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Misogynistic Harassment: A Stumbling Block for Scots Hate Crime Reform?

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In 2020, the Scottish Government published the Hate Crime and Public Order (Scotland) Bill. This legislation marks the most recent attempt to “reform” hate crime law in Scotland. Reform suggestions included adding a gender aggravator to the hate crime framework so as to capture instances of gender-based hate. The draft Bill instead left aside the issue of gender/sex-based hate, with government proposals focussing on a proposed stand-alone offence of misogynistic harassment. This article analyses the omission of gender in Scots hate crime—including in the 2020 draft Bill—and assesses the proposed stand-alone offence of misogynistic harassment. In so doing, it highlights the shortcomings of the proposed legislation, outlining the significant implications for women of a continued failure to capture gender within the hate crime framework in Scots law.

I. INTRODUCTION—SCOTS CRIMINAL LAW REFORM?

Over the last 20 years, hate crime reform—at least discussions of it—have been ever present in Scotland. The changing societal norms, behaviours and interactions continue to fuel discussions surrounding hateful speech, behaviour and attitudes—especially in light of the Independence Referendum in 2014, and the EU Withdrawal Referendum in 2016, and subsequent upsurge in public vitriol. In parallel, Scotland has been at the forefront of discussions and leading governmental initiatives focused on preventing and eliminating violence against women and making Scotland safe and equal for everyone—not least through the Equally Safe national strategy,¹ and One Scotland² campaign, but also through consideration of the implementation of the UK’s international obligations under the UN Convention on the Elimination of All Forms of Discrimination against Women.³ The issue of online violence against women, including online abuse directed against Scottish women

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¹ Scottish Government, *Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls* (Scottish Government, 2018), <https://www.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/> [Accessed 30 December 2020].

² Scottish Government, “One Scotland”, <https://onescotland.org/> [Accessed 30 December 2020].

³ Scottish Government, *Convention on the Elimination of All Forms of Discrimination Against Women: Position Statement* (Scottish Government, 2018), <https://www.gov.scot/publications/scottish-government-position-statement-convention-elimination-forms-discrimination-against-women/> [Accessed 30 December 2020].

politicians,⁴ has been also gaining momentum, prompting calls for adding sex/gender as a protected characteristic in the hate crime framework and/or making misogyny a hate crime.⁵ Yet reform of the hate crime framework has continued to rumble on rather than stride forward, with a lack of consensus amongst civil society organisations and the Scottish Government on the best way forward to address crimes committed on the basis of hatred and/or prejudice towards women within Scots law.

The reform of criminal law more broadly is something which has seen a rise in interest and attention, especially from the Scottish Government.⁶ Given the recurring theme of hate crime reform in the UK, it is therefore unsurprising that hate crime finds itself (again) within the reform landscape. While reform in this area has happened in piecemeal stages from 2004 onwards, there is still much room for improvement in the hate crime landscape, especially given that there are some groups notable by their absence from featuring within the hate crime protections. Most recently, the Scottish Government have committed to the “consolidation” of hate crime provisions into a single Hate Crime Bill.⁷ Quite what this consolidated legislation will contain is something less certain—especially given the debate and contention surrounding the inclusion—or otherwise—of gender and misogyny in the hate crime framework. Such a contention seems to be an ever-present stumbling block for law reform despite the increasingly pressing need to examine the inclusion of gender within the hate crime provisions.

This article therefore examines the contemporary and continuing absence of gender⁸ within the Scots hate crime framework before offering a critical assessment of the most recent reform

⁴ Paris Gourtsoyannis, “Police protection for SNP MP Joanna Cherry after death threats”, *The Scotsman*, 6 May 2019, <https://www.scotsman.com/news/politics/police-protection-for-snp-mp-joanna-cherry-after-death-threats-1-4921481> [Accessed 30 December 2020]; “Female politicians speak out over Twitter abuse” (*BBC News*, 21 March 2018), <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-43479004> [Accessed 30 December 2020].

⁵ Engender, “Women’s organisations disappointed by Lord Bracadale’s recommendations, seek further dialogue with Scottish Government” (*On the Engender*, 31 May 2018), <https://www.engender.org.uk/news/blog/womens-organisations-disappointed-by-lord-bracadales-recommendations-seek-further-dialogue/> [Accessed 30 December 2020].

⁶ James Chalmers, “Developing Scots Criminal Law”, 2017 *Jur. Rev.* 1, 33.

⁷ Nicola Sturgeon, “Nicola Sturgeon’s Speech on the Programme for Government” (*SNP*, 3 September 2019), <https://www.snp.org/nicola-sturgeons-speech-on-the-programme-for-government/> [Accessed 30 December 2020].

⁸ Whilst certain acts of violence against women may amount to gender-based hate, not all gender-based violence amounts to hatred motivated by gender. Kim Barker and Olga Jurasz, “Online violence against women as an obstacle to gender equality: a critical view from Europe” (2020) 1 *European Equality Law Review* 47, 52; Kim Barker and Olga Jurasz, “Expert Submission to Justice Committee of Scottish Parliament Hate Crime and Public Order (Scotland) Act Call for Views” (8 June 2020),

proposals.⁹ By assessing the various policy positions, hate crime reports, and 15 years of legislative developments (2004–2019), this article makes a thorough assessment of the place of gender within the hate crime framework, and its continued absence from inclusion within the legal provisions addressing criminal hatred, and fills a significant gap in the existing literature on this topic in Scots law.

The recent suggestion of a standalone offence of misogynistic harassment,¹⁰ and Lord Bracadale’s recommendation of a statutory aggravator for gender¹¹ are both examined here. Indeed, what is abundantly clear from the historical assessment undertaken here is that there have been numerous opportunities to address the issue of gender within the hate crime landscape, and each opportunity has been overlooked, or worse, seen gender sidetracked as an issue which is either too tricky, or too contentious in light of other potential reforms to the hate crime framework. The discussion that follows in this article advances the argument that gender is consistently overlooked within the hate crime framework, and argues that whilst it is refreshing to see gender being given due consideration by the Scottish Government, and relevant reform bodies, there is still work to be done on introducing gender-based hate into the current framework in a manner which is workable, inclusive, and functional. Therefore, as well intentioned as a misogynistic harassment standalone offence is, it is unworkable as a catch all for gender-motivated hatred at present and does not fit comfortably within the existing hate crime framework. However, misogynistic harassment as a standalone offence has some merit and is discussed later in this article.

Whilst the proposed gender aggravator is a potential step forward for addressing systemic inequalities, it does not put gender on the same level as other characteristics which are currently

[https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS520HC34_Barker_and_Jurasz\(1\).pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS520HC34_Barker_and_Jurasz(1).pdf) [Accessed 30 December 2020].

⁹ For a fuller assessment of gender within hate crime reform in Scotland and comparative discussions see Kim Barker and Olga Jurasz, *Hate crime and gender—Scots Law perspectives* (London: Palgrave Macmillan, 2021), forthcoming.

