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BRIEFING PAPER

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Voyeurism (Offences) (No. 2) Bill 2017-19

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Summary

The Voyeurism (Offences) (No. 2) Bill 2017-19 was introduced on 21 June 2018. Accompanying Explanatory Notes and a number of overarching policy documents have also been published.

The Bill has completed its Committee Stage (without amendment) and is awaiting Report and Third Reading on 5 September 2018.

The Bill extends to England and Wales only and has been certified by the Speaker under the "English votes for English laws" procedure.

The Bill provides for commencement two months after Royal Assent.

The Bill would add a new section 67A to the Sexual Offences Act 2003, which would set out two new voyeurism offences aimed at tackling "upskirting". This is the act of covertly photographing underneath someone's clothing without their consent. It is often performed in crowded public places, for example on public transport or at music festivals, which can make it difficult to notice the perpetrator.

In England and Wales there is currently no specific criminal offence to cover this type of conduct. It would instead be prosecuted under the more general offences of outraging public decency or voyeurism. There can be difficulties in satisfying the requirements of these more general offences, which in some cases means prosecutions cannot be brought.

Scotland, however, amended its voyeurism legislation in 2010 to make upskirting a specific offence.

The Bill would adopt a similar approach to that taken in Scotland. The two new forms of voyeurism would cover the operation of equipment or recording of an image under another person's clothing with the intention of viewing their genitals or buttocks (with or without underwear), and without that person's consent.

The offences would apply where the perpetrator had a motive of either obtaining sexual gratification, or causing humiliation, distress or alarm to the victim.

The new offences would be triable either way. The maximum sentence following summary conviction would be 12 months imprisonment and/or a fine. The maximum sentence following conviction on indictment would be two years and/or a fine.

The Bill also provides for offenders convicted of particularly serious forms of the new section 67A offences to be placed on the sex offenders register.

A Private Member's Bill on the issue, introduced by Wera Hobhouse, was blocked at second reading. The Government has therefore introduced its own Bill to ensure that the offences make it onto the statute book.

1. "Upskirting": the current law

"Upskirting" is the act of covertly photographing underneath someone's clothing without their consent. It is often performed in crowded public places, for example on public transport or at music festivals, which can make it difficult to notice the perpetrator.

In England and Wales there is currently no specific criminal offence to cover this type of conduct. It would instead be prosecuted under the more general offences of outraging public decency or voyeurism. There can be difficulties in satisfying the requirements of these more general offences, which in some cases means prosecutions cannot be brought.

Scotland, however, amended its voyeurism legislation in 2010 to make upskirting a specific offence.

1.1 England and Wales

Outraging public decency

Outraging public decency is a common law offence. A Law Commission report on the offence gave the following description of what the offence involves:

> The offence can consist of any act or display fulfilling the following conditions:
>
> (1) it must be lewd, obscene or disgusting to such an extent as to outrage minimum standards of public decency as judged by the jury (or other tribunal of fact) in contemporary society;
>
> (2) it must occur in a place which is accessible to or within view of the public; and
>
> (3) two or more persons must be present during the act or display, whether or not they are aware of the act or display or are outraged by it.[1]

The Law Commission also explained the type of conduct that the offence is used to prosecute:

> In a random sample of 47 prosecutions in 2014, it was found that most instances fell within the following categories:
>
> (1) exposure of genitals (8 cases);
>
> (2) masturbation in public (21 cases);
>
> (3) real or simulated sexual activity in public (8 cases);
>
> (4) making intimate videos without consent ("upskirting") (8 cases).[2]

The focus of this offence is on protecting the public from potential exposure to lewd, obscene or disgusting conduct, rather than protecting the individual victim: hence the requirement for the conduct to take place in public **and** for two or more persons to have been present and capable of witnessing it (whether or not they were actually aware of the

1 Law Commission, Simplification of Criminal Law: Public Nuisance and Outraging Public Decency, Law Com No 358, June 2015, para 1.7
2 Ibid, para 3.94

conduct). For an example of this offence being used to prosecute "upskirt" photography, please see R v Hamilton, [2007] EWCA Crim 2062. In that case a barrister was convicted of outraging public decency after filming underneath the clothes of women and a 14 year old girl while they shopped in supermarkets.[3]

Voyeurism

Voyeurism is an offence under section 67 of the Sexual Offences Act 2003, which currently covers the following four types of activity:

> (1) A person commits an offence if—
>
> — for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
>
> — he knows that the other person does not consent to being observed for his sexual gratification.
>
> (2) A person commits an offence if—
>
> — 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
>
> — he knows that B does not consent to his operating equipment with that intention.
>
> (3) A person commits an offence if—
>
> — he records another person (B) doing a private act,
>
> — 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
>
> — 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).

