

Engender submission of evidence to the Scottish Parliament Justice Committee call for views on the Hate Crime and Public Order (Scotland) Bill

July 2020

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 rights, resources, decision-making and safety.

Violence against women is a human rights violation and a cause and consequence of women's inequality. Misogynistic harassment prevents women and girls from living a good life, by inflecting our daily reality. Where to go, what to do, whether to speak in class, and what to work as are all decisions that are constrained by the threat and reality of men's harassment. A constraint on women and girls' freedom on this scale demands a credible and appropriate criminal justice response.

Women's organisations have previously been opposed to including 'sex' or 'gender' within the protected characteristics covered by hate crime law in Scotland because evidence shows them to be ineffective at preventing and penalising misogynistic harm.

As the law around hate crime has been revisited in Scotland over the last few years, we have worked with other national women's organisations, including Rape Crisis Scotland and Scottish Women's Aid, to consider whether a new Scottish hate crime bill offered possibilities for expanding protections from misogynistic harassment.

We have also considered whether aspects of the Bill, particularly the offences of stirring up hatred, will temper or have a chilling effect on women's political activism and campaigning.

In this response we set out our view that:

- **We need to know more about the types of misogynistic harassment that women and girls are experiencing before we can be sure that a new law could be shaped to prevent and respond to its most egregious forms.** There are significant holes in current data about prevalence and incidence. There has also been minimal work to review whether there are gaps in the law or gaps in implementation by justice bodies.
- **We are currently opposed to a ‘sex aggravation’ being included within the Hate Crime and Public Order (Scotland) Bill.** This is because similar approaches in other jurisdictions have failed to protect women and girls and failed to disrupt misogyny. A ‘sex aggravation’ would also undermine Scotland’s gendered analysis of violence against women and may therefore actively weaken the approach set out in *Equally Safe*.
- **We welcome the working group on a standalone misogyny offence.** Recent working groups exploring hate crime have not included gender and violence against women experts. The proposed misogyny working group will consider whether a ‘sex aggravation’ should be part of an approach to tackling misogynistic harassment, and we are content that [article 15] be part of the Bill so that future implementation is possible.
- **Freedom of expression is essential for women’s rights advocates.** There is a risk that stirring up offences be wielded inappropriately to prevent women and other groups from peaceful protest and campaigning. We believe that the Scottish Government should facilitate these rights through a general freedom of expression exception.

2. MISOGYNISTIC HARASSMENT AS A HATE CRIME

2.1 Misogynistic harassment

Misogynistic harassment, like other forms of violence against women, reproduces ‘relations of dominance’¹ between women and men. It is both a cause and consequence of women’s inequality.

Harassment permeates almost every aspect of women’s lives, constraining our freedoms and changing the way that we think about ourselves and relate to the world. It occurs in educational settings, in the workplace, and in shared public spaces, including physical and online domains. It happens along the life course for girls and women, beginning in childhood.

¹ Kelly L (2005) How violence is constitutive of women’s inequality and the implications for equalities work.

Sexualised and/or misogynistic harassment:

- Happens to the majority of women and girls;
- Costs women and girls time, money, and energy to avoid and manage harassment-related risks;
- Makes women and girls more fearful of victimisation than men and affects how women and girls use public space and spend their leisure time; and
- Reduces women and girls' space to act by constraining their behaviour online, in the classroom, and in the workplace.

We summarise the available information on misogynistic harassment and hate crime in our report, *Making women safer in Scotland: The case for a standalone misogyny offence*.²

2.2 What do we know about misogynistic harassment?

Data gaps

There is very limited data on misogynistic harassment. Most of the data that we have comes from surveys of variable quality. There is very little administrative data gathered on sexual harassment and there has been some resistance to gathering more of it in Scotland. As an example, sexual harassment and assault at school has been all but invisible in administrative data and in much of the discourse around bullying in school.

Is Scotland Fairer?, the barometer of equality in Scotland that the statutory Equality and Human Rights Commission is obliged to produce on a five-yearly basis, summarised identity-based bullying thus in 2015:

Bullying is a particular issue for some children and young people who share particular protected characteristics – including disabled, and lesbian, gay and bisexual (LGB) children and young people.³

The omission of girls (and sex more broadly) is indicative of the extent to which limited data exists on sexist bullying or sexual harassment in schools in Scotland. While schools claim that they routinely collect data on racist incidents, sexist incidents are not yet

² 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> [Accessed February 18, 2020].

³ EHRC Scotland (2015) *Is Scotland Fairer?* Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/is-britain-fairer-2018-is-scotland-fairer_0.pdf [Accessed October 15, 2019].

recorded, and there is a lack of consistency in how schools report sexual harassment and violence to the police and other authorities.