¹⁰ Scottish Government, “Tackling Misogyny: Legislative Option to Form Part of Forthcoming Public Consultation” (*ScotGov News*, 7 October 2018), <https://news.gov.scot/news/tackling-misogyny>; Scottish Government, *One Scotland: Hate Has No Home Here. Consultation on amending Scottish hate crime legislation* (Scottish Government, 2018), p.31, <https://www.gov.scot/publications/one-scotland-hate-home-here-consultation-hate-crime-amending-current-scottish-hate-crime-legislation/pages/4/>; Kim Barker and Olga Jurasz, “Misogynistic Harassment: Advancing Scots Criminal Law?” (*Scottish Legal News*, 7 February 2020), <https://www.scottishlegal.com/article/misogynistic-harassment-advancing-scots-criminal-law> [All Accessed 30 December 2020].

¹¹ Scottish Government, *One Scotland: Hate Has No Home Here. Consultation on amending Scottish hate crime legislation*, p.17.

protected in the existing hate crime framework in Scots law.¹² This article advocates not for the introduction of protection from gender-based hate at all costs, nor does it advocate for the introduction of a misogynistic harassment offence instead of a statutory gender aggravator. Instead, we argue for a revised approach to both proposals to reflect the Equally Safe agenda,¹³ and the Scottish Government’s pledge to ensure “equality for all”¹⁴ to ensure equal protection under the law, but also to ensure that gender-based hate is included in a workable manner within the legal framework addressing hate crime.

II. DEVELOPING A SCOTS HATE CRIME FRAMEWORK?

The implementation of an effective and appropriate system for identifying, capturing, and addressing hate crime is one that has been ongoing. The development of criminal provisions to address targeted hostility of social groups is a process which, in Scotland, has seen repeated consultations, legislative amendments, and working and advisory group input. The volume of work undertaken in the context of hate crime reform is significant. That said, the culmination of these efforts from 2002 onwards,¹⁵ has resulted in a fragmented, disjointed, and—for those subjected to hatred—confusing system. The hate crime system has seen a gradual and almost continuous process of review and reform since the devolution settlement. Nevertheless, a consistent feature in these developments was the ultimate failure to include gender (despite opportunities to do so, as discussed below) as a factor in the commission of hate crimes as well as ignorance of intersectional hate—especially where a crime is committed due to person’s gender and another (protected) characteristic. This approach, as evidenced below, has resulted in the invisibility of gender and intersectional hate within the legal framework in Scotland and, sadly, remains the legal status quo today.

1. Pre-devolution—Racial hatred

¹² Although not discussed in depth in this article.

¹³ Scottish Government and COSLA, *Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls* (Scottish Government and COSLA, 2018), <https://www.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/> [Accessed 30 December 2020].

¹⁴ Liam Furby, “Our plan for Scotland: equality and human rights for all” (SNP, 19 September 2017), <https://www.snp.org/scotland-programme-for-government-equality-and-human-rights-for-all/> [Accessed 30 December 2020].

¹⁵ The publication of Scottish Executive, *Tackling Religious Hatred: Report of Cross-Party Working Group on Religious Hatred* took place in December 2002, <https://www.webarchive.org.uk/wayback/archive/20170701074158/http://www.gov.scot/Publications/2002/12/15892/14540> [Accessed 30 December 2020].

Prior to the devolution settlement of 1998,¹⁶ the provisions addressing crimes motivated by malice and ill-will were focused almost exclusively on racial hatred. The Crime and Disorder Act 1998 was introduced by the then Labour Government to tackle crime and anti-social behaviour.¹⁷ The Labour Party election manifesto¹⁸ from the 1997 general election pledged to protect ethnic minorities by introducing a new offence of racial harassment. This commitment to introduce new offences into the criminal law was fulfilled in s.96 of the 1998 Act, which outlines offences that are aggravated on the basis of race. This, in conjunction with s.50A of the Criminal Law (Consolidation) (Scotland) Act 1995, forms the basis of the hate crime provisions designed to tackle racial hatred. These origins supplement the pre-existing provisions in the Public Order Act 1986 which deal with the associated offences of stirring up racial hatred.¹⁹ Both the 1998 Act and the 1986 Act share the definition of “racial”—with the 1986 Act focusing on racial “hatred” and the 1998 Act on racial “groups”—yet both Acts offer the same basis for, and definition of, hatred: namely defining it “by reference to colour, race, nationality (including citizenship) or ethnic or national origins”.²⁰

The considerations during the late 1990s of hate crime offences focus on the issue of race and racial aggravation, due in large part to the social and political issues in the public eye at the time, notably the murder of Stephen Lawrence²¹ and the subsequent *Report of the Stephen Lawrence Inquiry*,²² which called—amongst other things—for a new approach to the prosecution of racist crime (albeit in England and Wales). Sir William MacPherson in the Lawrence report also suggested that all racist language and behaviour might be considered criminal.²³ Given the understandable emphasis in the UK (and England and Wales immediately prior to devolution), few other grounds or characteristics were considered as being within the scope of hate crime and were not on the law reform radar.

¹⁶ Some legislation addressing hate crime is specific to Scotland (which has its own criminal law system) and some is UK-wide.

¹⁷ Crime and Disorder Act 1998 (1998 Act) preamble.

¹⁸ Labour Party, *New Labour: Because Britain Deserves Better* (1997), <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> [Accessed 30 December 2020].

¹⁹ Public Order Act 1986 (1986 Act) ss.18–22.

²⁰ 1986 Act s.17; 1998 Act s.96(6). The 1986 Act definition is repeated in the 1998 Act albeit with the list appearing in a different order.

²¹ Alexandra Heal, “Stephen Lawrence: timeline of key events”, *The Guardian*, 19 April 2018, <https://www.theguardian.com/uk-news/2018/apr/19/stephen-lawrence-timeline-of-key-events> [Accessed 30 December 2020].

²² Sir William Macpherson, *Report of the Stephen Lawrence Inquiry* (TSO, 1999), Cm.4262.

²³ Sir William Macpherson, *Report of the Stephen Lawrence Inquiry*, recommendation 39.

2. Post-devolution—From race to transgender identity

Moving forward to the first post-devolution considerations of hate crime, the emphasis remained—initially—on aspects other than gender. In 2002 the Scottish Executive established the Working Group on Religious Hatred (2002 Working Group). The 2002 Working Group was convened to assess whether there was a need for the development of new legal provisions designed to tackle religious hatred.²⁴ The remit of the 2002 Working Group when it was convened was to assess the need for new categories of statutory aggravations, but also the creation of new offences of incitement to religious hatred. When the 2002 Working Group reported, in December of that year, it concluded that legislation alone was likely to be ineffective in addressing and eradicating religious hatred. Alongside this conclusion, the 2002 Working Group indicated that “legislation would provide much needed clarity about the seriousness with which the law views offences motivated by religious hatred”.²⁵ At this point in time, no consideration was given to other elements of hate crime or other potential avenues for reform such as gender.

i. 2002—The Gorrie and Harper amendments

When the 2002 Working Group report was delivered, it formed the impetus for Donald Gorrie MSP to lodge an amendment to the (then) Criminal Justice (Scotland) Bill 2002. The amendment Gorrie proposed was to include statutory provision for an offence by religious prejudice to be included in the proposed legislation, which in his own words, “creates a bigger penalty if the court so decides, for an existing offence”²⁶ rather than creating a new offence. In accepting the Gorrie amendment, the Scottish Parliament ended up acting directly upon the recommendations from the 2002 Working Group. However, Gorrie was not the only MSP who was interested in lodging amendments to the draft Criminal Justice Bill; Robin Harper MSP also lodged an amendment to the Bill. Harper’s amendment, unlike Gorrie’s, offered a much broader set of proposed statutory aggravations. Included in the proposed Harper amendment was the provision to include statutory aggravations for prejudice against actual or presumed gender, sexual orientation, disability or age.²⁷ Such an extension, in Harper’s opinion, would extend protection from “malice and ill will based on the other grounds on which people most

²⁴ Scottish Executive, *Report of the Cross-Party Working Group on Religious Hatred* (Scottish Executive, 2002), p.6.

