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Online Misogyny, Hate Speech & Scotland: Two Steps Forward & One Step Back?

Kim Barker¹

Abstract

Online misogyny, comprising sexist hate speech, as well as gender-based abuse is a prevalent and widespread issue. Not only does this involve either image-based sexual abuses (such as so-called ‘rape porn’ or ‘revenge porn’) but now includes – frequently – text-based abuses and text-based sexual abuse. Increasing numbers of women and girls are reporting that they have suffered abuse or misogyny on social media platforms in particular. This is a concerning trend given the way in which social media and online activities are entrenched in everyday life. Why is it that these spaces are essential for social interaction and participation but they remain fundamentally unfriendly – and perhaps even unsafe – spaces for women and girls?

Whilst there have been some soft initiatives at an international level aimed at considering the broader issue, and also at a European level, few direct law reforms have taken place. At a domestic level within Scotland (and the UK), there is a complex and piecemeal system of overlapping criminal law legislation which could be applicable to these issues – but which often fails to cover such abuses. Within the UK, Scotland is taking a different approach to tackling the issue of Online Violence Against Women (OVAW) – this includes the consideration of gender as a basis for hate based prejudices within the criminal law.

This paper will outline the current phenomenon of online abuse and briefly outline the legal situation within Scotland, before considering the limits of current laws for the regulation of sexist hate speech. The paper will conclude by offering concrete suggestions on how to legislate and revise the relevant legal provisions, and offer some insights concerning Scottish reaction to the petition for law reform in this area. This is an area in need of pressing law reform – something which this paper will advocate for.

Key words: Online misogyny; hate speech; law reform; Scotland; law.

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Introduction

Online interactions – particularly through social media multi-user websites such as social media platforms – are an embedded part of daily life for millions of people. User numbers from platforms such as Twitter and Facebook often cite daily user figures in the millions and billions. Whilst these platforms have undoubtedly cornered the current market, they have also brought with them emerging problems concerning – but not limited to – so-called ‘unacceptable behaviours’. These behaviours are numerous and spread across a wide spectrum but include child grooming, pornography, abuse, racism and bullying. The focus of this paper – whilst acknowledging that there are broader questions surrounding the regulation of social media platforms more generally² – will fall on misogynistic and sexist abuse online. Particular attention will be given to the situation under Scots Law, but with the caveat of the rather complex legal structure operating in Scotland, especially in respect of matters over which the Scottish Parliament has no legislative competence.

This paper will advocate for a number of changes to the current legislative and regulatory framework in Scotland that is applicable to online sexist hate speech. In doing so, Part I of this paper will give a brief overview of the legislative situation, and the provisions that could be utilised to tackle sexist hate speech online. Part II will then outline the current limitations that exist and which provide barriers to tackling sexist hate speech. This section will also consider non-legislative aspects, recognising that the law alone is not to blame for this societal challenge. This paper will then in Part III offer recommendations for reforms that could tackle the pernicious and widespread abuse experienced by women and girls online.

Overview of Sexist Hate Speech

It is perhaps surprising that online abuse is now a commonly reported occurrence. In some respects, it is difficult to envisage a situation where there are millions of users interacting without any issues – legal or otherwise – arising. It would be equally idealistic to imagine a wider society achieving the same goal. However, whilst there is a growing acceptance that there is now a problem, there are few real solutions which have been offered.

Sexist hate speech is something which affects a large demographic and which is much more prominent than previously thought. It is defined here as a form of violence against women encompassing misogyny and sexism, both online and offline.³

² K Barker, *Virtual spaces and virtual layers – governing the ungovernable?*, *Information and Communications Technology Law*, 25 (1), pp. 62-70.

