"Up-Skirts" and "Down-Blouses": Voyeurism and the Law

Alisdair A. Gillespie*

Keywords to follow

Summary: *The criminal courts have increasingly been called upon to consider the legal position where a person covertly films up women's skirts in order to obtain images of their underwear, genitals or upper-thigh area. The criminalisation of such activity is not straightforward and a number of issues arise from how the courts have treated this behaviour, including whether this is an area where legislative amendment is required.*

Up-skirts and down-blouses: an emerging issue

In recent years a small, but growing, number of people have been caught trying to film up the skirts of women and girls. This kind of behaviour is colloquially known as "up-skirt" or "down-blouse" photographing which is a simple descriptor of the behaviour. An "up-skirt" picture is a picture taken by a man[1] using a covert camera directed up a female's skirt. "Down-blouse" photography is where a man similarly uses a covert camera to photograph females from above, with the camera focusing on the female's blouse in the hope of taking an image of the bra, cleavage or indeed breasts.

Technology has altered the way in which this behaviour can be performed. There have, in the past, been reported instances of men trying to look up skirts using low-tech devices such as mirrors.[2] However the behaviour would appear to have become more prominent as technology has developed. It is, of course, not known whether the behaviour became more common or whether it was just simply noticed more often, but cases across the world increasingly involved hiding a video camera in a bag positioned in such a way to ensure that an image could be taken.[3] Although inexpensive personal video cameras have been in existence since the 1980s, it has

*Reader in Law, De Montfort University.

[1] In this article the masculine will be used to refer to the perpetrator and the feminine to indicate the victim since research appears to show that the vast majority of voyeurs are male (see J.M. Metzl, "From scopophilia to Survivor: a brief history of voyeurism" (2004) 18 *Textual Practice* 415 at 416).

[2] Metzl, "From scopophilia to Survivor" (2004) 18 *Textual Practice* 415 at 426.

[3] L.E. Rothenberg, "Re-thinking Privacy: Peeping Toms, Video Voyeurs and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in Public Space" (2000) 39 *American University Law Review* 1127 at 1129–1130.

been argued by one commentator that this did not mark the ignition point for the outbreak of such behaviour but rather the internet did.[4]

On one level there would appear to be some truth in this, with another commentator noting that in 2004 a search for voyeurism led to 730,000 hits on Google[5] (today the figure has reached in excess of 2 million hits[6]) but it is submitted that the evidence is not conclusive. Whilst the growth in the number of internet sites demonstrates that there is a demand for voyeuristic material it does not automatically mean that the voyeuristic behaviour is increasing. Whilst we know that the internet has revolutionised the way that deviant sexual behaviour is conducted,[7] we do not know, as yet, how it has impacted on this behaviour. Many of the images on the internet appear to be staged. This is not unusual, with many adult-entertainment sites using ''creative licence'' in their products so that professional films are, for example, passed off as amateur films or ''chance encounters'' are, in fact, carefully staged.[8] Similarly many images on sites hosting voyeuristic material would appear to be of too high-quality for them to have been taken in truly voyeuristic circumstances.

Leaving aside the place of the internet in propagating such behaviour it is clear that technology has certainly allowed the behaviour to develop. High-quality devices have become increasingly sophisticated and smaller, allowing for more opportunities to take such images. Perhaps the most notable piece of technology in this area is the camera-equipped mobile telephone. A person holding a mobile telephone will not often trigger any suspicions (in part because, for example, a person standing above others in a shopping mall may look as though he is texting rather than taking a photograph) and yet the technology on mobile telephones means it is quick and simple to take and distribute such images. A person could, from his telephone, email an image to himself and then delete all traces of the image and distribution so that if asked to account for his behaviour by a security guard it would appear as though nothing untoward has happened.

The use of mobile telephones to take surreptitious photographs was most notable in Japan where it caused considerable disquiet and scandal but it has also featured heavily in other countries, including the United Kingdom, where it is now becoming increasingly common for organisations to prohibit mobile telephones on their premises.[9]

What does this behaviour amount to? It has been traditionally argued that such behaviour was a nuisance[10] but psychologists consider it to be much more than this.

[4] D. Kremenetsky, ''Insatiable 'Up-Skirt' Voyeurs Force California Lawmakers to Expand Privacy Protection in Public Places'' (2000) 31 *McGeorge Law Review* 285 at 287.

[5] J.M. Metzl, ''Voyeur Nation? Changing Definitions of Voyeurism, 1950-2004'' (2004) 12 *Harvard Review of Psychiatry* 127.