Following years of advocacy from women's organisations, and recommendations from the Equalities and Human Rights Committee of the Scottish Parliament in 2017,⁴ the new *Fairer Scotland for Women* action plan on the gender pay gap includes recommendations on tackling sexual harassment in schools and gathering and reporting data during 2019-20.⁵

Gaps in our knowledge about the law and implementation

Information coming to violence against women services suggests that there are gaps in the law, or areas in which existing laws are not being well-used by Police Scotland, Crown Office, or judiciary. An example of this concerns so-called 'pick-up artists' who target young women for street harassment, along with other possibly criminal sexual violence. To our knowledge, a single such 'pick-up artist' perpetrator has been convicted in Scotland of threatening and abusive behaviour towards five women, after his actions were exposed by BBC journalists.⁶ The BBC reports that YouTube has removed 'hundreds' of videos in response to their narrow investigation, for what the social media platform describes as 'violative sexual content'. Wider reporting on 'pick-up artists' suggests that they form part of a sprawling network of self-organised misogynist groups that operate online and offline and that overlap with acts of domestic terrorism and coordinated crowdsourced misogynistic harassment.⁷

There has been no systematic review of the way in which existing criminal and civil law in Scotland could be used to disrupt and respond to egregious misogyny. It is impossible to be certain about which gaps exist and whether failures to act in specific cases are a result of the law itself, or weaknesses in implementation.

⁴ Equalities and Human Rights Committee, Scottish Parliament (2017) *It is not Cool to be Cruel: Prejudice-based bullying and harassment of children and young people in schools*. Scottish Parliament.

⁵ Scottish Government (2019) *A fairer Scotland for women: gender pay gap action plan*. Available at: <https://www.gov.scot/publications/fairer-scotland-women-gender-pay-gap-action-plan/> [Accessed August 10, 2019].

⁶ BBC (2019) "Pick-up artist" jailed for threatening behaviour. BBC News. Available at: <https://www.bbc.com/news/uk-scotland-glasgow-west-50137960> [Accessed October 31, 2019].

⁷ See: Kini AN (2018) *Feminists were right: Ignoring online misogyny has deadly consequences*. Washington Post. Available at: <https://www.washingtonpost.com/news/posteverything/wp/2018/04/30/feminists-were-right-ignoring-online-misogyny-has-deadly-consequences/> [Accessed October 31, 2019].; Koul S (2018) *Pickup Artists Are Still A Thing. And They Want You To Know They've Evolved*. BuzzFeed News. Available at: <https://www.buzzfeednews.com/article/scaachikoul/pickup-artists-manosphere-incels-the-game-mras> [Accessed October 31, 2019]; Quinn Z (2017) *Crash Override: How Gamergate (Nearly) Destroyed My Life, and How We Can Win the Fight Against Online Hate*. New York: PublicAffairs; Grey Ellis E (2019) *Reddit's 'Manosphere' and the Challenge of Quantifying Hate*. Wired. Available at: <https://www.wired.com/story/misogyny-reddit-research/> [Accessed October 31, 2019].

2.3 Could the concept of 'hate crime' overlap with misogynistic harassment?

Barbara Perry's definition of hate crime, described by Professor James Chalmers and Professor Fiona Leverick as one of the most "commonly quoted academic definitions", says:

[Hate crime is] 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.

This sets out a critical feature of misogynistic 'hate crime' as Engender understands it, which is to reinscribe and police the roles of men and women under patriarchy.

The rationale for identifying or delineating 'hate crimes' for particular sanction is three-fold:

- **Harm to the individual.** Hate crimes cause psychological damage to their victim(s) over and above⁸ that which would result from a parallel non-hate crime.⁹ They also cause 'social harm' in which individuals' behaviour changes as a result of victimisation and they are less likely to participate in social and civic life.¹⁰ We see this in the 'safety work' that women do, including avoiding particular places, travel times, and modes of transport.¹¹
- **Harm to the group.** Hate crimes have a wider effect on other members of the group to which the direct victim belonged (or was perceived to belong). They "remind members that they are targets, often for reasons that make the risk impossible to avoid, or avoidance of which is a form of harm in itself".¹² Women who have never experienced harassment also carry out 'safety work', to avoid being victimised.¹³
- **Communicating norms to society.** As Chalmers and Leverick note, "hate crime legislation may service an educative function by consistently sending a message that prejudice [in this case misogyny] is socially unacceptable".¹⁴

There is the theoretical potential for the concept of hate crime to be extended in such a way that it could disrupt and respond to misogynistic harassment. This would give

⁸ It should be noted that no study has been possible of victims of gender-based bias or hate crimes, as there is not a large enough pool of these victims, due to under-reporting, under-investigation, and under-prosecution in those jurisdictions where gender-based hate or bias crimes exist.

⁹ Chalmers J, Leverick F (2017) *A Comparative Analysis of Hate Crime Legislation*.

