

Engender response to the Scottish Government consultation on reforming the criminal law to address misogyny

June 2023

1. INTRODUCTION

Engender is Scotland's feminist policy and advocacy organisation, working to secure women's political, economic and social equality with men. Our aspiration is for a Scotland where women and men have equal access to and enjoyment of rights, resources, decision-making and safety. We were formed with the purpose of ensuring that the detail of women's lives is visible, counted, and understood in policy-making processes.

We welcome the opportunity to respond to this consultation on reforming the criminal law to address misogyny. Misogynistic behaviour, harassment and abuse continue to significantly constrain the choices and freedom of women and girls while violating their human rights. These types of behaviour, along with all other forms of violence against women and girls (VAWG), continue to occur at endemic levels in Scotland.

Engender's own work on VAWG focuses on preventing this violence by tackling its primary root cause: gender inequality. As part of this, we work closely with many of Scotland's VAWG organisations that specialise in supporting victim-survivors. From this work, we know the disturbing extent to which many women and girls in Scotland live with the everyday impacts of this violence and abuse, which is rooted in sexism and misogyny. Therefore, a credible and appropriate criminal justice response is required.

Increasing effective protection for women and girls against misogynistic behaviour and harassment will be an important step to recognising and addressing the gendered nature of this violence. It will also contribute towards creating an environment in Scotland that identifies, names and addresses all forms of VAWG.

Engender has previously been involved with progressing work to consider how the Scottish criminal justice system deals with misogyny, as a member of the Working Group on Misogyny and Criminal Justice in Scotland, chaired by Baroness Kennedy QC. We would like to take this opportunity to recognise the significant contribution of our late Executive Director, Emma Ritch, who played a key role in progressing this work and driving forward these proposals.

Engender, alongside other national women's organisations, has supported the need for a separate approach to misogyny within criminal law on account of the practical concerns that would arise from including gender-based violence against women in the model of hate crime.¹ The Scottish hate crime model aims to provide protection of women who experience crimes motivated by hatred towards them because of their membership of a minority group, including lesbian, bisexual and Trans women, disabled women, and Black women, women of colour and other minoritised women. Yet gender and 'hate crime' has historically been substantially under-theorised, and there are limited examples to learn from, including how to address barriers to effective utilisation of the law. The work of the Independent Working Group was therefore vital to explore in greater detail how a gendered approach to criminal law could provide an appropriate and effective framework for tackling misogynistic behaviour and harassment.

The Misogyny Report² makes clear the need for 'a suite of solutions; legislation, public awareness raising, and education to provide the backbone for efforts to implement wider cultural change'. In isolation, the proposed offences can only offer one aspect of the solution to misogynistic harm and must be backed up by a much broader range of prevention efforts. There is also a need to ensure criminal justice responses are not relied upon disproportionately, risking broader human rights impacts.

Scottish Government has prioritised and invested in ground-breaking work on violence against women and girls through its strategy Equally Safe. The recent Independent Strategic Review of Funding and Commissioning of Violence Against Women and Girls Services³ has concluded that a major increase in support for prevention will be required to meet the aspirations of Equally Safe. This

¹ [Engender Submission to the Misogyny and Criminal Justice Working Group September 2021.](#)

² [Kennedy, 2022 Misogyny - A Human Rights Issue. Report of the Working Group on Misogyny and Criminal Justice.](#)

³ [Irving, L. 2023. The Independent Strategic Review of Funding and Commissioning of Violence Against Women and Girls Services.](#)

investment in prevention will also be necessary to and fundamental in determining whether the vision of the working group on misogyny is realised.

Engender is broadly supportive of the approach of Scottish Government. We will therefore limit our comments in this response to areas where we have remaining suggestions, concerns or where we consider greater clarification would be beneficial. Where our comments carry across the proposed offences, we indicate this by referring to initial answers. Throughout this response, we have included detail based on the specific offences proposed, as well as several broad points for Scottish Government to consider in developing these proposals further. These include:

- Reconsidering the proposed use of ‘malice and ill-will’ language from Hate Crime legislation, instead of ‘malice and/or prejudice’ as recommended by the Independent Working Group Report to better address the nature of ‘misogyny.’
- The need for further clarification of how the proposed offences would operate in practice for women that experience intersectional forms of marginalisation and oppression, e.g., Black women’s experiences of misogyny being integrally bound up with experiences of structural racism and abuse.
- The splitting of ‘harassment’ and ‘behaviour’ into two separate offences, departing from the recommendations of the Independent Working Group and considerations around the broad nature of the new behaviour offence as currently worded.
- The additional package of measures and resources that will be required to operationalise any new criminal law aimed at protecting women from misogyny, especially in light of the crisis in public trust in criminal justice institutions’ ability to tackle violence against women and operate in non-discriminatory ways, including within Police Scotland.
- The limitations and potential risks if the proposed criminal law response is not backed up by greater investment in upstream prevention approaches that challenge the attitudes, norms and structures that uphold gender inequality, misogyny and violence against women and girls.
- The need for enhanced leadership on these issues and policy coherence across national and local government and public services.

2. AN OFFENCE OF MISOGYNISTIC HARASSMENT

Question 1: Do you support the proposal to create an offence of misogynistic harassment which relates to harassment of an identified victim or victims?

- Yes
- No
- Other (please provide details in the text box below)

We support the creation of an offence of misogynistic harassment. However, we would ask for further clarity from the Scottish Government on why this offence has been split from the ‘offence of misogynistic behaviour’. This is a departure from the recommendations of the Misogyny Report, which envisioned an offence that would deal with harassment and behaviour together.

We recognise also that this offence is more narrowly drawn as it relates to actions directed towards ‘an identified victim or victims’. The Misogyny Report recommended a broader offence that ‘is committed whether or not the conduct is directed towards a particular woman or group of women’.

As a standalone offence, the Misogynistic Harassment offence proposed represents a potential weakening of the proposal in the Misogyny Report. However, in proposing a second behaviour offence, we recognise Scottish Government has tried to capture the intent of the Working Group to respond to broader misogynistic behaviours that cause harm.

We provide more comment on our thinking around the creation of a separate ‘offence of misogynistic behaviour’ in answer to Question 7.

Question 2: Do you have any comments on the list of effects on the victim (fear, alarm, degradation, humiliation and distress) that trigger the offence being committed?

We agree with the list of effects as recommended by the Misogyny Report. We support the drafting, which makes clear that these effects could be experienced individually by the victim, or in combination, to trigger the offence.

We also welcome the assurances set out in the consultation around the reasonable person test, particularly those relating to women with specific vulnerability. It is crucial that a disproportionate evidential burden is not placed on women when reporting misogynistic harassment or behaviour. This is in line with Baroness Kennedy’s recommendation that the test for causing these effects must be objective and not require proof that any woman or group of women directly suffered any of these effects.

Question 3: Do you agree that the offence of misogynistic harassment should be capable of being committed in all places (public and private)?

- Yes
- No
- Other (please provide details in the text box below)

We support the rationale and proposal from Scottish Government to build on the findings of the Working Group to determine that the offence of misogynistic harassment should 'be capable of being committed in all places with no distinction between what might be described as public spaces and private spaces.'

Misogynistic Harassment in Workplaces

We particularly welcome the direct reference to the inclusion of workplaces. There is a significant body of research on the harms caused by sexual and sexist harassment in the workplace, primarily directed at women. Engender has undertaken research in recent years which demonstrated that the incidence of sexual and sexist harassment in workplaces in Scotland is endemic, and that its impact on women's lives is both insidious and far-reaching, with implications for women's health and wellbeing, earning potential, financial stability, income inequality with men, career progression and, ultimately, for gender equality across all spheres.⁴ We, therefore, agree that this offence should be available to address workplace harassment where it meets the criminal threshold set out in the draft provision.

Misogynistic Harassment Online

We also welcome recognition of the need for protections against the growing tide of online misogynistic harassment. We acknowledge the complexity set out in the consultation around determining what is public and private in online spaces. We know from research on the prevalence of violence against women online, some of which is referenced in the Misogyny Report⁵, that direct communications on online platforms, which are arguably private messages, can create the conditions for perpetrators to commit threats of rape, violence and other forms of misogynistic harassment.