[6] Of course not every ''hit'' is necessarily a website devoted to voyeurism since it would include scholarly articles and certain media reports discussing the phenomenon. That said, a significant proportion of them do appear to be websites purporting to host voyeuristic material.

[7] Perhaps most notably child pornography: see E. Quayle and M. Taylor, ''Paedophiles, pornography and the Internet'' [2002] *British Journal of Social Work* 863–875.

[8] See, e.g. D. Bennett, ''Pornography-dot-com: Eroticising privacy on the Internet'' (2001) 23 *The Review of Education/Pedagogy/Cultural Studies* 381 at 388.

[9] See, e.g. G. Parry, ''Camera/video phones in schools'' (2005) 17 E. & L. 73.

[10] *Setting the Boundaries: Reforming the law on sex offences—volume 1*. Home Office. 2001, para.8.3.

It is considered to be a form of paraphilia, a term meaning ''sexual perversion or deviation''.[11] There are several examples of paraphilias but DSM-IV[12] recognises one, voyeurism, that appears to be related. Voyeurism is defined as:

> ''. . . intense sexually arousing fantasies, sexual urges or behaviours involving the act of observing an unsuspecting person who is naked, in the process of disrobing or engaging in sexual activity.''[13]

Of course the behaviour discussed above does not fit neatly into this definition of voyeurism in that up-skirt pictures do not involve a person being naked, disrobing or engaging in sexual activity. However the rest of the definition holds true and it has been gradually recognised that this clinical definition may need widening, with some suggesting:

> ''[Voyeurism] can also be defined as an overwhelming desire to observe a person of the preferred gender and age in some stage of undress . . . or in similar intimate or private situations.''[14]

This perhaps reflects the fact that voyeurism covers a broad range of behaviour and indeed some are arguing that the term should be considered an overarching behavioural definition covering a variety of distinct behaviours.[15] In terms of the behaviour discussed in this article this becomes relevant because up-skirt pictures relate to a very specific form of behaviour. Indeed some have argued that it should have its own label, with some suggesting ''paraphilic scopophilia'' would be appropriate, although this is somewhat controversial since many texts do not differentiate between ''scopophilia'' and ''voyeurism'', something which receives support from the dictionary.[16]

For our purposes, it is necessary to use a term other than ''voyeurism'' since this now bears a definition in law[17] which, as will be seen, arguably does not cover the behaviour discussed in this article. Since scopophilia is a controversial label for this behaviour it is suggested that the phrase ''up-skirt'' which has achieved colloquial recognition should be used instead.

Initial legal response

Within England and Wales the principal legal response has been to use the common-law offence of outraging public decency. It was not until 2007 that someone expressly challenged the applicability of outraging public decency to

[11] *Oxford English Dictionary*, online edition.

[12] *Diagnostic and Statistical Manual of Mental Disorders* (Version 4). Produced by the American Psychiatric Association this is arguably the most authoritative classification of psychiatric conditions.

[13] *Diagnostic and Statistical Manual of Mental Disorders*, para.302.82

[14] K. Freund, ''Courtship Disorder'' in W.K. Marshall, D.R. Laws and H.E. Barbaree (eds), *Handbook of Sexual Assault* (1990), p.196.

[15] See Metzl, ''Voyeur Nation?'' (2004) 12 *Harvard Review of Psychiatry* 127 at 128–129.

[16] See *Oxford English Dictionary* (online edition) which suggests that voyeurism is another term for scopophilia.

[17] Sexual Offences Act 2003 s.67.

this behaviour[18] although the courts had previously implicitly approved its use.[19] Thomas L.J., giving the judgment in *Hamilton*, spent a considerable period of time rehearsing the history of the offence and, whilst it is undoubtedly interesting and relevant to legal historians, it is submitted that much of the immediate history is not directly relevant to this discussion. The key issue that arose from this detailed rehearsal of the offence was whether there was a requirement that two people saw the act that amounted to public indecency.

