

**Submission on *Crimes (Amendment) Bill 2021*
by Association Concerning Sexual Violence Against Women**
關注婦女性暴力協會 就
《2021 年刑事罪行(修訂)條例草案》遞交之意見書



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[Editor’s Note:

This is an abridged translation of the Chinese version of the Submissions by ACSVAW on 3 May 2021. In case of inconsistencies between the full Chinese version and this abridged English version, the Chinese version prevails. Reference to the Chinese version is highly recommended.]

1. Established on 8 March 1997, the Association Concerning Sexual Violence Against Women (ACSVAW) has been striving to promote women’s rights and gender equity in Hong Kong. With particular focus on sexual violence, ACSVAW mobilizes the public to join the fight for victim’s rights, with a view to restore a life of confidence and dignity to the victims. We are submitting our recommendations on amendments regarding *Crimes (Amendment) Bill 2021* (the Bill) as below.

2. Outline of recommendations —

A. Voyeurism (s. 159AAB)

- (1) Remove the element of ‘*surreptitiously*’ (s. 159AAB(1)(a));
- (2) Expand the definition of ‘structure’ (s. 159AA and s.159AAB(2)(b))

B. Non-consensual recording of intimate parts (s. 159AAC)

- (1) Include the element ‘in circumstances in which a reasonable person would not expect the intimate part to be visible’ (s. 159AAC(1)(a)(i));
- (2) Remove the element of ‘dishonesty’ and encompass ‘to cause humiliation, alarm or distress’ to the scope of mens rea (s.159AAC(1)(b))

C. Publication or threatened publication of intimate images without consent (s.159AAE)

- (1) Add a subsection to deliver, the new offence regulates varied forms of threats;
- (2) Add a subsection, ‘it is immaterial as to (1) whether the intimate image exists; (2) whether the person identifies a specific intimate image to be published’

D. Insert new provisions regarding interim and image-removal orders made by the Court.

E. Include the four new offences to the definition of ‘specified sexual offence’ in Cap. 200 Crime Ordinance

F. Expand the definition of ‘intimate image’ to include altered image (s. 159AA)

G. Include the definition of ‘consent’ (Division 3—Consent and Defence)

A. Voyeurism (s. 159AAB)

A (1) Remove the element of ‘surreptitiously’ (s. 159AAB(1)(a))

3. The element of the act under s. 159AAB must be done ‘surreptitiously’ is formulated with reference to section 162(1) of the Criminal Code of Canada. The gravamen of the offence lies in the ‘non-consensual’ nature of the act. Whether the observation or recording is done secretly or blatantly, is irrelevant for the constitution of the offence. Besides, this element is not included in the equivalents of the English Act¹ and *Crimes Act 1900* of New South Wales².

A (2) Expand the definition of ‘structure’ by including permanent or immovable structures (s. 159AA and s.159AAB(2)(b))

4. The proposed scope of ‘structure’ in the Bill confines to ‘any aircrafts, vehicles, vessel, tent and other temporary or movable structure’. Any permanent or non-temporary or immovable structures are not covered. As such, for instance, a person who constructs or adapts any part of the walls or windows of a building, is not considered to have committed the offence under s.159AAB(2)(b). We propose to expand the definition of ‘structure’ of s. 159AA as follows —

‘*structure* (構築物) includes any aircraft, vehicle, vessel, tent and other temporary or movable structure; **and any building, premises and other permanent or immovable structure.**’

¹ *English Sexual Offences Act 2003* s. 67, see **Appendix 1**

² *Crimes Act 1900* (NSW) s. 91J, see **Appendix 1**

B. Non-consensual recording of intimate parts (s. 159AAC)

B (1) Include the element ‘in circumstances in which a reasonable person would not expect the intimate part to be visible’ (s. 159AAC(1)(a)(i))