¹⁰ *Ibid.* p.27-29.

¹¹ Vera-Gray F (2018) *The Right Amount of Panic: How women trade freedom for safety*, 1 edition. Policy Press.

¹² Chalmers J, Leverick F (2017) *A Comparative Analysis of Hate Crime Legislation*.

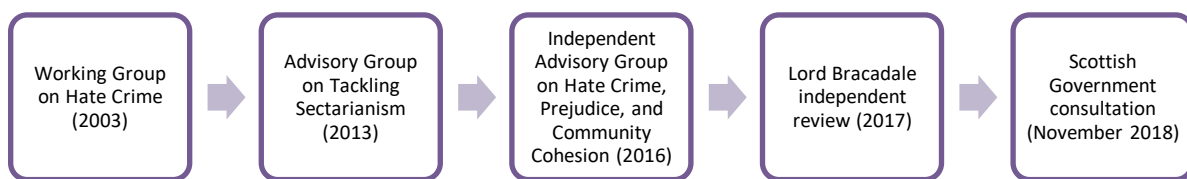
¹³ Vera-Gray F (2018) *The Right Amount of Panic: How women trade freedom for safety*, 1 edition. Policy Press.

¹⁴ Chalmers J, Leverick F (2017) *A Comparative Analysis of Hate Crime Legislation*.

women and girls access to justice and has the potential to change gendered norms that harm women and girls as a group.

However, Scotland has chosen to define hate crime in a way that ignores questions about power. This makes it much more difficult to see how it could be used to respond to the very gendered patterns of egregious misogynistic harassment.

2.4 Hate crime in Scotland: where does misogyny fit?



Engender has engaged with all of the processes exploring the expansion of hate crime to include 'sex' or 'gender' since 2003. It is worth noting, however, that only the first working group in 2003 included gender and violence against women experts. The working groups and advisory groups that followed, including the advisory group to Lord Bracadale's independent review, did not include any gender expertise. In addition, the two advisory groups on sectarianism and hate crime did not even meet with any women's organisations.¹⁵

The approach taken by the variety of working groups, and Lord Bracadale's independent review, has a critical weakness from Engender's perspective. All of the definitions of hate crime that were generated by the working groups ignore the question of power. They do not include the critical element of Barbara Perry's definition of hate crime that talks about 'reaffirm[ing] precarious hierarchies'.

Egregious misogynistic harassment re-creates women's subordination. It communicates that women and girls do not have equal access and rights to safety, public space, and physical autonomy. It uses sexist and sexualised language, unwanted touching, defamation and disruption to women's professional lives and girls' education, and sexually objectifying concepts and materials. 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

¹⁵ 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> [Accessed February 18, 2020].

healthcare appear on flyers with a reticule from a rifle scope digitally superimposed over their portraits.

The Domestic Abuse (Scotland) Act 2018 demonstrates how a law can be shaped to respond to the gendered particularities of women's lived experience. It is a 'gold standard' law in international terms because it emerged from a process that drew on significant expertise about domestic abuse.¹⁶ In contrast, the development of hate crime law in Scotland has not considered the ways in which gender operates as a hierarchy and misogynistic harassment sustains and reinforces that hierarchy.

In 2003, the notion of including a 'domestic abuse aggravation' was rejected by women's organisations, who were hopeful of advocating for a better, clearer, and more relevant law.¹⁷ Although it took 15 years, that hope was realised in the Domestic Abuse (Scotland) Act 2018. We make similarly hopeful arguments today when we oppose a 'sex aggravation' in favour of a standalone misogyny offence that will be scoped by the proposed advisory group.

3. WHY WE OPPOSE A 'SEX AGGRAVATION'

Engender and other women's organisations oppose a 'sex aggravation' because we do not think that it will be effective in responding to egregious misogynistic harassment. This is because:

- International experience suggests that a sex aggravation, 'gender hostility' aggravation, or gender aggravation will not work well.
- Gendered hate crime is not well understood as hate crime.
- A sex aggravation risks undermining Scottish responses to violence against women.
- A sex aggravation will not fill any existing gaps in the law.
- An ineffectual law may entrench women's inequality and will cut off the possibility of more effective approaches being taken.

3.1 International experience suggests a sex aggravation will not work

The international experiencing of adding gender to a long list of groups protected by hate crime legislation has not been encouraging. The list of protected characteristics included in selected jurisdictions within the academic paper commissioned for Lord

¹⁶ Brooks L (2018) 'Scotland set to pass "gold standard" domestic abuse law' The Guardian. Available at: <https://www.theguardian.com/society/2018/feb/01/scotland-set-to-pass-gold-standard-domestic-abuse-law> [Accessed October 31, 2019].

¹⁷ 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> [Accessed February 18, 2020].

