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Privacy-related crimes in English law

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Abstract
Since criminal law is usually considered a last resort for regulators, it provides a particularly focused lens through which to study privacy protection: privacy crimes are the most poignant forms of privacy infringements. This paper provides an overview of how privacy is protected through substantive criminal law in the UK (our analysis is generally limited to the law applicable in England in Wales). As part of a large-scale project on privacy protection in the 21st century, together with similar country studies, it will facilitate comparative legal analysis of privacy crimes (a relatively under-researched field), and also help to better understand privacy, as the forms and scope of privacy protection in criminal law tell us something about how privacy is conceptualized in law, and what legislators consider particularly protection-worthy in privacy. This paper offers a descriptive, bird's-eye overview of offences relating to spatial, personal, relational, and/or informational privacy.

Privacy-related crimes in English law

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1. Introduction

This report provides an overview of how privacy is protected through substantive criminal law in the jurisdiction of England and Wales (with occasional reference to other UK jurisdictions). Because criminalization is generally reserved for offenses that are seen as particularly damaging to society or morally undesirable (or, as Dressler and Garvey have formulated it, as the consequence of "a formal and solemn pronouncement of the moral condemnation of the

community"[1]), an analysis of substantive privacy crimes provides a particularly focused lens through which to study privacy protection. If these assumptions about the criminal law hold true, then those privacy intrusions that are criminalized, as opposed to those subject to only civil liability (e.g. under statutory legislation, tort law, or other theories), may be seen as examples of those forms of privacy that are seen by legislators within England and Wales as the most morally reprehensible or damaging to British society.

This working paper, which is part of a larger and on-going project, provides an overview of (selected) privacy violations in English criminal law. We structure our analysis along four types of objects of the right to privacy, as identified in our earlier work: the protection of persons, places, things, and data.[2] Because the overall goal of this project is to generate a better understanding of the concept of privacy and its importance in our contemporary society filled with myriad new forms of surveillance and other privacy intrusions (and to do so from a comparative perspective), we conceptualize privacy broadly and include criminal provisions that relate to the broad theme of protecting aspects of persons and their personal lives (encompassing the various types and dimensions of privacy we present in Koops, et al. (2017)). This conceptualization undoubtedly encompasses a large part of criminal law (e.g. even the crime(s) of homicide often involve physical contact with a person's body, which raise privacy questions about physical privacy and the right to limit access to our bodies). As such, we do not describe all privacy violations in great detail, and we limit our discussion to crimes that have clear connections to privacy interests. The current working version of this draft also includes more substantive analysis of particular offenses (those prioritized by our on-going research to date), and additional analysis and analysis of additional provisions will continue to be added as the research progresses.

The following sections some of the privacy-relevant criminal provisions in English law. Additional research is currently pending, and more sections will be added as that research is completed.

2. The protection of persons

2.1. Stalking

The offence of stalking is set out in ss. 2A and 4A of the Protection from Harassment Act 1997. In the form in which it was originally enacted, this legislation did not establish a specific offence of stalking. Instead it provided an offence of 'Harassment', which is sufficiently broad to deal with many of the forms of conduct that we are treating, for present purposes, as stalking. The offence of Harassment is committed when a person engages in 'a course of conduct that amounts to harassment of another and the person who engages in it knows or ought to know that it amounts to harassment of the other.' The offence can also be committed by a person who harasses two or more persons with the intention of persuading any person to do something that he or she is under no obligation to do, or not to do something that they are entitled to do. One can be convicted of harassment where the course of conduct is directed at the members or employees of an organisation. A further offence of 'Putting People in Fear of Violence' is provided by section 4 of the Act. This provides that 'a person whose course of conduct causes

[1] Joshua Dressler and Stephen P Garvey, CASES AND MATERIALS ON CRIMINAL LAW 3 (Sixth ed., St. Paul: West Academic Publishing, 2012).
[2] *See* Koops, et al., *A Typology of Privacy*, 38 U. PA. J. INT'L L. __ (2017) (forthcoming).

another to fear, on at least two occasions, that violence will be used against him, will be guilty of an offence if he knows that his conduct will cause the other such fear on at least two of those occasions.'

The offences of 'Harassment' and "Causing Fear' were intended to deal with stalking. However, they were considered for various reasons - none of which appear to be particularly compelling - to be inadequate for this purpose. The Act was amended in 2012. Two new provisions were inserted, creating the offences of 'Stalking' and 'Stalking Involving Fear of Violence or Serious Alarm or Distress.' These reflect to a great extent the pre-existing harassment offences, the only significant additional ingredient being the requirement that the course of conduct be of a form that is 'associated with stalking'.

