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Report of the Bills Committee on Crimes (Amendment) Bill 2021

Purpose

This paper reports on the deliberations of the Bills Committee on Crimes (Amendment) Bill 2021 ("the Bill").

Background

2. At present, there is no specific offence against voyeurism and non-consensual recording of intimate parts (such as upskirt photography). According to the Administration, such acts have been prosecuted with "access to computer with criminal or dishonest intent" under section 161 of the Crimes Ordinance (Cap. 200) ("the Ordinance"). Depending on the circumstances of different cases, prosecutions have also been made for "loitering" under section 160 of the Ordinance, "disorder in public places" under section 17B of the Public Order Ordinance (Cap. 245), and "outraging public decency" under common law. However, there are limitations on the application of these offences. For instance, if the act involved only the use of the suspect's own computer,¹ or if the act occurred in a private place,² those offences may not be applicable for prosecution against such acts.

3. As a related development, the Law Reform Commission ("LRC") appointed a Review of Sexual Offences Sub-committee in July 2006 to conduct an overall review of the substantive sexual offences in Hong Kong. In April 2019, LRC published the Report on Voyeurism and Nonconsensual

¹ In April 2019, the Court of Final Appeal held in *Secretary for Justice v Cheng Ka Yee & Others* [2019] HKCFA 9 that the offence of "obtaining access to computer with a view to dishonest gain for himself or another" under section 161(1)(c) of the Ordinance does not extend to the use of the offender's own computer.

² Generally speaking, offences such as "loitering" or "disorder in public places" are only applicable to acts that occur in public places or a place where what is done is capable of public view.

Upskirt-Photography ("the Report"), which is part of LRC's overall review of the law governing sexual offences. In the Report, LRC recommended the introduction of an offence of voyeurism; an offence of non-consensual upskirt photography committed for the purpose of obtaining sexual gratification, as well as a separate offence for upskirt photography committed irrespective of the purpose of the conduct. The Government accepted LRC's recommendations and launched a three-month public consultation exercise in July 2020 to receive public views on the proposed introduction of offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences ("public consultation exercise"). After taking into account the recommendations of LRC and the views received during the public consultation exercise, the Administration has introduced the Bill into the Legislative Council which seeks to provide for relevant new offences.

The Bill

4. The Bill was published in the Gazette on 19 March 2021 and received its First Reading at the Council meeting of 24 March 2021. The main object of the Bill is to amend the Ordinance to provide for new offences of voyeurism, non-consensual recording of intimate parts, publication of images originating from voyeurism or non-consensual recording of intimate parts as well as publication or threatened publication of intimate image without consent; and to provide for related matters.

5. The Bill, if passed, would come into operation on the day on which it is published in the Gazette as an Ordinance.

The Bills Committee

6. At the House Committee meeting on 26 March 2021, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon Elizabeth QUAT, the Bills Committee has held five meetings with the Administration. The membership of the Bills Committee is in **Appendix I**.

7. The Bills Committee has invited written views from the public on the Bill. A list of organizations and individuals which/who have provided written views to the Bills Committee is in **Appendix II**. At the request of the Bills Committee, the Administration has provided a consolidated written response [LC Paper No. CB(2)1222/20-21(01)] to these written views.

Deliberations of the Bills Committee

8. Members are supportive of the introduction of the proposed new offences of voyeurism, non-consensual recording of intimate parts,³ publication of images originating from voyeurism or non-consensual recording of intimate parts as well as publication or threatened publication of intimate image without consent, so as to address the limitation of existing legislation and better protect the public from such undesirable conducts. Members note that a person who commits any of the above proposed new offences would be liable on conviction on indictment to imprisonment for five years. The major discussions and concerns of the Bills Committee are summarized in the ensuing paragraphs.

Voyeurism

9. It is proposed under the proposed new section 159AAB that it would be an offence of voyeurism for a person, without consent and disregard⁴ as to whether consent is given, to surreptitiously observe (with or without the aid of equipment) or record an image of an individual who is in circumstances that give rise to a reasonable expectation of privacy, if -

- (a) the individual is in a place in which any individual person can reasonably be expected to be nude, to reveal his or her intimate part⁵, or to be doing an intimate act⁶;
- (b) the individual is exposing his or her intimate part, or is doing an intimate act, and the observation or recording is done for the purpose of observing or recording an intimate part or an intimate act, of any individual; or

³ After discussion, the Administration has proposed to amend the title of the proposed offence of "non-consensual recording of intimate parts" under the proposed new section 159AAC as "unlawful recording or observation of intimate parts" (please see paragraph 25 below for details). For easy reference, the heading "non-consensual recording of intimate parts" under the Bill as gazetted is used in this Report in relation to the new offence under the proposed new section 159AAC.

⁴ Under the proposed new section 159AAH, "disregard whether consent is given" means either the person "knows that the subject individual does not consent to the conduct", or "is reckless as to whether the subject individual consents to the conduct." Please see paragraph 44 below regarding the meaning of "reckless".

⁵ Under the proposed new section 159AA(1), "intimate part", 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.