Bracadale’s review suggests that only a handful of states or territories have added sex, gender, or gender expression (in addition to gender identity) to their legislation,¹⁸ but in none of these instances is there evidence of a significant number of prosecutions.

Between 1999 and 2008, for example, New Jersey recorded **four gender-bias incidents**, 3,521 race-bias incidents, 2,589 religious-bias incidents, 579 motivated by sexual orientation bias, and 25 disability-bias incidents.¹⁹ Engender analysis, based on state police reports, finds that between 2008 and 2018, New Jersey recorded **fourteen gender-bias incidents**, 3,289 race-bias incidents, 2,195 religious-bias incidents, 683 motivated by sexual orientation bias, and 42 disability-bias incidents.²⁰ **This amounts to 18 reports of gender-based hate crime in 20 years.**

Academics researching the New Jersey experience found that, “despite the fact that gender had been 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.”²¹

3.2 Gendered hate crime is not well understood as hate crime

Within anti-discrimination law, women are very well understood and there is considerable legal certainty around sex discrimination and equal pay. This stands in stark contrast to the extent that women and girls’ gendered experiences of the world are understood within hate crime.

Internationally, there are concerns about the extent to which gender-inflected or misogynistic hate crime is understood to be a hate crime at all. The very ubiquity of misogyny is used as a justification for failing to count it at all:

“Arguments against the addition of gender as a protected group maintain that, because of the extent of violence against women in this country, these crimes would overwhelm already congested courts and would make the gathering of statistics too cumbersome.”²²

¹⁸ Chalmers J, Leverick F (2017) A Comparative Analysis of Hate Crime Legislation.

¹⁹ Hodge JP (2011) Gendered Hate. Northeastern University Press.

²⁰ Source: New Jersey State Police Bias Incident Reports 2008 to 2017-18. Available at: <https://www.njsp.org/ucr/bias-incident-reports.shtml>.

²¹ Hodge JP (2011) Gendered Hate. Northeastern University Press.

²² Hodge JP (2011) Gendered Hate. Northeastern University Press.

There are parallels and interconnections between the experience of women and other protected groups. However, in the context of hate crime there are gendered challenges with both the discriminatory selection model²³ and the animus model.²⁴

Within Council of Europe member states there are legal, administrative, civil or criminal provisions supporting the prohibition of hate speech towards groups on the basis of certain grounds, including sex in a number of countries, with punishment ranging from fines to jail sentences. Despite this, the Council of Europe notes 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 difficulty to find the identity of an anonymous hater or the unwillingness to consider this issue as a serious one.”²⁵

Jessica Hodge also 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.”²⁶ As Valerie Jenness notes, “gender has found a home in legal discourse on hate crime legislation, but it remains in the guest house of that home.”²⁷

3.3 A sex aggravation risks undermining Scottish responses to violence against women

Engender is of the view, which is also shared by Rape Crisis Scotland, Scottish Women’s Aid, and Zero Tolerance, that creating a sex aggravation, or even a misogyny aggravation, and applying it to rape, domestic abuse, and other forms of violence against women would be incoherent with our understanding of those types of crime.

This is because we think that *all* violence against women is gender-based and this chimes with the analysis included within *Equally Safe*, which includes Scottish Government’s definition of gender-based violence:

“Gender based violence is a function of gender inequality, and an abuse of male power and privilege. It takes the form of actions that result in physical, sexual and psychological harm or suffering to women and children, or affront

²³ This is where a hate crime has been committed because the victim has been selected due to their membership of a protected group.

²⁴ This is where a hate crime has been committed because the offender is motivated by, or demonstrates prejudice against a protected group.

²⁵ Council of Europe (2011) Convention on Preventing and Combating Violence Against Women and Domestic Violence. Available at: <https://primarysources.brillonline.com/browse/human-rights-documents-online/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence;hrdhrd99532014005> [Accessed October 14, 2019].

²⁶ Hodge JP (2011) Gendered Hate. Northeastern University Press.

²⁷ Jenness V (2003) Engendering Hate Crime Policy: Gender, the “Dilemma of Difference,” and the Creation of Legal Subjects. *Journal of Hate Studies* 2.

to their human dignity, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. It is men who predominantly carry out such violence, and women who are predominantly the victims of such violence. **By referring to violence as ‘gender based’ this definition highlights the need to understand violence within the context of women’s and girl’s subordinate status in society.** Such violence cannot be understood, therefore, in isolation from the norms, social structure and gender roles within the community, which greatly influence women’s vulnerability to violence.”²⁸ (emphasis ours)

To apply a sex aggravation to a small number of the rapes and sexual assaults and domestic abuse cases each year, based on specific features around their perpetrator, context, or content would be to undermine that analysis. It would be to say that some gender-based violence is more gender-based than others, which is illogical. It also has the potential to cause profound confusion about mission and purpose to the public agencies that are developing the gender-competence²⁹ to deliver primary and secondary prevention programmes in respect of violence against women, and an effective response to victim-survivors. We understand violence against women to be a cause and consequence of women’s inequality. Undermining this causal story risks undermining public body and delivery agency and public understanding of violence against women and girls.

