

Reforming the criminal law to address misogyny

A Scottish Government Consultation

March 2023

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Ministerial Foreword

Since the Scottish Parliament was established in 1999, Scotland has taken significant steps to improve how the justice system recognises and addresses violence against women and girls.

This has included criminal law reforms in relation to rape and other sexual offences:

- modernising the substantive criminal law;
- introducing restrictions on the use of sexual history and character evidence concerning complainers in sexual offence cases; and
- legislating for statutory jury directions, requiring judges to make clear that a delay in reporting a sexual crime, or an absence of physical resistance to an attacker, does not necessarily mean that an allegation is false.

In 2018, the Parliament passed the Domestic Abuse (Scotland) Act, creating a new offence to enable the prosecution of domestic abuse as a single offence, recognising domestic abuse as a course of conduct which frequently encompasses both physical and psychological abuse. Other reforms to improve how the criminal justice system addresses violence against women have included the creation of a specific offence of stalking and new law to criminalise the emerging problem of the non-consensual sharing of intimate images.

This work continues and in this Parliament we will introduce legislation to abolish the 'not proven' verdict, provide a statutory right of anonymity for victims of sexual crime and implement many of the recommendations of Lady Dorrian's review *Improving the Management of Sexual Offence Cases*.

As I set out in the Vision for Justice in Scotland, which was published in February 2022, the simple and unpalatable truth at the heart of the abuse and violence that women and girls face is that it continues to be underpinned by inequality, societal attitudes and structural barriers that perpetuate that inequality.

This includes the operation of the justice system. The current justice system was historically designed by men, for men, and therefore it must adapt to meet the needs of over half of our society. We must therefore take urgent action to ensure women and children are better serviced by our approaches to justice.

As Baroness Kennedy's report, *Misogyny, a Human Rights Issue* makes all too clear, it remains the case that women and girls are still all too often subjected to misogynistic harassment and abuse when out on the street, at work, and while online. Society as a whole, and the criminal justice system in particular, fails to fully recognise or adequately respond to the problem. Indeed, for all the progress that has been made, emerging issues like the increasingly poisonous nature of many online discussions and the ubiquity of pornography means that in some respects, the problem is actually worse than it has been before.

Baroness Kennedy's report made four specific recommendations for reform of the criminal law to enable the justice system to better respond to misogynistic behaviour

that is or ought to be considered criminal. We have considered carefully and this consultation proposes five new criminal laws to respond to these recommendations.

The approach that the report proposed is radical in that it recommends the creation of gendered law. In other words, criminal law that offers protection for women and girls and only women and girls.

In part, the reforms are about properly labelling misogynistic harassment and abuse for what it is. While there are a range of laws that can be used to prosecute misogynistic harassment and abuse in some circumstances, including threatening or abusive behaviour, stalking and breach of the peace, these more general offences do not accurately identify the particular harm caused by misogynistic harassment and abuse. Equally, victims may not always even be aware that the harassment and abuse that they experience is against the law and the creation of specific offences may help victims to have confidence that they can access justice when they experience behaviour of this kind.

The proposed reforms also expand the scope of the criminal law with regard to how it deals with misogynistic abuse, for example, expanding the requirement that certain forms of abuse and harassment must be likely to cause fear or alarm, to include behaviour likely to cause humiliation, degradation and distress. This can send an important signal that such behaviour is not merely rude, sexist or unpleasant, but abusive and criminal.

Of course, criminal law reform alone cannot be expected to eliminate misogynistic abuse, or the attitudes that drive such abuse, from society. However, it can play an important role in making clear when behaviour is unacceptable and should not be tolerated and in so doing, it can have an important part to play in changing public attitudes.

Experience of the development of the domestic abuse offence has demonstrated that when extending the criminal law into novel and innovative areas, consultation often works best in response to the sight of draft criminal law provisions. This enables those with an interest to offer views not only on the general principle of reforming the criminal law but on the detail of exactly where the line should be drawn as regards behaviour that amounts to a criminal offence.

This consultation seeks views on five legislative provisions drafted to implement the four recommendations for criminal law reform contained in Baroness Kennedy's report. Baroness Kennedy's report provided a compelling and depressing picture of why action is needed. This consultation suggests how Baroness Kennedy's intent can be delivered through specific criminal law reforms and I encourage everyone with an interest to consider what is proposed and offer views.

Keith Brown
Cabinet Secretary for Justice and Veterans

Responding to this consultation

We are inviting responses to this consultation by Friday 2 June 2023

You are not required to answer every question in the consultation. Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space. Access and respond to the consultation online at the [Reforming the criminal law to address misogyny](#) page of the gov.scot website.

You can save and return to your responses while the consultation is still open. Please ensure that your response is submitted before the closing date of Friday 2 June 2023.

If you are unable to respond using our consultation hub, please send your response along with a completed Respondent Information Form, which can be found at the end of the document, to us:

By email: misogyny.consultation@gov.scot

Or by post:

Reforming the criminal law to address misogyny
Criminal Law, Practice and Licensing Unit
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Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential and will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see [our privacy policy](#).

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at [Citizen Space](#). If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to misogyny.consultation@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online at [Citizen Space](#). Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision-making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- Indicate the need for policy development or review
- Inform the development of a particular policy
- Help decisions to be made between alternative policy proposals
- Be used to finalise legislation before it is implemented.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Introduction

In February 2021, the Scottish Government established an Independent Working Group on Misogyny and Criminal Justice in Scotland (“the Working Group”), chaired by Baroness Helena Kennedy QC. The Working Group was tasked with considering how the Scottish criminal justice system deals with misogyny, including looking at whether there are gaps in the law that could be addressed by a specific criminal offence to tackle such behaviour.

The establishment of the Working Group followed the publication in January 2019 of the first report of the First Minister’s National Advisory Council on Women and Girls, which included a recommendation to “*criminalise serious misogynistic harassment, filling gaps in existing laws.*”

The Working Group was also asked to consider whether the statutory aggravation by prejudice and/or stirring up of hatred offence contained in the Hate Crime and Public Order (Scotland) Act 2021 (“the 2021 Act”) should be extended to the characteristic of ‘sex’.

That Act contains a power to add ‘sex’ to the list of characteristics covered by the statutory aggravation and the stirring up of hatred offence by secondary legislation. This reflected the fact that Lord Bracadale’s [Independent Review of Hate Crime Legislation in Scotland](#), published in May 2018, which provided the blueprint for the Hate Crime and Public Order (Scotland) Act 2021, had recommended that there should be a statutory aggravation of ‘gender hostility’ and that there should be a stirring up hatred offence covering stirring up hatred of people because of their gender.

The Working Group examined a large body of evidence and research concerning women’s experience of misogynistic behaviours. This included gathering new evidence and insights via their survey of [Lived Experiences of Misogyny in Scotland](#) and seeking input from women’s groups, academics, policy experts and Police Scotland on key issues.

The Working Group sought first to agree a working definition of misogyny to inform its work. The definition it agreed is:

“Misogyny is a way of thinking that upholds the primary status of men and a sense of male entitlement, while subordinating women and limiting their power and freedom. Conduct based on this thinking can include a range of abusive and controlling behaviours including rape, sexual offences, harassment and bullying, and domestic abuse.”

The definition was deliberately non-legal and intended to provide the Working Group with a framework within which to consider the extent to which the criminal law currently protects women from misogynistic behaviour. In doing so, the Working Group took account of Scotland’s hate crime legislation and the broader concept of ‘hate crime’ and the extent to which that concept is a useful tool to address misogynistic behaviours.

The Working Group was guided by the vision and objectives of Equally Safe, Scotland's strategy for preventing and eradicating violence against women and girls. Equally Safe sets out a vision to prevent violence from occurring in the first place, build the capability and capacity of support services, and strengthen the justice response to victims and perpetrators. The strategy and responses are informed by the experience of victims and by the expertise of professionals working in the field.

The Working Group published its [final report](#) in March 2022 (hereafter referred to as 'the report'). The report recommends the creation of what it describes as 'gendered law' – which is specifically intended to protect women and girls. However, the report also notes that “our preferred view that no offence should be created that requires a woman to prove that she is a woman” and accordingly, the criminal offence provisions apply where the perpetrator perceives their victim to be a woman, irrespective as to the victim's sex or gender.

The report notes:

“When law is created which is designed to protect men as well as women, it usually creates a blur around the ways in which women's lives can be markedly different from those of men and an ignorance of the life experiences of women, in terms of threat and fear in the public space...the evidence is clear that there is a pressing social need to address behaviours **towards women**. The Working Group recognised that there are men who need protection from certain things, but that they do not need protection from public sexual harassment and misogyny.”

The report's specific recommendations for reform of the criminal law are:

- A new statutory aggravation to relate to misogynistic behaviour where a crime such as assault, criminal damage/vandalism or threatening or abusive behaviour is aggravated by misogyny;
- A new offence of stirring up hatred against women;
- A new offence of public misogynistic harassment of women; and
- A new offence of issuing threats of, or invoking, rape or sexual assault or disfigurement of women and girls online and offline.

The report recommends that, in keeping with the position that gendered law is required to address misogyny, the characteristic of 'sex' should not be added to the 2021 Act.

Purpose of consultation

The Scottish Government published its initial [response](#) to the report's findings in April 2022.

In that response, the Government accepted that the report's recommendations represent a new and necessary departure, in that they specify women and girls as requiring specific protection of the criminal law, and are pivotal in challenging society's tolerance of misogyny.

The response stated that the Government will consult on draft legislative provisions which give effect to the recommendations for criminal law reform contained in the report.

This approach has been taken in the light of experience of legislating in sensitive and novel areas of criminal law such as the domestic abuse offence. That experience clearly showed that in such areas, informed and insightful feedback is often best provided in response to the sight of specific draft criminal law provisions where possible. This is to allow the most detailed level of scrutiny by all those with an interest.

The timing of introduction of a final bill into the Scottish Parliament will be considered as part of wider legislative planning and the Government's future legislative programme will be set out in the Programme for Government in the usual way.

Insofar as possible, the approach that has been taken in developing the draft provisions has been to seek to implement as faithfully as practicable each of the specific recommendations made in the report.

However, the recommendations for reform to the criminal law are presented in the report at a high level and in a number of respects, the report does not set out in detail the criminal law policy underpinning its proposals at a level that provides a clear blueprint for developing specific provisions. There are also some areas where the process of developing draft provisions has led to a slightly different approach to that proposed in the report. Where that has happened, the difference in approach is explained.

A number of the issues on which we are seeking views on in the consultation are concerned with the detail of criminal law policy. We have sought as far as possible to present these in an accessible way. However, some of the issues explored in the consultation paper may be of interest primarily to those with a background in issues relating to criminal law and policy, especially as it relates to violence against women.