⁶ Under the proposed new section 159AA(2), an individual is doing an intimate act if the individual is using the toilet in a manner that an intimate part of the individual is likely to be revealed; or the individual is doing a sexual act that is not of a kind ordinarily done in public.

- (c) the observation or recording is done for a sexual purpose.

Scope of the proposed offence

10. Some members have raised concern as to whether the proposed offence of voyeurism would be too wide in scope. They are in particular concerned that a person may inadvertently contravene the proposed offence by having recorded an image of the breasts of a male individual, given that the definition of "intimate part" includes the individual's underwear covering breasts irrespective of gender.

11. The Administration has advised that in line with the principle of gender neutrality, the four proposed offences under the Bill are equally applicable to all individuals regardless of the individual's sex. Specifically, the definitions of "intimate act" and "intimate part" in the proposed new offences cover breasts irrespective of gender. With respect to the proposed offence of voyeurism, the person observing or doing the recording must act "surreptitiously" and the act has to be done in circumstances that give rise to "a reasonable expectation of privacy", and without the consent of the subject individual. It is considered that these elements of the proposed offence would effectively rule out cases of inadvertent contravention.

12. The Legal Adviser to the Bills Committee ("the Legal Adviser") has sought clarification from the Administration in respect of the scope of the proposed new section 159AA(2), under which "intimate act" is proposed to mean, in particular, an individual doing a sexual act that is not of a kind ordinarily done in public, and it has been pointed out that the terms "sexual act" and "in public" are not defined under the Ordinance and the Bill. The Administration has advised that whether a particular conduct constitutes a sexual act that falls within the definition of "intimate act" depends on the actual circumstances of the case. The definition adopted in the Bill allows the court to determine, based on the facts of each case, what constitutes a sexual act that is not of a kind ordinarily done in public.

The term "surreptitiously" under the proposed offence

13. Some members have enquired about the rationale behind the use of the expression "surreptitiously" in the proposed new section 159AAB, given that the expression "surreptitiously" is not defined under the Bill, nor does it appear in similar legislation in the United Kingdom and Australia. These members have expressed concern as to whether the observation or recording which is done blatantly in a private place would constitute the offence of voyeurism. If not, the offence element of "surreptitiously" would narrow the scope of the offence

and indirectly hindered the prosecution of the offence.

14. The Administration has advised that the proposed offence of voyeurism is formulated with reference to the Criminal Code of Canada, which provides that under the offence of voyeurism, the observation or recording is conducted "surreptitiously". The Canadian court has explained in the case *R v Trinchi* [2019] O.J. No. 2278 that in the context of the offence of voyeurism, "surreptitiously" meant that the defendant observed or recorded the subject individual with the intent that the subject individual be unaware of that the defendant was doing so. This offence element is concerned with the defendant's intent at the time of the observation or recording, rather than the defendant's manner or conduct. For this offence element, the prosecution has to prove that the defendant observed or recorded the subject individual with the intent that the subject individual not being aware of what the defendant was doing. Whether it can be proved that the person doing the recording has that intent depends on the evidence and circumstances of each case.

15. The Administration has further advised that if a person openly observes or records the intimate parts of another person and intends to cause that person to apprehend immediate and unlawful physical contact, the person doing the observation or recording can be charged with "indecent assault", as the case may be, under section 122 of the Ordinance even if there is no actual physical contact. If the person doing the recording acts continuously in a public place or in the common parts of a building and in a way that causes others to be reasonably concerned for their safety or well-being, the person may also have committed the offence of "loitering" under section 160 of the Ordinance.

A place in which a subject individual can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act

16. Members have expressed concern whether the types of places (such as a hotel room or the living room of a residential apartment) that are intended to be included under the offence of voyeurism where a person can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act should be delineated more clearly in the Bill. Alternatively, the Administration should consider whether it is necessary to include some illustrative examples in the relevant provisions.

17. The Administration has explained that the proposed new section 159AAB(1)(a)(i) to (iii) establishes three different types of circumstances that may constitute voyeurism. The situation under the proposed new section 159AAB(1)(a)(i) covers a person who "observes (with or without the aid of equipment) or records an individual in a place in which any individual can

reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act",⁷ which emphasizes the place where a subject individual is in. The proposed offence of voyeurism could be engaged even though no intimate part or intimate act of the subject individual is being observed or recorded, if the circumstances of the case fall within the scope of the proposed new section 159AAB(1)(a)(i). The Administration has further advised that where the defendant surreptitiously observes or records an intimate part of an individual or an individual doing an intimate act, or observes or records an individual for a sexual purpose,⁸ and the individual who is being observed or recorded is in circumstances that give rise to a reasonable expectation of privacy, such acts could be in breach of the proposed offence of voyeurism under the proposed new section 159AAB(1)(a)(ii) or (iii). In view of the above, the Administration considers the proposed provisions to be sufficiently clear to cover different scenarios, and therefore does not see the need to include examples in the relevant provisions for illustrative purposes.