²⁵ Scottish Executive, *Report of the Cross-Party Working Group on Religious Hatred*, p.21.

²⁶ Scottish Parliament, *Official Report*, col.18470 (19 February 2003).

²⁷ Scottish Parliament, *Official Report*, col.18470 (19 February 2003).

commonly face harassment and prejudice—gender, sexual orientation, disability and age”.²⁸ This was a significant amendment to lodge to the Criminal Justice (Scotland) Bill, not least because at the time there had been no real consideration by any working or advisory group of the issues posed by such statutory aggravation proposals. Nevertheless, this demonstrates that the issue of gender-motivated hatred was on the political horizon in Scotland, for the first time, in 2002.

Gorrie’s amendment was successful and became s.74 of the Criminal Justice (Scotland) Act 2003, addressing offences aggravated by religious prejudice. An offence is aggravated by religious prejudice under s.74(2) of the Act where there is malice and ill will based on the victim’s membership of a religious group,²⁹ or of a group having a perceived religious affiliation. Contrastingly, Harper’s amendment was not accepted and statutory aggravations for actual or presumed gender, sexual orientation, disability or age did not make it into the draft Bill provisions—a particular disappointment in the advancement of gender-based hate crime protection. In announcing the rejection of the Harper amendment, the then Justice Minister Jim Wallace MSP stipulated the intention of the Scottish Executive to convene a further working group to explore the issues surrounding a wider set of statutory aggravations, including gender.³⁰ Harper was keen to ensure the amendment was added to the Bill to extend protection and move forward with the equality agenda.³¹

ii. The Scottish Executive Working Group on Hate Crime 2004

The Scottish Executive Working Group on Hate Crime (2004 Working Group) was subsequently established in June 2003 following the conclusion of the religious hatred reform, and the passing of the Criminal Justice (Scotland) Act 2003. The 2004 Working Group was charged with looking at “the current criminal justice system and consider[ing] improvements, including legislation, which might be made to deal with crimes based on hatred towards social

²⁸ Scottish Parliament, *Official Report*, col.18470 (19 February 2003).

²⁹ “Religious group” is defined in Criminal Justice (Scotland) Act 2003 s.74(7).

³⁰ Scottish Parliament, *Official Report*, col.18470 (19 February 2003); Scottish Parliament Justice Committee *Stage 1 Report on the Offences (Aggravation by Prejudice) (Scotland) Bill* (Scottish Parliament, 2009), SP Paper 225, para.7, <https://archive.parliament.scot/s3/committees/justice/reports-09/jur09-06.htm#14> [Accessed 30 December 2020].

³¹ Scottish Parliament, *Official Report*, col.18470 (19 February 2003); Scottish Parliament Justice Committee *Stage 1 Report on the Offences (Aggravation by Prejudice) (Scotland) Bill*, para.8-9.

groups”.³² The 2004 Working Group—unlike the 2002 Working Group—had a much wider remit to consider aspects relating to potential hate crimes, and to consider other characteristics beyond those already legislated upon. In its work, the 2004 Working Group had the scope to consider gender as one of the hate crime features not protected through legislation—largely as a result of the Harper amendment to the Criminal Justice (Scotland) Act 2003. Harper withdrew the amendment proposal only on the understanding that the Scottish Executive had indicated it would undertake work into exploring other dimensions of hate crime, including gender.

In its consultation paper, the 2004 Working Group posed the question as to which specific groups ought to receive special protection through hate crime legislation. In the responses to this particular question, not only is gender a featured group,³³ but it is the category listed as third most prominent—behind only the consultation categories of “disabled people”, and “LGBT people”.³⁴ This is a clear indicator from the responses that gender is perceived as a group where special protection ought to – at the very least – be considered. Despite this, the 2004 Working Group failed to reach a consensus on the introduction of a statutory aggravation on the ground of gender.³⁵ Concerns were raised by the working group about the complexities surrounding “attitudes and behaviours in our society which undermine women’s position”.³⁶ Further objections were noted with regard to malice and ill-will in the context of gender and how this could or would be evidenced for prosecution. These issues were raised even though there was explicitly recorded recognition that violence against women is the direct consequence of societal attitudes undermining women’s positions in respect of their equality to men.³⁷

The overall conclusions from the working group consultation and work in 2003 and 2004 were, again, disappointing when it comes to addressing gender-motivated hate, particularly within a criminal context.³⁸ The 2004 Working Group concluded that whilst there was an express need

³² Working Group on Hate Crime, *Working Group on Hate Crime Report* (Scottish Executive, 2004), para.1.2, <https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/Doc/26350/0025008.pdf> [Accessed 30 December 2020].

³³ The 2004 Working Group defined hate crime as “crime motivated by malice or ill-will towards a social group” (para.1.4). However, elsewhere in the literature the term “characteristic” is used with regard to gender. Scottish Parliament, *Official Report*, col.18470 (19 February 2003); Scottish Parliament Justice Committee *Stage 1 Report on the Offences (Aggravation by Prejudice) (Scotland) Bill*, para 1.4.

³⁴ Working Group on Hate Crime, *Working Group on Hate Crime Report*, para.4.10.

³⁵ Working Group on Hate Crime, *Working Group on Hate Crime Report*, para.5.37.

³⁶ Working Group on Hate Crime, *Working Group on Hate Crime Report*, para.5.37.

³⁷ Working Group on Hate Crime, *Working Group on Hate Crime Report*, para.5.37.

³⁸ For an in-depth analysis regarding why gender should be treated on a par with protection afforded to other minority groups see Ch.4 in Kim Barker and Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Abingdon: Routledge, 2019).

to consider a general statutory offence of, what they described as, “harassment and alarming or distressing behaviour”,³⁹ they were unable to recommend specific offences be introduced to address gender-based hate crimes. Instead, the 2004 Working Group recommended that the area of criminal law on violence against women ought to remain under review, with an increased emphasis being given to the exploration of societal approaches which lead to women being undermined—interestingly, the same approach aiming at an examination of social underpinnings of violence and hostility towards the three new proposed groups was not suggested.