An offence under section 67 is triable either way (i.e. in the magistrates' court or the Crown court, depending on seriousness). The maximum sentence on conviction in the magistrates' court is six months and/or a fine. The maximum sentence on conviction in the Crown court is two years imprisonment.

A key requirement of the existing section 67 offences is that the person being observed or recorded must be doing a "private act". This is defined in section 68 of the 2003 Act:

> … a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—

[3] Note that the charges in relation to the 14 year old girl were covered by offences under section 1 of the Child Protection Act 1978, which covers indecent photographs of children, rather than the offence of outraging public decency

— the person's genitals, buttocks or breasts are exposed or covered only with underwear,

— the person is using a lavatory, or

— the person is doing a sexual act that is not of a kind ordinarily done in public.

The current requirement for a section 67 offence to involve a "private act" obviously creates problems in the context of upskirting, which by its nature tends to take place when the victim is in a public place. The Law Commission has commented that this is one reason why the relevant criminal charge would instead usually be outraging public decency:

> One difficulty is that taking intimate videos without consent ("upskirting"), as in *Hamilton*, will often not fall within this offence, even when done for sexual gratification. The offence requires the victim to be doing a private act, or to be in a place such as a lavatory or a changing room where some degree of exposure or nudity may occur but one can reasonably expect privacy. Neither of these conditions is fulfilled when the victim is fully dressed in a public place. For this reason, the charge brought is invariably outraging public decency.[4]

In certain circumstances a person convicted of a section 67 offence will be made subject to the notification requirements set out in Part 2 of the Sexual Offences Act 2003 (commonly referred to as being placed on the sex offenders register).[5] This only applies if:

- the offender is aged under 18 and has been sentenced to imprisonment for at least 12 months;
- in any other case, **either** the victim was under 18, **or** the offender has been sentenced to a term of imprisonment, detained in a hospital, or given a community sentence of at least 12 months.[6]

1.2 Scotland

In Scotland, the general offence of voyeurism set out in section 9 of the Sexual Offences (Scotland) Act 2009 was amended in 2010 to make specific provision covering upskirting.[7]

The relevant provisions are subsections 9(4A) and (4B), under which a person ("A") will commit the offence of voyeurism if they do any of the following things:

> (4A) The fourth thing is that A—
>
> (a) without another person ("B") consenting, and
>
> (b) without any reasonable belief that B consents, operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B's genitals or

4 Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, Law Com No 358, June 2015, para 3.107

5 Library Briefing Paper 5267 Registration and management of sex offenders sets out full details of notification requirements under the 2003 Act

6 Section 80 and Schedule 3, para 34 of the 2003 Act

7 See section 43 of the Criminal Justice and Licensing (Scotland) Act 2010, which added new subsections 4A and 4B to section 9

> buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.
>
> (4B) The fifth thing is that A—
>
> (a) without another person ("B") consenting, and
>
> (b) without any reasonable belief that B consents, records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.

Subsection 9(7) provides that these things must be done for the purposes of "obtaining sexual gratification (whether for A or C)", or "humiliating, distressing or alarming B".

There is deliberately no requirement for the victim to have been doing a private act at the time they were observed or recorded.

The offence is triable either way. The maximum penalty following summary conviction is 12 months and/or a fine. The maximum penalty following conviction on indictment is five years and/or a fine.[8]

Government guidance explains that the subsection 9(4A) offence is intended to cover cases such as "where a person uses a hidden video-camera to view the buttocks or genitals of passers-by". The subsection 9(4B) offence is intended to cover cases such as "where a person uses a hidden camera to record so-called 'up-skirt' photographs of people".[9]

The guidance also gives examples of conduct that should not be covered:

