

Engender submission to the Independent Review of Hate Crime Legislation in Scotland

1. INTRODUCTION

Engender welcomes the opportunity presented by this independent review to consider the ways in which Scotland might respond to the gendered social phenomenon of misogynistic harassment and hate speech.

The aim of Lord Bracadale’s review is to consider “whether the law should be clarified and harmonised, and whether additional protected groups should be included”¹. Our submission attempts to reflect on the shape and impact of misogynistic harassment of women in Scotland, and to generate ideas about how this might be disrupted.

Since the Offences (Aggravation by Prejudice) (Scotland) Act 2009 the context and medium of the harassment that women and girls experience has changed and we endeavour to relate this shifting reality to the questions posed by the review.

Like other women’s organisations in Scotland, Engender’s ambition is for a Scotland in which women have the freedom to live a good life, unconstrained by the experience or the fear of misogynistic harassment. **We believe that a standalone piece of legislation to tackle misogynistic hate crime may be helpful in achieving this.**

We set out some broad principles for such a law, but we also recognise the relative dearth of international exemplars and the value and virtue of a collaborative, participatory approach to the development of something new. Scotland has rightly been lauded for the boldness and ambition of its violence

¹ Lord Bracadale (2017) *Independent Review of hate Crime Legislation in Scotland – Consultation Paper*

against women strategy, *Equally Safe*, and received international commendation for the Domestic Abuse Bill. Our approach to responding to the everyday crisis of misogynistic harassment and abuse should be similarly visionary.

1.1 EVIDENCE BASE AND ANALYTICAL PERSPECTIVE

Engender works around women's economic, political, and social and cultural equality with men. We work from a feminist perspective, applying a gendered analytical lens.

The expertise that we draw on in making this submission is principally around gender itself, and its interaction with violence against women and girls. We draw together some recent work on harassment, but do not make claims to a comprehensive review of the literature on harassment or on hate crime. It is our observation that gender and hate crime remains substantially undertheorised, and has even fewer real-world examples of practice from which to draw conclusions.

We have greatly appreciated the comparative analysis of hate crime legislation² prepared for the Hate Crime Legislation Review, and have principally relied on this and several other referenced texts for our understanding of hate crime law. The international literature on hate crime and gender skews towards a North American perspective, and this has doubtless influenced our thinking.

We have sought comments on this response from sister national organisations working around violence against women, including Rape Crisis Scotland and Scottish Women's Aid, and also from Zero Tolerance. Any mistakes in fact or analysis are our own.

1.2 NOMENCLATURE

We are conscious that as there is no such thing in Scotland as 'gender hate crime' we are being imprecise with our language in this submission.

² Chalmers, James and Fiona Leverick (July 2017) *A comparative analysis of hate crime legislation: A report to the Hate Crime Legislation Review*

There are few international examples of gender hate crime statutes, with some covering 'hate speech' and others providing something akin to a gender aggravation. We have attempted to describe these as precisely as possible, but there may be some unintended elisions in our submission.

We have used 'harassment' in this submission to refer to a wide range of gendered constraints on women's freedom. Some of the forms of harassment we describe have a wide range of names, and we have identified in footnotes where this is the case.

2. THE PROBLEM: WOMEN AND HARASSMENT IN SCOTLAND

“Equality is only achieved if women can enjoy and exercise all fundamental rights and freedoms such as mobility, freedom of speech, freedom to decide and organise, the right to sexual and reproductive autonomy, to personal security, to own assets, to work and earn income and to be recognised as full members of society.” – UN Division for the Advancement of Women

Hate crime [...] is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator’s group and the ‘appropriate’ subordinate identity of the victim’s group. – Barbara Perry³

Hate crime⁴, like other forms of violence against women, reproduces ‘relations of dominance’⁵ between women and men. It is both a cause and consequence of women’s equality.

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.

Amartya Sen’s capabilities approach describes the resources and freedoms required to live a good life. These include life and physical health, mental well being, bodily integrity and safety, social relations, political empowerment, education and knowledge, domestic work and non market care, paid work and other projects, shelter and environment, mobility, leisure activities, time-autonomy, respect, and religion. Work by Ingrid Robeyns⁶ and Liz Kelly⁷ identifies that violence against women, including harassment in public and private spaces, is inimical to these capabilities. Simply put, women cannot live a good life while harassment rooted in sexism and misogyny is allowed to

³ Barbara Perry (2001) *in the Name of hate: Understanding Hate Crimes* p.10

⁴ Unless otherwise qualified, when we write of ‘hate crime’ in this paper we are referring to misogynistic hate crime or hate crime perpetrated against women because of their sex.

