



# Engender response to the Scottish Government consultation on Scottish Hate Crime legislation

## 1. INTRODUCTION

Engender welcomes the opportunity to respond to the Scottish Government's consultation on how it might respond to Lord Bracadale's recommendations following his Independent Review of Hate Crime Legislation in Scotland. We engaged substantively with the Independent Review, and took the opportunity it presented to consider the ways in which Scotland might respond to the gendered social phenomenon of misogynistic harassment and what might be characterised as 'hate speech'.

The aim of Lord Bracadale's review was to consider "whether the law should be clarified and harmonised, and whether additional protected groups should be included". Our submission to that review attempted to reflect on the shape and impact of misogynistic harassment of women in Scotland, and to generate ideas about how this might be disrupted.

Engender's ambition is for a gender equal Scotland in which women are free to live their lives unconstrained by the experience or fear of misogynistic harassment.

Since the Offences (Aggravation by Prejudice) (Scotland) Act 2009 came into force the context and medium of the harassment that women and girls experience has changed, as online abuse has proliferated and there is rising consciousness of the prevalence and impact of harassment in public spaces, in the workplace, and in education settings. We endeavoured to relate this shifting reality to the questions posed by the review.

Scotland has rightly been lauded for the boldness and ambition of its violence against women strategy, *Equally Safe*, and received international commendation for the Domestic Abuse (Scotland) Act 2018. Our approach to responding to the everyday crisis of misogynistic harassment and abuse should be similarly visionary.

## 2. PART ONE – CONSOLIDATING AND MODERNISING HATE CRIME LEGISLATION

**Note:** We have answered only the questions in the consultation that most directly relate to our advocacy for a standalone misogynistic harassment offense. We have not responded to questions about statutory aggravations for other protected groups, and defer to the expertise of organisations that advocate for those groups and communities.

However, we must note that women are found in all protected groups, and that our experience of misogyny may be intensified by other aspects of our identity in different contexts. At the moment statutory aggravations do not seem designed to flex when people experience ‘hate crime’ that occurs because of their multiple identities. Engender has not done any work to chart harassment due to multiple layers of bias or hate, but a project on anti-sectarianism that we delivered between 2013 and 2015 found an example of the type of ‘hate crime’ that occurs because of multiple identities:

*The most common type of religious-inflected street harassment [disclosed to Engender through a nationwide series of participatory events] was of Muslim women wearing hijab or other types of head-covering. One woman described crying in the street in shock after a man came up and pulled at her head-covering and shouted in her face. (Engender (March 2015) The ‘S’ Word: Women’s experiences of intra-Christian sectarianism in Scotland)*

It is vital that Scotland’s response to ‘hate crime’ be responsive to incidents that occur at the intersections of different identities.

### **Q1. Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland?**

We do not take a view as to whether a statutory aggravation model is a suitable response for some groups who experience hate crime. We are concerned by the symmetrical quality of most of the protected characteristics enumerated in existing legislation, whereby a ‘racist hate crime’ can be perpetrated against a white person because of their whiteness. This means that Barbara Perry’s definition of hate crime – which has gained the strongest support from criminologists working in the field of hate crime - as “a mechanism of power and oppression, intended to reaffirm the

precarious hierarchies that characterise a given social order” is inconsistent with the current approach.

Sexual harassment and hate speech re-creates women’s subordination. It communicates, using sexist and sexualised language, unwanted touching, defamation and disruption to women’s professional lives and girls’ education, and sexually objectifying concepts and materials, that women and girls do not have equal access and rights to safety, public space, and physical autonomy. This is the case even when men are the primary targets, such as when high-profile men receive rape threats to their female partners or daughters, or when male doctors who provide abortion healthcare appear on flyers with a reticule from a rifle scope digitally superimposed over their portraits. It is, in our view, important to capture this feature of gendered hate crime in the definition used.

### 3. PART TWO – NEW STATUTORY AGGRAVATIONS

#### **Q7. Do you agree with Option A to develop a statutory aggravation for gender hostility?**

We are very clear that we do not think a statutory aggravation model is appropriate for misogynistic harassment. This is because:

