

Written Evidence to the Working Group on Misogyny and Criminal Justice in Scotland

Introduction

For Women Scotland is a grassroots women's rights organisation run by volunteers and unsupported by public funds. We have discussed hate crimes laws extensively within our group and consulted widely with other organisations and individuals across the UK. Our position remains largely unchanged from that given in evidence to the Justice Committee.^{1&2}

We welcome the opportunity to submit evidence to the Working Group, and do so in good faith despite reservations that the outcome will be anything other than that already decided by the Scottish Government and its funded groups.

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1. Summary

- 1.1. Valid concerns regarding the purpose and bias of the Misogyny Working Group still need to be addressed. The desire of the current administration to introduce self-identification of sex has become entangled in the Hate Crime Act and discussions on misogyny to the detriment of women's legal rights and safety with legislation already weaponised against women.
- 1.2. After giving up the opportunity to protect women under hate crime laws thirteen years ago the funded women's groups have made little progress and we agree with Lord Bracadale that, once again, meaningful progress has been lost by failing to add sex to the Hate Crime Bill.
- 1.3. The issue is not so much about gaps in the law but rather one of not adequately using existing laws to prosecute crimes against women, including street harassment. Adding sex to the Hate Crime Act would elevate the seriousness of these offences,

¹ [Hate Crime and Public Order \(Scotland\) Bill Written Submissions - Parliamentary Business](#)

² 24 November 2020, [Official Report - Parliamentary Business](#)

provide consistency, prevent duplication and confusion, and allow immediate access to essential police training and education and awareness campaigns.

- 1.4. Taking steps to prevent child access to pornography and progressing with reform on prostitution laws along lines of the Nordic Model would make a meaningful difference.

2. Integrity of Process

- 2.1. We remain concerned about the independence and neutrality of the Working Group on misogyny. While we are aware of Baroness Kennedy's distinguished history, we do not think it appropriate that the Chair of the Working Group (as selected by the Scottish Government) was also appointed, personally, by Nicola Sturgeon as a member of the First Minister's National Advisory Council on Women and Girls (NACWG)³ - an undemocratic group who recommended a standalone misogynistic harassment offence in January 2019⁴. The First Minister has, as previously promised,⁵ accepted all the recommendations of this group to date, which suggests a remarkable degree of cooperation. Having committed to implementing this recommendation⁶ it is not surprising that the Scottish Government failed to include sex as a characteristic in the subsequent Hate Crime Bill, contrary to the conclusion reached by the truly independent and comprehensive Bracadale Review. It also explains why NACWG had no need to take part in the Justice Committee's Call for Views. We think that this clear conflict of interests needs to be addressed.
- 2.2. The Working Group remains vulnerable to criticism that they are simply there to implement the next step towards NACWG's recommendation, with any consideration of adding sex to the Hate Crime and Public Order Act (HCA) tacked on as a sop to those who continued to raise it as an issue during the public consultation and the Bill's passage through Parliament. As stated by several MSPs during the debate, such an important inclusion should have been subject to parliamentary, democratic oversight.
- 2.3. The organisational view of Engender, as repeated at Engender's AGM in November 2020,⁷ is that sex should not be included and they have made it clear that they did not see this as a serious proposition. Again, this raises issues about whether conclusions are predetermined.
- 2.4. It was also worrying that, before the Working Group had taken any evidence, the Chair said: *"I am going to include in this work trans women as well as women who are born female. I am not going to make any distinctions between the two."*⁸ This

³ [National Advisory Council on Women and Girls questions: FOI release - gov.scot](#)

⁴ [First Minister's NACWG First Report and Recommendations](#)

⁵ [Scottish Government's Response to the National Advisory Council on Women and Girls](#)

⁶ [Misogyny and Criminal Justice in Scotland Working Group: FOI release - gov.scot](#)

⁷ [Transcript of Engender's AGM, Nov 2020](#)

⁸ Holyrood, 02 March 2021, [Love and hate: Helena Kennedy on tackling misogyny](#)

belies a fundamental misunderstanding of hate crime and equality laws, and introduces a controversial political viewpoint.

