



Law Society
of Scotland

Consultation Response

Independent Working Group on Misogyny and Criminal Justice Consultation

2 August 2021



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 Committee welcomes the opportunity to consider and respond to the consultation by the Independent Working Group on Misogyny and Criminal Justice (IWG) in Scotland (the consultation) whose remit¹ is to consider whether:

- there is a gap in the law that would require the creation of a stand-alone offence to make misogynistic behaviour a crime and
- to determine if sex should be added as characteristic to aggravations under the Hate Crime and Public Order (Scotland) Act 2021 (2021 Act).

We are content for our response to be published under the name of the Society. We would be content to present our evidence if requested to the IWG.

Executive Summary

Before considering the specific issues outlined in the consultation, there is a need to consider the purpose of the criminal law. Criminal law should protect society, ensure a safe environment free from crime and from the fear of crime and safeguard civil liberties.

If the Government intend to propose developments or changes to the criminal law, it must demonstrate that there is a need for those changes. Any changes ought to follow the principles of good law making, therefore any new law must be necessary, clear, coherent, effective and accessible.

Since there is much debate over what is covered by misogyny, any new law would need to prescribe clearly the scope of the offence i.e. the misogynistic behaviour that is intended to be included. The provision would also require to set out the penalties which would apply in the event of any conviction.

Much will depend on how any standalone offence and misogyny are defined. A new provision would need to comply with European Convention Rights. In bringing forward any bill for such a provision, the Scottish

¹ Misogyny and Criminal Justice in Scotland Working Group - gov.scot (www.gov.scot)

Ministers would need to consider the UN Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 (CEDAW)² which confirms commitment to fundamental human rights, respecting dignity and worth of the human person, in the equal rights of men and women.

In going forward with either the creation of a standalone offence or inclusion of sex as an aggravation, legislation needs to be fit for purpose, and not only at this time but for the future. We are concerned that any proposed legislation takes account of that need for future proofing in its use of terminology.

We repeat our comments about the need for equality. If there is to be an offence of misogyny drafting needs to factor in that a woman could commit a misogynistic offence. The Government should also state its intention about similar behaviour directed against men.

General

The remit of the IWG is wide. There is a need to have a common and clear understanding of what is meant by misogynistic behaviour before views are formed as to there being any gap in the law. Only then can the issue be addressed concluding that if there is a gap that consideration is given to the creation of a standalone offence and/or the addition of a sex characteristic as an aggravator potentially included within the 2021 Act.

Exactly where the timing of the consultation fits in with the three phases of the IWG could be clarified.

Phase one of the work comprises an evidential scoping exercise in which it intends to “build a picture of the experiences of women and girls in Scotland and internationally, applying a gendered analytical lens, through the consideration of existing data sets, literature reviews and lived experience and [setting] out the principles which will support a shared understanding of how these experiences are influenced and/or driven by misogynistic behaviour and/or attitudes and where this behaviour is, or should be, a criminal offence.”

We assume that this consultation fits into this phase though phase three of the IWG’s remit includes working with others to develop a specific definition of misogyny in a Scottish legal context. This is important as we are uncertain as to how this important debate following the consultation is to be taken forward.

We outline our observations on misogyny as follows:

Definition of misogyny

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. Just how success is measured if misogyny is defined and criminalised is difficult if not impossible to gauge.

In bringing forward any changes to legislation, there must be a positive difference to be made and specifically it should bring benefit to women's safety.

In focusing on the issue of misogyny, we recognise that this is a complex and emotive topic, compounded to an extent by the "current" lack of any accepted definition of misogyny. The IWG has produced a working definition, developed for discussion purposes and is deliberately broad in its scope.³

We have concerns about this definition albeit that it is specified as being merely for working purposes.

In our view, this definition could capture almost every male accused of a sexual offence, stalking and harassment or domestic abuse where there is a female victim. This is especially so if it is correct, as indicated, that misogyny can be unconscious and can be a learned socialised state of mind. A person could find that their crime is aggravated for something that they were not themselves aware that they were doing/being.

As highlighted above, to satisfy the requirements of criminal law, there is the need for clarity and understanding when behaviour is offending. It would be a very significant step to criminalise misogynistic behaviour as an absolute offence that could be committed unconsciously. The current working definition does not adequately distinguish.

We considered two dictionary definitions, outlining that misogyny is:

- "Dislike of, contempt for, or ingrained prejudice against women."⁴
- "Feelings of hating women or the belief that men are much better than women."⁵

³ '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 harassment and bullying. Misogyny can be conscious or unconscious, and men and women both can be socialised to accept it.'

