

## LEGISLATIVE COUNCIL BRIEF

### Crimes Ordinance (Chapter 200)

### Crimes (Amendment) Bill 2021

## INTRODUCTION

At the meeting of the Executive Council on 16 March 2021, the Council ADVISED and the Chief Executive ORDERED that the Crimes (Amendment) Bill 2021 (“the Bill”), at Annex, should be introduced into the Legislative Council (“LegCo”).

## JUSTIFICATIONS

### Voyeurism and non-consensual recording of intimate parts

2. There is currently no specific offence against voyeurism or non-consensual recording of intimate parts (such as upskirt photography). 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”)<sup>1</sup>. Depending on the circumstances of each case, prosecution have also been made with “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.

3. The Court of Final Appeal (“CFA”) held in its judgment laid down in April 2019<sup>2</sup> that section 161(1)(c) of the Ordinance (obtaining access to a computer “with a view to dishonest gain for himself or another”) does not

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<sup>1</sup> Section 161 of the Ordinance reads as follows –

- (1) Any person who obtains access to a computer (a) with intent to commit an offence; (b) with a dishonest intent to deceive; (c) with a view to **dishonest gain** for himself or another; or (d) with a dishonest intent to cause loss to another, whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years.
- (2) For the purposes of subsection (1) **gain** (獲益) and **loss** (損失) are to be construed as extending not only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and (a) **gain** (獲益) includes a gain by keeping what one has, as well as a gain by getting what one has not; and (b) **loss** (損失) includes a loss by not getting what one might get, as well as a loss by parting with what one has.

<sup>2</sup> *Secretary for Justice v Cheng Ka Yee & Others* [2019] HKCFA 9.

extend to the use of the offender's own computer. In the light of the CFA judgment, it will no longer be appropriate for the prosecution to press charge under the section against upskirt photography and the publication of intimate images without consent, if the act involved only the use of the suspect's own computer.

4. There are also limitations in the other offences set out in paragraph 2 above. Generally speaking, those offences are applicable only to acts that occur in a **public place** or a place where what is done is capable of public view, and thus may not be applicable to acts that occur in a private place. Furthermore, both "loitering" and "disorder in public place" are summary offences with relatively low levels of penalty<sup>3</sup>. This is not commensurate with the severity of surreptitious intimate photography, which violates the victim's right to privacy and sexual autonomy, and may cause long-term distress, humiliation, harassment, and stress to the victim. There are strong sentiments in the community and a pressing need to address voyeurism and non-consensual recording of intimate parts with criminal sanctions.

## Review of Sexual Offences

5. The Review of Sexual Offences Sub-committee of the Law Reform Commission ("LRC") published the *Report on Voyeurism and Non-consensual Upskirt-Photography* ("the Report") in April 2019 as part of LRC's overall review of the law governing sexual offences. Having studied similar offences in overseas jurisdictions, LRC recommended the introduction of an offence of voyeurism<sup>4</sup>; an offence of non-consensual upskirt photography committed for the purpose of obtaining sexual gratification, as well as a separate offence committed irrespective of the purpose. The Government accepts LRC's recommendations and launched a three-month public consultation in July 2020 to receive public views on the introduction of the relevant new offences.<sup>5</sup>

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<sup>3</sup> Persons convicted of "**loitering**" under section 160 of the Crimes Ordinance (Cap. 200) is liable to a maximum penalty of imprisonment for two years; while those convicted of "**disorder in public places**" under section 17B of the Public Order Ordinance (Cap. 245) is liable to a maximum penalty of a fine at level 2 (or \$5,000 at the current level) and imprisonment for 12 months.

<sup>4</sup> According to LRC, **voyeurism** refers to an act of non-consensual observation or visual recording (for example, of a photograph, videotape, or digital image) of another person for a sexual purpose.

