

Engender's response to the Scottish Government Consultation on a draft SSI to add 'sex' as a protected characteristic to the Hate Crime and Public Order (Scotland) Act 2021

October 2025

1. CONSULTATION QUESTIONS

Question 1: Do you support the approach of extension of both the stirring up of hatred offence and the aggravation of offences by prejudice to cover the characteristic of sex?

- Yes
- No
- Only support the Stirring Up Hatred Offence
- Only support the Aggravation of Offences by Prejudice

Please give reasons for your answer

Engender is a leading feminist policy and advocacy organisation working to secure women's social, political and economic equality and realise women's rights in Scotland. We aim to make visible the impact of structural inequalities on women and wider society, and work at Scottish, UK and international levels to produce research, analysis and recommendations for intersectional feminist legislation and policy development.

Our work on eradicating violence against women and girls (VAWG) focuses on preventing it by tackling the primary root cause: gender inequality. Our 'primary prevention' approach specifically focuses on addressing the gendered biases and norms that underpin violence against women and girls within our society and culture.¹ We work closely with Scotland's VAWG organisations that specialise in supporting victim-survivors and who see first-hand the disturbing extent to which many women and girls in Scotland live with the everyday impacts of this violence and abuse, which is rooted in structural sexism and misogyny. From this vantage point, it is clear to us that a credible and proportionate criminal justice response is required to help address these systemic

¹ <https://www.engender.org.uk/primary-prevention/>

issues. Legislation is, therefore, a critical and necessary part of any comprehensive response to the rising tide of misogyny that women and girls face in their daily lives.

Misogynistic behaviour, harassment, and abuse significantly constrain the choices and freedom of women and girls while violating their human rights. These types of behaviour, along with all forms of VAWG, remain endemic in Scotland. The increasing proliferation of self-styled misogynistic and far-right agitators, and associated narratives, in online spaces and communities is making the threat of gendered violence and discrimination ever more urgent and dangerous for many women and girls, and specifically for those from racialised and/or other marginalised communities.

Existing law and criminal justice approaches have failed to address the problem adequately. The need for urgent, effective action from the Scottish Government is increasing by the day. Recent research by the Young Women's Movement found that fears around rising misogyny were at the forefront of young women's concerns.² A majority reported feeling anxious and unsafe, especially online, where misogynistic harassment, bullying, and abuse are increasingly common, especially as new digital technologies develop.

Evidence-base

In this context, we are deeply concerned that the Scottish Government has chosen to suspend plans for more comprehensive legal reform that would enhance redress for misogyny offences, instead opting for the lesser approach of amending the Hate Crime Act to include sex. This significant change in direction is particularly difficult to understand, as existing evidence has not changed. This evidence demonstrates clearly that adding sex or gender as a category to hate crime law will not be effective or adequate in addressing the gendered violence and the misogyny that women and girls are increasingly facing.

Our 2019 report, 'Making Women Safer in Scotland', outlined how hate crime legislation offers an inadequate legal vehicle for dealing with the expansive and escalating challenge of misogyny. In this report, we examine how the use of hate crimes legislation in other jurisdictions has resolutely failed in addressing violence against women and girls (VAWG).³

This work also included reviewing international examples of existing hate crime laws that have integrated sex or gender aggravations in a state's criminal law.⁴ When exploring the laws in countries including Belgium, Spain, and the United States, we found no evidence that adding gender to hate crimes legislation in any jurisdiction increased protections or improved the justice system or state response to VAWG.

² <https://youngwomenscot.org/research-reports/status-of-young-women-in-scotland-2024-2025/>

³ <https://www.engender.org.uk/content/publications/Making-Women-Safer-in-Scotland---the-case-for-a-standalone-misogyny-offence.pdf>

⁴ <https://www.engender.org.uk/content/publications/Making-Women-Safer-in-Scotland---the-case-for-a-standalone-misogyny-offence.pdf>

Alongside the women's sector, we therefore advocated for a limited suite of misogyny offences, rooted in international evidence, that offer a more comprehensive criminal justice response to this escalating problem. This work was expanded upon significantly by the 'Independent Working Group on Misogyny and Criminal Justice in Scotland', commissioned by the Scottish Government, and chaired by Baroness Helena Kennedy KC. This two-year exercise examined in detail the most effective approaches for addressing misogyny in the criminal law.⁵ The Working Group examined multiple international case studies, conducted new research into women and girls' lived experiences and took oral evidence from over 20 leading experts.