The Offence of Stalking

The basic offence of stalking is set out in section 2A of the Act, which provides that a person is guilty of the offence if he 'pursues a course of conduct that would constitute harassment as it is defined in section 1(1) of the Act (see above), and that harassment amounts to stalking' (actus reus). Section 2 explains that a person's course of conduct will constitute 'stalking' if (i) it amounts to harassment of the other person, (ii) the acts or omissions involved are 'ones associated with stalking, and (iii) the person who engages in the course of conduct knows or ought to know that it amounts to harassment of the other person. The mens rea of the offence is the person's knowledge that the course of conduct in which he engages amounts to harassment. However, this knowledge can be imputed where a reasonable person in possession of the same information as the person would think that the course of conduct amounted to harassment. The Act defines neither harassment nor stalking. However, section 2A(3) provides example of acts or omissions that are ones 'associated with stalking': (a) following a person, (b) contacting or attempting to contact, a person by any means, (c) publishing any stamen or other material relating or purporting to relate to a person, or purporting to originate from a person, (d) monitoring the use by a person of the internet, email or any form of electronic communication, (e) loitering in any place (whether public or private), (e) interfering with any property in the possession of a person, (f) watching or spying on a person.

Defences

The offence of stalking depends on the person having engaged in a course of conduct that amounts to harassment. Although the section of the Act that establishes the offence of Stalking contains no defences, that which defines harassment provides that certain courses of conduct will not constitute harassment (section 1(3)). It follows that that these will provide a defence to any charge of stalking. They are: (i) that the course of conduct was pursued for the purpose of preventing or detecting crime; (ii) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, and; (iii) in the particular circumstances the pursuit of the course of conduct was reasonable.

Mode of Trial and Penalties

The offence of stalking is a summary only offence, upon conviction for which a sentence of imprisonment not exceeding 51 weeks may be imposed, or a fine not exceeding level 5 on the standard scale (currently £5000), or both. In addition a court may, following either a conviction or an acquittal, impose an order on the convicted or acquitted person restraining him or her from (in the case of a convicted person – s.5) engaging in harassment or conduct that may cause another person to fear violence, or (in the case of an acquitted person – s.5A) prohibiting the defendant from doing anything described in the order where it considers this necessary to protect the other person from harassment.

The Protection from Harassment Act also makes provision for a civil remedy. Damages may be awarded for any financial loss or anxiety caused. It also enables those who suffer harassment to obtain an injunction restraining the defendant from engaging in further harassment, to which a power of arrest is available in cases of breach. Those who breach the injunction commit a further criminal offence.

Offence of 'Stalking Involving Fear of Violence or Serious Alarm or Distress'

Section 4A of the Protection from Harassment Act 1997 provides a further offence of 'stalking involving fear of violence or serious alarm or distress.' The offence is committed where the person engages in stalking (per section 2A) and either (i) causes another to fear, on at least two occasions, that violence will be used against her (actus reus), or (ii) causes another serious alarm or distress which has a substantial adverse effect on the other's usual day-to-day activities (actus reus), and (iii) the person knows or ought to know that his course of conduct will cause the other to so fear on each of the occasions, or will cause alarm or distress. The test for determining whether the person 'ought to known' is that which applies the offence of stalking.

Defences

The defences available to a person charged with the offence of Stalking Involving Fear of Violence or Serious Alarm or Distress are identical to those available to a person charged with the offence of Stalking save in one respect. The final defence that is available in relation to the offence of stalking – i.e. that the particular circumstances the pursuit of the course of conduct was reasonable – is replaced by the narrower defence that 'pursuit of the course of conduct was reasonable for his own or another's protection of for the protection of his or another's property (section 5A(4)(c)).

Mode of Trial and Penalties

The offences set out in section 5A are triable either way. A person convicted of the offence following a trial on indictment is a term of imprisonment not exceeding 5 years, or fined, or both. Following summary conviction a term of imprisonment not exceeding 12 months, or an unlimited fine. No sentencing guidelines have yet been issued in respect of the stalking and harassment offences of stalking.

Recruiting Third Parties

There is no specific third party offence provided by the Protection from Harassment Act 1997. However, if a person aids abets, counsels or procures another to commit to engage in a course of conduct that conduct is taken to be conduct in which the person aiding abetting etc engages (section 7(3A)). This deals with the circumstances in which a person recruits others to engage in a course of conduct that amounts to stalking, making the recruiter who counsels or procures another to engage in conduct a participant in that conduct. By recruiting individuals to engage in independent acts the recruiter engages in a course of conduct that is constituted by those various acts.

