

## The Voyeurism (Offences) Act 2019: A Wasted Opportunity?

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*The Voyeurism (Offences) Act 2019 amended the Sexual Offences Act 2003 to introduce a new offence that would seek to tackle so-called ‘upskirting’. Whilst it originated as a Private Members Bill, it was quickly taken over by the government following a backbench blocking manoeuvre. The Act ostensibly seeks to fill a loophole that exists within the law, but this article will argue that it fails to do so. The Act does not protect the sexual autonomy and inherent dignity of a woman, and instead deals with a niche area. I will argue that the legislation is a wasted opportunity. Parliament had the opportunity to protect the sexual autonomy and inherent dignity of women and instead chose to kick the issue into the long grass, from where it will be difficult to recover, with Parliamentary time likely to be scarce over the coming years.*

### SEXUAL OFFENCES – VOYEURISM – UPSKIRTING – PORNOGRAPHY – AUTONOMY – DIGNITY

The *Voyeurism (Offences) Act 2019* (VOA) is the culmination of significant political pressure to introduce a criminal offence in England & Wales to criminalise so-called ‘upskirting’. After an ill-fated attempt to legislate by way of a Private Members Bill (discussed below), it was eventually passed as government legislation.

The genesis of the Act is a belief that the criminal law did not adequately tackle so-called upskirting. Whilst some forms of upskirting are prosecuted under the offence of voyeurism;<sup>1</sup> this does not apply in all situations because where the offence took place in a public space the requirement that a person was doing a ‘private act’ cannot be satisfied.<sup>2</sup> Where upskirting takes place in a public setting, then the common-law offence of outraging public decency can apply,<sup>3</sup> but this requires, *inter alia*, two people to have seen, or be capable of seeing the act. Also, it is not a sexual offence in the same way that, for example, the offence of voyeurism is.<sup>4</sup>

Whilst it would be wrong to say that the Act was the result of a single case, there can be little doubt that the treatment of Gina Martin was key to raising this issue in the public consciousness. Gina Martin attended a music festival in July 2017. Whilst standing in the crowd, a man took a picture up her skirt. At the time she was unaware of it but saw a picture on the phone of her genital area covered by thin underwear. She took the phone, and the man became aggressive. She ultimately reported the matter to the police and a police officer reviewed the footage and decided that there was no crime because it was not graphic. Whilst they made the man delete the photograph, they did not arrest him. After posting about this on social media, Martin received both support and substantial misogynistic abuse. A campaign was begun to highlight a potential gap in the law and, ultimately, it led to the Act.

The preceding paragraph is an extremely basic description of what happened, but this does not undermine what happened. The Gina Martin case is a paradigm of upskirting. Gina Martin

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<sup>1</sup> *Sexual Offences Act 2003*, s.67.

<sup>2</sup> AA Gillespie, “‘Upskirts’ and “down-Blouses”: Voyeurism and the Law’ [2008] Crim LR 370.

<sup>3</sup> *R v Hamilton* [2007] EWCA Crim 2026 and see Gillespie (n 2).

<sup>4</sup> The Law Commission has recommended that this offence is placed on a statutory footing; Law Commission, ‘Simplification of Criminal Law: Public Nuisance and Outraging Public Decency’ (2015) Law Com No 358.

demonstrated the range of emotions that arise from such cases, but she refused to accept that nothing could be done. What is interesting about the case, which has led to a change in the law, is that the police were wrong. An offence had been committed and the suspect could, and should, have been arrested. A music festival would be an obvious example of a public place. The offence of outraging public decency clearly applied. There were more than two people who saw, or could have seen, the photograph being taken, and it is clear that taking a photograph up a woman's skirt satisfies the requirements for both 'outraging' and 'public decency'.<sup>5</sup> What, therefore, the Gina Martin case shows is that front-line police officers do not understand the law. That is not to say that outraging public decency is an adequate offence, because arguably it is not. However, unless this lack of understanding of the law is addressed, then the VOA 2019 will be pointless. A law is only relevant when enforced. Specialist training for judges and prosecutors is meaningless unless a police officer on the beat understands that upskirting is illegal. If they do not then, as in the Gina Martin case, a victim will be let down.

It is perhaps not only the police that was wrong in the Gina Martin case. Many Parliamentarians referred to the case as demonstrating a need to change the law quickly. Whilst outraging public decency is far from perfect (not least because it is arguably a public order crime rather than a sexual offence, something that can be relevant in terms of offender management), it did provide a safety net. Parliament did not need to act as quickly as it did due to the existence of this safety net. By rushing through a piece of legislation it is submitted that Parliament has failed women. It has passed flawed legislation that only minimally increases the protection of women, and this can only be considered a wasted opportunity.

## A: The Passage of the Act

The VOA 2019 started out as a Private Members Bill, introduced by Wera Hobhouse MP. However, during its second reading, the backbencher Sir Christopher Chope MP shouted 'object',<sup>6</sup> a procedural mechanism which effectively 'kills' a private members Bill. There was considerable uproar,<sup>7</sup> with many believing that Sir Christopher's actions were inappropriate. Sir Christopher himself argued that he was not against the legislation but that he was against private member bills *per se* and routinely shouted object to them. The government stepped in and resurrected the Bill (then known as the *Voyeurism (Offences) (No 2) Bill*), which meant that there was guaranteed Parliamentary time. Sir Christopher during the passages of the Bill reiterated that this was his purpose, although some remain unconvinced of this.<sup>8</sup>

With government time, the Bill quickly passed the procedural hurdles in the Commons. Indeed, it proceeded too quickly. Unusually, the Bill had its second reading within committee rather than the House itself, meaning that it could not be debated in the main chamber at that time as is usual.<sup>9</sup> More than this, the government decided that it was going to stick strictly to the Bill. Therefore, despite repeated attempts at amending the Bill, the text of the Bill left the Commons exactly as it arrived. It could be argued that this should be commended. Bills can often become side-tracked, with competing interests leading to compromises and superfluous clauses. However, the counter-

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<sup>5</sup> *R v Hamilton* (n 3).

<sup>6</sup> HC Deb 15 June 2018, col 642, col 1269.

<sup>7</sup> J Maidment and A Mikhailova, 'Tory MP Labelled a "dinosaur" by Furious Conservative Colleagues after Blocking Ban on Upskirt Photographs' *Daily Telegraph* (15 June 2018) <<https://www.telegraph.co.uk/politics/2018/06/15/tory-mp-blocks-ban-upskirt-photographs/>> accessed 17 June 2018.

<sup>8</sup> HC Deb 5 September 2018, vol 646, col 267.

<sup>9</sup> Delegated Leg Cttee HC, 2 July 2018, col 1.

argument is that it meant the legislation was flawed from the beginning. As will be seen throughout this article, the legislation has inherent flaws. These were pointed out during the passage of the Bill and were noted by Parliamentarians, both within the chambers and outside.<sup>10</sup>

The approach of the government is perhaps best summarised by by Lucy Frazer MP, a junior minister in the Justice ministry, that:

[t]his Bill seeks to rectify a gap in the law. That gap exists in relation to where the act takes place; it is possible to prosecute for upskirting in a private place or a public place, but possibly not in a place that is neither private nor public, such as a school.<sup>11</sup>

The approach was not therefore to identify a way of tackling upskirting and some of the identifiable gaps in the existing legal framework, but rather to focus on a very niche gap. Indeed, at no point has an example been adduced of a case that has not been prosecuted because of a gap in the law. Gina Martin was not protected but that was a failure by the police and not the law. A convincing argument could be put forward that outraging public decency is not an appropriate offence for this conduct, but, as will be seen, that argument has not been forward and neither does this legislation negate the need for that offence. There was apparent consensus that speedy legislation was required. Indeed, the original sponsor said this:

All of us here, and me in particular, recognise that it is important to get something on the statute book, and I am grateful that the Government have acted so quickly.<sup>12</sup>

The need for speedy legislation was never articulated, Given the absence of any evidence that victims were being failed *by the law*, surely it would have been better to get the legislation right, rather than rush through a flawed offence? It will be seen throughout this article that the Act has failed to address a number of obvious issues or, in other cases, does so poorly. The government became so fixated on the original wording that it prevented Parliament to do its duty of scrutinising and amending draft legislation.