It has been clear for some time that the requirement for at least two people to see the act was meant to demonstrate that the act had occurred in public and, therefore, could be capable of outraging the public rather than a single victim.[20] More than this, it is necessary for the act to take place in an area to which the public has access, so that an act before two people in a private dwelling would not meet the criteria.[21] However it is also clear that it does not matter whether the people who saw the act were actually outraged.[22] This is particularly relevant in the context of up-skirt photographs where people may see the act as ''a laugh''.[23]

The real issue of substance in *Hamilton* was whether it is necessary for two people to see the act of photographing or be capable of seeing the act. This again is important in respect of up-skirt pictures where the conduct is often covert, indeed some psychologists argue that the secrecy of the activity is a fundamental part of the sexual arousal.[24] The appellant had submitted that the historic cases show that at least one person must see the act and it must be in circumstances where others were capable of seeing the act even if in fact they did not.[25]

Although the Court of Appeal accepted that the historical cases had so far all involved at least one person seeing the act, it held that this was an evidential point rather than a rule of substantive law. The court held that the purpose of the ''two-man rule'' was simply to ensure that the act took place in circumstances where members of the public *could* be outraged and it was not necessary for anyone to witness the act.[26] The court then went on to state that the decision of the jury in *Hamilton* was that it was possible that people could have witnessed the act.

Is it possible to reconcile this ratio with earlier contemporary cases, perhaps most notably the decision in *R. (on the application of Rose) v DPP*?[27] Here the applicant was acquitted of an offence of outraging public decency, the circumstances being that he and his girlfriend had oral sex in the foyer of a bank at 01.00. The only person to witness the act did so the next morning when viewing CCTV footage. Stanley Burnton J. held that the conviction could not be sustained as the public element must be satisfied at the time of the act and not subsequently.[28]

[18] *Hamilton* [2007] EWCA Crim 2062.

[19] See, e.g. *Tinsley* [2003] EWCA Crim 3505 which was an appeal against sentence imposed for outraging public decency after taking up-skirt images.

[20] *Halsbury's Laws*, para.764.

[21] P. Rook and R. Ward, *Sexual Offences: Law and Practice*, 3rd edn (2004), p.412.

[22] D.C. Ormerod, *Smith & Hogan's Criminal Law*, 11th edn (2005), p.966.

[23] e.g. it is known that a considerable amount of up-skirt pictures are taken in nightclubs. A group of boys may find this amusing but this would be irrelevant.

[24] G.C. Davison, J.M. Neale and A.M. Kring, *Abnormal Psychology*, 9th edn (2004).

[25] *Hamilton* [2007] EWCA Crim 2062 at [35].

[26] *Hamilton* [2007] EWCA Crim 2062 at [39].

[27] [2006] EWHC Admin 852; [2006] 1 W.L.R. 2626.

[28] [2006] EWHC Admin 852; [2006] 1 W.L.R. 2626 at [29].

It was accepted in *Rose* that it was possible that people walking past the foyer would be capable of seeing the act[29] but it was held that there was no proof that anyone was actually passing the foyer at that time of the night. It is perhaps this that allows the two cases to be reconciled since in *Hamilton* the Court of Appeal stated that whether it was possible for an act to be seen was a matter of fact for the jury[30] and it held that the video demonstrated that there were people around who may have seen the appellant. Presumably the logic of *Rose* was that the District Judge[31] was not satisfied that there were people capable of seeing the act. Precisely how, in circumstances such as *Rose*, it will be possible to prove this to the prosecution standard is perhaps more open to question.

A slightly different point, but one that is expressly raised in *Hamilton*, is that the test is not merely that the perpetrator is seen but that the perpetrator is seen doing the relevant *act*. In our context this means that it must be possible that people will see that the perpetrator is actually trying to film up someone's skirt. Given that this is a covert activity this may be somewhat difficult, especially when it is remembered that technological advancements are making it easier to disguise the activity. The court in *Hamilton* made reference to the facts of *Tinsley* where the contents of a bag spilled out as an example of how such evidence may be gathered, or that a security guard may see him manoeuvring the bag. Where, however, does this leave situations where the bag is secured or where technological solutions such as detachable lenses, etc. are used? Presumably if the prosecution cannot prove that at least two people could see the offender actually filming up-skirt pictures then a conviction could not be sustained even though the recording proves what the offender has been doing.

There are other problems with the use of this offence. It is commonly accepted that to comply with the European Convention on Human Rights offences must be defined with sufficient clarity to ensure that a person knows the limits of the law. It has been suggested that the offence of outraging public decency does not meet this test[32] but in *S and G v United Kingdom*[33] the European Commission on Human Rights refused an application to challenge this offence. It is somewhat surprising that a challenge to this offence has not been successful although this may be as a result of the particular facts of the case. It is unlikely that an application in respect of up-skirt images would be successful either with the courts undoubtedly suggesting that a person should be aware that such an activity is criminal. However this does not alter the fact that many of the circumstances surrounding the detail of this offence are largely unknown, something evident by the discussion about whether people must be capable of being outraged at the time of the act. It is submitted that it would be more appropriate for the law to adopt a clearer method of tackling this behaviour.