Offence of Harassment of a Person in His/Her Home

In addition to the stalking offences in the Protection from Harassment Act 1997, a further offence of 'Harassment of a Person in His Home' is established by section 42A Criminal Justice and Police Act 2001. This provision was inserted by section 126 of the Serious Organised Crime and Police Act 2005. Section 42 A provides that a person commits an offence if (i) he is outside or in the vicinity of any premises that are used by any individual (the resident) as his dwelling, (ii) and is present for the purposes of representing to the resident or another individual (whether or not one who uses the premises as his dwelling), or of persuading the resident or

such another individual that he should not do something that he is entitled or required to do; or should do something that he is not under any obligation to do (actus reus), and (iii) intends his presence (alone, or together with any other person) to amount to the harassment of, or to cause alarm or distress to, the resident; or knows or ought to know that his presence is likely to result in the harassment of, or to cause alarm or distress to, the resident (mens rea); and (iv) his presence amounts to the harassment of, or causes alarm or distress to, or is likely to result in the harassment of, or to cause alarm or distress to, (a) the resident,(b) a person in the resident's dwelling, or (c) a person in another dwelling in the vicinity of the resident's dwelling (actus reus).

Mode of Trial and Penalties

Harassment of a Person in His/Her Home is a summary offence. A person guilty who is guilty may be sentenced to a term of imprisonment not exceeding 51 weeks or to a fine not exceeding £2500.

Defences

The Act provides no defences.

2.2. Protection from interference with behaviour

2.2.1. Voyeurism and unlawful visual observation

In the United Kingdom, voyeurism is primarily considered a sexual offense, evidenced both by its placement within sexual offences legislation in England and Wales, Scotland, and Northern Ireland and by the predominant requirement that the offense be committed for purposes of sexual gratification.[3] Under the relevant legislation, unlawful visual observation by private parties often covers a wide range of surreptitious surveillance, sometimes (but not always) including photography or videography-related behaviors. Unlawful visual observation is often referred to as "voyeurism," whether or not the unlawful observation is accomplished through the use of a video camera or other visual recording device or consists of unaided visual observation. Beyond the criminal law, tort law may also provide some civil remedies for some types of voyeuristic behavior, depending on the circumstances and conduct at issue, including theories based in trespass or the emerging tort of "misuse of private information."[4]

The English criminal offence of voyeurism is found in section 67 of the Sexual Offences Act 2003. The Act is a discreet piece of legislation, making provision for a range of sexual offences, some of which had no analogue in the pre-existing body of criminal law (the offence of voyeurism being a notable example), others replacing offences found in earlier legislation which was in various respects inconsistent with contemporary societal values. A number of years after the Sexual Offences Act 2003 came into force, both Northern Ireland (in 2008) and Scotland (in 2009) promulgated their own distinct sexual offences legislation. The Irish order clearly resembles the English Act, however the Scottish Act—while also maintaining major similarities with the English law—contains some significant differences and prohibits voyeuristic conduct done for non-sexual purposes, including to humiliate, distress, or alarm.

[3] *See* Sexual Offences Act 2003 (England and Wales) § 67; Sexual Offences (Scotland) Act 2009 § 9 (also includes the alternative purpose of "humiliating, distressing or alarming" the victim); The Sexual Offences (Northern Ireland) Order 2008, Art. 71.

[4] For an analysis of the recognition in English law of this tort, see Vidal-Hall v Google Inc., [2014] EWHC 13 (QB, 2014).

2.2.2. Short history of voyeurism legislation in the UK

Prior to enactment of the Sexual Offences Act, some conduct that would now be an offence of voyeurism was addressed with using a range of broader criminal offences.[5] In *Smith v Chief Superintendent Woking Police Station*,[6] for example, a person who had entered a private garden and observed a woman in her nightdress through a gap in the curtains of her sitting room was charged with the offence of common assault.[7] Public order legislation was also used to prosecute individuals for voyeuristic conduct. In *Vigon v DPP*,[8] the defendant was charged with the offence of "insulting behaviour"[9] after being discovered observing female customers trying on swimwear in a changing cubicle at a market.