1. A symmetrical ‘gender hostility’ aggravation, which treats misogyny and misandry as conceptual equivalents, undermines the Barbara Perry definition of ‘hate crime’, and ignores the overwhelming evidence about the asymmetrical nature of gender-based harassment and hate;
2. An ‘aggravation’ model undermines our feminist and gendered analysis of violence against women, which is set out in *Equally Safe*, by suggesting that, for example, *some* incidents of rape and sexual assault or domestic abuse may be motivated by ‘malice or ill will’ or ‘gender hostility’ and some may not. *Equally Safe*, and Scotland’s gendered analysis of violence against women positions violence against women as a product of women’s inequality, and of misogyny. The idea of a ‘gender hostility’ aggravation in this context is therefore contradictory;
3. The limited international evidence about hate crime suggests that where gender/gender performance/sex is simply added to a comprehensive hate crime law covering multiple characteristics, that misogynistic hate crimes are then under-investigated and under-prosecuted. The literature suggests that this is

because of insufficient gender competence in police and prosecution services, and the complexity of identifying misogynistic hate crime when misogyny is endemic; and

4. In the format proposed by Lord Bracadale, it would require the construction of a notion of 'gender hostility', which currently does not exist, and is likely to muddy the waters with regard to creating a shared understanding in Scotland of misogyny and sexism.

The challenge set out in (4) is particularly relevant to the current moment, when public bodies and private companies are adopting actions to reduce women's inequality and sexism within their institutions. This understanding of how to tackle sexism is essential to deliver *Equally Safe*, but also to militate against the conducive context for sexual harassment.

We consider that it would not only be ineffectual to develop a statutory aggravation for gender hostility but actively harmful. This is because undermining public bodies' understanding of the nature of gender-based violence, and its causal story of women's inequality, risks the failure of *Equally Safe*.

We are also deeply concerned about the possibility of an ineffectual hate crime to institutionally entrench and systematise indifference to misogyny. There has been a great deal written about the capacity of hate crime legislation to communicate norms to society. As James Chalmers and Fiona Leverick note, "hate crime legislation may service an educative function by consistently sending a message that prejudice [in this case misogyny] is socially unacceptable". However we are not convinced by arguments that suggest that the symbolic or communicative quality of criminalising gendered hate crime is sufficient to respond to the reality of women's experience.

We also note that the international experience is that gender can be a difficult addition to existing hate crime laws. Jessica Hodge writes that "legal actors perceive gender-based harassment as limited to sexual harassment in the workplace; thus, when it occurs outside of the work setting – for instance, in the home – it is not recognised as a bias crime." Valerie Jenness further finds that "gender has found a home in legal discourse on hate crime legislation, but it remains in the guest house of that home."

This analysis is borne out in the experience of New Jersey, where between 1999 and 2008, **four gender-bias incidents** were recorded, 3,521 race-bias incidents, 2,589 religious-bias incidents, 579 motivated by sexual orientation bias, and 25 disability-bias incidents.

As Hodge explains “despite the fact that gender had been part a part of the state’s bias crime statute for over ten years, interviewees [in the criminal justice system] were still unsure of how the category fit in the hate crime framework. Investigators and prosecutors were also reluctant to conceptualize gender-based offences as hate crimes, much less enforce the gender category within the bias crime statute.”

If gender-based hate crime remains, as it does in the New Jersey experience, starkly under-investigated and under-prosecuted compared with hate crime targeting other protected groups, then a principally symbolic law will also signal that misogyny is less harmful and less proscribed than other forms of hate crime. The law on hate crime must not reinforce the notion that harassment of women is tolerated by society.

It is therefore vital to shape the law in such a way as to maximise its effectiveness and its capacity to create more space to act for individual women and girls. In our view, this means a standalone misogynistic offense.

**Q8. Do you agree with Option B to develop a standalone offence for misogynistic harassment?**

Yes. As outlined in response to Q.7 and in our submission to Lord Bracadale’s review, we do not think a statutory aggravation of ‘gender hostility’ is an effective response to the misogynistic harassment that women and girls experience.

**The evidence behind the need for a standalone offence for misogynistic harassment**

The international and UK experience speaks of a foundational lack in the capacity of police and prosecutors to recognise and respond to gender-based hate crime. In considering this, and taking cognisance of what has happened to some elements of non-discrimination law when it attempted to cut across too many protected characteristics, we recommend a **standalone piece of legislation to tackle misogynistic harassment**, rather than a consolidated single piece of law that would cover all groups.

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee’s General Recommendation 35 states that “[gender-based violence against women] takes multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty.” This definition plainly includes harassment and threats.

General Recommendation 35 also speaks to the spaces in which gender-based violence against women occurs, which include public spaces and ‘technology-mediated environments’:

*Gender-based violence against women occurs in all spaces and spheres of human interaction, whether public or private, including in the contexts of the family, the community, public spaces, the workplace, leisure, politics, sport, health services and educational settings, and the redefinition of public and private through technology-mediated environments, such as contemporary forms of violence occurring online and in other digital environments.<sup>1</sup>*

Further support can be found in the Council of Europe Convention on preventing and combating violence against women and domestic violence (the ‘Istanbul Convention’) in Article 40 on sexual harassment ([State] Parties shall 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 an intimidating, hostile, degrading, humiliating, or offensive environment, is subject to criminal or other legal sanction.) and Article 34 on Stalking. The UK Government is committed to ratifying the Convention following a private members bill introduced by Dr Eilidh Whitford in 2017.