Chapter One

Recommendation: An offence of Public Misogynistic Harassment

At the end of the first part of this chapter and the second part of this chapter, there is a draft provision indicating how the Scottish Government have developed the recommendation into draft pieces of law. The text below provides a summary of what the report recommended, key issues in the development of the draft provision and questions. Readers may wish to consider the text below in conjunction with the relevant draft provision before considering the questions.

What the report recommends

The report recommends the creation of a new criminal offence of public misogynistic harassment. It recommends that it should be committed where a person engages in any sexual or abusive conduct which is likely to cause fear, alarm, humiliation, degradation or distress to a woman or women, where either the accused intends to cause that effect or is reckless as to the likely effect of the conduct.

The report recommends that the test of whether conduct is likely to cause fear, alarm, humiliation, degradation or distress to a woman or women should be objective and that it should not be necessary to prove that any woman or group of women actually suffered any of these effects and there should be no requirement that the conduct is directed towards a particular woman or group of women.

The report recommends that behaviour should be defined as being 'sexual' if a reasonable person would consider it to be sexual. The writers of the report note that the term 'abusive' is regularly interpreted by the courts and indicate that they do not think it requires further definition.

Approach taken in developing two separate offences

In considering the report's recommendation, we have come to the view that the offence which the report proposes to create is seeking to criminalise two quite different forms of behaviour.

The first can best be described as misogynistic harassment. That is to say misogynistic behaviour that is directed at a specific woman or girl, or group of women or girls, which amounts to harassment of that woman or girl, or group of women or girls.

Examples of behaviour of this kind cited in the report would include shouting sexually abusive remarks at a woman on the street, deliberately rubbing up against a woman in a crowded place, showing extreme pornography on a phone to a group of women in a nightclub or using abusive language to a girl who does not want to be 'chatted up'.

The second type of behaviour which the report considers should be covered by their proposed offence can be described as misogynistic behaviour which is not necessarily directed at any particular identifiable victim or group of victims.

Examples of behaviour of this kind cited in the report would include watching pornographic material in a public place where it is clearly visible or audible, or having loud, graphic sexual conversations about women in a public place where they can be heard by others. While it may well be that specific identifiable victims were caused to suffer fear, alarm, degradation, humiliation or distress by the behaviour, the behaviour is not directed at them by the perpetrator. It can best be thought of as a kind of public order offence like the offence of threatening or abusive behaviour, but specifically concerned with misogynistic behaviour.

We consider that these two different types of behaviour are sufficiently different that the working group's recommendation for an offence of 'public misogynistic harassment' can best be implemented by the creation of two distinct offences: an offence of misogynistic harassment and one of misogynistic behaviour.

This allows for better clarity as to the conduct being criminalised through the structure of each offence and for any statutory defences that might be required to be appropriately tailored to the specific conduct that each offence is intended to criminalise. These two proposed offences are considered in more detail below.

An offence of misogynistic harassment

This offence is intended to criminalise behaviour which is misogynistic and amounts to harassment of a particular person or group of people.

The structure of this offence is similar to that used for existing offences such as stalking at section 39 of the Criminal Justice and Licensing (Scotland) Act 2010) and abuse of a partner or ex-partner at section 1 of the Domestic Abuse (Scotland) Act 2018. It sets out a five-part test for when the offence is committed. The offence of misogynistic harassment is committed where the accused person:

- behaves in a manner that is threatening, sexual or abusive (or a combination of those things); and
- the behaviour is directed at a particular person or group of people; and
- it is so directed at that person or group of people by reason of their being, or one or more members of the group being, or presumed to be, a woman or girl; and
- a reasonable person would consider that the behaviour would be likely to have the effect of causing the person or a member of the group to suffer, fear, alarm, degradation, humiliation or distress; and
- the accused either intends their behaviour to have one of these effects, or else is reckless as to whether their behaviour is likely to have one or more of these effects on that person (there is no requirement that the behaviour must actually have this effect).

Requirement one - behaves in a manner that is threatening, sexual or abusive (or a combination of those things)

The first requirement is that the accused must behave in a manner that is threatening, abusive or sexual. The report did not recommend inclusion of 'threatening' behaviour in the offence and it might be argued that the great majority of behaviour that is 'threatening' would also be 'abusive'. However, we consider that it is possible that 'threatening' behaviour might not automatically be regarded as 'abusive'. It is worth remembering that the offence of 'threatening or abusive behaviour' refers both to 'threatening' and 'abusive' behaviour, which would not be necessary if 'threatening' behaviour could always be characterised as being abusive.

The inclusion of behaviour that is 'sexual', distinct from behaviour that is 'threatening' or 'abusive' reflects the fact that a great deal of misogynistic harassment experienced by women and girls is sexualised in nature. It is worth noting that all of the examples cited at page 58 of the report as being criminalised by the proposed offence have a 'sexual' element. While we think that much of this behaviour could also be described as 'abusive', including behaviour that is 'sexual' helps to ensure that the sexualised harassment will be captured by the offence without the requirement for the court to be satisfied that the behaviour is also abusive or threatening (providing, of course, that the other four tests set out above are met).

Requirement two - the behaviour is directed at a particular person or group of people

The second requirement restricts the offence to behaviour that can be characterised as harassment of either a person or group of people.

Requirement three – the behaviour is so directed at that person or group of people by reason of their being, or one or more members of the group being, or presumed to be, a woman or girl

The third requirement has been included in order to restrict the scope of the offence to behaviour that can be characterised as being misogynistic.

The report does not specifically state that there should be any requirement that the behaviour amounting to the offence must be misogynistic in character. However, we consider that not all behaviour that is threatening, sexual or abusive and likely to cause fear, alarm, distress, degradation or humiliation to a woman or girl (though not, necessarily, only a woman or girl) where the accused is at least reckless as to whether their behaviour would have that effect can necessarily be described as 'misogynistic'.

For example, if someone behaves in, say, a threatening way towards a woman or girl in the course of a dispute about money or service provided in a restaurant, such behaviour may not necessarily be misogynistic, and, depending on the circumstances of the particular case, it may be equally likely to be directed at a man or boy.

We consider that the key difference between behaviour that amounts to harassment that may be equally likely to be directed at men and women and boys and girls and harassment that is misogynistic in character is that it is behaviour that is directed at the victim, at least in part, *because* they are a woman or girl.

The provision at section 1(4) states that references to women and girls include references to women and girls "of a particular description or who are member of a particular group." It is intended to be a measure to prevent those accused of an offence being able to say that the behaviour was not directed at the victim because she was a woman, but because she was a particular type of woman or belonged to a particular sub-set or group of women. This reflects the Working Group's report which made clear that the way in which behaviour that stirs up hatred against women and girls manifests itself is usually directed at particular subsets of women and girls. We consider that the same issue arises with behaviour that amounts to misogynistic harassment of a woman or girl. The report states:

"It should be noted that often this stirring up of hatred presents as being hatred of a particular type of woman – a noisy woman, a successful woman, an opinionated woman. But the crime is about female identity. It is no defence to say "I only hate certain kinds of women – feminists, fat women or unfeminine women... Antagonism towards particular "kinds" of women ultimately denies the humanity of women as a whole."

This test is causation-based. Under it, it is immaterial what motivated the offender. It need only be shown that he would not have subjected a man to the same behaviour. It is worth noting that a test of this kind was recommended by the Law Commission

for England and Wales as regards their proposed offence of harassment on grounds of disability.

Requirement four – a reasonable person would consider that the behaviour would be likely to have the effect of causing the person or a member of the group to suffer, fear, alarm, degradation, humiliation or distress

The fourth requirement provides for a list of effects relevant to the operation of the offence which is as is proposed in the report.

It is a longer list of effects than that used in other similar offences which reflects the policy intent of capturing a wider range of behaviour.

This set of effects is intended to ensure that the offence can be used to prosecute behaviour directed at women and girls that is likely to cause a form of harm. If the behaviour is not likely to cause any of these harms, the offence is not committed.

The effects reflect the sort of responses that the Working Group identify in their report as being experienced by women subjected to misogynistic abuse, taking particular account of responses received to the Working Group's Lived Experiences of Misogyny in Scotland survey.

It is worth noting there is a range of existing Scots law offences that may be committed when the accused engages in behaviour that has or is likely to have one or more of these effects.

For example, the offence of "threatening or abusive behaviour" criminalises behaviour that is threatening or abusive and likely to cause a reasonable person to suffer fear or alarm. Certain sexual offences contained in the Sexual Offences (Scotland) Act 2009 criminalise behaviour that is intended to cause the victim to feel humiliation, alarm or distress. And the offence of 'abuse of a partner or ex-partner' at section 1 of the Domestic Abuse (Scotland) Act 2018 provides a definition of 'abusive behaviour' that includes behaviour which is intended to have the effect of, or which a reasonable person would think likely to have the effect of, frightening, humiliating, degrading, or punishing the victim.

This test, like that used for the offences of stalking and abuse of a partner or ex-partner, is focused on whether the accused's behaviour would be likely to cause one of these effects on the specific individual. As such, it ensures that where a perpetrator deliberately targets an especially vulnerable individual, they do not escape criminal liability because a hypothetical 'reasonable woman or girl' would not be likely to suffer one of the listed effects.

It is worth noting there is no need for the behaviour to actually have any of the relevant effects under requirement four. The test is whether a reasonable person would consider the behaviour likely to cause one or more of these harms to the victim.

Courts require some basis on which to decide whether an offence has been committed and in the absence of a 'reasonable person' test, the court would have to

take into account the subjective reaction of the victim and corroborated evidence of this would be required. A further disadvantage of a subjective approach is that where a victim is stoical and does not exhibit, for example, any obvious fear, alarm or distress (even where it would be quite reasonable for them to do so) a court may not feel able to convict. This may be even more of an obstacle where the behaviour causes degradation or humiliation and the victim may not react outwardly at all.

Requirement five - the accused either intends their behaviour to have one of these effects under requirement four, or else is reckless as to whether their behaviour is likely to have one or more of these effects under requirement four on that person (there is no requirement that the behaviour must actually have this effect).

The fifth requirement is similar to the test used in offences of stalking and abuse of a partner or ex-partner.

The offence does not require that the accused must intend to cause one of the listed harms to the victim. However, the requirement that the accused must be at least reckless as to whether their behaviour would be likely to cause one of these effects. This means that if the accused could not reasonably have expected or known that their behaviour would be likely to have such an effect (for example, because of a particular vulnerability of the complainant of which the accused was entirely unaware) then they would not commit the offence.

Question: Do you support the proposal to create an offence of ‘misogynistic harassment’ which relates to harassment of an identified victim or victims?

Question: Do you have any comments on the list of effects on the victim (fear, alarm, degradation, humiliation and distress) that trigger the offence being committed?

Should the offence be restricted to public places?

The report recommends that the offence should be committed where the behaviour is ‘public’. The report notes

“A ‘public place’ is generally determined by the Courts. But it would include, for example, public transport, restaurants, clubs, bars, foyers and reception areas of hotels and public venues, as well as online platforms. Some places of work may be deemed ‘public’.