5. Subsection 159AAC (1)(a)(i) is *not* able to capture the recording that takes place in the circumstance— where a person unknowingly exposes his/her intimate part, however, a reasonable person might not expect it be visible. A person’s dress might have loosen or been torn off accidentally, revealing her private parts covered with underwear. She might not notice it or is unable to cover her private parts immediately. People around her then record her intimate part in such circumstance. Though her intimate parts become visible, a reasonable person would not expect it to be filmed. The New South Wales³ and South Australia⁴ equivalents cover the above situation and, we suggest Hong Kong follows suit. It is recommended, the scope of s.159AAC (1)(a)(i) be extended as follows —

‘(1) A person commits an offence if –

(a) the person –

- (i) records an intimate part of an individual, **in circumstances in which a reasonable person would not expect the intimate part to be visible, or** in circumstances in which the intimate part would not otherwise be visible; or’

B (2) Remove the element of ‘dishonesty’ and encompass ‘to cause humiliation, alarm or distress’ to the scope of *mens rea* (s.159AAC(1)(b))

6. We recommend removal of the element ‘dishonesty’ under subsection (b)(ii). The motive or purpose of the perpetrator is wide-ranging: out of curiosity, retaliation, excitement to violate the law, shaming of the victim, to gain recognition from peers in online chat groups..... For example, Hong Kong has been facing an epidemic of sharing covertly taken intimate images in online chat groups and forums. Under this social backdrop or internet culture, some people

³ *Crimes Act 1900* (NSW) s. 91L(3)

⁴ *Summary Offences Act 1953* (SA) s. 26A

might attempt upskirting or downblousing—*not* out of sexual purpose or monetary gain— but excitement or curiosity. Another example is bullying, where a classmate takes upskirt-photo to shame the other. The new offence, however, fail to cover recording out of the above motives. In the 1st meeting of Bill Committee, the Government had pointed out the possibility of the element ‘the purpose of obtaining dishonest gain’ to regulate these cases because ‘to get an image one has not (i.e. s.159AAC(3)(d))’ is a kind of ‘gain’ regardless of his/her intent.

7. However, one should note that the act must also pass the test of ‘dishonesty’. In principle, the element ‘dishonesty’ is required in theft-related crimes, for example, offences under Cap. 210 Theft Ordinance⁵ and that under ‘s.161. Access to computer with criminal or dishonest intent’⁶. ‘Dishonesty’ is construed in the context of the criminal acts where a person gets what does not belong to him/her. For a person who takes the intimate image for fun or bullying may fulfill the element of ‘to obtain gain’ (i.e. ‘to get an image one has not’ is a kind of ‘gain’), particularly if it is done for monetary return. The motives of satisfying curiosity, retaliation, excitement to violate the law, shaming of the victim, to gain recognition.....are *irrelevant* to deception or breaking ordinary standards of honesty. We concern, hardly can these acts pass the test of ‘dishonesty’.
8. We recommend an inclusion of the intent ‘(iii) to cause humiliation, alarm or distress to the individual, or is reckless as to whether the recording will or is likely to cause humiliation, alarm or distress to the individual’ to the mens rea under subsection (b). By encompassing this intent in addition to sexual purpose or obtaining gain, it is able to capture the recording done for harming the other. By including ‘*recklessness*’, it is able to capture those who deliberately and unjustifiably pursues the act of recording while consciously disregarding any harms and distress flowing from such action. This amendment would enhance the possibility of the new law to prosecute perpetrators whose acts were equally blameworthy as those done for sexual gratification or obtaining gain. To

⁵ See s. 3 ‘Dishonestly’ of *Cap. 210 Theft Ordinance*, please see **Appendix 1**

⁶ *Cap. 200 Crimes Ordinance* s.161

conclude the above, we suggest s. 159AAC(1)(b) be amended and expanded as follows –

‘the person engages in the conduct described in paragraph a (i) or (ii) for—

- (i) a sexual purpose; or
- (ii) **the purpose of obtaining gain for the person, or for any other person; or**
- (iii) **causing humiliation, alarm or distress to the individual, or is reckless as to whether the conduct will or is likely to cause humiliation, alarm or distress to the individual;**

**C. Publication or threatened publication of intimate images without consent
(s.159AAE)**

(C)(1) Insert a subsection to deliver, the new offence regulates varied forms of threats

