

Crimes (Amendment) Bill 2021

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Part XIIAA

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A BILL

To

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

Enacted by the Legislative Council.

1. Short title

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

2. Crimes Ordinance amended

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

3. Part XIII A added

After Part XII—

Add

“Part XIIIAA

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

Division 1—Interpretation

159AA. Interpretation

(1) In this Part—

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

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

image (影像) means—

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

intimate image (私密影像), in relation to an individual, means an image showing an intimate part of the individual, or showing the individual doing an intimate act;

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

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

record (拍攝)—

- (a) means creating or generating an image; and

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

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

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

- (2) For the purposes of this Part, an individual is doing an intimate act if—
 - (a) the individual is using the toilet in a manner that an intimate part of the individual is likely to be revealed; or
 - (b) the individual is doing a sexual act that is not of a kind ordinarily done in public.
- (3) For the purposes of this Part, a person operates equipment even if the person merely enables or secures its activation by another person without that other person's knowledge.
- (4) For the purposes of this Part, a person publishes an image if the person, whether or not for any form of reward—
 - (a) distributes, circulates, makes available, sells, hires, sends, gives or lends the image to another person; or
 - (b) shows the image in any manner to or for another person (including showing, playing or

projecting the image to or for another person using any machinery or apparatus and publicly displaying the image).

- (5) For the purposes of subsection (4), a reference to distributing, circulating, making available or sending an image to a person includes a reference to—
- (a) making available to the person any data from which the image is capable of being reproduced; and
 - (b) making available to the person any hyperlink, or location on an electronic platform, that gives access to the image or any data from which the image is capable of being reproduced.

Division 2—Offences

159AAB. Voyeurism

- (1) A person commits an offence if—
- (a) the person surreptitiously—
 - (i) observes (with or without the aid of equipment) or records an individual in a place in which any individual can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act;
 - (ii) observes (with or without the aid of equipment) or records an intimate part of an individual, or an individual doing an intimate act, for the purpose of observing or recording an intimate part or an intimate act, of any individual; or

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

159AAC. Non-consensual recording of intimate parts

- (1) A person commits an offence if—
 - (a) the person—
 - (i) records an intimate part of an individual, in circumstances in which the intimate part would not otherwise be visible; or
 - (ii) with intent to observe or record an intimate part of an individual—

- (A) operates equipment for the purpose of observing or recording an intimate part of the individual from beneath the clothing of the individual; or
 - (B) operates equipment in an unreasonable manner for the purpose of observing or recording an intimate part of the individual through an opening or a gap in the outer clothing of the individual,
 - in circumstances in which the intimate part would not otherwise be visible;
 - (b) the person engages in the conduct described in paragraph (a)(i) or (ii) for—
 - (i) a sexual purpose; or
 - (ii) the purpose of obtaining dishonest gain for the person, or for any other person;
 - (c) no consent is given by the individual referred to in paragraph (a)(i) or (ii) (*subject individual*) to the person's conduct described in that paragraph; and
 - (d) the person disregards whether the subject individual consents to the person's conduct described in paragraph (a)(i) or (ii).
- (2) A person who commits an offence under subsection (1) is liable on conviction on indictment to imprisonment for 5 years.
- (3) In subsection (1)(b)(ii)—
- gain** (獲益) includes—
- (a) a gain in money or property;

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

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

- (1) A person commits an offence if—
 - (a) the person publishes an image of an individual (*subject individual*);
 - (b) the image originates from the commission of an offence under section 159AAB(1) or 159AAC(1) (*specified offence*);
 - (c) no consent is given by the subject individual to the publication; and
 - (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.
- (2) For subsection (1)(b), it is immaterial whether the specified offence is committed by the person.
- (3) A person who commits an offence under subsection (1) is liable on conviction on indictment to imprisonment for 5 years.

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

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

- (3) For subsections (1) and (2), it is immaterial whether the intimate image is—
- (a) created, generated or obtained in Hong Kong or elsewhere;
 - (b) created, generated or obtained by—
 - (i) the individual referred to in subsection (1) or (2), as the case may be (*subject individual*); or
 - (ii) the person;
 - (c) created, generated or obtained with or without the consent of the subject individual;
 - (d) created, generated or obtained before, on or after the day on which the Crimes (Amendment) Ordinance 2021 (of 2021) comes into operation; or
 - (e) provided to the person by the subject individual.
- (4) For subsection (2), it is immaterial whether the person is capable of publishing the intimate image.
- (5) A person who commits an offence under subsection (1) or (2) is liable on conviction on indictment to imprisonment for 5 years.

Division 3—Consent and Defence

159AAF. Interpretation

In this Division—

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

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

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

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

159AAH. Disregard whether consent is given

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

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

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

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

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

159AAJ. Defence regarding lawful authority or reasonable excuse

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

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

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

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

- give a consent that would prevent a conduct from becoming an offence (new section 159AAG);
 - (b) set out the circumstances under which a person is to be taken to disregard whether a subject individual consents to the person's conduct (new section 159AAH); and
 - (c) provide for statutory defences (new sections 159AAI and 159AAJ).
7. Each of the new offences introduced in the Bill carries with it a maximum penalty of 5-year imprisonment.