

## Engender Briefing: Making women safer in Scotland: the case for a standalone misogyny offence

*Hate crime [...] is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator's group and the 'appropriate' subordinate identity of the victim's group. – Barbara Perry<sup>1</sup>*

Engender's ambition is for a Scotland in which women have the freedom to live a good life, unconstrained by the experience or the fear of misogynistic harassment. Violence against women is a human rights violation and a cause and consequence of women's inequality. Ubiquitous misogynistic harassment prevents women and girls from living a good life; where to go, what to do, whether to speak in class, and how to behave at work are all decisions that are constrained by the threat and reality of men's harassment.

Scotland is currently deciding between two options for how it should respond to the types of crimes that victimise women because they are women. Scottish Government's review of hate crime legislation has consulted on the incorporation of a 'gender hostility' aggravation or the creation of new standalone offence to challenge misogyny.

This **16 Days of Activism Against Gender-Based Violence**, Engender has published *Making women safer in Scotland: the case for a standalone misogyny offence*. Our proposed solution, and the solution of national violence against women organisations, is that Scotland consider the creation of a standalone offence to tackle egregious misogyny. The process we recommend would bring together women, lawmakers, and international expertise to identify areas where the current law is weak or non-existent, and create a new offence to disrupt and prevent this form of gender-based violence.

### THE PROBLEM: WOMEN AND HARASSMENT IN SCOTLAND

Harassment permeates almost every aspect of the lives of women and girls, constraining our choices and the ways we think about ourselves throughout our life courses, starting in childhood. The ubiquitous nature of harassment and violence includes physical and online spaces, public and private, education settings and workplaces. For example:

- More than half (52%) of women in the UK have experienced some form of sexual harassment, with one quarter experiencing unwanted touching, and one

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<sup>1</sup> Perry, Barbara. (2001) *In the Name of Hate: Understanding Hate Crimes*. 1st Edition. New York: Routledge.

fifth of women experiencing unwanted sexual advances. More than one in ten women reported unwanted sexual touching or attempts to kiss them.<sup>2</sup>

- Three quarters of women experiencing domestic abuse are targeted at work.<sup>3</sup>
- Three quarters (71%) of British women have taken action to guard themselves against the threat of harassment. This figure rises to nearly 9 in 10 (88%) for younger British women aged 18-24.<sup>4</sup>
- A 2010 YouGov poll of 16-18 year olds found that 29% of girls experienced unwanted sexual touching at school and a further 71% said they heard sexual name-calling such as ‘slut’ or ‘slag’ towards girls at school daily or a few times per week.<sup>5</sup>
- In 2015 Girlguiding UK found that 75% of girls and young women said anxiety about potentially experiencing sexual harassment affects their lives in some way.<sup>6</sup>
- Over half (53%) of young women aged 18 to 29 say that someone has sent them explicit images they did not ask for. 83% of young women (aged 18 to 29) view online harassment as a major problem.<sup>7</sup>
- An international survey commissioned by Amnesty International in 2017 found that nearly a quarter (23%) of women aged between 18 and 55 in Denmark, Italy, New Zealand, Poland, Spain, Sweden, the UK and USA has experienced online abuse and harassment, and of those 41% felt that their physical safety was threatened.<sup>8</sup>

This level of harassment has real and serious consequences for wellbeing - women describe sexual harassment as having a negative impact on their mental health, as making them less confident at work, and as inducing them to avoid certain work situations in order to avoid the perpetrator.<sup>9</sup> They are forced to constantly undertake ‘safety work’ – strategising and planning to avoid, manage or disrupt men’s violence in all spaces they navigate. The EU Agency for Fundamental Rights has also noted that “Women with irregular or precarious employment contracts, which are common for

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<sup>2</sup> Trades Union Congress. (2016) *Still Just a Bit of Banter? Sexual Harassment in the Workplace in 2016*. TUC.

<sup>3</sup> Swanberg, Jennifer E., and Caroline Macke. (2006) *‘Intimate Partner Violence and the Workplace: Consequences and Disclosure’*. *Affilia*. 21 (4) pp.391–406. doi:10.1177/0886109906292133.

<sup>4</sup> ActionAid UK. (2019) *‘Nearly Three in Four Women Were Harassed in Past Month’*. ActionAid UK. <https://www.actionaid.org.uk/latest-news/three-in-four-women-uk-world-harassed-in-last-month>.

<sup>5</sup> End Violence Against Women Coalition. (2010) *‘2010 Poll on Sexual Harassment in Schools’*. EVAW Coalition.

<sup>6</sup> Girlguiding UK (2015) *Girls’ Attitudes Survey*. Girlguiding UK.

<https://www.girlguiding.org.uk/globalassets/docs-and-resources/research-and-campaigns/girls-attitudes-survey-2015.pdf>.

<sup>7</sup> Duggan, Maeve. (2017) *Online Harassment 2017*. Pew Research Center.