9. Following the model of Northern Territory, Australia⁷, the conduct of threat can be verbal or physical, explicit or implicit, and conditional or unconditional—by including such provision, it could encompass all types of threats and leaves no grey area for dispute. For many of the victim-survivors who experienced threatening to distribute intimate images and reported their cases to the police, they were told that ‘threat’ only establishes where the intimidator threatens in (1)*explicit* and (2)*conditional* way – ‘*If you don’t get back to me, I will upload your nude photos to xx site*’. Threats to distribute intimate photos are the most common among intimate relationships. Because the intimidator and victim were/are in intimate relationship, they share many common understandings, including the possession of intimate photos. Both parties know the existence of intimate images. To deliver the intimidation, the partners do not need to express in an explicit way; rather, they are normally expressed in an implicit and subtle way—‘*If you don’t get back to me, your “things” will be uncovered soon*’; ‘*See you on Facebook, if you don’t return money*’. Despite the subtle expression, the victims know the implications between the lines and it is no difference from it being expressed in explicit way. However,

⁷ Section 208AC(2) of the *Criminal Code Act 1983* (NT) states:

In a prosecution for an offence against this section:

(a) a threat may be made by any conduct, whether explicit, implicit, conditional or unconditional; and

(b) it is not necessary to prove that the other person actually feared that the threat would be carried out; and

(c) a person may be found guilty even if carrying out the threat is impossible.

Examples for subsection (2)(c)

1 The image does not exist

2 Technical limitations prevent the person from distributing the image’

this might be insufficient to constitute a ‘threat’ from the perspective of the law enforcement.

10. To put down the definition of threat by encompassing varied types of threats, will leave no grey area for dispute. We recommend, include below subsection as to the kinds of ‘threat’ to be regulated by s. 159AAE:

‘For subsection (2), the threat may be made by any conduct, whether explicit, implicit, conditional or unconditional.’

(C)(2) Insert a subsection, ‘it is immaterial as to (1) whether the intimate image exists; (2) whether the person identifies a specific intimate image to be published’

11. In many circumstances, the victim does not know whether the person who carries out threat possesses his/her intimate image, especially if the image was taken covertly; nor does the victim know which specific image the person threatens to publish. It is irrelevant to prove the above, because the gravamen only lies in the conduct of threat itself.
12. Subsection (4) states that it is immaterial whether the person has the capability to carry out the threatened publication. By the same token, other than the conduct of threat, it is irrelevant to as to: (a) whether the image exists, or (b) whether the person identifies a specific intimate image to be published. We recommend adding a subsection regarding the above, in line with s. 159AAE(4), as follows —

‘For subsection (2), it is immaterial as to —
(a) whether the intimate image exists; or
(b) whether the person identifies a specific intimate image to be published’

D. Insert new provisions to the Bill regarding interim and image-removal orders made by the Court.

13. For victims who experienced intimate image sexual violence, the source of their worries stems from the existence of the images. Despite the conviction against perpetrators, distress will not dissipate until the image is deleted or destroyed. We suggest the Government to establish provisions that empower the Court to make orders against—
 - A. ‘Convicted persons’ to delete or destroy the image with reasonable measures, otherwise impose heavier penalties;
 - B. ‘Online content hosts’, if images posted on internet, to remove or disable the access to the images by the public.

14. Criminal proceedings can be lengthy, and the publicity of a criminal case can bring further harm to the victim if victims have no relief to take down the intimate images pending trial. To provide comprehensive protection to the victim, interim orders should also be available.

15. Relevant legislative models could be followed by Hong Kong include those of New Zealand (ss.18 and 19 of the *Harmful Digital Communications Act 2015*) and Queensland of Australia (s. 229AA of the *Criminal Code Act 1899 (Qld)*), please refer to **Appendix 1**.