The final report in 2022 concluded that a sex or gender aggravation in the Hate Crime and Public Order (Scotland) Act 2021 would be ineffective at reducing the abuse experienced by women for the following primary reasons:

- **Hate crime legislation is principally designed to protect minorities, and women are not a minority group.** It fails to recognise that misogyny is experienced by most women and the high prevalence of violence against women, much of which is still normalised in society. For example, 97% young women (aged 18-24) in the UK have experienced some form of sexual harassment in public.⁶
- **The hate crime framework fails to address questions of power and grapple with how structural inequality leads to increased violence against marginalised people.** This analysis was absent in the definition used in the Independent Review of Hate Crime Legislation, which informed the Hate Crime and Public Order Act 2021. In the context of misogynistic hate crime, adding 'sex' to the Act would therefore fail to recognise that such conduct is rooted in structural sexism, where women are discriminated against to maintain patriarchal power relations. The design of this approach is also weak in responding to the fact that a majority of misogynistic violence against women occurs in intimate relationships with the perpetrator being known to the victim, a family member, partner or associate.
- **Adding 'sex' to the Hate Crime Act would not create law for women, as women, reinforced by international human rights frameworks.** As recognised in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Istanbul Convention, there should be a presumption against gender-neutral laws when dealing with gender-based violence. There is no equivalent form of engrained, generational, systemic discrimination and violence against men on the basis of their sex and gender, equivalent to that of misogyny.

⁵ <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf>

⁶ <https://www.unwomenuk.org/campaigns/safe-spaces-now/>

However, the SSI as drafted implies, and will in effect establish in law, that there is.

- **‘Hate’ is not always a helpful concept for describing the harmful conduct that men direct at women and does not fully cover the attitudes that underpin their actions.** In particular, the concept of “ill-will”, which the Hate Crime Act requires judges to consider, fails to adequately describe the feelings that can drive abusive or degrading behaviour directed at women and girls. This is why the Working Group recommended a separate statutory misogyny aggravation be established, which would introduce the concept of “contempt” towards women for a more accurate reflection in the law of the way in which crimes motivated by misogyny hold women in a subordinate position.⁷

We do not accept the assertion that the proposed SSI will “in effect implement the first two recommendations of Baroness Kennedy’s report, but in a gender-neutral way.” **This is a significant misrepresentation of the findings, which were clear that the most effective way to protect women and girls from such abuse is through targeted, gendered laws.** Such measures cannot be achieved through the proposed gender-neutral approach for the Hate Crime and Public Order Act 2021. We remain unclear why the Working Group’s significant expertise has been sidestepped and their findings dismissed to pursue an SSI.

The fundamental importance of gendered policymaking

The weaknesses in a Hate Crime approach also mean the proposed SSI is incompatible with Scotland’s Equally Safe Strategy. The central reason the Strategy is seen as a global gold standard approach to ending VAWG is because of Equally Safe’s gendered analysis of this violence, which recognises that it is “an abuse of power and stems from systemic, deep-rooted women’s inequality.”⁸ Equally Safe recognises and replicates international best practices and long-established human rights standards on VAWG in both the CEDAW and Istanbul Conventions.

This approach recognises that women and girls’ experiences of this violence are not symmetrical to men’s. Men do not experience endemic levels of harm from women and girls, nor is this harm rooted in maintaining men’s inequality. The Scottish Government’s current proposals for this SSI reinforce the idea that there is a parallel relationship between misogyny and misandry. Misogynistic harassment, like other forms of VAWG, should be understood to be a cause and consequence of women’s inequality, in line with Equally Safe and international standards.

⁷ Page 12, Working Group Report:

<https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf>

⁸ Page 10, Equally Safe Strategy: <https://www.gov.scot/publications/equally-safe-scotlands-strategy-preventing-eradicating-violence-against-women-girls/documents/>

Symmetrical approach to an asymmetric issue

This approach to the Hate Crime Act sets a concerning precedent of dealing with a deeply gendered issue through a reductive, gender-neutral ‘sex’ protections framework. This type of symmetrical, gender-neutral approach in policymaking creates false equivalences in law between the experiences of men and women, frames misogynistic crimes against women as individual cases of hate, rather than contextualising acts of VAWG as driven by societal norms and stereotypes that women are subordinate to men.