<sup>8</sup> Amnesty International. (2019) *‘Amnesty Reveals Alarming Impact of Online Abuse against Women’*. Amnesty International. <https://www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/>.

<sup>9</sup> Trades Union Congress. (2016) *Still Just a Bit of Banter? Sexual Harassment in the Workplace in 2016*. TUC.

many jobs in the services sector, are also more susceptible to sexual harassment.”<sup>10</sup> This damage has further long-term consequences for women’s equality, for example the Council of Europe notes that cyber harassment constrains women’s career choices, finding women less likely to pursue certain roles and opportunities.<sup>11</sup>

Sexual harassment and misogynistic hate speech re-create women’s subordination and communicates to women and girls that they do not have equal access and rights to safety, public space, and physical autonomy through unwanted touching, defamation and disruption to women’s professional lives and girls’ education, and sexually objectifying concepts and materials. This can also be true where men are the primary targets, as we have seen with examples of high-profile men receiving rape threats to their female partners or daughters.

**Despite the scale of the problem, harassment and violence towards women by men has seemed peculiarly invisible to policymakers, administrators, and those responsible for the delivery of public services.** Worryingly, the third-party harassment provisions set out in the Equality Act 2010 which protected women from harassment by non-colleagues at work were repealed in 2013.<sup>12</sup>

## **THE SOLUTION: DISRUPTING MISOGYNISTIC HATE**

As noted by Barbara Perry, hate crime intends to reaffirm social hierarchies. There are three justifications for paying special attention to hate crime within the criminal justice system:

1. Hate crime harms individuals, both in the immediate term and in longer term changes to their behaviour.
2. Hate crime reminds other members of the group, in this case women, that the way that they are targeted by men makes them unsafe; and
3. Society has an interest in the education of all of its members against prejudice against the group.<sup>13</sup>

International instruments that Scotland is committed to deliver also mandate action on egregious misogyny. The Council of Europe Convention on preventing and combating violence against women and domestic violence (the ‘Istanbul Convention’) requires that states take the necessary legislative or other measures to ensure that **any form** of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating

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<sup>10</sup> European Union Agency for Fundamental Rights. (2014) *Violence Against Women: An EU Wide Survey*. Fundamental Rights Agency.

<sup>11</sup> Gender Equality Unit, Council of Europe. (2016) *‘Background Note on Sexist Hate Speech’*. Council of Europe.

<sup>12</sup> Advisory, Conciliation and Arbitration Service. (2013) *‘Repeal of Third-Party Harassment Legislation | Acas Workplace Snippet October 2013.’* ACAS. <https://www.acas.org.uk/index.aspx?articleid=4582>.

<sup>13</sup> Perry, Barbara. (2001) *In the Name of Hate: Understanding Hate Crimes*. 1st Edition. New York: Routledge.

an intimidating, hostile, degrading, humiliating, or offensive environment, is subject to criminal or other legal sanction (our emphasis).<sup>14</sup> Obligations to take “all appropriate measures to modify the social or cultural patterns of conduct of men and women [in order to realise substantive equality]” are also found in the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee’s General Recommendation 19, which clarifies that “discrimination against women, as defined in Article 1 of the Convention, includes gender-based violence.”<sup>15</sup>

**Engender, alongside Scottish Women’s Aid, Rape Crisis and Zero Tolerance, believes that the best way forward for addressing the harassment of women is the development of a “standalone misogynistic hate crime” to disrupt “epidemic levels of misogynistic hate.”<sup>16</sup>**

Following a review by Lord Bracadale in 2017 the Scottish Government is now deciding between two approaches to tackling egregious misogyny: **a new statutory aggravation based on ‘gender hostility’ and a standalone offence.**

‘Gender hostility’ has not been defined elsewhere and **fails to name the problem**<sup>17</sup> – misogyny.<sup>18</sup> We further believe that the **proposal for a new statutory aggravation does not pay enough attention to international jurisdictions that have attempted this approach**, by adding gender to a long list of groups protected by hate crime laws. New Jersey, for example, has seen only 18 recorded sex or gender-based hate crimes in the 20 years since its law was reformed, compared with thousands of race-biased, religion-biased and sexual orientation biased offences.<sup>19</sup> Emerging experience from within the UK suggests that pilot initiatives to record ‘misogynistic hate crime’ by police forces in England and Wales have had very mixed results (beyond precipitating further ‘hate crimes’ against the women who called for recording to be introduced).<sup>20</sup>

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<sup>14</sup> Council of Europe. (2011) *Convention on Preventing and Combating Violence Against Women and Domestic Violence*. Koninklijke Brill NV. doi:10.1163/2210-7975\_HRD-9953-2014005.

<sup>15</sup> UN Committee on the Elimination of Discrimination against Women (2017) *General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19*. United Nations.