³ Council of Europe, ‘Combating sexist hate speech’ (2016) 2 available at: <https://edoc.coe.int/en/gender-equal->

Significantly, the Council of Europe highlights the true nature of sexist hate speech:

“although it has taken a new dimension through the Internet, the root causes of sexist hate speech preceded the technology and are fundamentally linked to the persistent unequal power relations between women and men.”⁴

Sexist hate speech online encompasses vile abuse sent either publicly or privately on social media platforms in particular. Some examples of the vile abuse which this encompasses include:

“Fuck off and die...you should have jumped in front of horses, go die; I will find you and you don’t want to know what I will do when I do...kill yourself before I do; rape is the last of your worries; I’ve just got out of prison and would happily do more time to see you berried; seriously go kill yourself! I will get less time for that; rape?! I’d do a lot worse things than rape you.”⁵

“Ya not that gd looking to rape u be fine; I will find you; come to Geordie land bitch; just think it could be somebody that knows you personally; the police will do nothing; rape her nice ass; could I help with that lol; the things I cud do to u; dumb blond bitch.”⁶

Beyond these examples, there are a growing number of high-profile reports which indicate the scale of the problem. For example, DEMOS in 2016 reported that 6500 internet users had experienced some form of online abuse from 10 000 tweets in a three week period.⁷ This is a statistic reinforced by the GirlGuiding Report in 2016 which showed that 50 percent of women and girls aged between 11-21 believe that online sexism is far more extreme than offline sexism.⁸ This is not something which is an issue for a specific age group, nor is it something which happens online to certain women online – it happens to women online irrespective of age, race, religion, political persuasion, or sexual orientation. In short, women online suffer abuse because they are

ity/6995-combating-sexist-hate-speech.html.

⁴ Ibid

⁵ R v *Nimmo and Sorley*, 24 January 2014 (unreported) per Riddle J
<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-nimmo-and-sorley.pdf> 2.

⁶ Ibid

⁷ DEMOS (2016) ‘The use of misogynistic terms on Twitter’ available at: <https://www.demos.co.uk/wp-content/uploads/2016/05/Misogyny-online.pdf>.

⁸ Girlguiding, ‘Girls’ Attitudes Survey 2016’ 17-19, available at: <https://www.girlguiding.org.uk/globalassets/docs-and-resources/research-and-campaigns/girls-attitudes-survey-2016.pdf>.

women. This is a point highlighted on the global stage by Amnesty International in its considerations of the abuse suffered by women politicians⁹ during the 2017 General Election in the UK. As a result, these instances demonstrate a wider societal trend of abusing women because they are women. It is therefore of increasing importance that this problematic behaviour is addressed as a matter of urgency. Even the CEO of Twitter, Jack Dorsey has made this abundantly clear:

“We see voices being silenced on Twitter every day. We’ve been working to counteract this for the past 2 years…We prioritized this in 2016. We updated our policies and increased the size of our teams. It wasn’t enough.”¹⁰

Part I: Legislative Overview

There are a number of distinct pieces of legislation that are on the statute book in Scotland that could be used to tackle sexist hate speech and associated misogynistic behaviours. That said, there are a number of important caveats worthy of note. Firstly, this paper does not propose that all instances of offensive speech be treated as hate speech – not all distasteful speech is hateful, and not all speech reaches the threshold where it should receive attention from the criminal law. Secondly, there has never been a clearer nor more pressing need to uphold the principles attached to freedom of expression, and the rights underpinning Article 8 of the European Convention of Human Rights should always be paramount subject to the necessary limitations. Thirdly, tackling the problem of sexist hate speech is not something for the law alone, and the law alone cannot be responsible. Sexist elements of hate speech are deeply rooted within society and social structures, and therefore a more holistic approach to this problem is required – one that will necessarily involve a multitude of stakeholders. Ultimately of course, there is a fine line which must be drawn – the discussion here does not advocate for a regulatory model for opinions and thoughts. The freedom to hold opinions, no matter how objectionable they may appear to others is what makes discussions such as this one so valuable, but which equally imposes barriers on tackling sexist hate speech. Finally, the competence of the Scottish legislature is something which is also a significant caveat here – whilst there is devolved competence for some matters such as elements of criminal law in Scotland, other areas of legislative competence are reserved to the UK government at Westminster – including communications law.¹¹ Nevertheless, there are some pro-

⁹ Amnesty International, ‘Toxic Twitter’ (2018) available at: <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/#topanchor>

¹⁰ J Dorsey, Twitter CEO, 2017.

gressive steps being taken in Scots Law to tackle sexist hate speech.

