

VOYEURISM (OFFENCES) (NO. 2) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Voyeurism (Offences) (No. 2) as introduced in the House of Commons on 21 June 2018 (Bill 235).

- These Explanatory Notes have been prepared by the Ministry of Justice in order to assist the reader of the bill. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1. The purpose of this Bill is to bring forward legislation to create two new offences to capture instances where a person operates equipment or records an image beneath another person's clothing with the intention of viewing their genitals or buttocks, with or without underwear. This is known colloquially as 'upskirting'.
2. The Bill:
 - Would insert two new offences into the Sexual Offences Act 2003 covering the practice of upskirting.
 - Would capture instances where, without consent (and without reasonably believing that there is consent), a person either a) operates equipment beneath or b) records an image beneath someone's clothing to observe, or allow someone else to observe, their genitals or buttocks (whether exposed or covered by underwear), in circumstances where the genitals, buttocks or underwear would not otherwise be visible.
 - Would apply where the offender had a motive of either a) obtaining sexual gratification, or b) causing humiliation, distress or alarm to the victim.
 - Would ensure that the most serious offenders, where the purpose of the offending is for sexual gratification, are made subject to notification requirements (colloquially known as being put on the 'sex offenders register').

Policy background

3. In March 2018 Wera Hobhouse MP presented a Private Member's Bill (PMB) to the House of Commons that would legislate for upskirting by creating additional voyeurism offences under Part 1 of the Sexual Offences Act 2003. Based on a review of this area of the law, the government decided to support the PMB, subject to amendments. At the Bill's second reading on 15 June 2018 the Bill was objected to, thereby preventing its progress. In order to ensure that this offence was brought in soon, the government confirmed it would legislate for upskirting through a Government Bill. Additionally, amendments were to be included so that persons became subject to notification requirements under Part 2 of the Sexual Offences Act 2003 where upskirting took place for the purpose of obtaining sexual gratification, and also so that the Act would become law two months after it was passed.
4. The Bill makes specific offences for upskirting and closes any gaps in the law.

Upskirting

5. Without this Bill, the practice of upskirting does not go unpunished. Upskirting has been successfully prosecuted under the offence of outraging public decency (OPD). In certain circumstances, it may also be captured by the offence of voyeurism, under the Sexual Offences Act 2003 and, in the case of a child, the offence of taking an indecent photograph of a child, under the Protection of Children Act 1978.
6. In September 2017 the Justice Secretary announced he had asked MoJ officials to review this area of the law:

I have taken very seriously the representations made not only by Gina Martin, but by some of the police and crime commissioners around the country. I have asked for detailed advice on this, but I hope the

*hon. Gentleman will understand that, before proceeding to a commitment to legislation, I want to be absolutely certain that this would be the right course to take.*¹

7. This review found that not all instances of upskirting would necessarily be captured by the existing criminal law. For example, the OPD offence requires at least two people to have witnessed the act or be capable of witnessing it, so an instance of upskirting in an otherwise empty train carriage may not be captured. Additionally, the existing law did not make upskirting a sexual offence and so the most serious offenders were not made subject to notification requirements (colloquially known as being put on 'the sex offenders register').

8. In April 2018 the current Secretary of State acknowledged this in oral questions, stating:

*As I have said, I am sympathetic to the idea of our taking action in this regard. There are instances in which people have been successfully prosecuted for upskirting in the context of outraging public decency, and voyeurism can also apply under the Sexual Offences Act 2003. However, those offences do not necessarily cover every instance of upskirting, which is why there is a strong case for looking at the law and considering whether we need to change it.*²

9. On Friday 15 June, the government announced their support of Wera Hobhouse's PMB, subject to amendments. Wera Hobhouse's PMB mirrored existing specific upskirting offences in Scotland. Unlike the Scottish offences, the PMB would not introduce notification requirements for offenders, so the government committed to amending the PMB to introduce these where the purpose of the offence is for sexual gratification. At second reading on the same day, one member objected to the bill progressing to committee stage 'on the nod'. As the government had identified this gap in the law, the Prime Minister committed to legislating for upskirting, stating:

I am disappointed the Bill didn't make progress in the Commons today, and I want to see these measures pass through Parliament – with government support – soon

10. This Bill would close the gaps in the law identified by the review and ensure the most serious sexual offenders are put on the sex offenders register where the purpose of the offending is for sexual gratification.