The suggestion that this offence could be utilised to protect women and girls from receiving misogynistic harassment in all places is therefore welcome. We note that the Misogyny Report limited the scope of its proposed offences in online spaces to the Statutory Misogyny Aggravation, and its interaction with online offences

⁴ [Engender. 2022. Enough is Enough: Tackling Workplace Sexual Harassment in Scotland.](#)

⁵ See for example: [Amnesty International 2018. Toxic Twitter.](#)

committed under the Communications Act 2003, and issuing Threats of, or Invoking, Rape or Sexual Assault or Disfigurement of Women and Girls online and offline. Our understanding is that these limitations were set in part due to the complexity of the legal landscape on internet communications, particularly as it relates to reserved matters. We would therefore welcome further clarity on how Scottish Government will address this in legislation to ensure the offence of Misogynistic Harassment can be applied in Scotland to all spaces, particularly online.

Interaction with existing crimes that have a misogynistic element.

The recommendation of Baroness Kennedy was for an offence of *public* misogynistic harassment. The Misogyny Report does not, therefore, explore how such a harassment offence would interact in practice with other offences committed in private spaces that already have a misogynistic element, specifically domestic abuse, rape and sexual offences.

This issue is considered in the Misogyny Report in relation to the Statutory Misogyny Aggravation. The Report makes clear that there should be a ‘carve out’ of crimes where a misogynistic element is already recognised. It is fair to suggest that the spirit of the report, therefore, seeks to ensure that existing protections for women are not weakened by any of the proposed offences.

As such, if the Scottish Government moves ahead with the proposal for an offence of Misogynistic Harassment that is applicable in private spaces, it will need to examine and provide greater clarity on how such an offence will interact in practice with the existing offences set out by Baroness Kennedy that already have a misogynistic element.

There will also be a need to ensure public, police and judicial understanding on where the application of this proposed offence would apply in private settings, and where existing legislation such as the Domestic Abuse (Protection) (Scotland) Act 2021 and the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 would apply instead. This will require detailed and accessible public communications, as well as training and guidance for criminal justice institutions such as the Police and the Criminal Courts.

We would also encourage Scottish Government to engage further with expert organisations working in these areas, namely Amina: The Muslim Women’s Resource Centre, Scottish Women’s Aid, Shakti Women’s Aid, and Rape Crisis Scotland.

Question 4: Do you have any views on the proposed maximum penalty of 7 years imprisonment for the offence of misogynistic harassment?

We note that the Misogyny Report did not set out a proposed maximum penalty for the specific offence of Public Misogynistic Harassment. We recognise that the seven years proposed by Scottish Government is in line with the maximum penalty the report did recommend for the offence of ‘Stirring up Hatred against Women and Girls.’ We also acknowledge the possible rationale set out in the consultation aligning the maximum penalty for this offence with the equivalent for racially aggravated harassment.

Engender is not in a position to make direct comment on the appropriateness of the proposed maximum sentence for this offence, particularly as the parameters of the offence are still to be fully determined (see answers to earlier questions), and that there is not a direct equivalent of this offence in law.

We note that the proposed seven years sentence would be used in the most severe cases. The Misogyny Report recommended specifically that ‘there may be circumstances where a custodial sentence is appropriate’ (in response to its version of the public Misogynistic Harassment offence), but that in most cases ‘the response may often be fines, orders requiring Misogynistic Abuse Awareness Training or alternative resolutions.’ We support this principle, though we note that the Scottish Government are proposing adaptation of the Misogynistic Harassment offence to apply to actions directed towards an identified victim or victims, and to apply in both public and private domains. We are unclear how this impacts on considerations around sentencing.

Overall, there are gaps in detail around sentencing rationale in both the Misogyny Report and in the Scottish Government consultation, and we would welcome greater consideration be given to these issues and further consultation as the legislation takes shape.

Question 5: Do you agree with the inclusion of a reasonableness defence to the offence of misogynistic harassment?

- Yes
- No
- Other (please provide details in the text box below)

We recognise this defence is consistent with other legislation seeking to address violence against women and girls, including the Domestic Abuse (Scotland) Act 2018.

Question 6: Do you have any other comments on the offence of misogynistic harassment?

Resources, Implementation and Victim Support

In addition, it is vital that consideration is given to how this offence and others proposed in this consultation will be implemented and what resources will be required to ensure the new protections in criminal law work for all women in practice. For example, understanding how a new misogynistic harassment offence will be understood by the public so that victims know when and how to report the crime, to ensuring Police Scotland have a robust process in place to respond to reports. There is a need for a clear and well-resourced implementation plan for all the relevant actors within the Criminal Justice system to create best practice in victim support and in ensuring application of any new laws are as effective as possible in addressing the harm caused by perpetrators.