⁵ Liz Kelly (November 2005) *How violence is constitutive of women’s inequality and the implications for equalities work* CWASU: London Metropolitan University

⁶ Ingrid Robeyns (2003) “Sen’s capability approach and gender inequality: selecting relevant capabilities” *Feminist Economics: Amartya Sen’s Work and Ideas – A Gender Perspective*

⁷ Liz Kelly (November 2005) *How violence is constitutive of women’s inequality and the implications for equalities work* CWASU: London Metropolitan University

inflect our daily reality. In the language of human rights, women cannot enjoy the substantive equality promised by the UK Government's ratification of CEDAW within the status quo.

Despite the understanding by women and girls that harassment is ubiquitous, it is peculiarly invisible to policymakers, administrators, and those responsible for the delivery of public services. Sexual harassment in the workplace is (formally) unlawful but harassment of women and girls in public spaces, in education settings, and online is broadly publicly tolerated.

2.1 HARASSMENT IN INTERNATIONAL INSTRUMENTS

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not speak specifically to violence against women and girls in its articles⁸. However, the CEDAW Committee's General Recommendation 19 states in its comment on article 11 that "Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace."⁹

General Recommendation 19 followed the rising to prominence of the concept of sexual harassment, reflecting Catharine MacKinnon's definitional advocacy¹⁰, in which she argued that sexual harassment is sex discrimination because the act reinforces the social inequality of women to men.

In 2011, the European consensus had developed to ensure that the Council of Europe Convention on preventing and combating violence against women and domestic violence (the 'Istanbul Convention') contains two relevant articles that do not draw a constraining boundary around the workplace in their definition of sexual harassment.

Article 40 on sexual harassment says that:

[State] Parties shall take the necessary legislative or other measures to ensure that **any form** of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating

⁸ The first international instrument explicitly addressing violence against women was the 1993 Declaration on the Elimination of Violence against Women.

⁹ <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

¹⁰ Catherine MacKinnon (1979) *Sexual harassment of working women: a case of sex discrimination* New Haven: Yale University Press

an intimidating, hostile, degrading, humiliating, or offensive environment, is subject to criminal or other legal sanction.¹¹

Article 34 on stalking says that:

[State] Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.¹²

The UK Parliament passed Dr Eilidh Whiteford MP's private member's bill on Istanbul Ratification into law in April 2017¹³. This commits the UK Government to ratification. It signed the convention on 8 June 2012.

2.2 HARASSMENT IN THE WORKPLACE

Violence against women is perpetrated in and around workplaces. Three quarters of women experiencing domestic abuse are targeted at work, and perpetrators of domestic abuse and stalking often use workplace resources such as phones and email to threaten, harass or abuse their current or former partner, acquaintance, or stranger¹⁴. Perpetrator tactics such as sabotage, stalking, and harassment at work, affect women's productivity, absenteeism, and job retention¹⁵.

In the UK, more than half (52%) of women have experienced some form of sexual harassment, with one quarter experiencing unwanted touching, and one fifth of women experiencing unwanted sexual advances. More than one in ten women reported unwanted sexual touching or attempts to kiss them.¹⁶

The Equality Act 2010 enables employees and workers to seek remedy for sexual harassment in the workplace that is perpetrated by a colleague, treating it as sex discrimination. However, third-party harassment provisions set out in that Act were repealed from 1 October 2013¹⁷. This means that individuals cannot seek remedy where harassment is perpetrated by customers, clients, or

¹¹ <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>

¹² <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>

¹³ <https://www.holyrood.com/articles/news/snp-mp-eilidh-whiteford%E2%80%99s-bill-violence-against-women-passed-westminster>

¹⁴ EHRC (March 2013) *Managing and Supporting Employees Experiencing Domestic Abuse*

¹⁵ Swanberg, J.E., & Macke, C. (2006) Intimate partner violence and the workplace: Consequences and disclosure *Affilia*

¹⁶ TUC (2016) *Still just a bit of banter? Sexual harassment in the workplace in 2016*

