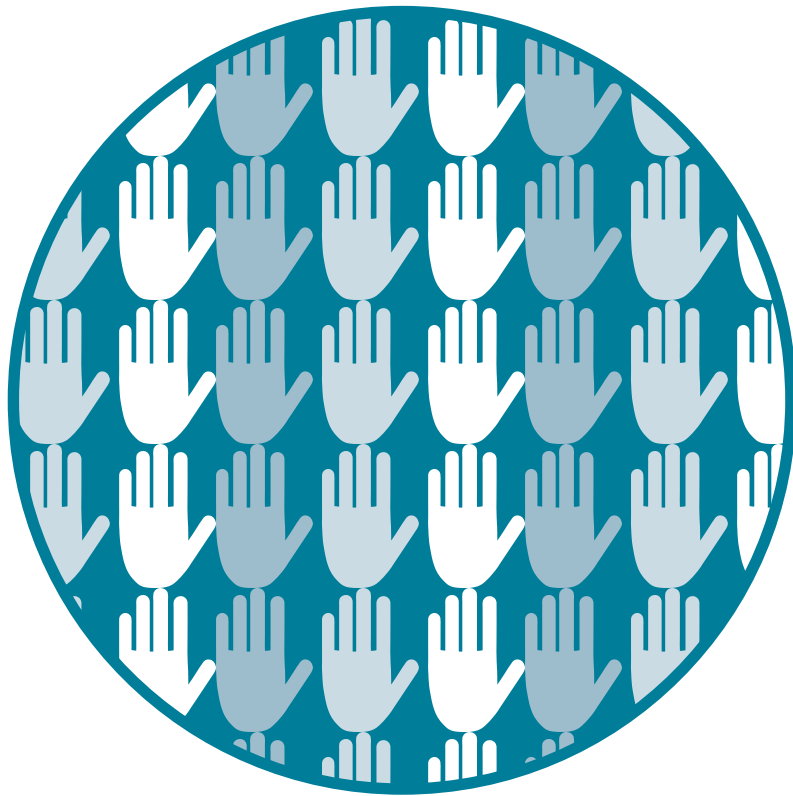




# MAKING WOMEN SAFER IN SCOTLAND: THE CASE FOR A STANDALONE MISOGYNY OFFENCE



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Engender is Scotland’s feminist policy and advocacy organisation. We work for women’s economic, political, and social equality with men.

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# 1. INTRODUCTION

“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 Perry<sup>1</sup>**

For over four decades, Scotland has been grappling with questions about how it responds to the types of crimes that victimise women because they are women. The majority of this conversation has happened within the frame of what we understand to be violence against women, defined in our national strategy as:

“The violence and abusive behaviour carried out predominantly by men directed at women and girls precisely because of their gender. Behaviour that stems from systemic, deep-rooted women’s inequality, and which includes domestic abuse, rape, sexual assault, commercial exploitation (like prostitution), and so called ‘honour based’ violence like female genital mutilation and forced marriage.”<sup>2</sup>

Another small piece of this conversation is set within the context of the types of laws which we in Scotland call ‘hate crime’. Although there is no single international definition for hate crime, this term is commonly used by criminal justice organisations in Scotland, like the police, Crown Office and Procurator Fiscal Service (COPFS), and Scottish Government. It includes:

“...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.”<sup>3</sup>

<sup>1</sup> Perry, Barbara. (2001) *In the Name of Hate: Understanding Hate Crimes*. 1st Edition. New York: Routledge.

<sup>2</sup> Scottish Government, and COSLA. (2018) *Equally Safe: Scotland’s Strategy for Preventing and Eradicating Violence against Women and Girls*. Scottish Government.

<sup>3</sup> Chakraborti, Neil, and Jon Garland. (2015) *Hate Crime: Impact, Causes, and Responses*. 2nd Edition. Los Angeles: SAGE Publications.

As the law around hate crime is being reconsidered in Scotland, feminist women's organisations are considering afresh whether the near-ubiquitous harassment of women in public places, education settings, workplaces, and online might be tackled in part through the development of an offense specifically designed to criminalise egregious misogyny.

This paper considers the prevalence and nature of the harassment women face, the capacity of the law to respond to this effectively, the barriers that we must overcome to use the law effectively to disrupt this harassment, and our recommendations for action. We set out some broad principles for the development of a standalone offense of misogynistic harassment. 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 and distinctive.

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

## TERMINOLOGY: HATE CRIME

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 paper. 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 writing. We have used 'harassment' in this paper 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 different formulations are used.

## 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. 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.

The expertise that we draw on is principally around gender itself, and its interaction with violence against women and girls. In this paper, 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 few real-world examples and practices which situate offences towards women within hate crime from which to draw conclusions.

We have greatly appreciated the comparative analysis of hate crime legislation<sup>4</sup> prepared for Lord Bracadale's Hate Crime Legislation Review by Professor James Chalmers and Professor Fiona Leverick at the University of Glasgow School of Law. We have principally relied on this and several other referenced texts for our understanding of hate crime law.

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

<sup>4</sup> Chalmers, James, and Fiona Leverick. (2017) *A Comparative Analysis of Hate Crime Legislation*. Scottish Government.

## 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**

Misogynistic harassment, like other forms of violence against women, reproduces ‘relations of dominance’<sup>5</sup> 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.

Amartya Sen’s capabilities approach<sup>6</sup> 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 Robeyns<sup>7</sup> and Liz Kelly<sup>8</sup> 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 inflect our daily reality. In the language of human rights, women cannot enjoy the substantive equality promised by the UK Government’s ratification of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) within a status quo in which harassment is endemic.

<sup>5</sup> Kelly, Liz. (2005) *How Violence is Constitutive of Women’s Inequality and the Implications for Equalities Work*. Child and Woman Abuse Studies Unit, London Metropolitan University.

<sup>6</sup> Sen, Amartya. (1999) *Commodities and Capabilities*. New Delhi: OUP India.

<sup>7</sup> Robeyns, Ingrid. (2003) ‘Sen’s Capability Approach and Gender Inequality: Selecting Relevant Capabilities’. *Feminist Economics*. 9 (2–3) pp.61–92. doi:10.1080/1354570022000078024.

<sup>8</sup> Kelly, Liz. (2005) *How Violence is Constitutive of Women’s Inequality and the Implications for Equalities Work*. Child and Woman Abuse Studies Unit, London Metropolitan University.

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 articles.<sup>9</sup> However, the CEDAW Committee's General Recommendation 19 clarifies that "discrimination against women, as defined in article 1 of the Convention, includes gender-based violence."<sup>10</sup> General Recommendation 19 further 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."<sup>11</sup>

General Recommendation 19 followed the rise to prominence of the concept of sexual harassment, reflecting Catharine MacKinnon's definitional advocacy,<sup>12</sup> 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 an intimidating, hostile, degrading, humiliating, or offensive environment, is subject to criminal or other legal sanction."<sup>13</sup>(our emphasis)

<sup>9</sup> The first international instrument explicitly addressing violence against women was the 1993 Declaration on the Elimination of Violence against Women.

<sup>10</sup> UN Committee on the Elimination of Discrimination against Women (2017) *General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19*. United Nations.

<sup>11</sup> UN Committee on the Elimination of Discrimination against Women (1992) *General Recommendation No. 19 on Violence Against Women*. United Nations.

<sup>12</sup> MacKinnon, Catharine A. (1979) *Sexual Harassment of Working Women: A Case of Sex Discrimination*. New Haven: Yale University Press.