The House of Lords was equally circumspect. When introducing the legislation into the House, the minister speaking to the measure – the Advocate General for Scotland (which is ironic as the legislation does not extend to Scotland) – noted that concerns were raised in the Commons but noted the Bill was passed without amendment there and hoped the same was true in the Lords.<sup>13</sup> Again, the quest was not to achieve legislation that is fit for purpose but rather to act quickly. That the government got its wish is apparent from the Committee stage of the House of Lords, which took place over 47 minutes on the 26<sup>th</sup> November 2018,<sup>14</sup> despite the fact that the Committee stage is when line-by-line scrutiny is expected. Four amendments were tabled, but only two were debated, and both were withdrawn without a vote. The first of these was tabled by Lord Pannick who, it will be remembered, had publicly stated the need for the Bill to be amended, but ultimately the amendment was withdrawn. Finally, the 3<sup>rd</sup> Reading in the House of Lords took precisely two minutes.<sup>15</sup>

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<sup>10</sup> See, for example, D Pannick, ‘The Upskirting Bill Must Be Scrutinised Properly to Make It Effective.’ *The Times* (London, 5 July 2018).

<sup>11</sup> PBC (Bill 235) 2017-2019, col 39. 12 July 2018.

<sup>12</sup> PBC (Bill 235) 2017-2019, col 45. 12 July 2018.

<sup>13</sup> HL Deb 23 October 2018, vol 793, col 785.

<sup>14</sup> HL Deb 26 November 2018, vol 794, cols 487-500.

<sup>15</sup> HL Deb 15 January 2019, vol 795, col 132.

The result is that there is the appearance of ‘legislation for legislation’s sake’ rather than a serious attempt to solve a problem that requires a solution. The government referred to the fact that it was tasking the Law Commission to look at a number of issues,<sup>16</sup> but that is not particularly convincing. If they believe that there is a need for the Law Commission to look at this issue, why pass a law in advance of this referral? The government argue that for certain matters, most notably the dissemination of footage, there are existing offences that can be used pending the review.<sup>17</sup> The same argument applies to the substantive offence. Outraging public decency existed as a fail-safe. It seems disingenuous to state that existing offences justify a pause for some matters but not for others. It would have been better to deal with all matters at the same time.

The Law Commission are tackling a number of projects at present and it can be seriously questioned whether the referral is required, because the behaviour is readily understood.<sup>18</sup> It should be seen as an abrogation of Parliament’s duty not to have improved the Bill. That said, the fact that Parliament managed to pass defective legislation both in 2003<sup>19</sup> and 2019,<sup>20</sup> suggests that perhaps referring the matter to the Law Commission may, at least, mean that appropriate draft legislation will be identified. However, it will be sometime before it reports and a general election is likely before any legislation can be introduced. Whether the next government will have time to pass the legislation, amongst the pressing business that Brexit will no doubt cause, is more open to question, and this flawed legislation is likely to be found on the statute book for years to come.

## A: The wrongs of upskirting

In order to understand whether the VOA 2019 has introduced protection into the law, it is necessary to consider what the wrongs of upskirting are. Whilst there is little doubt that many would consider upskirting behaviour to be wrong, it can be difficult to fully articulate what the wrong is.

A useful starting point could be the fact that it is a form of non-consensual behaviour. It has been noted that other forms of non-consensual photography can lead a woman to feel unsafe and suffering from emotional distress.<sup>21</sup> There is little reason to believe that the same would not be true of upskirting (as evident from the Gina Martin case). Is that enough by itself? There are numerous instances where mere emotional distress has not been considered sufficient to justify the criminal law.<sup>22</sup> So why should this be different? That said, an analogy could be drawn to so-called ‘revenge pornography’ where the emotional impact on women was considered to be a key factor.<sup>23</sup> However, it was not the primary factor: it was also that private footage was being disseminated to others, and invariably being placed onto the internet where it was being seen by many. It was, at its most basic, a form of harassment, but also undoubtedly a (sexual) harm. As

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<sup>16</sup> PBC (Bill 235) 2017-2019, col 50. 12 July 2018.

<sup>17</sup> HL Deb 23 October 2018, vol 793, col 800.

<sup>18</sup> Indeed, the Law Commission has recently published a scoping report on offensive and abusive communications which indicates many of the failings, and thus a full review is unlikely to be either necessary or productive (see Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com 381, 2018).

<sup>19</sup> *Sexual Offences Act 2003*, s.67.

<sup>20</sup> *Voyeurism (Offences) Act 2019*.

<sup>21</sup> S Bates, ‘Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors’ (2017) 12 *Feminist Criminology* 22; A Flynn, N Henry and A Powell, ‘More than Revenge: Addressing the Harms of Revenge Pornography’ (Monash University 2016) 5.

<sup>22</sup> For example, see the position in respect of non-fatal offences: AP Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (6th edn, Hart Publishing 2016) 443.

<sup>23</sup> See the Department of Justice Press Release ‘New law to tackle revenge porn’ (<https://www.gov.uk/government/news/new-law-to-tackle-revenge-porn>).

will be seen, the VOA 2019 does not criminalise the dissemination of the footage, so can the same justification be applied?

Lack of consent has been taken further, with it being suggested that ‘turning individuals into objects of pornography without their consent’ is worthy of criminalisation.<sup>24</sup> Whilst this may be true, it does not necessarily assist us in understanding why the VOA 2019 should act in respect of upskirting as objectifying a person without consent is not ordinarily a criminal offence. For example, if X draws a picture that portrays Y in a sexualised way, this would not ordinarily constitute a criminal offence.<sup>25</sup> Depending on what it features it might if it were to be distributed,<sup>26</sup> but the initial production would not. Perhaps more notably, the so-called ‘revenge pornography law’ does not apply where the footage is not real, i.e. where it has been adapted to make it look like a real person is posing in a pornographic way.<sup>27</sup> Thus, whilst the object of Citron and Franks to criminalise non-consensual productions is a worthy one, it cannot be readily seen as a justification for criminalising upskirting without also criminalising the pornographic objectification of women without their consent.

During the Parliamentary process, there was reference to ‘privacy’ as justifying the criminalisation of upskirting.<sup>28</sup> However, privacy rarely forms the basis of criminal liability, with it generally being considered a matter for the civil law. That said, that depends on how privacy is constructed. Henkin believes that the term ‘privacy’ is a misnomer and instead, one should refer to the private rights of an individual.<sup>29</sup> Ortiz agrees. Privacy, he argues, is not limited to concepts of secrecy, but should instead be considered to be the right to pursue one’s life without interference.<sup>30</sup> To that extent, privacy can be seen as a derivative of autonomy.

Feinberg argues that autonomy is linked to sovereignty. Embracing concepts from international law, he argues that autonomy means that a person is sovereign over their own body, and therefore they alone control who has ‘access’ to it.<sup>31</sup> Feinberg specifically considers the issue of voyeurism and suggests that criminalisation can be justified due to the disgust, shame and psychological problems caused to the victim when they discover the observation.<sup>32</sup> However, Nathan criticises this approach and notes that the suggestion appears to be that ‘criminal sanctions against the voyeurs [be] based on the depth of the offense...expressed by the women’.<sup>33</sup> This is a fair criticism. Feinberg is suggesting it is the consequences of voyeurism that is problematic, but, in reality, it is the conduct.

For that reason, it has been suggested that discussing ‘dignity’ may be more appropriate in this context. Nathan suggests that voyeurism is an affront to the inherent interests that a person possesses.<sup>34</sup> In other words, we all have the right to be respected for our identity as an individual. This is undoubtedly analogous to autonomy, in that it is premised on the basis that we should

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<sup>24</sup> DK Citron and MA Franks, ‘Criminalizing Revenge Porn’ (2014) 49 Wake Forest L. Rev. 345, 346.