⁴ <https://www.lexico.com/definition/misogyny>

⁵ <https://dictionary.cambridge.org/dictionary/english/misogyny>

That narrower focus seems essential when trying to contextualise any definition of the misogyny issue.

Picking up on the use of the word “unconscious”, a person can be sexist or demonstrate sexism without consciously or unconsciously actively disliking or women or treating them with contempt. Misogyny is more than that – it needs a state of mind which manifests itself in behaviour that demonstrates a hatred or aversion to or prejudice against women. We recognise that this can be a challenge, given the acceptance by society of certain types of behaviour. Findings such as those within the Ofsted Review of Sexual Abuse in Schools and Colleges⁶ provide evidence in that:

“It is concerning that for some children, incidents [of sexual abuse] are so commonplace that they see no point in reporting them....more or less prevalent for different groups of young people, and there may well be differences, but it found that the issue is so widespread that it needs addressing for all children and young people.”

Can misogyny be unconscious?

We accept that misogynistic attitudes can be learned and normalised, hence the need for care in defining and understanding how any criminal offence that could be created would be committed. If misogyny is to become a crime, a requirement of a particular state of mind would be appropriate for any accepted definition on which criminal liability rests. If the aim is to capture a broader social phenomenon, this working definition is too wide.

Consider, for instance, unconscious bias training where there may not be an acceptance that the behaviour amounts to being sexist. The purpose of that training seeks to educate that person of the wrongs of their relevant behaviour. There is a risk if the bar is set too low that any male could be described with being termed misogynist. In any case being currently considered, the court can determine the behaviour by hearing the facts and circumstances of the incident in question, and then that it is of a criminal standard. By adding too wide a definition, creating a new offence or an aggravation could risk behaviour being categorised as criminal which does not meet that required threshold.

We are also concerned as highlighted before to the debates on the 2021 Act about the need to ensure the inclusion of misandry. If the IWG were to seek to add sex as an additional characteristic to section 1(2) of the 2021 Act, then the aggravator should equally apply where the offender demonstrates malice and ill will towards a male victim.

⁶ <https://www.gov.uk/government/publications/review-of-sexual-abuse-in-schools-and-colleges>

Response to Questions

Question 1: Which conduct do you consider to be covered by the term misogynistic behaviours?

Generally, this is behaviour where the behaviour results from the fact that it affects women. There are a vast range of examples including behaviour which demonstrates contempt, dislike or ingrained prejudice such as threatening or abusive behaviour and other statutory communications offences, stalking and harassment, coercive and controlling behaviour, non-sexual and sexual assault including rape, and murder. This also includes the use of sexualised language, unwanted attention or touching, threats of sexual violence against women, discrimination based on a women's gender, not giving opportunities due to sexist beliefs about women's capabilities, and the promotion of anti-feminist 'men's right's activism.' A number of these are already criminal offences.

If the definition is developed, essentially it is behaviour that manifests itself in actions/things said, done, or otherwise communicated. An inference of misogyny currently requires to be drawn from the facts and circumstances of each case. It includes behaviour that demonstrates an indifference to, or greater level of disregard for, a woman's autonomy, independence and self-determination *because* she is a woman. The perpetrator's conduct should demonstrate a failure to recognise the woman as an equal. The behaviour might also reflect the perpetrator's belief in their entitlement to the attention of the woman whether the woman welcomes the man's approaches or not.

Conduct such as that described above can take place between strangers or where the parties are known to each other anywhere in public or in private. What can be implied sometimes, but not necessarily, is that there is a power imbalance between the man and the woman, and it can arise within working or personal relationships. It can also be promoted through music, films, advertising, publications, social media which influence societal and cultural attitudes. These effectively endorse misogyny attitudes that foster stereotypes of social roles based on gender.

There is a need for education and cultural awareness-raising that should not extend to criminalising behaviour. That should be the ultimate and not the primary solution.

Question 2: Do you know of any Scottish laws that currently address misogynistic behaviours?

As highlighted above, misogyny is a broad concept which covers a range of behaviour which may or may not be criminal. Some criminal offences (e.g. sexual offences and domestic abuse legislation) might be considered to address behaviour which is inherently misogynistic; other offences have no such inherent character but might commonly be used in respect of misogynistic behaviour (e.g. assault, threatening and abusive behaviour under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (2010 Act), and breach of the peace). There are a much broader range of criminal offences that would be capable of being applied in the context of misogynistic behaviour even if misogyny were not thought to be routinely connected with the wrongdoing in question.

