



## Engender Parliamentary Briefing: Stage 3 Hate Crime and Public Order Bill

9 March 2021

### BACKGROUND

#### 1. About Engender

Engender is Scotland's feminist policy and advocacy organisation. We work to secure women's political, economic and social equality with men and make visible the impacts of sexism on women and wider society. We welcome this opportunity to highlight our ongoing research and engagement with the Hate Crime and Public Order Bill ahead of the Stage 3 debate.

#### 2. Engender's Position on Hate Crime

Our central concern relating to the Hate Crime and Public Order Bill is that it does not recognise the realities of women's experience of egregious misogynistic harassment, offers ineffective response to violence against women, and does not work to challenge structural oppression. **The hate crime framework offers a harmfully ineffective response to gender-based violence against women.** While we support the broad concept of hate crime – which protects women who experience crimes motivated by hatred towards them because of their membership of a minority group, including lesbian and bisexual women, disabled women, trans women, and Black and minoritised women – we have practical concerns about including violence against women in the model of hate crime.

While we were initially drawn to the idea of extending Scottish hate crime law to offences that involved 'hatred' of women<sup>1</sup> we have found no evidence that such an approach will enhance criminal justice responses to women's experience of misogynistic harassment. In New Jersey for example, their 20-year-old hate crime law has seen only 18 reports of sex-based hate crime compared with 6,810 incidences of race-based hate crimes during the same period.<sup>2</sup> A Council of Europe review of legislation tackling sexist 'hate speech' found that "there are not many court cases dealing with sexist hate speech. This might be due to the lack of clear legislation, the lack of awareness and knowledge about rights, the

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<sup>1</sup> Engender (2020) Engender submission of evidence to the Scottish Parliament Justice Committee call for views on the Hate Crime and Public Order (Scotland) Bill. Available at <<https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-on-Hate-Crime-and-Public-Order-Scotland-Bill-.pdf>>

<sup>2</sup> Analysis by Engender at Engender (2019) Making women safer in Scotland: The case for a standalone misogyny offence. Available at <<https://www.engender.org.uk/content/publications/Making-Women-Safer-in-Scotland---the-case-for-a-standalone-misogyny-offence.pdf>>

difficulty to find the identity of an anonymous hater or the unwillingness to consider this issue as a serious one.”<sup>3</sup> A Nottinghamshire pilot of ‘hate crime’ recording and prosecution led to only one single charge in the space of two years.

**We also see 5 critical risks that have not yet been answered by proponents of extending the law to cover sex:**

- It is fundamentally contradictory within a feminist analysis of violence against women to say that some incidents or offences - from harassment to stalking to sexual assault - are a product of malice or ill will towards women as group and some are not. Scotland’s violence against women strategy, *Equally Safe*, roots violence against women in women’s inequality as a class.
- Human rights frameworks that Scotland is committed to and considering incorporating into domestic law, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Istanbul Convention, advise against gender-neutral laws and symmetrical approaches such as a sex aggravation or stirring-up offence. Instead, they call for laws tailored to women’s experiences, like Scotland’s Domestic Abuse Act.
- Reaching for an apparent solution that is easy but does not work may prevent Scotland from creating policy and legislation on misogynistic harassment that is new, distinctive and, crucially, effective.
- Evidence from similar legislation shows that women do not recognise their experience of misogyny in concepts like ‘hate crime’ and ‘hate speech’ and nor do criminal justice actors. This means that offences against women are not reported, investigated, or prosecuted, which leaves a gap in protection.
- That a reciprocal aggravation such as sex or gender hostility,<sup>4</sup> which protects men from non-existent sex-based ‘hate crime’ as well as women, may be used by perpetrators of offences against women as part of a course of conduct of domestic abuse.

Parliament has done some of its best cross-party work on complex issues around violence against women. Its Domestic Abuse (Scotland) Act has been hailed as ‘gold standard’ legislation, because parliamentary engagement with the Bill was deeply informed by women’s lived experience of men’s violence. We believe that similar detailed scrutiny is needed to provide adequate protection in respect of women and deeply embedded misogyny and inequality, which is not possible within the timetable available for the Bill.

## **SPECIFIC CONSIDERATIONS**

### **1. Why do we need new legal protection for women who experience misogynistic harassment rather than a sex aggravation?**

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<sup>3</sup> Gender Equality Unit, Council of Europe. (2016) ‘Background Note on Sexist Hate Speech’. Council of Europe. Available at <<https://rm.coe.int/168059ad42>>

<sup>4</sup> A ‘gender hostility’ aggravation was proposed by Lord Bracadale following his review into existing hate crime legislation and was opposed by Engender.

