

Response to Scottish Government Consultation: Reforming the Criminal Law to Address Misogyny

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1. Executive summary

1. The Scottish Human Rights Commission (the “Commission”) welcomes the opportunity to provide this advice and analysis in respect of the current consultation on reforming the criminal law to address misogyny. Our advice is given pursuant to section 3 of the Scottish Commission for Human Rights Act 2006.¹
2. We understand that the Scottish Government is proposing this Bill in response to concerns that women are not adequately protected in criminal law from prejudice-based harms including harassment, abuse and violence. The Commission notes the publication of the report ‘Misogyny – A Human Rights Issue’, published by the expert working group chaired by Baroness Helena Kennedy (the “Kennedy Report”), which outlines the underlying policy rationale for the proposals under consideration.
3. In this submission, we first set out the human rights standards as they relate to violence against women, making particular reference to the European Convention on Human Rights (“ECHR”), The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (“the Istanbul Convention”) and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”). We then consider international human rights law and hate speech against women before specifically considering freedom of expression protections. We finally make some observations on the draft proposals from the perspective of human rights compliance and best practice.
4. The Commission’s view is that human rights law provides substantive authority for further action to protect women and girls from gender-based violence. That said, the law must be sufficiently foreseeable and interference with the right to freedom of expression must be

¹ Scottish Commission for Human Rights Act 2006, s. 3 states that, for the purposes of its general duty to promote and encourage best practice in relation to human rights, the Commission may provide advice and guidance.

proportionate both in respect of the proposed legislation and in its every day application.

5. In our assessment, the proposed Bill is in general consistent with human rights standards; however, some areas need further development. In particular, law must be sufficiently predictable and interference with freedom of expression must be proportionate to the need to respond to gender-based violence against women and girls, articulated as misogyny in the legislation.
6. Implementation of the law must balance the competing need for prosecutorial discretion to ensure application is proportionate with the intended disruption of the forms of violence against women that the Kennedy Report argues exists., Funding for implementation which includes gender-sensitive training and education on the new law for police, prosecutors, judges and the general public will be essential.

2. Human Rights Standards and Violence Against Women

Overview

7. The UK is a party to a number of binding legal standards that require Scottish authorities to take action to prevent, investigate and punish gender-based violence. There has been a gradual recognition that human rights is a relevant lens through which to approach violence against women.²
8. The Scottish Government proposes to respond to the Kennedy report recommendations by introducing five new offences to Scottish Criminal Law that would cover:
 - the harassment of an individual woman or girl, or a specific group of women and girls by behaving in a threatening, sexual or

² An analysis of the trends in legal approaches to violence against women in human rights materials is undertaken in Ronagh J.A. McQuigg 'Domestic Violence as a Human Rights Issue: Rumor v. Italy' *Eur J Int Law* (2015) 26 (4): 1009

abusive way that is likely to cause them to experience fear, alarm, degradation, humiliation or distress

- Behaviour that is sexual or abusive and that causes a woman or girl to experience fear, alarm, degradation, humiliation or distress
- Creation of a statutory aggravation for certain existing offences which are motivated by, or demonstrate misogyny
- Sending of threatening or abusive communications invoking rape, sexual assault or disfigurement to a woman or girl, or a group of women and girls to intimidate or silence women, especially online, with the effect of discouraging women from participating in public debate
- Criminalising threatening or abusive language or communicate threatening or abusive materials intending to stir up hatred of women and girls in others

9. 'Gender-based violence' or '[gender-based] violence against women and girls' are not generally concepts explicitly named in human rights treaties to which the UK is a party. That said, several treaties have been authoritatively applied to cases of violence against women, creating clear legal standards for the application of human rights law in these circumstances. Policy and legislative approaches to violence against women in Scotland have increasingly and consistently made use of international human rights instruments.³
10. The United Nations has adopted a definition of violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".⁴ On this basis,

³ Examples include Equally Safe, NACWAG, Domestic Abuse Scotland Act 2018

⁴ UN Declaration on the Elimination of Violence Against Women, 20 December 1993, General Assembly Resolution 48/104.

harassment, even if no violent acts associated to it, falls under the protections against violence against women.