Since the replacement of the common law crime of rape by Section 1 of the Sexual Offences (Scotland) Act 2009, which removed the gender specific requirement that the victim must be female, all criminal offences in Scotland can be committed against both women and men. This gender-neutral drafting is important and picks up our observation about misandry above.

While it may be that many male offenders are, consciously or otherwise, motivated by their prejudice or hostility towards women, at present, this is not viewed as a specific issue by the criminal courts. However, this may something to be taken into consideration as part of the sentencing process when assessing the risk to others, of reoffending, or the need to impose an extended sentence or Order for Lifelong Restriction.

Exactly how aspects of sentencing should be factored in lies with judges and advice can be proffered through the Scottish Sentencing Council.⁷ Their role includes the development of specific guidelines to ensure that important consistency in sentencing practice and promoting much needed public awareness as to what a likely sentence will be. This duality reflects its important role. It also helps in judicial education.

We refer to our answer to Question 1 as the commission of certain baseline crimes already exist which may be aggravated related to misogynistic behaviour. These include, as examples, the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, Domestic Abuse (Scotland) Act 2018, Protection from Harassment Act 1997, Sexual Offences (Scotland) Act 2009, and the 2010 Act. They do not carry a specific aggravation of misogyny. This can be contrasted with section 1 of the 2021 Act which relates to the aggravation of conduct by means of one of the characteristics under section 1(2). Presumably were the IWG to recommend an aggravation related to sex, consideration would need to be given into how this would fit in with existing offences.

What must be stressed is for additional legislation to be required, there must be a clear gap demonstrated. There may be some such as in an employment setting in which an employee feels harassed by a colleague/ manager though we feel that necessary threshold is already reached by section 39 of the 2010 Act. We would like to see the IWG address where the line is drawn between criminal behaviour and an outdated social attitude. Legislation of course does need to reflect changing times but only where there is a gap.

⁷ <https://www.scottishsentencingcouncil.org.uk/>

There are also other mechanisms which pick up our point about education. We are aware that behaviour can be targeted by “Equality Ambassadors” who are members of staff for certain groups of people. These include that are representative of other characteristics such as those specified in the 2021 Act.

Question 3: Do the current laws adequately protect women in Scotland from misogynistic behaviours?

Without an agreed definition of misogyny, it is not possible to answer this question. The Criminal law should protect women and men equally from behaviour that is criminal. Currently, laws protect women from behaviour which may have misogyny at its root, but the misogynistic perspective may not be specifically named or approached as an identified aggravation to the offence.

The IWG has an important role to perform in reviewing the current law and establishing if there are gaps where such behaviour that is criminal should be prosecuted. We agree that when this type of behaviour is witnessed, for example in person, that there can be a tendency for others present to ignore it or fail to challenge it. That acquiescence is part of the cultural problem that needs to be addressed. If misogyny is identified as a problem in modern society, it needs tackled as a whole and not just in the context of the criminal law.

Arguably, the fact that our laws may lack specification on protecting women from certain behaviours may support that ongoing acquiescence or acceptance by society of certain types of behaviours.

This review of the law and attitudes is timely as societal and cultural change is needed when we consider how the media, corporate organisations, and others permit misogyny through their messaging, advertising and campaigning choices.

We agree that with the rise of the Internet, and in particular, social media platforms, have seen those participating in them attract mostly text-based online misogyny. As Dr Kim Barker and Olga Jurasc stated: “Such acts severely affect women’s rights to equal participation in the public sphere, taken here to include the online public sphere, on an equal basis with men.”⁸ The abuse suffered creates “significant obstacles to women’s equal participation in public and political life, while also affecting women’s rights to freely express their views.”⁹

We recognise the need for law to change to reflect cultural attitudes.

Question 4: Are there any gaps in the law in Scotland regarding misogynistic

⁸ Online Misogyny: A Challenge for Digital Feminism? [https://dspace.stir.ac.uk/retrieve/7cf50d94-9f42-4b9c-9bbf-3eb55ab5fec7/Barker%20and%20Jurasz_Online%20Misogyny%20\(JIA%20accepted\)%20.pdf](https://dspace.stir.ac.uk/retrieve/7cf50d94-9f42-4b9c-9bbf-3eb55ab5fec7/Barker%20and%20Jurasz_Online%20Misogyny%20(JIA%20accepted)%20.pdf)

⁹ Online Misogyny: A Challenge for Digital Feminism? [https://dspace.stir.ac.uk/retrieve/7cf50d94-9f42-4b9c-9bbf-3eb55ab5fec7/Barker%20and%20Jurasz_Online%20Misogyny%20\(JIA%20accepted\)%20.pdf](https://dspace.stir.ac.uk/retrieve/7cf50d94-9f42-4b9c-9bbf-3eb55ab5fec7/Barker%20and%20Jurasz_Online%20Misogyny%20(JIA%20accepted)%20.pdf)

behaviours?