As such, the decision to progress an SSI risks weakening and undermining our ability to effectively address the gendered root causes of these behaviours in society, and the established approach of Equally Safe.

The equal protection that men will have from sex-based protections in the Hate Crime Act could also be utilised maliciously by those seeking to undermine the work of women’s organisations and to make claims of misandry by individual women. We urge the Scottish Government to explore how misuse of this provision to claim cases of misandry against individual women and against women’s organisations furthering feminist goals could be a risk of this proposed SSI. We believe that the current political and cultural climate increases the risk of these occurrences.

There is already existing controversy on the policing and implementation of existing hate crime protections. In a high-profile recent case, a woman from a minority ethnic background was charged with a racially aggravated public order offence for a satirical sign at a protest that criticised UK politicians who were also from a minority ethnic background.⁹ Although cleared of the charges, the case shows clearly how hate crime protections can be misused to criminalise marginalised people expressing views that others disagree with.

Policy Incoherence

It is unclear from the consultation paper whether a sex aggravation would be used in existing crimes of VAWG set out in criminal law. Applying a sex aggravation to some existing sexual offences or domestic abuse cases but not others potentially contradicts Equally Safe’s analysis that all forms of VAWG are gender-based and rooted in gender inequality. This could create unhelpful inconsistencies in how the justice system deals with gendered crimes. It would, for example, leave it up to judges to determine whether an individual case of sexual assault or stalking meets the threshold for a sex-aggravated hate crime when these crimes against women are always inherently gendered forms of violence. Baroness Kennedy’s proposals recommended that a misogyny aggravation should only be used in offences that are not already inherently misogynistic; for example, it should not apply to rape, other sexual offences or domestic abuse. It is disappointing

⁹ <https://www.theguardian.com/uk-news/2024/sep/23/woman-cleared-over-coconut-placard-marieh-hussain-calls-on-iopc-to-investigate-met>

that this basic level of analysis on VAWG has not been applied in the Scottish Government's proposals.

The SSI will not offer protection to women and girls from rising online abuse. The proposed Misogyny Bill contained communications offences. ¹⁰ We strongly supported action to create a specific offence of 'threatening or abusive communications to women and girls, which reference rape, sexual assault or disfigurement.' The nature of communications has changed radically in recent decades, exposing women and girls to new environments where misogynistic threats and abusive messages readily occur. Research in 2020 from the World Wide Web Foundation and the World Association of Girl Guides and Girl Scouts found that over half of the young women surveyed have experienced violence online – including being sexually harassed, sent threatening messages or having their private images shared without consent. 87% thought that the problem was getting worse. ¹¹

Women in public life receive threats routinely, harming women and risking a chilling effect on participation in public life. ¹² There must be a proportionate and effective criminal justice response to threatening and abusive communications to women and girls. This is vital to combat the idea that public space is perceived as 'belonging' to men. Perpetrators often seek to silence or further harass women when they highlight gender-based oppression and inequity. We know from the Working Group's research ¹³ that the prevalence of violence against women online via direct communications on online platforms is on the rise and can create the conditions for perpetrators to commit threats of rape, violence and other forms of misogynistic harassment. ¹⁴

We supported the Scottish Government's proposals to reform the criminal law to address misogyny through a standalone Bill. We remain clear that this is the approach that should be pursued. ¹⁵ Rather than backing away from tackling misogyny at a time of rising threats, we need the Scottish Government to take bold action by committing to meaningful legal reforms. This should occur alongside continued investment in a robust national strategy on primary prevention of VAWG. We need a legal framework and system that recognises the impact of sexism, misogyny and violence against women by design – not as an add-on to existing gender-neutral legislation.

¹⁰ <https://www.engender.org.uk/content/publications/Engender-response-to-the-Scottish-Government-consultation-on-reforming-the-criminal-law-to-address-misogyny.pdf>

¹¹ https://webfoundation.org/docs/2020/03/WF_WAGGGS-Survey-1-pager-1.pdf

¹² <https://www.engender.org.uk/news/blog/guest-post-2/>

¹³ <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf>

¹⁴ See, for example, Amnesty International (2018) Toxic Twitter. Available at:

<https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1-1/>

¹⁵ <https://www.engender.org.uk/content/publications/Engender-response-to-the-Scottish-Government-consultation-on-reforming-the-criminal-law-to-address-misogyny.pdf>

Question 3: Are you content with the interpretive provision relating to the characteristic of sex?