The Misogyny Report echoes this by stating clearly there must be wide-reaching work beyond the introduction of new criminal law to tackle the ingrained misogynistic attitudes which have caused a gap in protection for women from gender-based violence. The research undertaken for the Working Group showed that '93.4% of women did not report bad experiences to the police, over 50% because they thought the police would not be interested and the rest because they themselves thought it would seem too trivial.'⁶

This is especially vital considering lack of public trust of the complex range of actors across the criminal justice system. In May 2023, the Chief Constable of Police Scotland, Sir Ian Livingstone QPM, acknowledged that the organisation is institutionally misogynistic, racist and discriminatory.⁷ This follows many high-profile individual incidents of systemic sexism and misogyny within Police Scotland⁸ as well as the Casey Report⁹ elsewhere in the UK, all of which have particularly damaged the ability of women and minoritised communities to trust that their concerns will be dealt with and understood by police. This is consistent with concerns raised by Women's Sector organisations that have documented issues around the ability of Police Scotland to adequately support those who have experienced rape and sexual violence, such as Rape Crisis Scotland and other organisations who specialise in supporting victim-survivors.¹⁰

⁶ [Kennedy, 2022 Misogyny - A Human Rights Issue. Report of the Working Group on Misogyny and Criminal Justice.](#)

⁷ [Statement by Chief Constable Sir Iain Livingstone, May 2023.](#)

⁸ [BBC News, May 2023. Women Police Scotland 'boy's club' culture.](#)

⁹ [The Guardian, March 2023. Louise Casey's Report on the Met Police: the fall of a British Institution.](#)

¹⁰ [Rape Crisis Scotland, 2021. Police Responses in Scotland, Survivor Reference Group Report, and the Guardian, Nov, 2021. Police Scotland response to complainers is outdated and inconsistent.](#)

Intersectionality and access to justice

There is a need for further consideration and detail, across the proposed offences, to how minoritised and marginalised women experience intersectional forms of harm and discrimination in response to other aspects of their identities and lived experiences. Specifically, greater detail is needed on:

- How the proposed offences will interact with hate crimes protections for minoritised women.
- Barriers in access to justice for minoritised and marginalised women.
- The need for specialist guidance, competency and approaches to better address the needs of different groups of women.
- The collection of intersectional data to improve access to justice and monitor application of the laws.

It is crucial that further consideration is given, across these offences, to how women experience intersectional forms of harm and discrimination in response to other aspects of their identities and lived experiences. Specifically, greater clarity is required around how the proposed misogyny offences will interact with Hate Crime offences in cases where minoritised women experience misogynistic harassment and abuse rooted in prejudice relating to other aspects of their identities. We know from our own work and specifically from the work of organisations directly representing minoritised women that experiences of misogynistic harassment rarely occur in a vacuum and that the harassment minoritised women experience often intersects deeply with discrimination and abuse directed at other aspects of their identity.¹¹

There is a need for further work to be developed to detail how women from minoritised groups, including Black women, women of colour and LGBTI+ women, will be able to access justice using these and other offences. This links strongly to evidence on the negative experiences of women from Black and Minority Ethnic and LGBTI+ backgrounds reporting sexual assault and harassment to the Police. In Rape Crisis Scotland's recent report from their Survivor Reference Group on Police Responses in Scotland, they stated: 'We have heard from survivors whose experiences have been dismissed as 'cultural issues' or have struggled to report to the police due to language barriers. Racist, sexist, ableist and prejudicial attitudes hinder justice and damage faith in the justice system, preventing minoritised and marginalised women from being given fair and equal access to pursue criminal justice.'¹²

¹¹ [Zero Tolerance, 2021. Blog: If you are Queer, are you more at risk?.](#)

¹² [Rape Crisis Scotland, 2021. Police Responses in Scotland, Survivor Reference Group Report.](#)

We would encourage Scottish Government to develop further detail on how these new offences related to misogyny would work for women that experience multiple forms of marginalisation.