The 2004 Working Group also recommended that the Scottish Executive ought to similarly explore the criminal law areas that deal with violence against women.⁴⁰ Again though, no recommendation for legislative reform was forthcoming here beyond this—a further missed opportunity especially given the concerns raised in the previous year by Robin Harper MSP. The 2004 Working Group was, however, able to recommend legislative changes to advance the hate crime framework in other areas, and specifically recommended that statutory aggravations be introduced as a matter of priority for crimes motivated by malice or ill-will based on sexual orientation, transgender identity or disability.⁴¹ Perhaps more significantly from a gender-hate perspective, the 2004 Working Group also indicated in recommendation 1 of their report that the proposed new aggravation for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity, or disability should be drafted in such a way so as to ensure that the list of characteristics could be easily added to in the future should the cumulative evidence suggest that there was a significant volume of hatred being suffered.⁴² This, whilst still omitting gender, provided a potential route to faster legislative reform in the future should the Scottish Executive fully act on the recommendation. Irrespective of the omission of a recommendation including gender within the proposed new statutory aggravations, the 2004 Working Group undoubtedly shaped the hate crime framework with their recommendations to expand the categories of protection.

iii. The Scottish Executive response

³⁹ Working Group on Hate Crime, *Working Group on Hate Crime Report*, p.4, recommendation 2.

⁴⁰ Working Group on Hate Crime, *Working Group on Hate Crime Report*, p.4, recommendation 3.

⁴¹ Working Group on Hate Crime, *Working Group on Hate Crime Report*, p.4, recommendation 1.

⁴² Working Group on Hate Crime, *Working Group on Hate Crime Report*, p.4, recommendation 1.

Interestingly, when the Scottish Executive published its response to the 2004 Working Group report it was far from supportive and did not endorse all of the recommendations put forward in October 2004. In particular, the Scottish Executive in its June 2006 response⁴³ rejected the recommendation to introduce a statutory aggravation for crimes motivated by sexual orientation, transgender identity or disability. In rejecting this recommendation, the Scottish Executive deferred to the Scottish Courts and Sentencing Commission,⁴⁴ who in 2006 were exploring mechanisms to ensure consistency in sentencing⁴⁵ and were reluctant to undermine this by introducing new statutory aggravations in response to the 2004 Working Group report. This was the position taken despite the unavoidable fact that the rest of the UK had already introduced specific protections for sexual orientation, transgender identity and disability within their respective hate crime frameworks.⁴⁶ For a purportedly more progressive nation, this refusal to act was stark in its lack of willingness to offer protection. That said, to introduce a statutory aggravation for three further characteristics, and to again overlook gender, would have rendered the criminal law and the criminal justice system even more unequal. In some respects, therefore, the refusal whilst not anti-inclusive, was seemingly not driven by equality either.

The Scottish Executive did not just reject recommendation 1 of the 2004 Working Group, refusing to legislate to offer hate crime protections for these three characteristics, it also rejected recommendation 2 in its entirety. It consequently refused to introduce the suggested general statutory offence of harassment and alarming or distressing behaviour. The Scottish Executive were not persuaded that this recommendation would offer any resolution to the issues posed by harassment and stalking. However, the Executive were slightly more open to acting in response to recommendation 3 of the 2004 Working Group, and partially accepted the recommendation, whilst remaining unconvinced about the need to include aggravations on

⁴³ Scottish Executive, *Response to the Recommendations of the Working Group on Hate Crime* (Scottish Executive, 2006) Graham Ross, *Offences (Aggravation by Prejudice) (Scotland) Bill* (Scottish Parliament, 2008), SPICe Briefing 08/41, pp.7–9, <https://www.parliament.scot/SPICeResources/Research%20briefings%20and%20fact%20sheets/SB08-41.pdf> [Accessed 30 December 2020].

⁴⁴ Scottish Executive, *Response to the Recommendations of the Working Group on Hate Crime*, p.4.

⁴⁵ Scottish Executive, *Response to the Recommendations of the Working Group on Hate Crime*, p.4.

⁴⁶ In England and Wales, by virtue of Criminal Justice Act 2003 s.145. In Northern Ireland the situation is more complicated with no specific legislation existing that addresses hate crime, with the Public Order (Northern Ireland) Order 1987 (SI 1987/463) (NI 7) containing provisions addressing stirring-up offences, and the Criminal Justice (No.2) (Northern Ireland) Order 2004 (SI 2004/1991) (NI 15) including provisions for sentencing enhancements. The Independent Review of Hate Crime Legislation in Northern Ireland reported in December 2020, full report is available at <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/hate-crime-review.pdf> [Accessed 30 December 2020].

the basis of gender.⁴⁷ In doing so, the Executive committed to tackling violence against women in all forms, but with a specific emphasis falling on the improvements needed to tackle domestic abuse. Whilst this is, in some respects, a positive response from a gender perspective, it is also one which again shows that both the Executive and the law agencies missed the point in respect of gender-motivated hate, focusing not on the “bigger picture” aspect of violence against women manifesting itself as gender-based hate crime, but instead choosing to focus on the specific domestic violence aspect.⁴⁸ The somewhat limited acceptance of recommendation 3 is a marker of limited celebration—much more could have been done in response to the 2004 Working Group report. By only partially accepting recommendation 3, the Scottish Executive missed another opportunity to address gender inequalities through the development of a progressive and inclusive hate crime framework.

Unfortunately for the Scottish Executive—especially given its rejection of the 2004 Working Group recommendations—Patrick Harvie MSP took more direct action and lodged a Private Member’s Bill in 2007⁴⁹ that sought to implement the recommendations rejected by the Scottish Executive in June 2006. Specifically, Harvie’s Bill sought to introduce legislation that would require “the aggravation of an offence by prejudice on the grounds of disability, sexual orientation or transgender identity to be taken into account in sentencing”.⁵⁰ The change of government in the 2007 election signaled a shift in policy, but also a renewed emphasis on addressing inequalities, with the SNP manifesto stating that an SNP Government would “not promote or support legislation or policies which discriminate on the grounds of race, disability, age, gender, faith or religion, social background or sexual orientation”.⁵¹ The SNP pledged a commitment to change course from the previous Labour Government position, and rather than reject the 2004 Working Group recommendations, fully supported an expanded programme of legislation addressing hate crime.⁵² Consequently, when Harvie’s Sentencing of Offences

⁴⁷ Ross, *Offences (Aggravation by Prejudice) (Scotland) Bill*, p.9.

⁴⁸ The Domestic Abuse (Scotland) Act 2018 has been heralded as “world-leading” for its conceptual approach to the issue of domestic abuse. That said, this landmark has not addressed the hate crime framework issues surrounding gender-based hatred outside of domestic contexts.

⁴⁹ Sentencing of Offences Aggravated by Prejudice (Scotland) Bill, 2 October 2007 (Sentencing of Offences Bill 2007).

⁵⁰ Patrick Harvie MSP, “Proposed Sentencing Of Offences Aggravated by Prejudice (Scotland) Bill Statement of Reasons” (2 October 2007),

https://www.parliament.scot/S3_MembersBills/Draft%20proposals/prejudice_reasons.pdf [Accessed 30 December 2020].

⁵¹ Scottish National Party, *Manifesto 2007: It’s Time* (Edinburgh: SNP, 2007), p.66, http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/12_04_07_snpmanifesto.pdf [Accessed 30 December 2020].