3.4 A sex aggravation will not fill gaps in the law

Although there are currently significant data and analysis gaps, we assume that there are some types of egregious misogyny that are not criminalised by existing law.

As an aggravation model does not create new offences but only increases the possible tariff for sentencing for offences, this means that it will not fill gaps in the law by criminalising behaviours and conduct that is currently not criminalised. An aggravation model enables existing crimes perpetrated against an individual because of their group membership to be treated more seriously, and to be separately monitored, but it does not allow the police to investigate or prosecutors to prosecute behaviours that are not already criminal.

²⁸ Scottish Government, COSLA (2018) Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls.

²⁹ 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. ‘Intersectional’ gender competence is that which understands that women are not a homogenous group, but that disabled and Black and minority ethnic women’s experiences will be inflected by ableism and racism.

3.5 An ineffectual law will entrench women's inequality

We are also deeply concerned about the possibility of an ineffectual hate crime law institutionally entrenching and systematising 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".³⁰ However, in the case of gender, we are not convinced that the symbolic or communicative quality of criminalising gendered hate crime is sufficient, nor should it come at the expense of effective responses which make women and girls safer and improve their lives.

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 to prevent harm to individual women and girls, and groups of women and girls.

4. WE WELCOME THE WORKING GROUP ON MISOGYNY

We welcome the creation of a working group on misogyny, as announced by Scottish Government in April 2020.³¹ This group has yet to be convened. We hope that the group will:

- **Work to fill data and analysis gaps, including identifying where the existing law does not provide coverage of egregious misogynistic harassment.** To create a compelling evidence-base for new laws, we need to know more about the experiences of women and girls. We also need to map this on to the criminal law in Scotland as it stands, to identify where there are gaps in the law itself and where there is a failure to implement existing legislation in a way that protects women and girls.
- **Work towards a definition of misogyny.**

We recognise that the working group may come to the conclusion that a sex aggravation should form part of the response to misogyny. We are content that a clause in the Bill provides for that possibility.

³⁰ Chalmers J, Leverick F (2017) A Comparative Analysis of Hate Crime Legislation

³¹ Scottish Government (2020) Hate Crime Bill: Working Group to consider standalone offence on misogynistic harassment. Scottish Government News. Available at: <https://news.gov.scot/news/hate-crime-bill> [Accessed July 21, 2020].

Our recommendation is for a participatory approach to the development of any future law designed to respond to misogynistic harassment. We look to the Domestic Abuse (Scotland) Act as an 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.

There are a number of features that we would propose for a law criminalising misogynistic hate crime, but these require further testing:

- It should develop a definition of ‘misogyny’ (and other related definitions), and enable all relevant 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 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.
- It should include incitement to misogyny, so that acts that crowdsource domestic 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 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 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 locate misogynistic hate crime and harassment within the understanding of violence against women in *Equally Safe*.³²
- 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.

³² Scottish Government (2014) *Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls*. Available at: <http://www.gov.scot/Resource/0045/00454152.pdf>.

Outside of the law itself, though, it is vital that Police Scotland and COPFS have sufficient capacity, including gender-competence,³³ to investigate and prosecute misogynistic harassment. As above, it is also essential, 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.

5. MAINTAINING FREEDOM OF EXPRESSION

Our only specific comment on the Bill as drafted is around the question of freedom of expression, on which women and women's organisations have long relied to advocate for equality and rights.

5.1 Stirring up offences and freedom of expression

Section 3 of the Bill replicates the offence of stirring up hatred against a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins. Additionally, the Bill proposes a new offence of stirring up hatred where a person "behaves in a threatening or abusive manner, or (ii) communicates threatening or abusive material to another person" and "in doing so, the person intends to stir up hatred against a group of persons based on the group being defined by reference to a characteristic mentioned in subsection (3),³⁴ or (ii) as a result, it is likely that hatred will be stirred up against such a group."

A defence is provided at section 3(4) to show that the behaviour or the communication was, in the particular circumstances, reasonable. However, the explanatory notes published with the Bill provide only that "a person communicates a threat of serious violence made by someone else for the purpose of alerting a journalist or a journalist reporting a threat of serious violence made by another person."³⁵ This may imply that the defence is limited to sharing of the form of communication rather than the content, and we believe that this should be further clarified.

