

**SWRC Response to:
Reforming the criminal law to address misogyny:
A Scottish Government Consultation**

The Scottish Women's Rights Centre (SWRC) is a unique collaborative project that provides free legal information, advice and representation to women affected by violence and abuse.

The SWRC exists because of abuses of power and because a gap persists between women's experience of violence and abuse and their access to justice. The SWRC strives to fill these gaps by working with specialist solicitors and experienced advocacy workers.

Informed by our direct work with victims/survivors of violence and abuse, we seek to influence national policy, research, and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender-based violence (GBV).

We recognise that people of any gender can be affected by abuse and violence (including sexual violence). However, statistics show that these crimes are more often committed by men against women. Also, as the SWRC specifically supports women aged 16 and over, when we talk about victims/survivors in this response we will generally refer to women. Despite this, we are aware – and do acknowledge – any person can be subjected to these crimes.

Through our outreach services we are afforded a unique insight into the legal landscape and the issues faced by victim/survivors of gender-based violence.

We offer weekly helplines and legal surgeries where we provide free and confidential legal information and advice to women who have experienced gender-based violence.

It is through our direct contact with women across Scotland that we have seen the requirement for greater protection from abuse. We are aware that the need for such protection is always a prevalent issue for women although we have seen a sharp increase in the need for protection as a result of the Covid-19 pandemic.

The SWRC, therefore, welcomes the discussion and proposed movement towards increased protection for women experiencing misogynistic conduct.

Part 1 An offence of misogynistic harassment

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

The Scottish Women's Rights Centre (SWRC) supports women affected by gender-based violence, including sexual violence, physical abuse, coercive control, and economic abuse, and specialise in advocating for women who face challenges in obtaining justice.

We believe gender-based violence is a symptom and a cause of gender inequality in our society, so a culture shift is required to prevent it; nonetheless, globally the movement towards gender parity is in reverse.

At the Scottish Women's Rights Centre, we therefore support of the creation of the offence of misogynistic harassment which relates to the harassment of an identified victim or victims. We see that those accessing our services are experiencing a range of misogynistic behaviours which are abusive and harmful to the well-being of women and girls. We also support the recommendations of the Working Group Report prepared by Baroness Helena Kennedy.

The proliferation of misogynistic attitudes is evident from our experience on the front-line supporting survivors, through our legal advocacy and casework services. In our outreach, we have seen a significant increase in misogynistic abuse and, in particular, online abuse, which includes cyberstalking, sexual harassment, grooming for exploitation or abuse, image-based sexual abuse (so-called 'revenge porn'), upskirting, fakeporn, sexual extortion and videos of sexual assaults and rapes, rape threats, doxxing (publicly publishing) of women's personal information, and tech abuse in intimate partnerships. Women are also subjected to behaviours in public spaces such as being groped or touched inappropriately, being verbally abused or having sexual comments made towards them. The impact of this abuse on survivors can be long-lasting and devastating.

Experience of these types of behaviour has the effect of limiting the lives of women and girls. They describe how it requires them to avoid certain situations or take protective measures, they spend time considering these factors rather than existing in shared spaces freely. It can erode self-confidence and leave them feeling scared and fearful for their safety.

Under international law, both the UK and Scottish Governments are under obligations to take measures to ensure women's full enjoyment of human rights on an equal basis with men.

Misogynistic conduct that causes harm to women can constitute a violation of women's human rights, as contained in:

- The Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) and
- The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).

CEDAW is a UN Convention which was signed by the United Kingdom in 1981 and ratified in 1986. This international treaty is reflective of the importance for gender equality to underpin human rights so that women and girls can enjoy them fully and without discrimination, as defined in Article 1:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of

men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The proposed changes can also contribute to creating a society in Scotland in which women and girls can live free from fear of harassment and abuse, in line with the obligations of the Scottish Government as set out in Article 12 of the Istanbul Convention which requires:

“Article 12 – General obligations

1. Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.

2. Parties shall take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person.”

The UK signed the Istanbul Convention in 2012 and ratified it in 2022; the Convention came into force on 1st November 2022.

Additionally, the National Advisory Council for Women and Girls (NACWG) has recommended clear actions to improve access to justice for women and girls experiencing men’s violence by criminalising serious misogynistic harassment and filling gaps in existing laws¹.

Scotland has a history of being at the forefront of developing progressive legislation that protects and promotes the safety of women and girls, as seen through its innovative laws surrounding domestic abuse and the implementation of the Equally Safe Strategy.