<sup>5</sup> The consultation invited public views on six proposed offences, namely—

- (a) voyeurism (i.e. observing or recording of intimate acts for the purpose of obtaining sexual gratification);
- (b) intimate prying (i.e. observing or recording of intimate acts but irrespective of the purpose, with a lower penalty than (a) above);
- (c) non-consensual photography of intimate parts for the purpose of obtaining sexual gratification;
- (d) non-consensual photography of intimate parts irrespective of the purpose, with a lower penalty than (c) above;
- (e) distribution of surreptitious images obtained from the acts in paragraphs (a) to (d) above; and
- (f) non-consensual distribution of intimate images where consent was previously given for the taking of such images but not for subsequent distribution.

6. Opinions received during public consultation are detailed at the “Public Consultation” section below. Having regard to the views received, the legislative proposal is set out in paragraphs 7 to 22 below.

## THE PROPOSAL

7. In drawing up the legislative proposal, the Government is conscious of the guiding principles laid down by the LRC sub-committee, namely –

- (a) clarity of the law;
- (b) respect for sexual autonomy;
- (c) the protective principle;
- (d) gender neutrality;
- (e) avoidance of distinctions based on sexual orientation; and
- (f) adherence to the human rights laws and practices guaranteed under the Basic Law.

After careful examination of the views received during the public consultation and by reference to the experience in handling such offences in other jurisdictions, the legislative proposal is set out below.

### (a) Voyeurism

8. We **propose** to introduce an offence of voyeurism, contravention of which will attract a maximum penalty of five years of imprisonment. We agree with the public views received that the crime of observing or recording a subject individual engaged in an intimate act is equally heinous whether it is for a sexual purpose or other purposes, and should be punishable at the same penalty level. Under the proposal, it is an offence for a person 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** without his or her consent, 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 part**<sup>6</sup>, or to be doing an **intimate act**<sup>7</sup>;

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<sup>6</sup> An “**intimate part**” in relation to an individual, means the individual’s genitals, buttocks, anal region or breasts (whether exposed or only covered with underwear); or the individual’s underwear covering genitals, buttocks, anal region or breasts.

<sup>7</sup> An individual is doing an **intimate act** if (a) the individual is using the toilet in a manner that is likely to show an intimate part of the individual; or (b) the individual is doing a sexual act that is not of a kind ordinarily done in public.

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

9. Under the offence of voyeurism, the person who is observing or doing the recording must **act “surreptitiously”**<sup>8</sup>. Secondly, the individual being observed or recorded must be in circumstances that give rise to “**a reasonable expectation of privacy**”. We consider that these two limbs could effectively ring-fence the offence against situations of inadvertence. It is also an offence for a person who installs or operates equipment, or 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 described in paragraphs 8(a), (b) or (c) above.

10. The proposed offence is formulated with reference to section 162(1) of the Criminal Code of Canada<sup>9</sup>. Of note, we have made three modifications/additions to the Canadian model. Firstly, we have included the element of consent. Observation or recording would only be caught by the offence if the individual does not consent to being observed or recorded and the person disregards whether such consent is given. Secondly, in line with the principle of gender neutrality, breasts of an individual regardless of the individual’s sex (as opposed to “female breasts” in the Canadian model) should be covered under the offence. Furthermore, to provide more protection to potential victims, we propose expanding the scope to cover the scenario in which the individual’s genitals, buttocks, anal region or breasts are only covered with underwear.

## **(b) Non-consensual Recording of Intimate Parts**

11. We **propose** to introduce an offence of non-consensual recording of intimate parts, with a maximum penalty of five years of imprisonment. Under the proposal, a person commits an offence if, (i) for a **sexual purpose**, or (ii) for

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<sup>8</sup> According to the Oxford English Dictionary, “**surreptitiously**” includes the meaning of “In an underhand way; secretly and without authority; clandestinely, by stealth, ‘on the sly’”.

<sup>9</sup> Section 162(1) of the **Criminal Code of Canada** provides that :  
*“Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if—*  
 (a) *the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;*  
 (b) *the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or*  
 (c) *the observation or recording is done for a sexual purpose.”*

a purpose to obtain **dishonest gain** for the person or for any other person<sup>10</sup> (“the dishonest purpose”), and **without an individual’s consent** –

- (a) the person records an image showing an intimate part of an individual in circumstances in which the intimate part would not otherwise be visible; or
- (b) the person, with intent to observe or record an intimate part of an individual, (i) operates equipment for the purpose of observing or recording an intimate part of the individual **from beneath the clothing**, or (ii) 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. The observation or recording is in circumstances in which the intimate part would not otherwise be visible.