Engender broadly supports the inclusion and the extension of stirring up offences, however, this section of the Bill has raised concerns from some quarters about freedom of expression. We would be strongly opposed to use of a stirring up offence to prevent criticism of political action or social debate that negatively affected women and gender equality outcomes. Yet we also note that freedom of expression is not

³³ 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.

³⁴ The characteristics are age, disability, religion or, in the case of a social or cultural group, perceived religious affiliation, sexual orientation, transgender identity and variations in sex characteristics.

³⁵ Scottish Government (2020) Hate Crime and Public Order (Scotland) Bill Explanatory Notes. Available at: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/explanatory-notes-hate-crime-and-public-order-scotland-bill.pdf>.

absolute. While the European Court of Human Rights (ECtHR) has described freedom of expression as a foundational aspect of European Human Rights culture, applying not only to “inoffensive or ideas favourably received”, but “also those that offend, shock or disturb”,³⁶ it has also stressed that it is expressly limited by the text of the convention (Article 10 (2) and the balancing of rights articulated through the case law of the Court.

Furthermore, the Court has generally adopted an approach of excluding hate speech cases from its consideration of Article 10, noting in *Gündüz v. Turkey*:

“The Court must also stress that statements which may be held to amount to hate speech or to glorification of or incitement to violence, such as those made in the instant case, cannot be regarded as compatible with the notion of tolerance and run counter to the fundamental values of justice and peace set forth in the Preamble to the Convention.”³⁷

Similarly, in *Norwood v UK*:

“a general, vehement attack against a ... group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination” and thus outside the protection of Article 10.³⁸

The Court has therefore approached cases involving national hate crimes as either excluded by Article 17 (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention; and the approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention where the speech in question is recognised as hate speech but does not undermine the fundamental values of the Convention, although this distinction has not always been clear.³⁹

5.2 Threshold

We therefore support maintaining the proposed threshold at ‘threatening or abusive’ for stirring up offences that do not include race. We are agnostic about the threshold of ‘abusive, threatening or insulting’ for offences in s.3(1). We note Scottish Government’s position that “removal of insulting [for racial hatred] could be perceived as suggesting it was in some way acceptable to insult on the basis of race in a manner that previously it would not have been. Such a perception, even if based on an

³⁶ *Handyside v. The United Kingdom*, ECHR No.5493/72.

³⁷ *Gündüz v. Turkey* [Extracts], ECHR No.59745/00. Available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-23973%22%7D>

³⁸ *Norwood v. United Kingdom*. ECHR No. 23131/03.

³⁹ Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. (2014) *Jacobs, White and Ovey: the European convention on human rights*. Oxford University Press, USA, 2014.

incomplete understanding of the operation of criminal law, is not a perception that the Scottish Government is willing to risk arising".⁴⁰ We additionally note that Black and minoritised women are particularly likely to experience harassment.⁴¹

We note that the threshold of threatening or abusive reflects the s.38 Criminal Justice and Licensing (Scotland) Act 2010 and does not extend criminality to speech which may offend, but not abuse. This is consistent with the reflection that stirring up offences should not be utilised to prevent social or political debate, especially when the proponent of the speech is speaking from or on behalf of a minoritised or marginalised group. Similar laws in Austria do not appear to have led to a rush of convictions of persons using aggravating language to pursue social justice aims.⁴²

5.3 Intention

Engender believes that additional protection for freedom of expression is maintained by the requirement to show an "intention to stir up hatred". As noted in the Scottish Government's policy memorandum – "For each of these offences under the 1986 Act (involving racial hatred), the conduct includes some form of threatening, abusive or insulting words, behaviour, material, images or sounds. The prosecution must show that the accused intended his conduct to stir up racial hatred, or that racial hatred was likely to be stirred up by it. However, for each offence there is no requirement to prove that racial hatred was in fact stirred up in consequence of this conduct."⁴³

However, the alternative requirement in S.3(2) (ii) that having regard to all the circumstances hatred in relation to the particular characteristic is likely to be stirred up thereby has softer parameters and is possibly more open to interpretation or subjectivity.

5.4 Exceptions

Despite this threshold, it is clear that some will have concerns about the extent to which freedom of expression is maintained, particularly in the context of political and social debate, and about how the power of the state will be applied. These concerns may have a chilling effect on protest, and legitimate concerns from marginalised

⁴⁰ Scottish Government. (2020). Hate Crime and Public Order (Scotland) Bill: Equality Impact Assessment

⁴¹ 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> [Accessed February 18, 2020].

⁴² Article 19 (2018) Austria: Responding to 'hate speech'. Available at: <https://www.article19.org/wp-content/uploads/2018/09/Austria-Responding-to-Hate-Speech-.pdf>; OSCE ODIHR HATE CRIME REPORTING (2019) Austria 2019 <https://hatecrime.osce.org/austria>.