<sup>25</sup> See the recent discussion on so-called ‘deepfake’ pornography: for example, Douglas Harris, ‘Deepfakes: False Pornography Is Here and the Law Cannot Protect You’ (2019) 17 Duke Law & Technology Review 99.

<sup>26</sup> Under either the *Obscene Publications Act 1959* but more probably, under *Communications Act 2003*, s.127.

<sup>27</sup> *Criminal Justice and Immigration Act 2015*, s.35(5) and see AA Gillespie, “‘Trust Me, It’s Only for Me’”: “Revenge Pornography” and the Criminal Law’ [2015] Crim LR 866, 870.

<sup>28</sup> PBC (Bill 235) 2017-2019, vol 47, 12 July 2018.

<sup>29</sup> L Henkin, ‘Privacy and Autonomy’ (1974) 74 Columbia Law Review 1410, 1419.

<sup>30</sup> D Ortiz, ‘Privacy, Autonomy, and Consent’ (1989) 12 Harvard Journal of Law and Public Policy 91.

<sup>31</sup> J Feinberg, ‘Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?’ (1983) 48 Notre Dame Law Review 445, 453.

<sup>32</sup> J Feinberg, *Offense to Others: The Moral Limits of the Criminal Law* (Oxford University Press 1985) 60.

<sup>33</sup> DO Nathan, ‘Just Looking: Voyeurism and the Grounds of Privacy’ (1990) 4 Public Affairs Quarterly 365, 366.

<sup>34</sup> Nathan (n 33) 380.

control our body and interests. Clapham agrees and notes that dignity is about respecting individual choice, self-fulfilment and self-realization.<sup>35</sup> This has been accepted by the Canadian courts who have, for example, condemned voyeurism as violating ‘the essential human dignity of the [victims]. [It] shows a complete disregard for the people’s autonomy, or their right to determine which, if any, of their most intimately private actions will be seen’.<sup>36</sup> Whilst referring to the covert observation of someone engaging in sexual activity, the quote can be easily extrapolated to upskirting. A person has the right to determine who, if anyone, has the right to see the most intimate areas of their body. Certainly, this is echoed by McGlynn and Rackley who have suggested that dignity is the key protected interest for non-consensual images.<sup>37</sup> They note that dignity requires that an individual is respected as an equal member of society. The upskirt photograph interferes with this as it undermines the respect that should be accorded to the individual. The perpetrator has decided that his decision to take a photograph is more important than the victim’s right not to be photographed.

Importantly, McGlynn and Rackley argue that dignity is not based on harm. Whilst they accept that physical, psychological or financial harm can be caused by non-consensual images, they do not believe that they should be a precursor to culpability.<sup>38</sup> Thus, upskirting can be considered a conduct crime that is wrong regardless of the consequences that this has for the individual victim. That must be correct. It has also received judicial support, albeit in limited form. In *Söderman v Sweden*<sup>39</sup> the claimant was 14-years-old when she alleged that her stepfather secretly recorded her undressing for a shower. Under the law of that time, this could constitute neither child pornography nor sexual molestation. The ECtHR held that the absence of a relevant criminal offence to protect children in such considerations breached Article 8, ECHR.<sup>40</sup> The court held that the covert recording ‘violated the applicant’s integrity’ and this can only be a reference to the inherent dignity a person has. Therefore, it is the act that is relevant, and the presence or otherwise of harm is not relevant to liability (although it could be relevant to sentencing).

A final observation should be made about the wrongs of upskirting. It must be recognised as a gendered crime. Whilst it is accepted that the VOA 2019 can apply to men too (something mentioned in Parliament<sup>41</sup>), most cases are committed by men against women.<sup>42</sup> As with voyeurism, some argue that upskirting is a way to debase women,<sup>43</sup> although that is not true of all perpetrators. McGlynn et al adapted the pioneering work of Kelly (who established a continuum of sexual violence<sup>44</sup>) to produce a continuum of ‘image-based sexual violence’.<sup>45</sup> Upskirting fits easily within this continuum. Whilst the continuum recognises the breaches of dignity and autonomy outlined above, the fact that it is a gendered form of violence must be considered a wrong by itself.

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<sup>35</sup> A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 545.

<sup>36</sup> *R v Berry* 2014 BCSC 284 at [63] per Holmes J.

<sup>37</sup> C McGlynn and E Rackley, ‘Image-Based Sexual Abuse’ (2017) 37 OJLS 534, 546.

<sup>38</sup> McGlynn and Rackley (n 37) 546.

<sup>39</sup> Application 5786/08. Judgment of 12 November 2013.

<sup>40</sup> Arguably applying the principle in *X and Y v Netherlands* (1986) 8 EHRR 235.

<sup>41</sup> Lord Hope referred to people looking up kilts worn by men: HL Deb 26 November 2018, vol 794, col 488.

<sup>42</sup> R Krueger and M Kaplan, ‘Noncontact Paraphilic Sexual Offences’ in A Phoenix and H Hoberman (eds), *Sexual Offending: Predisposing Antecedents, Assessments and Management* (Springer 2016).

<sup>43</sup> I Rosen, ‘Exhibitionism, Scopophilia and Voyeurism’, *Sexual Deviation* (3rd edn, Oxford University Press 1996) 175.

<sup>44</sup> L Kelly, ‘The Continuum of Sexual Violence’, *Women, violence and social control* (Springer 1987).

<sup>45</sup> C McGlynn, E Rackley and R Houghton, ‘Beyond “Revenge Porn”: The Continuum of Image-Based Sexual Abuse’ (2017) 25 Feminist Legal Studies 25.

## A: The Act's provisions

The VOA 2019 is quite a simple piece of legislation. It is only two sections long, the second of which is the extent, commencement and short title. Section 1 inserts two new offences into the *Sexual Offences Act 2003* by creating a new section, s.67A. Described in the marginal note as 'Voyeurism: additional offences', the offences can be described as 'looking' and 'recording'.

The first offence is contained in the new s.67A(1):

A person ("A") commits an offence if A-

- (a) he operates equipment beneath the clothing of another person (B),
- (b) A does so with the intention of enabling A or another person (C) for a purpose mentioned in subsection (3), to observe-
  - (i) B's genitals or buttocks (whether exposed or covered with underwear), or
  - (ii) the underwear covering B's genitals or buttocks,in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and
- (c) A does so-
  - (i) without B's consent, and
  - (ii) without reasonably believing that B consents.

The second offence relates to recording:

A person (A) commits an offence if-

- (a) he records an image beneath the clothing of another person (B),
- (b) the image is of-
  - (i) B's genitals or buttocks (whether exposed or covered with underwear), or
  - (ii) the underwear covering B's genitals or buttocks,in circumstances where the genitals, buttocks or underwear would not otherwise be visible.
- (c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and
- (d) A does so-
  - (i) without B's consent, and
  - (ii) without reasonably believing that B consents.

The phrasing of these offences are very similar to the Scottish offences.<sup>46</sup> This is understandable because campaigners for the law have looked north of the border to demonstrate proof that the behaviour can be readily criminalised.

## B: Operating equipment

The person must operate equipment beneath B's clothing. 'Equipment' is not defined but nor does it need to be. It would easily cover, for example, mobile telephones or video cameras, including covert cameras.

An important addition (and one that is also introduced to the existing offence of voyeurism) is:

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<sup>46</sup> *Criminal Justice and Licensing (Scotland) Act 2010*, s.43(2)(a).

