the individual" seems to cover down-blousing. A confirmation (e.g. in the Explanatory Memorandum) is required. Assuming that is the case, ➢ what if the female breasts are covered by a vest; or the female brassiere is observed or recorded. Is this to be also criminally sanctioned under the law? ➢ would this offence be dependent upon the extent of the exposure of the female breasts? ➢ would criminality be attached to male breasts to the same extent?
9)	(b) the person engages in the conduct described in paragraph (a)(i) or (ii) for— (i) … or (ii) the purpose of <u>obtaining dishonest gain</u> for the person, or for any other person;	If the accused commits acts of voyeurism not for dishonest gain, but e.g. for whistle-blowing, would he be caught? How about intimate images taken for revenge porn? Those are not for sexual purpose or for dishonest gain. The partner would not commit any non-consensual recording offence under the Amendment Bill if he only keeps intimate images taken non-consensually of the partner, so long as that is not for sexual purpose, or dishonest gain, and so long as he does not "publish" the images (see section 159AAE). Is the law intended to allow this?
10)	**159AAD.** **Publication of images originating from commission of offence under section 159AAB(1) or 159AAC(1)** (1) A person commits an offence if—	The reference to "<u>the commission of an offence</u> under section 159AAB(1) or

	Sections	Comments
	(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); **…**	159AAC(1)" is unclear – does it require that the accused be *charged* under section 159AAB(1) or 159AAC(1)" for the purpose of section 159AAD(1)(b)? Or is a *conviction* of an offence under section 159AAB(1) or 159AAC(1) required? Additionally, how does the court approach this offence – does the court only need to know of the allegations on the commission of an offence under section 159AAB(1) or 159AAC(1)?
11)	(d) 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.	This limb hinges upon the commission of an offence under section 159AAB(1) or 159AAC(1) which are 'specified offence'. For section 159AAC(1), it is an offence of observing or recording an individual for a sexual purpose. Query – if a perverted voyeur observes or records an athlete running and the running sexually arouses the voyeur. The voyeur would commit a section 159AAC(1) offence for observing or recording. However if the voyeur passes the photo to a normal third party who is not sexually aroused by the running at all as the running appears to be nothing but normal, and the third party publishes the photo, arguably the third party would be caught under this section. Is it intended that a third party needs to check whether the image taker was a voyeur and took the image for a sexual purpose, even if it seemed to be a normal picture for a reasonable person?
12)	**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	o The section does not address the scenario where consent *has been* given, but it is subsequently withdrawn. In that case, would the accused attract criminal sanction under the proposed legislation? o Revenge Porn – as discussed in the above (box 9 in the above), the law allows a person to keep intimate images taken non-consensually of the partner, so long as that is not for sexual purpose, or financial gain and that the person has not "published" the images. What if the person tells the partner – "you know I have taken you 100

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	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.	intimate and nude photos of you" – the person has not shown to a third party those photos and has thereby not 'published" the photos, but the partner would certainly be harassed and intimated by the mere knowledge of this. The person apparently would not be caught by Amendment Bill. Is this intended by this Amendment Bill?
13)	**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.	○ Could 'public interest' be a defence? Say e.g. a high-ranking official is caught having intimate acts with a spy, and pictures are taken. It would be of public interest that this be exposed, though this does not yield any sexual gratification. Could public interest be raised as a defence? ○ A wife puts up a camera in the bedroom to observe / record whether her husband is having an affair with another woman. This is for her divorce proceedings. Would that be a reasonable excuse for the voyeurism offence the wife may be facing?
14)	**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 <u>sufficient</u> evidence to raise an issue with respect to the lawful authority or	Why the inclusion of the word "sufficient" in the legislation? Who is to assess sufficiency

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	reasonable excuse; and (b) the contrary is not proved by the prosecution beyond reasonable doubt.	of the evidence? Can it be taken out?