The dishonest purpose is proposed with reference to the existing section 161(1)(c) of the Ordinance, which had been used for the prosecution against upskirt photography.

12. There have been different views as to whether the proposed offence should cover “down-blousing”, which generally refers to the taking of photos down the top of a person’s blouse to capture an image of their breasts. In considering whether “down-blousing” should be covered, we are mindful of the possibilities of inadvertent contravention and abuse, as well as the different levels of concern regarding the exposure of female and male breasts. In this regard, Members of the LegCo Panel on Security (“the Panel”) had raised objections to our 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.

13. On the scoping of the offence of **non-consensual recording of intimate parts**, a person will contravene the offence of non-consensual recording of intimate parts (including “**upskirting**” and “**down-blousing**”) only if **all** of the following elements are met –

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<sup>10</sup> Section 161(2)(a) of the Crimes Ordinance (Cap. 200) elaborates that “**gain**” in section 161(1)(c) includes a gain by keeping what one has, as well as a gain by getting what one has not. In *HKSAR v Tsun Shui Lun* [1999] 3 HKLRD 215, [1999] 2 HKC 547; applied in *Secretary for Justice v Li Man Wai* [2003] 2 HKC 1, the Court of First Instance held that “gain” included **obtaining information** which the defendant did not have prior to the access to a computer. Thus, before the ruling of *Secretary for Justice v Cheng Ka Yee & Others* [2019] HKCFA 9, section 161(1)(c) was often used for prosecution of cases of upskirt photography (i.e. non-consensual photography of intimate parts).

- (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 gain*; and
- (d) no consent is given by the individual to being observed or recorded, and the person disregards whether such consent is given.

14. The delicate scoping of the offence should be sufficient to ring-fence against inadvertent contravention, abuse and false accusations. We should also emphasize that the offence does not seek to criminalise observance or photo-taking of voluntary exposure of intimate parts, but to specifically target the intrusive acts of “upskirting” and “down-blousing” without consent.

### **(c) Non-consensual Publication of Intimate Images**

15. At present, there is no specific legislation to deal with the act of publishing, circulating, selling, or in any other way distributing the photos or videos generated by acts of the proposed offences of voyeurism and non-consensual recording in paragraphs 8 to 14 above. The Control of Obscene and Indecent Articles Ordinance (Cap. 390) only regulates the publication of obscene and/or indecent articles<sup>11</sup> to the public, and as such, may not be applicable to, for instance, the transmission of upskirt images among several individuals privately using mobile phones. While there is no available information on the extent of the circulation or publication of such images on the Internet or other means, the Police do from time to time receive reports from victims complaining that their nude images, whether taken with or without consent, were distributed on the Internet by a former partner in an intimate relationship.

16. In a case concerning upskirt photography,<sup>12</sup> the Court of Appeal noted that “the indecent photos taken by the defendant could be kept permanently, exchanged, circulated, sold as commodities, or even used to threaten the victim, and that therefore the victim could be subjected to harassment over a long period of time. Such conduct is an affront to the dignity of the female victim.” The act of distributing such images is a serious violation of the victim’s right to privacy and sexual autonomy, and should be subject to criminal sanctions.

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<sup>11</sup> Under the **Control of Obscene and Indecent Articles Ordinance**,

- (a) a person “publishes” an article if he, whether or not for gain, distributes, circulates, sells, hires, gives or lends the article to the public or a section of the public;
- (b) a thing is obscene if by reason of obscenity it is not suitable to be published to any person; and
- (c) a thing is indecent if by reason of indecency it is not suitable to be published to a juvenile.

<sup>12</sup> *Secretary for Justice v Chong Yao Long Kevin* [2013] 1 HKLRD 794.

17. Whilst LRC did not make any recommendation in this aspect, we note that there are similar offences in overseas jurisdictions (e.g. Canada, New Zealand and Singapore) for better protection of the victims. We therefore **propose** to introduce an offence to **prohibit the publication without consent of intimate images** that originate from the commission of the offence of voyeurism or non-consensual recording of intimate parts.