- 2.5. Part 1 of the HCA states an offence is aggravated by prejudice where an offender evinces malice and ill-will towards the victim based on their membership or presumed membership of the specified characteristic. So in a similar way that a straight man assaulted outside a gay pub is covered by the HCA on the basis that the perpetrator presumed he was gay, any man, regardless of personal identity, would be protected if presumed to be a woman by a perpetrator. It is not necessary to change the definition of homosexuality to include heterosexuality in order to apply the aggravator to such a crime, in fact it is essential to have a clear definition of homosexuality to be able to state the characteristic the victim is, or presumed to have. The same applies equally to the definition of woman.
- 2.6. The Equality Act has distinct and separate protected characteristics for sex and gender reassignment. The stated intention to conflate these characteristics by the Chair aligns with the recently revealed Scottish Government policy⁹ that “transwomen are women” which has no written record of existence or any basis in law or fact, and looks like yet another attempt to legislate by the back door for self-identification of sex. This is not acceptable, particularly when transgender people are already protected under hate crime laws and this Working Group was established to focus on addressing the overwhelming barrage of hatred towards women as a sex-class.
- 2.7. At a fundamental level, if something cannot be defined in law, it cannot be protected. If the Working Group is unable to arrive at a definition of women which goes beyond stereotypes, unquantifiable feelings or pronouns, then this will be unworkable. The latter, especially, implies that, with no other observable changes, a female using they/them has managed to opt out of being a victim of sexism, while a male using she/her is more at risk. This is self-evidently nonsense, and if pronouns were the answer, it would mean sexism could be eradicated overnight. It is a confusion the Scottish Government have become entangled in to the detriment of women’s legal rights and safety.
- 2.8. We further note Working Group members share the unevidenced “transwomen are women” belief, including Chloe Kennedy who has previously, and shockingly, written that rape by deception should not be illegal if it is committed by a man with the protected characteristic of gender reassignment.¹⁰
- 2.9. The survey on misogyny conducted by the Working Group was initially only open to NACWG Circle members so responses will be biased to the position already taken by that group. Although latterly opened up to the public the survey was not advertised, nor was our organisation notified about it, so the input of a breadth of women’s views is minimal.

⁹ The Scotsman, 07 January 2021, [Scottish Government can 'ride roughshod' over equalities law in row over definition of women in new Act](#)

¹⁰ [Sex, Identity and Recognition: Re-thinking 'Rape by Deception'](#)

Definition of Misogyny

- 2.10. We note that the definition of misogyny as decided by the Working Group has been pre-agreed and does not form part of the consultation. However, we believe it to be unnecessarily convoluted with too much emphasis placed on “a way of thinking”. The HCA has attracted much justified criticism for failing to sufficiently protect freedom of expression and it would be a mistake to continue down this line. A misogynistic way of thinking is not a crime and not all acts resulting from misogynistic thoughts are criminal.
- 2.11. A definition in line with both the more commonly understood definition, ie. hatred of women, and that used in the HCA for other characteristics would suffice ie. an offence (is aggravated by prejudice) where an offender evinces malice and ill-will towards the victim based on their membership or presumed membership of the specified characteristic - where the specified characteristic is “woman” and “sex” as defined in the Equality Act (as previously agreed by the Justice Minister to ensure consistency¹¹).
- 2.12. In both UK equality law and in CEDAW (much touted by the Scottish Government) there is a clear acceptance that sex remains the fundamental basis for discrimination and violence against women. Gendered expectations are superimposed based upon membership of a sex class (or perceived deviation from the expectations of performative masculinity or femininity) and remain a means of discrimination in and of themselves. We are concerned that any convoluted definition of misogyny, which strays from the understanding that it is hatred of women, could see this law being used against women who do not conform to sexist stereotypes, potentially by males who adopt “feminine” attitudes.
- 2.13. In any case, we would advise that “unconscious” is amended to “subconscious”.