The way in which the offence is punishable is also problematic. As a common-law offence, and one that covers a broad range of activity, it has never been brought

[29] [2006] EWHC Admin 852; [2006] 1 W.L.R. 2626 at [11].

[30] *Hamilton* [2007] EWCA Crim 2062 at [40].

[31] In *Rose* the matter was heard summarily so the District Judge (Magistrates' Court) would be the tribunal of fact.

[32] Ormerod, *Smith & Hogan's Criminal Law* (2005), p.967.

[33] Application 17634/91.

within the protective environment created by statute[34] and indeed the scope of its sentence has never been fully defined. As an offence that is broadly based upon the premise that it is a nuisance, any sentence imposed tends to ignore the psychological issues it presents. It will be remembered that DSM-IV classifies voyeurism, including up-skirt pictures, as a deviant sexual behaviour. It has been remarked that an issue with this form of behaviour is its ''recurrent and insistently and involuntarily and repetitive nature''.[35] In other words the behaviour is likely to reoccur and this raises issues of treatment and control. The issue of treatment has long been controversial in sexual offending[36] but it is clear that some assistance needs to be given. This does raise issues in terms of the sentence imposed. A common judicial reaction in these circumstances appears to be the imposition of a short custodial sentence and yet it is known that this is of little or no benefit to a sex offender in need of treatment. [37]

Prison sex offender programmes are reserved for those serving medium-to-long sentences. A short custodial sentence is unlikely to lead to a community sex offender programme either for similar reasons of resource. Perhaps the better solution would be the imposition of a community sentence or suspended sentence of imprisonment where, in both cases, conditions can be imposed in respect of a treatment programme.[38] In this way an offender has some chance of receiving treatment that may help address his deviant behaviour but whilst it is charged as an offence of outraging public decency it is unlikely that this position will be reached.

In terms of controlling repeat offending the fact that it is not a sexual offence for the purposes of the Sexual Offences Act 2003 means that it is not possible to impose a sexual offences prevention order (SOPO). A similar effect could be achieved through the use of an anti-social behaviour order (ASBO)[39] since up-skirt behaviour must, it is submitted, come within the definition of anti-social behaviour. However an ASBO and SOPO are not identical in effect and certainly the latter would ordinarily involve more attention by a multi-agency public protection panel which may be useful in addressing the offender's behaviour. Without addressing the causes of the offending behaviour there is a danger that all an ASBO would do is return an offender to court more speedily.[40]

Voyeurism

In *Hamilton*, one of the submissions challenged whether the acts were covered by the offence of voyeurism.[41] The court specifically declined to decide on this point because it was considered that it was not relevant.[42] The reasoning of the court

[34] e.g. it is not a ''sexual offence'' within the meaning of the Sexual Offences Act 2003 nor does it come within the ''dangerousness'' provisions of the Criminal Justice Act 2003.

[35] Metzl, ''From scopophilia to Survivor'' (2004) 18 *Textual Practice* 415 at 424.

[36] See generally W.L. Marshall (ed.), *Sexual offender treatment: controversial issues* (John Wiley & Sons, 2006).

[37] A point discussed in the Court of Appeal in *Tinsley* [2003] EWCA Crim 3505, when quashing a sentence of imprisonment.

[38] Criminal Justice Act 2003 ss.177(1), 189(1) and 190.

[39] Crime and Disorder Act 1998 ss.1 and 1C.

[40] A typical ASBO requirement could be the restriction of operating recording equipment in a shopping centre, or the carrying of a covert camera in a bag, etc.

[41] Sexual Offences Act 2003 s.67.

[42] *Hamilton* [2007] EWCA Crim 2062 at [28].

was based on the premise that the actions took place before the commencement of the Sexual Offences Act 2003. However the submission, that it is within the remit of voyeurism, is of interest as it does have implications for offences after its commencement.

The legal definition of voyeurism does not necessarily encompass all of the psychological definition discussed in the preceding sections of this article. Section 67 actually creates a number of distinct offences relating to voyeuristic activity but each has common elements, namely that the voyeurism is for the purposes of sexual gratification and involves observing,[43] recording,[44] operating equipment allowing another person to observe[45] or installing equipment or adapting a structure to allow a person to observe[46] a person doing a private act without their consent. For the context of this article the most relevant are s.67(1)—observing—and s.67(3)—recording—a person.