¹⁷ <http://www.acas.org.uk/index.aspx?articleid=4582>

individuals with other forms of relationships to the employer. Additionally, individuals working on zero hours contracts or with other precarious or unusual work arrangements are either unlikely to use the Equality Act in this way, or are unable to because they are neither employees or workers. This includes local government councillors and MSPs. The EU Agency for Fundamental Rights notes that “Women with irregular or precarious employment contracts, which are common for many jobs in the services sector, are also more susceptible to sexual harassment.”¹⁸ Some high-profile or public facing roles are particularly vulnerable to such third-party harassment. Journalists, and women in media or communications roles are very likely to be harassed by large numbers of individuals, and this is especially likely where editors require below-the-line engagement as part of the job role. In 2016, *The Guardian* carried out a quantitative analysis of its own below-the-line comment threads. After examining 70 million contributions it found that of its ten regular writers who received the most abuse, eight were women (four white and four were women of colour) and two were men of colour. The ten regular writers who received the least abuse were all men¹⁹.

Of all employees and workers surveyed by the TUC, four out of five women experiencing sexual harassment did not report this to their employer.²⁰

Women report sexual harassment as having a negative impact on their mental health, making them less confident at work, and inducing them to avoid certain work situations in order to avoid the perpetrator.²¹ All of these effects and responses are likely to diminish their performance at work, and their propensity to apply for and be appointed to promoted posts. In this way sexual harassment contributes to the ‘glass ceiling’, to women’s subordinate role in the workplace, and to the population-level gender pay gap²².

2.3 HARASSMENT AT SCHOOL

Equally Safe, the Scottish Government’s strategy for eradicating violence against women and girls, recognises the education system as a key setting for

¹⁸ EU Agency for Fundamental Rights (2014) *Violence Against Women: An EU Wide Survey*

¹⁹ <https://www.theguardian.com/technology/2016/apr/12/the-dark-side-of-guardian-comments>

²⁰ TUC (2016) *Still just a bit of banter? Sexual harassment in the workplace in 2016*

²¹ *Ibid.*

²² Close the Gap (March 2017) *Working Paper 17: Gender pay gap statistics*

shifting the discriminatory cultures, attitudes and behaviours that lead to violence against women and girls (VAWG) and notes that education has an opportunity to ‘lead the way in attitudinal change’²³. More broadly, the failure to challenge expressions of misogyny and sexism within educational settings helps lead to the entrenchment of gender inequalities within society.²⁴

Sexist and gender-based bullying – of which young women and girls are overwhelmingly the target – can range from name-calling and peer group ‘policing’ around gender conformity, through to unwanted sexual touching and online harassment. Some behaviours, often categorised as ‘sexual bullying’, are criminal in nature: sexual harassment, assault and violence. The consequence of experiencing this type of bullying are enormous for young women and girls, negatively impacting on their physical and emotional wellbeing as well as educational attainment and involvement.

Sexual harassment and assault at school 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, summarised identify-based bullying thus:

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.²⁵

The omission of gender 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 recorded, and there is a lack of consistency in how schools report sexual harassment and violence to the police and other authorities. Similarly, sexist bullying and sexual harassment are also very under-reported by girls, in part because they are “normalised, everyday occurrences, often positioned as “a

²³ Scottish Government (2014), *Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls* <http://www.gov.scot/Resource/0045/00454152.pdf>

²⁴ Educational Institute of Scotland (2016), *Get it Right for Girls* <http://www.eis.org.uk/public.asp?id=3421&dbase=2>

²⁵ Equality and Human Rights Commission (2015) *Is Scotland Fairer? The state of equality and human rights 2015*

joke” and therefore not reported.”²⁶ The Addressing Sexual Bullying Across Europe (ASBAE) Project found that sexual harassment was often taken for granted by young people and that young people accepted most sexual bullying behaviours as just a ‘normal’ part of their everyday lives, also making it harder for young people to identify (and report) these behaviours as problematic.²⁷

Looking at the few UK figures available, data published in September 2015 showed that 5,500 sexual offences were recorded in UK schools over a three year period, including 600 rapes²⁸. A 2010 YouGov poll of 16-18 year olds found 29% of girls experienced unwanted sexual touching at school and a further 71% said they heard sexual name-calling such as ‘slut’ or ‘slag’ towards girls at school daily or a few times per week²⁹. Girls as young as 11 reported experiencing sexual harassment, and a fifth of girls reported experiencing unwanted touching or unwanted sexual attention at school³⁰.