<sup>13</sup> Council of Europe. (2011) *Convention on Preventing and Combating Violence Against Women and Domestic Violence*. Koninklijke Brill NV. doi:10.1163/2210-7975\_HRD-9953-2014005.

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.”<sup>14</sup>

The UK Parliament passed Dr Eilidh Whiteford MP’s private member’s bill on Istanbul Ratification into law in April 2017.<sup>15</sup> This commits the UK Government to ratification, although this has yet to take place. It signed the convention on 8 June 2012.

## 2.2 HARASSMENT IN THE WORKPLACE

Violence against women is regularly 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 stranger.<sup>16</sup> Perpetrator tactics such as sabotage, stalking, and harassment at work affect women’s productivity, absenteeism, and job retention.<sup>17</sup> 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.<sup>18</sup> Qualitative work by the Equality and Human Rights Commission (n=750) found that “nearly all of the people who had been sexually harassed were women”.<sup>19</sup>

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 2013.<sup>20</sup> This means that individuals cannot seek remedy where harassment is perpetrated by customers, clients, or 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

<sup>14</sup> Council of Europe. (2011) *Convention on Preventing and Combating Violence Against Women and Domestic Violence*. Koninklijke Brill NV. doi:10.1163/2210-7975\_HRD-9953-2014005.

<sup>15</sup> Davidson, Jenni. (2017) ‘SNP MP Eilidh Whiteford’s Bill on Violence against Women Passed at Westminster’. [https://www.holyrood.com/news/view,snp-mp-eilidh-whitefords-bill-on-violence-against-women-passed-at-westminst\\_13382.htm](https://www.holyrood.com/news/view,snp-mp-eilidh-whitefords-bill-on-violence-against-women-passed-at-westminst_13382.htm).

<sup>16</sup> Equality and Human Rights Commission and the Chartered Institute for Personnel and Development. (2013) *Managing and Supporting Employees Experiencing Domestic Abuse*. EHRC and CIPD.

<sup>17</sup> Swanberg, Jennifer E., and Caroline Macke. (2006) ‘Intimate Partner Violence and the Workplace: Consequences and Disclosure’. *Affilia*. 21 (4) pp.391–406. doi:10.1177/0886109906292133.

<sup>18</sup> Trades Union Congress. (2016) *Still Just a Bit of Banter? Sexual Harassment in the Workplace in 2016*. TUC.

<sup>19</sup> Equality and Human Rights Commission. (2018) *Turning the Tables: Ending Sexual Harassment at Work*. EHRC.

<sup>20</sup> Advisory, Conciliation and Arbitration Service. (2013) ‘Repeal of Third-Party Harassment Legislation | Acas Workplace Snippet October 2013.’ ACAS. <https://www.acas.org.uk/index.aspx?articleid=4582>.



unlikely to use the Equality Act in this way, or are unable to because they are neither employees nor 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.”<sup>21</sup>

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 men.<sup>22</sup>

Of all employees and workers surveyed by the TUC, four out of five women experiencing sexual harassment did not report this to their employer.<sup>23</sup> A small-scale survey of people in Scotland in 2018 (n=978) found that 68% of people who witnessed or experienced sexual harassment did not report this.<sup>24</sup>

Barriers to reporting identified by the Equality and Human Rights Commission include: “the view that raising the issue was useless as the organisation did not take the issue seriously; a belief that alleged perpetrators, particularly senior staff, would be protected; fear of victimisation; and a lack of appropriate reporting procedures”.<sup>25</sup> There is a disconnect between women’s experiences of workplaces and what employers understand to be their own practice around sexual harassment. Despite the EHRC noting that they “found only a small minority of employers using effective approaches to prevent and address sexual harassment at work”, most of the large employers (n=234) that the Commission surveyed said that they “had a policy which dealt with sexual harassment”.<sup>26</sup>

Sexual harassment damages women’s working lives. Women describe sexual harassment as having a negative impact on their mental health, making them less

<sup>21</sup> European Union Agency for Fundamental Rights. (2014) *Violence Against Women: An EU Wide Survey*. Fundamental Rights Agency.

<sup>22</sup> Gardiner, Becky, Mahana Mansfield, Ian Anderson, Josh Holder, Daan Louter, and Monica Ulmanu. (2016) ‘*The Dark Side of Guardian Comments*’. The Guardian. <https://www.theguardian.com/technology/2016/apr/12/the-dark-side-of-guardian-comments>.

<sup>23</sup> Trades Union Congress. (2016) *Still Just a Bit of Banter? Sexual Harassment in the Workplace in 2016*. TUC.

<sup>24</sup> Weldon, Victoria. (2018) ‘*Revealed: ‘Appalling’ Scale of Sexual Harassment in Scotland’s Workplaces*’. The Herald. <https://www.heraldscotland.com/news/17427437.revealed-appalling-scale-of-sexual-harassment-in-scotlands-workplaces/>.

<sup>25</sup> Equality and Human Rights Commission. (2018) *Turning the Tables: Ending Sexual Harassment at Work*. EHRC.

<sup>26</sup> Ibid.

confident at work, and inducing them to avoid certain work situations in order to avoid the perpetrator.<sup>27</sup> 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 gap.<sup>28</sup>

There is exceptionally limited support for women experiencing sexual harassment in Scotland at the moment. The Scottish Women's Rights Centre<sup>29</sup> secured funding for a specialist sexual harassment solicitor from the Rosa Justice and Equality Fund in October 2018.<sup>30</sup> The legal and advocacy service provided by Scottish Women's Rights Centre will yield evidence about women's experience of acting in response to sexual harassment, but it is obviously insufficient to meet the needs of all women in Scotland. Women's other recourse is via their trade union, a solicitor that they find themselves, or a non-specialist law clinic.

Close the Gap, Engender, and Scottish Women's Rights Centre are currently developing an initiative that will scope alternative mechanisms for reporting, investigating, and adjudicating complaints of sexual harassment and will also develop materials to enable employers to take action to prevent sexual harassment.<sup>31</sup> Apart from this work, which is early in development, there is currently no targeted support for employers in Scotland seeking to transform existing sexist workplace cultures into those less conducive to sexual harassment and sex discrimination.

## 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 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'.<sup>32</sup> Conversely, the failure to challenge expressions of misogyny and sexism within educational settings helps lead to the entrenchment of gender inequalities within society.<sup>33</sup>

<sup>27</sup> Trades Union Congress. (2016) *Still Just a Bit of Banter? Sexual Harassment in the Workplace in 2016*. TUC.

<sup>28</sup> Close the Gap. (2019) *Close the Gap Working Paper 20: Gender Pay Gap Statistics*. Close the Gap.

<sup>29</sup> A partnership between University of Strathclyde Law Clinic, Rape Crisis Scotland, and JustRight Scotland, which is funded by Scottish Government and administered by the Scottish Legal Aid Board.

<sup>30</sup> Scottish Women's Rights Centre. (2018) 'New Sexual Harassment Solicitor thanks to Rosa Fund Grant'. SWRC. <https://www.scottishwomensrightscentre.org.uk/news/news/new-sexual-harassment-solicitor-position-thanks-to-rosa-fund-grant/>.

<sup>31</sup> Rosa. (2019) Meet the Latest Justice and Equality Fund Grantees. Rosa, the UK Fund for Women and Girls. <http://www.rosauk.org/uncategorized/meet-the-latest-justice-and-equality-fund-grantees/>.

<sup>32</sup> Scottish Government, and COSLA. (2018) *Equally Safe: Scotland's Strategy for Preventing and Eradicating Violence against Women and Girls*. Scottish Government.