3. Hate Crime Aggravator v Standalone Offence

- 3.1. A call for women to be protected in hate crime legislation was made some eighteen years ago¹² which, although not accepted by the then administration, led to the establishment of a Working Group to examine the issue. A number of women’s organisations including Engender, Rape Crisis Scotland and Scottish Women’s Aid supported the proposition but did a u-turn when it came to giving evidence to the Parliamentary Committee scrutinising the Offences (Aggravation by Prejudice) Bill in 2008, stating “*Something needs to be done, but I do not think that this bill is the answer...we do not know what, we do not know when, but there is hope.*”¹³ The Committee cautioned against giving up a chance to make a difference by including women in the Bill and it is bitterly disappointing to find ourselves back in the same position, with very little legislative or practical action in the thirteen years since, with

¹¹ 15 December 2020, Hate Crime and Public Order (Scotland) Bill: Stage 1, [Official Report - Parliamentary Business](#)

¹² 27 August 2008 [SPICe Briefing - Offences \(Aggravation by Prejudice\) \(Scotland\) Bill](#)

¹³ 04 November 2008 [The Scottish Parliament - Equal Opportunities Committee Official Report](#)

another warning, this time from Lord Bracadale, who described the omission of sex from the Hate Crime Bill as a lost opportunity for meaningful action.

- 3.2. An essential question in considering the relative merits of a sex aggravator or a standalone offence is what is the purpose of this consultation and legislation? If it is (as it should be) to protect women, why not provide the same protection as already afforded to the characteristics in the HCA? Why do women have to be in a different category, with a convoluted definition of misogyny and a different piece of legislation? It suggests a reluctance to treat women as a sex class in our own right, as well as a reluctance to listen to the views of women outside the inner circle approved by this administration.
- 3.3. The rationale given for not including sex in the Hate Crime Bill - without evidence and contrary to agreement on both sexes being covered in the Domestic Abuse Act - was that it might be used against women. We said then that this is not an argument against one category, but against the aggravated model as it exists in legislation in Scotland. In fact, as stated above, we believe that anything other than a clear definition of membership or presumed membership of a sex-class is far more open to reinterpretation and is far more likely to be used against women, especially in the current climate where hate crime law is already weaponised against women who maintain a traditional feminist belief in the rights of women as a sex-class.
- 3.4. Including sex would have the advantage of consistency, would prevent duplication and confusion and would also mean that training within the police and court system could begin at once. We note that there is funding set aside for the implementation of the new Hate Crime law. We have no reason to assume that a similar budget has been set aside for the standalone offence.
- 3.5. Within the existing framework, we have been informed that Hate Crime cases are unlikely to be dropped by the Crown Office and Procurator Fiscal Service and nearly always reach court. Sometimes, these crimes amount to name calling or unpleasant messages on social media. This is in stark contrast to often violent crimes against women which have a shamefully low rate of prosecution and conviction. We believe this is a factor of the operational failures in investigating crimes against women which we shall return to in more detail.
- 3.6. During the Hate Crime Stage 3 debate, Mr Yousaf referred to “intersectionality” in the crimes experienced by women.¹⁴ It is true that crimes against, for example, muslim or disabled women may be motivated by both their sex and by an additional characteristic. This, surely, suggests that legislation which allows for both or either factor to be considered in prosecution and sentencing would be more sensible and practical than a separate prosecution under a wholly different offence.
- 3.7. We think this fragmentation of the law creates a deliberate and unnecessary confusion which may, once again, leave women unprotected while some men are

¹⁴ 10 March 2021, Hate Crime and Public Order (Scotland) Bill: Stage 3 [Official Report - Parliamentary Business](#)

doubly protected. During the Hate Crime debate, Elaine Smith MSP raised the injustice of including cross dressers but excluding women: *“We include cross-dressers in the bill but we do not include women. What happens if someone says that they did not know that someone was a transwoman and thought that they were a woman? Is that a loophole?”*¹⁵

3.8. Justice Secretary Humza Yousaf replied that the reverse could be true and that: *“If a woman who was born a woman was the subject of transphobic hate, a transphobia aggravator could be applied, because it was the prejudice that motivated the hatred. That is how an aggravator works—it has always worked in that way.”*

3.9. Mr Yousaf missed the point that, in all this, the only people who were and remain unprotected are people who are abused simply for being women (or indeed, perceived to be women).