⁵² Scottish National Party, *Manifesto 2007: It’s Time* (2007), p.66.

Aggravated by Prejudice (Scotland) Bill 2007 was presented to the Scottish Parliament—with support from the Scottish Government⁵³—the Bill had migrated from a Member’s Bill to a Handout Bill,⁵⁴ and was unanimously passed on 2 June 2009. The combined efforts of Harvie and the new SNP Government led to the Offences (Aggravation by Prejudice) (Scotland) Act 2009, which contains provisions addressing aggravations on the basis of disability,⁵⁵ sexual orientation and transgender identity.⁵⁶ The new government acted swiftly to endorse the recommendations of the 2004 Working Group, yet—despite the manifesto commitment to address discrimination on the basis of gender—did not expand hate crime provisions beyond those introduced in the 2009 Act. On this, the government followed the position of the Justice Committee in outlining concerns—shared by the Equalities Committee—about the difficulties attached to capturing gender within the hate crime framework.⁵⁷ After a period of ongoing discussion and reform nearing, by this point, a decade, gender remained overlooked in the hate crime framework despite being highlighted repeatedly as an area needing exploration for reform.

3. Policy reform and review post-2009: What about gender?

By the time the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion was convened in 2016, Scotland had voted in the Independence Referendum,⁵⁸ the UK had voted in the EU Referendum⁵⁹ and the first assassination of a female Member of Parliament had been witnessed.⁶⁰ These events, whilst spread beyond Scotland, are indicators

⁵³ Such support coming from the Cabinet Secretary for Justice who outlined the Scottish Government’s support for legislation on 15 January 2008; Scottish Parliament, “Hate crime bill gets committee support” (5 March 2009), <https://www.parliament.scot/newsandmediacentre/17086.aspx> [Accessed 30 December 2020].

⁵⁴ A Handout Bill being a Member’s Bill which is sponsored and supported by the government of the day. Graham Ross, “Offences (Aggravation by Prejudice) (Scotland) Bill Summary” (Scottish Parliament, 2009), [https://www.parliament.scot/S3_Bills/Offences%20\(Aggravation%20by%20Prejudice\)%20\(Scotland\)%20Bill/Offencesprejudice.pdf](https://www.parliament.scot/S3_Bills/Offences%20(Aggravation%20by%20Prejudice)%20(Scotland)%20Bill/Offencesprejudice.pdf) [Accessed 30 December 2020].

⁵⁵ Offences (Aggravation by Prejudice) (Scotland) Act 2009 s.1.

⁵⁶ Offences (Aggravation by Prejudice) (Scotland) Act 2009 s.2.

⁵⁷ Scottish Parliament, “Hate crime bill gets committee support” (5 March 2009), <https://www.parliament.scot/newsandmediacentre/17086.aspx> [Accessed 30 December 2020]. The Bill was not intended to introduce new criminal offences but to clarify statutory aggravations. Concerns were raised by both the Justice Committee and Equalities Committee about the likely outcome of creating a hierarchy of victims’ rights. See comments by the Justice Committee convener Bill Aitken MSP.

⁵⁸ “Scottish Independence Referendum: Final results in full”, *The Guardian*, 8 September 2014, <https://www.theguardian.com/politics/ng-interactive/2014/sep/18/sp-scottish-independence-referendum-results-in-full> [Accessed 30 December 2020].

⁵⁹ Anushka Asthana, Ben Quinn and Rowena Mason, “UK votes to leave EU after dramatic night divides nation”, *The Guardian*, 24 June 2016, <https://www.theguardian.com/politics/2016/jun/24/britain-votes-for-brexiteu-referendum-david-cameron> [Accessed 30 December 2020].

⁶⁰ Ed Caesar, “Jo Cox, the Brexit Vote, and the Politics of Murder”, *The New Yorker*, 24 June 2016, <https://www.newyorker.com/news/news-desk/the-politics-of-murder-in-britain> [Accessed 30 December 2020].

of the upsurge in vitriol, and the fragmentation of tolerance in social attitudes and behaviour. In response to these societal divisions, the 2016 Scottish Government Programme of Work included a commitment to “building community cohesion and tackling hate crime”,⁶¹ following on directly from the SNP election manifesto in 2016. In that manifesto, there was no specific pledge addressing the issues of gender-based hate crime, yet it did contain election promises concerning other aspects of hate crime and equality.⁶² Subsequently, the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion (2016 Independent Advisory Group) was convened, and undertook its work in light of a situation where hate crimes in Scotland continued to rise in number.⁶³

The 2016 Independent Advisory Group commissioned a review⁶⁴ of the evidence relating to hate crime and prejudice as part of its remit to “reflect on the journey Scotland has been on”⁶⁵ since the original considerations of legislation to address hate crime in Scots law. The Scottish Centre for Crime and Justice Research report paid little attention to the issue of gender—continuing the historical trend—despite accepting the harms attached to gender-based hate⁶⁶ because, as far as the report and evidence was concerned, the issue of gender was being addressed in other policy areas.⁶⁷ Yet again, the issue of gender, whilst being recognised as an area requiring attention, was being pushed out of the hate crime remit—further indication of a concerted effort to omit gender. The 2016 Independent Advisory Group report did, however, advance a slightly different perspective when the issue of gender was considered. Significantly,

⁶¹ Scottish Government, *A Plan for Scotland: The Government's Programme for Scotland 2016–2017* (Scottish Government, 2016), p.77, <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2016/09/plan-scotland-scottish-governments-programme-scotland-2016-17/documents/00505210-pdf/00505210-pdf/govscot%3Adocument/00505210.pdf> [Accessed 30 December 2020].

⁶² Furby, “Our plan for Scotland: equality and human rights for all” (*SNP*, 19 September 2017), <https://www.snp.org/scotland-programme-for-government-equality-and-human-rights-for-all/> [Accessed 30 December 2020]. Specifically, the SNP Programme for Government committed to “delivering on the recommendations of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion”.

⁶³ Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, *Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion* (Scottish Government, 2016), para.4.

⁶⁴ Maureen McBride, *A Review of the Evidence on Hate Crime and Prejudice: Report for the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion* (Glasgow: Scottish Centre for Crime and Justice Research, 2016), Report No.07/2016, <https://www.scejr.ac.uk/wp-content/uploads/2016/09/A-Review-of-the-Evidence-on-Hate-Crime-and-Prejudice.pdf> [Accessed 30 December 2020].

⁶⁵ Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, *Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion*, p.4.

⁶⁶ McBride, *A Review of the Evidence on Hate Crime and Prejudice: Report for the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion* (2016), p.11.

⁶⁷ McBride, *A Review of the Evidence on Hate Crime and Prejudice: Report for the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion* (2016), p.11.

the issue of “extreme misogyny”⁶⁸ was recognised but the advisory group determined that matters such as gender—and misogyny—needed further consideration, research, and attention.⁶⁹ Given the recognition of the extreme misogyny—and the harms attached—it is surprising that no action was forthcoming without additional investigation. The continual trend of asserting the need for additional investigation when it comes to discussions surrounding the inclusion of gender within the hate crime framework is a repeated excuse, but one that serves as a convenient obstacle, rather than one of substance.⁷⁰

More disappointingly, the 2016 Independent Advisory Group report concluded that, once more, the issue of gender as an aggravation in the hate crime context could not categorically be introduced as a protection because it was a matter under discussion with equality and human rights groups.⁷¹ That said, the recommendation was made that the government ought to reassess “whether the existing criminal law provides sufficient protections for those who may be at risk of hate crime, for example based on gender”.⁷² This is hugely important in the historical development of the hate crime framework in Scots law—the first explicit time there has been a clear recommendation that gender ought to be considered for inclusion within the parameters of hate crime law.