<sup>33</sup> Educational Institute of Scotland. (2016) *Getting It Right for Girls*. EIS.

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 consequences 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.

Yet, 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.”<sup>34</sup>

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 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 joke” and therefore not reported.”<sup>35</sup> 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.<sup>36</sup>

Following advocacy from women’s organisations, and recommendations from the Equalities and Human Rights Committee of the Scottish Parliament,<sup>37</sup> 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.<sup>38</sup>

<sup>34</sup> Equality and Human Rights Commission. (2018) *Is Scotland Fairer?* EHRC.

<sup>35</sup> Educational Institute of Scotland. (2016) *Getting It Right for Girls*. EIS.

<sup>36</sup> Addressing Sexual Bullying Across Europe. (2015) *Addressing Sexual Bullying Across Europe Project Research Report*. ASBAE.

<sup>37</sup> 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.

<sup>38</sup> Scottish Government. (2019) *A Fairer Scotland for Women: Gender Pay Gap Action Plan*. Scottish Government.

Looking at the few UK figures currently available, data published in September 2015 showed that 5,500 sexual offences were recorded in UK schools over a three year period, including 600 rapes.<sup>39</sup> 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 week.<sup>40</sup> Girls as young as 11 reported experiencing sexual harassment, and a fifth of girls reported experiencing unwanted touching or unwanted sexual attention at school.<sup>41</sup>

Evidence from Girlguiding Scotland received by the Equality and Human Rights Committee of the Scottish Parliament, during their 2017 inquiry on prejudice-based bullying, 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." They also paint a picture of flawed institutional responses and teachers with limited capacity to understand sexual harassment, with 64% of those aged 11 to 16 saying that teachers or staff sometimes or always tell girls to ignore sexual harassment, and just over half saying that teachers and staff dismiss this as "banter" or "boys mucking around".<sup>42</sup>

In 2015 Girlguiding UK found that 75% of girls and young women said anxiety about potentially experiencing sexual harassment affects their lives in some way, with 25% of 11 to 16 year old girls stating that concerns over potential sexual harassment made them consider whether or not to speak out in class.<sup>43</sup>

In addition to the immediate damage to girls' health and wellbeing, sexual harassment in the classroom also undermines broader policy ambitions around gender equality. For example, preliminary work by IFS that looked at girls' propensity to opt for physics school-based qualifications identified that 67% of girls surveyed agreed or strongly agreed that "STEM jobs are male dominated". Girls in focus groups convened by IFS cited "male dominance and **boys' behaviour in the classroom** as reasons for not pursuing STEM subjects" (our emphasis).<sup>44</sup> There is a need for the empirical work that explores the links between sexual harassment in school and

<sup>39</sup> Savage, Claire. (2015) 'School Sex Crime Reports Top 5,500'. BBC News. <https://www.bbc.com/news/education-34138287>.

<sup>40</sup> End Violence Against Women Coalition. (2010) '2010 Poll on Sexual Harassment in Schools'. EVAW Coalition.

<sup>41</sup> ActionAid UK. (2019) 'Nearly Three in Four Women Were Harassed in Past Month'. ActionAid UK. <https://www.actionaid.org.uk/latest-news/three-in-four-women-uk-world-harassed-in-last-month>.

<sup>42</sup> 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.

<sup>43</sup> Girlguiding UK (2015) *Girls' Attitudes Survey*. Girlguiding UK. <https://www.girlguiding.org.uk/globalassets/docs-and-resources/research-and-campaigns/girls-attitudes-survey-2015.pdf>.

<sup>44</sup> Dytham, Siobhan, Claire Crawford, Sarah Cattam, and Rachel Cassidy. (2018) *How Can We Increase Girls' Uptake of Maths and Physics A-Level?* The IFS. doi:10.1920/re.ifs.2019.0149.

girls' avoidance of male-dominated subjects, apprenticeships, and workplaces, to be developed further.

## 2.4 STREET HARASSMENT

A US sociologist carried out 'one of the most influential studies'<sup>45</sup> on street harassment in the mid-1990s. Carol Brooks Gardner found from in-depth interviews with almost 500 men and women that, of the 293 women she spoke with, all reported some kind of public harassment and all but nine considered it 'troublesome'.<sup>46</sup>

There is limited data on street harassment in Scotland, and attempts to determine 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.<sup>47</sup> More than one in ten girls (11%) experiences street harassment before the age of ten.<sup>48</sup>

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 likely 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."<sup>49</sup> Reporting harassment using Hollaback! has mobilised women against street harassment:<sup>50</sup> Hollaback! now produces research, delivers training, and links activists across the world.<sup>51</sup>

Three quarters (71%) of British women have taken action to guard themselves against the threat of harassment. This figure rises to nearly nine in ten (88%) for

<sup>45</sup> Vera-Gray, Fiona. (2018) *The Right Amount of Panic: How Women Trade Freedom for Safety*. 1st Edition. Policy Press.

<sup>46</sup> Ibid.

<sup>47</sup> ActionAid UK. (2019) 'Nearly Three in Four Women Were Harassed in Past Month'. ActionAid UK.

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

<sup>48</sup> Vera-Gray, Fiona. (2018) *The Right Amount of Panic: How Women Trade Freedom for Safety*. 1st Edition. Policy Press.

<sup>49</sup> Rentschler, Carrie A. (2014) 'Rape Culture and the Feminist Politics of Social Media'. *Girlhood Studies*. 7 (1) pp.65–82. doi:10.3167/ghs.2014.070106.

<sup>50</sup> Dimond, Jill P, Michaelanne Dye, Daphne LaRose, and Amy S Bruckman. (2013) 'Hollaback!: The Role of Collective Storytelling Online in a Social Movement Organization'. Proceedings of the 2013 conference on Computer supported cooperative work. doi:10.1145/2441776.2441831.

<sup>51</sup> Hollaback!. (2019) *Together We Have the Power to End Harassment*. Hollaback!. <https://www.ihollaback.org/>.

younger British women aged 18-24.<sup>52</sup> The Fundamental Rights Agency survey on violence against women in the European Union identifies that 64% of women in the UK have avoided places or situations for fear of being physically or sexually assaulted in the 12 months prior to the interview.<sup>53</sup>

Liz Kelly describes this avoidance and additional planning as ‘safety work’: the strategising and action 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 “staring to touching, men walking more quickly behind you, or blocking your path”.<sup>54</sup> It alters how women dress, use public transport, navigate local physical space, participate in sport and leisure activities, and the times of day in which they will go outside the home.

F. Vera-Gray describes the way that these “hidden calculations, routinely performed without remark, disrupt women’s ability to enjoy their time in public space.” She notes that this may undermine the very little ‘free’ time women have, as private space may consist of “caretaking responsibilities at home and the invisible work of organising, cleaning, [and] running households.”<sup>55</sup>

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.”<sup>56</sup>

Design of our built environment exacerbates the demands on women for ‘safety work’. Although women’s experience of harassment influences how women use public space and public transport, there is very limited consideration given to gender in either urban planning<sup>57</sup> or public transport system design and management.<sup>58</sup> This includes features that may disrupt or prevent sexual harassment, or enable it to be reported and investigated.

<sup>52</sup> ActionAid UK. (2019) ‘Nearly Three in Four Women Were Harassed in Past Month’. ActionAid UK. <https://www.actionaid.org.uk/latest-news/three-in-four-women-uk-world-harassed-in-last-month>.

<sup>53</sup> European Union Agency for Fundamental Rights (2014) ‘Survey on Violence against Women in EU (2012)’. Fundamental Rights Agency.