However voyeurism would only apply if observing or taking the up-skirt pictures involved a person doing a private act. The Act defines a ''private act'' as:

> ''. . . a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and-
>
> (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
> (b) the person is using a lavatory, or
> (c) the person is doing a sexual act that is not of a kind ordinarily done in public.''[47]

Leaving aside the issue of lavatories—although it is known that some offenders have sought either to install equipment in a lavatory or indeed to hide in a lavatory[48]—there are other difficulties with the use of voyeurism in the context of up-skirt pictures. The syntax of s.68(1), which is most relevant for us, says ''a person is in a place . . . and the person's genitals, buttocks or breasts are exposed or covered only in underwear''. This suggests that the person's genitals, etc. are either exposed in this place or are covered only in underwear. If we take the typical example of someone seeking up-skirt pictures then this would involve manipulating a camera when a person is in a public space, such as a shopping centre. In that place—the shopping centre—the person's genital, buttocks or breasts are not exposed or covered only in underwear, the victim is likely to be wearing a skirt or blouse too.

Quite clearly where a person is seeking to observe people in, for example, shop changing rooms or whilst on a sunbed[49] then the offence would apply. It less clear that it would apply where people are simply standing on an escalator or walking up stairs. In those circumstances it cannot be said that the people are in a place where their genitals, etc. are covered only in underwear.

[43] Sexual Offences Act 2003 s.67(1).
[44] Sexual Offences Act 2003 s.67(3).
[45] Sexual Offences Act 2003 s.67(2).
[46] Sexual Offences Act 2003 s.67(4).
[47] Sexual Offences Act 2003 s.68(1).
[48] *Henderson* [2006] EWCA Crim 3264.
[49] See, e.g. *Turner* [2006] EWCA Crim 63; [2006] 2 Cr. App. R. (S.) 51.

AQ1

Even assuming that the courts will interpret this provision in a wider fashion, deciding that it suffices if a person is in a place where a person observes •or records the victim's genitals, buttocks or breasts or covered only in underwear—and certainly there appears to be some evidence that courts of first-instance have taken this approach—the next issue to decide is what is meant by ''reasonably expected to provide privacy''?

If people are walking in a public area can it be said that they are in a place where there is a reasonable expectation of privacy? Some commentators, whilst not addressing this specific point, have suggested the answer is ''no'', arguing that where the public have general access then this is a public rather than private place.[50] It is less clear that this is what the Act requires. The Act talks about *circumstances* where there is a reasonable expectation to privacy and not necessarily simply a place. It could be argued that a victim, even in a public place, does not expect someone to look up her skirt or down her blouse. Is that an expectation of privacy? Certainly it has been argued that:

> ''In Western society, one of the most fundamental and universal expectations of privacy involves the ability to control exposure of one's body.''[51]

This is undoubtedly true and the issue of exposure has been a controversial issue through the years. It could be argued convincingly that privacy is an issue but even if the stretched logic covers a person in a public place there is one other barrier: s.67 talks about doing a private *act*. Whilst it would be possible to construe privacy to include personal exposure, and it may be possible to stretch ''place'' to cover public places, it would be difficult to argue that the act—in the example above, shopping—is a private act, it is a public act. It may be that a person should have a right to privacy whilst doing this public act but that is not what s.67 appears to require. It is submitted that bringing up-skirt behaviour within the offence of voyeurism is stretching things too far.

A new offence

Whilst it appears that voyeurism is unlikely to be effective for criminalising up-skirt pictures, it is clear from the first part of this article that the offence of outraging public decency could be used. However it was also noted that there are some significant difficulties in its use, especially where it is not possible to identify whether at least two people were capable of seeing the offender taking the up-skirt pictures. It should be noted that the premise of this section of the article is that it is appropriate for this matter to be the subject of criminal sanction. It is submitted that this is more than just a nuisance and that a victim does suffer consequences of the crime.[52]

Several countries have begun to consider their response to these issues and many have responded with new legislation to combat up-skirt photographs.[53] In some

[50] Rook and Ward, *Sexual Offences: Law and Practice* (2004), pp.401–402.

[51] Rothenberg, ''Re-thinking Privacy'' (2000) 39 *American University Law Review* 1127 at 1135.

[52] K.J. Burton, *Voyage forward for Queensland: Unauthorised taking of photographs and making of film and its subsequent publication on the Internet* (2005), p.3, *http://eprints.qut.edu.au/archive/00004179* [Accessed February 19, 2008].