It is worth noting that criminal offences which are committed in public places will usually, if not always, provide for a statutory definition of ‘public place’ setting out clearly where the offence can and cannot be committed.

We note that the kinds of behaviour intended to be criminalised by the offence of misogynistic harassment might be more likely to occur in private places. However, it is not clear why harassment occurring, for example, in a private workplace should not be criminal if exactly the same behaviour would amount to a criminal offence if it happened on the street, given that the same ill-effects of the behaviour could arise.

A similar position arises as regards misogynistic abuse occurring in an online environment. The distinction between public and private online spaces is not entirely clear-cut. Material posted on, for example, the 'comments' section of an online newspaper might be regarded as 'public' while messages sent via e-mail or a messaging application would probably be regarded private. Material posted on a website which is accessible only to people who are 'members' of that site falls somewhere between these two poles.

However, irrespective as to the circumstances in which an online space might be considered to be a 'public place', it is not clear that misogynistic abuse sent directly to someone using a private messaging application should be regarded as being any less serious, or likely to harm the person to whom it is sent, than misogynistic abuse published in a publicly accessible forum. Indeed, it might reasonably be argued that the reverse is true as such messages may be harder to ignore and amount to a greater invasion of a person's privacy in making a person feel like they have been targeted directly.

For these reasons, we consider that the offence of misogynistic harassment should be capable of being committed in all places with no distinction between what might be described as public spaces and private spaces.

Question: Do you agree that the offence of misogynistic harassment should be capable of being committed in all places?

Penalties – section 1(6)

The report recommends that the maximum penalty for its proposed offence of public misogynistic harassment should be 7 years imprisonment on conviction on indictment. The report does not set out the rationale for the proposed maximum penalty. However, it may be that this penalty has been chosen to align the maximum penalty for this offence with the maximum penalty for the offence of racially aggravated harassment at section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 (and re-enacted in the Hate Crime and Public Order (Scotland) Act 2021).

We have an open mind on what might an appropriate maximum penalty for the offence. Any penalty that is provided is of course a maximum and discretion would sit with the court to determine an appropriate sentence in any given case within whatever maximum sentence was provided for.

Question: Do you have any views on the proposed maximum penalty of 7 years imprisonment for the offence of misogynistic harassment?

Defences – section 2

As with the existing offences concerning stirring up hatred and the proposed offence of stirring up hatred against women, we have provided for a defence to the offence of misogynistic harassment that the accused's actions were, in the particular circumstances, reasonable.

A 'reasonableness defence' is provided for other offences which potentially cover many different kinds of behaviour, such as threatening or abusive behaviour, stalking and abuse of a partner or ex-partner, where it is not possible to exhaustively list all the different ways that the offence might be capable of being committed.

While it may be difficult to envisage circumstances in which behaviour meeting each of the five tests set out above would ever be 'reasonable', this provision ensures that where someone behaves in an objectively reasonable way, but their behaviour nonetheless technically amounts to the commission of the offence of misogynistic harassment, they are not criminalised by the offence.

The draft offence provides that there is an evidential burden placed on the accused to provide sufficient evidence to the court to raise an issue as to whether the defence is established. That means that if the accused wants to make use of this defence, they have to provide evidence to the court about why their behaviour was reasonable. If they do this, it is for the prosecutor to prove beyond reasonable doubt that their behaviour was not, in fact, reasonable.

Question: Do you have any comments about the inclusion of a reasonableness defence to the offence of misogynistic harassment?

Question: Do you have any other comments on the offence of misogynistic harassment?

Draft provision

1. Offence of misogynistic harassment

- (1) A person ("A") commits an offence if—
 - (a) A behaves in a manner which is threatening, sexual or abusive (or a combination of those things),
 - (b) the behaviour is directed at a particular person or particular group of people,
 - (c) the behaviour is so directed by reason of the person or one or more members of the group being (or being presumed by A to be) a woman or a girl,
 - (d) a reasonable person would consider that the behaviour would be likely to cause the person or a member of the group who is (or is presumed by A to be) a woman or a girl to suffer—
 - (i) fear,
 - (ii) alarm,
 - (iii) degradation,
 - (iv) humiliation, or
 - (v) distress, and
 - (e) A intends by the behaviour to cause a woman or girl harm of a type mentioned in paragraph (d) or is reckless as to whether the behaviour has that effect.
- (2) Behaviour—

- (a) includes behaviour of any kind, and in particular, things that A says, displays, shows, plays or otherwise communicates, as well as things that A does,
 - (b) may consist of—
 - (i) a single act, or
 - (ii) a course of conduct.
- (3) For the purposes of subsection (1)(a), behaviour is sexual if a reasonable person would consider—
- (a) the behaviour, or
 - (b) where the behaviour includes communicating, the content or material being communicated,
- to be sexual.
- (4) In this section, a reference to women and girls (however expressed) includes a reference to women or girls (or both)—
- (a) of a particular description or who are members of a particular group,
 - (b) who are presumed by A to be of a particular description or members of a particular group.
- (5) It is immaterial whether or not the behaviour is also (to any extent) directed at the person or group because of any other factor.
- (6) A person who commits an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), or
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or a fine (or both).

2 Defence on grounds of reasonableness

- (1) In proceedings for an offence under section 1(1), it is a defence for A to show that the behaviour was reasonable in the particular circumstances.
- (2) That is to be regarded as shown if—
 - (a) evidence adduced is enough to raise an issue as to whether the behaviour is as described in subsection (1), and
 - (b) the prosecution does not prove beyond reasonable doubt that the behaviour is not as described in subsection (1).

An Offence of Misogynistic Behaviour

This offence is intended to criminalise misogynistic behaviour that is not directed at a particular person or group of people and can be seen as a ‘public order’ offence concerned specifically with misogynistic behaviour.

This offence is committed where the accused person:

- behaves in a manner which is sexual or abusive (or both); and
- the behaviour is motivated (wholly or partly) by contempt or malice and ill-will towards women and girls or of a character such that a reasonable person would consider it to be contemptuous of women and girls; and
- the behaviour would be likely to cause a reasonable woman or girl to suffer fear, alarm, degradation, humiliation or distress; and
- the person intends by their behaviour to cause a woman or girl one of these effects, or else is reckless as to whether their behaviour has that effect.

The structure of this offence is somewhat similar to the existing offence of ‘threatening or abusive behaviour at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

There are four requirements for the offence to be committed.

The first requirement is that the accused must behave in a manner that is sexual or abusive. In contrast with the ‘misogynistic harassment’ offence, as this offence is not concerned with behaviour directed at a specific victim, we do not consider that it is logical to make provision relating to ‘threatening’ behaviour as we think this would always have to be directed at someone – the person who was threatened.

The second requirement is that the behaviour must either be motivated by contempt for or malice and ill-will towards women and girls, or else that it is of a character such that a reasonable person would consider it to be contemptuous of women and girls. This is intended to restrict the scope of the offence to behaviour that can be characterised as being misogynistic.

There is provision at section 1(5), which is equivalent to the provision at section 1(4) of the misogynistic harassment offence, which provides that references to women and girls include women and girls of a particular description or who are members of a particular group. As with that provision, it is intended to ensure that the offence is committed where the accused person is engaging in behaviour which is motivated by contempt or malice and ill-will towards, or is of a character which is contemptuous of, a particular type of woman or members of a particular sub-set or group of women.

This test is different from the test used for the offence of ‘misogynistic harassment’, reflecting the fact that the behaviour is not directed at any particular victim. It is intended to distinguish between behaviour that may be abusive but which is not obviously misogynistic, and behaviour which is misogynistic in nature.

An example of behaviour that may be abusive but which is not obviously misogynistic may be two groups of rival football fans behaving in an abusive way

towards each other where women and girls are present, such that women and girls (and men and boys) present may experience fear or alarm.

What the offence is intended to capture instead is behaviour which is misogynistic in nature, such as watching hardcore pornography in a public place such as bus or train, where women and girls are likely to see or hear it.

The third requirement is that the behaviour would be likely to cause a reasonable woman or girl to suffer fear, alarm, degradation, humiliation or distress. The list of 'effects' is the same as that which is proposed for the offence of 'misogynistic harassment' and is in line with what was proposed in the working group's report. This test differs from that used in the misogynistic harassment offence because the court is not required to consider whether a specific identifiable victim would be likely to suffer one of these effects. That being said, in deciding whether the offence has been committed, the court would require to consider whether there was any woman or girl present who could conceivably have suffered these effects.

The fourth requirement is that the person either intends by their behaviour to cause one of the listed effects to a woman or girl, or that they are reckless as to whether their behaviour has that effect. This is the same test as is proposed for the offence of misogynistic harassment.

Question: Do you support the proposal to create an offence of misogynistic behaviour which does not require that the behaviour is directed at a specific victim?

Question: Do you have any comments on the list of effects on the victim (fear, alarm, degradation, humiliation and distress) that trigger the offence being committed?

Should the offence be restricted to public conduct?

The report recommends that the offence should be committed where the behaviour is 'public'. The report notes

"A 'public place' is generally determined by the Courts. But it would include, for example, public transport, restaurants, clubs, bars, foyers and reception areas of hotels and public venues, as well as online platforms. Some places of work may be deemed 'public'."

In contrast with the offence of 'misogynistic harassment', it is perhaps less clear-cut whether the proposed offence of misogynistic behaviour, which is concerned with behaviour that is not directed at any specific person or group of people should extend to private as well as public places.

It is expected that in the great majority of cases, behaviour amounting to an offence under this section would be committed in a public place (for example, watching pornography on a bus where it can be seen or heard by other members of the public, or having graphic sexual conversations on a train where others will hear them).

However, it is possible that behaviour of this kind could occur in private places in circumstances where a criminal law response may be appropriate. This could include, for example, misogynistic abuse occurring at a large party in someone's home or conceivably someone engaging in misogynistic behaviour in their home which is intended to be visible or audible from a public place.

For these reasons, the proposal is that the offence of misogynistic behaviour should also be capable of being committed in all places i.e., both public and private spaces.

Question: Do you agree that the offence of misogynistic behaviour should be capable of being committed in both private and public places?

Penalties - section 1(6)

The report recommends that the maximum penalty for its proposed offence of public misogynistic harassment should be 7 years imprisonment on conviction on indictment. The report does not set out the rationale for the proposed maximum penalty. However, it may be that this penalty has been chosen to align the maximum penalty for this offence with the maximum penalty for the offence of racially aggravated harassment at section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 (and re-enacted in the Hate Crime and Public Order (Scotland) Act 2021.)

The report did not, of course, consider whether a different penalty should apply for offending which is not directed at a specific identifiable victim. For the purpose of the consultation, it is provided that this shall be the maximum penalty for both the offence of misogynistic harassment and the offence of misogynistic behaviour. Both of the offences potentially cover a wide range of offending behaviour.