Engender’s response to the Independent Review of Hate Crime Legislation outlined the limited quantitative evidence that we have of women’s experience of near-ubiquitous misogyny. Although there is a dearth of administrative data, with public bodies failing to gather information about women’s experience of harassment within the scope of their activities, there is piecemeal survey data that allows us to paint a picture, including:

- TUC (2016) *Still just a bit of banter? Sexual harassment in the workplace in 2016* - findings of which included that in the UK 52% of women have experienced some form of sexual harassment in the workplace;
- Freedom of Information figures from September 2015 showed that 5,500 sexual offences were recorded in UK schools over a three year period, including 600 rapes;
- A 2010 YouGov poll of 16-18 year olds found 29% of girls experienced unwanted sexual touching at school and a further 71% said they heard sexual

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<sup>1</sup> UN Committee on the Elimination of Discrimination Against Women (July 2017) *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* para 20

name-calling such as 'slut' or 'slag' towards girls at school daily or a few times per week

- In 2017 Girlguiding Scotland provided evidence to Equality and Human Rights Committee of the Scottish Parliament said that "59% of girls aged 13 to 21 state they had faced some form of sexual harassment at school or college in the past year" and describe "sexual harassment directed at female students by male members of teaching staff."
- 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, with 25% of 11 to 16 year old girls stating that concerns over potential sexual harassment made them consider whether or not to speak out in class
- Action Aid reported statistics from 2016 which suggest that 71% of British women have done something to guard themselves against the threat of harassment.
- The Fundamental Rights Agency survey on violence against women in the EU identifies that 64% of women in the UK have avoided places or situations for fear of being physically or sexually assaulted in the 12 months prior to the interview.
- 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.

The full range of evidence explored by Engender is available in our original response to Lord Bracadale's independent review.

### **How we should develop a stand alone offence in the Scottish context**

To shape a standalone offence we need to sharpen the available survey data into a more comprehensive understanding of women's experience, and then map this on to the existing criminal law in order to formulate a response to the gaps. A similar project has been undertaken by Olga Jurasz and Kim Barker with respect to the law of England and Wales, specifically in considering the basis for legal regulation around online misogyny.

We also need to do some work to develop a shared definition of 'misogyny'. In submitting evidence to Lord Bracadale's independent review we defined it as "systems or actions that deliberately subordinate women, and reflect the actor's understanding that women are not their equals". In their recent book on online

misogyny and the law, Olga Jurasz and Kim Barker define it as “the manifestation of hostility towards women because they are women”. We are very persuaded by the work of Kate Manne, who has written the first book-length treatment of which we are aware on the nature of misogyny, and think that her distinctions between sexism and misogyny would and should contribute usefully to this definitional work.

We recommend undertaking a participatory approach to the development of a standalone law around misogynistic hate. We look to the Domestic Abuse (Scotland) Act 2018 as an example of a development process that drew on both international and Scottish feminist expertise, the experience of organisations such as Scottish Women’s Aid and Rape Crisis Scotland, and women with lived experience in its formulation.

Analysis of the Domestic Abuse (Scotland) Act 2018 suggests that the way it was developed, and particularly its inclusion of feminist expertise, led to its most transformational elements and specifically its direct relevance to the lived reality of domestic abuse. Research undertaken at the University of Bristol has found that the Domestic Abuse (Scotland) Bill Process was characterised by a rejection of “top-down, essentialist policy trends” and instead embraced feminist scholarship, survivors and women’s organisations to clarify the Bill’s definitions, scope and rationale.

There are a number of features that we would propose for the development process of a law criminalising misogynistic hate crime:

- That it should not set out a ‘misogyny aggravation’, which would echo the negative features of the ‘gender hostility aggravation’ that we set out in response to Question 7 above.
- It should develop a definition of ‘misogyny’ (and other related definitions), and enable all those practitioners within the criminal justice system to identify misogynistic harassment, investigate misogynistic harassment, and prosecute misogynistic harassment. This definition of ‘misogynistic harassment’ should capture the essence of the Barbara Perry’s definition of hate crime, and include the sense that misogynistic harassment or bias-crime is about re-creating a gendered hierarchy of men and women. It should provide explicit protection to women and girls and men and boys that are targeted by misogynistic hate.
- That it should include incitement to misogyny, so that acts that crowdsource misogynistic abuse or harassment of individuals by a distributed network are



included; as well as incitement to violence against individual women and groups of women.