[53] Burton, *Voyage forward for Queensland* (2005), pp.7 *et seq.*

countries, for example New Zealand, they have introduced specific legislation to tackle up-skirt images[54] and in others it has formed part of a wider voyeurism offence.[55]

It is perhaps this latter form that is the most appropriate for England and Wales to adopt. It is suggested that the intention of the Government with the voyeurism offence was to criminalise peeping[56] and that this should include up-skirt pictures, yet the preceding section of this article suggested that, in fact, this may not have occurred. For the reasons set out above it would be preferable for this activity to have the certainty of a statutory offence and it would seem easiest to amend the voyeurism offence. Interestingly the New Zealand model can act as a model for the change. The statute (amending the penal code[57]) was obviously influenced (somewhat ironically) by the UK provision because the first part of their offence mirrors in close terms the (UK) voyeurism offence.[58] However the New Zealand legislature recognised the difficulty that "private act" imposed and a second offence was introduced which criminalises recordings of:

> ". . . a person's naked or undergarment-clothed genitals, pubic area, buttocks or female breasts which is made—
>
> (i) from beneath or under a person's clothing, or
> (ii) through a person's outer clothing in circumstances where it is unreasonable to do so."[59]

Leaving aside the slightly problematic subpara.(ii),[60] this does appear an appropriate way of tackling the menace of up-skirt photography. The offence requires an absence of consent but there is no requirement for a person to be in a private place, nor indeed is there any reference to privacy.[61] This carries distinct advantages: it recognises the inherent right of people to limit exposure of their person whilst at the same time avoiding debates as to the nature of the clothing worn.[62] It is submitted that this can be justified because of the intrusion that is involved in covertly recording up-skirt pictures. The *mens rea* requirement for recording such images is intention or recklessness.[63] The use of recklessness may be somewhat controversial and it is more likely that an offence in this jurisdiction would be restricted to intentional recording or observation—especially since there appears to be little evidence to suggest this problem is caused by anyone other than those deliberately seeking the images—although, in common with other offences in the

[54] See Crimes (Intimate Covert Filming) Amendment Act 2006.

[55] See the position in New South Wales (Australia) in Burton, *Voyage forward for Queensland* (2005), p.11.

[56] *Setting the Boundaries: Reforming the law on sex offences—volume 1*. Home Office. 2001, para.8.3.

[57] Crimes Act 1961.

[58] Crimes Act 1961 s.216G(1)(a).

[59] Crimes Act 1961 s.216G(1)(b).

[60] As it may be difficult to define the circumstances when this would apply.

[61] Which is restricted to the para.(a) offence.

[62] An issue highlighted by Kremenetsky, "Insatiable 'Up-Skirt' Voyeurs" (2000) 31 *McGeorge Law Review* 285 at 291, when he considers the disadvantages of basing an action on privacy.

[63] Crimes Act 1961 s.216H.

Sexual Offences Act 2003 it is likely a case could be made that recklessness would suffice as to the absence of consent.

New Zealand also provides an offence on the distribution of such images.[64] This is an interesting issue because it is likely that the harm caused by up-skirt photography is enhanced where the images are distributed, at least where the victim is identifiable by others. A comparison could be drawn with the area of child pornography where research has shown that psychological harm is caused to victims who are aware that images of themselves are being used to stimulate sexual fantasies across the world and that they can never be sure as to who has seen the images.[65]

AQ2

The current voyeurism offence in the United Kingdom does not tackle the distribution of such images and yet it was noted above that there are a significant number of websites that are now dedicated to such material.[66]• One possible argument is that the distribution of such images is criminalised under existing legislation[67] but it is likely that it would be neater to introduce a specific offence relating to their dissemination by their creator.

Child victims

The final issue to consider is that of indecent photographs of children. One of the photographs in *Hamilton* related to a child and it was decided before trial to amend the indictment to include a charge of taking an indecent photograph of a child.[68] Although convicted of this charge the question arises whether an up-skirt photograph of a child automatically qualifies as an indecent photograph of a child within the meaning of the Protection of Children Act 1978.

At the heart of this issue is the question as to what ''indecent'' means. The term is not defined in the Protection of Children Act 1978 and the definition adopted by the courts has been quite controversial. In *Stamford*[69] it was held that indecency and obscenity were at different points on the same scale, and that they were to be measured according to contemporary standards of decency. In *Graham-Kerr*[70] the court held that context was irrelevant: the jury must simply look at the photograph itself and decide whether it is decent or indecent.[71] It has been noted that this can cause difficulty in respect of ''legitimate'' photographs where a family taking photographs of their child in a bath have to rely on an obiter statement that it would not be in the public interest to prosecute in these circumstances.[72]

[64] Crimes Act 1961 s.216J.

