



HONG KONG BAR ASSOCIATION

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7 October 2020

Security Bureau
Central Government Offices
10/F, East Wing
2 Tim Mei Avenue
Tamar, Hong Kong
Hong Kong

(Attn.: Mr. Billy Woo)

Dear Mr. Woo,

**Re: Public Consultation on the
Proposed Introduction of Offences of Voyeurism,
Intimate Prying, Non-consensual Photography of
Intimate Parts and Related Offences**

I refer to your letter dated 8 July 2020 addressed to the Hong Kong Bar Association regarding the captioned topic.

The Bar Council of the Hong Kong Bar Association invited its Committee on Criminal Law and Procedure to study the consultation paper. We have prepared a paper answering the questions raised by your Department with reasons and also voicing concerns. The paper is enclosed with this letter.

I need to point out that definitional clarity, width of coverage of the proposed offences as well as the proposed statutory defences are important aspects warranting careful considerations

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香港大律師公會

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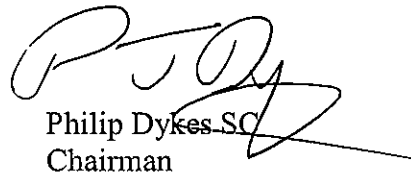
Ms. Christy Y.P. Wong 黃宛慈

HONG KONG BAR ASSOCIATION

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so as to minimise unintended consequences. I would be grateful if your Department would circulate to us the draft legislation when it is prepared for another round of consultation if such is to be carried out.

Yours faithfully,



Philip Dykes SC
Chairman

Encl.
PJD/MH/KC/ct

**Public Consultation on the Proposed Introduction of Offences of
Voyeurism, Intimate Prying, No-consensual Photography of Intimate Parts,
and Related Offences**

Comments of the Hong Kong Bar Association

Introduction

1. Pursuant to a three-month public consultation launched by the HKSAR Government, the Security Bureau (SB) has invited the Hong Kong Bar Association (HKBA) to give its views and comments on the proposed new offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences.
2. The HKBA has duly considered the matter and has gathered views of its members. In short, we generally welcome the SB's proposals and are glad to see that the Law Reform Commission (LRC)'s recommendations are accepted. The HKBA also notes the introduction of other related offences proposed by the Government and supports such endeavours that aim to render further protection to victims.
3. That said, we would like to sound a note of caution and point out that definitional clarity, width of coverage of the proposed offences as well as the proposed statutory defences are very important aspects warranting careful considerations so as to minimise unintended consequences.
4. Below are the responses to the individual consultation questions/proposals:

Consultation question 1

Do you agree with the introduction of a specific offence of voyeurism (i.e. Proposal 1)?

Answer: Yes

Consultation question 2

Do you agree with the introduction of a separate offence of intimate prying (i.e. Proposal 2), as a statutory alternative to the proposed offence of voyeurism, in addition to being a standalone offence?

Answer: Yes

Consultation question 3

Do you agree with the proposed scope of acts for Proposals 1 (i.e. voyeurism) and 2 (i.e. intimate prying)?

Answer: For Proposal 1, yes. For Proposal 2, we note that the mental element is not spelt out clearly. We would ask the Government to specify what the mental element of this offence is or if it is intended that the offence is a strict liability one.

Consultation question 4

Do you agree with the introduction of the offence of the non-consensual photography of intimate parts for sexual gratification (i.e. Proposal 3)?

Answer: Yes

Consultation question 5

Do you agree with the introduction of a separate offence of non-consensual photography of intimate parts irrespective of the purpose, as a statutory alternative to the proposed offence of non-consensual photography of intimate parts for sexual gratification, in addition to being a standalone offence (i.e. Proposal 4)?

Answer: Yes

Consultation question 6

Do you agree with the proposed scope of acts for Proposals 3 and 4 (i.e. non-consensual photography of intimate parts)?

Answer: For Proposal 3, yes. For Proposal 4, we note that the mental element is not spelt out clearly. We would ask the Government to specify what the

mental element of this offence is or if it is intended that the offence is a strict liability one.

Consultation question 7

Do you agree that Proposals 3 and 4 (i.e. non-consensual photography of intimate parts) should not cover “down-blousing”?