I. Scots Law Provisions on Sexist Hate Speech

There is a parallel law-making system in Scotland under devolution whereby some provisions are Scots Law specific, applying only in Scotland and others are enacted by Westminster and are applicable across England, Wales, and Scotland. This adds a layer of complexity to the matter of legislative competence, and in turn, adds to some of the issues in this area – some provisions are Scots Law specific whereas others cannot be amended under Scots Law because there is no devolved competence to do so.

i. Abusive Behaviour and Sexual Harm (Scotland) Act 2016

The most progressive and recent reforms enacted in Scots Law that deal with elements of Sexist hate speech fall under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (ABSHA). This Act does not per se address ‘speech’ issues but instead has introduced specific offences aimed at tackling image-based sexual abuse. Significantly, the new offences covering so-called rape pornography and revenge pornography were introduced here. These provisions, whilst mirroring their predecessors in English Law, reflect a greater willingness to respond quickly to these societal issues in Scotland. The Scottish Parliament ensured that legislative reform in this area was swift and efficient. Whilst a swift response to a changing social behaviour is welcome, part of the rapid response in Scotland is attributable to a more progressive social agenda and engaged Parliament, with active parliamentary members.

The ABSHA 2016 focussed on image based sexism but the discussions of this piece of legislation whilst it was in its draft form also briefly entertained the idea of including a non-image based aspect of the law i.e. a textual or verbal element of sexual harm.¹² Sadly, the parliamentary committee and its advisers declined to do so, and as such, the Act focuses on image-based harms to the detriment of other on-line harms which have sexism as their basis. Similarly, the Act focuses on ‘sexual images’ – also a misnomer and another missed opportunity to deal with other image-based harms on the basis of sexism such as those suffered by Anita Sarkessian in 2012. The provisions within the Act mean that where there is sexist hate manifested in an image – such as the hacking of Sarkessian’s image to allow a user to click on it and virtually beat her up¹³ – falls outside of the provisions unless there is an element of intimacy or image abuse of a sexual nature present.

¹¹ Scotland Act 1998 s29(2)(a) and s29(2)(b); s29(4); Schedule 5 (Head C, Section C.10)

¹² Written Submission from Scottish Women’s Aid to Justice Committee, Abusive Behaviour and Sexual Harm Bill (2015) available online: [http://www.parliament.scot/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20\(Scotland\)%20Bill/SPPB243.pdf](http://www.parliament.scot/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20(Scotland)%20Bill/SPPB243.pdf) at 269.

¹³ S O’Meara, ‘Internet Trolls Up Their Harassment Game With ‘Beat Up Anita Sarkeesian’’ (The Huffington Post, 6 July 2012) available online: https://www.huffingtonpost.co.uk/2012/07/06/internet-trolls-online-beat-up-anita-sarkeesian-game_n_1653473.html?guccounter=1.

ii. Communications Act 2003

This piece of legislation is not a Scots Law specific piece of law. It was introduced by the Westminster Government in 2003 and is applicable across the UK, including in Scotland. This Act, whilst not even remotely focussed on sexist hate speech was enacted to regulate – amongst other things – the provision of communications networks within the UK. It is therefore – fairly obviously – not designed to tackle issues of online hate speech. Indeed, it was introduced before most social platforms were even in existence. The Act includes within its provisions, the offence of sending grossly offensive electronic communications.¹⁴ This is the only provision within this Act which is relevant to sexist hate speech – the provision has already been used to prosecute individuals for communications posted on Twitter. Infamously, this provision has been shown to be unsuited to addressing social media communications in the ‘Twitter Joke’ case¹⁵ where an individual was criminally prosecuted for joking that he would blow up an airport if it cancelled his flight for a second time. The defendant’s conviction was overturned on appeal by the Supreme Court, who stated that the tweet was obviously a joke but which also highlighted the difficulty of regulating tweets through the criminal law – a point reiterated by Bernal¹⁶ and the House of Lords, both of whom are of the opinion that tackling issues in this sphere are far from straightforward.¹⁷

