



Law Society
of Scotland

Consultation Response

Reforming the criminal law to address misogyny

22 May 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law and Equality Law committees welcome the opportunity to consider and respond to the Scottish Government consultation: Reforming the criminal law to address misogyny. The committees have the following comments to put forward for consideration.

General Comments

In the independent report to Scottish Government, *Misogyny – A Human Rights Issue*, the recommendation was to create a gendered offence. The report stated, “We feel that to eradicate misogynistic crimes these laws have to be targeted at protecting women. Treating as equal those who are not yet equal only furthers inequality.¹” The report stated that an offence to deal with misandry was not required, stating, “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.”

There is not a definition of misogyny in the draft legislation and further consideration may be required. The definition of woman in the Equality Act is ‘a female of any age’ (s.212(1)) and this has recently been interpreted by the Court of Session to include transwomen with Gender Recognition Certificates². Following advice from the Equality and Human Rights Commission³, it is currently under consideration by the UK government as to whether the definition of sex in s.11 of the Equality Act should be restricted to ‘biological sex’ and therefore that the definition of woman in s.212(1) would be restricted to ‘biological women’. If the intention is that the legislation covers all women - including transwomen without or without GRCs - then this should be considered in the drafting of any offence.

¹ <https://www.gov.scot/publications/misogyny-human-rights-issue/> (page 7)

² (For Women Scotland Ltd (No.2) 2022csoh90.pdf (scotcourts.gov.uk))

³ (Clarifying the definition of ‘sex’ in the Equality Act | Equality and Human Rights Commission (equalityhumanrights.com))

Consultation questions

Question 1 - Do you support the proposal to create an offence of 'misogynistic harassment' which relates to harassment of an identified victim or victims?

Yes, in principle (subject to our comments in response to questions 3, 4 and 6).

Question 2 - 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?

Fear and alarm are standard requirements of e.g., threatening or abusive behaviour, distress is an outward manifestation of fear, alarm, degradation and humiliation. The list is a combination of the effects set out in other pieces of legislation.

Question 3 - Do you agree that the offence of misogynistic harassment should be capable of being committed in all places?

We tend towards the view that the offence should not be limited to public places. This may create unhelpful qualifications, and issues of definition around what constitutes a public space. Restricting the offence to taking place in public spaces may see misogynistic behaviours taking place in a workplace or educational environment treated differently were there to be a distinction and leave the prosecution to fall back on the current criminal law (for instance, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010).

Question 4 - Do you have any views on the proposed maximum penalty of 7 years imprisonment for the offence of misogynistic harassment?

Such a high maximum penalty as opposed to 5 years, the current maximum sentence at sheriff and jury level, should not be imposed without a clear rationale.

We note the consideration of this issue in the independent report to Scottish Government, *Misogyny - A Human Rights Issue* where it is recommended that public misogynistic harassment (PMH) should be a summary offence. "While in the spectrum of offending this is not the most serious of conduct, its impact must not be seen as negligible"⁴. The Review recommended that the vast majority of the offences would not attract the Sexual Offences Notification Requirements. However, in cases where the harassment is sexual in nature it may be possible to use Schedule 3 para 60 – where the offence has a significant sexual aspect.

Given that this type of offending has been dealt with under the common law in Scotland previously, where there has not been a maximum sentence, the 7 year period proposed may be somewhat arbitrary. Clarity

⁴ <https://www.gov.scot/publications/misogyny-human-rights-issue/> (page 60)

around the types of factor that might justify a higher sentence, for instance, a campaign of subject terror, or leading to suicide, may be helpful.

Question 5 - Do you have any comments about the inclusion of a reasonableness defence to the offence of misogynistic harassment?

A defence of reasonableness should be included, allowing an accused to provide a defence. This may have limited scope in practice.

Question 6 - Do you have any other comments on the offence of misogynistic harassment?