<sup>54</sup> Vera-Gray, Fiona. (2016) ‘Situating Agency’. Trouble and Strife. <http://www.troubleandstrife.org/2016/05/situating-agency/>.

<sup>55</sup> Vera-Gray, Fiona. (2018) *The Right Amount of Panic: How Women Trade Freedom for Safety*. 1st Edition. Policy Press.

<sup>56</sup> Taub, Amanda. (2014) “Yes Means Yes’ Is about Much More than Rape”. Vox. <https://www.vox.com/2014/10/10/6952227/rape-culture-is-a-tax-on-women-CA-yes-means-yes-dierks-katz>.

<sup>57</sup> Engender. (2018) *Gender Matters in Planning*. On the Engender Podcast. <https://www.engender.org.uk/content/on-the-engender-podcast/>.

<sup>58</sup> Engender. (2018) *Gender Matters in Transport*. On the Engender Podcast.



## 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.”<sup>59</sup> 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.<sup>60</sup>

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

Cyber harassment and other forms of online violence against women<sup>62</sup> disrupt online life with “threats of violence, privacy invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks.”<sup>63</sup> 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.”<sup>64</sup>

<sup>59</sup> Citron, Danielle Keats. (2016) *Hate Crimes in Cyber Space*. Harvard University Press.

<sup>60</sup> Duggan, Maeve. (2017) *Online Harassment 2017*. Pew Research Center.

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

<sup>61</sup> Amnesty International. (2019) *Amnesty Reveals Alarming Impact of Online Abuse against Women*.

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

<sup>62</sup> 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.

<sup>63</sup> Citron, Danielle Keats. (2016) *Hate Crimes in Cyber Space*. Harvard University Press.

<sup>64</sup> Hess, Amanda. (2019) *The Next Civil Rights Issue: Why Women Aren't Welcome on the Internet*. Pacific Standard. <https://psmag.com/social-justice/women-arent-welcome-internet-72170>.

Women in politics – including parliamentarians, journalists, and bloggers – are “particularly targeted by ICT-facilitated violence”,<sup>65</sup> according to the UN’s Special Rapporteur on Violence against Women. Evidence gathered by her office charts online threats of a misogynistic nature made to women in politics around the world, which are often sexualised, and which function as a “direct attack on the full participation by women in political and public life”.<sup>66</sup>

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 violence,<sup>67</sup> and notes that “these examples show that violent misogyny can still be present in cyberhate attacks in which men are the primary targets.”<sup>68</sup>

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.”<sup>69</sup>

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.

<sup>65</sup> UN Special Rapporteur on Violence Against Women (2018) *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Online Violence against Women and Girls from a Human Rights Perspective*. UN Human Rights Council.

<sup>66</sup> UN Special Rapporteur on Violence Against Women (2018) *Violence against Women in Politics*. UN General Assembly.

<sup>67</sup> Jane, Emma A. (2016) *Misogyny Online*. 1st Edition. Los Angeles: SAGE Publications.

<sup>68</sup> Ibid.

<sup>69</sup> Gender Equality Unit, Council of Europe. (2016) *Background Note on Sexist Hate Speech*: Council of Europe.



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. The absence of an online presence can prevent victims from getting jobs. Victims' low social media influence scores can impair their ability to obtain employment."<sup>70</sup>

Although there is insufficient administrative data on such cyber-violence against women and girls, 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 produced in 2016, entitled "Changes in Gendered Cyberhate since circa 2010", Emma A. 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**) (our emphasis)
- 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 doxing,<sup>71</sup> swatting,<sup>72</sup> bomb and death threats, inciting others to attack targets offline, demonstrating knowledge of targets' home addresses by organising items to be delivered, and so on.<sup>73</sup>

Although cyber-violence against women and girls 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.

<sup>70</sup> Citron, Danielle Keats. (2016) *Hate Crimes in Cyber Space*. Harvard University Press.

<sup>71</sup> 'Doxing' or 'doxing' is the publication of private information (or 'docs'), including identity documents, national insurance numbers, street and email addresses, and telephone numbers.

<sup>72</sup> '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.

<sup>73</sup> Jane, Emma A. (2016) *Misogyny Online*. 1st Edition. Los Angeles: SAGE Publications.

### 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 Bourdieu**<sup>74</sup>

“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. Hodge**<sup>75</sup>

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, which the UK Government has yet to ratify, 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,**

<sup>74</sup> Bourdieu, Pierre. (2001) *Masculine Domination*. 1st Edition. Cambridge: Polity.

<sup>75</sup> Hodge, Jessica P. (2011) *Gendered Hate*. Northeastern University Press.

**or offensive environment**, is subject to criminal or other legal sanction.”<sup>76</sup>  
(our emphasis)

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].<sup>77</sup>

### 3.1 WHAT IS ‘HATE CRIME’?

Barbara Perry’s definition of hate crime, described by James Chalmers and 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.”<sup>78</sup>

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 above<sup>79</sup> that which would result from a parallel non-hate crime.<sup>80</sup> 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.<sup>81</sup> We see this in the ‘safety work’ that women do, including avoiding particular places, travel times, and modes of transport.
- **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”.<sup>82</sup> Women who have never experienced harassment also carry out ‘safety work’, to avoid being victimised.

<sup>76</sup> Council of Europe. (2011) *Convention on Preventing and Combating Violence Against Women and Domestic Violence*. Koninklijke Brill NV. doi:10.1163/2210-7975\_HRD-9953-2014005.

<sup>77</sup> UN General Assembly. (1979) *Convention on the Elimination of All Forms of Discrimination Against Women*. United Nations.

<sup>78</sup> Perry, Barbara. (2001) *In the Name of Hate: Understanding Hate Crimes*. 1st Edition. New York: Routledge.

<sup>79</sup> 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.

<sup>80</sup> Chalmers, James, and Fiona Leverick. (2017) *A Comparative Analysis of Hate Crime Legislation*. Scottish Government.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

- **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”.<sup>83</sup>

## TERMINOLOGY: FORMS OF HATE CRIME

### Selective discrimination model

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

### Animus model

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

## 3.2 HOW THE CONVERSATION AROUND HATE CRIME HAS DEVELOPED IN SCOTLAND

### The Working Group on Hate Crime

Post-devolution, Scotland’s first piece of hate crime law was a provision, introduced by the Criminal Justice (Scotland) Act 2003, of a statutory religious hatred aggravation.<sup>84</sup> The Working Group on Hate Crime was set up to consider whether other groups should be protected in a similar way.<sup>85</sup> It was chaired by the Scottish Executive and included the Crown Office and representatives from the police, but principally comprised national equality organisations, including Engender.<sup>86</sup>

The Working Group recommended a ‘statutory aggravation for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability’.<sup>87</sup> It also weighed the question of a gender aggravation, which could potentially apply to crimes perpetrated against men or women because of malice or ill-will towards their gender, but eventually concluded that this would not be appropriate. This was because:

- Women’s organisations that responded to the call for evidence by the Working Group were divided as to the utility of such an aggravation, sensing that the police

<sup>83</sup> Ibid.

<sup>84</sup> An aggravation means that the element of hatred is ‘added on’ to the tariff for an existing crime, such as breach of the peace, at sentencing.

<sup>85</sup> The remit of the group was “To look at the current criminal justice system and consider improvements, including legislation, which might be made to deal with crimes based on hatred towards social groups.”

<sup>86</sup> Scottish Government. (2003) *Working Group on Hate Crime: Members’*. Scottish Government. <http://www2.gov.scot/Topics/archive/law-order/8978/17915/10731>.