Evidence given to the Equality and Human Rights Committee of the Scottish Parliament during their recent inquiry on prejudice-based bullying by Girlguiding Scotland said that “59% of girls aged 13 to 21 state they had faced some form of sexual harassment at school or college in the past year” and describe “sexual harassment directed at female students by male members of teaching staff.”³¹

In 2015 Girlguiding UK found that 75% of girls and young women said anxiety about potentially experiencing sexual harassment affects their lives in some way, with 25% of 11 to 16 year old girls stating that concerns over potential sexual harassment made them consider whether or not to speak out in class³².

²⁶ Educational Institute of Scotland (2016), *Get it Right for Girls*
<http://www.eis.org.uk/public.asp?id=3421&dbase=2>

²⁷ ASBAE (2015), *Addressing Sexual Bullying Across Europe Project Research Report*
<http://www.asbae.eu/latest-news/research-report/>

²⁸ BBC Freedom of Information request (2015), *School sex crime reports in UK top 5,500 in three years*
<http://www.bbc.co.uk/news/education-34138287>

²⁹ End Violence Against Women Coalition (2010), *2010 poll on sexual harassment in schools*,
<http://www.endviolenceagainstwomen.org.uk/2010-poll-on-sexual-harassment-in-schools>

³⁰ <https://www.actionaid.org.uk/latest-news/three-in-four-women-uk-world-harassed-in-last-month>

³¹ Equalities and Human Rights Committee (2017) *It is not Cool to be Cruel: Prejudice-based bullying and harassment of children and young people in schools* p.11

³² Girlguiding UK (2015), *Girls’ Attitudes Survey 2015*, <https://www.girlguiding.org.uk/globalassets/docs-and-resources/research-and-campaigns/girls-attitudes-survey-2015.pdf>

2.4 STREET HARASSMENT

There is limited data on street harassment in Scotland, and attempts to discern its prevalence have principally been undertaken by civil society organisations. ActionAid reported in 2016, based on survey data, that more than half (53%) of women in Great Britain had experienced some form of harassment within the last month, and that almost half (43%) of women experienced harassment at the age of 18 or younger.³³ More than one in ten girls (11%) experiences street harassment before the age of ten³⁴.

British Transport Police do invite reports of sexual harassment, but their list of successful convictions is minimal compared with what we understand to be its prevalence. Other administrative data on street and public harassment is slight. Filling this gap, women have developed their own tools to document and make visible its prevalence and incidence. Hollaback!, an international network of activists that emerged from a group in New York, developed a mobile phone app that enables users to “digitally document situations of street harassment, to map the location of the harassment and, by extension, young women’s responses to it.”³⁵

Three quarters (71%) of British women have done something to guard themselves against the threat of harassment. This figure rises to nearly 9 in 10 (88%) for younger British women aged 18-24.³⁶ The Fundamental Rights Agency survey on violence against women in the EU identifies that 64% of women in the UK have avoided places or situations for fear of being physically or sexually assaulted in the 12 months prior to the interview³⁷.

Liz Kelly describes this avoidance and additional planning as ‘safety work’: the strategising and planning that women and girls carry out in order to avoid, cope with, or disrupt men’s violence. It includes behaviours such as wearing headphones on public transport, avoiding eye-contact, modifying body language, and evaluating physical spaces in order to prevent the escalation of

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Rentschler, C (Summer 2014) “Rape Culture and the Feminist Politics of Social Media” in *Girlhood Studies* 7, no 1

³⁶ <https://www.actionaid.org.uk/latest-news/three-in-four-women-uk-world-harassed-in-last-month>

³⁷ <http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-violence-against-women-survey>

“staring to touching, men walking more quickly behind you, or blocking your path”³⁸.

Amanda Taub notes the financial and opportunity costs of the fear of harassment, which means that “certain opportunities are left unavailable to women, while still others are subject to expensive safety precautions, such as not traveling for professional networking unless you can afford your own hotel room. It amounts, essentially, to a tax that is levied exclusively on women.”³⁹

2.5 ONLINE HARASSMENT

Violence against women has always moulded itself to new contexts, and the advent of the Internet did not break this pattern. Legal philosopher Martha Nussbaum has observed that “mobs from dominant groups are notorious for shaming relatively powerless groups, in taking delight in the discomfort of the excluded and stigmatized.”⁴⁰ Gendered behaviour that aligns with this analysis is now clearly visible online.