For the purposes of sections 67 and 67A, operating equipment includes enabling or securing its activation by another person without that person's knowledge.<sup>47</sup>

A primary driver behind this amendment is undoubtedly the understanding that it is possible to activate cameras on, for example, laptops and tablets remotely.<sup>48</sup> An example of this can be seen from the New Zealand offence of *Police v Thomas*<sup>49</sup> where the defendant installed a program that allowed him to access the camera built into V's laptop at will. Arguably such conduct would be covered by 'operating equipment' as the camera is undoubtedly equipment and D has switched it on, but the amendment puts it beyond doubt. It also would cover situations where a third party has installed the software or switches on the camera for his behalf.

Whilst more relevant to voyeurism than upskirting, the amendment is to be welcomed. Without this amendment, conduct akin to *Thomas* was probably best prosecuted as a computer crime rather than a sexual offence.<sup>50</sup> This amendment sends an important signal that such conduct is an offence against the person and not an offence against a computer.

Requiring a person to operate equipment does mean that the focus is not on the behaviour – looking up a woman's skirt – but is on technology. Thus, where no equipment is used, the offence cannot be committed. Perhaps this is thought to be less problematic because the victim is likely to be aware that a person does this, and can take action to prevent it. However, it does raise an interesting question about what should happen to a person who does such things?

D and V are at an office party in a local pub. V is sitting on a stool and D suddenly lifts up V's skirt and peers up it, causing much laughter but also severe embarrassment to V.

In these circumstances, D could be guilty of a battery as it is common ground that the touching of the clothes can also constitute the offence of battery.<sup>51</sup> Could it constitute sexual assault?<sup>52</sup> This is, in essence, a battery that is sexual. Section 78 states, '...touching...is sexual if a reasonable person would consider that-

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual'.

It is likely that this would fall within paragraph (b) because it is not inherently sexual. Thus, it would be the 'circumstances' that would be relevant. It is quite possible that D would argue that his purpose was not sexual ('it was a joke') and in that context a jury may agree, but the dignity of the victim has undoubtedly been compromised.

What about those situations where there is no touching?

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<sup>47</sup> *Sexual Offences Act 2003*, s.68(1A) inserted by *Voyeurism (Offences) Act 2018*, s.1(3).

<sup>48</sup> L. Johnson, 'Can People Really Spy on Me through My Laptop's Camera?' (*Digital Spy*, 30 December 2016) <<http://www.digitalspy.com/tech/a795242/can-people-spy-on-me-through-my-laptop-or-smartphone-camera/>> accessed 20 January 2019.

<sup>49</sup> [2016] NZHC 2174.

<sup>50</sup> It would undoubtedly constitute an offence under *Computer Misuse Act 1990*, s.1 (unauthorised access).

<sup>51</sup> See, for example, *R v Thomas* [1985] Crim LR 677.

<sup>52</sup> *Sexual Offences Act 2003*, s.3.



V is sitting on a fence. Out of nowhere, D appears and lies on the floor, peering up V's skirt. V gets off the fence and chases D away.

Is there any liability here? It could not be voyeurism as it is in a public place. It is possible that it could constitute the common-law offence of outraging public decency or even a public order offence. However, that would depend on whether it was seen, or capable of being seen, by at least two people.<sup>53</sup> What of the position where it was in a semi-private setting? For example, instead of sitting on a fence, V is sitting on a stool in an office when the same thing happens? It would be difficult to think of a criminal offence that would be committed under such circumstances (including an offence under the VOA 2019), although employment law may apply. It is difficult to see how that can be said to protect the dignity of the female victim.

What about the use of mirrors? Is a mirror 'equipment'? In *R v Tinsley*<sup>54</sup> the defendant placed a mirror on the ground so that he could look up the skirts of women from his car. Deliberately placing mirrors in a selected location could probably be considered to be the 'operation' of equipment although that does require interpretation rather than it being the natural meaning of the words. What of the situation where D discovers that a mirror or a piece of glass (eg window) that he has not placed there allows him to see up a woman's skirt? He is not operating the glass or mirror and thus even if he moves into a particular position in order to do so, there would presumably be no liability under this offence? Is that problematic? Potentially. Let us take two examples:

D sits in a café and places a mirror underneath an adjoining table. He can see up the skirt of V, who sits at the next table.

D sits in a café and realises that if he moves his chair ten degrees, he can see up the skirt of V, who is sitting at the next table.

It is not immediately clear that D's actions in either-case are any different morally. V's response in both instances is also likely to be the same. Her personal dignity has undoubtedly been violated in both situations, but only in one example would there be liability. This could be avoided if the offence had been framed as looking instead of operating equipment. This is perhaps arguably even more true if one considers the fence/stool scenario above where the victim is likely to be outraged and yet identifying an appropriate criminal offence could be difficult.

## B: Recording

The second offence is broadly the same as the 'observing' offence save that instead of it requiring D to operate equipment, he must record an image. 'Recording' is not defined but it does not need to be as it is a word of ordinary usage. Clearly, live-streaming up someone's skirt would not constitute recording but this is not a problem because it would constitute 'observing' and thus within s.67A(1). Indeed, the terminology of that offence specifically allows for person A to be operating the streaming equipment but it being person C that is looking at it.

What is the liability of C in these circumstances? It will be remembered that A is the one operating the camera but C is the one who is looking at the footage. Can it be said that it is only A who is interfering with the autonomy of B? It would be difficult to argue that this is the case, particularly where C knows that B does not consent to the footage. Let us take an example:

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<sup>53</sup> Discussed in *R v Hamilton* (n 3).

<sup>54</sup> [2003] EWCA Crim 3505.

A uses his mobile telephone to live-stream pictures of B's genitals by pointing it up her skirt without her knowledge or permission. C is receiving this live-stream after A contacted him to explain what he was doing.

In such circumstances, it can be said that C is complicit in the undermining of the autonomy of the individual. Whilst A is the one who is directly interfering with B's autonomy, C is clearly sharing in that interference. B is, at the very least, likely to suffer distress from knowing of C's role in the process. The ordinary principles of complicity should, in the example above, make C culpable. It is likely that, at the very least, C will be considered to have abetted A.<sup>55</sup> Even if A started the filming before C knew that he was going to do so, C could still be culpable for encouraging the continuation of the offence.<sup>56</sup>

## B: Clothing

The offences requires B to observe or record "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". The inclusion of 'underwear' has caused difficulties in respect of the voyeurism offence.<sup>57</sup>

In *Police Service for Northern Ireland v MacRitchie*<sup>58</sup> a defendant was acquitted by a magistrate for an offence of voyeurism. He had attended a swimming pool where the changing rooms were mixed but where each person changed in an individual cubicle. He used his mobile telephone to record a woman in the next cubicle. In fact, the footage simply showed her in a bikini. Section 68, which defines terms within s.67, refers to underwear and therefore the question arose as to whether 'underwear' included swimwear. Kerr LCJ stated:

In its ordinary connotation underwear means clothing worn next to the skin under outer clothes. Swimwear is not in its normal function underwear. But it seems to us clear that some items of swimwear could be worn as underwear. A woman may choose to wear, for instance, bikini bottoms as underpants. Whilst wearing them for this purpose we are satisfied that if a woman were to be filmed in circumstances where she was entitled to expect privacy, this would constitute an offence under section 67.<sup>59</sup>

However, his Lordship goes on to state, '[w]e do not consider that the meaning of underwear can be extended to cover swimwear worn on any occasion'.<sup>60</sup> In this case, Kerr LCJ held that the complainant had been wearing the bikini as swimwear and not as underwear, and therefore the (substantive) offence was not committed.<sup>61</sup>

The wording of s.68 creates an oddity. Let us take two examples:

V is on holiday. She is preparing to go to the beach and, for convenience, she wears her skirt over her bikini, intending to quickly discard the skirt when she gets to the beach, so

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<sup>55</sup> *Accessories and Abettors Act 1861*, s.8. 'Abet' means to incite, instigate or encourage (see *AG Reference (No 1 of 1975)* [1975] QB 773.

<sup>56</sup> *Serious Crime Act 2007*, s.44 when read in conjunction with s.47(8)(b).

