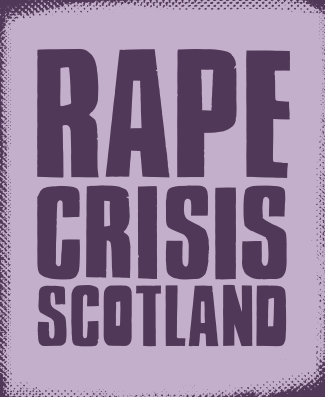





# CONSULTATION

## Reforming the criminal law to address misogyny (2023)



**RAPE  
CRISIS  
SCOTLAND**

**Rape Crisis Scotland Response to;  
Reforming the criminal law to address misogyny: A Scottish Government Consultation  
June 2023**

**Misogynistic Harassment**

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

At Rape Crisis Scotland we are supportive of the creation of the offence of misogynistic harassment which relates to the harassment of an identified victim or victims. Those accessing our services are experiencing a range of misogynistic behaviours which are abusive and harmful to the wellbeing of women and girls as a whole. We fully support the recommendations of Misogyny – A Human Rights Issue by Baroness Helena Kennedy.

The proliferation of misogynistic attitudes is evident from our work supporting survivors. The Scottish Women's Right's Centre reports seeing 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, fake porn, sexual extortion, videos of sexual assaults and rapes, rape threats, doxxing (publicly publishing 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. There has been a rise in the techniques promoted by 'pick-up artists' who suggest that women need to be targeted on their own and repeatedly asked for personal information. The impact of this abuse on survivors can be long lasting and devastating.

Women in Scotland should be free to live without fear of harassment and abuse. It creates a culture of fear and there are real barriers to women and girls fully participating in society. Women are taught from childhood to protect themselves and to learn protective behaviours such as avoiding eye contact with men or keeping keys in between your fingers when walking home at night.

Experience of these types of behaviour has the effect of limiting the lives of women and girls. Some women describe avoiding certain situations or taking protective measures and spending time considering these factors rather than existing in shared spaces freely. This can erode self-confidence and leave women and girls feeling scared and fearful for their safety.

Scotland has a history of being at the forefront of developing progressive legislation that protects and promotes the safety of women and girls. These laws would share the ethos which underpins the Equally Safe Strategy and work 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'.

We support that stand alone offences are created to achieve this purpose. If people don't know that certain behaviour is a crime, they won't report it. The Scottish criminal justice

system is almost entirely based on need for a complainer so if it is not clear if behaviour is criminal, or what crime is being committed, this presents a barrier to reporting. This can act as a particularly acute barrier in cases involving sexual or street harassment, where women and girls may already be worried about being seen to overreact. In this context, there is a strong argument for offences which explicitly name behaviour as criminal. A helpful example is with stalking, which was arguably covered by criminal law prior to it being made a specific offence in section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. However, campaigners and legislators came to the view that there was a need for a dedicated offence. The level of reports of stalking since has justified this approach; in 2019-20, 1,145 stalking charges under section 39 of the Act were reported to COPFS.

There are elements to misogyny and the abuse experienced by women that mean it is not appropriate to just simply 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'.

There is no credible male equivalent to misogyny and women are not a minority – this is experienced by vast majority of women and because of this there is a society wide chilling effect. The idea of neutrality in law is largely a fiction – laws for men and women usually fail to take account the specific context in which women and girls live their lives.

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

The creation of standalone provisions will send a clear signal to women that these behaviours are unacceptable. It can convey that they are serious violations and will be taken seriously by a criminal justice system which is there to protect them. The working group report showed that 93.4% of the women who described their experiences of abusive and harassing behaviour did not report this to the police. They reported feeling that the police would not be interested or minimised the behaviour by saying it would be considered trivial. 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 from 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 as a good example, we believe the provisions suggested for Scotland propose to go further and have the potential to achieve more.

The criminal laws we currently have are not properly addressing this range of complex behaviours. There are conceptual difficulties in applying supposedly 'neutral' offences such as breach of the peace, or acting in a threatening or abusive manner<sup>1</sup> to street harassment of women and girls, harassment which occurs in the specific context of women and girls' lives.

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*Ahmed v HM Advocate* [2020] HCJAC 37 demonstrated the limits of the this and exposed a gap which exists in our current framework of offences in Scotland. 'Addy A Game' was a so-called pick-up artist who was convicted of a series of offences under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. He successfully appealed his conviction, and in the judgement, the bench commented:

"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."