<sup>87</sup> Scottish Government. (2004) *Working Group on Hate Crime Report*. Scottish Government. <http://www2.gov.scot/Publications/2004/10/20027/44266>.

and Crown Office did not have sufficient gender-competence to identify, investigate and prosecute such crimes;

- The discussion within the Working Group (on which Engender had a representative) mainly focused on domestic abuse and violence against women, and there were challenges in unpicking how a gendered analysis of this might interrelate with a gender aggravation.<sup>88</sup> There were particular differences of view as to whether a perpetrator of domestic abuse who victimised his partner, but not other women, was perpetrating a ‘hate crime’; and
- There was a lack of international examples that might point the way towards a legislative solution.<sup>89</sup>

Consequently, the Working Group recommended that there be a specific statutory aggravation of domestic abuse. This idea was ultimately to develop into the Domestic Abuse (Scotland) Act 2018. Engender, Scottish Women’s Aid, and Rape Crisis Scotland gave similar evidence to the Equal Opportunities Committee as to the Working Group, stating that our organisations perceived a risk that a ‘gender aggravation’ would create a ‘two-tier’ response to violence against women offences.<sup>90</sup> For example, a ‘gender aggravation’ could label some crimes of rape and sexual assault against women as gender-related and some not. This would undermine our understanding of violence against women, which is based in women’s inequality and therefore always rooted in gendered power dynamics. Additionally, we informed the Committee about the experience of women in other states and nations that were introducing gender-based hate crime offences. Engender, in oral evidence,<sup>91</sup> described multiple jurisdictions in which gender aggravations were included in penal codes without discernibly improving the state’s response to misogynistic harassment or other offences.<sup>92</sup>

<sup>88</sup> For example, Scotland’s definition of violence against women understands all domestic abuse experienced by women to be based in women’s inequality with men and therefore related to gender. It is not clear how the criminal justice system could conclude that some crimes relating to domestic abuse were ‘motivated by malice or ill-will’ based on gender and some are not. This would undermine a gendered analysis of violence against women.

<sup>89</sup> Scottish Government. (2004) *Working Group on Hate Crime Report*. Scottish Government. <http://www2.gov.scot/Publications/2004/10/20027/44266>.

<sup>90</sup> Equal Opportunities Committee, Scottish Parliament. (2008) *Report (Session 3) of the Offences (Aggravation by Prejudice) (Scotland) Bill*. Scottish Parliament. [https://www.parliament.scot/S3\\_EqualOpportunitiesCommittee/Reports/eoR08-03.pdf](https://www.parliament.scot/S3_EqualOpportunitiesCommittee/Reports/eoR08-03.pdf)

<sup>91</sup> “In the US, 19 out of 41 statutes cover victims who are chosen by reason of gender. To charge a person with a hate crime, prosecutors must have concrete and admissible evidence of a bias. The offence has been reserved largely for cases in which perpetrators did not know their victims. There have not been an overwhelming number of gender-based crimes reported, and the legislation is used mainly for racially and religiously motivated crime. In Belgium, gender aggravation legislation was introduced in 2003, but some people think that enforcement agencies have failed to adopt effective procedures. In Canada, the legislation that defines gender as an aggravating factor has been used only in cases where attacks were perpetrated by strangers—it has not been used in cases of domestic abuse. In Spain, article 22 of the penal code makes provision for gender to be considered as an aggravating factor, but we have no information on how it is being used. We found no evidence that legislation in any of those jurisdictions is making a major difference.”

<sup>92</sup> Equal Opportunities Committee, Scottish Parliament. (2008) *Report (Session 3) of the Offences (Aggravation by Prejudice) (Scotland) Bill*. Scottish Parliament.

The other recommendations of the Working Group eventually became the Offences (Aggravation by Prejudice) (Scotland) Act 2009. During Stage 1 scrutiny of the Bill, the Equal Opportunities Committee<sup>93</sup> reported that the Cabinet Secretary for Justice was not minded to proceed with a 'gender aggravation' as "in line with the conclusions of the Working Group, we do not feel that it is appropriate to attempt to deal with it within the context of this Bill, particularly given the lack of consensus amongst women's organisations on the best approach".<sup>94</sup>

### **Independent Advisory Group on Hate Crime, Prejudice, and Community Cohesion**

The issue of gender and hate crime was considered temporarily settled until it appeared the following decade within the margins of work that was principally focused on intra-Christian sectarianism. In response to a variety of high-profile public order concerns, Scottish Government established an advisory group on tackling sectarianism in Scotland, which was chaired by Dr Duncan Morrow. When this group produced an interim report in 2013 it made a number of preliminary recommendations about reviewing and monitoring hate crime, and considering its application to sectarianism.<sup>95</sup>

From these recommendations, an independent advisory group on hate crime, prejudice, and community cohesion was established, which was also chaired by Dr Duncan Morrow. This had a remit to take forward consideration of the nature, extent and impact of hate crime and broader hate behaviour on modern Scottish life, and assess current practice to tackle hate crime, hate behaviour, reduce prejudice and build community cohesion.<sup>96</sup>

Neither the expert group on sectarianism nor the independent advisory group on hate crime included any gender experts, nor did they meet with any expert women's organisations. The report of the independent advisory group in September 2016 did include a recommendation that the Scottish Government consider "whether the existing criminal law provides sufficient protections for those who may be at risk of hate crime, for example based on gender, age or membership of other groups such as refugees and asylum seekers."<sup>97</sup>

<sup>93</sup> The lead committee on the Bill was the Justice Committee, but the Equal Opportunities Committee was a secondary committee.

<sup>94</sup> Equal Opportunities Committee, Scottish Parliament. (2008) *Report (Session 3) of the Offences (Aggravation by Prejudice) (Scotland) Bill*. Scottish Parliament. [https://www.parliament.scot/S3\\_EqualOpportunitiesCommittee/Reports/eoR08-03.pdf](https://www.parliament.scot/S3_EqualOpportunitiesCommittee/Reports/eoR08-03.pdf).

<sup>95</sup> Advisory Group on Tackling Sectarianism in Scotland, Scottish Government, and the APS Group. (2013) *Independent Advice to Scottish Ministers and Report on Activity 2012-15*. Scottish Government. <http://www.nls.uk/scotgov/2014/9781784121525.pdf>.

<sup>96</sup> Independent Advisory Group on Hate Crime Prejudice and Community Cohesion. (2019) *'Hate Crime: Independent Advisory Group'*. Scottish Government. <https://www.gov.scot/groups/independent-advisory-group-on-hate-crime/>.

<sup>97</sup> Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion. (2016) *Report of Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion*. Scottish Government. <https://www.gov.scot/publications/report-independent-advisory-group-hate-crime-prejudice-community-cohesion/community-cohesion/>.

## Lord Bracadale's independent review

Scottish Ministers then tasked Lord Bracadale, a senior member of the judiciary, to undertake a review of hate crime legislation in Scotland.<sup>98</sup> The aim of Lord Bracadale's review was to consider "whether the law should be clarified and harmonised, and whether additional protected groups should be included".<sup>99</sup>

Lord Bracadale had an advisory group to support his work, which did not include any gender experts. Lord Bracadale did meet with expert women's organisations, including Engender and Scottish Women's Aid. We advocated against a gender-based aggravation and for a standalone offence that would cover gaps in the existing criminal law to respond to misogynistic harassment,<sup>100</sup> for reasons that we outline from section 3.3 of this paper.