Pew Research Center reported in 2017 that 21% of 18-29 year old (American) women have been sexually harassed online, a figure that is more than double the share among men in the same age group (9%). Over half (53%) of young women aged 18 to 29 say that someone has sent them explicit images they did not ask for. 83% of young women (aged 18 to 29) view online harassment as a major problem. Of those experiencing the most severe forms of harassment, including physical threats, sustained harassment, sexual harassment, and stalking, 32% attribute this directly to their gender. 30% of those experiencing severe harassment have stopped using one or more online services.⁴¹

An international survey commissioned by Amnesty International in 2017 found that nearly a quarter (23%) of women aged between 18 and 55 in Denmark, Italy, New Zealand, Poland, Spain, Sweden, the UK and USA has experienced online abuse and harassment, and of those 41% felt that their physical safety was threatened. More than half had experienced lower self-esteem or a loss of

³⁸ <http://www.troubleandstrife.org/2016/05/situating-agency/>

³⁹ Amanda Taub (October 2014) “*Yes means yes*” is about much more than rape Vox, 13 October

⁴⁰ Danielle Keats Citron (2014) *Hate Crimes in Cyberspace* Harvard University Press p.5

⁴¹ <http://www.pewinternet.org/2017/07/11/online-harassment-2017/>

self confidence (61%); stress, anxiety, or panic attacks (55%); disrupted sleep (63%); or a reduction in their concentration (56%)⁴².

Cyber harassment and other forms of online violence against women⁴³ disrupt online life with “threats of violence, privacy invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks.”⁴⁴ As Amanda Hess observes, “when anonymous posters say they would like to rape us, or cut off our heads, or scrutinize our bodies in public or shame us for our sexual habits – they serve to remind us in ways both big and small that we can’t be at ease online”⁴⁵.

Online misogyny is also aimed at men. Emma A. Jane provides a short list of high-profile men who have been targeted with misogynistic messages describing their female partners and family members, including those adopting the rhetoric of sexual violence⁴⁶, and notes that “these examples show that violence misogyny can still be present in cyberhate attacks in which men are the primary targets.”

The Internet is now a space that is integral to everyday life and citizenship. Contemporary careers of all kinds require individuals to engage with social media, to transact business, to profile themselves on professional networking spaces, and to publish online. Social and family life is also lived at least partly online, and it is the most efficient (and sometimes only) method of engaging with a diverse range of public and state services.

The Council of Europe notes that cyber harassment constrains women’s career choices, including acting as a drag on women opting for male-dominated technology careers: “Fear of retaliation for what they might be, say or do can impede women aspiring to use the Internet for personal or professional matters, including from choosing a job in an Internet-related field.”⁴⁷

⁴² <https://www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/>

⁴³ Nomenclature for this new-ish form of violence against women has yet to settle, with the UN Broadband Commission favouring cyber violence against women and girls or cyber VAWG

⁴⁴ Danielle Keats Citron (2014) *Hate Crimes in Cyberspace* Harvard University Press p.3

⁴⁵ Amanda Hess (January 2014) “Why Women Aren’t Welcome on the Internet: The Next Frontier of Civil Rights” *Pacific Standard Magazine*

⁴⁶ Emma A. Jane (2017) *Misogyny Online: A Short (and Brutish) History* Singapore: Sage

⁴⁷ Council of Europe (February 2016) *Background note on sexist hate speech* p.8

Danielle Keats Citron summarises the considerable impact of cyber stalking and cyber violence against women and girls (cyber VAWG) on women's freedom of expression:

Cyber mobs go in disguise on the Internet to deprive women and minorities of their right to engage in online discourse. Victims are forced offline with cyber mobs' technological attacks. To avoid further abuse, victims shut down their social network profiles and blogs. They limit their websites' connectivity by password-protecting their sites. They close the comments on their blog posts, foreclosing positive conversations along with abusive ones.