Five young women, aged between 16 and 21, gave evidence at his trial about how they had been intimidated by Ahmed in Glasgow city centre and in Uddingston, South Lanarkshire. The trial heard how Ahmed approached two schoolgirls in a secluded lane in Uddingston in 2016, when they were 16 and 17. He called one of them "pretty", tried to get her phone number and made her feel "uncomfortable" but she walked away. Another woman broke down in court as she described how Ahmed followed her through Glasgow city centre and grabbed her head as he tried to kiss her.

The notion that a 'compliment' is not a threat in the context of the above behaviour exposes that far from being neutral, the law is often located primarily within male view and experience. There is an inherent limitation in supposedly 'neutral' offences being used to cover experiences of sexual harassment which are very specific to the context of women and girls' lives.

The proposed new offences expand the scope of behaviour which will be criminalised and will properly address the misogynistic element within them. The concept of 'fair labelling' of offences is relevant here as the criminal act must be properly named for the type of harm it is. The criminal provisions we currently have not successfully criminalised these behaviours and we do not see that they properly capture the essence of the wrongdoing. The proposed offences are required to properly combat this behaviour and see it sanctioned. For the same reasons, we do not see that a standalone aggravator of misogyny (to add to existing offences) is enough in itself. These provisions will give clarity on societal norms, they are comprehensible, justifiable and proportionate and have the advantage of providing meaningful data on the extent of the offending.

The proposed laws are well balanced in their attempts to curtail the serious harassment and abuse that women and girls are experiencing whilst not seeking to interfere with the right to freedom of expression. The criminal law is not enough, in itself, to eradicate sexism and misogyny from our society, deeply rooted cultural attitudes must also be shifted. Education is key here, especially when it comes to young people. At RCS we reflect these values in our prevention work, in delivering the Equally Safe At School programme. But the law can play a key role in society by criminalising and holding the examples of behaviour we have discussed to account. Protections against freedom of expression are not absolute and the law should intervene when harm is done.

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?

We welcome the concept that the potential legislation would cover 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 be 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 these can include feeling uneasy, unsafe, intimidated or on alert to potential danger. The list of effects should encompass these types of responses.

We welcome the principle, contained in the draft offences, which does not require the response be evidenced by the particular victim, it instead requires a reasonable person test. This is very important as although there are many feelings that 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.

We believe that the law must be robust enough to cover the types of behaviour that it intends to. 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 real need for professionals in the criminal justice sector to properly understand the effects of this behaviour.

Question: 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 clarity with regard to online spaces where much of this abuse is carried out.

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

The proposed maximum penalty should be proportionate to the level of offending and should serve as a deterrent.

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

We see very little scope for the behaviour covered by the proposed offences to ever be considered 'reasonable'. Any defence should be limited in use and only for the most exceptional circumstances. 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, because she deserved it for being 'mouthy' etc and any defence should not be used in such circumstances.

Question: 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 those experiences. These key players can set standards for wider society.

### **Misogynistic Behaviour –**

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?

We support the introduction of an offence of misogynistic behaviour which does not require the behaviour to be directed at a specific victim. There are many examples of where this could be applied, and many are outlined in the consultation document and the working group report. We have heard many of these situations reported by women and girls we support including men talking loudly about graphic sexual acts in public places or workplaces, men openly watching explicit pornography in a public place.

We have given a great deal of consideration as to the particular wording of this offence, we note that the requirement has been proposed as; 'contempt, malice or ill will' differs from that in the working group report which suggested the use of the term 'prejudice'. We are aware that in many cases it might be difficult to prove actual malice or ill-will, some of this behaviour is very normalised and it could be argued that the necessary intent is not met because the person was just 'indifferent' or felt their behaviour was reasonable. However, we consider that the use of the word 'contempt' can cover many circumstances as it implies a disregard or belittling – if a man watches explicit pornography on the bus this reads to us that this would be contemptuous as it demonstrates a disregard for the effects on women.

In general, we believe that stand alone offences are required to target this type of behaviour and have discussed this above. We would note that watching pornography in public would not necessarily be covered by the provisions in the Sexual Offences (Scotland) Act 2009 because there would be a requirement to prove that there was sexual gratification or an intention to humiliate or distress. This new proposed offence would widen the behaviour that would be criminalised.

It is important to note that misogyny is not always about active hatred towards women – many of the perpetrators of this behaviour will no doubt suggest that they love many women in their lives. 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 as 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 to women.

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?

As discussed above in relation to the previous offence, we welcome expanding the list (from that within the 2021 Act) of effects that can result from this to reflect the wide range of feelings and responses this can cause women or girls whilst recognising that not every victim will respond in a prescribed way.

Question: 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 on the previous offence.

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

The proposed maximum penalty should be proportionate to the level of offending but should serve as a deterrent.