The offence element of "no consent is given by the subject individual to the conduct"

18. Two elements of the proposed offence of voyeurism under the proposed new section 159AAB concerning the absence of consent are: (i) no consent is given by the subject individual to being observed or recorded by the person (proposed new section 159AAB(1)(c)); and (ii) the person engaging in the conduct disregards whether the subject individual consents to the conduct (proposed new section 159AAB(1)(d)). Members note that these two elements on the absence of consent are found in all the proposed new offences under Division 2 of the Bill. Members generally take the view that conducts such as voyeurism, clandestine photography and non-consensual publication of intimate images should be criminalized because the subject individuals do not consent to the conducts.

19. The Legal Adviser has enquired whether, in addition to proving that the person either has knowledge that the subject individual does not consent to the conduct or disregards whether the subject individual consents to the conduct, it must be proved that as a matter of fact no consent has been given by the subject individual to the conduct; if so, the rationale for requiring standalone proof of absence of consent of subject individuals under the proposed new offences.

⁷ The Administration has proposed textual amendments to the Chinese text of the proposed new section 159AAB(1)(a)(i).

⁸ Under the proposed new section 159AA(1), "sexual purpose", in relation to a person, includes the stimulation or satisfaction of the sexual desire of the person or any other person.

20. The Administration has explained that the two offence elements mentioned in paragraph 18 above have different focuses. While one focuses on whether the subject individual actually consents to the conduct, the other focuses on the subjective criminal intent of the person engaging in the conduct. The element of "no consent is given by the subject individual to the conduct" is included with the intention to express more accurately the legislative intent to protect the victim's right to privacy and sexual autonomy, and not to interfere with the private and voluntary conduct of members of the public.

21. Members have expressed concern about how the prosecution could prove that no consent is given by the subject individual to the conduct in the event that the actual identity of the subject individual is not known and evidence of consent (or the lack thereof) is unlikely to be found. The Administration has advised that the subject individual should normally be present to give evidence. In the event that the subject individual is not found, prosecution may need to rely on circumstantial evidence. Some members remain concerned whether the provisions as presently drafted would hinder prosecution of the offence of voyeurism.

22. After careful consideration of members' concerns, and the possibility that in an individual case where the subject individual could not be brought before the court to give evidence (e.g. failure to locate the subject individual, subject individual is unwilling to testify in court, etc.), there could be difficulty for the prosecution to prove beyond reasonable doubt that no consent is given by the subject individual to the conduct, the Administration has proposed amendments to rectify the situation. The Administration has proposed to remove the offence element of "no consent is given by the subject individual" from three proposed new offences, namely the proposed new sections 159AAB (voyeurism), 159AAC (non-consensual recording of intimate parts) and 159AAD (publication of images originating from commission of offence under the proposed new section 159AAB(1) or 159AAC(1)).⁹ Upon amendment, if the prosecution could prove that the defendant "disregards whether the subject individual consents to being observed or recorded" and could establish the other elements of the offence, the Administration considers that the defendant's conduct should constitute the relevant offences even if the subject individual does not testify in court as to his or her consent.

⁹ Please see paragraphs 26 to 38 below regarding the proposed new offence of non-consensual recording of intimate parts (under the proposed new section 159AAC) and paragraphs 39 to 44 below regarding the proposed new offence of publication of images originating from the commission of offence under the proposed new section 159AAB(1) or 159AAC(1) (under the proposed new section 159AAD).

23. Having regard to the Administration's earlier explanation on the necessity for the prosecution to prove the absence of consent as a matter of fact, the Legal Adviser has sought clarification as to whether the Administration's proposed amendments to remove this offence element represents a change in the legislative intent. Moreover, clarification is sought as to whether the prosecution threshold for the three new offences would be lower than that of other existing sexual offences if the prosecution would not bear the onus of proving that no consent is given by the subject individual.

24. The Administration has advised that the legislative intent remains unchanged. The Administration has explained that even though under the proposed amendments, the prosecution would not have to prove that no consent is given by the subject individual to the defendant's conduct, the consent of the subject individual is still important as the prosecution has 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". The Administration has distinguished the proposed offences with other existing sexual offences. The proposed offences often would not involve physical contact, and the subject individual may not be identified, while the subject individual in existing sexual offences (e.g. rape) could usually be identified and would have to give evidence in court. The Administration considers that the proposed amendments reflect appropriately the legislative intent.

25. Given the proposed amendment to remove the offence element of "no consent is given by the subject individual" from the proposed new section 159AAC, the Administration has taken into account members' views and further proposed to amend the heading of the proposed new section 159AAC from "Non-consensual recording of intimate parts" to "Unlawful recording or observation of intimate parts" to better reflect the nature of the offence. Members also note that consequential amendments would be made to the long title of the Bill.

Non-consensual recording of intimate parts

26. It is proposed in the Bill under the proposed new section 159AAC that a person would commit an offence of non-consensual recording of intimate parts if -

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

- (c) the act is done for a sexual purpose, or for the purpose of obtaining dishonest gain¹⁰; and
- (d) no consent is given by the individual to being observed or recorded¹¹, and the person disregards whether such consent is given.

Scope of the proposed offence

27. Members note that when consulting the Panel on Security on the legislative proposal, the Administration had suggested that the proposed offence would cover only upskirting photography and not "down-blousing". As advised by the Administration, the Panel on Security had strongly expressed that "down-blousing" should be dealt with in the current legislative exercise given its prevalence. The Administration has taken into account the views received and upon further consideration, included "down-blousing" under the proposed offence in the Bill as gazetted.