> In all cases, the offence is committed where it may reasonably be inferred that A acted for the purpose of obtaining sexual gratification, or for the purpose of humiliating, distressing or alarming B. As such, these provisions would not apply where, for example, a shop fitted CCTV in changing rooms for security purposes (though an offence under this section may be committed by someone who subsequently misused the CCTV for voyeuristic purposes). In circumstances where it is not possible to establish that the accused acted for the purpose of obtaining sexual gratification or causing humiliation, alarm or distress to the victim, the behaviour may, depending on circumstances, constitute a criminal offence (e.g. breach of the peace.)[10]

Anyone convicted of a section 9 offence is placed on the sex offenders register.[11]

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8 Section 48 and Schedule 2 of the 2009 Act

9 Scottish Government, Guidance on the Sexual Offences (Scotland) Act 2009, undated, paras 41-42

10 Ibid, para 44

11 By virtue of section 80 and Schedule 3, para 59M of the 2003 Act

2. Calls for change

2.1 The Law Commission

In a 2015 report, the Law Commission considered how the offences of outraging public decency and voyeurism could possibly be amended:

> …abolishing the offence of outraging public decency would leave a gap in the law, as there would be no offence that addresses:
>
> (1) upskirting;
>
> (2) exposure where there is no intention to cause alarm or distress; or
>
> (3) masturbation or other sexual activity in public that does not involve exposure.
>
> 3.109 One option would be to extend the existing offences of indecent exposure and voyeurism to cover these cases. There is some logic to this in the case of upskirting, as this could be argued to involve a different wrong from most other instances of outraging public decency: the fundamental mischief in these cases is not creating disgusting sights in public but infringing the dignity of individuals. For this reason, Alisdair Gillespie argues that, though in current law upskirting is covered by the offence of outraging public decency, this is unsatisfactory and it would be preferable to have a specific offence, of the kind that exists in New Zealand. However, reform of these offences falls outside our present terms of reference. In these circumstances it would be sensible either to retain the offence of outraging public decency or to create a statutory replacement for it.[12]

The Government has not yet issued a response to the report.

2.2 Gina Martin's campaign

In 2017 the issue of upskirting made headlines after Gina Martin, who was the victim of upskirt photography at a music festival, launched a petition for upskirting to be made illegal under the Sexual Offences Act 2003.[13] At the time of writing the petition had attracted over 106,000 supporters.

When she reported the incident to police at the festival, Ms Martin was told that nothing could be done:

> When they came back over to me the male police officer was apologetic - he told me, "Unfortunately, I've had to look at the picture. It shows more than you'd like… but it's not graphic. So there's not much we can do because you can't see anything bad. I'm going to be honest - you might not hear much from us."[14]

Speaking to the Woman's Hour programme on BBC Radio 4, Clare McGlynn (Professor of Law at Durham University) observed that there had been a number of successful prosecutions for upskirting under the offence of outraging public decency, and that she was "concerned that

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12 Law Commission, Simplification of Criminal Law: Public Nuisance and Outraging Public Decency, Law Com No 358, June 2015, paras 3.108-9

13 The Petition Site, I had upskirt photos taken of me – please sign to make this illegal under the Sexual Offences Act of 2003 [accessed 28 June 2018]

14 "Upskirting - how one victim is fighting back", *BBC News*, 9 August 2017

the police just made an assumption here that the image isn't covered, rather than what is actually the practice of the law".[15]

Ms Martin said that her experience demonstrated the need for a specific victim-centred offence to cover upskirting:

> I found out that the one law I could charge under was an old common law called "outraging public decency" - a law that states something lewd or indecent happened in public and at least two people saw it. Ironically, it is usually applied to flashers. So, to put it plainly, the only law that protects a victim of upskirting in England and Wales is one that worries about what the public saw, not the victim who's been harassed.
>
> It's an old law too - victims don't push for it because they don't know about it. If they had known about that law would the police have dealt with my case differently?
>
> (…)
>
> My next step is to have the laws amended so that upskirt photos are listed as a sexual offence and a "victim crime", not a public nuisance.[16]

In May 2018 Ms Martin launched another petition asking people to support the Voyeurism (Offences) Bill 2017-19, a Private Member's Bill introduced by Wera Hobhouse. At the time of writing the new petition had received nearly 7,000 signatures.[17]

2.3 The Voyeurism (Offences) Bill 2017-19

The Voyeurism (Offences) Bill 2017-19 is a Private Member's Bill introduced by Wera Hobhouse in March 2018. It was introduced as a Presentation Bill under Standing Order No.57.