Legal background

11. The relevant legal background is explained in the policy background section of these Notes.

Territorial extent and application

12. Clause 2 sets out the territorial extent of the Bill; that is the jurisdictions which the Bill forms part of the law of. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect. The provisions of the Bill extend and apply to England and

¹ Hansard reference [900704]

² Hansard reference [904918]

Wales only.

Commentary on provisions of Bill/Act

Clause 1: Voyeurism: additional offences

Subsection 1:

13. Subsection 1 establishes that the Bill will make changes to the Sexual Offences Act 2003.

Subsection 2:

14. Subsection (2) inserts a new section 67A in the Sexual Offences Act 2003, which creates two additional offences to the existing voyeurism offence.
15. 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.
16. 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.
17. 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, buttocks or underwear), and b) to humiliate, distress or alarm the victim.
18. The available sentences for these offences are set out in section 67A(4). A person guilty of an offence under this section is liable, on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both. On conviction on indictment, a person guilty of an offence in this section is liable to imprisonment for a term not exceeding 2 years.
19. Finally, section 67A(5) acknowledges that currently the maximum that magistrates can sentence is 6 months, but this will be increased to 12 months under the Criminal Justice Act 2003. That provision has not yet been commenced; therefore, in the meantime references to 12 months should be read as 6.

Subsection 3:

20. This introduces a clarification into Section 68 (voyeurism: interpretation) of the Sexual Offences Act 2003 to confirm that operating equipment includes enabling or securing its activation by another person without that person's knowledge. This would include, for example, a camera that is activated by someone entering a room. This interpretation will apply for both the new upskirting offence, and the existing voyeurism offence.

Subsection 4:

21. This subsection inserts a new paragraph into Schedule 3 of the Sexual Offences Act 2003 (sexual offences for purposes of notification requirements) to ensure the most serious sexual offenders are subject to notification requirements, known colloquially as being put on the 'sex offenders register'.
22. Firstly, it clarifies that offenders will only be subject to notification requirements if they commit the offences for the purpose of sexual gratification. Where the offender was under 18, they would be made subject to notification requirements where their sentence for the offence is an

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imprisonment for a term of at least 12 months. In any other cases, offenders need to meet sentencing thresholds in order to be made subject to notification requirements. These thresholds include where the victim was under 18, or if the offender is or has been i) sentenced to a term of imprisonment, ii) detained in a hospital, or iii) made the subject of a community sentence of at least 12 months.

Subsection 5:

23. This subsection extends the provisions set out in sections 14, 41, 42, 43 and 99 of the Children and Young Persons Act 1933 to the new upskirting offences. These sections make provision in respect of certain offences committed against those aged under 18 - in particular, they allow proceedings to take place without the victim having to be in court where their presence is not essential to the case (s.41), and allows a written statement (deposition) where attendance in court would be of serious danger to the life or health of the victim (in the opinion of a qualified medical practitioner) instead of attendance in court (s.42). They also contain provisions in respect of the procedure for charging a defendant in these cases, allowing flexibility in respect of whether one charge is made for all offences against 18 year olds by that defendant (although if that is the case, only one penalty may be given) (s.14) and in respect of the service and admission of any statement (deposition) taken from the young person in place of oral evidence (s.43).

Subsection 6:

24. This subsection would extend the provisions under s.327A of the Criminal Justice Act 2003 to allow information about those convicted of the new upskirting offences where the victim is under the age of 18 to be disclosed to particular members of the public by the responsible authority (eg. chief officer of police or local probation board for that area). There is a presumption information will be disclosed where the responsible authority has reasonable cause to believe that the offender poses a risk of causing serious harm to a particular child or children in that area and the disclosure is necessary to protect that child or children from serious harm.