An offence of voyeurism was first proposed in a Government consultation document on reform of the law relating to sexual offences—*Setting the Boundaries: Reforming the Law on Sexual Offences*.[10] The Government observed that "rather like flashing, our traditional attitude to [voyeuristic conduct] has been to regard it as unpleasant but a nuisance rather than criminal, possibly because of difficulties in definition."[11] However, it was suggested that there were good grounds for criminalising such conduct. It was said that "secret observation for the gratification of the watcher," was likely to engender in the person observed, a sense of violation "not only of their privacy but of their sense of personal safety and integrity."[12] The Government proposed that the offence would be committed where observation had taken place in a space in which there was a reasonable expectation of privacy. It suggested that there might be such an expectation in a person's own home or bathroom, provided that those spaces were within the plain sight of those outside. It followed, therefore, that where some structural alteration would be required in order to observe, it could readily be inferred that those being observed had a reasonable expectation of privacy. An approach in which certain kinds of spaces would be designated "private places"—changing rooms and tanning booths for example—was rejected on the grounds that it would "give undue prominence to certain nuisances at the expense of others."[13] Significantly, it was proposed that the offence ought to be limited to observation of a person who was in a building or other structure, the Government seemingly taking the view that there could be no reasonable expectation of privacy in "open spaces," even a "private garden."

The Government further suggested that "lewd and lascivious intent" should not be an element of the offence. The harm that the proposed offence was intended to address, was the "fear and distress" that a person could suffer when it was discovered that he or she had been observed in circumstances that were presumed to be private. This was considered sufficient to justify imposing criminal sanctions on those who observed another in such circumstances. The proposal was that "[t]here should be an offence of voyeurism where a person in the interior of a building or other structure has a reasonable expectation of privacy and is observed without

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[5] see generally D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th edition, (2015: OUP), p.883.
[6] (1983) 76 Cr App R 234.
[7] Contrary to section 4, Vagrancy Act 1824.
[8] [1998] Crim LR 289
[9] An offence under section 5, Public Order Act 1986.
[10] Setting the Boundaries: Reforming the Law on Sex Offences, (2000: London, Home Office), available at *http://webarchive.nationalarchives.gov.uk/+/http:/www.homeoffice.gov.uk/documents/vol1main.pdf?view=Binary*
[11] *ibid*. p.122.
[12] *ibid*.
[13] *ibid*. p.123.

their knowledge or consent, whether by remote or mechanical means or not." It was further proposed that there should be an exception for authorized surveillance.

These proposals were the basis of the offence(s) of "Voyeurism" set out in section 67 of the Sexual Offences Act 2003. Criminal liability under this provision is in some respects broader than the offence that the Government had proposed in *Setting the Boundaries*, and in at least one respect, significantly narrower. The legislation is broader insofar as it establishes four distinct voyeurism offences (though each would be charged simply as the offence of "voyeurism") dealing respectively, with *observation*, *operating equipment* to enable facilitate observation by another, *recording*, and *installing equipment or adapting a structure* to enable observation. Further, whereas the proposed offence was limited to observation of a person in a building or other structure, the voyeurism offences in section 67 are committed in respect of persons who are doing a "private act," such an act being one carried out in a place where there is a reasonable expectation of privacy. This leaves open the possibility of the offence of voyeurism being committed in a broader range of circumstances than those envisaged in the Government's consultation document, including "open" or "public" spaces. However, the offence as enacted is, by virtue of the requirement that observation be undertaken for the purpose of sexual gratification, significantly narrower than the proposed offence, which would have criminalized observation *per se* where the person observed was inside a structure in circumstances in which there was a reasonable expectation of privacy.

2.2.3. The nature and forms of voyeurism offenses

Basic Offence: Observation

Section 67(1) provides that a person commits an offence if 'for the *purpose* of obtaining sexual gratification, he *observes* another person doing a private act' (*actus reus*),[14] and 'he *knows* that the other person does not consent to being observed for his sexual gratification' (*mens rea*). It is explained in section 68 of the Act that a person is doing a 'private act' if; (i) the person is in a place, which in the circumstances, would *reasonably be expected to provide privacy*, and (ii) either the person's genital, buttocks or breasts are exposed or covered only with underwear; or the person is using a lavatory; or the person is doing a sexual act that is not of a kind ordinarily done in public.