E. Include the four new offences to the definition of ‘specified sexual offence’ in Cap. 200 Crime Ordinance

16. We recommend all four new offences in the Bill should be included in the list of specified sexual offences under the Sexual Conviction Record Check Scheme (‘SCRC’). For the offence concerning non-consensual publication, the perpetrator disregards the will of the person depicted in the image and shows his/her intimate parts to the third party. As for the offence concerning threatened publication, the perpetrator deprives the person’s control over the publication of the image and imposes unreasonable demands for an extended period of time and this causes prolonged pressures to the victims. Both acts amount to a serious infringement to the sexual autonomy of the victims concerned. The harms done by the above two acts are equally detrimental as voyeurism and recording of intimate parts.
17. In addition, all four offences shall be included in ‘specified sexual offence (指明性罪行)’ of s. 117 of *Crimes Ordinance (Cap. 200)*⁸, to ensure anonymity of complainants⁹. Under sections 9.5¹⁰ and 9.10¹¹ of *Practice Direction*, witnesses of sexual offence cases are entitled to request the use of (1) screen; (2) special passageway; (3) accompany by support person; and (4) giving evidence by way of Live Television Link. We opine that complainants of the cases regarding the four new offences in the Bill should be offered the above court protective measures to minimise second-traumas caused by court proceedings.

⁸ Under s.117, ‘*specified sexual offence* (指明性罪行) means any of the following, namely, rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences, and incitement to commit any of those offence’

⁹ According to s. 156(1) of *Crimes Ordinance (Cap. 200)* — ‘after an allegation is made that a specified sexual offence has been committed no matter likely to lead members of the public to identify any person as the complainant in relation to that allegation shall either be published in Hong Kong in a written publication available to the public or be broadcast in Hong Kong except as authorized by a direction given in pursuance of this section’

¹⁰ PD 9.5. Evidence by way of Live Television Link or Video Recorded Testimony. See: <https://legalref.judiciary.hk/lrs/common/pd/pdcontent.jsp?pdn=PD9.5.htm&lang=EN>

¹¹ PD 9.10. Use of screens in sexual offence cases in magistrates courts. See: <https://legalref.judiciary.hk/lrs/common/pd/pdcontent.jsp?pdn=PD9.10.htm&lang=EN>

F. Expand the definition of ‘intimate image’ to include altered image (s 159AA).

18. We submit that the definition of ‘intimate image’ should be extended to include ‘altered image’, where the subject individual’s head or face is superimposed on to an image showing the individual’s intimate parts or doing an intimate act with aid of software and/or artificial intelligence (also known as ‘morph porn’ or ‘deepfake porn’). The definition of ‘intimate image’ of relevant offences in overseas jurisdictions also includes altered image, such as Scotland¹², Singapore¹³ and many of the Australian states and territories (e.g. New South Wales¹⁴, Queensland¹⁵, Australian Capital Territory¹⁶, South Australia¹⁷ and Northern Territory¹⁸). It is suggested to expand the definition of ‘intimate image’ in s.159AA by inserting **part (b)** as follows:

intimate image (私密影像) in relation to an individual, means –
(a) an image showing an intimate part of the individual, or showing the individual doing an intimate act; **or**
(b) an image that has been altered to appear to show any of the things mentioned in paragraph (a).

¹² Section 3(2) Abusive Behaviour and Sexual Harm (Scotland) Act 2016

¹³ Section 377BE(5) Penal Code Singapore

¹⁴ Section 91N Definitions of Division 15C Recording and distributing intimate images, Crimes Act 1900 No 40 (NSW)

¹⁵ Section 207A Criminal Code Act 1899 (Qld)

¹⁶ Section 72A Crimes Act 1900 (ACT)

¹⁷ Section 26A Summary Offences Act 1953 (SA)

¹⁸ Section 208AA Criminal Code Act 1983 (NT)

G. Include the definition of ‘consent’ (Division 3—Consent and Defence).

19. We recommend the inclusion of a statutory definition of ‘consent’ in lines with Final Recommendations 2 to 6 in the Report on *Review of Substantive Sexual Offences*, published by the Law Reform Commission of Hong Kong (‘HKLRC’) in December 2019¹⁹. Among the range of definitions of consent raised by HKLRC, there shall as least be a provision on the definition of ‘consent’ in s 159AA —