The ongoing commitment to address equality was also embedded in the Scottish Government’s programme of work for 2017, which listed promises to act upon the recommendations of the 2016 Independent Advisory Group addressing intolerance and prejudice. This in itself was a significant marker given the recommendations the group made in respect of gender. More importantly still, in the sphere of hate crime, the same government programme of work outlined

⁶⁸ Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, *Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion*, p.17.

⁶⁹ Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, *Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion*, p.17.

⁷⁰ See for further instances of this, see the Scottish Parliament, *Official Report of 29th Justice Committee Meeting* (25 November 2020); see also: “Barrister appointed to lead working group on offence of misogynistic harassment” (*Scottish Legal News*, 25 November 2020), <https://www.scottishlegal.com/article/barrister-appointed-to-lead-working-group-on-offence-of-misogynistic-harassment-in-scots-law> [Accessed 30 December 2020].

⁷¹ Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, *Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion*, p.18.

⁷² Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, *Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion*, p.18.

commitments to both “consider the findings of, and take action following, Lord Bracadale’s review of hate crime legislation”.⁷³

Lord Bracadale’s 2017 Review—the Independent Review of Hate Crime Legislation in Scotland (Bracadale Review)⁷⁴—was part of the follow up to the work of the 2016 Independent Advisory Group. Included within his remit, Lord Bracadale was charged with the obligation to specifically consider any additions to the existing characteristics protected in Scots law.⁷⁵ When the Bracadale Review was convened, the associated research report⁷⁶ indicated that the two characteristics most commonly appearing in other jurisdictions yet absent from Scots law included that of gender⁷⁷—a further indicator that action was needed in respect of this characteristic. Lord Bracadale set out to undertake a wide examination of ideas and options in his comprehensive review; this included specifically seeking opinions on whether new categories of hate crime ought to be created to cover gender.⁷⁸ In his final report, published in 2018, Lord Bracadale, like others before him, indicated that discussions surrounding aggravations for gender-based hate are complex, and recommended a new stand-alone statutory aggravation based on gender hostility.⁷⁹ This conclusion—despite its controversy—was offered on the basis that Lord Bracadale saw hate crime as that which attracted hostility on the basis of identity,⁸⁰ and therefore, unlike the other reviews before his, recommended addressing

⁷³ Scottish Government, *A Nation with Ambition: The Government’s Programme for Scotland 2017–2018* (Scottish Government, 2017), p.115, <https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2017/09/nation-ambition-governments-programme-scotland-2017-18/documents/00524214-pdf/00524214-pdf/govscot%3Adocument/00524214.pdf> [Accessed 30 December 2020].

⁷⁴ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland: Consultation Paper* (Scottish Government, 2017), <https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/> [Accessed 30 December 2020].

⁷⁵ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Scottish Government, 2018) (Bracadale Report), p.iii, <https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2018/05/independent-review-hate-crime-legislation-scotland-final-report/documents/00535892-pdf/00535892-pdf/govscot%3Adocument/00535892.pdf> [Accessed 30 December 2020].

⁷⁶ James Chalmers and Fiona Leverick, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (Glasgow: University of Glasgow, 2017), https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf [Accessed 30 December 2020].

⁷⁷ Chalmers and Leverick, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (2017), p.55.

⁷⁸ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland: Consultation Paper*, pp.2, 62.

⁷⁹ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland: Final Report*, p.43.

⁸⁰ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland: Final Report*, p.43.

gender-based hate through legislative protections above and beyond the other existing provisions that fail to address gender specifically as a hate crime.

Interestingly, despite the recommendation made in the Bracadale Report concerning statutory aggravation based on gender hostility, the then Communities Minister, Annabelle Ewing, indicated that whilst the Scottish Government were open to amending the hate crime legislation, and would be using the Bracadale Report as a basis for future work,⁸¹ there was less support forthcoming for suggestions of a stand-alone offence, much to the reported disappointment of parties beyond the SNP.⁸² The Bracadale Review concluded with strong reservations about a stand-alone offence, preferring instead consistency with the statutory aggravation model. Third sector groups, including Engender, in response to the Bracadale Review, indicated that there ought to be consideration given to the introduction of a potential new offence addressing misogynistic harassment,⁸³ despite criticism from other quarters.⁸⁴ Given the dichotomy between those in favour of, and in opposition to, any stand-alone offence relating to misogyny, it is unsurprising that there has not, yet, been any legislative commitment to it.

Post-Bracadale Review, the Scottish Government introduced a further consultation to take forward the work of Lord Bracadale, and the 2016 Independent Advisory Group before him. In their *One Scotland: Hate Has No Home Here* consultation,⁸⁵ the government raises a number of issues in respect of how gender-based hate ought to be addressed, and to obtain further input into the questions concerning both a statutory aggravation for gender,⁸⁶ and a stand-alone offence relating to misogynistic harassment.⁸⁷ Currently, the Scottish Government is

⁸¹ Libby Brooks, “Scotland declines to introduce misogynistic harassment law”, *The Guardian*, 31 May 2018, <https://www.theguardian.com/society/2018/may/31/scotland-declines-to-introduce-law-for-misogynistic-harassment> [Accessed 30 December 2020].

⁸² Jenni Davidson, “Gender and age should be added to hate crime laws Lord Bracadale report recommends”, *The Holyrood*, 1 June 2018, https://www.holyrood.com/news/view/gender-and-age-should-be-added-to-hate-crime-laws-lord-bracadale-report-rec_8802.htm [Accessed 30 December 2020].

⁸³ Engender, “Engender submission to the Independent Review of Hate Crime Legislation in Scotland” (2017) <https://www.engender.org.uk/content/publications/Engender-submission-to-the-Independent-Review-of-Hate-Crime-Legislation-in-Scotland.pdf> [Accessed 30 December 2020].

⁸⁴ Kim Barker and Olga Jurasz, “Misogynistic Harassment: Advancing Scots Criminal Law?” (*SPRE*, 27 January 2020), <http://spre.scot/misogynistic-harassment-advancing-scots-criminal-law/> [Accessed 30 December 2020].

⁸⁵ Scottish Government, *One Scotland: Hate Has No Home Here. Consultation on amending Scottish hate crime legislation*.

⁸⁶ Scottish Government, *One Scotland: Hate Has No Home Here. Consultation on amending Scottish hate crime legislation*, p.13.