18. We also **propose** to introduce another offence to **prohibit the publication or threatened publication**<sup>13</sup> **without consent of intimate images** (including still images and videos) where consent might have been given, or was given, for the taking of such intimate images, but not for the publication or threatened publication. The proposed offence will be constituted if the publisher knows the subject individual did not give any consent for the publication or threatened publication, or the publisher disregard whether the individual gave such consent.<sup>14</sup>

19. Similar to the legislation in Singapore<sup>15</sup>, the construct of the offence will include the element that “the publisher intends, knows or is reckless as to whether the publication will or is likely to **cause humiliation, alarm or distress** to the victim” for proper scoping. The proposed formulation of the offence will render effective legal remedy to individuals involved in cases such as revenge porn, while excluding the mere forwarding or sharing of such images in the absence of the requisite *mens rea* from the scope of the offence. The two offences relating to the publication of intimate images both carry a maximum penalty of five years of imprisonment.

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<sup>13</sup> Section 2 of the **Abusive Behaviour and Sexual Harm (Scotland) Act 2016** provides for threatened disclosure of intimate photographs or film as follows:

*“A person (“A”) commits an offence if—*

- (a) A **discloses, or threatens to disclose**, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation,*
- (b) by doing so, A intends to cause B **fear, alarm or distress** or A is reckless as to whether B will be caused fear, alarm or distress, and;*
- (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B’s consent.”*

<sup>14</sup> Similar provision could be found in section 162.1 of the **Criminal Code of Canada** which provides that:  
*“Everyone who knowingly **publishes**, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty of an indictable offence ... or of an offence punishable on summary conviction.”*

<sup>15</sup> Section 377BE(1) of the **Penal Code in Singapore** provides that:  
*“Any person (A) shall be guilty of an offence who (a) intentionally or knowingly distributes an intimate image or recording of another person (B); (b) without B’s consent to the distribution; and (c) knows or has reason to believe that the distribution will or is likely to cause B **humiliation, alarm or distress**.”*

#### **(d) Statutory Defences**

20. We **propose** to provide in the legislation that it is a defence for a person charged for any one of the proposed new offences (excluding offences committed for a sexual purpose) to establish that the person had **lawful authority or reasonable excuse** for the contravention. The provision of a statutory defence on the ground of “reasonable excuse” will allow flexibility to cater for any justifiable scenarios, having regard to the circumstantial evidences and facts of individual cases. As regards cases concerning a subject individual who was aged under 16, or is mentally incapacitated, it is also a defence for a person who honestly believed that consent was given by the subject individual to the conduct, and the person did not know and had no reason to suspect the subject individual was such a person.

#### **(e) Sexual Conviction Record Check Scheme (“SCRC”) Scheme**

21. The SCRC Scheme is an administrative scheme established in 2011 to enable employers of persons undertaking child-related work and work relating to mentally incapacitated persons to check whether eligible applicants have any criminal conviction records against a specified list of sexual offences. Taking into account the nature of the proposed offences of “voyeurism” and “non-consensual recording of intimate parts”, which amount to a serious infringement to the sexual autonomy of the victims concerned, we **propose** to include these two offences in the list of specified sexual offences under the SCRC Scheme for better protection of children and mentally incapacitated persons from sexual abuse. The inclusion of these two offences in the SCRC Scheme does not require any legislative amendments. We will follow up with the administrative procedures after passage of the Bill.

22. As for the two proposed offences on the publication of intimate images, the motives vary and may relate to revenge (as in revenge porn), blackmail, monetary gains, humiliation, or other non-sexually motivated purposes. As such, it may not fit the purpose of the SCRC Scheme which is more a reflection on unlawful sexual inclination or tendency. It is also noted that offences related to the publication of obscene and indecent articles under the Control of Obscene and Indecent Articles Ordinance (Cap. 390) are not currently included in the list of sexual offences under the SCRC Scheme. Considering the similar nature of the offences concerned and the purpose of the Scheme, we **propose** that the two proposed offences on the publication of intimate images should not be covered under the Scheme.