A cyber mob's interference with victims' free expression produces tangible economic harms. Closing down one's blog or website can mean a loss of advertising income. Their absence of an online presence can prevent victims from getting jobs. Victims' low social media influence scores can impair their ability to obtain employment.⁴⁸

Although there is insufficient administrative data on cyber VAWG, those who have been documenting online harassment for some years describe an explosion in its incidence and some alarming shifts in its characteristics. In a long list entitled "Changes in Gendered Cyberhate since circa 2010" Emma Jane includes the following:

- Vast expansion of the number of attackers and targets
- Vast expansion of the number and types of channels used for attack
- Vast expansion in the types of women targeted (alongside an increase in attacks explicitly framed as **responses to feminist activism and/or perceived feminist gains**)
- Planned and coordinated attacks as part of group strategies
- Dramatic increases in the longevity of attacks (some continuing for years or having ongoing status)
- Increases in the frequency, severity, specificity, and credibility of threats such that targets are more likely to give them credence and take offline action (such as cancelling public engagements and leaving their homes)
- Increases in the number and types of attacks which begin online but then move (or at least are designed to appear as if they are about to move) offline in the form of doxing⁴⁹, swatting⁵⁰, bomb and death threats, inciting others to attack

⁴⁸ Danielle Keats Citron (2014) *Hate Crimes in Cyberspace* Harvard University Press p.160

⁴⁹ 'Doxing' or 'doxing' is the publication of private information (or 'docs'), including identity documents, national insurance numbers, street and email addresses, and telephone numbers.

⁵⁰ 'Swatting' is reporting that there is an active shooter or bomb at an address occupied by an individual that is being harassed. Its name refers to the 'SWAT' police who attend such a call, who may force entry to the distress of occupants.

targets offline, demonstrating knowledge of targets' home addresses by organising items to be delivered, and so on⁵¹.

Although cyber VAWG is fundamentally similar to domestic abuse, stalking, and other attempts to control and limit women's space for action, its propensity to be perpetrated by a network rather than an individual presents some specific challenges to lawmakers seeking to disrupt it.

⁵¹ Emma A. Jane (2017) *Misogyny Online: A Short (and Brutish) History* Singapore: Sage p.74

3. THE SOLUTION: DISRUPTING MISOGYNISTIC HATE

Male domination is so rooted in our collective unconscious that we no longer even see it. It is so in tune with our expectations that it becomes hard to challenge it. What are the mechanisms and institutions which make possible the continued reproduction of this age-old domination by men? – Pierre Bordieu⁵²

Gender-bias crimes affect women collectively, similar to the way that burning a cross or vandalizing a synagogue affects an entire racial or religious community. The act does not just affect one individual; rather, it affects an entire group, making the targeted community feel fear and, sometimes, a sense of inferiority. Women are constantly aware of their vulnerability and status as potential victims. – Jessica P. Hodge⁵³

The domains of harassment set out in the previous section – employment, public spaces, online, and education – provide the backdrop for a wide range of negative experience for women.

Harassment causes direct harm to its victims, but also harm to other women and girls who witness or hear about it. Harms caused described in the previous section include women's well-documented fear of crime, damage to women's health and mental health, girls' reluctance to speak in class, women's limited progression at work, women reducing their participation in online spaces vital to civic and professional engagement, and the extent to which women must do consuming and expensive 'safety work' to attempt to disrupt harassment and men's violence.

The Istanbul Convention, soon to be ratified by the UK Government, requires action in article 40 to:

take the necessary legislative or other measures to ensure that **any form** of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating, or offensive environment, is subject to criminal or other legal sanction [our emphasis].⁵⁴

Additionally, article 5 of CEDAW requires states parties to:

Take all appropriate measures to modify the social or cultural patterns of conduct of men and women [in order to realise substantive equality].

⁵² Pierre Bordieu (1998) "On male domination" *Le Monde Diplomatique*

⁵³ Jessica P. Hodge (2011) *Gendered Hate: Exploring Gender In Hate Crime Law* Northeastern University Press: Boston p. 5

⁵⁴ <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>

3.1 WHAT SHOULD BE REGARDED BY HATE CRIME BY THE LAW OF SCOTLAND?

The definition of hate crime in the consultation paper is:

the creation of offences, or sentencing provisions, which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim's identity should be treated differently from 'ordinary crimes' although legislation may define hate crimes by reference to concepts other than motivation, such as the demonstration of hostility based on a particular feature of the victim's identity, or the selection of the victim on the basis of a particular feature.

This misses a key feature from Barbara Perry's definition, described in the academic paper as one of the most "commonly quoted academic definitions", which includes:

[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.