The Review (p.59) admits that the proposal widens the scope of the criminal law. It also claims that the PMH offence lowers the threshold of criminality compared to e.g., section 38 offences. We are not convinced that this is the case, save that the potential impact would be extended to add degradation humiliation and distress to the more traditional fear and alarm. The Review recommended that it should be an offence to engage in “sexual or abusive” conduct in a public place. The Consultation draft legislation removes the requirement for a public place but adds threatening, or a combination threatening, abusive and sexual, to the type of conduct caught by the offence. Section 38 can be committed in public or in private.

Neither the Review’s original proposal nor the draft provision lower the threshold of criminality in any significant way. In fact, the draft offence would not address the problems in interpreting ‘threatening’ as illustrated in *Ahmed v H.M. Advocate* [2020] HCJAC 37.

In that case the Appeal Court took a view on the meaning of threatening which excluded notions of feeling at risk or afraid that something bad was about to happen. The court stated, “It does not seem to us that a polite conversational request or compliment can be construed as threatening merely because it is uninvited or unwelcome. There was nothing in the appellant’s behaviour as spoken to by the complainers in charges 5, 6 and 18 which was overtly threatening or which could reasonably be construed as threatening.”

The new offence as drafted will not capture Ahmed type situations even where there is evidence that the accused’s clear intent is to cause fear, alarm, distress, humiliation or degradation. Provided the accused is polite and takes care to avoid sexualised language, then women and girls would be no better off than they are at present. Nothing Ahmed said or did was abusive and it was not overtly threatening. Therefore, it did not come within the ambit of section 38 as drafted. However, how could the witnesses know that the incident would end without their coming to serious harm?

This issue could be addressed in one of two ways:

- 1) by finding a term that accurately describes Ahmed type behaviour but that does not also widen the net of criminality unacceptably, or;
- 2) by including a statutory definition of threatening to include ‘causing someone to feel vulnerable or at risk’ or ‘giving the impression that something unpleasant or violent might occur.’ If section 38 were to be amended likewise this could close a loophole in the current criminal law.

We believe that the current proposals would not address the types of behaviour occurring in the Ahmed case and that further consideration be given to these types of behaviour. The issues emerging from this case are difficult, and there is a question about the extent to which the criminal law should be extended, which merit further discussion and scrutiny.

Question 7 – 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?

Some of the behaviour described in the Review would not necessarily be directed at a specific victim or group of victims. However, there is a risk that the threshold for criminality is set too low especially when demonstrating contempt in a private context could be sufficient. Even where the conduct must be sexual or abusive, for instance, the example cited by the Review of a man watching pornography on e.g., public transport where women or girls are likely to see it, this may be over-extending the criminal law.

Question 8 - 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?

See our response to question 2 above – although in the case of this proposed offence what anger/outrage at such behaviour may be a factor.

Question 9 – Do you agree that the offence of misogynistic behaviour should be capable of being committed in both private and public places?

We refer to our response to question 3 above. There would need to be a clear justification for the interference with an accused's Article 8 right. This need demonstration that the proposed offence was necessary and proportionate, and we are unsure that the proposed offence is sufficiently clear and justified to meet this test.

Question 10 - Do you have any views on the proposed maximum penalty of 7 years imprisonment for the offence of misogynistic behaviour?

See our response to question 4 above.

Question 11 - Do you have any comments about the inclusion of a reasonableness defence to the offence of misogynistic behaviour?

See our response to question 5 above.

Question 12 - 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?

We have considered these issues previously, including in our responses on the Hate Crime and Public Order (Scotland) Bill in 2020⁵. We considered that the inclusion of freedom of information provisions was important, stating, “This will help to reinforce the boundaries of the criminal law by protecting the right to express views that may be distasteful or offensive to many, but nonetheless are not and should not be the business of the criminal law and any subsequent prosecution.” We also maintained that these provisions should be clear, fair and balanced, capable of understanding from the provisions of the legislation itself, rather than through subsequent debate and interpretation through caselaw.

Question 13 - Do you have any other comments on the offence of misogynistic behaviour?