Criminal liability arises only where observation of a private act is undertaken for the purpose of sexual gratification. The offence of voyeurism is not committed where such observation is motivated by some other purpose.[15] What might constitute a 'private act' was considered in *R v Bassett*.[16] The defendant had being convicted of voyeurism after taking a camera hidden in a bag that had a small hole in it into a communal male changing area at a swimming pool. He was discovered filming, or about to film, a man using the showers. The man was, at the time,

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[14] In *R v MB* [2012] EWCA Crim 770 (also reported as *R v B*).the Court of Appeal suggested that although the purposive element of the offence in in section 67(1) concerned the observer's state of mind, 'the link between deliberate observation and the purpose of sexual gratification of the observer is central to the statutory offence of voyeurism.'[14] That purpose was said to turn 'the deliberate observation of another doing an intimate act (such as undressing) in private into an 'injurious act'.[14] The Court declined to use the 'Latin tags' *actus reus* and *mens rea* to isolate and define the elements of the offence. However, its identification of sexual purpose and observation as the 'act' with which the offence is concerned, and 'knowledge that the person observed does not consent to being observed' as a state of mind not connected with that 'outward component' of the offence, might reasonably be taken as a statement of the *actus reus* and *mens rea* elements of the offence.

[15] This is so even if the observer does in fact derive sexual gratification from the observation.

[16] [2008] EWCA Crim 1174.

wearing swimming trunks and the issue on appeal was whether the defendant had filmed him doing a 'private act.' The Court recognised that a person could have a reasonable expectation of privacy in places where it was possible that he or she would be seen. It illustrated the point by reference to the circumstances of an unreported case[17] in which marathon runners had gone into bushes to urinate during a race. Although they were not entirely concealed from public view, they had entered the bushes to find a degree of privacy. It was suggested that in those circumstances an expectation that they would not be followed and observed would be reasonable. However, that expectation would not extend to all of those whom they might encounter. While they could reasonably expect people not to loiter near the bushes closely observing them, there could be no reasonable expectation of privacy in respect of a 'casual and innocent' encounter with a passerby who came across them by accident rather than design. In such circumstances no offence of voyeurism would be committed even if the 'accidental observer' derived sexual gratification from the encounter. By analogy, those using a shower cubicle in a communal changing room that was not entirely enclosed from others' view might have a reasonable expectation of privacy in respect of someone who has drilled a hole in the wall of the changing room to in order to observe them, but not in respect of casual observation by other changing room users. The Court concluded that:

> The range of possible circumstances which exists between those comparatively plain cases shows that the question of whether the person observed has a reasonable expectation of privacy from the king of observation which ensued is one for the jury in each case. We accept that may well mean that in many cases the question of whether there is or is not a reasonable expectation f privacy will be closely related to the nature of the observing which is under consideration. That in turn may mean that the question of expectation of privacy may have an indirect link to the purpose of the observer. It is however plain that it is the nature of the observation rather than the purpose of the observation which may be relevant to the expectation of privacy… [T]he presence of sexual gratification in the observer does not ipso facto mean that the observation is one from which there is a reasonable expectation of privacy.[18]

The conclusion that a person has been observed in circumstances in which there was a reasonable expectation of privacy, does not necessarily lead to the further conclusion that he or she was 'doing a private act'. An act is only 'private' for the purposes of the offence in section 67 if in addition to thre being a reasonable expectation of privacy, either: the observed person's 'genitals buttocks or breasts are exposed or covered only with underwear'; she is using a lavatory; or is engaged in a sexual act of a kind other than that which is ordinarily done in public. It was held in *Barrett*, that the word 'breasts' in section 68, referred only to female breasts. The court observed there 'could be no reasonable expectation by a man in the 21st century who swims in a public pool in a pair of shorts with his exposed that he should enjoy privacy from observation of his upper torso.'[19]

Offence of Operating Equipment to Facilitate Observation by Another Person

A second form of the offence of Voyeurism is set out in Section 67(2). This provision imposes criminal liability on any person who operates equipment that facilitates observation of a person by another. It provides that 'a person commits an offence if (i) he *operates* equipment (*actus reus*), (ii) with the *intention of enabling* another person to observe, for the *purpose of* obtaining

[17] *R v Swyer* [2007] EWCA Crim. 204.
[18] At [11]
[19] at [13]

sexual gratification, a third person doing a private act, and (iii) he *knows* that that the third person does not consent to his operating equipment with that intention' (*mens rea*).