However, it could be argued that the offence of misogynistic harassment, which is concerned with behaviour targeted at a specific identifiable victim or group of victims, has the potential to involve more serious offending behaviour than the offence of misogynistic behaviour and views are welcomed on whether this should be reflected in the maximum penalties available to the courts for each of the offences.

Question: Do you have any views on the proposed maximum penalty of 7 years imprisonment for the offence of misogynistic behaviour?

Defences – section 2

As with the existing offences concerning stirring up hatred and the proposed offence of stirring up hatred against women, a defence is provided to the offence of misogynistic behaviour that the accused's actions were, in the particular circumstances, reasonable.

As with the offence of 'misogynistic harassment', a 'reasonableness defence' is provided for other offences which potentially cover a wide swathe of different kinds of behaviour, such as threatening or abusive behaviour, stalking and abuse of a partner or ex-partner and it is not possible to exhaustively list all the different ways that the offence might be capable of being committed.

While it may be difficult to envisage circumstances in which behaviour meeting each of the four tests set out above would ever be 'reasonable', this provision ensures that where someone behaves in an objectively reasonable way, but their behaviour nonetheless technically amounts to the commission of the offence of misogynistic behaviour, they are not criminalised by the offence.

Question: Do you have any comments about the inclusion of a reasonableness defence to the offence of misogynistic behaviour?

Freedom of expression – section 3

In keeping with the proposed offence of 'stirring up hatred against women and girls' which does not require behaviour which is targeted at a specific identifiable victim, provision has been made protecting freedom of expression reflecting the nature of the offence as not requiring to be targeted at a specific identifiable victim.

The draft misogynistic behaviour offence is limited to behaviour which is sexual or abusive and likely to cause fear, alarm, degradation, humiliation or distress to a reasonable woman or girl.

The purpose of the offence is not to interfere with a person's ability to freely debate issues concerning, or relating to, women and girls. However, in light of concerns raised during the passage of the 2021 Act, the approach has been taken to make bespoke provision, similar to that contained within section 9 of the 2021 Act, which makes clear for the avoidance of doubt, that behaviour or material is not to be taken to be sexual or abusive solely on the basis that it involves or includes discussion or criticism of issues relating to women and girls.

This ensures, for the avoidance of doubt, that criticism of, for example, equal pay for women or the right to maternity leave would not, in and of itself, be considered to be abusive. Something more is required for any such discussion or criticism to be taken to be sexual or abusive. For example, if it were proved that a reasonable person would consider that the criticism was expressed in a sexual or abusive way, or the material containing the criticism also included other sexual or abusive comments, it could still be taken to be behaviour or material that is sexual or abusive and therefore satisfy the first element of the offence. For the offence to be committed, however, the other elements of the offence would also have to be proved beyond reasonable doubt.

Question: Do you have any comments about the inclusion of a freedom of expression provision setting out, for the avoidance of doubt, that certain behaviour does not constitute an offence of misogynistic behaviour?

Question: Do you have any other comments on the offence of misogynistic behaviour?

Draft provision

1 Offence of misogynistic behaviour

- (1) A person commits an offence if—
 - (a) the person behaves in a manner which is sexual or abusive (or both),
 - (b) the behaviour is—
 - (i) motivated (wholly or partly) by contempt, or malice and ill-will, toward women and girls, or
 - (ii) of a character such that a reasonable person would consider it to be contemptuous of women and girls.
 - (c) the behaviour would be likely to cause a reasonable woman or girl to suffer—
 - (i) fear,
 - (ii) alarm,
 - (iii) degradation,
 - (iv) humiliation, or
 - (v) distress, and
 - (d) the person intends by the behaviour to cause a woman or girl harm of a type mentioned in paragraph (c) or is reckless as to whether the behaviour has that effect.
- (2) Behaviour—
 - (a) includes behaviour of any kind, and in particular, things that the person says, displays, shows, plays or otherwise communicates, as well as things that the person does,
 - (b) may consist of—
 - (i) a single act, or
 - (ii) a course of conduct.
- (3) For the purposes of subsection (1)(a), behaviour is sexual if a reasonable person would consider—
 - (a) the behaviour, or
 - (b) where the behaviour includes communicating, the content or material being communicated,to be sexual.
- (4) The harm mentioned in subsection (1)(c) need not be likely to be exclusively suffered by women and girls.
- (5) In this section, a reference to women and girls (however expressed) includes a reference to women or girls (or both)—
 - (a) of a particular description or who are members of a particular group,
 - (b) who are presumed by the offender to be of a particular description or members of a particular group.

- (6) A person who commits an offence under this section is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), or
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or a fine (or both).

2 Defence on grounds of reasonableness

- (1) In proceedings for an offence under section 1(1), it is a defence for the person to show that the behaviour was reasonable in the particular circumstances.
- (2) That is to be regarded as shown if—
 - (a) evidence adduced is enough to raise an issue as to whether the behaviour is as described in subsection (1), and
 - (b) the prosecution does not prove beyond reasonable doubt that the behaviour is not as described in subsection (1).

3 Protection of freedom of expression for the purposes of the offence of misogynistic behaviour

For the purposes of section 1, behaviour is not to be taken to be sexual or abusive solely on the basis that it involves or includes discussion or criticism of matters relating to women and girls.

Chapter Two

Recommendation: An offence of Issuing Threats of, or Invoking, Rape or Sexual Assault or Disfigurement of Women and Girls online and offline

At the end of the chapter, there is a draft provision indicating how the Scottish Government have developed the recommendation into draft law. The text below provides a summary of what the report recommended, key issues in the development of the draft provision and questions. Readers may wish to consider the text below in conjunction with the draft provision before considering the questions.

What the report recommends

The report recommends making it a specific offence to issue threats of, or invoke, rape or sexual assault or disfigurement to women and girls. The report notes that while the majority of this conduct is likely to occur online, the offence should be capable of being committed both online and offline.

The report recommends that it should not be necessary to prove that the conduct had a particular impact on the person or people towards whom it was directed, nor should it be necessary to consider what the accused's intention was in determining whether the offence has been committed. This means there should be no need to prove that the accused intended to cause, or was reckless as to whether their communication would be likely to cause, for example, distress to its recipient. The conduct in and of itself should be sufficient for the offence to be committed.

Discussion

The report highlights the problem of issuing threats of, or invoking, rape, sexual assault or disfigurement against women and girls. They consider that such behaviour falls firmly within the report's definition of misogyny and recommend that a specific offence is created to criminalise threats of rape, sexually assault or disfigure directed at women and girls, and the invoking of these harms which they describe as *"the use of the language of male violence, which is used to reinforce the subordinate status of women."*

Consideration of the existing law

Some behaviour of the kind which this offence seeks to criminalise is likely to be criminal under the existing law. Making a direct and credible threat to physically assault or otherwise harm someone, including threats of rape, sexual assault or disfigurement, can be prosecuted using the common law offence of 'uttering threats'.

In practice, the common law offence of 'uttering threats' is rarely prosecuted and the kinds of threats described in the report are more likely to be prosecuted using the offence of 'threatening or abusive behaviour' at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. This makes it an offence for a person to behave in a 'threatening or abusive' manner where the behaviour would be likely to cause a reasonable person to suffer "fear or alarm". In contrast with the common law offence of 'breach of the peace' it can be committed in a public or a private place.

For the common law offence of uttering threats, the Stair Memorial Encyclopaedia 'The Laws of Scotland' states that the mens rea is "probably intention to cause fear and alarm either per se or with a view to obtaining the victim's complaint response to what is demanded. It will probably be inferred from the tenor of the threat.". The lack of certainty about the scope of the common law offence is perhaps reflected in the fact that few uttering offences are recorded each year.

Where threats are prosecuted using the offence of threatening or abusive behaviour, the person making the threat must either intend to cause the recipient(s) fear or alarm or, failing that, be reckless as to whether they will do so.

While there is no requirement for either offence that the accused intends to carry out the threat, fear of a threat being carried out is likely to be relevant to the question of whether the threat is likely to cause a reasonable person fear or alarm.

The new offence recommended by the report is different from the existing offences because there is no requirement that the perpetrator either intends their behaviour to cause, or is reckless as to whether their behaviour would be likely to cause, the recipient of the threat to experience fear or alarm.

On its own, this is unlikely to significantly change the circumstances in which making a threat of rape, sexual assault or disfigurement would amount to a criminal offence. This is because there are probably only limited circumstances in which a person can make a threat of, for example, rape which is likely to cause fear or alarm, where they are not, at least, reckless as to whether the threat is likely to cause fear or alarm.

However, a further important aspect of the offence which the report proposes is that it has no requirement for the threat to be likely to cause a reasonable person fear or alarm.

Taken together, these features make the offence proposed in the report significantly wider in scope than the existing law.

The extension of the criminal law to what the report describes as 'invoking' rape, sexual assault or disfigurement of women and girls represents a more significant extension of the existing criminal law.

At present, in some circumstances, making such comments might amount to an offence of 'threatening or abusive behaviour'. This would depend both on whether the court is satisfied that the comments could be characterised as 'threatening or abusive' and whether the communicating of the comments would, in the circumstances, be likely to cause fear or alarm to a reasonable person and that the sender was, at least, reckless as to whether their behaviour would be likely to have this effect.

Where this test is not met, if the message is sent using the internet, it may be possible to prosecute using the offence of 'improper use of a public electronic communications network' at section 127 of the Communications Act 2003, which criminalises sending messages which are grossly offensive or of an indecent,

obscene or menacing character (though it is worth noting the maximum penalty of 6 months imprisonment is considerably lower than for the offence of threatening or abusive behaviour).

The report recommended creating an offence of public misogynistic harassment. As set out above, the draft offence to implement this recommendation that we are consulting on does not require a 'public' element. As such, conveying threatening or abusive messages concerning rape, sexual assault or disfigurement would be likely also amount to the proposed offence of misogynistic harassment. This would depend on the message being likely to cause fear, alarm, degradation, humiliation or distress to the recipient but the test is wider than that which applies in respect of the offence of threatening or abusive behaviour which applies only where the behaviour is likely to cause fear or alarm to a reasonable person.

Even if it is likely that much of the behaviour covered by the offence proposed in the report would amount to one or more of a number of existing criminal offences, it could be argued that it is helpful to legislate for a specific offence, either in order to be clear, including to victims, that such behaviour is criminal, or to enable the collection of accurate data about the extent of this behaviour, or both.

Question: Do you support the proposal to create a specific offence of 'threatening or abusive communications to women and girls which reference rape, sexual assault or disfigurement'?

The offence

The offence on which we are consulting is one of 'threatening or abusive communications to women and girls which reference rape, sexual assault or disfigurement'. It is committed where a person knowingly conveys a message which is

- threatening or abusive or both to a person who is, or is presumed to be, a woman or girl; and
- the message makes reference to rape, sexual assault, disfigurement, violence likely to result in disfigurement, or a combination of those things.