The Bill would have added a new section 67A to the Sexual Offences Act 2003, which would have extended to England and Wales.

Section 67A would have used identical wording to that set out in subsections 9(4) and (4B) of the Sexual Offences (Scotland) Act 2009. It would therefore have introduced two new forms of voyeurism involving the operation of equipment or recording of an image under another person's clothing with the intention of viewing their genitals or buttocks (with or without underwear), and without that person's consent.

The offences would have applied where the perpetrator had a motive of either obtaining sexual gratification, or causing humiliation, distress or alarm to the victim.

The Bill was due to have its second reading on 15 June 2018. It was widely expected to pass through this stage unimpeded, particularly as the Government had indicated its support for the Bill.[18]

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15 BBC, Woman's Hour looks at the increase of upskirt photography without consent, 8 August 2017 (from 06:22)

16 "Upskirting - how one victim is fighting back", *BBC News*, 9 August 2017

17 The Petition Site, Email your MP: Make upskirt photos a specific sexual offence! [accessed 28 June 2018]

18 Home Office, Government acts to make 'upskirting' a specific offence, 15 June 2018

The Bill was listed eighth on the Order Paper for 15 June. As it was not reached before 2.30, there was no opportunity to debate the Bill that day, which meant that it would only receive a second reading if unopposed.[19]

As a (now-archived) House of Commons Information Office Factsheet explains:

> At 2.30 pm on a Friday the Clerk reads out the titles of bills which are on the Order Paper, in the order in which they have been put down for that day. If any Member shouts object when the title of a bill is read then no further progress is made. It is, therefore, only non-controversial bills that are likely to get through without debate. If the bill is objected to, the Member in charge of the bill, or another member on their behalf, may nominate another Friday and seek to persuade those who objected not to repeat their action.[20]

The Bill was not given a second reading after Conservative backbencher Sir Christopher Chope objected, and the Bill did not progress any further that day.[21]

Speaking to the Bournemouth Daily Echo, Sir Christopher said that he supported the content of the Bill, but disagreed with legislation being brought in without any debate at second reading:

> Sir Christopher told the Echo he wanted to see the measure on the statute book in the fastest and surest way possible and would fully support it.
>
> But he said he objected to the procedure on Friday because he does not agree with legislation being brought in with no debate at Second Reading.
>
> "The government has been hijacking time that is rightfully that of backbenchers. This is about who controls the House of Commons on Fridays and that's where I am coming from. I actually support the Bills that were before the house. Four of the 26 Bills that fell at the same time were my own.
>
> "But this is something I have fought for in most of my time as an MP and it goes to the very heart of the power balance between the government and Parliament. The government is abusing parliamentary time for its own ends and in a democracy this is not acceptable. The government cannot just bring in what it wants on the nod. We don't quite live in the Putin era yet."[22]

He said his recommendation to the Government was that it should introduce its own legislation – which he would "wholeheartedly support" – without delay.[23]

Speaking on BBC One's Andrew Marr Show on 17 June, the Prime Minister said that the Government would act against the "invasive,

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19 Standing Order No.9(6)
20 House of Commons Information Office Factsheet L2, Private Members' Bills Procedure, June 2010, p6 (the Factsheet has been archived but the explanation is still relevant)
21 HC Deb 15 June 2018 c1269
22 "Christchurch MP Christopher Chope: I DO support upskirting ban", Bournemouth Daily Echo, 17 June 2018
23 Ibid

offensive act" of upskirting by putting through legislation on Government time.[24]

On 18 June Wera Hobhouse asked an urgent question on the Government's plans to legislate.[25] In response, Justice minister Lucy Frazer confirmed that the Government would be introducing its own Bill on 21 June.

Shadow Justice minister Yasmin Qureshi called for the matter to be addressed quickly, given the "broad parliamentary consensus" on the matter and the approach of the summer festival season. In response, Lucy Frazer said that the Government's priority was "to ensure that this legislation gets on to the statute book as soon as possible".[26]

24 BBC News, Why was upskirting row MP given knighthood?, 17 June 2018
25 HC Deb 18 June 2018 c40
26 Ibid, c41

3. The Bill

The Voyeurism (Offences) (No. 2) Bill 2017-19 was introduced on 21 June 2018. Accompanying Explanatory Notes and a number of overarching policy documents have also been published.