Ultimately, we do not believe that the consultation makes a convincing case for creating this offence. The offence, as drafted, widens the net too far and risks overcriminalisation. By merely requiring the sexual or abusive conduct to be of such a character that a reasonable person would consider it to be “contemptuous of women and girls” sets the threshold for criminality very low. On a more practical level, it is also likely to be difficult to prove.

Considering the example cited of a man watching pornography on a phone or laptop on a busy train. The behaviour can be described as sexual. Witnesses speak of being annoyed, disgusted, embarrassed etc. However, it must also be shown that the behaviour was motivated wholly or partly by contempt or malice and ill will toward women and girls, or of a character such that a reasonable person would consider it to be contemptuous of women and girls. The requirement to prove the accused’s motive is a departure from current Scots criminal law where the accused’s motive is considered irrelevant when establishing mens rea⁶.

This raises practical questions in prosecuting the case. How could witnesses help the court to infer that the accused was motivated by contempt or malice and ill will? This individual may think it is acceptable to watch what he wants irrespective of whether women, girls or young children can see and hear it. Equally how can a court judge whether the behaviour viewed objectively is contemptuous of women and girls? It is disruptive, unpleasant, and ought to be stopped by a member of staff, we are not persuaded that this proposed offence would assist. In any event, this behaviours could also fall within the scope of section 38 currently.

Question 14 - 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?'

New offences, especially those which broaden the scope of the criminal law, must be shown to be necessary and a proportionate response to a problem for which the current law offers no effective solution. For the reasons that we have outlined above, we do not think that this proposed offence meets these

⁵ <https://www.lawscot.org.uk/media/369185/2020-07-24-call-for-evidence-hate-crime-and-public-order-scotland-bill-2020.pdf>

⁶ See for example Lord Advocate’s Reference (No 2 of 1992)

needs. The consultation offers no evidence of the extent of this type of behaviour or how many cases are reported and prosecuted each year.

However, if an offence is to be created, then in the interests of clarity, the offence should accurately record the nature of the behaviour. Prior to section 39 of the 2010 Act, for example, an offender's schedule of previous convictions might contain several convictions for breach of the peace without disclosing that they related to stalking or harassment. Other options might be to make behaviour of this type an aggravation of existing criminal law provisions (for instance, under the Communications Act), rather than a new offence.

Question 15 - 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?

Notwithstanding our comments above, if a new offence were to be created, then we agree.

Question 16 – Do you have any comments on the approach taken in the draft offence to the harms of rape, sexual assault and disfigurement?

For the avoidance of doubt, rape and sexual assault could be defined as they are in the Sexual Offences (Scotland) Act 2009 and would achieve consistency.

Question 17 – 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?

We do not have comments currently.

Question 18 – Do you have any comments on the proposed defences to the offence?

We refer to our response to question 5.

We disagree with defence of 'improbability'. It is virtually inconceivable that anyone could rule out that a message such as an e-mail or text, Tweet etc might not be shared or elements of conversation repeated.

Question 19 - Do you have any comments on the proposed maximum penalty of 5 years for the offence?

No. This approach is consistent with other offences such as section 38.

Question 20 - Do you have any other comments on the proposed offence?

While this offence would catch the type of online abuse experienced by many women who engage in public debate, where they, rather than their reasoning, are attacked, it is drafted very broadly. For example, it

appears to capture a situation where a person sends a message to or says to others that X (a woman or girl) should be subjected to sexual violence even if the woman or girl herself is not the recipient of the message. It should be clarified whether the message needs to be conveyed to the woman or whether it just needs to be threatening or abusive to her but could be conveyed to someone else.

It should be necessary to include the requirement that a reasonable person would consider the message likely to cause fear and alarm or be reckless as to whether it did or not.

Question 21 – Do you support the recommendation that there should be a statutory sentencing aggravation relating to misogyny?

In principle, yes.