There is no requirement that anyone is, in fact, observed. Further, it would seem that the offence would be committed even if it transpired that the equipment that was operated was not, for some reason, capable of enabling another to observe the third person. Criminal liability rests on operation of equipment with an intention to bring about a state of affairs – enabling another to observe a third person doing a private for the purposes of sexual gratification of the other. Any observation enabled by the operation would presumably be charged as an offence of observation under section 67(1). Furthermore, in view of the provision of a specific offence of recording in section 67(3), it is likely that section 67(2) will most commonly be used in cases in which hidden cameras are used to stream images to a remote location where they can be viewed by others but are not recorded, for example, where a webcam is used to broadcast images of sexual activity without the consent of all of those engaged in it. The person operating the webcam may not know whether anyone is watching the footage, but commits the offence if he broadcasts with the intention of enabling others to do so. The term 'private act' in the offences of *observation, operating equipment* to enable another to observe, and *recording* (in section 67(1)-(3), is to be understood as it is defined in section 68.

Recording Offence

The third form of voyeuristic activity criminalized by section 67 of the Act, is recording. Section 67(3) provides that a person commits an offence if (i) he *records* another person doing a private act (*actus reus*), (ii) with the intention that he or a third person will, for the *purpose* of obtaining sexual gratification, look at an image of the person doing the act, and (iii) he *knows* that the person doing the act does not consent to his recording with that intention (*mens rea*). The images need be neither disseminated nor viewed to give rise to criminal liability. The offence is committed if the recording is made with the necessary intention, and in the knowledge that the person(s) depicted do not consent to recording for the intended purposes.

Although the offence will encompass many forms of covert recording, it has been argued that the terms in which a 'private act' is defined in section 68, are such that it will not apply to the practice of 'up-skirting' and 'down blousing.' These terms describe the practice of taking pictures or moving images using a covert camera, which is directed up a woman's skirt or down her blouse with the intention of capturing an image of her breasts or cleavage. The offence of recording is only committed in respect of a 'private act', which according to section 68 is an act carried out not only in circumstances in which the person who is filmed has a reasonable expectation of privacy, but one in which the genitals, buttock's or breasts of the person are exposed or only covered in underwear. The offence will clearly apply where the person is using a lavatory or is in a changing room and has stripped to their underwear. The problem, it is suggested, is that where a mobile phone, for example, is used to surreptitiously film up a woman's skirt on a bus or train, or on an escalator, the person's genitals, buttocks or breasts will be neither exposed nor only covered in underwear.[20] In such circumstances it would appear that what is filmed will not be a 'private act.'

[20] *See* A. Gillespie, '"Up-skirts" and "Down Blouses": Voyeurism and the Law', [2008] Criminal Law Review 370.

Offence of Installing Equipment or Adapting a Structure to Enable Observation.

In addition to the offences of *operating equipment* and *recording* described above, section 67(4) provides a further offence of *installing equipment*, or *constructing or adapting a structure* or part of a structure (*actus reus*), with the *intention* of enabling himself or another person to commit an offence under section 67(1) (*mens rea*). There is no requirement that the equipment be operated, or that anyone be subsequently observed. The provision criminalises acts that are preparatory to non-consensual observation. It is explained in section 68(2) that 'structure includes a tent, vehicle or vessel or other temporary or moveable structure.'

Mode of Trial and Penalties

The offences in section 67 are 'triable either way', either in as a summary proceeding conducted in the Magistrates' Court, or by way of trial on indictment in the Crown Court. The defendant may elect to have the case tried on indictment, which will entail trial by jury rather than by lay-magistrates or a judge (District Judge). If those presiding over a trial in the Magistrates' Court take the view that the matter is too serious to be tried as a summary offence or that their sentencing powers are unlikely to be sufficient in the event of a guilty verdict they have the power to commit the matter for trial in the Crown Court. A person found guilty of any of the offences in section 67 in a summary proceeding is liable to a term of imprisonment not exceeding 6 months or a fine not exceeding the current statutory maximum of £5000 (or both), and following conviction on indictment to a term of imprisonment not exceeding 2 years.

Sentencing guidelines have been issued for the offence of voyeurism.[21] While there is no offence of publication of images, distribution is an aggravating factor when it comes to determination of sentence, along with the location and timing of offence, the placing of images where there is a potential for a high number/volume of viewers, the period over which the victim was observed, the period over which images were made.