The independent review considered whether to recommend the incorporation of any response to misogynistic harassment into Scottish hate crime or other law. Lord Bracadale's final report proposed that something called a 'gender hostility' aggravation,<sup>101</sup> which is a new concept not found in other jurisdictions, be added to the list of other aggravations within Scottish hate crime law.

Engender, Scottish Women's Aid, and Rape Crisis Scotland issued a joint statement that criticised Lord Bracadale's proposals as "not pay[ing] enough attention to international experience and evidence". We used the statement to continue to advocate for the development of a "standalone misogynistic hate crime" to disrupt "epidemic levels of misogynistic hate."<sup>102</sup>

## Scottish Government consultation

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

<sup>98</sup> Scottish Government. (2017) 'Hate Crime Legislation Review'. Scottish Government. <http://www2.gov.scot/Topics/archive/Hate-Crime-Legislation>.

<sup>99</sup> Lord Bracadale. (2017) *Independent Review of Hate Crime Legislation in Scotland – Consultation Paper*. Scottish Government.

<sup>100</sup> Engender. (2017) *Engender Submission to the Independent Review of Hate Crime Legislation in Scotland*. Engender. <https://www.engender.org.uk/content/publications/Engender-submission-to-the-Independent-Review-of-Hate-Crime-Legislation-in-Scotland.pdf>.

<sup>101</sup> Lord Bracadale. (2018) *Independent Review of Hate Crime Legislation in Scotland: Final Report*. Scottish Government. <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

<sup>102</sup> Engender, and Scottish Women's Aid. (2018) 'Women's Organisations Disappointed by Lord Bracadale's Recommendations, Seek Further Dialogue with Scottish Government'. On the Engender Blog. <https://www.engender.org.uk/news/blog/womens-organisations-disappointed-by-lord-bracadales-recommendations-seek-further-dialogue/>.



women’s equality and rights, we contend that it is appropriate to consider how egregious misogyny might further be included in Scots criminal law.

Following Lord Bracadale’s review, Humza Yousaf, Cabinet Secretary for Justice, announced his intention to “be part of the solution” in the “fight against misogyny” at the Scottish National Party conference in October 2018. He committed to consult on “whether to make hate motivated by misogynistic harassment an offence.”<sup>103</sup>

Scottish Government duly consulted between November 2018 and February 2019 on a range of proposals to amend hate crime law in various ways, including four options for integrating gender into hate crime law:<sup>104</sup>

- A. Implement Lord Bracadale’s recommendation to establish a statutory aggravation based on gender hostility;
- B. Develop a standalone offence relating to misogynistic harassment;
- C. Build on *Equally Safe* to tackle misogyny (a non-legislative approach); and
- D. Take forward all of the above options: A, B, and C.

Responses by Engender,<sup>105</sup> Scottish Women’s Aid, Rape Crisis Scotland, and Zero Tolerance set out the evidence for an approach including options B and C, and explained why we did not consider either option A or option D to be evidence-based. These arguments are summarised from section 3.3 below.

The analysis of responses to the consultation notes wide concerns around Lord Bracadale’s notion of ‘gender hostility’ and specifically that it fails to name the problem (misogyny)<sup>106</sup> that the legislative response is meant to address.<sup>107</sup> The analysis report additionally concludes that those organisations with most expertise around gender do not support a ‘gender hostility’ aggravation and do support a standalone offence.<sup>108</sup>

<sup>103</sup> MacNab, Scott. (2018) ‘Humza Yousaf: Misogyny Could Be Made a Hate Crime’. Scotsman. <https://www.scotsman.com/news/politics/humza-yousaf-misogyny-could-be-made-a-hate-crime-1-4811376>.

<sup>104</sup> Scottish Government. (2018) *One Scotland: Hate Has No Home Here: Consultation on Amending Scottish Hate Crime Legislation*. Scottish Government. [https://consult.gov.scot/hate-crime/consultation-on-scottish-hate-crime-legislation/user\\_uploads/sct08182935681.pdf](https://consult.gov.scot/hate-crime/consultation-on-scottish-hate-crime-legislation/user_uploads/sct08182935681.pdf).

<sup>105</sup> Engender. (2019) *Engender Response to the Scottish Government Consultation on Scottish Hate Crime Legislation*. Engender. <https://www.engender.org.uk/content/publications/Engender-response-to-the-Scottish-Government-consultation-on-Scottish-Hate-Crime-legislation.pdf>.

<sup>106</sup> One of the critical pieces of work that remains is to develop a shared definition of ‘misogyny’. In responding to correspondence from Lord Bracadale’s secretariat we defined it as “systems or actions that deliberately subordinate women and reflect the actor’s understanding that women are not their equals.”

<sup>107</sup> Platts, Alison, Dawn Griesbach, and Fiona Mackay. (2019) *Consultation on Amending Scottish Hate Crime Legislation: Analysis of Responses*. Scottish Government. <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/>.

<sup>108</sup> Ibid.



### 3.3 HATE CRIME INVOLVES POWER

The definition of hate crime in the consultation paper produced for Lord Bracadale's independent inquiry 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.”<sup>109</sup>

The later Scottish Government consultation recycled Lord Bracadale's description of hate crime. This has a critical omission: it is missing a key feature from Barbara Perry's definition, described in the academic review of evidence commissioned by Lord Bracadale 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.”<sup>110</sup>

Sexual harassment and hate speech re-create women's subordination. It communicates that women and girls do not have equal access and rights to safety, public space, and physical autonomy, using 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 healthcare appear on flyers with a reticle from a rifle scope digitally superimposed over their portraits. It is, in our view, important to capture this feature of gendered hate crime in any definition used to create misogynistic offences in Scotland.

### 3.4. WHY A GENDER-BASED AGGRAVATION WILL NOT PROTECT WOMEN AND GIRLS

#### Lack of evidence of efficacy of 'adding gender' to protected groups

Leaving to one side the definitional vagueness of Lord Bracadale's 'gender hostility'

<sup>109</sup> Lord Bracadale. (2017) *Independent Review of Hate Crime Legislation in Scotland – Consultation Paper*. Scottish Government.

<sup>110</sup> Chalmers, James, and Fiona Leverick. (2017) *A Comparative Analysis of Hate Crime Legislation*. Scottish Government.

as a concept, we do not think there is evidence to suggest a gender hostility, gender, or sex aggravation will expand access to justice for women and girls. The international experience 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 the Bracadale 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,<sup>111</sup> 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.<sup>112</sup> Engender analysis, based on state police reports, finds that between 2008 and 2018, New Jersey recorded 14 gender-bias incidents, 3,289 race-bias incidents, 2,195 religious-bias incidents, 683 motivated by sexual orientation bias, and 42 disability-bias incidents.<sup>113</sup> This amounts to 18 reports of gender-based hate crime in 20 years.

### **The experience of the public sector equality duty**

A domestic analogy to the hate crime simplification exercise proposed by Lord Bracadale is 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.

It has only been six years since the public sector equality duty regulations came into force in Scotland, but indications to date are that it has resulted in a diminution of focus on the specific needs of specific protected groups for a number of reasons.<sup>114</sup> 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.

<sup>111</sup> Perry, Barbara. (2001) *In the Name of Hate: Understanding Hate Crimes*. 1st Edition. New York: Routledge.

<sup>112</sup> Chalmers, James, and Fiona Leverick. (2017) *A Comparative Analysis of Hate Crime Legislation*. Scottish Government.

<sup>113</sup> Hodge, Jessica P. (2011) *Gendered Hate*. Northeastern University Press.

<sup>114</sup> Source: New Jersey State Police Bias Incident Reports 2008 to 2017-18, available at <https://www.njsp.org/ucr/bias-incident-reports.shtml>.

