

SSI to add sex as a characteristic to the Hate Crime and Public Order (Scotland) Act 2021 (GREC's response)

Do you support the approach of extension of both the stirring up of hatred offence and the aggravation of offences by prejudice to cover the characteristic of sex?

We concur with the position of Engender, Rape Crisis Scotland, Scottish Women's Aid, and Zero Tolerance, as well as the Working Group on Misogyny and Criminal Justice's report "Misogyny – A Human Rights Issue", that the extension of the stirring up hatred offence and the aggravation of offences by prejudice to cover the characteristic of sex would fail to appropriately address the issue of gendered violence against women and girls (VAWG) and may undermine the impact of Scotland's Equally Safe Strategy to prevent and eradicate VAWG. We wish to highlight three issues with the proposed approach: the presumption of gender neutrality in the offences, the lack of recognition of the widespread and structural nature of women's experiences of misogyny, and the failure to consider how the new offences will cohere with existing gendered crimes.

Gender neutrality

Policy approaches to addressing VAWG must recognise the asymmetrical nature of gendered violence. This fact has long been recognised by research and international treaty. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) states explicitly in Article 6 that 'parties shall undertake to include a gender perspective' (2011) in the implementation and evaluation of gender-sensitive policies. The UN Committee on the Elimination of Discrimination Against Women concurs, emphasising the 'gendered causes and impacts' of VAWG (2017: 4). The inclusion of 'sex' as a characteristic within the existing hate crime framework would equivocate the experiences of gendered discrimination, harassment, and violence between men and women, insinuating an unfounded equivalence between misogyny and misandry. Entrenching such a gender-neutral approach to gendered violence would perpetuate existing structural inequalities women and girls face in the justice system.

Individualisation of misogynistic violence

Attempting to address VAWG by extension of the Hate Crime and Public Order (Scotland) Act 2021 (HCP0A21) would fail to account for the widespread and entrenched experiences of misogyny by locating VAWG between individual actors. As Duggan and Mason-Bish (2022: 19) have argued, the paradigm of hate crime is 'already inherently gendered as masculine', and therefore merely extending this framework to include gender (or sex) would not adequately address the structural elements of VAWG. By this, they mean that the forms of violence imagined by hate crime law – discrete actions within the public sphere between unentangled individuals, clearly motivated by singular prejudice against a certain characteristic – are representative of bias crimes typically experienced by men, but not by women. Furthermore,

the ‘reasonable person’ test of the HCPOA21 implies a masculinist, universalised interpretation of events, rather than a victim-centred approach amenable to the differences in how men and women experience abusive and threatening behaviour. This reason informed the Working Group on Misogyny and Criminal Justice's reasons for recommending against extension of the HCPOA21: the normalisation and extent of VAWG means that the design of the HCPOA21, intended to respond to masculinised forms of violence, would fail to capture the experiences of victims of VAWG.

Overlap with existing gendered crimes

Many existing crimes, including stalking, sexual assault, and domestic abuse, contain a gendered element. It is unclear in the proposed SSI how those existing crimes would interact with the new offences. If it is judged on a case-by-case basis where the circumstances of such crimes amount to an aggravation by prejudice against sex, it would result in inconsistencies in the application of criminal law and communicate to women a dismissal of their experiences of VAWG. For this reason, the Working Group's proposed statutory aggravation relating to misogyny explicitly recommends a ‘carve-out’ of already-misogynistic crimes, such that the new aggravation may be applied only in cases where a crime with misogynist elements would not otherwise be considered VAWG.

Are you content with the interpretive provision relating to the characteristic of sex?

The interpretation of the characteristic of sex within section 5 of the draft is not appropriate for the implementation of the SSI. Its drafting appears intended to exclude transgender women in principle, if not necessarily in practice. We wish to highlight three issues with the interpretive provision: the precedent of inclusive interpretation within international law, the redundancy of the definition of sex given the principle of perception, and the lack of justification for this limited definition. These concerns also relate to question 6.

Precedence of inclusivity

The foundations of international anti-VAWG law, the Istanbul Convention and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), both emphasise the necessarily inclusive interpretation of women in their approach. In Article 3.c, the Istanbul Convention (2011) clarifies:

“gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

CEDAW, while referring to ‘sex’ in its text, has historically been interpreted to apply protections to transgender as well as cisgender women. As Meyer (2016: 590) argues by reference to the Vienna Convention, ‘a definition of the term “woman” in CEDAW as a “unified” category excluding trans* individuals is impossible’. Therefore, defining the provision as in reference to biological sex, meaning sex assigned at birth, would be in

contradiction to established convention. The Equally Safe Strategy aligns with this interpretation, directly referring to specific instantiations of VAWG experienced by intersectionally marginalised women, including transgender women.

Redundancy of 'biological sex'

Section 1 of the HCPOA21 provides that aggravation by prejudice may be based on actual or presumed membership of a protected characteristic. In cases of misogynistic aggravation, the victim's gender assignment would be irrelevant to an offender's perception of the victim's belonging to a protected group. The interpretive provision is unnecessary, confusing, and could lead to misapplication of the law where a transgender victim of VAWG is unable to assert that an offence was motivated by malice or ill will towards either sex or transgender identity.

Lack of justification

The provision is written to, in the words of the Scottish Government, 'include the implications of the recent Supreme Court Judgment', as transcribed in the background to the consultation. However, as plainly stated within that judgement, the role of the court was not 'to define the meaning of the word "woman" other than when it is used in the provisions of the EA 2010. It [had] a more limited role which does not involve making policy.' While the impact of the Supreme Court judgement is still being assessed, especially the accord of the judgement and the ensuing Home Office guidance with international human rights law, it is clear that it has no reason to be considered in the drafting of the proposed SSI.

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

The proposal fails to account for the impact of the SSI on human rights. As pointed out by Engender, the lack of a full Equality Impact Assessment in advance of finalisation of the SSI suggests a concerning disregard for a human rights-based approach in policymaking. While a full impact assessment should be conducted, we highlight two concerns that may conflict with the prohibition of discrimination: the lack of an intersectional approach in the application of the provision and its potential to undermine the lauded public health approach of the Equally Safe Strategy.

Intersectional approach

As alluded to in the response to question 3, the proposal fails to consider the intersectional aspects of VAWG. By adopting a uniform approach to gender-based violence issues, the proposal discriminates against women who experience gender-based violence in differing ways. The Committee on the Elimination of Discrimination Against Women identify that 'appropriate legal and policy responses are needed' to accommodate the ways that the discrimination faced by women is 'inextricably linked to other factors that affected their lives' (2017: 5). This was taken up by the Equally Safe Strategy, which describes varying shared and

differing experiences of VAWG across women with different intersecting identities. Policy which simplifies misogyny into the narrow terms of an extended list of characteristics in the HCPOA21 risks further discriminating against already-marginalised women. This issue also relates to question 6.

Public health approach

The Equally Safe Strategy is founded on a public health approach to VAWG: a collaborative engagement between diverse policy sectors using evidence-led practices. If the criminal justice system abandons the principles of the Equally Safe Strategy, as has been demonstrated, the entire approach will be undermined. The Strategy, which has been described as a 'leading policy initiative' (Barker and Jurasz 2022: 255) for its commitment to international human rights agreements, application of joined-up thinking, and deep, research-led approach to VAWG, must remain at the centre of Scotland's policy on gender-based violence. The proposal represents an alarming step back for Scotland's approach to these issues.