11. The proposals from Scottish Government differ from comparable protections for marginalised groups, largely treated as ‘hate crime offences’.⁵ The [Kennedy Report](#) makes the following case for this departure, arguing that a gender-neutral approach would not recognise that:

- Women are not a minority;
- There is no pervasive male-sex equivalent to misogyny;
- Adding ‘sex’ to the Hate Crime and Public Order (Scotland) Act 2021 would not create law for women, as women, reinforced by international human rights frameworks which are clear that there should be a presumption against gender-neutral laws (CEDAW, Istanbul).

and additionally arguing that “Hate is not a useful concept when it comes to the malign conduct that men display towards women, and the attitudes behind this conduct.”

As a result, the Commission highlights the relevant international human rights standards applied to violence against women and to hate crime.

2.1. European Convention on Human Rights

12. A number of the provisions of the ECHR may be engaged in relation to violence against women and girls⁶ – including Article 3 (Prohibition of torture, inhuman and degrading treatment or punishment); Article 8 (Right to respect for private and family life); Article 14 (Prohibition of discrimination); and Article 2 (Right to life). Other rights protected by the convention such as freedom of assembly and association (Article 11) or the right to stand for election (Article 3 of Protocol 1 to the

⁵ However note that not all groups defined by characteristics in the Hate Crime and Public Order Act are drafted in strictly symmetrical terms, e.g. disability or transgender identity.

⁶ See [European Court of Human Rights Factsheet on Violence Against Women](#).

Convention) are likely to be inhibited by tolerance of misogyny in public settings.

13. Over the past 20 years, the European Court of Human Rights (“ECtHR”) has developed a significant body of case law elaborating legal standards under each of the above noted provisions within the context of violence against women, and in applying these standards, has determined substantive violations.

Article 3 ECHR

14. Article 3 ECHR is absolute. This means that if treatment reaches the minimum level of severity as to engage Article 3, that treatment can never be justified. It is clear that some forms of violence against women will meet the threshold for treatment contrary to Article 3.⁷
15. Articles 2 and 3 ECHR require the State not only to refrain from conduct contrary to the prohibition of torture or the right to life, but include obligations to take positive steps to prevent the relevant harm. For example, States are required to take appropriate steps to safeguard the lives of those within its jurisdiction.⁸ Failure to take “reasonable measures” which could prevent or mitigate serious harm in the future has also been found to engage State responsibility under Article 3.⁹
16. Importantly, the gendered nature of violence against women, predominantly domestic abuse, has been confirmed in the case law of the ECtHR. In the case of *Opuz v Turkey*¹⁰ the ECtHR considered the historically and culturally ingrained attitude to violence against women in Turkey and specifically amongst Turkish public authorities as relevant factors in interpreting positive obligations under Article 2 and 3 of the Convention in cases of domestic abuse. Significantly, the Court

⁷ See for example, *E.S and Others v Slovakia*, no. 8227/04, 15 September 2009; *De Giorgi v Italy*, no. 23735/19, 16 June 2022.

⁸ *Osman v UK*, no. 23452/94, 28 October 1998.

⁹ *E and others v UK*, no. 33218/96 at para. 99.

¹⁰ *Opuz v Turkey*, no. 33401/02, 9 June 2009.

in *Opuz* drew explicitly from the UN Convention on the Elimination of All Forms of Discrimination against women and the relevant treaty body's approach to defining "gender-based violence".¹¹ The Court has also described gender equality as a key underpinning principle of the convention.¹²

Article 8 ECHR

17. Article 8 is also relevant to acts within the spectrum of violence against women. In cases of violence against women (largely domestic abuse) the ECtHR has typically examined the State's positive obligation to safeguard the applicant's physical integrity protected within the scope of Article 8.
18. Physical and psychological integrity concerns perceived or real harms to the person as an intimate aspect of their private life. States are obliged to ensure protection from private individuals under their positive obligations to protect the physical and psychological integrity of individuals, both under Article 8 taken alone or in combination with Article 3. Positive obligations under Article 8 include a duty to maintain and apply in practice an adequate legal framework which must also be effectively implemented in practice.