28. Some members have expressed concern about whether recording an intimate part of an individual inadvertently or live-streaming of an individual's intimate parts without the individual's consent would constitute the proposed offence. Some members are concerned about whether a person would be deemed to have committed the offence if the person non-consensually records an intimate image of the person's partner not for a sexual purpose or in a dishonest way (such as "revenge porn", or pranking), and has no intent to publish the image.

29. The Administration has advised that a person would commit the proposed offence (including the act which is commonly known as "upskirting" and "down-blousing") only if all the four elements set out in paragraph 26 are met. The Administration has further advised that the proposed offence of non-consensual recording of intimate parts mainly seeks to address non-consensual recording in public places. Given that "down-blousing" is more susceptible to argument and misunderstanding, it is considered necessary to define the scope of the proposed offence precisely in order to avoid inadvertent contravention and false accusations. Hence, it is proposed that the offence would include the element of whether the act was done for a sexual purpose, or for the purpose of obtaining dishonest gain. Depending on the circumstances, if the defendant surreptitiously records an intimate image of the subject individual who is in circumstances that give rise to a reasonable expectation of privacy, the recording

¹⁰ Please see paragraphs 33 to 38 below regarding the offence element of "obtaining dishonest gain" and subsequent amendments proposed by the Administration.

¹¹ The Administration has proposed to remove the offence element of "no consent is given by the subject individual" from the three new offences under the proposed new sections 159AAB, 159AAC and 159AAD. Please see paragraph 22 above.

could constitute voyeurism under the proposed new section 159AAB. As for live-streaming, it would be regarded as "publication" pursuant to the proposed new section 159AA(4) and (5), and live streaming of an individual's intimate parts without the individual's consent could be caught under the proposed new section 159AAE(1) regarding publication of intimate images without consent.¹² The Administration has stressed that it does not intend to criminalize observance or photo-taking of voluntary exposure of intimate parts under the proposed new section 159AAC. The proposed offence targets specifically the intrusive acts of clandestine photography (such as upskirting and down-blousing) without consent. The Administration believes that with the well-defined scope of the offence, inadvertent contravention, false accusations or abuse would be unlikely under the proposed provision.

The offence element of "sexual purpose"

30. Some members have expressed concern that the meaning of "sexual purpose" is not clear and that the motives for taking or recording intimate images may be non-sexual in nature, such as revenge or humiliation. They have enquired about the criteria for deciding whether a person is observing or recording an intimate part or an intimate act of any individual for a sexual purpose, as well as whether the prosecution bears the onus to prove that a person records an individual's intimate parts for a sexual purpose under the proposed new section 159AAC(1)(b). The Legal Adviser has also pointed out that LRC recommended in the Report, among others, the introduction of an offence of non-consensual upskirt photography committed for the purpose of obtaining sexual gratification, as well as a separate offence of non-consensual upskirt photography committed irrespective of the purpose of the conduct to cater for scenarios where e.g. a person was employed by another to take upskirt photographs, and sought the Administration's clarification of their rationale in adopting a different approach under the Bill.

31. The Administration has advised that having regard to the views collected during the public consultation exercise (including the views that non-consensual recording of intimate parts was equally heinous whether it was for a sexual purpose or for other purposes, that it should be punishable at the same penalty level, and that the scope of the offence might be too wide if it could be committed irrespective of the purpose), it has proposed in the Bill the introduction of one single offence of non-consensual recording of intimate parts either for sexual purpose or engaging in the conduct dishonestly, with a view to refining the scope of the offence.

¹² Please see paragraphs 45 to 49 below regarding the proposed offence of publication of intimate images without consent under the proposed new section 159AAE.

32. The Administration has further advised that it has made reference to overseas jurisdictions and found that "sexual purpose" is always included as an element in sexual offences. That said, "sexual purpose" is only one of the elements of the proposed offence; alternatively a person may be caught under the offence if the person engaged in the conduct dishonestly. The Administration has stressed that given a person who is convicted on indictment of the proposed offence would be liable to imprisonment for up to five years, it must strike a careful balance in defining the scope of the proposed offence. While the Bill has the purpose of protecting people from falling victims to abuse, the scope of offence must not be so wide that people without the requisite *mens rea* would inadvertently break the law.

The offence elements of "dishonesty" and "gain"

33. It is stipulated in the proposed new section 159AAC(3) that "gain" includes a gain in money or property; a temporary or permanent gain; a gain by keeping what one has; and a gain by getting what one has not. Some members have reiterated the concern that the motives of non-consensual recording of an intimate part of an individual may vary and does not necessarily relate to monetary gain, but could be for revenge, humiliation, or other non-sexual purposes. They have questioned the need for including the element of "gain" under the proposed offence. These members have also expressed concern on whether the proposed purpose provision of "for the purpose of obtaining dishonest gain" under the proposed new section 159AAC(1)(b), which is contrary to LRC's recommendation of criminalizing non-consensual recording of an intimate part of an individual irrespective of the purpose of the conduct, may have the effect of excluding some conducts (e.g. practical joke) and thus would unnecessarily narrow the scope of the offence.