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 characteristics.”<sup>115</sup>

Consolidation and simplification have 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.

### **Gendered hate crime is not 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.”<sup>116</sup>

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<sup>117</sup> and the animus model.<sup>118</sup>

<sup>115</sup> Engender, Inclusion Scotland, Close the Gap, Coalition for Racial Equality and Rights, Equality Network, LGBT Youth Scotland, Scottish Women's Aid, Scottish Women's Convention, Stonewall Scotland and the ALLIANCE. (2017) *The Socio-Economic Duty: A Consultation - Equality Sector Response*. Engender. <https://www.engender.org.uk/content/publications/Equality-sector-response-to-the-Scottish-Government-consultation-on-Socioeconomic-Duty-September-2017.pdf>.

<sup>116</sup> Ibid.

<sup>117</sup> Hodge, Jessica P. (2011) *Gendered Hate*. Northeastern University Press.

<sup>118</sup> This is where a hate crime has been committed because the victim has been selected due to their membership of a protected group.

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, Crown Office, and judiciary.

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 (beyond precipitating further ‘hate crimes’ against the women who called for recording to be introduced).<sup>119</sup> With data driving police responses and priorities, an argument could be made that failing to record misogynistic incidents renders invisible women’s experiences and leads to the gaps in administrative data we outlined in section 2 of this paper.<sup>120</sup> However, without an explicitly gendered basis for data gathering and response, it is possible that data gathering may misrepresent, misunderstand, or misidentify women’s experiences.

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 England and Wales. 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 contested and sometimes contra-indicated in the case of violence against women.<sup>121</sup> Simply extending hate crimes practice from another group to cases involving women is ignoring gendered dynamics and risks women’s wellbeing and safety.

### **An ‘aggravation model’ risks undermining responses to violence against women**

An ‘aggravation model’ of the kind proposed by Lord Bracadale, and being considered by Scottish Government, does not create new offences but only increases the possible tariff for sentencing for offences inflected by ‘gender hostility’.

(Jennifer Sloan suggests that this means ‘hate crime’ as a term is a misnomer; it is more accurate to think in terms of ‘hate sentencing’ or ‘hate recording’).<sup>122</sup>

<sup>119</sup> This is where a hate crime has been committed because the offender is motivated by, or demonstrates prejudice against a protected group.

<sup>120</sup> Ridley, Louise. (2016) ‘Women Who Helped Make Misogyny A Hate Crime Now Subjected To Eye-Watering Abuse’. Huffington Post UK. [https://www.huffingtonpost.co.uk/entry/wolf-whistling-misogyny-hate-crime-nottingham\\_uk\\_579756cce4b06d7c426da55d](https://www.huffingtonpost.co.uk/entry/wolf-whistling-misogyny-hate-crime-nottingham_uk_579756cce4b06d7c426da55d).

<sup>121</sup> Sloan, Jennifer. (2017) ‘Sex Doesn’t Matter? The Problematic Status of Sex, Misogyny, and Hate’. *Journal of Language and Discrimination*. 1 (1) pp.61–83. doi:10.1558/jld.33114.

<sup>122</sup> See Westmarland, Nicole, Clare McGlynn, and Clarissa Humphreys. (2018) ‘Using Restorative Justice Approaches to Police Domestic Violence and Abuse’ *Journal of Gender-Based Violence*. 2 (2) pp.339–358. doi:10.1332/239868018X15266373253417; and Craven, Shona. (2019) ‘Can a Restorative Approach Help Survivors of Sexual Violence Get Justice?’. The Scottish Centre for Crime and Justice Research. <https://www.sccjr.ac.uk/can-a-restorative-approach-help-survivors-of-sexual-violence-get-justice/>.

Engender is of the view, which is also shared by Rape Crisis Scotland, Scottish Women's Aid, and Zero Tolerance, that creating a 'gender hostility 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 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.”<sup>123</sup> (our emphasis)

To apply a 'misogyny aggravation' or a 'gender hostility 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-competence<sup>124</sup> 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 agency and public understanding of violence against women and girls.

<sup>123</sup> Sloan, Jennifer. (2017) 'Sex Doesn't Matter? The Problematic Status of Sex, Misogyny, and Hate'. *Journal of Language and Discrimination*. 1 (1) pp.61–83. doi:10.1558/jld.33114.

<sup>124</sup> Scottish Government, and COSLA. (2018) *Equally Safe: Scotland's Strategy for Preventing and Eradicating Violence against Women and Girls*. Scottish Government.

## An aggravation model will not fill gaps in the law

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.<sup>125</sup> 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.<sup>126</sup>

As an ‘aggravation model’ does not create new offences but only increases the possible tariff for sentencing for offences inflected by ‘gender hostility’, 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.

## An ineffective 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”.<sup>127</sup> However, in the case of gender, we are not convinced that the symbolic or communicative quality of criminalising gendered hate crime is sufficient.

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

<sup>125</sup> Gender competence refers to the skills, knowledge and analytical capability to develop policy that is well-gendered; that takes account of the socially constructed difference between men’s and women’s lives and experiences. ‘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.

<sup>126</sup> BBC News (2019) ‘Pick-up Artist’ Jailed for Threatening Behaviour’. BBC News. <https://www.bbc.com/news/uk-scotland-glasgow-west-50137960>

<sup>127</sup> See Kini, Aditi Natasha. (2019) ‘Perspective / Feminists Were Right: Ignoring Online Misogyny Has Deadly Consequences’. Washington Post; Koul, Scaachi. (2019) ‘Pickup Artists Are Still A Thing. And They Want You To Know They’ve Evolved’. BuzzFeed; Quinn, Zoë. (2017) ‘Crash Override: How Gamergate (Nearly) Destroyed My Life, and How We Can Win the Fight Against Online Hate’. Public Affairs; Ellis, Emma. (2019) ‘Reddit’s ‘Manosphere’ and the Challenge of Quantifying Hate’. Wired.



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 women and girls as a series of groups.

### 3.5 WHAT SHOULD CRIMINALISING MISOGYNISTIC HATE LOOK LIKE?

There are two barriers to forming a clear recommendation about criminalising misogyny. The first relates to data: section 2 of this paper outlines the clear shape of a problem, but it also identifies a comprehensive lack of administrative data that might provide granular information about women’s experiences of harassment and hate. We simply do not know what women’s experiences are in enough detail to identify precise gaps in the law. Secondly, there is a dearth 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. We don’t have models of good law to learn from.

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.”<sup>128</sup>

In New Jersey, “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.”<sup>129</sup>

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.”<sup>130</sup> As

<sup>128</sup> Chalmers, James, and Fiona Leverick. (2017) *A Comparative Analysis of Hate Crime Legislation*. Scottish Government.

<sup>129</sup> Gender Equality Unit, Council of Europe. (2016) *Background Note on Sexist Hate Speech*. Council of Europe.

<sup>130</sup> Hodge, Jessica P. (2011) *Gendered Hate*. Northeastern University Press.

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.”<sup>131</sup>

### Fill data and analysis gaps

In section 2 of this paper we described the epidemic misogyny that girls and women face in Scotland. Much of our understanding of the prevalence and incidence of this misogynistic harassment comes from surveys of women and girls conducted by NGOs and crowdsourced data from projects such as Hollaback!.

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. Olga Jurasz and Kim Barker have done some of this analysis with respect to the law of England and Wales, specifically in considering the basis for legal regulation around online misogyny.<sup>132</sup> They are currently undertaking a similar exercise around Scots law.