Article 14

19. Article 14 of the Convention protects individuals from violations of their rights under the Convention that has a discriminatory impact because of their real or perceived membership of a social group, including sex. Article 14 cannot be raised alone – discrimination must be found in the enjoyment of another substantive convention right. A relevant

¹¹ *Opuz* Para 74: "The Committee on the Elimination of All Forms of Discrimination Against Women (hereinafter "the CEDAW Committee") has found that "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men" and is thus prohibited under art 1 of CEDAW. Within the general category of gender-based violence, the Committee includes violence by "private act."

¹² *Leyla Sahin v. Turkey*, no. 44774/98, 10 November 2005. In this case, the Court articulated for the first time that the principle of gender equality was 'one of the key principles underlying [the] Convention'.

consideration is also the extent to which a gendered provision of law- i.e., one that reflects inequalities between women and men's experiences of and position in society - discriminates against men by virtue of their exclusion from the ambit of protection or because of the likelihood of criminalisation (Article 7) and / or interference with freedom of expression¹³ (Article 10).

20. Although the Court has found that 'very weighty reasons' must be advanced to justify different treatments on the grounds of sex¹⁴, Article 14 is not an absolute prohibition on different treatment. Difference in treatment can be compatible with Article 14 where objective and reasonable justification is provided. This requires a legitimate aim and "a reasonable relationship of proportionality between the means employed and the aim sought to be realised."¹⁵
21. When deciding cases of discrimination, the ECtHR applies the following test:
 1. Has there been a difference in treatment of persons in analogous or relevantly similar situations – or a failure to treat differently persons in relevantly different situations?
 2. If so, is such difference – or absence of difference – objectively justified? In particular,
 - a. Does it pursue a legitimate aim?
 - b. Are the means employed reasonably proportionate to the aim pursued?
22. A neutral provision or practice may amount to indirect discrimination against women under Article 14 if women's access to justice or enjoyment of rights (including Articles 3, 8 and 2) is undermined,

¹³ A fuller discussion of freedom of expression is considered below.

¹⁴ *Abdulaziz, Cabales and Balkandali v. UK*, nos. 9214/80; 9473/81; 9474/81, 28 May 1985.

¹⁵ *Abdulaziz, Cabales and Balkandali v. UK*, nos. 9214/80; 9473/81; 9474/81, 28 May 1985.

including by the general attitudes of police, judges or other justice actors.¹⁶

23. Article 14 may also be engaged where a State – without an objective and reasonable justification – fails to treat differently persons whose situations are significantly different. Failure to take into account inherent vulnerability when considering if neutral treatment is appropriate can amount to discrimination¹⁷. Case law indicates that in domestic abuse cases there are a set of criteria that must be proven to claim a failure to act amounts to discrimination – firstly that the type of violence affects mainly women and that the authorities’ actions were not a simple failure or delay in dealing with domestic violence, but amounted to repeated acceptance and condoning of violence towards women that reflects a discriminatory attitude.¹⁸ Increasingly the ECtHR has been willing accept the existence of discrimination on the basis of specialised reports and expert analysis such as the UN CEDAW Committee, UN Special Rapporteur findings or NGOs.¹⁹
24. Given the evidenced scale and nature of gender-based violence against women,²⁰ the Commission’s view is that a gendered law²¹ with the aim of preventing the harms identified would be permissible under European human rights law, if it is enforced in a way that respects an individual’s Article 10 right to freedom of expression, or any other rights engaged in the circumstances. Article 10 is discussed in more detail below.

¹⁶ *Opuz v Turkey*, no. 33401/02, 9 June 2009.

¹⁷ *B.S. v Spain*, no. 47159/08, 24 July 2012.

¹⁸ *Eremia v. the Republic of Moldova*, no. 3564/11, 28 May 2013 at para. 89.

¹⁹ *Talpis v Italy*, no. 41237/14, 2 March 2017 and *Opuz v Turkey*, no. 33401/02, 9 June 2009.