34. The Administration has reiterated that having regard to the views collected during the public consultation exercise, LRC's recommendation of criminalizing non-consensual recording of intimate parts irrespective of the purpose of the conduct is not adopted; instead, the proposed offence of non-consensual recording of intimate parts would include a purpose provision (i.e. "for the purpose of obtaining dishonest gain"), such that the scope of the offence would be clearly delineated and the chance of inadvertent contravention would be minimized. The Administration has further explained that the element of "for purpose of obtaining dishonest gain" under the proposed new section 159AAC(1)(b)(ii) is formulated with reference to the existing section 161(1)(c) of the Ordinance (which was previously applied in prosecutions against upskirt photography before the Court of Final Appeal ("CFA")'s decision in *Secretary for Justice v Cheng Ka Yee & Others* [2019] HKCFA 9), and that obtaining

intimate images which the defendant does not have prior to the non-consensual recording could be regarded as obtaining "a gain by keeping what one has" and "a gain by getting what one has not" under the proposed new section 159AAC(3).

35. The Administration has drawn the attention of members to the prosecution of upskirt or clandestine photography under section 161 of the Ordinance in the past and pointed out that there is ample case law involving various scenarios where the element of "dishonesty" was involved. Specifically, in *HKSAR v Tsun Shui Lun* ([1999] 3 HKLRD 215, [1999] 2 HKC 547), the Court of First Instance of the High Court ("CFI") stated that the objective of section 161 of the Ordinance was to impose sanctions against access to a computer with a specific intent or purpose (i.e. an intent to commit an offence or dishonest purpose), and consideration should be made to the intent or purpose of the defendant at the moment of access to the computer rather than subsequently. CFI also held that "gain" included obtaining information that the defendant did not have prior to the access to the computer. In order to determine a defendant's requisite *mens rea* under section 161 of the Ordinance, the two-stage test laid down in *R v Ghosh* [1982] QB 1053 should be applied to decide whether the defendant was "dishonest". The first limb of the test is to decide whether the defendant's conduct was dishonest by the standards of ordinary reasonable and honest people (an objective test). The second limb of the test is to decide whether the defendant realized that ordinary reasonable and honest people would regard the conduct as dishonest (a subjective test).

36. Having regard to members' views and concerns, the Administration has advised that it would introduce amendments to the proposed new section 159AAC(1)(b) to express clearly that the term "dishonest" in the provisions refers to the circumstances or manner in which the observation or recording is done and to delete the proposed new section 159AAC(3) in respect of the element of "gain". In other words, under the proposed amendments, a defendant who observes or records intimate parts in a dishonest way would commit the offence if other elements of the offences are proven.

37. Some members have raised concern as to whether the Administration's proposed amendments may be too restrictive and render the prosecution threshold of the offence of non-consensual recording of intimate parts even higher and make it more difficult for the prosecution to prove the relevant offence elements. The Administration has advised that based on the proposed amendments to the proposed new section 159AAC, the prosecution would not be required to prove "obtaining gain" but would only be required to prove that the defendant did the recording or operated the equipment in a dishonest manner, which should not be a particularly onerous burden for the prosecution. The Administration considers that the proposed amendments should make the relevant offence elements clearer

and more precise, and would not increase the difficulty of prosecution.

38. The Administration has stressed that in considering whether the defendant has engaged in the conduct dishonestly, the circumstances or manners in which the observation or recording is done, rather than the purpose of obtaining the photos, constitute the relevant evidence. This would minimize the chance of inadvertent contravention, in particular since "down-blousing" is included within the scope of the offence.

Publication of images originating from the proposed offences of voyeurism or non-consensual recording of intimate parts

39. Pursuant to the proposed new section 159AAD, a person would commit an offence if the person publishes an image of a subject individual that originates from the commission of an offence under the proposed new section 159AAB(1) (voyeurism) or 159AAC(1) (non-consensual recording of intimate parts) ("specified offence") without the subject individual's consent,¹³ knowing that or being reckless¹⁴ as to whether the image originates from the commission of a specified offence, and disregarding whether the subject individual consents to the publication.

40. Members have expressed concern on whether possession and mere forwarding of an intimate image from an unknown source would amount to commission of an offence, if it is later learnt that the subject individual has not given consent to the recording. The Administration has explained that the proposed new section 159AAD is intended to prevent the publication of images originating from the commission of a specified offence. The construct of the offence would include the element that the person 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 the offence, and disregards whether the subject individual consents to the publication. The mere forwarding or sharing such images in the absence of the requisite *mens rea* would be excluded from the scope of the offence relating to non-consensual publication of images. The act of publication is defined in the proposed new section 159AA(4) and (5) and does not cover mere possession.

41. Having regard to the Administration's advice, some members have enquired whether the prosecution must prove that the person knows that voyeurism or non-consensual recording of intimate image is a specified offence. For the avoidance of doubt, the Administration proposes to add a new subsection

¹³ Please also see footnote 11 above.