Hate crime is not a model that was designed with majority groups in mind. Women are 52% of the population and a third of women globally will experience physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.<sup>5</sup> ActionAid reported in 2016, based on survey data, that more than half (53%) of women in Great Britain had experienced some form of harassment within the last month, and that almost half (43%) of women experienced harassment at the age of 18 or younger.<sup>6</sup>

Misogynistic harassment, like other forms of violence against women, reproduces 'relations of dominance' between women and men.<sup>7</sup> It is unclear how a sex aggravation would distinguish between incidents of violence against women. It is fundamentally incompatible with feminist analysis to suggest that one incident of men's violence is motivated by animus toward a woman on the basis of her sex and one is not. Scotland's violence against women frameworks – including the Domestic Abuse (Scotland) Act – are gendered, in that while the law protects any victim the content is informed by and responds to the specific experiences of women. For example, coercive control, which is criminalised by the Domestic Abuse (Scotland) Act almost never has a female perpetrator and male victim.

A 'sex' aggravator does not reflect this analysis and replicates what was described during Stage 2 consideration as "a symmetrical approach—an approach that, to date, has patently failed."<sup>8</sup>

## 2. Would adding a sex aggravator make women safer?

Adding an aggravation offers no new protection where the law is not already designed or implemented to protect women and girls from harassment, harm or misogyny.

We think that **there is a need to recognise that existing law and/or its implementation across criminal justice is failing to disrupt and respond to the scale of this problem.**

The Crown Prosecutor and Procurator Fiscal confirmed when they gave evidence to the justice committee at stage one that the absence of a specific sex aggravator will not prevent a single prosecution from taking place that could be subject to a sex aggravator.<sup>9</sup> Developing mechanisms that will disrupt behaviour that constrains women's choices, expression or safety is vital but **the presence or otherwise of an aggravator has no bearing on existing criminal law.**

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<sup>5</sup> World Health Organisation (2017) Violence Against Women Key Facts. Available at <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>>

<sup>6</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>7</sup> Kelly L (2005) How violence is constitutive of women's inequality and the implications for equalities work

<sup>8</sup> Official Report Justice Committee 2 February 2021. Available at <<https://www.parliament.scot/parliamentarybusiness/report.aspx?r=13097&mode=pdf>>

<sup>9</sup> Justice Committee Official Report 26th Meeting 2020, Tuesday 3 November 2020 col 50

While we understand that there is an instinctive desire to take any opportunity to advance women's equality and rights, that opportunity must be more than symbolic. We are not supportive of adding sex in this Bill because we are unclear that it constitutes any positive benefit at all. Once passed into law, **a sex aggravator will be difficult to correct if it is not working for women** or indeed if it is causing harms that we cannot anticipate. We note that there is no amendment that could allow for the speedy removal of a sex aggravator if it is found to be harmful.

### **3. What is the benefit of further consideration by the Misogyny Working Group?**

We want proposals that actually make women in Scotland safer and improve their access to justice. The Misogyny Working Group will be able to examine evidence specific to women and girls and consider the best possible response to the issues we face, including aggravators, new primary legislation specifically aimed at egregious misogyny, changes to criminal procedure, investigating procedures or any other measure across the criminal justice system. This process should inform Parliament's next steps rather than Parliament directing the Working Group to work out the detail of an approach that may not work. We suggest this should extend to including any definitions of sex within the Bill that may be helpful, including those more narrowly restricted to women, misogyny or any other concept that will protect women and girls. Parliament should not currently preclude exploring any definition, whatever it ultimately decides to include in law.

For these reasons we welcomed<sup>10</sup> the Justice Committee's conclusion that "Whilst the arguments are finely balanced, the Committee considers it might be wise to wait until the Working Group on Misogynistic Harassment has reported before Parliament considers legislating to add sex as a hate crime characteristic."<sup>11</sup> With consensus and momentum behind the need to address the misogyny and hatred toward women **there is an opportunity for an ambitious 'fit for purpose' approach.**

**Engender therefore urges Parliament to support the Bill's approach, which leaves it open to Parliament to add a sex aggravator if and when solutions to these problems have been identified.** The Misogyny Working Group has committed to reporting on this within a year and the Cabinet Secretary has committed the Scottish Government to implementing such a recommendation within a month of receipt.