We consider these laws would share an ethos that underpins the Equally Safe Strategy and works well alongside it. They would complement and work towards the goal of reforming ‘*a Scotland in which every woman and girl is safe and free from gender-based violence in all its forms*’.²

We support this proposal to create standalone offences to achieve this goal. There are elements of misogyny and the abuse experienced by women that mean it is not appropriate to add the protected characteristic of ‘sex’ into the Hate Crime and Public Order (Scotland) Act 2021. As stated in the working group report; ‘*treating as equal those who are not yet equal will only further inequality*’³.

As Scotland’s hate crime legislation was drafted, it became clear that attempts to make provision for misogynistic hate crimes did not fit, and were thus excluded. This has left women and girls in a position where these behaviours are long overdue to be properly addressed by criminal law.

¹ National Advisory Council for Women and Girls, “Recommendations: Accountability,” <https://www.generationequal.scot/our-recommendations/accountability/>

² [Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls \(www.gov.scot\)](https://www.gov.scot/publications/equally-safe/strategy/2022-01-12/html/equally-safe-scotland-s-strategy-for-preventing-and-eradicating-violence-against-women-and-girls)

³ [Misogyny - A Human Rights Issue \(www.gov.scot\)](https://www.gov.scot/publications/misogyny-a-human-rights-issue/2022-01-12/html/misogyny-a-human-rights-issue) – p7

'Misogyny is so deeply rooted in our patriarchal ecosystem that it requires a more fundamental set of responses'⁴.

The creation of standalone provisions will send a clear signal to women that these behaviours are not acceptable, it can convey that they are serious violations and will be taken seriously by a criminal justice system which is there to protect them. Despite what we know about the damaging effects of misogynistic abuse we see that women often feel the need to mitigate it and deal with it personally.

Some support can be found in the recent French laws regarding street harassment of women, these are not gender-neutral laws and allow the police to deliver swift penalty fines for behaviours. While this proves a good example, we believe these Scottish proposals can create the potential to achieve more.⁵

Freedom of expression is an important human right which is essential for a society to be democratic, and it must be respected and protected under Articles 9 and 10 of the European Convention of Human Rights (ECHR) and Articles 18 and 19 of the International Covenant on Civil and Political Rights (ICCPR).

We are aware that the proposed laws must strike a careful balance to achieve the aim of curtailing the serious harassment and abuse experienced by women and girls, whilst upholding individual freedom of expression, protected by international law.

It is noted in the working group report that;

'All the recommendations made in this report are intended to fall squarely within the limitations permitted by international human rights law. If enacted, they must also be applied in practice in a way that respects individual human rights'⁶.

Criminal law is not enough to eradicate sexism and misogyny from our society, a major change to shift deeply rooted cultural attitudes is also needed, with education at its core. Nonetheless, criminal law can play a key role in society by criminalising and holding accountable the examples of behaviour we have discussed.

We recognise that this law needs to strike a balance, one which does not seek to eradicate every comment or action that might be described as 'sexist' or inappropriate, but is designed to capture the most serious abusive, degrading, sexual or frightening behaviours and situations that women and girls can be exposed to every day. These might include, for example, being approached and repeatedly asked for personal details, turning down a man in their attempt to make a romantic move and being verbally abused, being rubbed against on the bus, or being shouted at with lewd comments as they walk down the street.

These things go on every day, and we believe they do go beyond a level that should be tolerated and we feel should be marked as so by the criminal law.

⁴ [Misogyny - A Human Rights Issue \(www.gov.scot\)](http://www.gov.scot) – p7

⁵ [2 Years Later, What We Can Learn From France's Anti-Catcalling Law \(forbes.com\)](http://forbes.com)

⁶ [Misogyny - A Human Rights Issue \(www.gov.scot\)](http://www.gov.scot) – p11

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?

We welcome the concept that the potential legislation would cover such a wide range of effects to reflect the scope of feelings described by women and girls experiencing misogynistic harassment.

We approve that the scope of the behaviour is widened to include degradation and humiliation, which goes beyond that which appears in the 2021 Act as this better encompasses the real effects of this behaviour.

We note that women and girls who experience such harassment will speak to a range of emotional and psychological responses, that can include feeling uneasy, unsafe, intimidated or on alert to potential danger. We welcome that the list would encompass these feelings.