<sup>57</sup> *Sexual Offences Act 2003*, s.67.

<sup>58</sup> [2008] NICA 26.

<sup>59</sup> *Ibid.*, at [14].

<sup>60</sup> *Ibid.*, at [16].

<sup>61</sup> However, the Court accepted that the defendant was guilty of attempted voyeurism ([17] et seq).

she can swim. D is cleaning the holiday home where V is staying and takes a picture of her through a crack in the door when she is bending down packing her bag.

The same facts but this time V intends to walk to the local town. Because she is doing laundry, she has no spare underwear and so wears her bikini bottoms as it is convenient.

According to *MacRitchie*, there is culpability in the second example but not the first. In the first, the bikini is being used as swimwear but in the second it is being used as underwear. In both examples, D will see the same thing, and indeed his actions are the same. The only difference between the two examples is V's intention (the first to go swimming and the second is to go for a walk). It is no defence to say "ah, but she would have been happy to be observed in her bikini at the beach" because she is not there. She must surely have a reasonable expectation of privacy in her holiday home and yet because she is wearing a bikini as swimwear, the offence of voyeurism is not made out.

The absurdity then increases if it is remembered that filming up a woman's skirt in public can constitute the offence of outraging public decency. That offence does not (quite rightly) care what the woman is wearing: it acknowledges that it is inappropriate behaviour. However, in the first example above, if D were to take the photograph of V *en route* to the beach, rather than in her holiday house, D would be culpable. But by taking her photograph at a time when she would invariably have thought she had greater privacy, no offence is committed.<sup>62</sup>

How would this apply to s.67A? Presumably, one way to avoid such decisions would be to rely on the final wording, 'in circumstances where the genitals, buttocks or underwear would not otherwise be visible'. In both the examples above, the bikini would not be visible save for the fact that D took a picture up her skirt. Thus, the tortured logic of *MacRitchie* could perhaps be avoided. However, it still begs the question of whether swimwear is underwear? Perhaps it was thought that people may wear shorts underneath a skirt along with their underwear. That is true, but does that mean it is ok for a person to take a picture of V's shorts up her skirt without her permission? Surely this should be a conduct crime rather than a result crime? It should not matter what a person is wearing, the issue is that a person should not assume the right to look up the skirt of a woman without her consent. Doing so compromises the dignity of the woman and therefore should what she is wearing be relevant?

## B: Consent

As noted immediately above, the new offences require an absence of consent, which recognises that some forms of this behaviour could be consensual (for example, in the context of modelling). A must not reasonably believe that B consented. This echoes the general push away from honest belief to reasonable belief in the context of sexual offences. This could be important in certain contexts. For example, the actress Emma Watson recalled that at the time of her 18<sup>th</sup> birthday, paparazzi photographers would lie in the gutter to try and take a picture up her skirt.<sup>63</sup> It is quite possible that a photographer could claim an honest belief in consent by arguing that celebrities often tip-off members of the press where they are going to be (although a number do not). However, it is likely to be more difficult to claim a *reasonable* belief in consent save where they know that the celebrity did so.

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<sup>62</sup> If the defendant was not aware of what V was wearing then it could constitute the offence of attempt (*Criminal Attempts Act 1981*, s.1) but if he is aware that she is wearing swimwear then it could not.

<sup>63</sup> O Blair, 'Emma Watson Recalls Photographers Lying down on the Floor to Take Pictures up Her Skirt on Her 18th Birthday' *The Independent* (10 March 2016) <<https://www.independent.co.uk/news/people/emma-watson-photographers-lying-down-take-pictures-up-her-skirt-on-18th-birthday-hershe-feminism-a6922501.html>> accessed 18 June 2018.

Little more needs to be said about consent, save that it is submitted that this should be the focus of the offence. Inherent dignity requires that the person's autonomy is respected. Thus, it is the absence of consent that constitutes the wrong. A man should not assume the right to look up a woman's skirt as that places their desire above the right of the woman to her bodily integrity. That is not appropriate, and consent ensures that bodily integrity is safeguarded.

### B: Ulterior purpose

As has been noted already, there was little debate during the passage of the Bill, but when there was the opportunity for debate, much of the attention of Parliamentarians was devoted to the *mens rea* of the offence. For both offences, the relevant *actus reus* must be accompanied by an ulterior intent. This is defined under s.67A(3) as:

- (a) obtaining sexual gratification (whether for A or C);
- (b) humiliating, alarming or distressing B.

Paragraph (a) is uncontroversial as it simply replicates the wording under s.67. However, the more interesting provision is paragraph (b), which widens the offence beyond the scope of s.67 to include non-sexual purposes. This expanded purpose is also to be found in the Scottish offences,<sup>64</sup> and is seen as a response to criticism that the law relating to non-consensual pornography is often too limited. Thus, for example, the so-called 'revenge pornography' laws have been criticised for focusing solely on distress.<sup>65</sup> However, this extension raises a number of questions about parity in offending, the extent that the offence has been widened, and also raises an issue about offender management.

### C: Parity of offending

The original voyeurism offence under s.67 only applies where the defendant acts for the purpose of obtaining sexual gratification for himself<sup>66</sup> or for another.<sup>67</sup> The wider purposes under s.67A could lead to the situation whereby a woman's integrity is protected only in respect of certain acts and not others. Let us take two examples:

V is taking a shower. Unknown to her, D has installed a camera that allows him to broadcast footage of it to a monitor that he has placed in a public place. All of V's neighbours see the footage. D acted to cause V distress after she annoyed him by parking her car near his house.

D and V are at a party with lots of their mutual friends. Unbeknown to V, D has placed a camera in a nearby hedge that allows him to film up V's skirt, showing that V is not wearing underwear and displaying her genitalia. This footage is beamed to everyone at the party. D acted this way to humiliate V after she broke up with him.

The offence of voyeurism would, at first sight, cover the first example. He is watching (and, indeed, operating equipment) that observes V doing a private act. There can be no doubt that taking a shower is a private act for the purposes of s.68 in that it will inevitably show her exposed genitalia,

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<sup>64</sup> *Sexual Offences (Scotland) Act 2009*, ss.9(4A), (4B).

<sup>65</sup> Gillespie, "Upskirts" and "down-Blouses": Voyeurism and the Law' (n 2) 000; McGlynn and Rackley (n 37) 000.

<sup>66</sup> *Sexual Offences Act 2003*, ss.67(1)(a), 67(2)(a).

<sup>67</sup> *Sexual Offences Act 2003*, s.67(3)(b).

buttocks and breasts. However, s.67 only applies where D acts for the purpose of sexual gratification. The desire to humiliate V is not sufficient for the offence. By acting in this way, it is not immediately clear what offence would be committed. It is unlikely a shower-scene would be considered obscene for the purposes of the *Obscene Publications Act 1959*. Whilst the transmission of the camera footage is likely to be considered an indecent ‘electronic communication’ for the purposes of the *Malicious Communications Act 1988*,<sup>68</sup> the communication must be for the purposes of causing anxiety or distress to the *recipient*. It is not clear that the people watching the footage will be the ones who suffer anxiety or distress. V will, but she is not a recipient. As an indecent communication it is likely to constitute a communication offence,<sup>69</sup> but it cannot be said that adequately represents the behaviour of D. Certainly, it is not considered a sexual offence and a convicted offender is not subject to the same ancillary orders.

The VOA 2019 will bring the second example set out above within the criminal law. As the intention to humiliate is sufficient *mens rea* under s.67A, the defendant will be guilty of an offence. What of the defendant in the first example? As s.67 is left unchanged, he will escape liability. Clearly, in the first example, D has not acted with the intention of obtaining sexual gratification for himself or another, and so the *mens rea* is not satisfied. Neither can s.67A apply because D has not operated equipment that observes or records V beneath her clothing: she is naked. The fact that D cannot be convicted under either offence seems difficult to justify, as arguably the dignity of V has been undermined more significantly in the first example than the second. The extension of *mens rea* under s.67A is to be welcomed, but by not extending this to s.67, Parliament has failed women who have their sexual autonomy impacted for non-sexual purposes other than through upskirting.