3.10. A simple sex aggravator would do away with all this confusion. Any offence motivated by hostility to a person based on a perception that they were (or were not) a member of one sex class or that they were not performing the social or cultural expectations of that sex class would be captured. Any offence which, in contrast, relies on expressions or definitions of the cultural or social expectations that, in gender ideology, define women and men might, for example, leave gender non-conforming women unprotected.

3.11. We would also point out that the majority of “coalface” groups consulted by the then Justice Secretary back sex as aggravator in preference to a standalone offence.¹⁶

Legal Challenge

3.12. As can be seen in the comment section of any media report on this topic, the call for an equivalent offence of misandry is often referenced. Access to the law should be available to all and while sexism predominantly concerns offences against women, the reverse does happen. Any law based solely on misogyny will be open to legal challenge on the grounds of sex discrimination and it would be preferable, as in the case of the recent Domestic Abuse Act, that the legislation be written in neutral language with the recognition in statutory guidance and training that women are most affected.

Operational Failures

3.13. Lord Bracadale felt there were no gaps in the legislation, which suggests that the issue is not that we need more laws but better education and prosecution.

3.14. We are all aware of the shocking statistics on the prosecution of rape and domestic violence. If these serious crimes are not taken as seriously as they should be by the police and the courts, we have little faith that a new crime built around something like street harassment will fare any better. In fact, this law may end up doing more

¹⁵ 10 March 2021, Hate Crime and Public Order (Scotland) Bill: Stage 3 [Official Report - Parliamentary Business](#)

¹⁶ 04 December 2020, MurrayBlackburnMackenzie, [Legislating for hatred against women: the view from the coalface \(December 2020\)](#)

harm than good if it plays into notions that women are harassed based on appearance or presentation rather than address the sexist assumptions which underlie these judgements.

- 3.15. As an example of the current disparity between weight placed on crimes against women and girls and those which fall under the current Hate Crime umbrella, Chris Bell of Police Scotland said in a recent webinar¹⁷ that school children were well versed in hate crime laws and were encouraged to report their peers, however, when it came to sexual abuse in schools, he talked of “poor decisions” and recommended that all parties sit together to discuss “supportive action” rather than “punitive action”. This is against a backdrop of one rape per day in UK schools.

4. Gaps in the Law

- 4.1. We maintain that in the most serious criminal offences committed against women, the issue is not a gap in the law, but the inaction or failure of the criminal justice system. We do not believe that adding additional, minor offences will mitigate this. We have our doubts about Hate Crime as a means to address crime per se, but if we are to have a system in place, it should cover the group most likely to be a target of crime motivated by malice or ill will, especially if this means additional resources for police training and awareness.
- 4.2. There are areas where we do need action, however, and we do not believe they are being considered by the Working Group.

Pornography

- 4.3. Porn normalises the sexual abuse of women and girls. Thanks to the internet, it is now readily available and is a major driver of sexual harassment. What was extreme is now becoming mainstream with violent practices such as choking sometimes described as a “kink”. The group *We Can't Consent to This*¹⁸ was formed in response to the rising use of the “rough sex” defence in murder trials.
- 4.4. To date, both the Scottish Government and the UK government have been reluctant to address the harms of pornography and the dangerous, hateful ideas it perpetuates.¹⁹
- 4.5. CEASE Big Porn Report²⁰ links the epidemic of boys sexually harassing and assaulting girls at schools and colleges across the UK with the consumption of porn. It quotes UK Government statistics that show each month around 1.4 million children visit porn sites from their desktop - this has profound real-life consequences. Several important amendments are proposed to improve the upcoming Online Safety Bill.