⁴³ Scottish Government (2020) Hate Crime and Public Order (Scotland) Bill Policy Memorandum. Available at: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/policy-memorandum-hate-crime-and-public-order-scotland-bill.pdf>.

groups with lesser access to power and to advice that prevents them from engaging in public discourse.

The Bill's approach to this balancing of rights is to create the specific exceptions in section 11 and section 12. Under section 11, specific criticisms of religions and worship will not be considered to stir up hate and under section 12, criticism or discussion of sexual practices will not be considered to stir up hate against persons on the basis of sexual orientation.

Engender is not convinced that a case has been made for the inclusions of the absolute, yet narrow exceptions in sections 11 and 12. It is unclear why these very specific criticisms are universally exempted from the scope of the stirring up offence beyond their presence in sections 29J and 29JA the Public Order Act 1986.

It is clear that some criticism of religious worship is a proxy for and can overtly be criticism of a religious group while criticism of a sexual practice may clearly cause great personal and political harm to lesbian, gay and bisexual people and organisations. However, there may be other forms of heated comments that actively contribute to necessary social and political debate. It is therefore important to note that the exceptions state that speech will not be considered offenses solely on the basis it involves such comments, a wider context may still be relevant.

Because hate speech is not protected by the European Convention, it is vital to be clear about the parameters of hate speech in domestic law (See *Vejdeland* discussed below). The current drafting of the Bill ensures symmetrical protection for persons with a listed characteristic – for example, straight persons are protected from hate speech on the basis of sexual orientation in the same way as LBG persons. This has the potential to obscure the complexity of social power and marginalisation and oppression, particularly in the context of stirring up offences. This was a key element of our position, noted above that “all of the definitions of hate crime that were generated by the working groups [on hate crime in Scotland] ignore the question of power.”

The failure to incorporate an understanding of power and hierarchies into the Bill maintains inequalities in access to freedom of expression. For example, a hypothetical young woman protesting against restriction of reproductive rights has considerably less power to actually threaten or abuse than a white male political leader protesting against large-scale migration, and the language they use therefore has a degree of contextual impact.

Hate speech itself also has a silencing effect, which reduces the ability of others to engage in political and social debate. A purely formal freedom of expression exception

obscures these imbalances as freedom to speak is not synonymous with equal consequences.⁴⁴

5.5 A way forward – an overt proportionality exception protecting political speech

While, as we have outlined, we believe that the Bill already creates a high threshold for speech to be criminalised, we are mindful that:

- The perceived threat of criminality may stifle necessary political and social debate;
- That marginalised groups and causes are more vulnerable to interference and less capable of inspiring hatred to a majority or state-backed power;

But also:

- That exceptions should be narrowly constituted and not used to further or excuse oppression, and therefore the scales must be weighted in favour of the oppressed.

We would therefore urge consideration of replacing the specific exemptions in s.11 and s.12 with a more general provision which explicitly provides limited protection for speech made as part of political or social debate in the public interest. This reflects the approach the European Court of Human Rights has adopted, weighing the need to promote democracy and advance political, artistic, scientific or commercial development and the need to protect the rights of individuals and minority or marginalised groups.⁴⁵

*Vejdeland and others v. Sweden*⁴⁶ offers one of very few examples of hate crime as considered as a freedom of expression issue. The case concerned prosecutions under a Swedish law⁴⁷ that provided that a person who, in a disseminated statement or communication, *threatens or expresses contempt* for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious beliefs or sexual orientation, should be convicted of agitation against a national or ethnic group. It is worth highlighting that “Expression of contempt” would be a lower threshold than that proposed in S.3(2) of the Bill.

While the applicants argued that their leaflets were not abusive or encouraging any hateful acts but encouraged discussion among pupils, the Government submitted that

⁴⁴ J. Neller (2018) 'The Need for New Tools to Break the Silos: Identity Categories in Hate Speech Legislation'.

⁴⁵ Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. (2014) *Jacobs, White and Ovey: the European convention on human rights*. Oxford University Press, USA, 2014 p.484.

⁴⁶ Case Of *Vejdeland and others v. Sweden*. ECHR No. 1813/07.

⁴⁷ *Brottsbalken*, SFS 1962:700 (Criminal Code of Sweden (1962: 700)). Available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700.

the criminal conviction and the sentence imposed were proportionate to the legitimate aims pursued, and thus necessary in a democratic society.

The Court found no violation of Article 10. The majority held that the restriction in law was sufficiently clear and foreseeable and thus “prescribed by law” and that the interference served a legitimate aim, namely “the protection of the reputation and rights of others”. The Court, citing earlier jurisprudence stated that:

“in reviewing under Article 10 the decisions taken by the national authorities pursuant to their margin of appreciation, the Court must determine, in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them, whether the interference at issue was “proportionate” to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are “relevant and sufficient”

Finally, the court made clear that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts.