- Yes
- No

Please give reasons for your answer.

We are deeply concerned with the Scottish Government's approach to the interpretive provision, and disagree with its introduction. The Scottish Government states that it aims to “achieve equivalence with the meaning of sex in the Equality Act 2010, as determined by the Supreme Court in *For Women Scotland v Scottish Ministers*.”

The UK Supreme Court stated that its judgment should not be used to define the category of a “woman” for broader purposes, beyond the definition of ‘sex’ in the Equality Act 2010 (EA). The judgment does not impact or require the definitions in the EA to be used in the same way across existing and developing policies and legislation in other areas. Furthermore, the impact of the Supreme Court’s judgment on the implementation of sex in the EA is yet to be fully determined. Finalised guidance from the Equality and Human Rights Commission is yet to be approved by the UK parliament. What EHRC has shared publicly has been widely critiqued as difficult to implement in practice,¹⁶ and likely in contravention of the Human Rights Act 1998.¹⁷

The provision to define sex as ‘biological sex’ is explained in the explanatory note as necessary to ensure “no overlap” between the scope of two characteristics of ‘transgender identity’ and ‘sex’ in the Act:

“The groups that are protected by the characteristic of sex under the 2021 Act, as now inserted by these Regulations, are the group of people who were, at birth, assigned female and the group of people who were, at birth, assigned male. Every person will belong to one of those two groups. A person cannot change that they were once assigned to such a group through a process of subsequently obtaining a Gender Recognition Certificate or through any other process associated with transitioning to a person’s acquired gender.”

This reading of the law ignores the existence of the Gender Recognition Act 2004.¹⁸ It risks being an overly expansive application of the Supreme Court judgment, which clearly stated that the Gender Recognition Act should continue to apply in other legal contexts.

It is our view that the Equality Act represents the floor and not the ceiling of what we need to achieve on equality as a society. The existing Scottish Hate Crime and Public Order (Scotland) Act 2021 uses a broader range of protected characteristics than those listed in the Equality Act to ensure hate crime protections reach minorities most likely to be at

¹⁶ <https://www.independent.co.uk/news/uk/politics/supreme-court-trans-single-sex-spaces-b2826924.html>

¹⁷ <https://www.libertyhumanrights.org.uk/issue/liberty-launches-legal-action-against-ehrc-over-unlawful-code-of-practice-consultation/>

¹⁸ <https://www.legislation.gov.uk/ukpga/2004/7/notes/division/2>

risk. For example, the Hate Crime Act protects people with variations in sex characteristics, which is a group that does not appear in the list of protected characteristics in the EA.

The impetus for applying this definition is also unclear, given that a hate crime “statutory aggravation applies in relation to the perpetrator’s perception of the victim’s identity, irrespective of the victim’s actual identity.” Individuals with a GRC can be perceived as their acquired gender, and therefore, it is possible they will experience hate crimes based on that perception.

The stated aim of avoiding “overlap” between different aggravators is also at odds with the widely accepted concept of intersectionality in policymaking. This recognises that multiple forms of inequality and discrimination impact women’s lives and experiences of violence. A transgender woman who is a victim of a hate crime could be impacted by the perpetrator’s perception that she is a woman and/or that she is transgender. These two types of ‘hate’ are deeply intertwined and cannot be neatly defined as separate issues in criminal law. Recognising misogyny offences separately offered greater scope for proper recognition in law of intersecting harms.

We are concerned that expanding the scope of the Supreme Court decision in law, beyond the Equality Act, further increases the threat to gender-based policymaking (as set out in our answer to Question 1). This creates a dangerous precedent that risks undermining the centrality of gender in feminist policymaking and efforts to address gender inequality, as set out in both the CEDAW and Istanbul Conventions.

There is a strong global consensus, underpinned by international institutions including the United Nations and the Council of Europe, that the root cause of all forms of gender-based violence is *gender* inequality.¹⁹ The CEDAW Committee has made clear that women require protection from discrimination on the grounds of both their biological differences from men and the unequal impacts they experience due to socially constructed conceptions of gender. Such roles shape social norms and behaviours and determine women’s access to social and economic power and resources through processes of gender stereotyping. This understanding goes beyond biological differences between men and women to highlight the impact of patriarchal power relations, stereotypes, structures and norms on women’s experiences of violence.