¹⁴ Please also see paragraph 44 below regarding the meaning of "reckless".

to the proposed new section 159AAD to the effect that the person is either taken to know or is taken to be reckless as to whether a specified offence has been committed if the person is aware of or reckless as to the existence of all the matters that must be established in order to prove the specified offence.

42. Concern has also been raised as to whether a defendant charged under the proposed new section 159AAD would also be charged under the proposed new section 159AAB(1) or 159AAC(1). The Administration has advised that the proposed new section 159AAD aims to deter the continued circulation of an image obtained through voyeurism and non-consensual recording of intimate parts. Therefore, it is immaterial whether the publisher is the person taking the image or is also charged under the proposed new section 159AAB(1) or 159AAC(1), as long as the publisher knows or is reckless as to whether the image originates from the commission of a specified offence and other elements of offence stated in the proposed new section 159AAD can be proved.

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

Meaning of "reckless"

44. The Legal Adviser has pointed out that under the proposed new section 159AAH, "disregard" is proposed to mean, among others, that "is reckless as to whether the subject individual consents to the conduct". Members and the Legal Adviser have enquired about the meaning of "reckless" in the above context. The Administration has advised that CFA held in *Sin Kam Wah and another v HKSAR* (2005) 8 HKCFAR 192 that, given the subjective interpretation of "recklessness", the prosecution would be required to prove that the defendant: (a) was aware of a risk which did or would exist, and acted recklessly in respect of the circumstances, or (b) knowing the consequences or the potential risk, acted recklessly, and it was, in the circumstances known to the defendant, unreasonable to take the risk. Conversely, the defendant could not be regarded as having the requisite *mens rea* and be convicted if, due to the defendant's age or personal

characteristics, the defendant genuinely did not appreciate or foresee the risks involved in his actions. The Administration has further advised that the concept of "recklessness" also exists in sexual offences in other existing legislation.

Publication or threatened publication of intimate images without consent

45. It is proposed in the Bill that the proposed new section 159AAE be introduced, under which a person would commit the offence if he publishes or threatens to publish an intimate image of an individual with intent to cause humiliation, alarm or distress to the individual (or knowing or being reckless as to whether it will or is likely to cause such humiliation, alarm or distress), without consent and with disregard as to whether the individual consents to the publication¹⁵ or threatened publication of the intimate image.

46. Members have expressed concern that a victim would sometimes be unable to provide the prosecution with evidence as to whether the defendant indeed possesses such intimate images, and the mere threat to publish an intimate image of the victim has already caused much alarm and distress to the victim concerned. Members have enquired about the prosecution threshold for the proposed offence under the proposed new section 159AAE, in particular whether it would be necessary for the prosecution to prove the existence of an intimate image of the subject individual.

47. The Administration has explained that the proposed new section 159AAE(2) focuses on the conduct of threatened publication. If a person threatens to publish an intimate image of a victim and intends to cause humiliation, alarm or distress to the victim, or knows or is reckless as to whether the victim would be humiliated, alarmed or distressed, even if the person is not capable of publishing the image (e.g. the image does not exist or the person does not possess it), such conduct still seriously infringes the victim's right to privacy and sexual autonomy, potentially causing great harm and distress to the victim. To express clearly the legislative intent, the proposed new section 159AAE(4) stipulates that it is immaterial whether the person who makes the threat is capable of publishing the intimate image. In other words, the prosecution is not required to prove the actual existence of an intimate image before bringing a prosecution under the proposed new section 159AAE(2).

48. Some members have asked whether a person who publishes an intimate image of a subject individual would commit an offence under the proposed new section 159AAE if the subject individual withdraws his/her consent after the

¹⁵ The act of publication is defined in the proposed new section 159AA(4) and (5).

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

The element of "no consent is given by the subject individual" under the proposed new section 159AAE

49. Members note that the Administration would propose amendments to remove the offence element of "no consent is given by the subject individual" from the three new offences under the proposed new sections 159AAB, 159AAC and 159AAD (paragraph 22 above refers). As advised by the Administration, it proposes to retain the offence element of "no consent is given by the individual to the publication" in the proposed new section 159AAE to avoid the scope of the offence being so wide that people without the requisite *mens rea* would breach the law inadvertently. As compared to the offence of publication of images originating from commission of a specified offence under the proposed new section 159AAD, the publication in relation to the offence under the proposed new section 159AAE may involve voluminous intimate images circulating on the internet. From the content of these images, an ordinary person may not know the background to their publication, such as whether the subject individual captured in such images gave consent to the recording and publication. If the said offence element is removed, a person who publishes an image disregarding whether consent is given by the subject individual (e.g. in case they do not know each other at all) could be considered as having committed the offence, even though the subject individual in fact gave consent to the publication.

Proposed amendments to expand the definition of "intimate image" to include "altered image"

50. Some members and some organizations which have provided written views to the Bills Committee have raised the concern that with technological development, it is increasingly easy to make high quality altered intimate images. It is suggested that the definition of "intimate image" be expanded to include an "altered image", given that the harms caused to the victims can be equally devastating as those of real intimate images.

