

ONC Lawyers
柯伍陳律師事務所

**When would using a computer be a
crime?**



**CFA narrowed the scope of
application of the
offence of accessing a computer
with dishonest intent**

16 May 2019

Section 161 (1) (c) of Crimes Ordinance (Cap. 200)

- **161 Access to computer with criminal or dishonest intent**
- (1) Any person who obtains access to a computer—
 - (a) ...
 - (b) ...
 - (c) with a view to dishonest gain for himself or another; or
 - (d) ...
 - 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



Elements

- “*obtain access*” to
- a “*computer*”
- with a view to “*dishonest gain*” for himself or another



Definition of “Computer” - Secretary for Justice v Wong Ka Yip Ken [2013] 4 HKLRD 604 (“Wong Ka Yip Ken case”)

- No definition in the Crimes Ordinance (Cap 200)
- 2014: a man set his **smartphone** to record a video in the ladies’ washroom of his office
 - found guilty of the section 161 offence
 - Court of First Instance considered the definition of “**computer**”
 - held that the dictionary meaning of “computer” as “a device for electronic data storage, processing and retrieval” included smartphone
- Definition of “obtain access” not discussed



Excessive usage of the offence

- Police have invoked section 161 for:
 - online fraud
 - illegal intrusion into computer systems
 - clandestine photo-taking using smartphones in such non-public places as toilets or changing rooms
 - online publication of obscene or threatening information
 - inciting others on the Internet to engage in illegal acts

Excessive usage of the offence (Cont'd)

- **1999**: a technical assistant at Queen Mary Hospital, retrieved the medical records of the then-Secretary for Justice, Elsie Leung, and share them with his friends, family, and the media,
 - found guilty of the section 161 offence
- **2014**: a man posted on the popular HKGolden forum, calling for protesters to “paralyse the railway system by gathering on railway platforms in an attempt to create chaos” during the pro-democracy Occupy protests
 - arrested under the section 161 charge
- **2016**: a 22-year-old man posted erotic writing involving rape
 - arrested on suspicion of the section 161 charge



Definition of “obtain access” - Secretary for Justice v Cheng Ka-Yee and others (“Cheng Ka Yee case”)

- Three teachers in a primary school (the “Primary School”) and a teacher in another primary school (the “Four”)
- used mobile smartphones and a school’s computer to leak pictures and copies of the questions of the admission interview of the Primary School
- charged with s.161(1)(c) of the Crimes Ordinance: “obtain access to a computer with dishonest or criminal intent”

Cheng Ka-Yee case– Magistrates’ Court’s ruling

- **2016:** acquitted by Kowloon City Magistrates’ Court:
 - Element: with a view to “***dishonest gain***”
 - not sure if the three who worked in the Primary School were warned of the confidentiality obligations with respect to the questions of the admission interview
 - prosecution failed to prove the objective limb of the Ghosh test on “**honesty**” against the Four
- review application by the prosecution: Magistrate confirmed decision to acquit

Cheng Ka-Yee case– Court of First Instance [2018] HKCFI 1809

- Element: “**obtain access**”
- Deputy High Court Judge Pang Chung-ping:
 - Considered the definition of “**obtain access**”
 - Refused to convict the Four

Cheng Ka-Yee case– Court of First Instance [2018] HKCFI 1809

- Deputy High Court Judge Pang Chung-ping (Cont'd):
 - Prosecution’s legal position that whether or not a person should be punished **depends on the type of devices** that the person used to communicate **cannot be reasonably explained**
 - The use of communication device was only **peripheral** to the criminal or dishonest plan, which could be achieved with or without the communication device
 - using a person’s **own** mobile smartphones, or use of computer which is **not unauthorized**, to leak questions did not amount to “obtaining access to computer”

Cheng Ka-Yee case – Court of First Instance [2018] HKCFI 1809 (Cont'd)

- Deputy High Court Judge Pang Chung-ping (Cont'd):
 - drew a difference between “**obtaining access** to a computer” and “**using** a computer”
 - does not support the contention that “obtaining access to computer” includes using a person’s own smartphone to communicate, to take photographs or to send messages
 - To prove *actus reus* (the criminal act), the prosecution must prove “the unauthorized extraction and use of information” from a computer