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

3.2 SHOULD WE HAVE SPECIFIC HATE CRIME LEGISLATION?

Some actions that harm women and are rooted in misogyny and an attempt to 'recreate hierarchies' are already criminalised in Scotland. These include rape and sexual assault and domestic abuse.

Given the existing requirements of CEDAW and the forthcoming requirements of the Istanbul Convention, and the clear and profound impact of misogynistic

actions on women's equality and rights, we contend that it seems appropriate to consider how misogynistic hate crime might be included in Scots law.

However, there are two barriers to forming a clear recommendation about how such a law might be framed. The first relates to data: the previous section outlines the clear shape of a problem, but it also identifies a comprehensive lack of administrative data that might provide granular detail about women's experiences of harassment and hate. Secondly, there does not appear to be a preponderance of international examples in which gendered hate crime has been criminalised in a way that has seen material advances for women's equality and rights.

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. 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 difficult to find the identity of an anonymous hater or the unwillingness to consider this issue as a serious one."⁵⁵

In New Jersey, "despite the fact that gender had been part a part of the state's bias crime statute for over ten years, interviewees [in the criminal justice system] were still unsure of how the category fit in the hate crime framework. Investigators and prosecutors were also reluctant to conceptualize gender-based offences as hate crimes, much less enforce the gender category within the bias crime statute."⁵⁶

Between 1999 and 2008, 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.⁵⁷

⁵⁵ Council of Europe (February 2016) *Background note on sexist hate speech* p.9

⁵⁶ Jessica P. Hodge (2011) *Gendered Hate: Exploring Gender In Hate Crime Law* Northeastern University Press: Boston p. 95

⁵⁷ Jessica P. Hodge (2011) *Gendered Hate: Exploring Gender In Hate Crime Law* Northeastern University Press: Boston p. 64

Hodge writes that “legal actors perceive gender-based harassment as limited to sexual harassment in the workplace; thus, when it occurs outside of the work setting – for instance, in the home – it is not recognised as a bias crime.”⁵⁸As 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.”⁵⁹

We are not convinced by arguments that suggest that the symbolic or communicative quality of criminalising gendered hate crime is sufficient. If misogynistic hate crime remains, as in the New Jersey experience, starkly under-investigated and under-prosecuted then a principally symbolic law will also signal that misogyny is less harmful and less proscribed than other forms of hate crime. The law on hate crime must not reinforce the notion that harassment of women is tolerated by society. It is therefore vital to shape the law in such a way as to maximise its effectiveness and its capacity to create more space to act for individual women and girls.

3.3 SHOULD WE HAVE A SINGLE PIECE OF LEGISLATION?

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 in the academic paper suggests that only a handful of states or territories have added sex, gender, or gender expression (in addition to gender identity) to their legislation⁶⁰, but in none of these instances is there evidence of a significant number of prosecutions.

An analog to the simplification exercise proposed in the consultation paper was the output of the UK Government’s Discrimination Law Review: the Equality Act 2010. This consolidated and brought together anti-discrimination law in Great Britain, replacing predecessor pieces of legislation that included the Sex Discrimination Act 1975 and Equal Pay Act 1970. It also replaced the predecessor public duties on race equality, disability equality, and gender equality with a single public sector equality duty.

⁵⁸ Jessica P. Hodge (2011) *Gendered Hate: Exploring Gender In Hate Crime Law* Northeastern University Press: Boston p. 83

⁵⁹ Jenness, V. (2003) Engendering Hate Crime Policy: Gender, the “Dilemma of Difference,” and the Creation of Legal Subjects *Journal of Hate Studies* Vol. 2:73

⁶⁰ Chalmers, James and Fiona Leverick (July 2017) *A comparative analysis of hate crime legislation: A report to the Hate Crime Legislation Review* p. 54-55

For a number of reasons, it has only been four years since the public sector equality duty regulations came into force in Scotland, but the early indication is that it has resulted in a diminution of focus on the specific needs of specific protected groups⁶¹. A coalition of equalities organisations in Scotland, of which we were part, noted:

The response from public authorities to the public sector equality duty has essentially been to treat protected characteristics in an undifferentiated way, glossing over or ignoring the specific disadvantage and discrimination faced by specific groups of people. Public bodies increasingly attempt to consider multiple characteristics at the same time, and without adequate data or characteristic-specific competence. There has been a trend away from characteristic-specific engagement and (co)production mechanisms such as women's committees, race equality officers, and disability stakeholder groups. Instead, structures that cover multiple characteristics, such as equality advisory groups and internal 'equality champions' have been established.