2.3. Protection from interference with identity, reputation or honour

2.3.1. Revenge porn (non-consensual pornography)

The offence of 'revenge pornography' is a relatively recent addition to the statute book in England and Wales. It was included as a late amendment during the passage through parliament of the Criminal Justice and Courts Bill. The Bill set out measures on a broad range of matters including jurors use of social media, appeals in civil proceedings, the release and recall of prisoners, and leave for judicial review. During the second reading in the House of Lords, it was explained that publishing 'intimate pictures of former lover on the internet' without that person's consent 'can have profound and devastating effects on their victims' lives, causing deep distress, often psychological illness and havoc within personal, family and work relationships.'[22] As a consequence of the availability of high definition cameras on phones and 'cameras built into glasses', it was thought this practice might become more widespread and criminal prohibition was required as a deterrent.[23]

Elements of the offence

The offence, referred to in the legislation as "Disclosing private sexual photographs and films with intent to cause distress," is set out in section 33(1) of the Criminal Justice and Courts Act

[21] https://www.sentencingcouncil.org.uk/offences/item/voyeurism/2-voyeurism/
[22] Hansard, House of Lords, 30 Jun 2014 : Column 1549
[23] *Ibid*.

2015. This provides that it is a criminal offence for a person (i) to *disclose* a private sexual photograph or film (*actus reus*) (ii) where the disclosure is made *without the consent* of an individual who appears in the photograph or film (*actus reus*), and (iii) the person disclosing the photograph or film does so with the *intention of causing* the person depicted distress (*mens rea).* It is not a requirement that any distress be caused, only that the image is disclosed with the intention of causing distress. Further, section 33(8) provides that a person cannot be taken to have disclosed the film or image with the intention of causing distress merely because that was a natural and probable consequence of the disclosure. In other words, the necessary intention cannot be inferred from the mere fact that an image or film has been disclosed – something more will be needed. However, disclosure is likely to often be preceded by the issuing of a threat, or some other form of communication between the person depicted and the person who discloses the images. It will often be possible to draw an inference regarding intention from what is said. It might also be possible to infer the required intention either from the circumstances of publication, for example, if it is published on a website is dedicated 'revenge pornography', or from words that accompany the image of film when it is published. Non offence is committed of the only person to whom a disclosure is made is the person depicted in it (section 33(2)).

The offence can also be committed by the provider of 'information society services' (Criminal Justice and Courts Act 2015, Schedule 8). The definition of 'information society services'used by the Act is that found in Article 1(2) of Directive 98/34/EC – 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.' In the case of a service provider established in England and Wales, an offence is committed where a photograph or film is disclosed in any European Economic Area state. However, there is a general prohibition against the institution of proceedings against a service provider that is established in an EEA state other than the United Kingdom, but this is subject to an exception where certain public policy conditions are met.

There are exceptions to criminal liability where the service provided consists of provision of access to a communications network, or the transmission in a communications network of information provided by the service user, (provided that the service provider does not initiate the transmission, select the recipient or modify the information contained in the transmission – i.e. an exception for 'mere conduits'). There are also exceptions for (i) services that cache information 'automatically, immediately, and temporarily at the request of the service users for the purposes of making onward transmission more efficient, and (ii) services consisting in the storage of information provided by service users (provided that the service provider had no knowledge that it consisted of or included a private sexual photograph or film provided without the consent of the person who appears in it, and that it was provided by the service user for the intention of causing distress to that person).

Defences

Given lack of consent to the disclosure is an element of the offence, a defence that will be available to a person charged with an offence of disclosing a private sexual photograph and film is that the person depiected in the image(s) consented to its disclosure (either on the particular occasion or generally). However, the legilsation provides a number of specific defences. A person will not commit the offence where:

- he or she reasonably believed the disclosure was necessary for the purposes of preventing, detecting, or investigating crime (s.33(3));
- the disclosure was made in the course of the publication of journalistic material (to the world at large) and the person reasonably believed disclosure to be in the public interest (s.33(4));

- he or she reasonably believed that the photograph had previously been disclosed for reward, either by the individual depicted in the image(s), or by another person, and (ii) he or she had no reason to believe that the previous disclosure for reward was made without the consent of the person depicted.

Definitions

The legislation defines various terms that are used in section 33. The meanings of 'photograph or film', 'sexual' and 'private' are set out in section 35.

A 'photograph or film' is a still or moving image in any form that 'appears' to consist of one or more filmed or photographed images, and in fact consists of one or more filmed or photographed images. The word 'appears' addresses the possibility of an image being altered from its original form. Non-consensual disclosure of any private and sexual image that has been alterred, amended or manipulated, and remains 'private' and 'sexual' (see below) notwithstanding the alteration, will give rise to criminal liability (s.34(4)). However, images that are entirely computer generated do not fall within the defintiion of 'film or photgraph' and do not give rise to criminal liability under this provision. Also included in the definition of 'photograph or film' are negatives, and data files that are capable of being converted into images (s.34(8)). Filming means making a recording, on any medium, from which a moving image may be produced by any means (s.34(7)).