## THE BILL

23. The key provisions of the Bill are as follows –

- (a) Clause 3 of the Bill adds a new Part XIIAA (new sections 159AA to 159AAJ) to the Ordinance. The new Part XIIAA contains 3 Divisions.
- (b) Division 1 defines and provides for the meaning of certain terms for the purposes of the new Part XIIAA (new section 159AA).
- (c) Division 2 introduces the following **new offences** –
  - (i) voyeurism (new section 159AAB);
  - (ii) non-consensual recording of intimate parts (new section 159AAC);
  - (iii) publication of images originating from the commission of the offence under section 159AAB(1) or 159AAC(1) (new section 159AAD);
  - (iv) publication or threatened publication of intimate images without consent (new section 159AAE).
- (d) Division 3 contains provisions to –
  - (i) provide for the definition of “subject individual” with regard to the provision of consent under Division 3 (new section 159AAF)
  - (ii) 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 to a conduct that would prevent the conduct from becoming an offence (new section 159AAG);
  - (iii) 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
  - (iv) provide for statutory defences (new sections 159AAI and 159AAJ).

## LEGISLATIVE TIMETABLE

24. The tentative legislative timetable will be as follows –

Publication in the Gazette

19 March 2021

First Reading and commencement of Second Reading debate	24 March 2021
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

## **IMPLICATIONS OF THE BILL**

25. The Bill is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the current binding effect of the existing provisions of the Ordinance. It has no financial, civil service, economic, productivity, environmental, sustainability or family implications. Any additional workload arising from the new criminal offences will be absorbed by the Police with their existing resources.

26. As to the gender implications, the proposed introduction of offences against voyeurism, non-consensual recording of intimate parts and non-consensual publication of intimate images would have a gender perspective. One of the guiding principles laid down by the LRC sub-committee is gender neutrality. In this regard, the proposed offences are equally applicable to all genders. In particular, the definitions of “intimate acts” and “intimate parts” in the proposed offences cover breasts irrespective of gender. This notwithstanding, we note that women are generally more likely to be victims of clandestine photography (i.e. upskirting photos) and revenge porn. The proposed offences of non-consensual recording of intimate parts and publication of intimate images will provide better protection to vulnerable groups against sexual violence and protect their right to privacy and sexual autonomy.

## **PUBLIC CONSULTATION**

27. We launched a three-month public consultation on the introduction of new offences on voyeurism, non-consensual recording of intimate parts or distribution of intimate images in July 2020. During the three-month public consultation, the Government received a total of about 200 submissions, including submissions from major stakeholders such as the Law Society of Hong Kong, the Hong Kong Bar Association, the Equal Opportunities Commission, the Office of the Privacy Commissioner for Personal Data, other groups/organisations which are concerned with the subject matter, and individual members of the public. Consultation report and major feedbacks received are set out in the paper submitted to the Panel for discussion on

15 January 2021<sup>16</sup>. The Panel supported the legislative proposal in general, while some Members considered that the Government should also cover “down-blousing” in the offences of non-consensual recording of intimate parts to offer legal protection of the non-consensual recording of breasts. Members also suggested including threat to distribute intimate images as an offence.

## **PUBLICITY**

28. A press release will be issued on the day when the Bill is gazetted (19 March 2021). A spokesperson will be available to answer media and public enquiries.

## **ENQUIRIES**

29. Enquiries relating to the brief can be directed to Ms Joceline Chui, Principal Assistant Secretary for Security at 2810 2632.

**Security Bureau**  
**17 March 2021**

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<sup>16</sup> The Panel paper is available at <https://www.legco.gov.hk/yr20-21/english/panels/sc/papers/se20210115cb2-580-4-e.pdf>.

**Crimes (Amendment) Bill 2021**

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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 XIIAA added**

After Part XII—

**Add**

## “Part XIIAA

### 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 XIIAA (new sections 159AA to 159AAJ) to the Ordinance. The new Part XIIAA contains 3 Divisions.
4. Division 1 defines and provides for the meaning of certain terms for the purposes of the new Part XIIAA (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.