For *consent* (同意) in Division 2, it means a subject individual—
(a) freely and voluntarily agrees to the sexual activity; and
(b) has the capacity to consent to such activity.²⁰

¹⁹ Law Reform Commission (December 2019). *Report on Review of Substantive Sexual Offences*. See: https://www.hkreform.gov.hk/en/publications/rsubstantive_sexual_offences.htm

²⁰ Please see ‘Final Recommendation 3’ in *Report on Review of Substantive Sexual Offences* (Law Reform Commission, December 2019)

Appendix 1

(1) English Sexual Offences Act 2003, s. 67

- "(1) A person commits an offence if—
- (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
 - (b) he knows that the other person does not consent to being observed for his sexual gratification.
- (2) A person commits an offence if—
- (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and
 - (b) he knows that B does not consent to his operating equipment with that intention.
- (3) A person commits an offence if—
- (a) he records another person (B) doing a private act,
 - (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
 - (c) he knows that B does not consent to his recording the act with that intention.
- (4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1)."

(2) Crimes Act 1900 (New South Wales) s. 91J

"(1) *A person who, for the purpose of obtaining sexual arousal or sexual gratification, observes a person who is engaged in a private act:*

- (a) without the consent of the person being observed to being observed for that purpose, and*
- (b) knowing that the person being observed does not consent to being observed for that purpose,*

is guilty of an offence"

(3) Theft Ordinance (Cap. 210), s.3 Dishonestly (不誠實地)

(1) A person's appropriation of property belonging to another is not to be regarded as dishonest—

- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
- (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
- (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

(4) Harmful Digital Communications Act 2015, New Zealand, ss.18 and 19

Section 19 of the *Harmful Digital Communications Act 2015* (HDC Act) of New Zealand provides that the court has power to make orders against the defendant:

Section 19 of the HDC Act (NZ) outlines a variety of orders that can be made by the court against a defendant:

- (a) an order to take down or disable material;*
- (b) an order that the defendant cease or refrain from the conduct concerned;*

- (c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual:*
- (d) an order that a correction be published:*
- (e) an order that a right of reply be given to the affected individual:*
- (f) an order that an apology be published.²¹*

Section 19 of the HDC Act (NZ) also empowers a court to make the following orders against an online content host:

- ‘(a) an order to take down or disable public access to material that has been posted or sent:*
- (b) an order that the identity of the author of an anonymous or pseudonymous communication be released to the court:*
- (c) an order that a correction be published in any manner that the court specifies in the order:*
- (d) an order that a right of reply be given to the affected individual in any manner that the court specifies in the order.²²*

Non-compliance with the a court order will commit an offence and the offender is liable on conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding \$5,000 for a natural person and a fine not exceeding \$20,000 for a body corporate.²³

Section 18 of the HDC Act (NZ) provides for the court to grant interim orders for relief set out in section 19.

- ‘18 Interim orders*
- (1) The District Court may, if the court considers it is desirable to do so, grant any interim orders pending the determination of the application for orders under section 19.*

²¹ *Harmful Digital Communications Act 2015 (NZ), s 19(1)*

²² *Harmful Digital Communications Act 2015 (NZ), s 19(2)*

²³ *Harmful Digital Communications Act 2015 (NZ), s 21*

(2) An interim order under this section may do anything that may be done by order under section 19 and expires when the application under that section is determined.’²⁴

(5) Criminal Code Act 1899 (Queensland), s. 229AA

‘229AA Rectification order

(1) If a person is convicted of an offence against section 223 (1) [Distributing intimate images] , 227A (1) or (2) [Observations or recordings in breach of privacy], 227B (1) [Distributing prohibited visual recordings] or 229A (1) or (2) [Threats to distribute intimate image or prohibited visual recording] the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording involved in the offence within a stated period.

*(2) A person who fails to comply with an order made under subsection (1) commits a misdemeanor
Maximum penalty—2 years imprisonment.’²⁵*

²⁴ *Harmful Digital Communications Act 2015 (NZ)*, s 18

²⁵ *Criminal Code Act 1899 (Qld)*, s 229AA