Subsection 7:

25. This subsection disapplies the general defence set out in section 45 of the Modern Slavery Act 2015 in respect of the new offences. Section 45 of the Modern Slavery Act 2015 provides a defence where a defendant aged 18 or over can show they were compelled to commit an offence because they were a victim of slavery or relevant exploitation and where a reasonable person in the same situation and with the same characteristics would have had no realistic alternative other than to commit that offence. Schedule 4 specifies that this defence is not available in respect of various offences, including the sexual offences listed at para 33 to Sched 4. This subsection adds the new offences to this list, meaning the defence at s.45 of the Modern Slavery Act 2015 would not be available in respect of these new offences.

Clause 2: Extent, commencement and short title

Subsection 1:

26. This establishes that the Bill will extend to England and Wales only (see Annex A for further information).

Subsection 2:

27. This subsection sets out that the Act will come into force two months after the Act receives Royal

Assent.

Subsection 3:

28. This establishes that the Act can be cited as the Voyeurism (Offences) Act 2018.

Financial implications of the Bill

29. Given that a number of cases of this behaviour are already being successfully prosecuted under the outraging public decency offence, it is not anticipated that the creation of a bespoke offence for upskirting will have a substantial impact on costs or prison places.
30. The costs to the criminal justice system (excluding costs to the CPS and the police) are estimated to stand at £8,000 per prosecution of the proposed offence and an average of £5,000 for each prosecution of an offender who has breached their conditions as set out in s. 91 of the Sexual Offences Act 2003.
31. Taking account of estimated volumes, total costs of the proposed offence are expected to amount to £230,000 and the costs related to prosecution of offenders who have breached their requirements would add up to £15,000.

Parliamentary approval for financial costs or for charges imposed

32. The Bill does not require a Money resolution or a Ways and Means resolution.

Compatibility with the European Convention on Human Rights

33. Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, has made the following statement under section 19(1)(a) of the Human Rights Act 1998:
- "In my view, the provisions of the Bill are compatible with the Convention rights."
34. The Government has published a separate ECHR memorandum with its assessment of compatibility of the Bill's provisions with the Convention rights: this memorandum is available on the Government website.

Annex A - Territorial extent and application in the United Kingdom

1. The information provided in this Annex is the view of the UK government. The Bill relates to a general restriction in relation to the criminal law of England and Wales and is outside the legislative competence of the National Assembly for Wales; in that it relates to sexual offences including offences relating to indecent [and pornographic] images: paragraph 4(2)(c) of Schedule 7B to the Government of Wales Act 2006 (as amended by the Wales Act 2017.) Subject to any minor and consequential effects which are to be confirmed, the Bill forms part of the law of England and Wales only and applies to England and Wales only. Accordingly, no legislative consent motion is being sought in relation to any provision of the Bill.
2. In the view of the Government of the United Kingdom and disregarding minor or consequential effects outside the area in question, the entirety of the Bill applies exclusively to England and Wales and it would be within the legislative competence of the Scottish Parliament or the Northern Ireland Assembly to make corresponding provision³.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 1: Voyeurism additional offences	Yes	Yes	No	No	No	Yes	Yes	No
Clause 2: Extent, commencement and short title	Yes	Yes	No	No	No	Yes	Yes	No

Subject matter and legislative competence of devolved legislatures

3. The subject matter of the Bill (criminal law) is reserved to the UK Government under the Government of Wales Act 2006 (Schedule 7B). The subject matter of the Bill is not reserved to the

³ References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

UK Government under the Scotland Act 1998 (Schedule 5); nor is it a reserved or excepted matter under the Northern Ireland Act 1998 (Schedules 2 and 3). If there are amendments relating to matters within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.

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