Contrary to the warning of the three predecessor equality bodies, our collective sense is that the publication and process requirements of the public sector equality duty are now almost universally carried out using a highly genericised approach that spans all of the protected characteristics⁶².

Consolidation and simplification has resulted in the experience of women and girls becoming lost inside a list of nine protected characteristics, as public authorities attempt to develop one set of policies, practices, and interventions that will bring about equality for all. The laudable aim of consistency has had the unintended consequence of undermining the very purpose of the law.

Internationally, there are concerns about the extent to which gender-inflected or misogynistic hate crime is understood to be a hate crime. The very ubiquity of misogyny is used as a justification for the non-inclusion of crimes against women underneath a rubric of hate crime:

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

⁶¹ <https://www.engender.org.uk/content/publications/Equality-sector-response-to-the-Scottish-Government-consultation-on-Socioeconomic-Duty-September-2017.pdf>

⁶² <https://www.engender.org.uk/content/publications/Equality-sector-response-to-the-Scottish-Government-consultation-on-Socioeconomic-Duty-September-2017.pdf>

overwhelm already congested courts and would make the gathering of statistics too cumbersome.⁶³

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 model and the animus model. Women, as Liz Kelly writes, “grow up in households, and have intimate relations, with members of the group that they are not the equals of”. To flip this around, the men who perpetrate harassment have mothers, daughters, wives, sisters, colleagues, and possibly even female friends. The extent to which they are read as having committed a generic hate crime against women will require deft gendered analysis from the police and fiscal.

Emerging experience from within the UK suggests that pilot initiatives to record ‘misogynistic hate crime’ by police forces in England and Wales have had mixed results. With evaluation still to take place, we have received private correspondence from women’s sector colleagues that identify their concern at some of the interventions that are unfolding. In some areas, community police officers are undertaking the type of ‘restorative’ approaches that may be evidence-based when responding to hate crimes involving other protected groups, but are contra-indicated in the case of violence against women. Simply extending hate crimes practice from another group to cases involving women is ignoring gendered dynamics and risks women’s wellbeing and safety.

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

3.4 WHAT SHOULD THE GENDER HARASSMENT LAW LOOK LIKE?

There are profound gaps in our knowledge and in the collective understanding of women’s experience of harassment and misogynistic hate. There is a relative dearth of data, and a lack of examples of effective legislation that

⁶³ Jessica P. Hodge (2011) *Gendered Hate: Exploring Gender In Hate Crime Law* Northeastern University Press: Boston p. 8

Scotland may emulate. We therefore suggest a way of developing a piece of legislation to tackle misogynistic hate crime, along with a set of broad principles for its content, rather than a comprehensive solution.

Our recommendation is for a participatory approach to the development of such a law. We look to the Domestic Abuse Bill 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:

- That it should not set out a 'gender aggravation' or 'misogyny aggravation'. In our view, this would create a contradictory demarcation between crimes such as rape and domestic abuse that are, by their very nature, inflected with misogyny, and crimes such as (for example) breach of the peace that incorporate explicitly misogynistic language. In this example the latter would be a 'hate crime' and the former would not.
- That it should capture the essence of the Barbara Perry's definition of hate crime, and include the sense that harassment or bias-crime is about re-creating a gendered hierarchy of men and women. It should provide explicit protection to women and girls and men and boys that are targeted by misogynistic hate.
- That it should include incitement to misogyny, so that acts that crowdsource 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 include post-legislative scrutiny so that the Scottish Parliament must evaluate its impact and any unintended consequences for women and girls' equality and rights.
- It should enable action where women experience hate, bias, or harassment because of their sex or gender as well as because of another protected characteristic. It should provide for responses to misogyny that is inflected with racism, ableism, homophobia, and transphobia.

- It should locate misogynistic hate crime and harassment within the understanding of violence against women in *Equally Safe*⁶⁴.

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

Although it is beyond the scope of this inquiry, we would also wish to emphasise that criminal sanction for egregious harassment can only ever be one small part of preventing violence against women. As with all organisations working in this space, our ambition is for violence against women, including misogynistic harassment and hate, to be consigned to history.

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.

⁶⁴ Scottish Government (2014), *Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls* <http://www.gov.scot/Resource/0045/00454152.pdf>