#### C: Jokes

During the passage of the legislation, concern was raised in Parliament that the ulterior intent did not go far enough. During the committee stage within the Commons, the police stated they were confident that most cases of upskirting would be caught by this *mens rea*.<sup>70</sup> Many Parliamentarians were not convinced, and it is not clear that the confidence of the police is well-placed. For example, if one were to return to the case of Gina Martin – which, it will be remembered, was one of the key drivers behind the Act – it is not obvious that her case comes within the provisions. Whilst never formally interviewed, and therefore subject to some conjecture, it would appear from the circumstances known that it is unlikely the man took the pictures for the purposes of sexual gratification. Neither does it seem obvious that his intention was to humiliate, alarm or distress Ms Martin. Gina Martin reports that she inadvertently saw the footage, suggesting that the intention was more one of misplaced humour. It is this subject that most concerned Parliamentarians, with them raising concern that humour is not caught by the Act.<sup>71</sup>

The government argued that this concern was misplaced:

If people take a picture that they think is funny, but the obvious reason that it is funny is that they are humiliating someone or laughing at the humiliation, it does not really matter whether the victim knows about that humiliation. The person is taking the picture because it is humiliating and people laugh at the picture because it is humiliating.<sup>72</sup>

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<sup>68</sup> *Malicious Communications Act 1988*, s.1(1)(b).

<sup>69</sup> *Communications Act 2003*, s.127.

<sup>70</sup> PBC (Bill 235) 2017-2019, col 14. 12 July 2018.

<sup>71</sup> HC Deb. 5 September 2018, vol 646, col 272.

<sup>72</sup> PBC (Bill 235) 2017-2019, col 41. 12 July 2018. Lucy Frazer MP.

However, it must surely depend on how the words are constructed. The requirement is that he acts for the purposes of ‘humiliating, alarming or distressing B’. The syntax of this suggests that the humiliation, alarm or distress must be directed towards B. Certainly it would not be possible to suggest that B could be alarmed or distressed if they did not see the footage, nor were they ever intended to see the footage. What about humiliation? Can a person be humiliated if they are not aware of the footage? Similarly, if someone never intends a person to see the recording: can it be said that they intend to humiliate *that person*?

Grammatically it would appear the answer is ‘no’, and this perhaps explains why Parliamentarians were concerned about the way that the *mens rea* was articulated. However, grammar is one thing, the meaning of a word is another. The *Oxford English Dictionary* defines ‘humiliate’ as ‘to lower or depress the dignity or self-respect of [a person]’.<sup>73</sup> This is interesting as it specifically echoes the wrongs that were identified above. If this definition of ‘humiliation’ were to be adopted, then the *act* of taking a photograph up the skirt of a woman without her consent would be an attack on her dignity or self-respect. Therefore, a person knowingly doing so would be acting with the intention to do so.

If the courts were to adopt this definition then the *mens rea* would include all acts of non-consensual upskirting, including where they were done as ‘a joke’. Whilst this cannot be guaranteed, the courts do, at least, usually adopt the literal approach to statutory construction, including using the dictionary-definition where appropriate.<sup>74</sup> Whether the courts will consider it necessary to have recourse to the dictionary is uncertain. Again, this shows the difficulty that undue haste can pose in the drafting of legislation. The uncertainty could have been resolved easily by, for example, including recklessness as a form of *mens rea*. Whilst a person should act intentionally when operating or recording the equipment, it would have been acceptable to say that D must intend to humiliate, alarm or distress V, or be reckless as to whether that would happen. This would have ensured that jokes etc. were clearly within the remit of the offence. It may have been thought that recklessness would expose too many people to the risk of conviction, but the protection against that is that the observation or recording must be done without consent.

### C: Offender management

The expansion of *mens rea* has led Parliament to consider the extent to which offenders should be managed according to their intent. Where the intent is to humiliate, alarm or distress then the matter is not considered a sexual offence for the purposes of being subject to the notification requirements.<sup>75</sup> This is in contrast to other offences where this distinction is not made. For example, a sexual assault does not require any sexual motivation, only that the touching is sexual.<sup>76</sup> Yet a person convicted of sexual assault is subject to the notification requirements subject to a sentencing threshold.<sup>77</sup> Let us take an example:

D walks up to V and puts his hand down her trousers and touches her vagina. D is not sexually attracted to V but does this to humiliate V in front of her friends.

This undoubtedly constitutes a sexual assault and could lead to a period of imprisonment. It does not, of course, follow that the VOA 2019 is wrong not to apply notification periods to all

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<sup>73</sup> Oxford English Dictionary Online Edition.

<sup>74</sup> J Bell and G Engle, *Cross. Statutory Interpretation*. (3rd edn, Butterworths 1995) 61–62.

<sup>75</sup> *Sexual Offences Act 2003*, Sch 3, para 34A.

<sup>76</sup> *Sexual Offences Act 2003*, s.3(1).

<sup>77</sup> *Sexual Offences Act 2003*, Sch 3, para 18.

offenders, it is perhaps more likely that the SOA 2003 regime is inappropriate where there is no sexual motivation, but it demonstrates further inconsistency in the law.

The fact that notification requirements only apply in limited circumstances also raises the question as to how this should be adjudicated. For example, D accepts that he filmed up the skirt of V but denies he did so for the purposes of sexual gratification. If the prosecution disagree, will it be necessary to hold a *Newton* hearing<sup>78</sup> to determine whether the notification requirements apply? The courts have traditionally said that the notification requirements are not a punishment and so are not a matter for the courts.<sup>79</sup> That being the case, a *Newton* hearing would seem inappropriate, but it is probably inevitable otherwise the necessity to ascertain whether D is subject to notification requirements cannot be adjudicated. However, even if this does happen, will the CPS consider a *Newton* hearing to be a valuable use of resources where they would otherwise secure a conviction? In these times of public spending constraints, the answer may well be ‘no’.

## A: A wasted opportunity?

The VOA 2019 can only be considered a wasted opportunity. There was a clear need to rationalise and improve the law in respect of both voyeurism and upskirting, and yet Parliament did neither. The failure of Parliament to pass sensible legislation means that the sexual autonomy and dignity of women remain unprotected, something that cannot be right. Throughout the preceding sections of this article, I have shown how the wording of the legislation is flawed. In this final section, I note what is missing, and how this contributes further to the conclusion that Parliament missed an opportunity presented to it to protect women.

## B: Female breast

Perhaps the first issue to note is the somewhat extraordinary situation where the offence applies only to upskirting. It does not protect the sexual dignity of a woman in other ways. Tabloids frequently exhibit so-called ‘nip-slip’ photographs, where the top of a dress slips or where the buttons of a shirt become undone, allowing a glimpse of the breast. The same types of footage can be seen in pornography sites, where people have used technology to take pictures of the breast.

It is unlikely that photographs of the female breast will be covered by this offence. The Act requires that a person ‘operates equipment beneath the clothing of another person’.<sup>80</sup> Clothes sit differently on a person depending on their stance (sitting, crouching, standing, moving) and therefore the person may not know, or ever intend, their breast to be exposed. Many of these photographs are only obtained through the use of a zoom lens. Thus, a person sitting near the person may not be able to see the breast but by using a zoom lens and potentially moving around to get a particular angle, a photographer could see the breast. However, in these instances the *equipment* is not operating beneath the clothing of the person. The equipment is outside of the clothing looking in.

Even if this obstacle could be overcome, and it is difficult to see how it could, the next difficulty is the definition of what must be seen. The Act is clear that the observation must be of the ‘genitals or buttocks’ of an individual. The female breast is not a genital. The *Oxford English Dictionary* defines ‘genitals’ as ‘the organs of reproduction, esp. those visible on the surface of the body (spec. the testicles and penis of the male and vulva of the female)’. Thus the female breast does not fall within the offence.