[65] e.g. a victim who is now a student attending university will be caused anxiety sitting in the lecture theatre wondering if anyone has seen the images: T. Palmer, *Just one click* (2004).

[66] See p.000 above.

[67] e.g. Communications Act 2003 s.127 (sending an indecent or obscene communication) or even the Obscene Publications Act 1959 although this would require a tribunal of fact to decide that each image the subject of a charge is obscene. This is certainly not guaranteed in every case.

[68] *Hamilton* [2007] EWCA Crim 2062 at [1].

[69] [1972] 2 Q.B. 391.

[70] (1988) 88 Cr. App. R. 302.

[71] This approach had earlier been adopted in respect of the Postal Act 1953 (*Kosmos Publications v DPP* [1975] Crim. L.R. 345) and it was later confirmed that the passing of the Human Rights Act 1998 did not alter this approach (*Smethurst* [2002] 1 Cr. App. R. 6).

[72] See D.C. Ormerod's comment on *Smethurst* at [2001] Crim. L.R. 657 at 658.

None of this, it is submitted, adequately sets out what indecent means. We know that it is in the eye of the jury but are there any limits as to their discretion? In *Oliver*[73] the Court of Appeal, for the purposes of sentencing, accepted that it would be useful to use a modified COPINE typology of indecent photographs to classify their seriousness. The original scale[74] had 10 points within it but the Court of Appeal stated that the first three levels would not be included because:

> ''. . . it seems to us, neither nakedness in a legitimate setting, nor the surreptitious procuring of an image, gives rise by itself, to a pornographic image.''[75]

The original COPINE scale included, at level three, ''surreptitious photographs of children . . . showing either underwear or varying degree of nakedness''[76] and this was under the label ''erotica''. In *Hamilton* one of the charges related to an up-skirt picture of a 14-year-old schoolgirl and this led to a charge being made of taking an indecent photograph of a child.[77] The court was silent as to the propriety of this and simply referred to it in passing, perhaps because the court had, on an earlier occasion, specifically considered this issue. In *Henderson*[78] the appellant was convicted, inter alia, of taking an indecent image of a child in that he had taken an up-skirt picture of a child also aged 14. The court, in that case, described the photograph as showing ''the upper thighs from below''.[79] The issue of relevance during that appeal was whether an up-skirt image could properly be categorised as indecent. In *Henderson* the court stated it could because it was for a jury to decide what was indecent, but can it truly be said that a surreptitious photograph showing the upper thighs of a schoolgirl is an indecent photograph of a child?

Some have argued that a distinction needs to be drawn between child pornography (''the sexually explicit reproduction of a child'') and child erotica (''any material, relating to children, that serves as a sexual purpose for a given individual'').[80] It is notable that COPINE level three is classified as ''erotica''[81] and the original authors note that it is not unusual for the law to draw a distinction between indicative, indecent and obscene images, with indicative images being classed as ''material depicting clothed children, which suggests a sexual interest in children''.[82] This must cover up-skirt images and it would seem to fall squarely within the comments of the Court of Appeal in *Oliver*, i.e. it is not indecent.

However this is not the first time that the courts have caused confusion in this area. In *O'Carroll*[83] the appellant, a prominent paedophile campaigner, was

[73] [2002] EWCA Crim 2766; [2003] 1 Cr. App. R. 28.

[74] M. Taylor, G. Holland and E. Quayle, ''Typology of Paedophile Picture Collections'' (2001) 74 *Police Journal* 97.

[75] *Oliver* [2002] EWCA Crim 2766; [2003] 1 Cr. App. R. 28 at [10].

[76] Taylor et al., ''Typology of Paedophile Picture Collections'' (2001) 74 *Police Journal* 97 at 102.

[77] Contrary to Protection of Children Act 1978 s.1(1)(a).

[78] [2006] EWCA Crim 3264.

[79] [2006] EWCA Crim 3264 at [7].

[80] K. Lanning, *Child Molesters: A Behavioural Analysis* (1992), pp.24–25.

[81] Taylor et al., ''Typology of Paedophile Picture Collections'' (2001) 74 *Police Journal* 97 at 102.

[82] Taylor et al., ''Typology of Paedophile Picture Collections'' (2001) 74 *Police Journal* 97.