It is vital that this process of mapping and consensus-building not be rushed. Scotland has a violence against women strategy that integrates a feminist, gendered analysis of men’s violence.<sup>133</sup> It has a ‘gold standard’ domestic abuse law.<sup>134</sup> Nonetheless, the most recent year has seen the highest level of sexual crime since records began.<sup>135</sup> An Inspectorate of Prosecution report recently included the assessment by victim-survivors of sexual violence that the criminal justice system is ‘brutal, uncompassionate, and cruel’.<sup>136</sup> A judicially-led review, chaired by Lord Justice Clark Lady Dorrian, will generate proposals for how sexual offences should be responded to by the criminal justice system in Scotland.<sup>137</sup> This indicates the complexity of getting justice right even for crimes that we know a great deal about. Hate crime and misogyny is undertheorised and underexplored: we cannot skip over the necessary steps to developing a shared understanding of what we are trying to achieve and how best to deliver justice for women and girls.

<sup>131</sup> Ibid.

<sup>132</sup> Jenness, Valerie. (2003) ‘Engendering Hate Crime Policy: Gender, the ‘Dilemma of Difference,’ and the Creation of Legal Subjects.’ *Journal of Hate Studies*. 2 (January) pp.73-93. doi:10.33972/jhs.12.

<sup>133</sup> Barker, Kim, and Olga Jurasz. (2018) *Online Misogyny as Hate Crime: A Challenge for Legal Regulation?* 1st Edition. Routledge.

<sup>134</sup> Scottish Government, and COSLA. (2018) *Equally Safe: Scotland’s Strategy for Preventing and Eradicating Violence against Women and Girls*. Scottish Government.

<sup>135</sup> Brooks, Libby. (2018) ‘Scotland Set to Pass ‘gold Standard’ Domestic Abuse Law’. *The Guardian*. <https://www.theguardian.com/society/2018/feb/01/scotland-set-to-pass-gold-standard-domestic-abuse-law>.

<sup>136</sup> Rape Crisis Scotland. (2019) ‘Recorded Crime 2018-19 - Sexual Crimes at Highest Level since Records Began’. RCS. <https://www.rapecrisisscotland.org.uk/news/news/recorded-crime-2018-19---sexual-crimes-at-highest-level-since-records-began/>.

<sup>137</sup> Inspectorate of Prosecution in Scotland. (2017) *Thematic Review of the Investigation and Prosecution of Sexual Crimes*. Scottish Government. <https://www.gov.scot/publications/thematic-review-investigation-prosecution-sexual-crimes/>.



## Defining misogyny

One of the critical pieces of work that remains is to develop a shared definition of 'misogyny'. In responding to correspondence from Lord Bracadale's secretariat we defined it as "systems or actions that deliberately subordinate women and reflect the actor's understanding that women are not their equals".<sup>138</sup>

In their recent book on online misogyny and the law, Olga Jurasz and Kim Barker define it as "the manifestation of hostility towards women because they are women".<sup>139</sup>

Kate Manne has written the first book-length treatment on the nature of misogyny, and we think that her distinctions between sexism and misogyny would and should contribute usefully to this definitional work. She is a philosopher and not a legal scholar but provides some foundational thinking in her reasoning that "misogyny ought to be understood as the system that operates within a patriarchal social order to police and enforce women's subordination and to uphold male dominance" and that "misogyny primarily targets women because they are women in a *man's world* rather than because they are women in a *man's mind*, where that man is a misogynist."<sup>140</sup> (author's emphasis)

These definitions of misogyny overlap considerably, but it is important that criminalising flagrant misogyny begins with clarity on what misogyny is and how it functions. There are difficult lessons to be learned from the lack of clarity around the definition of 'sectarianism' and the way in which criminal justice and programme interventions were both undermined by definitional confusion.<sup>141</sup>

## To develop our own model for a law

One of the profound challenges for introducing a law criminalising misogynistic hate crime in Scotland is the (probable) dearth of comparable laws we might emulate. We will need to draw together expertise of various types to map women's experience, consider the gaps in criminal justice response, and develop new laws to tackle misogyny.

Our recommendation is for a participatory approach to the development of such a law. 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.

<sup>138</sup> Rape Crisis Scotland (2019) 'Fairness, Dignity and Justice - Changing Scotland's Response to Sexual Crimes'. RCS. <https://www.rapecrisisscotland.org.uk/news/news/fairness-dignity-and-justice---changing-scotlands-response-to-sexual-crimes/>.

<sup>139</sup> Engender. (2018) *Additional Submission by Engender to the Independent Review of Hate Crime*. Engender.

<sup>140</sup> Barker, Kim, and Olga Jurasz. (2018) *Online Misogyny as Hate Crime: A Challenge for Legal Regulation?* 1st Edition. Routledge.

<sup>141</sup> Manne, Kate. (2018) *Down Girl: The Logic of Misogyny*. New York.

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 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 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*.<sup>142</sup>
- 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.

Outside of the law itself, though, it is vital that Police Scotland and COPFS have sufficient capacity, including gender-competence,<sup>143</sup> 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.

<sup>142</sup> Engender. (2015) *The "S" Word: Women's Experiences of Intra-Christian Sectarianism in Scotland*. Engender. [https://www.engender.org.uk/content/publications/1432569345\\_The-S-Word---Womens-experience-of-intra-Christian-sectarianism.pdf](https://www.engender.org.uk/content/publications/1432569345_The-S-Word---Womens-experience-of-intra-Christian-sectarianism.pdf).

<sup>143</sup> Scottish Government. (2014) *Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls*. Scottish Government.

## 4. CONCLUSION

Violence against women is a human rights violation and a cause and consequence of women's inequality. Ubiquitous misogynistic harassment prevents women and girls from living a good life, by inflecting 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.

The 'Me Too' and 'Time's Up' movements are powerfully engaging with the question of justice. How should organisations prevent sexual harassment? How should women's experiences be reported, investigated, and adjudicated? How can we reallocate safety more equitably between men and women?

All jurisdictions must consider whether their system of laws enables or frustrates gender justice. The concept of hate crime was developed in response to the oppression of racism. As we have described above, it is an awkward fit for gendered injustices. In those jurisdictions where gendered hate crime exists, it has not changed much for women.

Nonetheless, in Scotland, women's organisations perceive gaps in the law where egregious misogynistic harassment is not criminalised. The rise of online abuse, crowdsourced violence against women, and multi-perpetrator multi-victim rolling campaigns of misogyny all create the demand for criminal justice responses.

There are two models currently being considered by Scottish Government: a 'gender aggravation', in the grain of existing hate crime law, and a standalone offence that would respond to these new expressions of misogyny.

We are of the view that a 'gender aggravation' would be a mistake. It would not fill the gaps in the law. It would undermine our shared analysis of violence against women and girls. International experience suggests that we would see very few investigations, prosecutions, and convictions because it is not a model that aligns well with public understanding of women's inequality.

Instead, we are calling for a participatory development process for a standalone offence that would include the most iniquitous forms of misogynistic harassment and abuse. We would recommend a similar approach to the development of the Domestic Abuse (Scotland) Act, where legal scholars, gender experts, and victim-survivors came together to create a law that meets the needs of women and girls. Our law would be evidence-based and aligned with Scotland's innovative work to prevent violence against women.



Engender  
10 Old Tolbooth Wynd  
Edinburgh  
EH8 8EQ  
+44 (0) 131 558 9596  
info@engender.org.uk  
www.engender.org.uk  
Twitter: @EngenderScot  
Facebook: /engender

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