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<sup>78</sup> *R v Newton* (1983) 77 Cr App R 13.

<sup>79</sup> *R v Longworth* [2006] 1 WLR 313 and *R v Rawlinson* [2018] EWCA Crim 2825.

<sup>80</sup> *Sexual Offences Act 2003*, s.67A(1)(a).

Does this matter? Undoubtedly. Where someone is using equipment to see down the top of a woman to observe or record her breasts, this is as much an affront to her dignity as operating equipment up her skirt. As with genitalia, many women will exercise a conscious choice as to who sees their naked breasts. Whilst not a sexual organ, the female breast remains an intimate part of her body, and she alone should control who sees her breasts. It is notable that the original offence of voyeurism included the observation of the female breast,<sup>81</sup> and it is not clear why the VOA 2019 did not do likewise.

The consequence of this can be seen from two examples:

D and V are sat in D's house. Unbeknown to V, D has positioned a camera directly above V's seat that allows him to see down V's top, seeing her breasts.

D and V are sat in a café. Unbeknown to V, D has a 'button camera' that means when he leans forward, he can see down V's top, showing her breasts.

In both examples D can see V's breasts. Yet only in the first example would D be guilty of the offence of voyeurism. In the second example, it is possible that D will commit the offence of outraging public decency, but what if they were in an office environment instead? In such circumstances, that offence may not apply.

It would have been simple to include observations of the female breast in this legislation, and it is regrettable that Parliament did not do so.

## B: Dissemination of the footage

The main issue that provoked discussion in Parliament was whether the offence should include the dissemination of the footage recorded. Ultimately Parliament did not press this, and acceded to the suggestion of the government that the matter should be passed to the Law Commission.<sup>82</sup>

In fairness to the government, the fact that the dissemination of footage is not ostensibly criminalised is not restricted to these offences. The original offence of voyeurism similarly did not include any provision relating to the dissemination of footage. To that extent, it can be said that the VOA 2019 is at least consistent. However, does it really require a referral to the Law Commission for what is, in essence, a very simple issue?

Leaving aside the distribution of pornography,<sup>83</sup> the only real dissemination offence in respect of adults,<sup>84</sup> is the offence that was introduced to tackle so-called 'revenge pornography'. The base offence is:

It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made-

- (a) without the consent of an individual who appears in the photograph or film, and

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<sup>81</sup> *Sexual Offences Act 2003*, s.68(1).

<sup>82</sup> HL Deb. 26 November 2018, vol 794, cols 499-500.

<sup>83</sup> Criminalised under the *Obscene Publications Act 1959*.

<sup>84</sup> Dissemination of indecent photographs of children is an offence under the *Protection of Children Act 1978*.



- (b) with the intention of causing that individual distress.<sup>85</sup>

The simplest way of criminalising the distribution of voyeuristic footage would be to redefine ‘private sexual photograph or film’. Currently ‘private’ is defined as ‘something that is not of a kind ordinarily seen in public’,<sup>86</sup> and an image is sexual if:

- (a) it shows all or part of an individual’s exposed genitals or pubic area,  
(b) it shows something that a reasonable person would consider to be sexual because of its nature, or  
(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.<sup>87</sup>

Paragraph (a) is likely to cover some footage recorded by conduct committed under s.67 (voyeurism) as that offence applies where a person observes or records the person’s genitals.<sup>88</sup> That said, it would not include all forms of voyeurism, including where the genital area is covered by underwear or where it is the female breast since that is not a genital. The Law Commission noted that in *CPS v Marquis*<sup>89</sup> a person was prosecuted for disclosing to another a picture of a female’s breasts without her consent.<sup>90</sup> However, the defendant pleaded guilty and so the issue was never tested. A literal reading of s.68 suggests that the defendant in *Marquis* was wrong to plead guilty unless the pictures that were distributed included more than the exposed female breast, as dictionaries, both ordinary and medical, are clear that the breast is not a genital.

This section could have been amended to include the product of conduct under s.67 or s.67A. However, doing so would have been unwelcome because the offence under s.33 is as flawed as the VOA 2019. There have been a number of criticisms of the Act, but most centre on the fact that many images are excluded from the definition,<sup>91</sup> and the ulterior intent under s.33 is highly restrictive. Indeed, the latter is the primary reason why extending s.33 would not be appropriate. It would be somewhat odd if a person recording the image can be prosecuted for acting out of a desire to humiliate the victim or for the purposes of sexual gratification, but if he then distributed that footage, he would not be guilty as there was no intent to cause distress.

Clearly, therefore, an alternative approach is required. In both the House of Commons and the House of Lords, an attempt was made to introduce a third offence:

- (3A) It is an offence for a person (A) to disclose an image of another person (B) recorded during the commission of an offence under subsection (2) if the disclosure is made without B’s consent.<sup>92</sup>

The amendment was withdrawn in both House. As written, this offence could have caused difficulties. There is no need on the face of the offence that A knew that the footage was gathered in contravention of subsection (2) (the recording of an upskirt image). Whilst in many instances

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<sup>85</sup> *Criminal Justice and Courts Act 2015*, s.33(1).

<sup>86</sup> *Criminal Justice and Courts Act 2015*, s.35(1).

<sup>87</sup> *Criminal Justice and Courts Act 2015*, s.35(2).

<sup>88</sup> *Sexual Offences Act 2003*, s.68(1)(a).

<sup>89</sup> Unreported, 2015.

<sup>90</sup> Law Commission, ‘Abusive and Offensive Online Communications: A Scoping Report’ (HMSO 2018) Law Com No 381 254.

<sup>91</sup> Gillespie, “‘Trust Me, It’s Only for Me’: “Revenge Pornography” and the Criminal Law’ (n 27); McGlynn and Rackley (n 37).

<sup>92</sup> Tabled by Maria Miller MP and 16 other MPs in the House of Commons and by Lord Marks of Henley-on-Thames and Baroness Burt of Solihull in the House of Lords.

this will be clear, because it is likely to be the person who made the recording will be the person who disseminates it, the potential for unfairness could arise. Let us take an example:

D downloads a video of V from a pornography website. D does not know V. He sends it to X with a message saying 'look at the tight arse on this!'

Clearly, D has undertaken a morally objectionable act. He has objectified V, and communicated in a misogynistic way. However, is D's actions worthy of criminalisation? It could be argued 'yes', because the distribution of the footage contributes to the humiliation suffered by V. Certainly, in respect of other forms of non-consensual pornography, the knowledge that the material is being circulated and used for sexual gratification is cited as a continuing harm against the victim.<sup>93</sup> However, does D know that the footage was gathered in contravention of s.67A? Whilst it may seem unusual to think otherwise, the fact is that some upskirt photographs are done consensually, which is why the provision is included within s.67A in the first place. Also, it is known that material described on the internet as 'real', 'amateur' or 'voyeuristic' is not. As a genre of interest to people sexually, pornography sites will produce material to satisfy their customers desires. If there is not sufficient amateur footage, then 'recreating' footage is an obvious solution. Therefore, D may believe that he is disseminating professional or fake footage, not real pictures. In such circumstances it would seem unfair to criminalise D.

The rules of jurisdiction also raise interesting questions. Where the footage was recorded in country X but disseminated in England & Wales, should this still be a criminal offence? Arguably the answer should be 'yes' because the dissemination unquestionably impacts upon the inherent dignity of the victim. It should not matter that the victim is based abroad, because there are two breaches of dignity here. The first is the recording of the footage (which would not be actionable in the English courts), but the second is the dissemination which does take place within the jurisdiction. Section 67A would apply where D films up the skirt of a French tourist in London because the offence takes place within the territory of England & Wales. The same would be true of dissemination. Of course, the difficulty that this poses for a defendant is that it is even less likely that they would know the circumstances of how the footage was taken, so how will they know that it was gathered in circumstances akin to s.67A? Given that fake footage exists, does this not render prosecutions difficult? The final point about jurisdiction is that where a country does not criminalise the taking of upskirt pictures, we potentially create a situation whereby it becomes illegal to distribute a lawful photograph. Let us take an example:

A takes a photograph of V in country X, where it is not illegal to do so. A comes to England for a business trip. Whilst on the trip, he shows B the image, to which B replies, 'she's hot: send that to me'.