LBTI women

We ask the Scottish Government to consider evidence submitted by the Equality Network and others, who have provided detailed reasons on the need for intersectional approaches to tackling misogyny and the distinct experiences of LBTI women, which must be recognised in criminal justice responses. This includes calls to recognise the biphobia, lesbophobia and transmisogyny within the varied experiences of misogyny, and we support the Equality Network's call for guidance that recognises these varied experiences and ensures that all women who experience intersecting inequalities are adequately supported.

Racialised women

Research has shown clearly that Black women often experience what has been described as 'misogynoir', which is a specific manifestation of misogyny that is deeply rooted in racism.¹³ Moya Bailey first coined the term misogynoir and defined it as the ways anti-Black and misogynistic representation shape broader ideas about Black women. The need for distinct approaches to violence and harassment for Black women has been made by organisations such as Sistah Space, a specialist domestic violence charity working with Black women in the UK. They demonstrate how Black women often do not receive the same level of support as white women and face additional issues, including "adulthoodification", where young Black women are perceived as older than they are due to engrained racialised bias.¹⁴ In 2021, this led to their campaign for Valerie's Law in England, to tackle domestic abuse specifically among Black communities through a process of cultural competency training for the UK police force and related bodies.¹⁵

There are critical gaps in Scottish-specific research, however, work is underway to explore the experiences of women of South Asian heritage, how criminal justice responses to violence against women work for them and the ways in which access to help by the police is often complicated by community mistrust around issues relating to institutional racism.¹⁶

¹³ Bailey, Moya. 2021 NYU Press. *Misogynoir Transformed: Black Women's Digital Resistance*.

¹⁴ [BBC News, March 2022. Black abuse campaigners get Valerie's Law proposal heard.](#)

¹⁵ [Sistah Space: Valerie's Law.](#)

¹⁶ See for example, [Diversifying Justice, University of Glasgow.](#)

Data collection

Scottish Government should detail how police and criminal justice responses to misogynistic harassment will be recorded in order to recognise the different experiences of marginalised women. This is also extremely important from a data capture perspective, as we need intersectional, gender-disaggregated data collection mechanisms in place when recording enforcement of any of the new proposed misogyny offences. This is vital if we are to understand how new offences are being applied in practice and which women are able to benefit from access to justice and gain the support they may need from the police as a result of experiencing misogynistic harassment.

3. AN OFFENCE OF MISOGYNISTIC BEHAVIOUR

Question 7: Do you support the proposal to create an offence of misogynistic behaviour which does not require that the behaviour is directed at a specific victim?

We strongly support enhancing responses to public and private misogynistic behaviour and the calls for law reform on this area. This is in line with the Misogyny Report findings that ‘there is an important role for the law in dealing more effectively with the lesser offending behaviour which is endemic, especially if it is of a sexualised nature and in a public place.’ We strongly agree with the Report’s statement that women should know that there is distinct law clearly there for them ‘for when they experience frightening, humiliating, degrading or abusive behaviour.’

However, Baroness Kennedy’s report proposed a law covering ‘Public Misogynistic Harassment’ that would also cover behaviour and which ‘introduced an understanding of misogyny, and its pernicious effect, into specific legislation for women to concentrate the minds of investigators and prosecutors.’ As currently drafted, the Scottish Government’s proposed offence deviates from dealing with misogynistic behaviour as part of an offence on misogynistic harassment, and proposed expansion of this offence into private spaces – as recommended by Baroness Kennedy’s report. We are concerned that the decision to create a separate offence of misogynistic behaviour that is applicable in private spaces could mean that the proposed law is potentially very broad and not clearly defined.

We support the rationale that there may be some instances where the proposed offence of misogynistic behaviour could occur in private. However, as outlined earlier in response to Question 3, we would welcome further clarification of how

this proposed offence may interact with existing crimes that have a misogynistic element.

We would also welcome further detail of thresholds for criminal 'behaviour' under the offence, and modelling of whether particular cases would meet this threshold. Due to there not needing to be a specific victim in this proposed offence, it will potentially be more complex for someone to report this to the police and gather evidence needed to meet the threshold.

We would be happy to work with Scottish Government colleagues to better understand how this particular offence could be strengthened in its parameters and purpose.

Question 8: Do you have any comments on the list of effects on the victim (fear, alarm, degradation, humiliation and distress) that trigger the offence being committed?