- It should enable action where women experience hate, bias, or harassment because of their sex or gender as well as because of another protected characteristic. It should provide for responses to misogyny that is inflected with racism, ableism, homophobia, and transphobia.
- It should locate misogynistic hate crime and harassment within the understanding of violence against women in *Equally Safe*.
- It should mandate the collection of data that would enable the impact of the law to be measured, and ongoing monitoring of reported incidents of misogynistic harassment and their outcome within the criminal justice system. It should also mandate collection of data about perpetration.
- It should include post-legislative scrutiny so that the Scottish Parliament must evaluate its impact and any unintended consequences for women and girls' equality and rights.

### **Implementing a misogyny offence**

Outside of the law itself, though, it is vital that Police Scotland and COPFS have sufficient capacity, including gender-competence<sup>2</sup>, to investigate and prosecute misogynistic harassment. It is also important, given the lack of data about women and girls' experience of harassment that there is adequate data gathered, analysed, and used to shape services, including the criminal justice response.

### **Q9. Do you agree with Option C of building on Equally Safe to tackle misogyny (this would be a non-legislative approach)?**

Yes. As a women's equality policy and advocacy organization, we have joined sister organisations in the violence against women sector in warmly welcoming the broad approach of Equally Safe. This bold document of ambition firmly locates the causal story for men's violence against women in women's inequality, and seeks to close the gaps between men's and women's access to power, autonomy, resources, and safety. Engender's director is a member of Equally Safe's Joint Strategic Board, and we would welcome further discussion about the action plan might be expanded to include additional work to tackle misogyny.

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<sup>2</sup> Gender competence – refers to the skills, knowledge and analytical capability to develop policy that is well-gendered; that takes account of the socially constructed difference between men's and women's lives and experiences.

We would also refer to the National Advisory Council on Women and Girls' recommendations on attitude and culture change, which are included in the report of their first year of activity.

**Q10. Do you agree with Option D of taking forward all of the identified options?**

No. As we set out in response to Question 7, we consider that it would not only be ineffectual to develop a statutory aggravation for gender hostility but actively harmful. This is for two reasons:

- Undermining public bodies' understanding of the nature of gender-based violence, and its causal story of women's inequality, risks the failure of *Equally Safe*; and
- An ineffectual hate crime is likely to institutionally entrench and systematise indifference to misogyny and its profound impact on women and girls.

## **4. PART THREE – NEW STIRRING UP OF HATRED OFFENCES**

**Q26. Do you agree with Lord Bracadale's recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred?**

Unsure. We think that the development process for a standalone misogyny offence should and would fully consider the implications of any associated offences including 'stirring up of misogynistic hatred' as definition and experience will be vital to its success.

Feminists and women's organisations are committed to maintaining protection for freedom of expression, and it is important to consider the impact of misogynistic harassment in schools, workplaces, and online on women's freedom of expression. These issues warrant careful unpicking in the context of the development process for the standalone offence that we propose in response to Question 8.

**Q34. Do you agree with Lord Bracadale's recommendation that no specific legislative change is necessary with respect to online conduct?**

Unsure. Engender's response to the Independent Review of Hate Crime Legislation outlined the limited evidence that we have of women's experience of near-ubiquitous misogyny. Although there is a dearth of administrative data, with public bodies failing to gather information about women's experience of harassment within

the scope of their activities, there is piecemeal survey data that allows us to paint a picture. We have summarised some of this data and analysis in response to Question 8.

To shape a standalone offence we need to sharpen this survey data into a more comprehensive understanding of women's experience, and then map this on to the existing criminal law. A similar project has been undertaken by Olga Jurasz and Kim Barker with respect to the law of England and Wales, specifically in considering the basis for legal regulation around online misogyny. We need this work to be done for Scotland.

One of the issues that Jurasz and Barker considered directly was the extent to which existing legal protections in England and Wales could be brought to bear on online misogyny. They say:

*Whilst an assessment of the legal provisions dealing with online misogyny, and online violence against women more broadly, suggests that there is a plethora of potential legal provisions which could apply to this issue, these are currently underutilised or unsuitable.*

Additionally, although their book principally relates to the situation in England and Wales, they do note a devolution concern: the reserved competences Westminster holds in respect of communications law. The Communications Act 2003 applies across the UK.

The mapping of law against women's experiences in Scotland will allow a robust view to be taken around where gaps in the law exist, and where there appears to be coverage by the law but potential failures in investigation, prosecution, or other elements of implementation.

#### **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.