The Bill was considered by a Second Reading Committee on 2 July 2018.[27] The Committee debated and approved a motion that it recommended that the Bill ought to be read a second time. The Bill then received a second reading in the House without debate.[28]

The Bill completed its Committee stage in July 2018. There were three sittings. Key areas of debate included the motive of the perpetrator, the disclosure and distribution of upskirt images, and enhanced sentencing for offenders motivated by misogyny. The Bill was not amended.

Report stage and third reading are due to take place on 5 September 2018.

The Bill extends to England and Wales only and has been certified by the Speaker under the "English votes for English laws" procedure.

The Bill provides for commencement two months after Royal Assent.

3.1 The Bill as introduced: clause by clause analysis

New voyeurism offences

Clause 1(2) of the Bill would add a new section 67A to the Sexual Offences Act 2003.

New section 67A would follow the approach taken by Wera Hobhouse's Private Member's Bill and by subsections 9(4) and (4B) of the Sexual Offences (Scotland) Act 2009:

> Section 67A(1) makes it an offence is to operate equipment beneath a victim's clothing without consent with the intention of observing, or enabling another person to observe, the victim's genitals or buttocks (whether exposed or covered with underwear), in circumstances where their genitals, buttocks or underwear would not otherwise be visible, for a specified purpose.
>
> Section 67A(2) makes it an offence to record an image beneath the clothing of a victim's clothing without consent to look at the image, or allow another person to look at the image, of the victim's genitals or buttocks (whether exposed or covered by underwear), in circumstances where their genitals, buttocks or underwear would not otherwise be visible, for a specified purpose.
>
> Section 67A(3) sets out the specified purposes themselves. These are: a) obtaining sexual gratification (either for themselves or for the person they are enabling to view the victim's genitals,

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27 2RC (Bill 235) 2 July 2018. The Second Reading Committee procedure is normally reserved for "a few very uncontroversial bills": Cabinet Office, Guide to Making Legislation, July 2017, para 31.20

28 HC Deb 3 July 2018 c292

buttocks or underwear), and b) to humiliate, distress or alarm the victim.[29]

The new section 67A offences would be triable either way. The maximum sentence following summary conviction would be 12 months imprisonment and/or a fine.[30] The maximum sentence following conviction on indictment would be two years and/or a fine. This mirrors the maximum sentences for the existing section 67 voyeurism offences.

Notification requirements: the sex offenders register

Clause 1(4) would provide for certain offenders convicted of the new section 67A offences to be made subject to the notification requirements in Part 2 of the Sexual Offences Act 2003 (commonly known as being placed on the sex offenders register).

The notification requirements would only be imposed if the following conditions were met:

- the offence was committed for the purpose of obtaining sexual gratification; **and**
- the "relevant condition" is met.

The "relevant condition" mirrors the current provision for the existing section 67 voyeurism offences:

- if the offender is aged under 18, the relevant condition is that they have been sentenced to imprisonment for at least 12 months;
- in any other case, the relevant condition is **either** that the victim was under 18, **or** the offender has been sentenced to a term of imprisonment, detained in a hospital, or given a community sentence of at least 12 months.

Procedural matters

Clause 1(5) would extend the existing provisions of sections 14, 41, 42, 43 and 99 of the Children and Young Persons Act 1933 to the new upskirting offences. These provisions enable proceedings for certain criminal offences against or by under 18s to be conducted without the victim's and/or defendant's presence in court.

Clause 1(6) would bring section 67A offences committed against a child within the scope of the child sex offender disclosure scheme. The scheme – governed by section 327A of the Criminal Justice Act 2003 – enables people who care for children to find out if a person (e.g. a new partner or a neighbour) has a record of child sex offending.

Clause 1(7) relates to the general defence to criminal activity set out in section 45 of the Modern Slavery Act 2015. The section 45 defence applies where the defendant can show that they were compelled to commit an offence because they were a victim of slavery or relevant

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29 Explanatory Notes to the Bill, paragraphs 15-17

30 Note that the reference to 12 months is to be read as six months until such time as section 154(1) of the Criminal Justice Act 2003 (which deals with increased sentencing powers for magistrates) is brought into force.

exploitation, and that a reasonable person in the same situation would have had no realistic alternative other than to commit that offence. The section 45 defence is not available in respect of any of the offences listed in Schedule 4 to the 2015 Act. Clause 1(7) would add the section 67A offences to this list.