At present, misogynistic behaviours amounting to criminal conduct are prosecuted using existing common law or statutory offences. The court can only address the perpetrator's motivation through the usual sentencing process.

Some behaviours as highlighted in our answer to Question 3 may not meet the threshold of criminality even where the perpetrator is motivated by hatred of, or prejudice against or contempt for women and intends to cause fear and alarm, and cause those affected to feel vulnerable or at risk but is not abusive.

*Ahmed v H.M. Advocate*¹⁰¹¹ illustrates some of the issues in seeking to interpret 'threatening' in section 38(1) of the 2010 Act. The sheriff found the accused as having behaved in a threatening manner which was likely to have caused fear or alarm. The sheriff had not indicated what he considered could be threatening as there was no evidence of the use of any threatening language, manner or tone or comments containing any innuendo, sexual or otherwise.¹² The accused had indicated to one complainer that "she looked pretty" another that "she was cute" and another complimented her skirt. The encounters had taken place in daylight.

What is important is to consider in considering any potential criminalisation is whether as the court stated, "a polite conversational request or compliment can be construed as threatening merely because it is uninvited or unwelcome."¹³

Question 5: Do you think there should be a stand-alone offence to cover misogynistic behaviour in public spaces including the street, around schools, on public transport, online etc.?

The question is if there is a gap in the law that needs to be addressed.

There are so many examples where women must take care such as watching out for cars slowing down, sharing their location with others, and avoiding walking alone. These activities may arguably be concerns expressed by other groups and not therefore motivated by misogyny. If misogyny were defined as a hate crime, this could promote awareness of some of that conduct but would not reduce the prevalence of misogyny itself or the impact on life that it has. The root cause of misogyny is what needs to be tackled. This comes back to education to prevent, address and undo learned misogynistic behaviours.

Why does the question refer to real and virtual public spaces only? The issue is if the conduct is misogynistic and caused or was intended to cause the woman alarm or distress and demonstrates malice

¹⁰ [2020] HCJAC 37

¹¹ Though the appeal does deal with several other factors

¹² Paragraph 46 of the Ahmed

¹³ Paragraph 51 of the Ahmed.

and ill will towards the victim because she is female. If there is to be a new offence, there must be a gap to be addressed.

Where we could agree is in considering online crimes. Women are often made to feel scared and intimidated, which may fit on occasions within section 38 of the 2010 Act. However, much of the behaviour would not necessarily cause a 'reasonable person' fear or alarm and often a group of men cat calling at a single woman on her own can be a fear inducing situation as would where a man sits next to a woman on a train or a bus and insists that they speak to them can also make a women feel scared.

We are not sure if it is about a new offence as much as our use and guidance around our existing laws that need to change. If there is to be a new offence it needs to be clear and coherent to ensure that the application and understanding of the criminal law is as simple as possible.

Question 6: Do you think that the characteristic of 'sex' should be added to hate crime legislation in Scotland?

Sex would need to apply to both male and female and clarified in the drafting of any legislation.

Question 7: Do you think that there should be an offence of stirring up of sexual hatred added to hate crime legislation in Scotland?

If sex were to be included as a characteristic under section 1 (2) of the 2021 Act and were not to be added to the list on characteristics in section 4(3) then a significant difference would be drawn between stirring up hatred on the grounds of race, etc and against a group of persons based on the group being defined by reference to their sex.

Question 8: What non-legal measures are you aware of that have attempted to address misogynistic behaviours within Scottish society?

These would be matters for the specific organisations involved in the relevant policy to expand on as they are best able to comment.

Question 9: How effective, in your view, have these non-legal measures been in addressing these behaviours?

We refer to our answer to question 8.



Question 10: Should any of these non-legal measures be made mandatory?

Education and wider considerations of cultural change can be driven by non-legal measures. These would not be mandatory unless for instance regarding convicted offenders where it could be included under a Community Payback Order or their prison education. It may help to observe that a difficulty with the creation of an offence based upon motivation or perceived motivation, rather than egregious conduct or the result of conduct, is that it risks criminalising the trivial which is usually best avoided and historically contrary to legal principle.

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