51. To address members' concerns, the Administration has made reference to the definition of "intimate image" in section 377BE(5) of the Penal Code of Singapore and suggested that the definition of "intimate image" in the proposed new section 159AA be expanded to include an image that has been altered to show an intimate part of an individual or an individual doing an intimate act, unless it has been so altered that no reasonable man would believe it shows an intimate part of that individual or an individual doing an intimate act. The Administration believes that the proposed amendment would afford further protection to victims by enabling the offence of publication or threatened publication of intimate images without consent to cover altered intimate images. At the same time, it adopts the objective test of "a reasonable man" to strike a balance and excludes images apparently not describing the victims for clear scoping of the offence.

52. Some members consider that the expression "an image so altered that no reasonable person would believe" under the proposed amendment is not clear enough, and enquired about the scenarios that are intended to be covered. The Administration has pointed out that the inclusion of "altered image" in the definition of intimate image in the context of criminal offences in overseas jurisdictions is a relatively new legislative development. Furthermore, with rapid technological advancement, it may not be easy to give a precise definition of an "altered image". Hence, the Administration has suggested to make reference to the definition of "intimate image" in the Penal Code of Singapore and exclude from the proposed offence images so altered that a reasonable person would not consider that such images as showing an intimate part of the subject individual concerned or the individual doing an intimate act. It is further pointed out that the application of the reasonable man test has been an effective legal test in respect of other criminal offences.

Defences

53. Members note that it would be a defence under the proposed new section 159AAJ for a person charged with any of the proposed new offences in the Bill (except if the offences are committed for a sexual purpose) to establish that the person has lawful authority or reasonable excuse for the contravention. In cases where the subject individual is aged under 16 or is mentally incapacitated, it is proposed under the proposed new section 159AAI that it would be a defence if a person charged could prove that he or she honestly believed that a consent was given by the subject individual to the person's conduct, and the person did not know and had no reason to suspect that the subject individual was an individual under the age of 16 or mentally incapacitated.

Defence regarding the age or mental capacity of the subject individual

54. Some members and some organizations which have provided written views to the Bills Committee have raised concern that the proposed defence regarding the age or mental capacity of the subject individual under the proposed new section 159AAI would create a loophole and do not afford sufficient protection to children under the age of 16. These members take the view that there should be no defence, i.e. absolute liability for sexual offences involving children under the age of 16 or mentally incapacitated.

55. The Administration shares members' view that legislation on criminal offences should protect vulnerable persons, including children and mentally incapacitated persons, from sexual abuse or exploitation. Members' attention has been drawn to the proposed new section 159AAG, which states that a person cannot give a consent to a conduct that would prevent the conduct from becoming an offence under Division 2 of the Bill if the subject individual is under the age of 16 or is mentally incapacitated. Having said that, the Administration considers it appropriate to also introduce a defence allowing a defendant to prove, on a balance of probabilities, that he or she honestly believed that a consent was given by the subject individual to the conduct and had no reason to suspect that the subject individual was an individual under the age of 16 or a mentally incapacitated person. Similar defence is also found in a number of common law jurisdictions.

56. The Legal Adviser has raised queries regarding the different standards of proof applicable to the proposed defence under the proposed new sections 159AAI and 159AAJ, and whether there are similar statutory defences in existing legislation for members' reference. The Administration has advised that in respect of the proposed new section 159AAI, the defendant bears the burden of proving a defence on a balance of probabilities. The Administration has referred members to the case of *HKSAR v Choi Wai Lun* (蔡偉麟) (2018) 21 HKCFAR 167, a case involving indecent assault of a girl aged 13. In the *Choi Wai Lun* case, CFA considered it unnecessary to resort to absolute liability for achieving the legislative intent. CFA held that, among others, the imposition of a burden on the defendant to prove on the balance of probabilities that he honestly and reasonably believed that the girl in question was aged 16 or more could pass the rationality and proportionality tests. Taking into account CFA's judgment on the *Choi Wai Lun* case and other relevant considerations, the Administration is of the view that the construct of the proposed new section 159AAG in conjunction with the proposed new section 159AAI, which imposes a persuasive burden on the defendant to prove his defence on a balance of probabilities, can pass the rationality and proportionality tests, and strike a reasonable balance between protection of vulnerable persons and the right to a fair trial for the defendant.

Moreover, the defendant's burden of proof under the proposed new section 159AAI is more onerous than that of establishing a defence regarding lawful authority or reasonable excuse under the proposed new section 159AAJ, which imposes an evidential burden on the defendant.

57. The Administration has further advised that if a recording or publication of intimate parts involving children, depending on the circumstances, the person may have committed the offences of possession or publication of child pornography under the Prevention of Child Pornography Ordinance (Cap. 579). A person who commits such offences would be liable on conviction to a fine of \$1,000,000 and imprisonment for five years, and a fine of \$2,000,000 and imprisonment for eight years respectively.

Defence regarding lawful authority or reasonable excuse

58. Under the proposed new section 159AAJ, it would be a defence for a person charged with an offence under the Bill to establish that the person had lawful authority or reasonable excuse for the contravention, except when the offence was committed for a sexual purpose.