### **4. Would an aggravator give us better data about crimes against women on the basis of sex?**

We suggest that the presence or otherwise of an aggravator does not prevent us gathering sex disaggregated data about any offence. Indeed knowing that a 'sex' hate crime

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<sup>10</sup> Engender (2020) Engender submission of evidence to the Scottish Parliament Justice Committee call for views on the Hate Crime and Public Order (Scotland) Bill. Available at <<https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-on-Hate-Crime-and-Public-Order-Scotland-Bill-.pdf>>

<sup>11</sup> Official Report Justice Committee 24 November 2020. Available at <<https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12973>>

occurred tells us nothing about the victim, perpetrator or cause of antipathy, especially where the victim may not be an individual but instead an organisation, for example. Engender continues to support all efforts to advance the quality of gender-sensitive sex-disaggregated data and welcomes the amendment passed at stage two (section 15A) introducing a statutory requirement for Police Scotland to publish an annual report detailing instances of hate crime reported to the police, which includes sex. However, an aggravator that is poorly understood or not used, or is coupled with poor reporting we see in other jurisdictions, may in fact dramatically underestimate the prevalence of misogynistic harassment - rendering the harms that women and girls experience invisible.

## **5. What do we do about the rising levels of misogyny directed at women?**

Much of the misogyny that is expressed daily does not represent a direct threat of harm but has huge impact on women and girls' access to online and physical spaces. We are perplexed by the proposal to add sex as an aggravator now but leave it open to the Misogyny Working Group to consider adding sex to the stirring up offences at a later date by considering amendments only relating to section 1 offences.

While we are not yet convinced that sex – or misogyny – is best dealt with through the hate speech model for stirring up offences, it seems contradictory to say women's protection cannot wait for the Working Group to develop comprehensive proposals when it comes to an aggravator (which creates no new offence) but can wait for such proposals to be forthcoming where a new offence is considered. **In our view the whole issue of misogyny is best dealt with holistically and we urge MSPs to give this expert group the space and time in which to develop such proposals.**

## **6. What is the best protection for freedom of expression?**

We believe that the appropriately high threshold for an offence under section 3(2) should be supported by a freedom of expression clause that makes clear the application of ECHR jurisprudence in full to any purported offence. We do not however believe that it is appropriate to single out aspects of protected characteristics or identity as being more or less worthy of criticism than others. Fixing aspects of current social and political debate on the face of the Bill runs the risk of the law becoming out of date, as evidenced by the reaction to the attempt to replicate freedom of expression clauses drafted in 1986.

Prescriptive yet narrow freedom of expression clauses will not prevent an offence being committed. In fact, they may lead people to commit offences capable of crossing the threshold in section 3(2) under the mistaken belief their speech is protected because its content corresponded with a matter listed on the face of the Bill. Finally, no clause, unless it represented an absolute exception to stirring up offences based on content, could eradicate concerns about investigations of vexatious complaints.

## 7. What about freedom of expression and sexist speech?

**We would be vehemently opposed to any attempt to list aspect of women's identity that were 'up for debate' in a piece of legislation passed in 21<sup>st</sup> century Scotland**, even if clearly such speech fell below a threshold for criminal action. It is vital to consider what statements about women, gendered norms and sex could be given tacit approval under the guise of freedom of expression. For example, would it be appropriate to question women's suitability for particular jobs or industries or to make comments about women's bodies or physical appearance? Parliament has a responsibility to think cautiously about what message such an approach sends to any group of people.

### CONCLUSION

Women deserve and need criminal justice approaches that have been developed to respond to gendered social norms. **Equality does not mean treating oppressed groups the same but responding to the particular needs and barriers that are faced by each group in order to realise their rights.** A bespoke and detailed consideration of misogyny, which is now being pursued through the Working Group, has been our long stated key ask of this process and we look forward to engaging with the Group's recommendations.

Engender therefore asks MSPs to:

- **Oppose Amendment 4** adding a sex aggravation before the Misogyny Working Group has developed proposals to respond to misogyny.
- **Oppose Amendment 17** replicating the Equality Act's definition of sex into criminal legislation without evaluating whether the definition is the best way to protect women from misogynistic harassment and **oppose Amendment 26** which removes the ability to add any interpretative provision related to 'sex' once the Working Group reports.
- **Support Amendment 11** on freedom of expression, without further amendment.
- **Oppose Amendments** which single out aspects of protected characteristics' identity under the guise of freedom of expression.

### FOR FURTHER INFORMATION

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### ABOUT US

Engender is Scotland's feminist policy and advocacy organisation, working to increase women's social, political and economic equality, enable women's rights, and make visible the impact of sexism on women and wider society. We work at Scottish, UK and international level to produce research, analysis, and recommendations for intersectional feminist legislation and programmes.