No. We agree with the replication of the list of effects as recommended by the Misogyny Report. See our earlier comments made at Question 2.

Question 9: Do you agree that the offence of misogynistic behaviour should be capable of being committed in both public and private places?

See comments set out at Question 7.

Question 10: Do you have any views on the proposed maximum penalty of 7 years imprisonment for the offence of misogynistic behaviour?

See earlier comments made at Question 4. Engender is not in a position to make direct comment on the appropriateness of the proposed maximum sentence for this offence, particularly as the parameters of the offence are still to be fully determined.

We recognise the rationale set out by the consultation that the harassment offence may capture more serious offending than the behaviour offence as currently drafted. The suggestion we have made for Scottish Government to develop further detail around criminal thresholds for this offence and to model certain case studies, will be critical to determining whether the behaviour offence should carry the same or a lesser penalty to that of harassment.

The proposed 'behaviour' offence deviates from that set out in the Misogyny report. There are gaps in detail around sentencing rationale in both the Misogyny Report and in the Scottish Government consultation, and we would welcome greater consideration be given to these issues and further consultation as the legislation takes shape.

Question 11: Do you agree with the inclusion of a reasonableness defence to the offence of misogynistic behaviour?

We recognise this defence is consistent with other legislation seeking to address violence against women and girls, including the Domestic Abuse (Scotland) Act 2018.

Question 12: Do you agree with the inclusion of a 'freedom of expression' provision setting out, for the avoidance of doubt, that certain behaviour does not constitute the offence of misogynistic behaviour?

- Yes
- No
- Other (please provide details in the text box below)

We recognise the fundamental importance of human rights compliance in the development of new criminal laws, and we support the inclusion of a freedom of expression provision in relation to this offence.

We are keen to ensure that the protections for women from misogynistic behaviour are robust and would welcome more detail on the interplay between freedom of expression and this offence. Specifically, how the thresholds for the behaviour offence match up with the permissible restrictions on freedom of expression set out in the Human Rights Act.

We are also keen to ensure that the behaviour offence is robust enough to ensure it could not be used in bad faith to constrict areas such as artistic and sexual expression by women and marginalised people – rather than to protect against the harmful behaviour of perpetrators of gender-based violence which this offence is aimed at.

Question 13: Do you have any other comments on the offence of misogynistic behaviour?

In the wording of the offence of misogynistic behaviour, the Scottish Government have used the terms 'malice and ill-will' in the drafting of the offence: 'where that behaviour is either motivated by contempt or malice and ill-will towards women or girls or is of such a character that a reasonable person would consider it to be contemptuous of women and girls.'

Our position is that 'malice and ill will' mirrors the current standard used for Hate Crime aggravators and would not be effective in reflecting the critical elements identified in the Misogyny Report definition of misogyny that it 'is a way of thinking that upholds the primary status of men and a sense of male entitlement,

while subordinating women and limiting their power and freedom.’ As the report explains, a separate response to misogynistic behaviour that differs to Hate Crime legislation is needed because the nature of misogynistic thinking is not driven necessarily by ‘hate’:

‘Hate is not a useful concept when it comes to the malign conduct that men display towards women, and the attitudes behind this conduct... Ill-will does not describe what men feel when they abuse or degrade women. Our formulation introduces the word contempt with its connotations of scorn, disrespect and disdain.’

In line with the Misogyny Report, we would recommend the Scottish Government re-visit this wording to consider the use of ‘prejudice’ to more accurately describe the misogyny that motivates behaviour that causes harm to women and girls.

Over-criminalisation and need for police reform.

We are supportive of the need for consequences and accountability among those who perpetrate misogynistic harassment, to ensure that women and girls feel safe and protected from future harm. In the most serious cases, we agree that custodial sentences may be needed and recognise this is for courts to decide on a case-by-case basis.

However, will need to take account of the potential for current inequalities which exist in how the criminal law is applied in practice by the police and courts system in Scotland to be embedded in the application of any new offences created by this proposed legislation. It is important when taking an intersectional feminist approach to law reform to recognise that certain groups experience disproportionate contact with the police and criminal justice system due to inequalities which exist in how policing crime is conducted across Scotland and the UK.