3.2 Second reading

The Bill was considered by a Second Reading Committee on 2 July 2018.[31] The Committee debated and approved a motion that it recommended that the Bill ought to be read a second time.

Justice minister Lucy Frazer said that the Bill would fill "a gap in the law" and would enable convictions in cases that are not covered by the existing offences of outraging public decency and voyeurism.

Shadow Justice minister Yasmin Qureshi said that it was "shocking" that England and Wales lacked a specific criminal offence to cover upskirting, particularly as it has been an offence in Scotland since 2009. She indicated that the Opposition did not object to or seek to amend any part of the Bill.

Wera Hobhouse said that she hoped the debate around upskirting would "lead society to talk more widely about consent", and that "it was clear that it is predominantly an issue of how we, as a society, view women and their autonomy over their own bodies".[32]

Maria Miller welcomed the Bill but said that the Government needed to "take a long, hard look at image-based abuse" more generally.[33] She said that the Bill could be strengthened by amendments in three areas:

- by making sure the Bill covers those who take upskirt photographs for financial gain or "for a laugh";
- by making it unlawful to distribute upskirt images, following the approach taken in Scotland; and
- by ensuring that all upskirting against under-18s is a notifiable sex offence.

Liz Saville Roberts echoed calls for a more comprehensive review of "all non-consensual taking and sharing or private intimate sexual images, including threats and altered images … as well as further legislation to future-proof and modernise the law".[34] She said that the Bill should focus on whether the victim's consent was received, and not on the motivation of the perpetrator.

Lucy Frazer reiterated that the aim of the Bill was to close a "small but important gap in the law".[35]

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31 2RC (Bill 235) 2 July 2018
32 2RC (Bill 235) 2 July 2018, c9
33 2RC (Bill 235) 2 July 2018, c12
34 2RC (Bill 235) 2 July 2018, c13
35 2RC (Bill 235) 2 July 2018, c22

The Bill subsequently received a second reading in the House without debate.[36]

3.3 Committee stage

There were three Public Bill Committee sittings between 10 and 12 July 2018. There were no divisions and no amendments were made.

The main areas of debate included the motive of the perpetrator, the disclosure and distribution of upskirt images, and enhanced sentencing for offenders motivated by misogyny.

Motive

The Committee considered a group of amendments that would have removed the requirement for the perpetrator to have acted for the purpose of obtaining sexual gratification or humiliating, alarming or distressing the victim.

The amendments would also have introduced new defences for perpetrators who could show that their conduct was necessary for the purposes of preventing or detecting crime, or that they had not acted with the intent of observing or recording another person's genitals, buttocks or underwear.

Under the amendments all upskirting would therefore be covered, regardless of the perpetrator's purpose, unless one of the defences could be established.

The lead amendment was tabled by Maria Miler and moved by Liz Saville Roberts. Speaking to the amendment, Ms Saville Roberts said that this change "would ensure that all upskirting is illegal, regardless of the motivation".[37]

She said that the Bill did not adequately cover upskirting where the motivation was financial gain (e.g. people who take celebrity upskirt photos to sell to the press) or "group bonding or banter". She also referred to written evidence from the Crown Prosecution Service, which said that although "most offending" would fall within the specified purposes it was "not inconceivable that suspects will advance the defence that this purpose is not made out beyond reasonable doubt and/or that they had another purpose, such as 'high jinks'".[38]

Stella Creasy set out her support for the amendments, and said that focusing on the offender's motives "takes the power away from the victim to be the one who defines what happened".[39]

In response, Lucy Frazer said that the two purposes specified in the Bill were "clear and appropriate", and would be familiar to criminal justice agencies as they are used in existing legislation.[40] She expressed