²⁰ Kennedy Report. See also [Working Group on Misogyny and Criminal Justice, Lived Experience Survey Analysis](#).

²¹ Gendered law or policy refers to that which is not ‘gender-neutral’ and takes into account the different position of men and women in society. See UN Women [Handbook-on-gender-mainstreaming-for-gender-equality-results-en.pdf \(unwomen.org\)](#)

2.2. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)

25. The Council of Europe Convention on preventing and combating violence against women and domestic violence (the “Istanbul Convention”) is intended to build on the ECtHR approach to violence against women and respond to the exclusion of violence against women from the traditional ambit of human rights.²² The Istanbul Convention has been somewhat reflected in Equally Safe, Scotland’s Strategy to End Violence Against Women (2018), including the focus on gendered approaches.²³
26. The UK ratified the Convention in July 2022,²⁴ accepting binding obligations to “protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence... design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence (Article 1).”
27. Article 3 provides helpful definitions for analysis of the Scottish Government’s proposals:

“violence against women” is defined as “a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

²² L. Grans ‘The Istanbul Convention and the Positive Obligation to Prevent Violence’, Human Rights Law Review (2018) 18(1): 133–155 outlines evidence from the preparatory documents that supports this claim. See also Article 12 of the Istanbul Convention.

²³ [Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls \(www.gov.scot\)](https://www.gov.scot)

²⁴ Following signature in 2012.

“gender-based violence against women” is defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately.”

“gender” is defined as “socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.”

28. A specific obligation to act in response to misogynistic behaviour and speech can be located within Article 40:

*“Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.”*²⁵[our emphasis]

29. The Convention does not mandate specific approaches, but there is a clear obligation to consider how gender-based violence against women can be effectively prevented, investigated and responded to.²⁶
30. There are two authoritative supervisory mechanisms established by the Convention - a Group of experts on action against violence against women and domestic violence (GREVIO)²⁷ and a Committee of the Parties, composed of the representatives of the Parties to the Convention. A mid-term review of the implementation of the Istanbul Convention²⁸ considered the initial assessments under the review

²⁵ [CETS 210 - Council of Europe Convention on preventing and combating violence against women and domestic violence \(coe.int\)](https://www.coe.int/en/web/convention-on-preventing-and-combating-violence-against-women-and-domestic-violence)

²⁶ See also Article 12 “Any measures taken pursuant to this chapter shall take into account and address the specific needs of persons made vulnerable by particular circumstances and shall place the human rights of all victims at their centre.... Parties shall ensure that measures taken pursuant to this chapter shall... be based on a gendered understanding of violence against women.”

²⁷ GREVIO has to date published one General Recommendation that provides an authoritative analysis of the application of the convention to online abuse and harassment of women. Available [here](#).

²⁸ This excluded the UK as it preceded ratification.

mechanism, and expressed concerns about shifts towards gender neutrality in policy and legislation regarding violence against women. GREVIO stated that these gender-neutral approaches “raise concern about the extent to which those policies are underpinned by the concept that violence against women is both a cause and a consequence of the inequality between women and men and whether violence against women is recognised as a form of gender-based violence.”²⁹

2.3. UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)

31. While the text of the CEDAW Convention makes no reference to violence, abuse or harassment, the CEDAW Committee addressed this omission throughout its General Recommendation 35,³⁰ At paragraph 6, the Committee describes gender-based violence against women as “*pervasive in all countries, with high levels of impunity*” and, *reflecting the growing characterisation as “a continuum of multiple, interrelated and recurring forms, in a range of settings, from private to public, including technology - mediated settings and in the contemporary globalized world it transcends national boundaries.”*
32. The Committee notes the connection between violence against women and gender equality, and the role of violence in undermining the enjoyment by women of their human rights and fundamental freedoms, as enshrined in the Convention.
33. According to General Comment 35 State obligations under CEDAW to prevent, adjudicate and respond to violence against women include:
 - adopting legislation prohibiting all forms of gender-based violence against women and girls and, harmonizing national law with the Convention³¹. In such legislation, women who are

²⁹ Available [here](#).