The taking of the photograph is not illegal, and neither was it illegal when A brought it into England, as s.67A does not criminalise the possession of such images.<sup>94</sup> A took the image and so he knows that it was obtained without her permission, as indeed, would be the distribution. Does it matter that A is being prosecuted for distributing an otherwise lawful photograph? Arguably not. If distribution was to be criminalised, then England & Wales would be sending a signal that it intends to uphold the inherent dignity of a woman. There are two breaches of dignity here. The

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<sup>93</sup> AA Gillespie, *Child Pornography: Law and Policy* (Routledge 2012) 38; S Ost, *Child Pornography and Sexual Grooming: Legal and Societal Responses* (Cambridge University Press 2009) 123.

<sup>94</sup> A theoretical argument could be made that its importation breaches *Customs and Excise Management Act 1979*, s.50(3) when read in conjunction with *Customs Consolidation Act 1876*, s.42 (importation of, inter alia, an indecent photograph) but that would very-much depend on what the picture shows. It is not clear that an upskirt image that showed, for example, the underwear of a woman would be classed as 'indecent'.

first is the taking of the photograph. The English courts can do nothing about this. However, the second infringement of dignity is the distribution and English law could do something about this, as it takes place within its territory. If English law is going to respond seriously to upskirting, then the distribution of material must be criminalised.

How could this be done? One possibility would have been to use an offence similar to this:

**67B Distribution of voyeuristic photographs**

- (1) It is an offence for a person (A) to disclose a photograph or film of another person (B) to a third person (C) where subsections (2) and (3) are satisfied.
- (2) This subsection is satisfied where A knows, or ought to have known, that the photograph or film was obtained in a way that would, if committed now, breach sections 67 or 67A of this Act.
- (3) This subsection is satisfied where B does not consent to the disclosure of the photograph.
- (4) For the purposes of subsection (2) it is immaterial that the photograph was taken outside of the territory of England & Wales so long as it would have constituted an offence under sections 67 or 67A had it been taken within the territory.
- (5) It shall be a defence for D to prove that he had a legitimate reason to disclose the photograph to C.

This draft offence deliberately goes beyond s.67A and seeks to criminalise the distribution of photographs that were gathered in circumstances that would contravene s.67. As noted above, this would fill a gap in existing legal frameworks.

The proposed offence does not require that A took the photograph. It suffices that A knows, or ought to have known, that the photograph was produced in circumstances that would breach sections 67 or 67A. Let us take an example:

X and Y are standing in a crowded bar. X takes a photograph up V's skirt and sends it to Y, who immediately sends it to Z.

If we concentrate on the distribution of the footage rather than its production, can it be said that Y is any less culpable than X? Y will be aware that the footage was gathered without V's consent and yet he asserts the right to ignore her dignity by propagating further humiliation (meaning the degradation of one's dignity) by sending the footage to others.

Unlike the offences under s.67A, this proposed offence does not require an ulterior intent. However, this is justified because there is a requirement that the defendant must know, or ought to have known, that the footage was gathered in a way that breaches (or would breach<sup>95</sup>) sections 67 or 67A. This requirement would also protect those who are not aware of how the footage was gathered. Requiring knowledge, including constructive knowledge, seems most appropriate for this type of offence. It could be argued that it would be more appropriate for this to be dealt with by way of a defence ('a person is not guilty if they did not know, or could not reasonably have known,

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<sup>95</sup> This formulation would ensure that the distribution of footage taken before the commencement of s.67A could be prosecuted. Given the knowledge of the circumstances of its production, it is worthy of criminalisation as it is a deliberate act that undermines the inherent dignity of the victim.

that the photograph or film was created in circumstances that would breach sections 67 or 67A) but arguably this takes things too far. The global nature of the internet would mean it would be very difficult for a defendant to ever show this knowledge and the courts have previously cautioned about requiring people to prove something not easily knowable.<sup>96</sup>

How will this be shown? The most obvious way will be through the investigative interview, but also any message that is sent with the footage. Where the photographs are tagged in such a way that it is clear that they were gathered without the consent of the victim, then it is likely that a jury would be satisfied that the defendant was aware of the circumstances under which the footage was gathered.

A defence is included within the provision because there may be circumstances when it is appropriate for the distribution to take place. This is not something that can be dealt with by the consent provision because, for example, that requires that the victim is aware of the distribution or potential distribution, something that might not be possible where, for example, the victim is not known to the person sending the footage, or because the person does not want the victim to be aware that they have seen it. Let us take an example:

D is sent a photograph of V by X. The photograph shows the exposed genitalia of V and it was clearly taken up V's skirt without her knowledge. D, V and X all work for the same company. D sends the photograph to HR to show what X has done.

Clearly, D may not want V to know that he has seen this photograph. It could be embarrassing or distressing for V to know that D has seen the photograph. Yet D is trying to uphold the interests of V by reporting X's conduct to their employer. It cannot be said that the distribution took place with the consent of V, as that requires positive assent. Therefore, a defence of legitimate reason would seem more appropriate. Other reasons could include D sending V herself the photograph (to show that it is on the internet) or D sending the photograph to the police.

Whilst there are undoubtedly different ways that distribution could have been criminalised, Parliament chose not to do so. This is an abject failure to protect women. The same justification for criminalising so-called revenge pornography applies equally to the dissemination of upskirting photographs and, for that matter, voyeurism. The dissemination of footage that depicts an intimate part of a person's body, without that person's consent, unquestionably impacts upon their dignity.

## A: Conclusion

The VOA 2019 can be welcomed only to the extent that it has led politicians, the media and society to discuss the problem of upskirting. The treatment of Gina Martin and other cases has demonstrated that, until now, we have not considered upskirting particularly seriously. The uproar that greeted the blocking of the original Bill by Christopher Chope MP showed a political will to ensure that women were protected from men who claimed the right to look up a skirt 'for fun'. However, that political will has been wasted.

Throughout this article it has been demonstrated that the VOA 2019 is flawed. It does not tackle the issue in a particularly coherent way. Whilst the government has referred the matter to the Law Commission, it should be questioned whether this is either necessary or appropriate. It will be remembered that the *Sexual Offences Act 2003* itself was not a product of the Law Commission. It

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<sup>96</sup> See, for example, *Sweet v Parsley* [1970] AC 132 and *R v Collier* [2005] 1 WLR 843.

was not thought necessary to do so, and instead the government produced a report and consultation.<sup>97</sup> Does that matter? Possibly. Arguably *Setting the Boundaries* was more political than a Law Commission report could ever be. It proposed some radical changes, not all of which were implemented. The Law Commission tend to take a more measured approach. However, they are experts in law reform, and their reports are serious and demand attention. However, the Law Commission are able to only take on a relatively small number of projects each year. Their expertise should be reserved for those situations where there is a need for expert assistance in the reform of law.<sup>98</sup> This was not one of these issues. When the private members Bill was blocked the government sought to use its time, but not its resources, to pass this legislation. Had it used its own advisors, or considered launching a consultation, these matters could have been dealt with quickly. Instead, the issue has been kicked into the long-grass, from where it will struggle to return, and flawed legislation was introduced that does not address the central problems with this behaviour. Upskirting and voyeurism is not complicated. It does not require careful and studious research. It requires action. Something Parliament has failed to do.

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<sup>97</sup> Home Office, 'Setting the Boundaries: Reforming the Law on Sex Offences.' (HMSO 2000).

<sup>98</sup> M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commission: The Dynamics of Law Reform* (Hart Publishing 2016).