<sup>16</sup> Engender, and Scottish Women’s Aid. (2018) ‘*Women’s Organisations Disappointed by Lord Bracadale’s Recommendations, Seek Further Dialogue with Scottish Government*’. On the Engender Blog. <https://www.engender.org.uk/news/blog/womens-organisations-disappointed-by-lord-bracadales-recommendations-seek-further-dialogue/>.<<https://www.engender.org.uk/news/blog/womens-organisations-disappointed-by-lord-bracadales-recommendations-seek-further-dialogue/>

<sup>17</sup> Platts, Alison, Dawn Griesbach, and Fiona Mackay. (2019) *Consultation on Amending Scottish Hate Crime Legislation: Analysis of Responses*. Scottish Government. <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/>

<sup>18</sup> One of the critical pieces of work that remains is to develop a shared definition of ‘misogyny’. In responding to correspondence from Lord Bracadale’s secretariat we defined it as “systems or actions that deliberately subordinate women and reflect the actor’s understanding that women are not their equals.

<sup>19</sup> Hodge J. (2011) *Gendered Hate*. Northeastern University Press. Citing New Jersey State Police Bias Incident Reports 2008 to 2017-18, available at <https://www.njsp.org/ucr/bias-incident-reports.shtml>

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International evidence suggests that police forces, prosecutors, and judges struggle to **perceive gender-inflected or misogynistic hate crime as a hate crime at all**.

We are also concerned that an aggravation model – whether termed ‘gender hostility’ or ‘misogyny’, is **incompatible with the definition of violence against women in *Equally Safe***, which understands that all forms of violence against women are causally connected to the inequalities between men and women. **By referring to violence as ‘gender based’, *Equally Safe* highlights the need to understand violence within the context of women’s and girl’s subordinate status in society.**<sup>21</sup> Applying a ‘gender-based’ aggravation to some forms of violence or to some cases and not to others (for example treating one case of domestic abuse as involving ‘gender hostility’ and another not) would therefore be incoherent with our understanding of those types of crime.

An ‘aggravation model’ does not create new offences but only increases the possible tariff for sentencing; it cannot fill the gaps in the law for conduct that is currently not criminalised. Equally, we are not convinced that the symbolic or communicative quality of criminalising gendered hate crime is sufficient when it comes to protecting women. The law must work for women and girls.

## DESIGNING A MISOGYNY OFFENCE

It is vital to shape the law in such a way as to maximise its effectiveness to prevent harm to individual women and girls, and women and girls as a series of groups. We recognise that there are considerations which must be collectively worked through in designing an effective law. Firstly, there is a **need to address the shortage of administrative data** that might provide detailed information to fully understand women’s experiences. Secondly, the **international examples of gendered hate crime are few and do not appear to have resulted in material advances** for women’s equality and rights.

Engender recommends that these issues are pursued through a **participatory approach to developing a law criminalising egregious misogyny**. The Domestic Abuse (Scotland) Act provides a positive example of a development process that drew on both international expertise, the experience of organisations such as Scottish Women’s Aid and Rape Crisis Scotland, and women with lived experience in its formulation. We further propose the following features be part of these discussions:

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<sup>21</sup> Scottish Government, and COSLA. (2018) *Equally Safe: Scotland’s Strategy for Preventing and Eradicating Violence against Women and Girls*. Scottish Government.

- **Defining ‘misogyny’ comprehensively and effectively**,<sup>22</sup> which enables all people in the system to identify, investigate and prosecute misogynistic harassment;<sup>23</sup>
- Enabling action where women experience hate, bias, or **harassment because of their sex or gender as well as because of another protected characteristic**;
- **Mandating the collection of data** that would enable the impact of the law to be measured and monitored;
- Locating misogynistic hate crime and harassment **within the understanding of violence against women in *Equally Safe***<sup>24</sup> and,
- **Inclusion of post-legislative scrutiny** so that the Scottish Parliament must evaluate its impact and any unintended consequences.

## CONCLUSION

As movements such as ‘Me Too’ and ‘Times Up’ have powerfully demonstrated over the past few years, women all over the world continue to experience chronic levels of harassment and violence from men because they are women. There are serious questions about how our justice systems engage with these realities effectively. The concept of hate crime was developed in response to the oppression of racism and, as we have described, it is an awkward fit for gendered injustices. In those jurisdictions where gendered hate crime exists, it has not changed much for women.

**Instead, we are calling for a participatory development process for a standalone offence targeted effectively to respond to misogynistic harassment and abuse.** We would recommend a similar approach to the development of the Domestic Abuse (Scotland) Act, where legal scholars, gender experts, and victim-survivors came together to create a law that meets the needs of women and girls. Our law would be evidence-based and aligned with Scotland’s innovative work to prevent violence against women.

### FOR FURTHER INFORMATION

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### ABOUT US

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women’s power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.

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<sup>22</sup> We have previously defined misogyny as we have previously described as “systems or actions that deliberately subordinate women and reflect the actor’s understanding that women are not their equals.”

<sup>23</sup> Engender. (2018) *Additional Submission by Engender to the Independent Review of Hate Crime*. Engender.

<sup>24</sup> Scottish Government. (2014) *Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls*. Scottish Government.