³⁰ Available [here](#), updating General Recommendation No. 19

³¹ Articles 2 (b), (c),(e), (f), and (g); and 5 (a)

victims/survivors of such violence should be considered to be rights holders. It should contain age-sensitive and gender-sensitive provisions and effective legal protection, including sanctions on perpetrators and reparations to victims/survivors.”

- A requirement to “examine gender-neutral laws and policies to ensure that they do not create or perpetuate existing inequalities and repeal or modify them if they do so;”
- “Develop and implement effective measures with the active participation of all relevant stakeholders, such as representatives of women’s organizations and of marginalized groups of women and girls, to address and eradicate the stereotypes, prejudices, customs and practices set out in article 5 of the Convention;”
- Establishing “Awareness-raising programmes that promote an understanding of gender-based violence against women as unacceptable and harmful, provide information about available legal recourses against it and encourage the reporting of such violence and the intervention of bystanders;” and
- To “develop and implement effective measures to make public spaces safe for and accessible to all women and girls, including by promoting and supporting community-based measures adopted with the participation of women’s groups. Measures should include ensuring adequate physical infrastructure, including lighting, in urban and rural settings, in particular in and around schools”.

34. It is important to note that the Scottish Government has committed to incorporating CEDAW and other human rights treaties that the UK has ratified directly into Scots law through the forthcoming Human Rights Bill³².

³² [Human Rights Bill consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

2.4. International Human Rights Law and Hate Speech against women

35. While UN human rights law addresses hate crime, there is no single accepted international or regional definition of 'hate speech' or hate crime, nor a single model for tackling crimes motivated by the perpetrators' animosity towards an identity group. There is so far also limited definition of the concept in relation to gender-specific 'hatred' and misogyny.³³
36. Case law from the European Court of Human Rights confirms that legislation to criminalise hate crimes and the effective implementation of that legislation form part of the positive obligations of State under the ECHR.³⁴ A failure to treat hate crimes according to their underlining motivations may be considered a violation of Article 14 ECHR.³⁵
37. International human rights law does not mandate approaches to compliance with the obligations to protect individuals from hatred and violence. The Kennedy Report identified hate as a less useful concept when considering philosophical and practical approaches to misogyny. It is clear that on the other hand the approach selected has strong parallels with UK and other comparable hate crime legislation.
38. In summary, it can be said that human rights law supports and, in some cases, obliges States to protect women from physical, verbal and psychological harms motivated by prejudice towards women under both an analysis of violence against women and hate crime.

³³ The Council of Europe has in recent years noted the gap in analysis with regards to hate speech and violence against women. "A link between hate speech and violence against women has also been drawn explicitly in the CoM (Committee of Ministers) Recommendation on Preventing and Combatting Sexism, which includes the first internationally agreed definition of sexism. The Recommendation acknowledges that "While racist hate speech is recognised as contrary to European and international human rights standards, the same is not always true of sexist or misogynistic hate speech, and current policies and legislation at all levels have not been adequately able to address this issue."

³⁴ Article 2 *Zashevi v Bulgaria*, no. 19406/05, 2 December 2010; Article 3 *Beganovic v Croatia*, no. 46423/06, 25 June 2009; Article 8 *MC v Bulgaria*, no. 39272/98, 4 December 2003.

³⁵ *M.F. v Hungary*, no. 45855/12, 31 October 2017.

3. Freedom of expression protections

39. An independent review of Hate Crime Legislation in Scotland in 2017³⁶ noted the requirement to balance freedom of expression and protection from hate speech, and in particular “the potential risk to freedom of expression from the introduction of stirring up hatred offences...” While aggravators create no new offences interfere with individual expression, across the proposed legislation in the harassment, behaviour, communication and stirring up offences proposed in the draft Bill.
40. Freedom of expression, protected by Article 10 ECHR, extends to ideas that may shock, disturb or offend the deeply-held beliefs of others.³⁷ Freedom of expression is not absolute, and may be limited in certain circumstances in line with Article 10(2) ECHR. Restrictions on expression must be:
- In accordance with the law
 - Pursuant to a legitimate aim
 - Necessary and proportionate to the legitimate aim pursued.
41. The above assessment extends to the terms of legislation as well as any individual assessment as to whether a specific act or speech should be restricted. The latter assessment inevitably turns on the facts and context of a given case.
42. Article 10(2) provides that expression may be limited in pursuit of national security or public safety interests, the prevention of disorder or crime, protection of health or morals, for the protection of the reputation or rights others, preventing the disclosure of information