A photograph or film is 'sexual' if (i) it shows all or part of an individual's exposed genitals or pubic area, or (ii) shows something that a reasonable person would consider to be sexual because of its nature, or (iii) its content taken as a whole is such that a reasonable person would consider it to be sexual (s.35(3)). It seems that the offence covers images depicting a broad range of subject matter. A person might commit an offence if he were to disclose, for example, images of a person posing naked; images of a person simulating sexual activity; images that do not depict sexual acts, but show persons in circumstances in which the reasonable person would assume the persons in the images are engaged in such acts and would therefore regard as sexual images.

A photograph is 'private' if it shows something that is not of a kind ordinarily seen in public (s.35(2)).

A film or photograph is 'disclosed' if the person, 'by any means', gives or shows, or makes it available to another person. So the offence may be committed, for example, by posting an image or footage on the internet, sending the a file containing an image by email or text message, or by giving another person a hard copy of the image or some portable storage device in which an image is stored.

Sections 33(4) and (5) establish that a photograph or film of an individual that is neither private nor sexual, cannot become private or sexual by virtue of any subsequent alteration or combination with other images. So a person who superimposes the face of a former partner onto the body of another person deoicted performing a sexual act, does not commit the offence.

Mode of Trial, and Sanctions

The offence is triable either way. A person convicted following trial on indictment can be sentenced to a term of imprisonment not exceeding 2 years, and following a summary conviction a term of imprisonment not exceeding 12 months, or a fine, or both. There are no sentencing guidelines for the offence of disclosing a private sexual film or photograph.

Alternative offences

There are a number of alterantive offences. Prior to enactment of the Criminal Justice and Courts Act 2015, conduct now dealt with as the offence of disclosing a private sexual photographs and films, might have been dealt with using criminal offences found in various pieces of legisaltion - including the offence of staking or harrassament (sections 2-4A Protection from Harassment Act 1997); sending a communication that is grossly offence, obscene, menacing or false (s.127 Communications Act 2003); sending a communication that is grossly offensive, indecent, obscene, threatening or false, with intent to cause distress or anxiety (s.1 Malicious Communications Act 1988) and blackmail.

2.4. Offences against communications

Blackstone described the common law offence of eavesdropping as being committed by those who "listen under walls or window, or the eaves of a house, to hearken after discourse and thereupon to frame slanderous and mischievous tales"[24] However, this common law offence having been abolished by the Criminal Law Act 1967, [25] eavesdropping is no longer subject to criminal prohibition in England and Wales.

Covert surveillance undertaken by security and surveillance agencies, law enforcement agencies and other public authorities is subject to regulation. The Regulation of Investigatory Powers Act 2000 provides statutory scheme of authorization, which when complied with will render covert surveillance 'lawful.' But this legislation does not create any criminal offence of 'unlawful surveillance.'

Section 27(1) provides that covert surveillance, including the kind of conduct that we have described as eavesdropping, is lawful insofar as it is authorized in the manner prescribed by the Act, and is carried out in accordance with that authorization.

The effect of this provision is unclear and it is has been suggested that it might be understood in one of two ways. The first is that there is no counterpart of 'unlawful surveillance' to the 'lawful surveillance' that is authorized under the Act. In *Malone v Metropolitan Police Commissioner*,[26] the House of Lords rejected the suggestion that an act is unlawful unless positively authorized by law; 'England is not a country where everything is forbidden except what is expressly permitted.'[27] On this view section 27(1) is merely the reiteration of an existing state of affairs - that surveillance, including auditory surveillance, by an undercover agent is lawful. It is suggested the reason for doing so is to ensure that such surveillance does not fall foul of the right to respect for private life provided by Article 8 of the European Convention on Human Rights. The Convention's doctrine of 'legality' requires the law be accessible and expressed with a sufficient degree of certainty.

The alternative view of section 27(1) is that it is concerned only with illegal activity. It ensures that law enforcement officers who engage in criminal activity that is within the parameters of an authorized surveillance operation will not be charged with a criminal offence. Whatever the correct view, neither casts any doubt on the proposition that English law knows no offence of eavesdropping.

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[24] Blackstone's Commentaries, 15th edn. (1809), vol. 4, p.168.
[25] Section 13(1), which abolished a number of common law offences: being a common barrator, challenging to a fight, being a common scold or a common nightwalker.
[26] [1979] Ch. 344.
[27] At 366