We welcome the principle, contained in the draft offences, which does not require the response to be evidenced by the particular victim, it instead requires a reasonable person test. This is very important as although many feelings might be expected of a woman in a particular scenario, these will not always be experienced by a particular woman in a particular moment. A woman might react in anger rather than show fear or some behaviour might be so normalised that there is little outward response.

What is clear to us is that what women and girls might see as being threatening or abusive might be different from what someone who has not experienced a lifetime of misogyny. A reasonable person should understand how threatening this behaviour is to a woman and how unsafe it can make them feel. There is a real need for professionals in the criminal justice sector to properly understand the effects of this behaviour. Appropriate funding and resources would require to be put in place to ensure that the provisions were properly enforced.

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

We agree that the offence should be capable of being committed in all places whether they are public or private. Women occupy all places; they deserve protection from this type of harassment at all times - whether this is a woman in her own home, her workplace or in someone else's home. This provision will also provide welcome clarity regarding the need for protection for women and girls in online spaces, where much of this abuse is now carried out.

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

No response.

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

While we see that there is little scope for much of the behaviour we have highlighted to be considered 'reasonable' we recognise and support the proposal that appropriate safeguards are factored into these new offences.

We are aware that often the perpetrator of such harassment might claim a wide variety of excuses for their behaviour such as; it was a 'joke' or 'banter', their genuine opinion, or because the victim "deserved it" for being 'mouthy' etc.

We do not think it would be appropriate for such a defence to be used in these circumstances, but recognise there could be other exceptional circumstances where a defence could be appropriate, and where a defence might be necessary to ensure that competing rights are fairly balanced.

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

The proposed new offences are complex in nature, and appropriate training will need to be given to Criminal Justice partners, including the police, COPFS and the judiciary to allow for their effective use. Implementation will require to be properly resourced and sustained for these proposed offences to have the desired effect.

There also must be greater awareness of the experiences of women and girls, and belief in their experiences, including within the criminal justice system. These key players can set standards for wider society.

The law alone cannot address misogyny; education, communication and training are critical.

Part 2 An Offence of Misogynistic Behaviour

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?

We believe that standalone offences are required to target this type of behaviour and have discussed this above.

It is important to note that misogyny is not always about active hatred towards women. There is a culture of casual misogyny that exists, and this legislation aims to address the worst expressions of that in behaviour. That culture of casual misogyny has so far protected those who harass and abuse in a misogynistic way from being censured and ultimately protects patriarchal structures which place men in a position of dominance over women.

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?

As discussed above in relation to the previous offence, we welcome the list of effects that can result from this to reflect the wide range of feelings and responses this can

cause women or girls whilst still recognising that not every victim will respond in a prescribed way.

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

Yes, we agree with this and refer to our above answer relating to the same point in relation to the previous offence.

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

No response.

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

We refer to our above answer relating to the same point in relation to the previous offence.

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 recognise that this mirrors a similar provision in the 2021 Act. It would be the duty, and requirement in law, of the decision maker in a case to weigh in the competing right of freedom of expression with or without further provision, but accept that this would provide clarity.

As stated above, we welcome the introduction of these offences as their aim is to punish and curtail the serious behaviour that flows from misogyny and that endangers women, not to curtail freedom of expression.

We recognise the importance that the right to freedom of expression has for our society and that these provisions must strike a careful balance in order to achieve their aims, whilst also preserving freedom of expression for all.

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

No.

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'?

We are supportive of the proposal to create a specific offence of 'threatening or abusive communications to women and girls which reference rape, sexual assault or disfigurement'.

We have seen a significant rise in such threats being made to women and girls⁷. There is particular concern for women in online spaces and we have heard of women who receive these types of messages regularly. The messages can be exceptionally graphic, and also refer to knowing where the woman lives.

This has the impact of making women and girls fearful and distressed, as well as putting them at physical risk. Women have described having to install security measures or ensure male partners or family members are with them, as they can become too afraid to be alone in their own homes. Many women also report taking active steps to protect themselves from sexual violence and harassment, after receipt of abusive communications, whether that is changing how they dress, how much they drink, or checking in with friends after they get home.

Quite often a perpetrator will rely on an anonymous status online in making these threats, and more needs to be done to ensure that they are held accountable for their actions.

While there has been a significant rise in this behaviour being carried out online, it is by no means the only way in which abusive communications are delivered. Protection is also necessary to confront and end abusive communications which are made by physical means, or in person.

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?