Question 5: Do you have any views on potential impacts of the proposals in this consultation on human rights?

The framing of the SSI to add sex as a characteristic to the Hate Crime Act offers gender-neutral protections. This creates a false equivalence between misogyny and misandry.

¹⁹ UN Committee on the Elimination of Discrimination Against Women (1992) General Recommendation No. 19: Violence against women. Available at: <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; Council of Europe (2011) Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic abuse. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>

This gender-neutral approach to combating violence against women and girls and addressing the endemic nature of misogynistic behaviour and harassment is incompatible with international human rights standards and best practice on gender equality and addressing violence against women and girls.

As previously stated, both the CEDAW and Istanbul Conventions articulate a presumption against gender-neutral legislation when creating legal remedies to combat VAWG. In March 2025, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) reported on the UK's action to implement the Istanbul Convention. The report noted the experts' positive interest in the Scottish Government's action to introduce a new law to criminalise misogyny, which would create distinct legal protection for women and girls from sexual harassment. This indicates a rolling back of progress by the Scottish Government on realising human rights and gender equality.

Question 6: Do you have any views on the potential impacts of the draft SSI on equalities and the protected characteristics of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation?

We are concerned that the consultation and draft SSI have been published without a full Equality Impact Assessment (EQIA) being conducted in advance. We were dismayed to learn that equalities impact evidence will only be published alongside the finalised SSI. We urge the Scottish Government to provide detailed evidence in the EQIA on how this proposed approach will positively impact women, girls, and other groups with protected characteristics, considering this has not been fully assessed and does not have any apparent international comparators.

As evidenced by the findings of the Working Group, international experience of adding gender or sex to a long list of groups protected by hate crime law has proven ineffective.²⁰ There is little evidence from these locations of sex or gender aggravators being used effectively to deal with the scale of the problem of misogynistic violence and harassment. In our 2019 report,²¹ we provided evidence of multiple jurisdictions, such as Belgium and Spain, in which gender aggravations were included in penal codes without noticeably improving the state's response to misogynistic harassment or other offences. We found no evidence that hate crimes legislation in any of those jurisdictions has increased protections or improved the criminal justice response for women and girls.

In the United States, to charge a person with a hate crime based on gender, prosecutors must have concrete and admissible evidence of bias. The offence has been mainly reserved for cases in which perpetrators did not know their victims, and gender-based

²⁰ <https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2018/05/independent-review-hate-crime-legislation-scotland-final-report/documents/00535892-pdf/00535892-pdf/govscot%3Adocument/00535892.pdf>

²¹ <https://www.engender.org.uk/content/publications/Making-Women-Safer-in-Scotland---the-case-for-a-standalone-misogyny-offence.pdf>

crimes have continued to be under-reported. Hate crime statutes in the US have been mainly used for racially and religiously motivated crime. Official FBI statistics indicate that 11,323 hate crime incidents were recorded in the USA in 2024, with 0.9% recorded as related to gender, the lowest among all demographic groups.²²

The ineffectiveness of these laws in the US has been an issue since their introduction. We previously analysed the state of New Jersey's crime statistics to illustrate the utilisation of these statutes better:

- Between 1999 and 2008, four gender-bias incidents were recorded, 3,521 race-bias incidents, 2,589 religious-bias incidents, 579 motivated by sexual orientation bias, and 25 disability-bias incidents.
- Our analysis, based on state police reports, found 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. **This amounts to 18 reports of gender-based hate crimes in 20 years.**²³

We are concerned about the replication of a similarly ineffectual hate crime law in Scotland. Critically, we do not want to replicate a law on hate crime that serves to reinforce the notion that harassment of women is tolerated by society.

FOR FURTHER INFORMATION

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ABOUT US

Engender is Scotland's feminist policy and advocacy organisation, working to increase women's social, political and economic equality, enable women's rights, and make visible the impact of sexism on women and wider society. We work at Scottish, UK and international level to produce research, analysis, and recommendations for intersectional feminist legislation and programmes.

²² <https://www.justice.gov/hatecrimes/hate-crime-statistics>

²³ New Jersey State Police Bias Incident Reports 2008 to 2017-18, available at <https://www.njsp.org/ucr/bias-incident-reports.shtml>