What is meant by 'invoking'?

In considering the Working Group's recommendation, we reached the view that the use of the term 'invoking' of rape, sexual assault or disfigurement of women and girls did not make sufficiently clear exactly what the behaviour that the offence seeks to criminalise actually is. 'Invoke' is defined in the Merriam-Webster dictionary as meaning:

- a: to petition for help or support
- b: to appeal to or cite as authority
- c: to call forth by incantation
- d: to make an earnest request for
- e: to put into effect or operation
- f: to bring about or cause

It is not clear what exactly would amount to ‘invoking’ rape, sexual assault or disfigurement. It must mean something more than simply to refer to these terms. It is not the intention of the Working Group that it should be an offence to send any message to a woman or girl that refers to or relates to rape, sexual assault or disfigurement. Such a widely drawn offence could inadvertently criminalise, for example, someone organising a campaign *against* violence against women and girls or providing information to victims of rape or sexual assault.

In seeking to clearly define what it is that the Working Group wish the offence to criminalise, we have given careful consideration to the examples of the kinds of messages they are seeking to criminalise that they set out in the report:

- “someone should slash that pretty little face of yours you fucking bitch”
- “I’d love to watch you getting your fucking teeth kicked in, you slut”
- “You need to be raped”
- “Somebody should rape you”
- “#Iwouldnteven rape [woman’s name]”
- “Anyone want to fuck [woman’s name] with me?”
- “A good spit-roasting is what you need”

Some of these examples are direct threats of rape, sexual assault or disfigurement. Others, while not direct threats, can certainly be characterised as being threatening. However, we consider that what links all these examples is that they can be described as threatening or abusive (or both).

As such, the draft provision gives effect to the Working Group’s recommendation by criminalising the conveying of a message which is threatening, or abusive, or both and makes reference to rape, sexual assault, disfigurement, violence likely to result in disfigurement or a combination of these things.

Question: Do you agree that with our approach to implementing the working group’s recommendation that the offence is committed where a message is threatening or abusive, or both, and makes reference to rape, sexual assault or disfigurement?

Conveying a message

The kinds of circumstances in which such abusive messages referencing rape, sexual assault and disfigurement of women and girls are sent are not limited to circumstances in which the message is sent directly to the victim. In cases where the offence is committed online, in particular, the message may be posted on a website in circumstances where the person to whom the message relates is likely to see it otherwise be made aware of its existence. This is just as likely to have an adverse effect on the victim as if the message had been sent directly to them.

With this in mind, the offence has been drafted so that it is committed where a person conveys a message that is threatening or abusive to a person who is presumed to be a woman or girl. There is no requirement that the message must be sent directly to them, although it is proposed that there should be a defence of

'improbability' where there was no reason to believe the message would be seen or heard by the person in respect of whom it is threatening or abusive.

The term 'convey' is defined widely at section 1(3) so as to include saying, sending, directing, publishing, showing, playing, making available, demonstrating or otherwise communicating a message.

The term 'message' is also defined widely so as to include statements, comments, expressions whether verbal or written, recorded or unrecorded by words or representations – reflecting the different forms that such a message may take (spoken word, written word, still photograph or video, for example).

Definition of rape, sexual assault and disfigurement

The offence does not define the terms 'rape', 'sexual assault' and 'disfigurement'. It is considered that courts will be able to determine whether an act that is referred to is one of rape or sexual assault.

However, with regard to the question of what a threat of disfigurement, or a threatening or abusive message referencing disfigurement is, it is worth noting that it will not always be clear whether a threat of, or reference to, violence, is or is not a threat of disfigurement. Many threats of violence will carry an implied threat of disfigurement, even if the extent to which there is an explicit threat of disfigurement may vary. Compare for example:

- "I'm going to smash your face in"
- "I'm going to smash your pretty little face in"
- "I'm going to smash your pretty little face in so you look like Frankenstein's monster"

For this reason, we have provided that the offence is committed both where the message refers directly to disfigurement and where it refers to violence likely to result in disfigurement.

This does mean it could bring within the scope of the offence some threats of violence which are not intended primarily to be threats of disfigurement, but we consider that this is preferable to requiring the court to determine on a case-by-case basis whether or not, or to what extent, a threat of violence is or is not intended by the person conveying the message to be a threat of disfigurement.

An alternative approach would be to very narrowly frame the offence as one concerned only with *explicit* threats of disfigurement. However, it is considered that this would result in many threats of violence which are intended primarily to be threats of disfigurement being excluded from the scope of the offence on the grounds that they do not directly refer to the disfiguring consequences of the violence that is threatened.

The message does not have to threaten or refer to the rape, sexual assault or disfigurement of the person to whom it is sent. This ensures that a person cannot avoid prosecution by, for example, sending an image showing the rape, sexual

assault or disfigurement of a third party which might in effect be a thinly veiled threat of these harms to the person to whom it has been sent.

Question: Do you have any comments on the approach taken in the draft offence to the harms of rape, sexual assault and disfigurement?

How the offence can be committed – section 1(1)-1(3)

The report recommended that the offence should be one of threatening or invoking rape, sexual assault or disfigurement of women and girls. The draft offence provides that the offence is committed where the accused conveys such a message to a woman or girl, irrespective of any belief the accused may have about that person's identity, or where the accused conveys the message to someone whom they presume to be a woman or girl.

This approach is likely to be of particular value in an online environment especially where many users are anonymous and/or use pseudonyms, a person sending such a message may not know the identity of the person with whom they are communicating. However, it may be that the very nature of the message that they have sent to them in itself demonstrates that they believed that the person to whom they had conveyed the message was a woman or girl. Equally, we do not think it should be a defence where a person conveys a message of rape, sexual assault or disfigurement to someone who is in fact a woman or girl that they believed the person with whom they are communicating to have been a man or boy.

Question: Do you have any comments on the approach taken in the draft offence as regards the two different ways in which the offence can be committed?

Defences – sections 2 and 3

Two defences are provided to the offence.

The first is a defence of 'reasonableness'. It is considered that a defence of reasonableness is important for this offence because of the absence of any need for the accused to have a particular intention in conveying a threatening or abusive message that refers to rape, sexual assault or disfigurement of a woman or girl. The defence may be relevant if, for instance, a person conveys such a message with the intention of making them aware that a third party has made such a threat against them.

The second is a defence of 'improbability'. This provides that it is a defence to the offence that the accused is able to show that there was no reason to believe that the statement would be seen or heard by the person to whom it relates.

The offence is concerned with sending threatening and abusive messages referring to the rape, sexual assault or disfigurement of women and girls. This is different to the situation where a person sends a message via, for example, a private communications channel such as e-mail to a third party with no expectation or reason to believe that the message would ever be seen by the person to whom it relates. Such behaviour, while potentially both misogynistic and distasteful, is not

equivalent to conveying such a message in a way where it is either the accused's intention that the person to whom it relates will see it, or at the very least, it is possible that they may see it (e.g. because the message has been published on an internet site where it can be viewed by members of the public).

Question: Do you have any comments on the proposed defences to the offence?

The maximum penalty on conviction on indictment for this offence is 5 years imprisonment. This is in line with the existing offence of 'threatening or abusive behaviour' and with offences of indecent communication or coercing a person to view a sexual image, in the Sexual Offences (Scotland) Act 2009.

Question: Do you have any comments on the proposed maximum penalty of 5 years for the offence?

Question: Do you have any other comments on the proposed offence?

Draft provision

1. Offence of threatening or abusive communications to women and girls which reference rape, sexual assault or disfigurement

- (1) A person commits an offence if the person knowingly conveys a message which—
 - (a) is threatening or abusive (or both) to a person who is or is presumed to be a woman or girl, and
 - (b) makes reference to—
 - (i) rape,
 - (ii) sexual assault,
 - (iii) disfigurement,
 - (iv) violence likely to result in disfigurement, or
 - (v) a combination of those things.
- (2) For the purposes of subsection (1), it does not matter whether or not the rape, sexual assault or disfigurement mentioned in paragraph (b) of that subsection is of, or in relation, to the person mentioned in paragraph (a) of that subsection.
- (3) In this section—

"conveys" includes says, sends, directs, publishes, shows, displays, plays, makes available, demonstrates or otherwise communicates, as well as things that the person does,

"message" means a statement, comment or expression, whether verbal or written, recorded or unrecorded, by words or representations,

"presumed to be a woman or girl" means presumed to be a woman or a girl by the person conveying the message.
- (4) A person who commits an offence under this section is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), or
- (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

2. Defence on grounds of reasonableness

- (1) In proceedings for an offence under section 1(1), it is a defence for the person to show that the behaviour was reasonable in the particular circumstances.
- (2) That is to be regarded as shown if—
 - (a) evidence adduced is enough to raise an issue as to whether the behaviour is as described in subsection (1), and
 - (b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (1).

3 Defence of improbability

In proceedings for an offence under section 1(1), it is a defence for the person to show that there was no reason to believe that the statement would be seen or heard by the person mentioned in section 1(1)(a).

Chapter Three

Recommendation: A new Statutory Aggravation relating to Misogyny, where crimes that are not excluded are aggravated by misogyny

At the end of the chapter, there is a draft provision indicating how the Scottish Government have developed the recommendation into draft law. The text below provides a summary of what the report recommended, key issues in the development of the draft provision and questions. Readers may wish to consider the text below in conjunction with the draft provision before considering the questions.

What the report recommends

The report recommends the creation of a new statutory aggravation relating to misogyny to enable a judge to take account of the misogynistic nature of the conduct when sentencing. It recommends that the aggravation should define misogyny as being 'prejudice, malice or contempt towards women.' It proposes the addition of 'contempt', which is not featured in the existing statutory 'hate crime' aggravations, because they consider that it speaks to denigration, disrespect or scorn towards women which holds them in a subordinate position.

It notes that the existing 'hate crime' aggravations extend to circumstances where the perpetrator targets a victim of a crime because of their perceived membership of a group as well as their actual membership of a group and consider that the misogyny aggravation should operate in the same way. This would mean that if a person is targeted by an offender because of their hatred of women and the perpetrator perceives them to be a woman, then the aggravation could still be libelled even if the victim is not, in fact, a woman.

The report proposes that there should be a carve-out of crimes where the misogynistic element is already recognised and will therefore already be taken into account when sentencing the offender. It states that these crimes should be rape, other sexual offences and domestic abuse, defined as either the offence of 'abuse of a partner or ex-partner' at section 1 of the Domestic Abuse (Scotland) Act 2018 or any offence in respect of which the 'domestic abuse' aggravation at section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 has been proven.

The report recommends that the court should be able to take into account the aggravation when sentencing and record what difference, if any, the aggravation made. Where there is no difference, the court should state the reasons.

Discussion

Statutory Sentencing Aggravations

There are a number of statutory aggravations currently in effect in Scots law.