Question 22 – 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.**

We do not believe that contempt should be included in the aggravation. It reduces the benchmark if all that is required is a demonstration of contempt. We do not believe that the Government has made a case for drafting an aggravation by misogyny differently from the existing statutory aggravations and refer to our previous comments to question 13 above. The majority of aggravations will be established where the court holds that the things said, done or communicated demonstrate malice and ill will towards the victim, based on the victim being or presumed by the accused to be a woman.

Additionally, these are already issues that a sentencing judge would be likely to take into account. They would be brought out by the CJSWR.

Question 23 – Do you agree with the Working Group's recommendation that the statutory aggravation should not be capable of being labelled for certain offences because these offences are inherently misogynistic and this would already be taken account of when sentencing the offender?

In principle, yes.

Question 24 – Do you have any comments on the list of offences in the schedule in respect of which the misogyny aggravation cannot be labelled?

The list is comprehensive. We are concerned about Ministers being able to amend primary legislation by regulation and subject to the affirmative procedure.

Question 25 - Do you have any other comments about the statutory aggravation relating to misogyny?

No.

Question 26 – Do you agree with the report's recommendation that there should be an offence of stirring up hatred of women and girls?

Yes, subject to our comments on question 27 below.

Question 27 – 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?

There are some challenges around the use of 'stirring up'. It was, for instance, used in the Abusive Behaviour at Football and Threatening Communications Scotland Act 2012. The expression is not statutorily defined but appears to imply the incitement, instigation, or encouragement of others to engage in prohibited conduct. As the 2021 Act has still to come into force, we have no experience of how the offence works or otherwise in different contexts.

If a new offence is required, then it should adopt the drafting in the 2021 Act. The offences are designed to tackle the same mischief - the stirring up of hatred of groups due to their membership of perceived membership of that group. There could be evidential problems associated with establishing that the accused's intention was to stir up hatred. Much would depend on what was said, written or communicated.

Question 28 – Do you have any comments on the proposed approach to freedom of expression set out in the draft provisions?

See comments elsewhere in this paper.

Question 29 – Do you have any other comments on the draft offence of stirring up hatred of women and girls?

No.

Question 30 - Do you have any views on potential impacts of the proposals in this consultation on human rights?

Human rights issues are engaged by the proposals in this consultation, for instance, Article 8 - The right to respect for private and family life. Any new offences must be necessary and proportionate. They must also be clearly and drafted narrowly to avoid unnecessary criminalisation. No attempt is made to define misogyny in the proposed legislation.

Article 10 freedom of expression is also engaged, though we note reported cases in this area, and the wide margin of appreciation observed by the courts We have expressed some misgivings about the

breadth of the Review Committee's working definition of misogyny. in our response to the Review Committee in 2021, stating, "Any definition of misogyny must be drafted with care to ensure that it has clarity from a criminal law perspective and that the offence is capable of being prosecuted. If misogyny is to form part of any offence, it must not risk criminalising people wrongly. The potential impact of having a definition which lacks clarity would result in a wrongful conviction which may go on to adversely affect someone's life, travel and career prospects with their having then a criminal conviction.⁷"

Question 31 - Do you have any views on the potential impacts of the proposals in this consultation on equalities and the protected characteristics set out above?

Not currently.

Question 32 - 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?

Not currently.

Question 33 - Do you have any views on the potential impacts of the proposals in this consultation on socio-economic inequality?

Not currently.

Question 34 - Do you have any views on potential impacts of the proposals in this consultation on communities on the Scottish islands?

No.

Question 35 - Do you have any views on the potential impacts of the proposals in this consultation on privacy and data protection?

Not currently.

Question 36 - Do you have any views on the potential impacts of the proposals in this consultation on businesses and the third sector?

No.

Question 37 - Do you have any views on the potential impacts of the proposals in this consultation on the environment?

No.

⁷ <https://www.lawscot.org.uk/media/371380/20211-08-02-crim-sg-misogyny-consultation.pdf>

BUSINESS

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