For example, organisations which represent the rights of Black and minority ethnic communities have expressed consistent concerns in relation to the institutionalised racism within the criminal justice system across the UK. The Runnymede Trust recently conducted work on ‘Reimagining justice’, to discuss why British policing is failing marginalised groups and how the problem can be addressed. They state that ‘racial disproportionalities exist in all stages of the criminal justice system, from ... charging decisions to judicial decision-making.’¹⁷

In addition, we support the Equality Network’s position in their written submission on the need for significant police reform alongside the introduction of any new offences, in order for them to be enforceable in practice.

¹⁷ [Runnymede Trust May 2023. Reimagining Justice: Blog.](#)

4. AN OFFENCE OF THREATENING OR ABUSIVE COMMUNICATIONS TO WOMEN OR GIRLS THAT REFERENCE RAPE, SEXUAL ASSAULT OR DISFIGUREMENT

Question 14: Do you support the proposal to create a specific offence of 'threatening or abusive communications to women and girls which reference rape, sexual assault or disfigurement?'

- Yes
- No
- Other (please provide details in the text box below)

We agree with this offence as drafted and welcome the fact that the Scottish Government have implemented this recommendation from Baroness Kennedy's report findings – we would add that any such offence should apply to both private and public conduct (online or offline), as recommended.

The nature of communications has changed radically in recent decades that has exposed women and girls to new environments where misogynistic threats and abusive messages occur. As Baroness Kennedy's report makes clear, threats of rape have become a common occurrence for women and girls online and offline. Women in public life receive such threats routinely, and a wealth of research findings are emerging that demonstrate how this limits women's ability to pursue and succeed in a variety of public roles.¹⁸

For example, the impacts of the online abuse female politicians face are multi-faceted and far-reaching and can have a profound psychological effect on those experiencing this harassment. An Amnesty International poll on British and American women who experienced harassment via social media¹⁹ found that 55-67 per cent reported a diminished ability to focus on everyday tasks, increased stress, anxiety, panic attacks and a feeling of apprehension when thinking about social media or receiving social media notifications. Female politicians who received online abuse have also reported impacts on self-confidence and a sense of humiliation and powerlessness. These effects are felt across public-facing jobs, including journalism and academia, with women journalists stating that online abuse limits opportunities for women and causes a deterioration of the trust in media reporting.

¹⁸ [Engender, June 2023. Digital Safety in Politics: Blog](#).

¹⁹ [Amnesty International 2018. Toxic Twitter](#), Chapter 6.

It is vital that there is a criminal justice response to threatening and abusive communications to women and girls to combat the idea that public space is perceived as 'belonging' to men. Perpetrators often seek to silence or further harass women when they highlight these forms of gender-based oppression and inequity in public forums, including online public spheres. Online abuse functions in a similar way as offline public abuse in that it upholds the primary status of men and a sense of male entitlement, while subordinating women and limiting their power and freedom and works to prevent women from fully occupying public spaces.²⁰

We note that the Scottish Government have widened the scope of the Misogynistic Harassment and Behaviour offences to apply in private and online spaces. We would therefore welcome further consideration on how these offences will work together in practice.

Question 15: Do you agree that the offence should be committed where a message is threatening or abusive, or both, and makes reference to rape, sexual assault or disfigurement?

- Yes
- No
- Other (please provide details in the text box below)

Question 16: Do you have any comments on the approach taken in the draft offence to the harms of rape, sexual assault and disfigurement?

No.

Question 17: Do you have any comments on the approach taken in the draft offence about the two different ways in which the offence can be committed?

No.

Question 18: Do you have any comments on the proposed defences to the offence?

No.

Question 19: Do you have any comments on the proposed maximum penalty of 5 years imprisonment for the offence?

See previous comments made in relation to Questions 4 and 10. Additionally, we are unclear of the rationale why the maximum penalty for this offence would be

²⁰ Vickery, Jacqueline Ryan. 2018. 'This isn't new: Gender, publics, and the internet', *Mediating Misogyny: Gender, Technology, and Harassment*: 31-49.

less than that of the Misogynistic Behaviour offence and differ from that of the Misogynistic Harassment offence as proposed.

Question 20: Do you have any other comments on the proposed offence of threatening or abusive communications to women and girls that reference rape, sexual assault or disfigurement?

No.