[83] [2003] EWCA Crim 2338.

convicted of importing indecent photographs into the country.[84] The images were described by the court as showing ''young naked children engaging in naked outdoor activity such as playing on a beach''[85] and it was his submission that they were not indecent. Reference to the original COPINE scale would place this either at level two (''pictures of naked or semi-naked children in appropriate nudist settings'') or level three (''surreptitiously taken photographs of children in play areas . . .'') depending on who took the photographs. In either situation they would appear to lie within the proposition put forward by the Court of Appeal in *Oliver*. However the Court of Appeal rejected this argument, stating it was solely for the jury to decide whether an image was indecent, noting:

> ''A dictum of a judge in one case in this court as to what constitutes a 'pornographic image' cannot bind a jury as to what in another case is indecent material . . .''[86]

Whilst from a strict point of stare decisis this is correct,[87] it does not of course follow that the dictum was wrong. It is perhaps surprising that nobody other than O'Carroll has sought to challenge a conviction on the basis of the obiter comments in *Oliver*. The Court of Appeal continues to create a degree of confusion in this area since in *Carr*[88] the appellant was convicted of offences relating to the taking of indecent images of children, including several thousand up-skirt images. The Court of Appeal quashed the (concurrent) sentence imposed in respect of the up-skirt pictures and imposed no separate penalty. It did not quash the conviction, which could cause confusion since the court is accepting that it amounts to an offence[89] but one that should not be punished because it is outside of the scale created in *Oliver*.

It is suggested that the obiter comments in *Oliver* are correct and that an image within COPINE levels one to three is indicative (and thus relevant to psychological assessment of the offender's behaviour) but not pornographic and should, therefore, not be considered an indecent photograph of a child. Law enforcement, quite correctly, dislikes the term ''child pornography'', preferring the term ''abusive images of children''[90] and this perhaps shows the true purpose of the 1978 legislation. That is not to say, of course, that this behaviour should not be the subject of criminal sanction, it should. The preceding sections of this article have demonstrated that the criminal law does, and should, tackle those who seek to take up-skirt images, but is the behaviour any different when the victim is under or over 18? It is submitted that it is not, and that in both cases it is clearly the paraphilia of scopophilia or voyeurism and that it should be tackled in this way. The courts could easily differentiate between victims under a certain age through sentencing and it is submitted that this would be more appropriate.

[84] Contrary to Customs and Excise Management Act 1979 s.170(2)(b).
[85] *O'Carroll* [2003] EWCA Crim 2338 at [2].
[86] *O'Carroll* [2003] EWCA Crim 2338 at [17].
[87] These were appeals against sentence and not against conviction.
[88] [2003] EWCA Crim 2416.
[89] Although it should be noted that the appeal was against sentence so there is some question as to whether the court could, in any event, have quashed the conviction.
[90] M. Taylor and E. Quayle, *Child Pornography: An Internet Crime* (2003), pp.2–7.

Conclusion

Technology has allowed deviant behaviours to become more noticeable and arguably intensifies the number of people involved in the activity. There has been concern for many years that up-skirt pictures were being facilitated by the technological revolution, most notably through the proliferation of camera-equipped mobile telephones and cheap digital cameras.

England and Wales, as a common-law jurisdiction without a penal code, is able to react to technological changes by relying on stretching the definitions of common-law crimes, for example outraging public decency, to cope with emerging behaviours. However, stretching the law in this way brings several problems, not least the fact that it can cloud the certainty of law. Common law crimes rarely capture specific behaviour in an appropriate manner and issues of punishment are often unaddressed. The decision in *Hamilton* is welcome to the extent only that it ensures that this behaviour is caught by the criminal law since it is submitted it is not a petty nuisance.

However this analysis has demonstrated that the offence of outraging public decency has limits and may not apply to all offenders who take up-skirt pictures. It is submitted that the voyeurism offence contained within s.67 of the Sexual Offences Act 2003 should be amended to take account of this behaviour. The New Zealand model acts as a starting point for this amendment and demonstrates how the law could seek to tackle those who deliberately take such images without the consent of others. This law should also apply to those who seek to take up-skirt images of children. Currently these are dealt with under the Protection of Children Act 1978 but it must be doubted whether this is the most appropriate legal remedy taking account of what is known about this deviant behaviour.

THOMSON

SWEET & MAXWELL

Author: Please take time to read the below queries marked as AQ and mark your corrections and answers to these queries directly onto the proofs at the relevant place. DO NOT mark your corrections on this query sheet:

AQ1: Does the first mention of ''person'' refer to the offender or the victim?

AQ2: Cross-reference to be filled in.