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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 35 OF 2021



Carrie LAM
Chief Executive
7 October 2021

An Ordinance to amend the Crimes Ordinance to provide for new offences of voyeurism, unlawful recording or observation of intimate parts, publication of images originating from voyeurism or unlawful recording or observation of intimate parts and publication or threatened publication of intimate images without consent; and to provide for related matters.

[8 October 2021]

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 XIIIAA

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

Division 1—Interpretation

159AA. Interpretation

(1) In this Part—

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

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

image (影像) means—

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

intimate image (私密影像), in relation to an individual—

- (a) means an image showing—
 - (i) an intimate part of the individual; or
 - (ii) the individual doing an intimate act; and
- (b) includes an image that has been altered to appear to show—
 - (i) an intimate part of the individual; or
 - (ii) the individual doing an intimate act, regardless of whether any intimate part shown in the image described in subparagraph (i) or (ii) is in fact that of the individual; but

- (c) does not include an image so altered that no reasonable person would believe that it shows—
 - (i) an intimate part of the individual; or
 - (ii) the individual doing an intimate act;

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

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

record (拍攝)—

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

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

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

- (2) For the purposes of this Part, an individual is doing an intimate act if—
 - (a) the individual is using the toilet in a manner that an intimate part of the individual is likely to be revealed; or

- (b) the individual is doing a sexual act that is not of a kind ordinarily done in public.
- (3) For the purposes of this Part, a person operates equipment even if the person merely enables or secures its activation by another person without that other person's knowledge.
- (4) For the purposes of this Part, a person publishes an image if the person, whether or not for any form of reward—
 - (a) distributes, circulates, makes available, sells, hires, sends, gives or lends the image to another person; or
 - (b) shows the image in any manner to or for another person (including showing, playing or projecting the image to or for another person using any machinery or apparatus and publicly displaying the image).
- (5) For the purposes of subsection (4), a reference to distributing, circulating, making available or sending an image to a person includes a reference to—
 - (a) making available to the person any data from which the image is capable of being reproduced; and
 - (b) making available to the person any hyperlink, or location on an electronic platform, that gives access to the image or any data from which the image is capable of being reproduced.

Division 2—Offences

159AAB. Voyeurism

- (1) A person commits an offence if—
 - (a) the person surreptitiously—
 - (i) observes (with or without the aid of equipment) or records an individual in a place in which any individual can reasonably be expected to be nude, to reveal an intimate part, or to be doing an intimate act;
 - (ii) observes (with or without the aid of equipment) or records an intimate part of an individual, or an individual doing an intimate act, for the purpose of observing or recording an intimate part or an intimate act, of any individual; or
 - (iii) observes (with or without the aid of equipment) or records an individual for a sexual purpose;
 - (b) the individual who is being observed or recorded as described in paragraph (a)(i), (ii) or (iii) (*subject individual*) is in circumstances that give rise to a reasonable expectation of privacy; and
 - (c) 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. Unlawful recording or observation of intimate parts

- (1) A person commits an offence if—
- (a) the person—
- (i) records an intimate part of an individual, in circumstances in which the intimate part would not otherwise be visible; or
 - (ii) with intent to observe or record an intimate part of an individual—
 - (A) operates equipment for the purpose of observing or recording an intimate part of the individual from beneath the clothing of the individual; or
 - (B) operates equipment in an unreasonable manner for the purpose of observing or recording an intimate part of the individual through an opening or a gap in the outer clothing of the individual,
in circumstances in which the intimate part would not otherwise be visible;
- (b) the person engages in the conduct described in paragraph (a)(i) or (ii)—
- (i) for a sexual purpose; or
 - (ii) dishonestly; and

- (c) the person disregards whether the individual referred to in paragraph (a)(i) or (ii) consents to the person's conduct described in that paragraph.
- (2) A person who commits an offence under subsection (1) is liable on conviction on indictment to imprisonment for 5 years.

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

- (1) A person commits an offence if—
 - (a) the person publishes an image of an individual (*subject individual*);
 - (b) the image originates from the commission of an offence under section 159AAB(1) or 159AAC(1) (*specified offence*); and
 - (c) the person—
 - (i) knows that the image originates from the commission of a specified offence, or is reckless as to whether the image originates from the commission of a specified offence; and
 - (ii) disregards whether the subject individual consents to the publication.
- (2) For subsection (1)(b), it is immaterial whether the specified offence is committed by the person.
- (3) For subsection (1)(c)(i)—
 - (a) the person is taken to know a specified offence has been committed if the person is aware of all the matters that must be established in order to prove the specified offence; and

- (b) the person is taken to be reckless as to whether a specified offence has been committed if the person is reckless as to the existence of all those matters.
- (4) 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 (35 of 2021) comes into operation; or
 - (e) provided to the person by the subject individual.
- (4) For subsection (2), it is immaterial whether the person is capable of publishing the intimate image.
- (5) A person who commits an offence under subsection (1) or (2) is liable on conviction on indictment to imprisonment for 5 years.