5. A NEW STATUTORY AGGRAVATION RELATING TO MISOGYNY

Question 21: Do you support the recommendation in Baroness Kennedy's report that there should be a statutory aggravation concerning misogyny?

- Yes
- No
- Other (please provide details in the text box below)

Yes, we support the recommendation for a statutory aggravation concerning misogyny. As the Misogyny Report has outlined, a misogyny aggravation would allow for the gendered elements of criminal behaviour to be recognised in prosecution of most offences 'such as assault or threatening behaviour or criminal damage or online offences committed under the Communications Act 2003 when there is evidence of misogyny.' The aggravator would be a useful tool. As with other Statutory Aggravations, the Misogyny Aggravation should not require corroboration.

An example we have considered is where such an aggravator could have potentially been used when prosecuting serious harmful misogynistic conduct by those in public service. Most prominently, there have been several instances of behaviour from 2017 and 2021 discovered in investigations into the Metropolitan Police, which included private WhatsApp communications that contained messages 'that praised a rapist, made offensive remarks about the Holocaust, abused disabled people and applauded violence against women.'²¹

This links to the investigation and resulting imprisonment of two Metropolitan Police Officers who shared images via private communications on WhatsApp of the bodies of Nicole Smallman and Bibaa Henry, who were murdered in June 2020. The officers involved were prosecuted and sentenced under criminal law covering

²¹ [The Guardian, Feb 2023. Met Officers Shared WhatsApp messages praising rapist.](#)

misconduct in public office - however, the misogynistic and racist dehumanisation of both victims in the case was not recognised in the handling of the verdict.

Question 22: Do you agree with the approach contained in the draft provision that an offence is aggravated by misogyny if: the offender demonstrates contempt or malice and ill-will towards the victim that is based on the victim being, or being presumed by the offender to be a woman or girl; or whether or not there is a specific victim of the offence, the offence is motivated wholly or partly by contempt for, or malice and ill-will towards, women and girls.

- Yes
- No
- **Other** (please provide details in the text box below)

As stated in response to Question 13, when commenting on the offence of misogynistic behaviour, we would reiterate the need for Scottish Government to revisit the wording of ‘contempt or malice and ill-will’ being demonstrated by the offender. We ask that the Scottish Government consider the use of ‘prejudice’ to more accurately describe the misogynistic views and behaviours that can motivate behaviour that causes harm to women and girls.

Our position is that ‘malice and ill will’ mirrors the current standard used for the hate crime aggravator and would not be effective in reflecting the critical elements identified in the working group’s definition of misogyny, that it – ‘upholds the primary status of men and a sense of male entitlement, while subordinating women and limiting their power and freedom.’ (page 28)

Question 23: Do you agree with the Working Group's recommendation that the statutory aggravation should not be capable of being labelled for certain offences because these offences are inherently misogynistic, and this would already be taken into account of when sentencing the offender?

- Yes

See earlier comments in answer to Question 3.

Question 24: Do you have any comments on the list of offences in the schedule in response of which the misogyny aggravation cannot be labelled?

No.

Question 25: Do you have any other comments about the statutory aggravation relating to misogyny?

No.

6. AN OFFENCE OF STIRRING UP HATRED AGAINST WOMEN AND GIRLS

Question 26: Do you agree with the report's recommendation that there should be an offence of stirring up hatred of women and girls?

Yes.

Question 27: Do you agree with the report's recommendation that the offence should be committed where a person behaves in a threatening or abusive manner or communicates threatening or abusive material, with the intention of stirring up hatred?

Yes.

Question 28: Do you have any comments on the proposed approach to freedom of expression set out in the draft provisions?

No.

Question 29: Do you have any other comments on the draft offence of stirring up hatred of women and girls?

No.

7. IMPACT ASSESSMENTS

Question 30: Do you have any views on potential impacts of the proposals in this consultation on human rights?

Question 31: Do you have any views on the potential impacts of the proposals in this consultation on equalities and the protected characteristics set out above?

Question 32: Do you have any views on the potential impacts of the proposals in this consultation on socio-economic inequality?

Please see earlier comments made in our introduction and in answer to questions 6, 12,13,21.

FOR FURTHER INFORMATION

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ABOUT US

Engender is Scotland's feminist policy and advocacy organisation, working 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.