⁸⁷ Scottish Government, *One Scotland: Hate Has No Home Here. Consultation on amending Scottish hate crime legislation*, p.17.

committed to acting upon responses to its most recent hate crime consultation, and a Hate Crime Bill is expected in 2020. The commitment to introduce legislation consolidating hate crime provisions in Scotland is significant⁸⁸—not least because it encompasses a much broader consideration of hate crime issues than any previous hate crime programme of work previously undertaken in Scotland. More significantly for gender, there are express considerations which the Scottish Government are committed to exploring as part of the Hate Crime Bill expected during the 2019–2020 parliamentary session. As part of its commitment, the Scottish Government have pledged to extend the characteristics to which hate crime offences can apply.⁸⁹ In making this commitment, the Scottish Government are finally acting to address some of the gaps in the hate crime framework, and are—in respect of extending the characteristics to which hate crimes will apply—ahead of other jurisdictions within the UK.⁹⁰ That does not, however, address the, still unresolved, issues of gender-based hate offences, and the (suggested) stand-alone offence of misogynistic harassment.

III. HATE CRIME BILL 2020—ROOM FOR IMPROVEMENT?

The Hate Crime and Public Order (Scotland) Bill (2020)⁹¹ was tabled on 23 April 2020. The initial debates surrounding the Bill have resulted in significant attention being given to numerous elements of it. Of most significant disappointment in the context of gender, is the absence of the characteristics of sex and gender—both of which were proposed in previous consultations addressing hate crime reform. More disappointingly still, as Barker and Jurasz state:

⁸⁸ Scottish Government, *Protecting Scotland's Future—The Government's Programme for Scotland 2019–2020* (Scottish Government, 2019), p.33,

<https://www.gov.scot/binaries/content/documents/govscot/publications/publication/2019/09/protecting-scotlands-future-governments-programme-scotland-2019-20/documents/governments-programme-scotland-2019-20/governments-programme-scotland-2019-20/govscot%3Adocument/governments-programme-scotland-2019-20.pdf> [Accessed 30 December 2020]; Nicola Sturgeon, “Nicola Sturgeon’s speech on the Programme for Government” (SNP, 3 September 2019), <https://www.snp.org/nicola-sturgeons-speech-on-the-programme-for-government/> [Accessed 30 December 2020].

⁸⁹ Scottish Government, *Protecting Scotland's Future—The Government's Programme for Scotland 2019–2020*, p.33.

⁹⁰ Both in England and Wales and in Northern Ireland, reform of hate crime legislation in these jurisdictions is being considered (information correct as of November 2020). In England and Wales, the Law Commission has opened a public consultation concerning the proposed changes to legislation. In Northern Ireland, the public consultation closed on 30 April 2020. For further details see: Law Commission, “Hate Crime”, <https://www.lawcom.gov.uk/project/hate-crime/> [Accessed 30 December 2020]; Department of Justice, “Hate Crime Legislation in Northern Ireland: Independent Review”, <https://www.hatecrimereviewni.org.uk/> [Accessed 30 December 2020].

⁹¹ Hate Crime and Public Order (Scotland) Bill, SP Bill 67, Session 5 (2020). See <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/bill-as-introduced-hate-crime-and-public-order-bill.pdf> [Accessed 30 December 2020].

“The absence of ‘gender’ is striking, not least because it goes against recommendations of Lord Bracadale’s Review, but also the First Minister’s Advisory Council on Women and Girls—both of whom advocated for addressing the—recognised—gaps in the existing legal provisions in Scots Law in respect of misogyny.”⁹²

The Scottish Government announced that a working group will be convened, chaired by Baroness Kennedy QC, to explore the potential for a stand-alone offence of misogynistic harassment. While it is again a significant let-down in terms of the absence of sex/gender from the hate crime framework, it is also difficult to construe this as anything other than a continuance of the omission of gender from the hate crime landscape. Furthermore, given that Engender (in conjunction with Rape Crisis Scotland and Scottish Women’s Aid) proposed the stand-alone offence of misogynistic harassment,⁹³ and have been noted as already being parties to the working group, it is difficult—if not impossible—to see this influence by the third sector organisations as difficult to oppose when it comes to policy-making.⁹⁴ Above all else, the prevarication by the Scottish Government over gender, again, is baffling given that a gender aggravator is not included in the draft Bill which “claims to be a *consolidating* and, more importantly, *updating* piece of legislation on hate crime”.⁹⁵

IV. MISOGYNISTIC HARASSMENT: A NOD TO REFORM?

The proposal to create a stand-alone offence of misogynistic harassment is, in many ways, a tangible response to the much-prolonged failure of the Scottish Government to capture prejudice and hatred of women (because they are women) within the provisions of Scots criminal law. Given the lack of firm commitment and plan to include gender within the scope of hate crime legislation in Scotland, misogynistic harassment may appear as an attractive legislative alternative—and certainly innovative, given no other jurisdictions pursued it thus

⁹² Kim Barker and Olga Jurasz, “Scots Hate Crime Bill: A Missed (Gender) Opportunity?” (*University of Stirling, Public Policy blog*, 1 May 2020), <https://policyblog.stir.ac.uk/2020/05/01/scots-hate-crime-bill-a-missed-gender-opportunity/> [Accessed 30 December 2020].

⁹³ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland: Consultation Paper*, para.4.45.

⁹⁴ Barker and Jurasz, “Scots Hate Crime Bill: A Missed (Gender) Opportunity?” (*University of Stirling, Public Policy blog*, 1 May 2020), <https://policyblog.stir.ac.uk/2020/05/01/scots-hate-crime-bill-a-missed-gender-opportunity/> [Accessed 30 December 2020].

⁹⁵ Barker and Jurasz, “Scots Hate Crime Bill: A Missed (Gender) Opportunity?” (*University of Stirling, Public Policy blog*, 1 May 2020), <https://policyblog.stir.ac.uk/2020/05/01/scots-hate-crime-bill-a-missed-gender-opportunity/> [Accessed 30 December 2020].

far. Moreover, it also arises as a potential solution for capturing (and prosecuting) some abusive behaviours motivated by misogyny—or misogynistic in nature—that affect many women on a frequent basis, but for which the current legal system in Scotland does not offer an appropriate legal characterisation. In this context, the proposed offence of misogynistic harassment emerges as a potential avenue for women to seek justice for the harms suffered—something that is not currently possible due to the absences of the relevant legal provisions within the hate crime framework in Scotland.

The offence of misogynistic harassment was first mooted by Engender (with the support of Scottish Women’s Aid and Rape Crisis Scotland) in their response to the Lord Bracadale’s Review.⁹⁶ Despite Engender acknowledging that “there is insufficient data at present to say precisely how the offence should operate”,⁹⁷ they nonetheless recommended that a process of consultation and shaping the new offence should be based on the one used to develop the concept of coercive control in the context of the Domestic Abuse (Scotland) Act 2018. At the time, no concerns were raised about the legal aspects of “misogyny” and “harassment” under Scots law. As such, whilst the proposal to create a stand-alone offence of misogynistic harassment has been met with a positive response—particularly from Scottish women’s groups and equality organisations, as well as Cabinet Ministers—questions remain about the actual scope of this offence, especially legal definitions of “misogyny” and “harassment”.