The s127 offence is also problematic in terms of its punishment for those convicted under it. The maximum sentence is two years in prison – for ‘gross’ communications this seems too lenient as a maximum sentence – a point evidenced in *R v Nimmo & Sorley* (2014) where the defendants subjected their victims to rape and death threats sent via Twitter for a sustained period of time. Upon conviction, the defendants received eight and twelve weeks in prison respectively, despite the judge highlighting the significant harm that they had inflicted on their victims:

“...the serious harm caused by the offending behaviour makes it inappropriate to impose anything other than an immediate custodial sentence...The harm caused is very high.”¹⁸

iii. Criminal Justice and Licensing (Scotland) Act 2010

This piece of legislation – is again – not specifically targeted at sexist hate speech

¹⁴ Communications Act 2003, s127.

¹⁵ *Chambers v DPP* [2012] EWHC 2157.

¹⁶ P Bernal, ‘Written Evidence to House of Lords Internet Regulation Enquiry’ (May 2018) available online: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/communications-committee/the-internet-to-regulate-or-not-to-regulate/written/82600.pdf>.

¹⁷ Communications Select Committee, Social Media and Criminal Offences (HL 2014-2015, 32) <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3704.htm>.

¹⁸ *R v Nimmo & Sorley* (unreported) (2014), ‘Sentencing Comments’ per Howard Riddle, 24 January 2014. <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-nimmo-and-sorley.pdf>

online but does nonetheless introduce two specific offences that can be applicable to instances of online abuse. Firstly, s39 introduces the offence of harassment and introduces – significantly – legislative punitive measures that allow for civil remedies to be pursued on the basis of isolated incidents. For example, this could mean that where there are only one or two tweets issued to a pursuer (victim) that individual could pursue a civil court action for a non-harassment order (NHO). Once issued the defender (defendant) would be required to cease and desist or face further enforcement action, and additional consequences for failing to do so.

These provisions could operate as standalone examples of potential mechanisms for addressing sexist hate speech online but in order to be applicable, the behaviour complained of must fall within the definitions of ‘harassment’ envisaged within the Act. The harassment complained of here is also notably different and distinct from that complained of under other provisions related to this area. It is for example envisaged that these provisions supplement existing provisions relating to domestic violence under the Domestic Abuse (Scotland) Act 2010, and therefore whilst undoubtedly applicable, were also not intended to tackle the specific phenomenon of sexist hate speech online.

iv. Protection from Harassment Act 1997

The Protection from Harassment Act (PHA) is a UK wide piece of legislation designed to reinforce some of the old common law criminal offences – including harassment and stalking. The date of its enactment also makes it very difficult to suggest that the provisions contained within it are targeted at abusive sexist behaviour, especially online. For the purposes of the discussion here, the provisions within the PHA have different applicability depending on whether the offence is committed in England or Scotland.

As such, the focus here falls on the provisions within s8 and s8A of the PHA which have been introduced into Scots Law by the Domestic Abuse (Scotland) Act 2010. These provisions therefore reflect and mirror the provisions of the Criminal Justice and Licensing (Scotland) Act 2010 (CJLA) in respect of non-harassment orders. Again, the emphasis here is not one which falls on sexist hate speech regardless of online or offline, but which instead falls on domestic violence. This too – much like the CJLA is not directed at sexist hate speech online. The aim of the legislation – and the reforms – are laudable but there ought to be no confusion here in respect of the online context. Domestic violence and sexist hate speech are connected – and in some situations will even form part of a pattern of behaviour – but are broadly distinct and need to be treated with equal respect by the legal system. To date, domestic violence has gained greater traction and legislative attention.