Cheng Ka-Yee case – Court of Final Appeal

[2019] HKCFA 9

- Department of Justice appealed CFI's decision
- CFA unanimously dismissed the appeal
- upheld the CFI's decision that the s.161(1)(c) Charge should not apply to a person's **own** computer when it did not involve access to another's computer

Cheng Ka-Yee case – Court of Final Appeal

[2019] HKCFA 9 (Cont'd)

- Mr. Justice French NPJ decided (agreed by CJ Ma, Ribeiro PJ, Fok PJ, Cheung PJ), inter alia:
 - as a matter of language, one always “**obtain**” access to something to which one **did not have access before**
 - the statutory language is a bit redundant as the verb “**obtain**” is a synonym for “**access**” when used as a verb
 - the **overlap** emphasizes the oddness of applying the s.161(1)(c) Charge to the use by a person of their own computer

Cheng Ka-Yee case – Court of Final Appeal

[2019] HKCFA 9 (Cont'd)

- Mr. Justice French NPJ decided (agreed by CJ Ma, Ribeiro PJ, Fok PJ, Cheung PJ), inter alia (Cont'd):
 - during the **legislative history**, the interpretive provision “a person obtains access to a computer if (and only if) he causes a computer to perform any function” was deleted;
 - the words “(obtaining access) with or without authority” did not appear in the bill either;
 - s.161(1)(c) Charge does not apply to the use by a person of his or her **own** computer, not involving access to another’s computer

Cheng Ka-Yee case – Court of Final Appeal

[2019] HKCFA 9 (Cont'd)

- Mr. Justice French NPJ (agreed by CJ Ma, Ribeiro PJ, Fok PJ, Cheung PJ):
 - it is not the function of the Court to adopt a construction of a statute that advance a desirable public policy;
 - the Court seeks to ascertain the purpose of the statute to inform its construction;
 - the Court does not identify a purpose which it thinks would be beneficial and then construe the statute to fit it

What if Wong Ka Yip Ken case is decided after CFA judgment in Cheng Ka Yee case?

- **Facts:** A man set his own smartphone to record a video in the ladies' washroom of his office
- **Analysis:** using his own smartphone device to record the video
- using **own device**, and it did not involve access to another's computer
- → would **not** satisfy the definition of “**obtaining access**”
- Cannot prosecute under s.161 of Crimes Ordinance (Cap. 200)

What if Wong Ka Yip Ken case is decided after CFA judgment in Cheng Ka Yee case? (Cont'd)

- Possible alternative charges?
- (1) Outraging public decency? (common law offence)
 - may not apply
 - Elements:
 - “**capable** of being **seen by two or more persons** who are actually present” AND
 - “in a place where there was a real **possibility** that members of the **general public might witness** it”
 - difficult to prove

What if Wong Ka Yip Ken case is decided after CFA judgment in Cheng Ka Yee case? (Cont'd)

- Possible alternative charges? (Cont'd)
- (2) Disorder in public places? (s.17B, Public Order Ordinance, Cap. 245)
 - may not apply
 - Elements:
 - act was done in **public place**
 - the victim is put in fear of being so harmed through the disturbance, and
 - an average Hong Kong citizen is likely to be outraged by such conduct
 - female toilet of the company is unlikely a “public place”

What if Wong Ka Yip Ken case is decided after CFA judgment in Cheng Ka Yee case? (Cont'd)

- Possible alternative charges? (Cont'd)
- (3) Loitering causing concern ? (s. 160 Crimes Ordinance, Cap. 200)
 - may or may not apply
 - Elements:
 - offender has been idling, hanging about or remaining
 - in or about the vicinity of the **common parts of a building** (entrance hall, lobby, toilet, compound, car park, etc.)
 - causes any person reasonably to be concerned for his/her safety or well-being
 - depends on whether the female toilet of the company is considered as a “common part of a building”
 - E.g.: whether the toilet is in common use by occupiers of building

What if Wong Ka Yip Ken case is decided after CFA judgment in Cheng Ka Yee case? (Cont'd)

- **May 2018:** Law Reform Commission's Review of Sexual Offences Subcommittee
 - proposed the creation of a new offence of “**voyeurism**” to criminalise acts of non-consensual observation or visual recording of another person done for a sexual purpose
 - forms of visual recording would include photography, video recording and the taking of digital images
- The prosecution in Wong Ka Yip Ken case may have to rely on the proposed new offence of “**voyeurism**”

solutions • not complications