

The Voyeurism (Offences) (No. 2) Bill – European Convention on Human Rights

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) as set out in Schedule 1 to the Human Rights Act 1998 (“HRA 1998”) in relation to The Voyeurism (Offences) (No. 2) Bill (“the Bill”). On introduction in the House of Commons, Lucy Frazer QC MP will make a statement under section 19(1)(a) of the HRA 1998 that in her view the provisions of the Bill are compatible with Convention rights.
2. Only the clauses which contain substantive Convention rights issues are discussed. The Department considers that the provisions of the Bill which are not covered by this memorandum do not give rise to any substantive Convention rights issues.

Summary of the Bill

3. The Voyeurism (Offences) (No. 2) Bill (“the Bill”) creates two new voyeurism offences for (1) operating equipment or (2) recording an image beneath a person’s clothing to observe their genitals or buttocks (whether exposed or covered with underwear) where, absent consent or a reasonable belief of consent, the purpose is to obtain sexual gratification or to cause humiliation, distress or alarm to the victim.
4. The Bill would insert a new s.67A into the Sexual Offences Act 2003 and make a consequential amendment to s.68 of the same Act.

Legal Issues raised by the Bill

5. Article 7 requires that the law should be sufficiently accessible and precise to enable an individual to know in advance whether his or her conduct is criminal (*Handyside v UK [1974] 17 YB 228*).
6. Whilst the two offences, namely, “operates equipment” and “records an image”, are similar, we are satisfied that both offences are sufficiently clear and certain for the purposes of Article 7, in terms of what conduct is covered by each offence. Unlike the offence concerning a person recording an image, the offence concerning “operating equipment” would capture instances where someone uses equipment to observe under someone’s clothing, but does not record it, for example “live streamed” images. Identical offences were introduced into the Sexual

Offences (Scotland) Act 2009 and successful prosecutions have been made under it. For these reasons we consider there is justification for the creation of the two offences and both are sufficiently certain. Article 8 notification requirements attach to the offence when committed for the purpose of obtaining sexual gratification. Notification requirements require offenders to notify the police of various personal details annually and whenever they change, including: name, address, date of birth, passport and national insurance number. The imposition of notification requirements therefore engages Article 8, because they constitute an interference with an individual's right to respect for private and family life.

7. Notification requirements are directed at the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. They ensure safeguarding measures are available for more serious offenders – the objective being, in broad terms, to help the police manage and prevent sexual re-offending. Following *R (F(A Child) v Secretary of State for the Home Department [2011] 1 AC 331)* they are a proportionate means of achieving those aims as they allow for individual review.
8. We have considered the imposition of such notification requirements in this context. The Bill imposes notification requirements for those convicted of upskirting but only where the purpose is for obtaining sexual gratification. Furthermore, certain thresholds would need to be met before notification requirements are triggered,¹ which mirror those for existing voyeurism offences before notification requirements would apply. This ensures that only sufficiently serious conduct – in light of the age of the victim, or the length of sentence imposed by the court (as length of sentence is connected to the seriousness of the offence) – is caught.
9. We are therefore satisfied that where the proposed new offence is committed for the purpose of obtaining sexual gratification there is a clear rational connection between the offence itself and the objectives of the notification requirements, and therefore the imposition of

¹ Notification requirements would only apply when the following thresholds are reached:

- 1) **where the offender was under 18**, he is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months; **OR**
- 2) **where the offender is 18 or over**:
 - a. the victim was under 18, OR
 - b. the offender, in respect of the offence or finding, is or has been–
 - i. sentenced to a term of imprisonment (any length),
 - ii. detained in a hospital, or
 - iii. made the subject of a community sentence of at least 12 months.

notification requirements in these circumstances would be a proportionate means of achieving the legitimate aims set out above.

Conclusion

10. The Department considers therefore that the two offences are sufficiently clear and certain for the purposes of Article 7, and that the imposition of notification requirements when the offence is committed for the purpose of obtaining sexual gratification would be a proportionate means of achieving a legitimate aim under Article 8.

Ministry of Justice

19 June 2018