Division 3—Consent and Defence

159AAF. Interpretation

In this Division—

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

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

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

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

159AAH. Disregard whether consent is given

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

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

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

- (1) This section applies to proceedings against a person charged with an offence under Division 2 if the subject individual—
 - (a) is under the age of 16; or
 - (b) is a mentally incapacitated person as defined by section 117(1).
- (2) It is a defence for the person to prove that the person—
 - (a) honestly believed that a consent was given by the subject individual to the person's conduct that would constitute the offence; and
 - (b) did not know and had no reason to suspect that the subject individual was an individual falling within subsection (1)(a) or (b).
- (3) The burden of proving a defence under subsection (2) lies on the person.

159AAJ. Defence regarding lawful authority or reasonable excuse

- (1) Subject to subsection (3), it is a defence for a person charged with an offence under Division 2 to establish that the person had lawful authority or reasonable excuse for the contravention.
- (2) A person is taken to have established that the person had lawful authority or reasonable excuse referred to in subsection (1) if—
 - (a) there is sufficient evidence to raise an issue with respect to the lawful authority or reasonable excuse; and

- (b) the contrary is not proved by the prosecution beyond reasonable doubt.
- (3) Subsection (1) does not apply to—
 - (a) a person charged with an offence under section 159AAB(1) that relates to section 159AAB(1)(a)(iii);
 - (b) a person charged with an offence under section 159AAB(2) that relates to section 159AAB(1)(a)(iii); and
 - (c) a person charged with an offence under section 159AAC(1) in respect of the conduct described in section 159AAC(1)(a)(i) or (ii) that was engaged in by the person for a sexual purpose.

Division 4—Disposal Order

159AAK. Interpretation

In this Division—

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

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

- (a) means proceedings, before any court or magistrate, in which a person is charged with the specified offence; and
- (b) includes proceedings on appeal against conviction or sentencing (or both) before any court and proceedings under section 104 of the Magistrates Ordinance, in relation to the person for the specified offence;

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

Magistrates Ordinance (《裁判官條例》) means the Magistrates Ordinance (Cap. 227);

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

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

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

159AAL. Disposal order

- (1) A magistrate may, on application made in the name of the Secretary for Justice at any time during any criminal proceedings in relation to a specified offence concerning an image and subject to subsections (3) and (4) and section 159AAM, order a person, whether in Hong Kong or elsewhere, to take reasonable steps to remove, delete or destroy, or to cause the removal, deletion or destruction of, the image within a period to be specified by the magistrate.
- (2) A magistrate may still deal with an application under subsection (1) and make the disposal order even if the criminal proceedings to which the application relates do not take place before a magistrate.
- (3) In an application made under subsection (1) for a disposal order—
 - (a) in relation to an image proposed to be made subject to the disposal order—

- (i) the image must be identified;
 - (ii) it must be proved that the image is an intimate image of an individual; and
 - (iii) it must be proved that the image is a subject of the criminal proceedings; and
- (b) in relation to a person proposed to be made subject to the disposal order—
 - (i) the person must be identified by stating the person's particulars;
 - (ii) it must be proved that the person has the means to control, or is in possession, of an image; and
 - (iii) it must be proved that the person is able to take the actions required under the terms proposed in the application to be specified in the disposal order.
- (4) A magistrate must not make a disposal order against a person in relation to an image unless the magistrate is satisfied that all matters that are required to be proved for the purposes of the application have been proved on a balance of probabilities.
- (5) After a disposal order is made, a magistrate may—
 - (a) on the magistrate's own motion;
 - (b) on application made in the name of the Secretary for Justice; or
 - (c) on application by the subject person, or a concerned person,review the disposal order, and affirm, suspend, vary, cancel or revoke the disposal order as the magistrate considers appropriate.

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

159AAM. Procedures in relation to disposal order

- (1) An application under section 159AAL(1) or (5)—
 - (a) must be made in writing; and
 - (b) must be filed with a magistrate.

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

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

159AAN. Service of summons and disposal order

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

- (7) If the service of a summons or disposal order has been effected, the proof of service must be filed with a magistrate.
- (8) In this section—
- proof of service*** (送達證明), in relation to service of any summons or disposal order, means—
- (a) for service in Hong Kong—statutory declaration as to the service made by the police officer who effected the service; or
 - (b) for service out of the jurisdiction—applicable proof of service in accordance with the applicable law of the jurisdiction in which the service is effected.

159AAO. Offence relating to disposal order

- (1) A person commits an offence if the person—
- (a) has been made subject to a disposal order;
 - (b) has been served with the disposal order; and
 - (c) fails to comply with the disposal order.
- (2) A person who commits an offence under subsection (1) is liable on conviction on indictment to a fine at level 6 and to imprisonment for 1 year.
- (3) It is a defence for a person charged with an offence under subsection (1) to establish that the person had a reasonable excuse for not complying with the disposal order.
- (4) The person is taken to have established that the person had reasonable excuse referred to in subsection (3) if—

- (a) there is sufficient evidence to raise an issue with respect to the reasonable excuse; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.”.