59. In response to the Legal Adviser's enquiry about the scope and content of the defence regarding lawful authority or reasonable excuse, the Administration has advised that lawful authority mainly targets at the conduct of law enforcement agencies in accordance with the relevant laws. Such defence is also common in other offences in Hong Kong. As for "reasonable excuse", the Administration has advised that as the elements of the proposed offences under the Bill are defined clearly and the requisite *mens rea* specified precisely, the Bill should be able to eliminate most cases of inadvertent contravention. This approach of offering a statutory defence based on "reasonable excuse" is preferable to listing out in detail the specific circumstances under which a defendant could raise a defence. 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.

Empowering the court to order deletion and removal of an intimate image

60. Some members and some organizations which have provided written views to the Bills Committee are of the view that the court should be allowed to order deletion and removal of an intimate image to prevent further circulation. These members have suggested the Administration to consider introducing provisions to the Bill regarding interim image-removal or disposal order for the purpose of taking down intimate images. In that regard, the Legal Adviser referred to e.g. provisions under the Control of Obscene and Indecent Articles Ordinance

(Cap. 390) which deal with forfeiture of obscene articles and obliteration of indecent matter for members' reference.

61. The Administration has pointed out that there are currently various means to stop illegal content from further circulation. Pursuant to section 102 of the Criminal Procedure Ordinance (Cap. 221), the court may order the forfeiture of any property that has been used in the commission of an offence, such as a mobile phone used for recording intimate parts and a computer used for distributing intimate images. Furthermore, any party can also initiate civil action to seek an injunction. Besides, the Police have a well-established mechanism to request online content hosts to remove illegal content or images.

62. Some members remain of the view that out of control circulation of intimate images pending court trial would cause persistent harm and distress to the victims concerned. To render further protection to the victims suffering from intimate image abuse, these members have called on the Administration to consider empowering the court to make a disposal order in this regard.

63. In the light of members' concerns, the Administration has proposed to add a new Division 4 (proposed new sections 159AAK to 159AAO) to the Bill to empower a magistrate to order the defendant or any other person to remove, delete or destroy relevant intimate images. Under the proposed new Division, the Government may make an application to the magistrate in the name of the Secretary for Justice at any time during any criminal proceedings of the offences under the proposed new section 159AAD or 159AAE to order a person (whether in Hong Kong or elsewhere) to take reasonable steps to remove, delete or destroy the image, or to cause the removal, deletion or destruction of the image, within a period to be specified by the magistrate. To ensure procedural justice, with the exception of the circumstances stipulated under the proposed new section 159AAM(4), the magistrate must issue a summon to the person subject to the proposed disposal order to appear in a hearing to defend himself or herself, before issuing a disposal order. A subject person who fails to comply with the disposal order is liable on conviction on indictment to a fine at level 6 and to imprisonment for one year unless he or she could establish reasonable excuse. After a disposal order is made, the magistrate may, on its own motion, on application in the name of the Secretary of Justice, or on application by the subject person or other persons affected by the disposal order to review the disposal order and affirm, vary, cancel or revoke the disposal order as the magistrate considers appropriate.

Amendments proposed to the Bill

64. In addition to the Administration's proposed amendments as elaborated in paragraphs 22, 25, 36, 41, 51 and 63 above, members note that the Administration

has also proposed to amend to the Chinese text of the proposed new section 159AAB(1)(a)(i) for better consistency with the English text.

65. The Bills Committee will not propose any amendments to the Bill.

Resumption of Second Reading debate

66. Subject to the Administration moving the proposed amendments to the Bill, the Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 29 September 2021.

Consultation with the House Committee

67. The Bills Committee reported its deliberations to the House Committee on 10 September 2021.

Council Business Division 2
Legislative Council Secretariat
17 September 2021

Bills Committee on Crimes (Amendment) Bill 2021

Membership list *

Chairman	Hon Elizabeth QUAT, BBS, JP
Deputy Chairman	Hon YUNG Hoi-yan, JP
Members	Hon Paul TSE Wai-chun, JP Hon SHIU Ka-fai, JP Hon Vincent CHENG Wing-shun, MH, JP (Total : 5 members)
Clerk	Miss Betty MA
Legal adviser	Miss Joyce CHAN

* Changes in membership are shown in **Annex to Appendix I**.

Bills Committee on Crimes (Amendment) Bill 2021

Changes in membership

Member	Relevant date
Dr Hon CHENG Chung-tai	Up to 25 August 2021

According to the announcement made by the Hong Kong Special Administrative Region Government on 26 August 2021 pursuant to the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region, CHENG Chung-tai was disqualified from being a member of the Legislative Council on 26 August 2021.

Bills Committee on Crimes (Amendment) Bill 2021

List of organizations/individuals which/who have provided written submissions

1. Anti480 Anti-Sexual Violence Resource Centre
2. Les Corner Empowerment Association
3. Midnight Blue
4. Equal Opportunities Commission
5. The Society for Truth and Light and Hong Kong Sex Culture Society Limited
6. The Hong Kong Federation of Trade Unions Women Affairs Committee
7. The Law Society of Hong Kong
8. Association Concerning Sexual Violence Against Women
9. Mr Thomas SO Ho-yat