¹⁷ 15 June 2021, Glasgow City Parents Group, [Hate Crime & Third Party Reporting with Police Scotland](#)

¹⁸ [We Can't Consent To This](#)

¹⁹ 27 July 2021, The Critic, [Time to get tough on porn - Jamie Gillies](#)

²⁰ [Centre to End All Sexual Exploitation, Expose Big Porn Report](#)

Prostitution

- 4.6. The Scottish Government have promised to reform the law on prostitution (which they regard as violence against women). The cross party group on Commercial Sexual Exploitation are lobbying for reforms along the lines of the Nordic Model which would see the women decriminalised and exit routes provided, while criminal charges are reserved for the men who exploit, use and abuse the women. We are in favour of this and we are very concerned by the push in some funded lobby groups to categorise “sex work” as a job like any other. VAWG groups like NIA²¹ have highlighted that the “normalisation, understatement and minimisation of rape and abuse masks the scale and extent of violence, coercion and abuse in prostitution.”²²
- 4.7. We maintain that a society that accepts the abuse and exploitation of women as part of a “job” is complicit in propagating violence and we hope to see that this important change is prioritised.
- 4.8. Beyond the gaps above, we believe that Scottish Law is replete with statutory offences which could be used to tackle crimes against women, including street harassment, were there the will to do so. An aggravator could be applied to any offence committed under the laws listed in the Annex which would mean that a range of offences potentially motivated by sexist malice could be tackled rather than a more narrow application.

²¹ [NIA - Ending Violence Against Women and Girls](#)

²² [Said by NIA](#), intervenors in Court of Appeal case re [carers helping find prostitutes for vulnerable people](#)

Annex - Current Law

Examples of current legislation to which a sex aggravator could be added (street harassment could be addressed by a number of these existing laws):

Common law breach of the peace - conduct severe enough to cause alarm to ordinary people and to threaten serious disturbance to the community

Common law issuing threats - written or oral threats of violence

Common law - assault (an attack on the person of another, with evil intent to either cause injury or fear of injury.),

There are degrees of aggravated assaults that take harm caused into account. In a rough reverse order of seriousness, they are:

Assault to injury (e.g. scratching / bruising)

Assault to severe injury (e.g. deep wounds, broken bones)

Assault to severe injury and permanent disfigurement (e.g. attacks that will leave permanent scarring)

Assault to severe injury and permanent impairment (e.g. loss of vision)

Assault to the danger of life (e.g. throwing someone out of a moving vehicle – the sort of assault that might endanger someone's life, whether or not any injuries were actually life-threatening)

You can assault someone without touching them. Gestures that cause fear of injury (e.g. brandishing a weapon at someone) can constitute assault.

Section 38 Criminal Justice and Licensing (Scotland) Act 2010 - behaving in a threatening or abusive manner likely to cause a reasonable person to suffer fear or alarm

Section 39 Criminal Justice and Licensing (Scotland) Act 2010 - engages in a course of conduct that amounts to stalking with intention/likely to/does cause fear or alarm

Section 8 Protection from Harassment Act 1997 - engages in a course of conduct that amounts to harassment ie. causes alarm or distress

Sexual Offences (Scotland) Act 2009 - rape, sexual assault, sexual coercion, communicating indecently, sexual exposure, voyeurism (inc upskirting)

Section 127(1) Communications Act 2003 - sends an electronic message that is grossly offensive or of an indecent, obscene or menacing character

Section 127(2) Communications Act 2003 - sends an electronic message that he knows to be false

Domestic Abuse (Scotland) Act 2018

Section 2 Abusive Behaviour and Sexual Harm (Scotland) Act 2016- deals with the so-called 'revenge porn' offence of disclosing or threatening to disclose an intimate photograph or film

Equality Act 2010 - discrimination, harassment, victimisation in work, education, political parties, larger membership organisations, some transport and some housing, services to the public and public functions

Section 46 Criminal Justice and Licensing (Scotland) Act 2010 - people trafficking

Section 47 Criminal Justice and Licensing (Scotland) Act 2010 - slavery, servitude and forced or compulsory labour

Vandalism - section 52 of the Criminal Law (Consolidation) (Scotland) Act 1995

Criminal Law (Consolidation) (Scotland) Act 1995 - procuring, prostitution, abduction

Prohibition of Female Genital Mutilation (Scotland) Act 2005

Forced Marriages etc (Protection and Jurisdiction) (Scotland) Act 2011

Common law:

Murder (any wilful act causing the destruction of life, whether wickedly intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences),

Fraud (dishonestly-made false pretence, in order to bring about a practical result), breach of the peace (conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community...conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person).

Theft