Of greater note in respect of the PHA provisions is the fact that s2 and s4 do not apply in Scots Law, and these are the main offences introduced under this Act. These provisions introduce criminal offences relating to harassment but are not offences under Scots Law. This Act predates the Communications Act 2003 and therefore

whilst it is possible to perceive a gap in Scots Law, it must be noted that the Communications Act offence under s127 could be utilised in Scotland for offences and behaviour which would otherwise fall within the scope of s2 and s4 PHA in English Law.

v. Scots Law & Sexist Speech

There are a number of criminal law provisions which could potentially be used to retrospectively tackle sexist hate speech in Scots Law. Sadly, to date, few specific measures on this issue have been enacted. The situation at a UK level is broadly similar albeit with some legislative differences, and a wider spectrum of legislation to consider. The real truth is, that despite the progressive social agenda in Scotland, and within the tolerances of restricted legislative competence, there are few real mechanisms which have been enacted to deal with sexist hate speech. This means that there is still a pressing need to act in this area.

Part II: Limitations of Current Law

In a utopian scenario, new offences would be introduced to tackle this legal problem as a matter of urgency. Such offences would face no barriers, and there would be no problems in tackling sexist hate speech. The reality, however, is very different as a result of the limitations which are in operation.

There are a number of limitations which all have an impact in tackling sexist hate speech. The two with the greatest level of impact are firstly, the lack of legislative competence for the Scottish Parliament over communications law, and secondly, the lack of appreciation by law-making bodies at every level of the difficulties and impact sexist hate speech is having on victims. Until these two elements see a change, it is unlikely that the issue will be tackled in a multi-dimensional manner. Other limitations include the exhaustive list of protected characteristics under hate crime laws – meaning there is an absence of gender as a factor here. Finally, the very nature of the way which in technology is used poses problems for the legal system when dealing with such issues – law is, by its nature, reactive and the legislative process is cumbersome and time-consuming. As such, even where there is legislative intent, the process can take a long time to introduce changes to the law, or new offences.

i. Protected Characteristics & Hate Crime

This situation is rather baffling, especially when other areas of law are considered. Whilst there are no specific nor dedicated provisions dealing specifically with sexist hate speech, other areas of law have been much more progressive in introducing statutory protections. In the context of hate crime for example, there are a number of ‘characteristics’ which benefit from statutory protections. These include race, religion, age, disability and sexual orientation. This is an exhaustive list – there is no pro-

tection given to gender as a characteristic. This ultimately means that there cannot be a hate crime on the basis of a hatred of gender.

ii. Hate Crime & Sentencing Uplifts

Similarly, where there is already a criminal offence that has been committed and there is a suspicion of motivation by prejudice, a higher sentence can be imposed by a court depending on the nature of that prejudice.¹⁹ Again, the characteristics which are protected are race, religion, age, disability and sexual orientation. There is no recognised characteristic of gender here. This is a significant gap in the legislative protections – it seems odd that sexual orientation can be a protected characteristic but not gender alone. This essentially means that even where there is harassment and online abuse targeted at women because they are women, the sentencing provisions are only going to consider the sentences available under the communications provision or the harassment provision. There will not be a sentencing uplift in this example because there is no ability within the legislation to impose a higher sentence for the prejudice displayed on the basis of hostility to women. This is in stark contrast to situations where for example, a black woman is abused online. The offences – be they harassment or stalking – if prosecuted, could see a sentencing uplift imposed on the basis of the harassment being motivated by a prejudice on the basis of race. This would therefore see a higher sentence imposed because of the protection afforded on the basis of race. This is a completely unacceptable distinction to the situation regarding gender.

iii. Equality Provisions

The lack of provisions within hate crime legislation protecting gender as a characteristic is a significant omission in its own right. Beyond that however, there is a direct contradiction to the provisions dealing with equality under UK law. Within the Equality Act 2010, sex is listed as characteristic benefitting from protection against discrimination.²⁰ It is rather strange then that within the same legal system it is possible to benefit from statutory protections from discrimination on the basis of sex for equality purposes yet there is no protection from hate-based prejudice under the hate crime provisions for sex. This is a significant omission and limitation within the current legislative landscape, and must be addressed as a matter of urgency to provide one of the foundations for effectively tackling sexist hate speech. The disparity between the two parallel sets of law is confusing and unjustifiable.

iv. Recognition & Willingness

Finally, one of the other significant barriers to action being taken to deal with sex-

¹⁹ Criminal Justice Act 2003 s145 and s146.