For example, the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 provides for a statutory aggravation that an offence is aggravated by involving abuse of a

person's partner or ex-partner where the person, in committing the offence, either intended to cause, or was reckless as to whether their actions would cause, physical or psychological harm to their partner or ex-partner.

The 2021 Act provides for a statutory aggravation by prejudice where the offender demonstrates malice or ill-will based on the victim's race, religion, sexual orientation, transgender identity, age, disability or variations in sex characteristics or where the offence is motivated by such malice and ill-will.

In either of these examples, the underlying offence to which the aggravation applies could, for example, be an assault or behaviour amounting to the offence of 'threatening or abusive behaviour'. While evidence of the offence requires to be corroborated, evidence from a single source is sufficient to establish the aggravation.

Statutory aggravations are useful in identifying and recording the nature of, or motivation for, a particular offender's behaviour. For example, that an offence of assault or threatening or abusive behaviour was aggravated by amounting to abuse of the offender's partner or ex-partner, or an offence of assault was aggravated because it was motivated by prejudice against, for example, the victim's race, religion or sexual orientation. The fact that an offence was so aggravated will be recorded on an offender's criminal record and, subject to the usual rules governing the disclosure of information about spent convictions, may be disclosed when considering, for example, a person's suitability for a job or voluntary role.

Statutory aggravations also provide a formal means of ensuring that where an offence has been so aggravated, this is accounted for in determining the appropriate sentence for the offender. The fact that an offence is aggravated in this way does not change the maximum penalty that is available to the court in sentencing an offender, but where an offence is proven to have been aggravated in this way, the court must take that into account when determining sentence.

The proposed statutory aggravation in relation to misogyny is similar in its purpose to the 'hate crime' aggravations contained in 2021 Act. In both cases, the aggravation will apply where the offender demonstrated, or was motivated by prejudice in committing the offence.

Lord Bracadale's Independent Review of Hate Crime

Lord Bracadale's Final Report on his Independent Review of Hate Crime Legislation in Scotland recommended the creation of a new statutory aggravation of 'gender hostility'. The report said:

" I...am recommending a new statutory aggravation based on gender hostility following the pattern used in the existing statutory aggravations for race, religion, disability, sexual orientation and transgender identity. Where an offence is committed, and it is proved that the offence was motivated by hostility based on gender, or the offender demonstrates hostility towards the victim based on gender during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by gender hostility."

However, when the Scottish Government consulted on the proposal for an aggravation of 'gender hostility' contained in Lord Bracadale's report, a number of women's organisations were strongly opposed to this approach, calling for the development of a standalone offence for misogynistic harassment outwith hate crime legislation. They were concerned that creating a gender aggravation would lead to a failure to deal effectively with violence against women and girls, and they were not convinced that the hate crime framework provides an appropriate model for dealing with gender-based violence. In view of this, the Hate Crime and Public Order (Scotland) Bill did not make provision for a statutory aggravation of 'gender hostility'.

The 2021 Act contains a power to add 'sex' to the list of statutory aggravations as a characteristic. Baroness Kennedy's Working Group was asked to consider whether 'sex' should be added to the list of characteristics in respect of which the provisions in the 2021 Act have effect.

The report concluded that a 'sex' aggravation should not be added to the 2021 Act. The report notes that there is no pervasive male-sex equivalent to misogyny and adding 'sex' to the 2021 Act would not be in keeping with the report's overall approach that specific, gendered laws are required to protect women from misogynistic behaviour.

The report instead recommends the creation of a statutory aggravation relating to misogyny. It is similar in its purpose to the hate crime aggravations contained in the 2021 Act. In both cases, the aggravation will apply where the offender has demonstrated, or was motivated by, prejudice in committing the offence. However, the report recommends that the aggravation should relate specifically to misogyny rather than being 'gender neutral' and the report also recommends using a slightly different test for determining whether behaviour was motivated by, or demonstrates, prejudice. This is considered further below.

Question: Do you support the recommendation that there should be a statutory sentencing aggravation relating to misogyny?

The test for determining whether an offence is aggravated by misogyny - sections 1(1)-1(4)

Whilst the report defines misogyny for the purposes of the aggravation, it does not state the precise relationship required between the offending behaviour and the offender's misogyny. The approach adopted in the draft legal provision, which appears at the end of this chapter, follows the formulation of the statutory aggravation in section 1 of the 2021 Act: an offence is aggravated by misogyny where the offender demonstrates the requisite mindset towards the particular victim based on her being a woman or girl or is motivated by the requisite mindset toward women and girls.

As with the aggravations in the 2021 Act, there are two ways that this test can be met. The first is that, where there is a specific victim of the offence, the offender demonstrates contempt or malice and ill-will towards the victim and the contempt or malice and ill-will is based in the victim being or being presumed to by the offender to be a woman or girl. The second is that, whether or not there is a specific victim of

the offence, the offence is motivated, wholly or partly, by contempt or malice and ill-will towards women and girls.

The provision at section 1(4) ensures that the aggravation applies not only where the offender demonstrates or is motivated by contempt for or malice and ill-will towards women and girls, generally, but also where they are motivated by contempt for malice and ill-will towards a particular group of women and girls or women and girls of a particular description – e.g. outspoken women, or women who dress conservatively or provocatively.

The report advises that the aggravation defines misogyny as "prejudice and/or malice and/or contempt towards women". The approach that is taken in the draft provision is slightly different. It does not define misogyny as such but uses the report's definition of misogyny as an articulation of the mindset that needs to be present for the aggravation to apply. The draft provision does not refer to 'prejudice'. The reason for this is that 'prejudice' is an umbrella term which can be used to generally describe the negative feelings about women and girls that may motivate a person to commit a criminal offence or be demonstrated by a person in committing a criminal offence but which is not sufficiently specific to describe the necessary mindset. It is worth noting that while the provision at section 1 of the 2021 Act is titled 'Aggravation of offences by prejudice', the term 'prejudice' is not used in the test that determines whether an offence is aggravated in this way.

While prejudice is wider in its meaning than 'malice', 'ill-will' or 'contempt' in that it can encompass discriminatory views that are 'milder' than 'malice', 'ill-will' or 'contempt' (e.g. a belief that women are not as suited as men to certain roles in society or the workplace) it doesn't appear that such beliefs, on their own, could motivate or be demonstrated by a person committing a criminal offence, without there also being malice etc. present.

The definition recommended in the report differs from the existing statutory 'hate crime' aggravation in that it incorporates reference to "contempt" in addition to "malice and ill-will". The report states that

“...We add 'contempt' (which is not a feature of the traditional hate crime framework) as it speaks to denigration, disrespect or scorn towards women, which holds them in a subordinate position.”

It is not immediately obvious that extending the scope of the aggravation to include contempt has a significant practical impact as regards when the aggravation could be proven. Before the aggravation can become relevant, the accused must commit a criminal offence. It is likely that there will be few circumstances in which a person committing a criminal offence might be said to demonstrate 'contempt' for, but not 'malice or ill-will' towards, the victim, because they were a woman or girl, particularly given the type of offences which are to be excluded from the scope of the aggravation.

However, it might enable the aggravation to be used to deal with certain kinds of stalking behaviour where the offender does not demonstrate overt malice or ill-will

but their behaviour could be said to demonstrate contempt for the victim based on their being a woman or girl.

It might also be helpful where an offender assaults or threatens a male victim of a crime because of, for example, their support for women's rights. In such circumstances, the offender's malice and ill-will would appear to be directed at the (male) victim of the offence, but where it is proven that they attacked the (male) victim because of their support for women's rights, it might be argued that they were motivated by contempt towards women and girls.

It should be noted that, in contrast with the aggravation provisions at section 1 of the 2021 Act, this statutory aggravation does not explicitly extend to persons associated with women and girls in the same way that the 2021 Act provision extends to people associated with the groups covered by the aggravation. The reason is that, in contrast with the situation that may pertain to many of the characteristics covered by the 2021 Act provision, almost everyone, whether or not they are themselves a woman or girl, will have some degree of association with women or girls.

The offence could be committed against a man or boy whom the perpetrator had mistakenly believed to be a woman or girl. However, in the event that a person commits a criminal offence against someone whom they knew to be a man or boy and it can be proven that they were motivated to do so by contempt, malice or ill-will towards women and girls (for example, because the victim was targeted as a high profile supporter of women's rights), the misogyny aggravation could apply.

The report does not specifically recommend that 'ill-will' be included within the definition of the aggravation. However, this term is used in all the existing statutory 'hate crime' aggravations and we consider the term is well-understood by the courts. The draft aggravation therefore uses a 'test' which refers to 'contempt, or malice or ill-will' and therefore allows for two possible alternative but not necessarily mutually exclusive mindsets.

Question: Do you agree with the approach contained in the draft provision that an offence is aggravated in the following two situations; namely if:

- the offender demonstrates contempt, or malice and ill will towards the victim and that is based on the victim being or being presumed by the offender to be a woman or girl; or
- whether or not there is a specific victim of the offence, the offence is motivated wholly or partly by contempt, or malice and ill will towards women and girls.

Exception for offences which are intrinsically misogynistic – section 1(5) and schedule 1

The report recommends that the aggravation should not be capable of being used (or 'libelled') in respect of offences which they consider are inherently misogynistic as they consider that the misogynistic aspect of such offending is already routinely taken into account when sentencing offenders convicted of these crimes. They propose that, for this reason, the aggravation should not be capable of being libelled

for sexual offences and domestic abuse offences and for the new offences which their report recommends creating.

Even if there is an argument that there are individual instances where such offences do not have a misogynistic motive or involve the perpetrator demonstrating misogyny in committing the offence (most obviously where the victim is male) this approach also avoids the unfortunate scenario highlighted by some consultees in response to the earlier [consultation](#) on Lord Bracadale's report whereby a court would be required to rule on whether individual offences of, for example, rape or domestic abuse were or were not aggravated by misogyny.

The statutory aggravation is drafted such that it cannot be libelled in respect of any of the offences listed in the schedule. This schedule is intended to be a comprehensive list of offences which are intrinsically misogynistic in nature when committed against a female victim.

Question: Do you agree with the Working Group's recommendation that the statutory aggravation should not be capable of being libelled for certain offences because these offences are inherently misogynistic and this would already be taken account of when sentencing the offender?

In considering the report's recommendation, we are of the view that, aside from sexual offences and domestic abuse offences, there are certain other offences which can reasonably be considered to be intrinsically misogynistic. These are the offences relating to female genital mutilation, forced marriage, hymenoplasty and virginity testing. We have therefore added these offences to the schedule of offences in respect of which the aggravation cannot be libelled.