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36 HC Deb 3 July 2018 c292
37 PBC 12 July 2018 c37
38 PBC 12 July 2018 c38. See also Written Evidence: Crown Prosecution Service (CPS) (VOB04)
39 PBC Deb 12 July 2018 c46
40 For example, the existing voyeurism offences under s67 of the Sexual Offences Act 2003 require the perpetrator to have been acting "for the purpose of obtaining sexual gratification". The revenge pornography offence in s33 of the Criminal

confidence that conduct motivated by financial gain or "for a laugh" would still be caught by the two proposed purposes. She highlighted evidence given by Assistant Commissioner Martin Hewitt (National Police Chiefs' Council lead on adult sexual offences), Rhyan Whelan (Gina Martin's lawyer) and the Crown Prosecution Service:

> As Assistant Commissioner Martin Hewitt said on Tuesday, it is hard to imagine any other reason for which someone would take an upskirt photo that could not be prosecuted under the new offences, as drafted. As Ryan Whelan said:
>
> "There is no requirement that the prohibited motive be the only motive".
>
> The hon. Lady also referred to the Crown Prosecution Service, but it is important to point out that the CPS stated:
>
> "We anticipate that most offending will fall comfortably within these categories."[41]

Lucy Frazer also expressed concern that the amendments could effectively reverse the usual burden of proof in criminal proceedings:

> Amendment 1 would reverse the burden of proof to the extent that it would rest on the defendant to show that they acted for a different purpose, and it is very limited, with only two reasons. It would put the burden of proving a defence on the defendant, but I see no issue with the fact that in our law it is for the CPS to prove its case and to prove that people should be criminalised for what is an extremely significant offence.[42]

She also said that identifying an offender's purpose as part of a conviction for upskirting would ensure that only those who posed a risk would be placed on the sex offenders register:

> Specifying the purposes allows us to ensure that serious sexual offenders are made subject to notification requirements – that is, they are placed on the register. Where offenders commit a sufficiently serious act for the purpose of obtaining sexual gratification, they will be placed on the sex offenders register, which assists the police with their management in the community. Specifying the purposes also ensures that those who do not pose a further risk are not made subject to those requirements.[43]

Alex Chalk said that the amendments had "validity and force", but opposed them on similar grounds to those set out by the Minister. He said that it would be "vanishingly rare" for a defendant to credibly argue that no part of his or her motivation fell within the two purposes set out in the Bill.

He also said that the Bill was right to distinguish between those who commit the offence to humiliate or degrade, and those who commit it to achieve sexual gratification, as this had important consequences for the sex offenders register:

Justice and Courts Act 2015 is committed where the perpetrator intended to cause the victim "distress".

41 PBC Deb 12 July 2018 c40. See also PBC Deb 10 July 2018 (First sitting) cc10-18, Written Evidence: Ryan Whelan (VOB05) and Written Evidence: Crown Prosecution Service (CPS) (VOB04)

42 PBC Deb 12 July 2018 c42

43 Ibid

> Let us imagine for a second that this amendment were carried. The defendant would say, "I'm not guilty of this crime. I want to have a trial, please." He would go before a judge and jury and say, "My phone was operating by accident. I didn't mean to do it," and the jury would say, "Pull the other one. Guilty." At that point, who would decide whether that person went on the sexual offenders register or not? The jury would not have been able to give any kind of verdict on the individual's purpose when he took the photo. In other words, the judge might sit there and say, "I've no idea. It wasn't really relevant to the offence. Am I, the judge, going to make the decision about what his motivation was?" How does that serve justice?[44]

Liz Saville Roberts withdrew the lead amendment but said that she intended to return to the matter on Report.

Disclosure and distribution

Liz Saville Roberts moved an amendment (tabled by Maria Miller) that would have criminalised the non-consensual disclosure of upskirting images taken or recorded during the commission of an offence under clause 1.[45]

She pointed out that the upskirting legislation in Scotland – on which the Bill is modelled – had been supplemented "relatively soon after its introduction by additional legislation to stop the distribution of images".[46] She said that it was illogical for the Government to only implement part of the Scottish legislation, and not to act to prevent sharing.

In response, Lucy Frazer sympathised with the position of Ms Saville Roberts on forwarding and sharing upskirting images. However, she said that the distribution and sharing of inappropriate images was a "significant issue" that was "a wider problem than this specific offence".[47]

To that end, she said that the Government had asked the Law Commission to look into the onward sharing of images as part of its review into online abuse, and had also looked at the matter as part of its work on a new Internet Safety Strategy. She therefore considered that it would be "prudent and beneficial to be careful not to cut across the ongoing work", but to wait for the outcome of these reviews before deciding what steps (if any) were needed to take the matter forward.