²⁰ Equality Act 2010, s4.

ist hate speech – particularly from a communications perspective – is that law-making bodies are of the persuasion that there is no need to introduce new provisions nor new offences. This is broadly reflective too of the Law Commission attitude in respect of reforming hate crime laws – and in 2014, they concluded there was no need to make significant alterations to the current legal landscape in this respect.²¹

Perhaps the clearest indicator of the lack of willingness to enact new, specific and targeted provisions comes from the Westminster Parliament in 2014. The House of Lords undertook a significant and comprehensive review of social media laws in 2014 within the UK, and whilst considering whether new offences were required to deal with trolling and sexist hate speech, concluded that there was no such need. In their report, they stated this particularly clearly:

“Our starting point is that what is not an offence off-line should not be an offence online...We consider that the current range of offences, notably those found in the Protection from Harassment Act 1997, is sufficient to prosecute bullying conducted using social media... Although we understand that ‘trolling’ causes offence, we do not see a need to create a specific and more severely punished offence for this behaviour.”²²

Despite this – and despite the lack of legislative attention given to this area since 2014 – there are some indicators that this may be about to change. The Westminster Government made it abundantly clear in its 2017 election manifesto that they were keen to make the internet a safe place for all.²³ This necessarily involves considering all internet users rather than just children for example. This traction has recently seen the UK Government publish its position paper relating to its Internet Safety Strategy²⁴ – whilst it is very much an initial starting point, there is real potential for significant improvements to be made to the legal landscape in respect of sexist hate speech.

²¹ Law Commission, ‘Hate Crime: Should the Current Offences be Extended?’ (2014) Law Com No 348, available online: <https://www.lawcom.gov.uk/project/hate-crime/>.

²² Communications Select Committee, Social Media and Criminal Offences (HL 2014-2015, 32) <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3704.htm>.

²³ Department for Culture, Media & Sport, ‘Digital Charter’ (25 January 2018) available online: <https://www.gov.uk/government/publications/digital-charter/digital-charter>.

²⁴ HM Government, ‘Government Response to the Internet Safety Strategy Green Paper’ (May 2018).

Part III: Recommendations & Reactions – One Step Forward?

The most straightforward suggestion here would simply be to advocate for a change in the law, and a new offence to be introduced. However, simply changing a number of legal provisions will be insufficient to actually address the problem of sexist hate speech. This is a problem which is not one likely to be solved purely by the legal system alone. As such, there are four recommendations offered here, two of which require legislative reforms but two of which are about broader social alterations. Sexist hate speech is not a problem created by the legal system alone, and it is therefore unlikely to be resolved by legislation alone.

i. Making Gender Work

Firstly, it is important to recognise that sexist hate speech is rooted in society and in social attitudes, rather than purely in social media interactions. As such, the first stage in addressing and potentially reducing sexist hate speech and online abuse is to recognise that sexist hate speech is not a threat to one specific gender but is instead a threat to all genders. This means that there is a shared responsibility on each and every individual to challenge the social structures which make sexism – online and offline – acceptable.

Without the brave few, sexist hate speech, and online sexist hate would not even be the subject of discussion. It is therefore important to reflect that bravery, and challenge the current status quo of sexist hate speech. It is easy to suggest that in time this will happen – however the harm caused by sexist hate speech is having an impact now, and therefore social change has to be driven by those interacting with platforms where these behaviours are prevalent. Gender has to work – and those advocating for change must ensure that gender equality is achievable online.

ii. Shift in Attitudes

In making gender work, the second recommendation here is a broader reflection of that. In order to lead to a shift in attitudes, gender has to be made to work. In making gender work, this will lead to a shift in attitudes, and hopefully to a reduction in sexist hate speech instances. That said, in order to ensure that this is achievable, there is a need for the legal system, judicial bodies, and those involved in the criminal law system to recognise the difficulties here, but also to recognise the harm that is inflicted through sexist hate speech. Beyond that, there is a need to ensure that non-traditional harms such as the harm of not engaging online is also a harm that needs to be reduced. To not recognise this, means that certain platforms are not available to all, and participation is not a universal right. The legal system is much better at recognising that domestic violence is harmful – the same can be said of sexist hate speech but the system is currently less willing and less receptive to such a suggestion. The UK Government Internet Safety Strategy needs to ensure that dis-

cussions of safety include discussions of non-traditional harms so that a wider awareness of the impact of harm can be used to change attitudes to instances of online abuse and online sexist hate. Any action taken will need to include stakeholders from a number of different sectors – including victims of online sexist hate speech, charity sector, judicial bodies, as well as the online platform providers.

