

Engender Parliamentary Briefing: Stage One Debate Hate Crime and Public Order (Scotland) Bill

14 December 2020

BACKGROUND

Engender is Scotland's feminist policy and advocacy organisation, working to secure women's political, economic and social equality with men. Our aspiration is for a Scotland where women and men have equal access to rights, resources, decision-making and safety.

We welcome this opportunity to highlight our work on misogyny and hate crime ahead of the Scottish Parliament's Stage One debate on the Hate Crime and Public Order (Scotland) Bill. In particular, we welcome the Justice Committee's detailed scrutiny of the effective response needed to tackle the nature and scale of harassment and violence directed toward women because they are women.

SPECIFIC CONSIDERATIONS

1. The efficacy of a 'sex aggravation' and hate crime

We warmly welcome the Committee's report and the conclusion that "Whilst the arguments are finely balanced, the Committee considers it might be wise to wait until the Working Group on Misogynistic Harassment has reported before Parliament considers legislating to add sex as a hate crime characteristic. The Committee calls on the Working Group to complete its work within a year." We appreciate and welcome the range of views the Committee heard on approaches available to respond to misogyny and sex-based harassment.

As we outlined to the Committee in both written¹ and oral evidence,² Engender was instinctively drawn to a sex aggravator when hate crime consolidation was put forward. However, when we looked at the evidence available from other states and current work on violence against women and criminal justice systems in Scotland and Europe, we concluded that not only would a sex aggravator do nothing to make women safer, but it

¹ Engender (2020) Engender submission of evidence to the Scottish Parliament Justice Committee call for views on the Hate Crime and Public Order (Scotland) Bill. Available at <https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-on-Hate-Crime-and-Public-Order-Scotland-Bill-.pdf>

² Official Report Justice Committee 24 November 2020. Available at <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12973>

may also have unintended and harmful consequences. We see four critical risks in introducing a sex aggravator or 'stirring up' offence at this stage:

- Equally Safe, Scotland's world-leading violence against women strategy, may be undermined. It is fundamentally contradictory under Equally Safe's understanding of violence against women to say that some incidents of violence against women are a product of discrimination or animus on the ground of sex, and some are not.
- Human rights frameworks that Scotland is committed to, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Istanbul Convention, are clear that there should be a presumption against gender-neutral laws and symmetrical approaches such as a sex aggravation or stirring-up offence.
- There is harm in promising rights in legislation that are not actually enforceable in practice and won't improve women's lives. There is a risk that reaching for a solution that is easy but does not work will prevent us creating policy and legislation that is new, distinctive and, crucially, effective.
- Evidence from similar legislation shows that hate crime and hate speech are poorly understood in the context of women. Rushing to legislate risks entrenching those misunderstandings in our criminal justice systems and public understandings of violence against women.

Statutory aggravations involving sex or gender have not worked in other jurisdictions that have tried them. In New Jersey for example, their 20-year-old hate crime law has seen only 18 reports of sex-based hate crime compared with 6,810 incidences of race-based hate crimes during the same period.³ Pilot initiatives by police forces in England and Wales to record crimes and incidents motivated by 'misogynistic hate' have resulted in very few reports and prosecutions. They have surfaced attitudes of police that hate-based crimes against women are qualitatively different from those caused by animus on the grounds of sexual orientation or race.⁴

Engender is of the view that a more rigorous equality-based approach would be to treat women and misogynistic harassment in the way that the evidence suggests that they should be treated, not to include these concerns in a hate crime model that has not been designed with women in mind.

The evidence of the Crown Prosecutor and Procurator Fiscal clarifies that there is nothing to prevent prosecution of offences in the short term while other gaps in the law are

³ Analysis by Engender at Engender (2019) Making women safer in Scotland: The case for a standalone misogyny offence. Available at:

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

⁴ L. Mullany and L. Trickett (2018) Misogyny Hate Crime Evaluation Report. Nottingham Women's Centre. Available at <<https://www.nottinghamwomenscentre.com/wp-content/uploads/2018/07/Misogyny-Hate-Crime-Evaluation-Report-June-2018.pdf?fbclid=IwAR1-cDzCVoaMU7acJm1421wnCSkhyEVzuYZOIDnAhwlVVRyU-Hagtvw3q9Y>>

considered: “the absence of a specific statutory aggravation in relation to gender [sic] does not prevent the COPFS from taking prosecutorial action in relation to gender and its addition would not aid our ability to address those offences”.⁵ An aggravation model requires us to understand and respond to the initial crime and we do not believe that existing criminal law does this effectively when it comes to misogynistic harassment.