We agree with the way the offence has been framed. No woman or girl should be required to demonstrate the impact of this type of communication, the impact is self-evident. We also welcome that there is no need to prove the intention of the perpetrator.

In Scottish society, we must end rape culture and this offence can be seen as a necessary step in making that happen.

We agree that the trigger for committing this offence should be the act of conveying a message, as this means protection will not just be limited to a direct message to a woman or group of women, but could also include a comment on a forum, regardless of the composition of the forum members.

With the rise of incel culture, well documented in the writing of Laura Bates⁸, there has been a rise in men making videos aimed at young men which promote rape. There are also forums where men discuss that they can and should rape women who refuse to have sex with them. In our view, these types of communications are also acts of misogyny which should be tackled to ensure women and girls are adequately protected from the potentially harmful consequences.

⁷ [Online abuse of women widespread in UK | Amnesty International UK](#)

⁸ Laura Bates, 'Men Who Hate Women,' Simon and Schuster (2020).

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

See above.

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 agree that the offence should be recognised in two different ways, as described in the draft offences; 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.

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

We would echo the comments made above regarding the use of defences and are even more cautious about the use of defences here. The seriousness of the offence should be reflected, proportionately, in the provisions of the offence.

It is hard to see how it would ever be reasonable for someone to commit this sort of behaviour. An example has been given in the consultation document where a person sends a copy of a threat to a woman to let them know that someone made it, perhaps to warn them. These rare and exceptional circumstances are the only types of examples we can consider fitting as a defence for this behaviour.

We are therefore concerned by the defence of improbability, and we believe the scope and meaning of the defence need to be defined in greater detail.

The most recent exposure of text communications between serving officers in the Met Police serves as an example of where we are concerned such a defence could be exploited⁹ and we are keen to ensure, therefore, that any proposed defences are carefully examined in light of such examples to ensure they do not eviscerate the protections of this proposed legislation.

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

No response.

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

No.

PART 3 Statutory Aggravation

⁹ [Police officers found guilty of sharing grossly offensive WhatsApp messages | The Crown Prosecution Service \(cps.gov.uk\)](https://www.cps.gov.uk/police-officers-found-guilty-sharing-grossly-offensive-whatsapp-messages)

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

We are supportive of the creation of a specific statutory sentencing aggravation relating to misogyny. Whilst the above offences cover a wide range of behaviours, there are still some offences such as assault, stalking, and vandalism that can have a misogynistic element and it is right that there be provision to reflect that.

This does not just mean that the crime was committed against a woman but that it captures a misogynistic element such as; misogynistic graffiti, assaulting a woman whilst using misogynistic language or throwing a brick through a known feminist's window etc.

Like other such sentencing aggravations, we believe it is appropriate that a single source of evidence should be enough to prove them, and no corroboration of the aggravation should be required.

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.

Yes, we agree with these two types of situations being accounted for. We have made comments above surrounding the terms of 'contempt, malice and ill will'.

Question 23: 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?

No response.

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

No response.

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

No.

Part 4 An offence of stirring up hatred of women and girls

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, we are supportive of the report's recommendation that there should be an offence of stirring up hatred of women and girls. This should be used to address the '*rapidly growing culture with far reaching impacts, of stirring up hatred towards women...which causes women as a group to feel vulnerable and excluded*'.¹⁰

We have seen a rise in recent years of Incel culture and online forums where individuals encourage assault or rape of women who do not sleep with them consensually. There are also examples of men who promote physical punishment of women or encourage domestic abuse within relationships as a way to maintain control.¹¹

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?

Yes, we agree with the proposal. The offence of behaving in a threatening or abusive manner with the intention of stirring up hatred of women and girls would ensure that most behaviour that incites violence and harassment is captured while excluding that which is considered free expression.

The proposed offence should be robust enough to cover spaces which might be described as 'all male' – including online chat rooms and Whatsapp groups. This behaviour does not have to be in the presence of women to be criminalised and those who perpetrate it should not be able to rely on this for protection.

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

Yes as stated in previous response.

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?

As outlined above, we have highlighted a careful balance must be struck to achieve the aim of curtailing the serious harassment and abuse experienced by women and girls due to misogynistic behaviour, whilst upholding individual freedom of expression, protected by international law.

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?

¹⁰ [Misogyny - A Human Rights Issue \(www.gov.scot\)](http://www.gov.scot)

¹¹ 'Men Who Hate Women' – Laura Bates

If not implemented, we believe this will continue to hold up the inequality of women and girls.