**Misogyny Consultation: What do the provisions do – an explainer**

There is a wide range of necessary activity to help deal with misogyny in Scotland. Baroness Kennedy’s report (the report) focused on how the criminal law has a key part to play in helping drive behavioural change amongst men to prevent the harmful effects of misogyny arising, and where they do arise, ensuring the criminal justice system can respond effectively to such behaviour.

The report made recommendations for four new criminal law steps to be taken.

In converting these recommendations into draft law, the Scottish Government has split up the most important recommendation – that of a public misogynistic harassment offence – into two separate offences that cover the conduct intended by the recommendation – a misogynistic harassment offence and a misogynistic behaviour offence.

Taken together, these proposals for new law are a comprehensive response to the need to address the type of male misogynistic conduct committed almost exclusively by men, which is a blight for women and girls across Scotland. This comprehensive response ensures the criminal law can either deal for the first time, or better deal, with situations such as where someone:

* **Harasses** an **individual woman or girl**, or a **specific group of women and girls by behaving in a threatening, sexual or abusive way** that is likely to cause them to experience fear, alarm, degradation, humiliation or distress.
* **Behaves in a sexual or abusive manner** that causes **a woman or girl to experience** fear, alarm, degradation, humiliation or distress
* Commits certain existing offences in a manner which is **motivated by, or demonstrates misogyny**
* **Sends threatening or abusive communications invoking rape, sexual assault or disfigurement** to a woman or girl, or a group of women and girls **to intimidate or silence women**, especially online, with the effect of **discouraging women from participating in public debate**
* Uses **threatening or abusive language** or **communicate threatening or abusive materials** intending to **stir up hatred of women and girls in others**

**Summary of the provisions being consulted on**

**An offence of misogynistic harassment**

This can be seen as the core provision which will make it a criminal offence for a person to behave in a way that amounts to misogynistic harassment directed at a woman or girl or group of women and girls.

It expands the existing criminal law by making it an offence to behave in a way that it threatening, abusive or sexual towards a woman or girl, where this behaviour is directed at them by reason of their being a woman or girl, and a reasonable person would consider the behaviour likely to cause them fear, alarm, degradation, humiliation or distress. For the offence to be committed, the accused must either intend their behaviour to have one or more of these effects or be reckless as to whether their behaviour is likely to do so.

This offence is wider than, for example, the offence of ‘threatening or abusive behaviour’. Firstly, it captures conduct which is sexual only, as well as that which is threatening or abusive. Secondly, it covers behaviour likely to cause degradation, humiliation or distress as well as fear or alarm,. Thirdly, the court is asked to consider whether the behaviour would be likely to have these effects on the specific victim, rather than on a hypothetical ‘reasonable person’. In contrast with the offence of ‘stalking’ a single incident is sufficient for the offence to be committed.

The kinds of behaviour this offence may cover include shouting sexually abusive remarks to a woman, rubbing up against a woman in a crowded place, or using abusive language to a woman or girl who does not want to be ‘chatted up’.

**An offence of misogynistic behaviour**

This offence is intended to deal with misogynistic behaviour which is likely to have the effecting of causing a woman or girl to experience fear, alarm, degradation, humiliation or distress where that behaviour is not directed at a specific woman or girl or group of women and girls (and so could not be described as ‘harassment’).

It expands the existing criminal law by making it an offence for a person to behave in a manner that is sexual or abusive (or both) where that behaviour is either motivated by contempt or malice and ill-will towards women or girls or is of such a character that a reasonable person would consider it to be contemptuous of women and girls, and which is likely to have the effect of causing a reasonable woman or girl to suffer fear, alarm, degradation, humiliation or distress if they are at least reckless as to whether their behaviour would have this effect.

As with the offence of ‘misogynistic harassment’ above, it is wider in scope than offences of, for example, threatening or abusive behaviour or common law breach of the peace by explicitly criminalising behaviour which is sexual only, as well as that which is abusive, and behaviour likely to have the effect of causing a reasonable woman or girl to experience degradation, humiliation or distress as well as fear or alarm.