iii. Hate Crime: An Agenda for Reform

Changes also need to be made to the legal system as part of a multi-faceted response to sexist hate speech. Ultimately, where gaps or omissions have been identified they must be closed and reforms made. This means initially, that the agenda for hate crime reform must be advanced. Firstly, the grounds upon which hate crime are based must be expanded to include gender as a standalone characteristic. This must then be reflected in reform the provisions upon which aggravation factors can be considered for sentencing purposes – this means adding gender as a protected characteristic here too. Once that has happened and the provisions within the Equality Act 2010 are mirrored, there needs to be a willingness from the criminal law and from judicial bodies including prosecutors and the police to pursue incidents of sexist hate speech, and a willingness to pursue higher sentences for hate motivated by a hatred of gender. There needs to be a necessary marriage between the changes to the legal provisions and their use by the investigatory and judicial bodies. Having the provisions but not using them will undoubtedly be a backwards step.

iv. Communications Law: Time for a ReWire

Beyond reforming the hate crime and gender provisions, it is also necessary to consider reforms to the legal landscape surrounding communications law. Firstly, there needs to be a new offence introduced of text-based abuse to mirror the image-based sexual abuse offences which have recently been legislated. Secondly, a new offence of abusive behaviour online²⁵ ought to be considered to operate at a level lower than the hate crime offences. Whilst this may lead to high numbers of prosecutions for illegal behaviour online, there is a need to recognise that enforcement of the law online has been lacking for a considerable period and challenging that would also be a progressive step. It is time to mirror the attention paid to economic crimes online²⁶ by paying attention to harm caused online.

Beyond that, there needs to be tweaks made to the prosecutorial guidance²⁷ to en-

²⁵ K Barker, O Jurasz, ‘Submission of Evidence to Scottish Government’s Independent Review of Hate Crime Legislation’ (November 2017), available at: <http://oro.open.ac.uk/52612/1/Hate%20Crime%20Legislation%20Review%20%28Barker%20%26%20Jurasz%29.pdf>, 7.

²⁶ See e.g. Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online (C(2018) 1177 final) <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>.

²⁷ CPS, ‘Social Media: Guidelines on prosecuting cases involving communications sent via social media’ available online: <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving->

sure that the provisions which are enacted are actually used by the prosecutors seeking prosecutions for sexist hate speech, and online abuse. Similarly, the threshold for prosecution needs to be considered as it is recognised as being a barrier to prosecution currently,²⁸ creating a further intolerable gap in the legislative sphere. This will likely necessarily include revising the approaches to the collection of evidence in such cases. Irrespective of this, the communications law needs to be pushed into the digital age, and contrary to the House of Lords opinion, the time for this is now.

Conclusion: Two Steps Forward?

It is beyond doubt that sexist hate speech and online abuse are widespread problems which have a significant impact. That said, it is necessary for greater attention to be paid to this problem, and for reforms to be implemented so that such behaviour can be tackled, and tackled quickly. This paper has advocated for an approach which reflects ‘joined-up thinking’ in dealing with this – it is therefore time to ensure that such thinking becomes a reality. Tackling this problem from one aspect will not have the necessary impact – it is therefore essential that in order to make progress, that a multi-faceted approach is the one adopted. Anything else will mean that instead of taking two steps forward, we take one step back.

communications-sent-social-media/.

²⁸ Ms Marit Maij, Rapporteur of the Council of Europe Parliamentary Assembly Committee on Equality & Non-Discrimination, in her Report: ‘Ending cyber-discrimination and online hate’ Doc. 14217 (13 December 2016), para.32, available at: <http://bit.ly/2hX6mPA>.