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

Any defence of reasonableness should be restricted to the most exceptional circumstances. In the example of a person watching explicit pornography on a bus or other public place, we do not think that they should have any reasonable expectation of privacy if this is a place that women and girls are likely to be. The purpose of these offences is to make spaces safer for women and give them the confidence that this will not be happening if they access shared spaces.

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?

We recognise that this mirrors the 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 in order to punish and curtail the serious behaviour that flows from misogyny and that which endangers women within

society as a whole, not to curtail freedom of expression or punish 'sexist' comments or discussions no matter how much we may disagree with them.

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

No further comments.

**Offence of Threatening or Abusive Communications to W&G which reference rape, sexual assault or disfigurement -**

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?

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 girls. There is particular concern for women in online spaces; women receive these types of messages on a regular basis. The messages can be exceptionally graphic and also make reference to knowing where that woman lives. This has the impact of making them fearful, distressed and at physical risk. Women have described having to install security measures or ensure male partners or family members are with them as they are too afraid to be alone in their own homes. There have been particular concerns raised by women who occupy online spaces that are predominantly male orientated, such as coding or gaming online, that abuse is often used as a way to exclude them from those spaces. Threats of disfigurement are also common place, this can have particular impact with the reference to female genital mutilation.

Quite often a perpetrator will rely on an anonymous status online to perpetuate this abuse. 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 this is delivered. There is a deeply unsettling, misogynistic value to the statement that; 'you deserve to be raped' or 'I will rape you'. As highlighted above, many women take active steps to protect themselves from sexual violence and harassment, whether that is changing how they dress, how much they drink, checking in with friends after they get home. The act of communicating such a statement is so serious because the perpetrator draws on the knowledge of that fear to further subjugate and frighten their target. It is deserving of particular focus and censorship in the criminal law.

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?

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. That there is no need to prove the intention of the perpetrator is also welcome.



We also support the approach in including messages or comments which make reference to rape – including harmful comments such as ‘I wouldn’t even rape you’ – ‘you aren’t worth raping’ etc.

We agree the offence should refer to the conveying of a message. This means it will not just be limited to a direct message to a woman or group of women, but could include a comment on a forum for example

With the worrying rise of incel culture, well documented in the writing of Laura Bates, there has been an increase in men making videos aimed at young men which promote rape and sexual violence.<sup>2</sup> There are also forums where men discuss that they can and should rape women who refuse to have sex with them.

The creation of this offence could play an important role in work to transform our cultural attitudes towards women.

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

We are cautious about the use of defences. 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 examples we can consider a use for such a defence.

The defence of improbability causes us some concern, why should anyone making such statements ever feel safe in communicating them to another? What circumstances could this be appropriate? If a man is talking to another about his desire to rape a woman, should he ever be protected just because he thought the person he was communicating this to would not report this. The most recent exposure of text communications between serving officers in

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the Met Police serves as an example of where this defence could be exploited. Those who make such statements should not be protected by these defences.

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

The maximum penalty should reflect the seriousness of the offence and act as a deterrent to offending. We note that the first two proposed offences had maximum penalties of 7 years and this only 5, which makes it a summary level offence. We envisage that there could be particularly serious cases involving this offence where a prolific offender is prosecuted, we are aware that some men have made serious and repeated threats of this nature to multiple women and as such it may want to attract a serious penalty in exceptional cases. We would also suggest that this offence be added to the list of those for which registration on the sex offenders register is automatic.

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

No

### **Statutory Aggravation**

Question: 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 aggravation relating to misogyny. Whilst the above offences cover a wide range of behaviours there are still some offences such as assault, stalking, vandalism can have a misogynistic quality 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 a single source of evidence should be enough to prove them, and no corroboration of the aggravation should be required.

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.

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

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?

Yes, we agree with this.

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

No further comments, they appear to contain the relevant offences.

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

No

### **Stirring up Hatred**

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

We support 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'.

We have seen a rise in recent years of incel culture and online forums where individuals encourage sexual violence against women who do not sleep with you 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.

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?

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 presence of women to be criminalised and those who perpetrate it should not be able to rely on this for protection.

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

Yes, as above.

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

There is an impact on freedom of expression; this is justified when balanced against the duty to protect women and girls from known harms. There are multiple protections in relation to freedom of expression built into the draft legislation.

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?

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

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?

The state has an obligation to protect girls from violence – there are specific duties under the UNCRC. This includes their right to education, their freedom of expression, their right to live without violence and harassment.

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

Women's socio-economic inequality is at stake here as these behaviours can limit women and girl's access to education or positions in the workplace.

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

No

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

No

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

No

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

No