Consideration was given to adding the offence of 'stalking' as there will often be a misogynistic motive. However, in contrast with the offences listed in the schedule, we consider that a significant proportion of stalking cases can involve other motivations (e.g. a neighbour or financial dispute) and note that the [Scottish Crime and Justice Survey 2019/20](#) found no difference in the proportion experiencing stalking and harassment in the 12 months prior to interview for men and women (11.4% and 12.1%, respectively.) As such, we consider that the statutory aggravation can usefully identify those stalking convictions where the offender is motivated by, or demonstrates, misogyny and therefore we do not propose to exclude the stalking offence by including it in the list of offences to which the aggravation cannot be libelled.

In common with other statutory aggravations, it is not proposed that the aggravation should have retrospective effect and as such, it will only be capable of being libelled with respect to offences committed after the provision comes into effect. As such, offences which are no longer in effect have not been listed in the schedule.

The legislation contains a power for the Scottish Ministers to amend the list of offences in respect of which the aggravation cannot be libelled by an order laid in the Scottish Parliament and subject to affirmative resolution procedure. This ensures that the list can be kept up to date to reflect any legislative changes in this area, and any oversights can be corrected, without the need for further primary legislation.

Question: Do you have any comments on the list of offences in the schedule in respect of which the misogyny aggravation cannot be libelled?

Question: Do you have any other comments about the statutory aggravation relating to misogyny?

Draft Provision

1. Aggravation of offences by misogyny

- (1) An offence is aggravated by misogyny if—
 - (a) where there is a specific victim of the offence—
 - (i) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates contempt, or malice and ill-will, towards the victim, and
 - (ii) the contempt or malice and ill-will is based on the victim being or being presumed by the offender to be a woman or a girl, or
 - (b) whether or not there is a specific victim of the offence, the offence is motivated (wholly or partly) by contempt, or malice and ill-will, toward women and girls.
- (2) It is immaterial whether or not the offender's contempt, or malice and ill-will, is also based (to any extent) on any other factor.
- (3) Evidence from a single source is sufficient to prove that an offence is aggravated by misogyny.
- (4) In this section, a reference to women and girls (however expressed) includes a reference to women or girls (or both)—
 - (a) of a particular description or who are members of a particular group,
 - (b) who are presumed by the offender to be of a particular description or members of a particular group.
- (5) This section does not apply to the offences specified in schedule 1.
- (6) The Scottish Ministers may by regulations modify schedule 1 by—
 - (a) adding an offence, or
 - (b) removing, or modifying the description of, an offence for the time being mentioned there.
- (7) Regulations under subsection (6) are subject to the affirmative procedure.

2. Consequences of aggravation by misogyny

- (1) Subsection (2) applies where it is—
 - (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by misogyny, and
 - (b) proved that the offence is so aggravated.
- (2) The court must—

- (a) state on conviction that the offence is aggravated by misogyny,
- (b) record the conviction in a way that shows that the offence is aggravated by misogyny,
- (c) take the aggravation into account in determining the appropriate sentence, and
- (d) state—
 - (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
 - (ii) otherwise, the reasons for there being no such difference.

SCHEDULE
(introduced by section 1)

OFFENCES TO WHICH SECTION 1 DOES NOT APPLY

- 1 Abduction with intent to commit the statutory offence of rape.
- 2 Assault with intent to commit the statutory offence of rape.
- 3 Indecent assault.
- 4 An offence under section 170 of the Customs and Excise Management Act 1979 in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876, but only where the prohibited goods include indecent photographs of persons.
- 5 An offence under the following provisions of the Civic Government (Scotland) Act 1982—
 - (a) section 52 (taking and distribution of indecent images of children),
 - (b) section 52A (possession of indecent images of children).
- 6 An offence under the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995—
 - (a) section 1 (incest),
 - (b) section 2 (intercourse with a stepchild),
 - (c) section 8 (abduction of woman or girl for purposes of unlawful intercourse),
 - (d) section 10 (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16).
- 7 An offence under the following provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005—
 - (a) section 1 (meeting a child following certain preliminary conduct),
 - (b) section 9 (paying for sexual services of a child),
 - (c) section 10 (causing or inciting provision by child of sexual services or child pornography),
 - (d) section 11 (controlling a child providing sexual services or involved in pornography),

- (e) section 12 (arranging or facilitating provision by child of sexual services or child pornography).
- 8 An offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009—
- (a) section 1 (rape),
 - (b) section 2 (sexual assault by penetration),
 - (c) section 3 (sexual assault),
 - (d) section 4 (sexual coercion),
 - (e) section 5 (coercing a person into being present during a sexual activity),
 - (f) section 6 (coercing a person into looking at a sexual image),
 - (g) section 7(1) (communicating indecently),
 - (h) section 7(2) (causing a person to see or hear an indecent communication),
 - (i) section 8 (sexual exposure),
 - (j) section 9 (voyeurism),
 - (k) section 11 (administering a substance for sexual purposes),
 - (l) section 18 (rape of a young child),
 - (m) section 19 (sexual assault on a young child by penetration),
 - (n) section 20 (sexual assault on a young child),
 - (o) section 21 (causing a young child to participate in a sexual activity),
 - (p) section 22 (causing a young child to be present during a sexual activity),
 - (q) section 23 (causing a young child to look at a sexual image),
 - (r) section 24(1) (communicating indecently with a young child),
 - (s) section 24(2) (causing a young child to see or hear an indecent communication),
 - (t) section 25 (sexual exposure to a young child),
 - (u) section 26 (voyeurism towards a young child),
 - (v) section 28 (having intercourse with an older child),
 - (w) section 29 (engaging in penetrative sexual activity with or towards an older child),
 - (x) section 30 (engaging in sexual activity with or towards an older child),
 - (y) section 31 (causing an older child to participate in a sexual activity),
 - (z) section 32 (causing an older child to be present during a sexual activity),
 - (z1) section 33 (causing an older child to look at a sexual image),
 - (z2) section 34(1) (communicating indecently with an older child),
 - (z3) section 34(2) (causing an older child to see or hear an indecent communication),
 - (z4) section 35 (sexual exposure to an older child),
 - (z5) section 36 (voyeurism towards an older child),

- (z6) section 37(1) (engaging while an older child in sexual conduct with or towards another older child),
 - (z7) section 37(4) (engaging while an older child in consensual sexual conduct with another older child),
 - (z8) section 42 (sexual abuse of trust),
 - (z9) section 46 (sexual abuse of trust of a mentally disordered person).
- 9 An offence under any of the following provisions of the Prohibition of Female Genital Mutilation (Scotland) Act 2005—
- (a) section 1(1) (female genital mutilation),
 - (b) section 3(1) (aiding and abetting female genital mutilation).
- 10 An offence under any of the following provisions of the Anti-social Behaviour, Crime and Policing Act 2014—
- (a) section 122(1) (forced marriage),
 - (b) section 122(3) (deception with intent to cause person to enter forced marriage abroad).
- 11 An offence—
- (a) that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (aggravation of offence where abuse of partner or ex-partner),
 - (b) under section 2 of that Act (disclosing, or threatening to disclose, an intimate photograph or film).
- 12 An offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018 (abusive behaviour towards partner or ex-partner).
- 13 An offence under any of the following provisions of the Health and Care Act 2022—
- (a) section 140(1) (virginity testing),
 - (b) section 141(1) (offering to carry out virginity testing),
 - (c) section 142(1) (aiding and abetting virginity testing),
 - (d) section 152(1) (carrying out hymenoplasty),
 - (e) section 153(1) (offering to carry out hymenoplasty),
 - (f) section 154(1) (aiding and abetting hymenoplasty).
- 14 An offence under any of the following provisions of this Act—
- (a) misogynistic harassment,
 - (b) misogynistic behaviour,
 - (c) threatening or abusive communications to women and girls which reference rape, sexual assault or disfigurement,
 - (d) stirring up hatred against women and girls.

Chapter Four

Recommendation: An offence of Stirring Up Hatred Against Women and Girls

At the end of the chapter, there is a draft provision indicating how the Scottish Government have developed the recommendation into draft law. The text below provides a summary of what the report recommended, key issues in the development of the draft provision and questions. Readers may wish to consider the text below in conjunction with the draft provision before considering the questions.

What the report recommends

The report recommends that an offence of stirring up hatred against women and girls should be created. It proposes that it should criminalise engaging in threatening or abusive behaviour, or communicating threatening or abusive material, with the intention of stirring up hatred towards women and girls.

The report notes that the offence should not require there to be a specific victim and as such the question of whether any individual targeted by a perpetrator is or is not a woman or girl is not relevant as the offence relates to stirring up hatred of women as a group.

The report notes that freedom of expression must be considered in determining whether the behaviour or communication was reasonable, but that no one should enjoy the freedom to stir up hatred towards women.

Discussion

The report recommends that an offence of stirring up of hatred of against women and girls should be created to address:

“a rapidly growing culture, with far reaching impacts, of stirring up hatred towards women...which causes women, as a group, to feel vulnerable and excluded”

The report cites examples of how the offence may be committed such as an ‘incel’ who encourages his social media followers to assault women who refuse to have sex with men who have taken them on a date, and an extremist religious preacher who advocates physical punishment of women who have sex outside of marriage.

The 2021 Act will, when it comes into effect, provide for offences of ‘stirring up hatred’. The offences cover stirring up hatred on grounds of race, age, disability, religion, sexual orientation, transgender identity and variations in sex characteristics.

In the 2021 Act, the test used for the offence covering all characteristics except race¹ is as follows. This offence is committed where a person behaves in a manner, or

¹ A specific approach on race was agreed by Parliament which reflected the long-standing operation of the stirring up racial hatred offence. This was distinct from new stirring up hatred offences. It is the policy of the new stirring up hatred offences which is relied upon in this context.

communicates material to another person, that a reasonable person would consider to be threatening or abusive, and, in doing so, the person *intends* to stir up hatred against a group of persons based on their membership of a group defined by one of these listed characteristics.

It may be worth noting that the number of prosecutions for existing ‘stirring up hatred’ offences in different jurisdictions across the UK is very low (typically between 5 and 15 across the whole of the UK per year) and it is reasonable to expect that this will also be the case for the offence of stirring up hatred of women and girls.

It is possible that behaviour which amounts to the stirring up of hatred against women and girls may often take a slightly different form from the stirring up of hatred against groups covered by the existing offences. The report notes that

“often this stirring up of hatred presents as being hatred of a particular type of woman – a noisy woman, a successful woman, an opinionated woman. But the crime is about female identity. It is no defence to say “I only hate certain kinds of woman – feminists, fat women or unfeminine women...”

This may contrast with stirring up of hatred against groups defined by their racial or religious identity or sexual orientation, where, for the most part, people who stir up hatred against these groups target the group in its entirety, rather than stirring up hatred against, for example, people of a particular racial identity who dress in a certain way, people of a particular religious faith who hold certain opinions, or people of a particular sexual orientation who are ‘too loud’.