The kinds of behaviour this offence may cover include watching graphic pornography in a public place such as a bus or train where women and girls are likely to see or hear it, or having a loud sexually explicit conversation discussing women in a demeaning or degrading way, in a place where women and girls in the vicinity are likely to hear it.

**A statutory aggravation concerning misogyny**

We expect the majority of criminal misogynistic behaviour will be covered either by the proposed new offences of misogynistic harassment and misogynistic behaviour, or by existing criminal offences where the misogynistic element of the offence is clearly recognised, such as rape, sexual assault and domestic abuse.

However, someone could commit other offences against a woman or girl and be motivated by, or demonstrates, misogyny. This could include, for example, assault. The statutory aggravation will ensure that, as is the case with existing statutory aggravations concerning e.g. hate crime or domestic abuse, the fact that an offence had a misogynistic motive or the accused demonstrates misogyny, is recorded and taken into account when sentencing.

The aggravation defines an offence as being aggravated by misogyny:

* Where there is a specific victim of the offence, at the time of committing the offence, or immediately before or after doing so, the accused demonstrates contempt, or malice and ill-will towards the victim on the basis that the victim is or is presumed by the accused to be a women or girl; or
* Whether or not there is a specific victim of the offence, the offence is motivated by contempt, or malice and ill-will towards women and girls.

As recommended by the Working Group, offences where the misogynistic aspect of the offence is widely recognised, such as sexual offences, offences involving domestic abuse, and the new offences proposed in the Working Group’s report, are ‘carved out’ from the aggravation so that it cannot be libelled in these cases. This ensures that the court would not have to consider whether an individual instance of, for example, rape or sexual assault involved the offender being demonstrates contempt or malice and ill-will because the victim was a woman.

**An offence of threatening or abusive communications to women or girls that reference rape, sexual assault or disfigurement**

The Working Group heard during their evidence-gathering phase that a particular issue faced by women and girls is the experience of messages threatening or invoking rape, sexual assault and disfigurement being used to intimidate or silence women, especially online, with the effect of discouraging women from participating in public debate.

Offences like threatening or abusive behaviour under section 38 of the 2010 Act can be used to prosecute this behaviour in certain circumstances. However, they require the court to be satisfied that the comments are “threatening or abusive” and likely to cause a reasonable person to suffer “fear or alarm” and that the person making the comments was at least reckless as to whether their conduct was likely to cause “fear or alarm” to a reasonable person.

This offence criminalises sending an abusive message to a woman or girl that refers to rape, sexual assault or disfigurement. There is no requirement to prove that the message is likely to have a particular effect on the recipient, nor that the accused must intend to cause, or be reckless as to whether their behaviour is likely to cause, any particular effect on the recipient. As such, the circumstances in which this offence can be used are wider than is the case for the offence of ‘misogynistic harassment’, though we acknowledge that in many instances, the sending of such a message would also amount to an offence of misogynistic harassment.

**An offence of stirring up hatred against women and girls**

The Working Group recommend that an offence of ‘stirring up hatred of women and girls’ is created. While in many circumstances, behaviour intended to stir up hatred of women and girls may amount to an offence of misogynistic behaviour or misogynistic harassment, these offences are concerned with the direct effect of behaviour on women and girls towards whom it is directed, or who may otherwise see or hear it.

By contrast, behaviour intended to stir up hatred against women and girls, may take place in all-male spaces, including online. This offence is concerned with the effect that the behaviour may be likely to have on the (probably male) people in whom the perpetrator is seeking to stir up hatred of women and girls.

As with the ‘stirring up of hatred’ offences concerning religion, sexual orientation, transgender identity, age, disability or variations in sex characteristics, the offence is committed where the accused behaves in a threatening or abusive manner, or communicates threatening or abusive material, with the intention of stirring up hatred against women and girls.

The offence would cover behaviour intended to stir up hatred of particular groups of women and girls, as well as women and girls in general - for example, women and girls who dress a particular way, or single women and girls, or women and girls who campaign for (or indeed against) women’s rights – but it applies only where the accused intends to stir up hatred of women and girls and not merely a group of people predominantly comprised of women and girls.