She said that the Government was aware that it needed to consider how new technologies were affecting women and children, but that using the Bill to deal with this issue could result in "unforeseen consequences": for example by criminalising people who received and shared an image without knowing it had been taken without consent.

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44 PBC Deb 12 July 2018 c44
45 PBC Deb 12 July 2018 c49
46 The taking of upskirting images was criminalised in Scotland by section 43 of the Criminal Justice and Licensing (Scotland) Act 2010. This was later supplemented by sections 2 and 3 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (related Explanatory Notes are available), which criminalised the non-consensual distribution of upskirting (and other intimate) images.
47 PBC Deb 12 July 2018 c50

She also highlighted a number of existing offences that could capture the sharing of upskirting images, including the revenge pornography offence under s33 of the Criminal Justice and Courts Act 2015, improper use of a public communications network under s127 of the Communications Act 2003, or the sending of indecent or offensive communications under s1 of the Malicious Communications Act 1988.

Liz Saville Roberts withdrew the amendment but again indicated that she would return to the matter on Report.

Enhanced sentencing

Stella Creasy moved an amendment relating to sentencing for cases of upskirting where the perpetrator demonstrated or was motivated by hostility based on the victim having a particular "sex characteristic", as defined in section 11 of the Equality Act 2010. In such cases, the amendment would require the courts to treat this hostility as an aggravating factor for sentencing purposes.[48]

Ms Creasy said that the amendment was aimed at tackling the misogyny that she considered lay behind activity such as upskirting:

> There is a simple, obvious conversation that we might have, which is, "Has somebody done this because, actually, they hate women and believe they have an entitlement to women? They believe that women are second-class citizens and that, therefore, it is their right to use film of them for entertainment." That is not a new conversation in our society. Upskirting, and therefore the need for the Bill, reflects the fact that everyone now has a mobile phone in their pocket, but humiliating women, targeting women and treating women as pieces of meat for entertainment is a very old facet of our society.[49]

She said that coming up with individual offences – such as upskirting – was treating the symptoms, rather than tackling "the message that the issue is equality under the law". The law does not yet see hate against women as on a par with racial or religious hatred, which means women are often "dismissed" when reporting such crimes.

She recognised that there might be concerns about whether this was an issue to tackle in the Bill, but asked the Minister whether the Government was looking at the overarching issue of treating misogyny as a hate crime.

Yasmin Qureshi said that "in normal circumstances" the Opposition would support some of the amendments. However, the Opposition's priority was ensuring that the Bill proceeded without delay, including in the Lords. It would not therefore be supporting the amendments on this occasion. She pointed out that sentencing guidelines already allow

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48 This follows the general approach taken to sentencing in cases where the offender was motivated by hostility on the grounds of race, religion, disability, sexual orientation or transgender status, as set out in sections 145 and 146 of the Criminal Justice Act 2003. Detailed background on misogyny as a hate crime is set out in Library Debate Pack 2018-0057 Misogyny as a hate crime.

49 PBC Deb 12 July 2018 c52

the courts to consider misogyny when sentencing, even though it is not a statutory aggravating factor such as race is.[50]

Lucy Frazer said that the maximum sentence for the offence – two years – was "in line with the sentence for racially aggravated assault, assaulting a police constable while resisting arrest and other sexual offences, such as voyeurism and exposure".[51] She also said that statutory aggravating factors do not usually apply to "just one or two offences", and that creating an aggravating factor for upskirting alone would make it "inconsistent with all other sexual offences".[52]

Stella Creasy said that she believed misogyny as an aggravating factor "could be ascribed to a number of offences", and asked the Minister to commit to a review of misogyny as a hate crime. Lucy Frazer responded with a general comment that the Government "always keep matters under review".[53]

Ms Creasy withdrew the amendment but said she would return to the issue on Report.

50 See Sentencing Council, Aggravating and mitigating factors [accessed 17 August 2018], as discussed in section 1.3 of Library Debate Pack 2018-0057 Misogyny as a hate crime
51 PBC Deb 12 July 2018 c55
52 PBC Deb 12 July 2018 cc55-6
53 PBC Deb 12 July 2018 c58

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