However, the ‘stirring up hatred’ offence in the 2021 Act is wide enough to criminalise stirring up of hatred that takes this form, providing the stirring up of hatred relates specifically to the members of one of the protected groups. The draft offence of stirring up of hatred against women and girls works in the same way.

There is likely to be a degree of overlap between the types of behaviour that amount to an offence of ‘stirring up hatred of women and girls’ and the proposed offences of ‘misogynistic harassment’ and ‘misogynistic behaviour’ discussed earlier in the consultation.

However, there is nonetheless a good case for legislating for a stirring up hatred against women and girls offence.

The offences of misogynistic harassment and misogynistic behaviour are concerned with the direct effect of behaviour on women and girls towards whom it is directed, or who may see or hear it. By contrast, behaviour intended to stir up hatred against women and girls may take place in all-male spaces, either on or off-line and is concerned with the effect that the behaviour has on the (probably male) people in whom the perpetrator is seeking to stir up hatred of women and girls. There is acute societal concern about online content, in particular, which glorifies the abuse of women and which the existing law is unable to deal with effectively.

This behaviour may not amount to misogynistic harassment offence or misogynistic behaviour offence if there are no women or girls present who may be directly harmed

by it. As such, the stirring up hatred offence is focused on behaviour that seeks to stir up hatred in others against women and girls rather than any behaviour that is necessarily directed at, or takes place in the vicinity of, women and girls.

In this regard, it is worth noting that the 2021 Act provides for both an offence of stirring up racial hatred and a separate offence of racially aggravated harassment which demonstrates the different policy aims of stirring up hatred offences and offences concerned with e.g. harassment or abusive behaviour more generally type which is directly experienced by its victims.

Question: Do you agree with the report's recommendation that there should be an offence of stirring up hatred of women and girls?

The behaviour to be covered by the offence – section 1(1)

The report recommends adopting the approach taken for the general stirring up of hatred offence contained in the 2021 Act. The 'stirring up of hatred of women and girls' offence has been drafted on this basis.

What this means is that the offence of stirring up hatred of women and girls is committed where the accused behaves in a threatening or abusive manner, or communicates threatening or abusive material, and, in either case, has the intention of stirring up hatred against women and girls.

A 'reasonableness' defence modelled on that contained in the 2021 Act has also been provided for. The maximum penalty on conviction on indictment is 7 years imprisonment, in line with the offences of stirring up hatred in the 2021 Act.

Question: Do you agree with the report's recommendation that the offence should be committed where a person behaves in a threatening or abusive manner or communicates threatening or abusive material, with the intention of stirring up hatred of women and girls?

Freedom of expression (section 2)

The report states that

“Freedom of expression must be considered in determining whether the behaviour or communication was reasonable e.g. arguing against feminism, but no-one should enjoy freedom to stir up hatred towards women.”

It is a defence to the stirring up hatred offences contained in the 2021 Act for a person charged with an offence under this section to show that the behaviour or the communication of the material was, in the particular circumstances, reasonable. This was included as a safeguard, albeit as regards the offences requiring an *intent* to stir up hatred, it is difficult to envisage when the accused's actions would ever be reasonable.

The stirring up offence is limited to behaviour or communications which are threatening or abusive and intended to stir up hatred of women and girls. The purpose of the offence is not to interfere with a person's ability to freely debate issues concerning, or relating to, women and girls.

In light of concerns raised during the passage of the 2021 Act, we have included a provision to address this which is similar to that contained within section 9 of the 2021 Act. This provision makes clear the following: For the avoidance of doubt, behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes discussion or criticism of issues relating to women and girls.

This ensures, for the avoidance of doubt, that discussion or criticism of, for example, equal pay for women or the right to maternity leave would not, in and of itself, be considered to be (threatening or) abusive. Something more is required for any such discussion or criticism to be taken to be threatening or abusive. For example, if it were proved that a reasonable person would consider that the criticism was expressed in a threatening or abusive way, or the material containing the criticism also included other threatening or abusive comments, it could still be taken to be behaviour or material that is threatening or abusive and therefore satisfy the first element of the offence. For the offence to be committed, however, the second element (i.e., the intention to stir up hatred) would also have to be proved beyond reasonable doubt.

Question: Do you have any comments on the proposed approach to freedom of expression set out in the draft provisions?

Question: Do you have any other comments on the draft offence of stirring up hatred of women and girls?

Draft Provision

1 Offence of stirring up hatred against women and girls

- (1) A person commits an offence if—
 - (a) the person—
 - (i) behaves in a manner that a reasonable person would consider to be threatening or abusive, or
 - (ii) communicates to another person material that a reasonable person would consider to be threatening or abusive, and
 - (b) in doing so, the person intends to stir up hatred against women and girls.
- (2) It is a defence for a person charged with an offence under this section to show that the behaviour or the communication was, in the particular circumstances, reasonable.
- (3) For the purposes of subsection (2), it is shown that the behaviour or the communication of the material was, in the particular circumstances, reasonable if—
 - (a) evidence adduced is enough to raise an issue as to whether that is the case, and
 - (b) the prosecution does not prove beyond reasonable doubt that it is not the case.

- (4) For the purposes of subsection 1(a)(i), a person's behaviour—
 - (a) includes behaviour of any kind, and in particular, things that the person says, or otherwise communicates, as well as things that the person does,
 - (b) may consist of—
 - (i) a single act, or
 - (ii) a course of conduct.
- (5) For the purposes of subsection (1)(a)(ii), the ways in which a person may communicate material to another person are by—
 - (a) displaying, publishing or distributing the material,
 - (b) giving, sending, showing or playing the material to another person,
 - (c) making the material available to another person in any other way.
- (6) A person who commits an offence under this section is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), or
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or a fine (or both).
- (7) In this section—
 - "material" means anything that is capable of being looked at, read, watched or listened to, either directly or after conversion from data stored in another form,
 - "women and girls" includes women or girls (or both)—
 - (a) of a particular description or who are members of a particular group,
 - (b) who are presumed by the offender to be of a particular description or members of a particular group.

2 Protection of freedom of expression for the purposes of the offence of stirring up hatred against women and girls

For the purposes of section 1, behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes discussion or criticism of matters relating to women and girls.

Chapter Five

Impact Assessments

As we develop policy in response to the recommendations for criminal law reform contained in the report, we will carry out impact assessments. The aim of these assessments is to identify issues that may affect some groups more than others and to consider how we will address these issues. The assessments also explore what impacts the proposed reforms to the criminal law will have on matters such as privacy, equality, child rights and wellbeing and business. In addition, we need to ensure that any reforms to the criminal law comply with the European Convention on Human Rights.

This chapter seeks views on the potential impacts of proposals in this consultation.

The questions on the potential impacts of the proposals are broken down in line with the formal assessments carried out by the Scottish Government, which are:

- Compliance with ECHR
- Equality Impact Assessment
- Child Rights and Wellbeing Impact Assessment
- Fairer Scotland Duty Assessment
- Islands Community Impact Assessment
- Data Protection Impact Assessment
- Business and Regulatory Impact Assessment
- Strategic Environmental Assessment

We recognise that the proposed reforms will have a much greater impact in some areas than in others and that the proposals may have a minimal or no impact in some areas.

As all of the specific recommendations in the report relate to reform of the criminal law to address misogyny, we expect that there will be a great deal of commonality across each of the four specific proposals. When answering the questions, if your comments relate to a specific proposal, rather than the whole set of proposed reforms, it would be helpful if you could set this out when describing any impacts which you think should be considered.

Human Rights

The [Human Rights Act 1998](#) incorporated the [European Convention on Human Rights \(ECHR\)](#) into UK law. It means that public authorities, such as the Scottish Government, must not act in a way that is incompatible with the rights set out on the ECHR. It is therefore vital that we consider how the proposals will impact on human rights.

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

Equalities

The [Public Sector Equality Duty](#) requires the Scottish Government and other public bodies when they are exercising their functions to have due regard to the need to:

- eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the [Equality Act 2010](#)
- advance equality of opportunity between people who share a relevant protected characteristic and those who do not
- foster good relations between people who share a relevant protected characteristic and people who do not share it.

For the purposes of the Public Sector Equality Duty, a ‘relevant protected characteristic’ means age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The Equality Act 2010 sets out nine protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. The Public Sector Equality Duty includes a requirement for the Scottish Government and other public bodies to have due regard to the need to eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Equality Act 2010.

Question: Do you have any views on the potential impacts of the proposals in this consultation on equalities and the protected characteristics set out above?

Children’s rights

The [UN Convention on the Rights of the Child \(UNCRC\)](#) is an international treaty which sets out the fundamental human rights of all children. [Part 1 of the Children and Young People \(Scotland\) Act](#) places a duty on the Scottish Ministers to (a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements and (b) If they consider it is appropriate to do so, take any of the steps identified by that consideration.

All new legislation and policy that is developed by the Scottish Government must consider the impacts on the rights and wellbeing of children up to the age of 18.

Question: Do you have any views on the potential impacts of the proposals in this consultation on children and young people as set out in the UN Convention on the Rights of the Child?

Fairer Scotland Duty

The [Fairer Scotland Duty](#) came into force on 1 April 2018 and places a legal responsibility on named public bodies, including the Scottish Government, to actively

consider how they can reduce inequalities of outcome caused by socio-economic disadvantage when making strategic decisions.

This means that as well as considering the impact on people with protected characteristics, the Scottish Government must consider how any proposals will impact on people depending on their economic background. For example, if proposals would have a specific impact on people with low incomes or who live in a deprived area.

Question: Do you have any views on the potential impacts of the proposals in this consultation on socio-economic inequality?

Island Communities

[Section 7 of the Islands \(Scotland\) Act 2018](#) states that a relevant authority – which includes the Scottish Ministers – must have regard to island communities when carrying out its functions.

Scotland's islands face particular challenges around distance, geography, connectivity and demography, so it is important that this is considered when developing legislative proposals. It is also important that we ensure the islands receive fair and equitable treatment and that policy outcomes are tailored to their unique circumstances.

Question: Do you have any views on potential impacts of the proposals in this consultation on communities on the Scottish islands?

Data protection and privacy

Data protection and privacy impact assessments help the Scottish Government to assess the risks of proposed legislative changes that are likely to affect the way in which personal data is used.

Question: Do you have any views on the potential impacts of the proposals in this consultation on privacy and data protection?

Business

A Business and Regulatory Impact Assessment (BRIA) is used to analyse the costs and benefits to businesses and the third sector of any proposed legislation or regulation, with the goal of using evidence to identify the proposal that best achieves policy objectives while minimising costs and burdens as much as possible.

Question: Do you have any views on the potential impacts of the proposals in this consultation on businesses and the third sector?

Environment

In Scotland, public bodies, including the Scottish Government, are required to assess, consult on and monitor the likely impacts that their plans, programmes and

strategies will have on the environment. This helps to better protect the environment, aims to ensure that any development is sustainable, and increases opportunities for public participation in decision-making.

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



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