The law in Scotland (as well as other jurisdictions in the UK) does not define misogyny; similarly, there are no accepted definitions in other legal systems which would define (in legal terms) the meaning of this social phenomenon. Therefore, it remains unclear as to how the “misogynistic” aspect of harassment would be defined and proven in Scots law. Also, the introduction of the new offence would likely require the establishment of a statutory offence of “harassment”; unlike in England and Wales, harassment is not a statutory offence in Scotland. To introduce an offence of misogynistic harassment without the statutory offence of harassment in Scots law would undermine the purpose of hate crime reform to date. Introducing a stand-alone offence does not—as the reform process notionally intended—clarify the statutory aggravation model for hate crimes, nor move away from the common law basis for hate offences. Moreover, s.38 of the Criminal Justice and Licensing (Scotland) Act 2010

⁹⁶ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland: Final Report*, para.4.45.

⁹⁷ Scottish Government, *Independent Review of Hate Crime Legislation in Scotland: Final Report*, para.4.45.

criminalises threatening or abusive behaviour which would cause a reasonable person to suffer fear and alarm and it remains unclear whether the new offence of misogynistic harassment would rely on this definition or the one contained within the Protection from Harassment Act 1997.

In light of the lack of an accepted legal definition of “misogyny”, the word has been often used relatively loosely, frequently pointing towards different meanings and describing different behaviours. For instance, it is not uncommon to see a certain act being described as a “misogynistic hate crime” merely because it was committed against a woman. To assert this would require an assumption that all crimes committed against women are motivated by misogyny—something which is not always the case, but which has not been firmly settled by those in support of the misogynistic harassment reform. That leaves the question of what is socially and, most of all, legally understood as misogynistic open to interpretation, until such time as it is articulated in legal terms. Whilst “recognise misogyny as hate crime” has been frequently appearing in the news and political campaigns—especially those in England⁹⁸—it is worth noting that misogyny is not a protected characteristic in the same way as categories such as race, religion or gender are, and as such the recognition of misogyny as a hate crime is misleading. Such campaigns suggest that misogyny should be a protected characteristic to be recognised as a hate crime when in fact it is the underlying factor, i.e. womanhood that is the origin of the hate. As we argue elsewhere,⁹⁹ misogynistic abuse and violence could amount to hate crime. However, in order to adequately capture it within the hate crime framework, a protected characteristic of gender needs to be added. As such, it would allow the recognition of gender-based hate within the legal system and provide for appropriate punishment for perpetrators through the sentencing uplift provisions. Whilst a potential misogynistic harassment offence could ensure that perpetrators see punishment, it is unlikely that it alone could satisfy the threshold for achieving a sentencing uplift as such a stand-alone offence would fall outside of the hate crime framework. Failing to include gender protections within the hate crime framework means that no sentencing uplift enhancements will be available for misogyny-related acts. Instead, if the hate crime framework was reformed to include gender, it

⁹⁸ Wera Hobhouse, “IWD 2020: Recognise misogyny as a hate crime” (*Liberal Democrats*, 9 March 2020), <https://www.libdems.org.uk/iwd-2020-misogyny-hate-crime> [Accessed 30 December 2020]; “Make misogyny a hate crime, Stella Creasy urges” (*BBC News*, 5 September 2018), <https://www.bbc.co.uk/news/uk-politics-45408492> [Accessed 30 December 2020].

⁹⁹ Kim Barker and Olga Jurasz, “Why Misogyny and Hate Crime Reforms Need More Than Slick Campaigns” (*The Conversation*, 26 March 2020), https://theconversation.com/why-misogyny-and-hate-crime-reforms-need-more-than-slick-campaigns-134265#comment_2180791 [Accessed 30 December 2020].

could be possible for an enhanced sentence to be issued where there is criminal offence of, for example, harassment which is shown to be motivated by a hatred of women. For such an example to work in reality, reform is required of the hate crime provisions *and* protected characteristics, rather than pursuing the introduction of a separate criminal offence of misogynistic harassment.

More broadly, misogynistic harassment—whilst partially capturing the element of hatred in the name of the proposed offence—falls outside the scope of hate crime legislation in Scotland. It is, therefore, important to note that the introduction of such an offence would not advance hate crime legislation in Scotland in the way that adding gender to the list of protected characteristics would. Reform focused on the latter would, ultimately, result in a broader application to all crimes under Scots criminal law, not just harassment. It would also enable a sentence uplift in cases where the crime committed were aggravated due to the victim's gender as well as legal recognition of the gender-based hate factoring into the commission of the crime. Whilst the latter is mostly symbolic, it nonetheless plays an important role in signalling that the legal system stands against gender-based hate—especially when it falls outside the already protected transgender characteristic.

Furthermore, pursuing the introduction of a misogynistic harassment offence instead of expanding the list of protected characteristics (rather than doing both) carries the potential risk of distracting from a number of the Scottish Government's commitments to bring gender into the hate crime legislation in Scotland. As we argued in section II above, the Scottish Government has made numerous commitments to incorporate gender into the hate crime framework but, sadly, has not acted upon them. The impetus to make this pressing change was brought about not only by hate crime focused developments (e.g. the outcome of Lord Bracadale's Review and the One Scotland consultation), but also the government's commitments to tackle violence against women (e.g. Equally Safe), as well as social support for these changes. Combined, these present an unprecedented opportunity for Scotland to lead the way in the UK in terms of legal recognition of gender as a protected characteristic within hate crime legislation.

V. CONCLUSION

For an offence of misogynistic harassment to be introduced in Scots law poses as many problems as it potentially solves.¹⁰⁰ Despite the novel features of the proposed offence, it does fall outside the scope of the reform of hate crime legislation in Scotland as mandated by the Scottish Government's *One Scotland* consultation and supported by Lord Bracadale's Review. In developing a hate crime framework that is workable, forward-thinking, and capable of effectively addressing gender-based hate, the emphasis must fall on gender. Misogynistic harassment can, in the future, contribute towards the widening of Scottish laws to lead the way on addressing many forms of abuse, hatred and violence suffered by women. However, within the current law reform landscape, it is not a substitute for the comprehensive reform of hate crime legislation in a manner which captures gender-based hate. Given the emphasis of the Scottish Government to make Scotland a place that is equal and free of hate, it is paramount that the opportunity to amend legislation—in a gender-sensitive way—as a result of the *One Scotland* consultation is not foregone.

Given that law reforms are generally both time and resource heavy procedures, it is difficult to envisage the Scottish Government reopening the question of amending hate crime legislation anytime soon in case the currently proposed amendments are not adequately acted upon. As such, the Scottish Government not only has a unique opportunity to act upon their commitments to gender equality and the fight against violence against women, but is also very well positioned to do so. However, most importantly, and aside from political gains, bringing gender under the scope of hate crime legislation in Scotland would have significant and practical implications for women who are victims of crimes motivated by gender-based hate—particularly when it comes to the legal recognition of the underpinning reasons for the commission of the crime, but also offering an avenue for redress and adequate punishment of the perpetrators.

¹⁰⁰ Barker and Jurasz, "Misogynistic Harassment: Advancing Scots Criminal Law?" (*Scottish Legal News*, 7 February 2020), <https://www.scottishlegal.com/article/misogynistic-harassment-advancing-scots-criminal-law> [Accessed 30 December 2020].