Answer: No. Given that the offence is premised on the “non-consensual” nature of photography and that images caught by down-blousing may also fall within the definition of “intimate parts” as outlined in the later part of the consultation paper, we do not see a viable and proper way to exclude “down-blousing” from the proposed offences.

Consultation question 8

Do you agree with the introduction of the offence against the distribution of surreptitious intimate images (i.e. Proposal 5)?

Answer: Yes

Consultation question 9

Do you agree with the proposed scope of act for Proposal 5 (i.e. distribution of surreptitious intimate images)?

Answer: Yes

Consultation question 10

Do you agree with the introduction of the offence against the non-consensual distribution of intimate images, in cases where consent might have been given or was given for the taking of such intimate images (including stills and videos), but not for subsequent distribution (i.e. Proposal 6)?

Answer: Yes

Consultation question 11

Do you agree with the proposed scope of act for Proposal 6 (i.e. non-consensual distribution of intimate images)?

Answer: Yes

Consultation question 12

Do you think that for Proposal 6, the offence should be constituted if the distributor knows the victim did not give any consent for the distribution, or is reckless as to whether the victim gave such consent?

Answer: We take the view that recklessness currently defined under common Law (per *R v. G*, being Subjective Recklessness) provides better coverage than if there is the need to prove the distributor's knowledge of a lack of consent.

Consultation question 13

Do you think that for Proposal 6, the offence should be constituted if the distributor intends to cause the victim distress, or knows or has reason to believe that the distribution will or is likely to cause the victim's humiliation, alarm or distress?

Answer: We take the view that all three elements should be included in the offence in order to achieve proper coverage. The difference should properly be reflected in sentencing based on the particulars of the charge and the actual circumstances of the case.

Consultation question 14

Do you agree that "intimate acts" should mean acts, in a place which would reasonably be expected to provide privacy, by a person when the person's intimate parts are exposed or covered only with underwear, OR the person is using the toilet, OR the person is doing a sexual act not ordinarily done in public?

Answer: The definition should be sufficiently wide in scope to cover the ever-changing societal understanding of "intimate acts". Hence, the "reasonable expectation test" is preferred.

Consultation question 15

Do you agree that "intimate parts" should be taken to mean a person's genitals, buttocks, or breasts, whether exposed or covered only with underwear?

Answer: Yes. We would also refer back to our answer to consultation question 7 and invite the Government to explain how the inclusion of “breasts, whether exposed or covered only by underwear” as “intimate parts” can be reconciled with the exclusion of “down-blousing” from the offences proposed in Proposals 3 and 4.

Consultation question 16

Do you agree that for the purpose of the proposed offences, the definition of “intimate parts” should include breasts and chest, irrespective of gender, or should the definition include breasts of female only?

Answer: It should include breasts and chest, irrespective of gender.

Consultation question 17

Do you agree that a defence of lawful authority or reasonable excuse should be provided for the proposed offences under Proposals 2, 4, 5 and 6?

Answer:

For Proposals 2 & 4: No. The offence is by nature directly committed against the victim and we can see no justification for a statutory defence thereof. It is reasonable that only factual defences are available to Defendants. However, our concern remains as to whether the offences to be created under Proposals 2 and 4 are meant to be strict liability and what the mental elements for these offences are.

For Proposals 5 & 6: Yes. For these distribution offences, there may well be a need for such statutory defences that are based on academic, scientific and educational purposes especially in areas such as criminology, psychology, ethics, sex education etc. It is questionable if there can ever be a need to distribute such images etc. for journalistic purposes.

(Note: Views are also expressed that reasonable excuse defence should be available to private investigators who investigate family related cases especially when adultery is suspected.)

Consultation question 18

Do you think that a defence of lawful authority or reasonable excuse should also be provided for the proposed offences under Proposals 1 and 3?

Answer: No

Consultation question 19

If suitable defence(s) are made available covering acts done with lawful authority or reasonable excuse, what should be included as reasonable excuses?

Answer: Scientific, educational or academic purposes only.

(Note: Views are also expressed that reasonable excuse defence should be available to private investigators who investigate family related cases especially when adultery is suspected.)

Consultation question 20

Do you agree that the proposed offences under Proposals 1 to 6 should be included in the Specified List of Sexual Offences under the Sexual Conviction Record Check Scheme?

Answer: Yes

Dated this 5th day of October 2020

Hong Kong Bar Association