In a concurring opinion, a minority of judges agreed that there was no violation of Article 10 but did so on the basis that the offence involved minors which swung the proportionality balance. Another judge did so on the basis the school constituted a captive audience and a final concurring opinion indicated dissatisfaction with allowing for any consideration under Article 10, citing US constitutionalist Alexander Bickel: *“This sort of speech constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible ... Where nothing is unspeakable, nothing is undoable.”*

This case and the multitude of concurring opinions demonstrates the difficulty in agreeing a perfect balance between the rights of the speaker and the rights of the group when it comes to stirring up type offences and suggests that at least sometimes a degree of context will influence a proportionality assessment. It also suggests that a proportionality assessment where the legitimate aim is the dignity of others does not necessarily allow for tolerance of attempts to stir up hatred.

5.6 How could a general defence work?

Engender would support exploring a more generalist exception that applies to all protected characteristics but is more restricted to an assessment of the speech’s contribution to necessary and political debate against the harm to a marginalised cause, group or individual.

Many states with penalties for hate speech including France, Canada, South Africa and Sweden have developed laws which weigh freedom of expression rights against the

rights of others.⁴⁸ The Canadian law provides a defence to the offence of ‘wilful promotion of hatred’ that protects the speaker “if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true.”⁴⁹

In relying on the defence, the speaker must be able to demonstrate that the statement complained of was, or formed part of, a statement on a matter of “*public interest*” and the defendant must have “*reasonably believed*” that the statement was in the public interest. This approach is similar to that provided in the Defamation Act 2013 which may therefore offer some guidance in drafting.⁵⁰

In England, part III of the Public Order Act 1986 s.18(1) states that ‘A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if— (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.’ Section 18(5) provides that it is a defence if a person ‘did not intend his words or behaviour, or the written material, to be, and was not aware that it might be ‘threatening, abusive or insulting.’

The Scottish Government notes a further option which has been disregarded in not to make any explicit provision in the Bill for the protection of freedom of expression on the grounds that it is already clear from the terms of the Bill that only behaviour that is threatening or abusive is capable of amounting to an offence relating to stirring up hatred under either section 3(2) or 5(2).⁵¹ While we believe that the Bill creates an appropriate high threshold, we are mindful of a) importance of perception and b) power imbalances in terms of who is on the end of the Bill.

In our view, a replacement to sections 11 and 12 should be general in character and applied to each of the characteristics protected by the Bill, in keeping with the Scottish Government’s position that all protected groups should be treated equally and without hierarchy. The context and power of the speaker should also be critical in the assessing whether the speech was protected by a freedom of expression provision. This would also enable a degree of power balance to be factored in, which offered greater protection to at risk or marginalised groups against those with amplified or hegemonic power but present a higher bar where the context is reversed.

⁴⁸ Alexander Tsesis (2002) *Destructive Messages How Hate Speech Paves the Way For Harmful Social Movements*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699370#:~:text=Destructive%20Messages%20argues%20that%20when,the%20rights%20of%20all%20citizens.

⁴⁹ Canadian Criminal Code (R.S.C. 1985) s.319(3)(c). Available at: <https://laws-lois.justice.gc.ca/eng/acts/c-46/section-319.html?wbdisable=true>.

⁵⁰ Available at: <http://www.legislation.gov.uk/ukpga/2013/26/section/4/enacted>.

⁵¹ Scottish Government (2020) Hate Crime and Public Order (Scotland) Bill Policy Memorandum. Available at: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/policy-memorandum-hate-crime-and-public-order-scotland-bill.pdf>.

6. CONCLUSION

Engender has very few specific comments on the Hate Crime and Public Order (Scotland) Bill. We believe that the evidence is clear that hate crime legislation that includes a sex, gender, or similar aggravation has so far proven in other jurisdictions to have very few positive outcomes for women and not to function as an effective response to misogynistic harassment. At its worst, treating misogynistic behaviours that harm or restrict women and girls' opportunities as hate crime within the model of this Bill may fail to adequately prevent or respond to the egregious misogynistic harassment and may undermine our collective understanding of violence against women.

We conclude:

- **We need to know more about the types of misogynistic harassment that women and girls are experiencing before we can be sure that a new law could be shaped to prevent and respond to its most egregious forms.**
- **We are currently opposed to a 'sex aggravation' being included within the Hate Crime and Public Order (Scotland) Bill.**
- **We welcome the working group on a standalone misogyny offence.**

We do however have comments on the inclusion of stirring up offences. **Our view is that stirring up offences may have positive outcomes for marginalised groups, but that the failure to consider structural and individual power is a weakness of the Bill and may lead to inappropriate wielding of the new offences.** We have suggested a freedom of expression exemption that incorporates the existing exemptions within the Bill with a more responsive element of weighting based on power and influence.

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.