2. Freedom of Expression

We share the view of many witnesses to the Committee that there is a need to finely balance freedom of expression and the stirring up offences designed to protect minority groups. We have also noted our support for the stirring up offences where they are supported by individual communities protected by the Bill. Stirring up offences should not prevent criticism of political action or social debate that negatively affects women and gendered equality outcomes, either in practice or because of perception of their reach.

We have suggested in our evidence that this balance could be better achieved with a broader freedom of expression protection that applies to all characteristics protected by the Bill and overtly balances rights.⁶ Courts are well used to undertaking a balancing freedom of expression against the rights of the others. Such a provision would not negate the need to be clear about where the stirring up offences begin and end, but may create clearer exceptions for speech that is necessary for political or social debate on matters of public policy.

3. The Working Group on Misogyny

There is an urgent need to develop a criminal justice response to the ubiquitous harassment, abuse and violence women experience on an almost daily basis in every aspect of their lives. From online abuse that prevents women from participating in public life to acts of terrorism motivated by misogyny that are currently proceeding through Scottish courts,⁷ this behaviour severely constrains women’s freedom and undermines their safety. Crucially, misogynistic harassment, like other forms of violence against women, reproduces ‘relations of dominance’ between women and men.⁸ It is both a cause and consequence of women’s inequality.

Existing law is failing to disrupt and respond to the scale of this problem. There has been no systematic review of how criminal and civil law could better protect women nor any

⁵ Justice Committee Official Report 26th Meeting 2020, Tuesday 3 November 2020 col 50

⁶ Engender (2020) Engender submission of evidence to the Scottish Parliament Justice Committee call for views on the Hate Crime and Public Order (Scotland) Bill. Available at <<https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-on-Hate-Crime-and-Public-Order-Scotland-Bill-.pdf>>

⁷ BBC (2020) Gabrielle Friel: Man on trial over Edinburgh terrorism charges. Available at <<https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-55231253>>

⁸ Kelly L (2005) How violence is constitutive of women’s inequality and the implications for equalities work.

attempt to define the scale and nature of the issue. There is very little administrative data gathered on sexual harassment and there has been some resistance to gathering more of it in Scotland.

We therefore support the development of tailored approaches to be developed through the working group on misogynistic harassment that will be chaired by Baroness Helena Kennedy QC. Such a process should be participatory and draw from the wide range of expertise in the Parliament, the women's sector and lived experiences of women in Scotland and further afield.⁹ We should also learn from the development of the Domestic Abuse (Scotland) Act, internationally considered the 'gold standard' law responding to coercive control.

We recognise that the working group may conclude that a sex aggravation should form part of the response to misogyny and agree with the inclusion of the clause in the Bill which provides for that possibility.

We hope that the group will assess data gaps, how we might fill those gaps, reporting concerns, and determine whether there are gaps in the law, or areas in which existing laws are not being well-used by Police Scotland, Crown Office, or judiciary in respect of misogynistic harassment at all levels and in all places. While we do not wish to pre-empt the deliberations of the group, in our 2019 report we made a series of recommendations that the group may wish to consider. These include:

- Developing a definition of 'misogyny' which enables all relevant practitioners within the criminal justice system to identify misogynistic harassment, investigate misogynistic harassment, and prosecute misogynistic harassment;
- It should include incitement to misogyny and 'hate speech' towards women;
- It should provide for responses to misogyny that is inflected with racism, ableism, homophobia, and transphobia; and
- It should locate misogynistic hate crime and harassment within the understanding of violence against women in Equally Safe.

FOR FURTHER INFORMATION

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ABOUT US

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.

⁹ Engender (2019) Making women safer in Scotland: The case for a standalone misogyny offence. Available at: <https://www.engender.org.uk/content/publications/Making-Women-Safer-in-Scotland---the-case-for-a-standalone-misogyny-offence.pdf>.