³⁶ A senior member of the Scottish Judiciary, Lord Bracadale was appointed by Scottish Government to conduct an independent review into Hate Crime Legislation in Scotland in 2017. The review recommended reforms to modernise, consolidate and extend hate crime laws, which led to the Hate Crime and Public Order Act (Scotland) 2021.

³⁷ *Handyside v UK*, no. 5493/72, 7 December 1976.

received in confidence and for maintaining the authority and impartiality of the judiciary.

43. In the Commission's assessment, the prevention of violence against women, including gendered harassment that restricts women's access to and use of public space, would be considered a legitimate aim under Article 10.
44. Legislation, especially resulting in criminal convictions, including prison sentences, that restricts individual expression must be no more than is necessary to prevent and punish gendered harassment. The Council of Europe Venice Commission (European Commission for Democracy through Law, the Council of Europe's advisory body on constitutional matters) outlines that criminal sanctions should be the last resort when no other means appears capable of the desired protection of individual rights in the public interest. It advises that "hate legislation must be measured in order to avoid an outcome where restrictions, which aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology".³⁸
45. The Rabat Plan of Action³⁹ is guidance developed by the United Nations Office of the High Commissioner for Human Rights on implementation of Article 20 ICCPR. It contains a six-part threshold test for considering severity and forms of speech that should be prohibited under criminal law:
 - **Context** within the social and political context prevalent at the time the speech was made and disseminated;
 - The **speaker's** position or status in the society;
 - **Intent**, reflecting Article 20 of the International Covenant on Civil and Political Rights which indicates that negligence and recklessness are not sufficient for an act to be an offence;

³⁸ Venice Commission of the Council of Europe, Blasphemy, insult and hatred: finding answers in a democratic society Science and technique of democracy, No. 47. Available at: [sinanoğlu \(coe.int\)](https://www.coe.int/sinanoğlu)

³⁹ Available [here](#).

- **Content and form**, for example the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;
 - **Extent** of the impact, or size of audience; and
 - **Likelihood**, including imminence, **of harm** but not necessarily required to cross the threshold for incitement.
46. In light of the persistent, normalised and tolerated level of misogyny reported by women in the Kennedy report⁴⁰ and other studies⁴¹, which has not been thus far disrupted by other interventions, it appears that the case for new criminal law can be legitimately made under human rights law. However, the application of such legislation and associated sanctions must be proportionate in all cases.

4. Specific comments on draft provisions

4.1. An offence of Public Misogynistic Harassment (Chapter 1)

47. The Commission understands that the intention behind this provision is to promote a transition in what is considered acceptable conduct towards women in Scottish society. The Consultation Document's Foreword describes this as "send[ing] an important signal that such behaviour is not merely rude, sexist or unpleasant, but abusive and criminal." Human rights law as described in this submission clearly supports the policy ambition behind this draft provision.
48. We question whether the offence should be extended to both public and private spaces as considered in the consultation questions. It is unclear to us that there exists a gap in domestic abuse and sexual crime laws in relation to misogynistic harassment in the home, and we do not believe that there should be any encouragement to label certain

⁴⁰ Working Group's Lived Experiences of Misogyny in Scotland survey.

⁴¹ See, for example [Street harassment | Plan International UK \(plan-uk.org\)](#); [Safe Spaces Now - UN Women UK](#). [The UK's First National Street Harassment Study | Stop Street Harassment](#).

behaviours misogynistic harassment when they are more rightly covered by domestic abuse legislation. However, we support the extension of the offence to private electronic communications such as social media direct messages, where a considerable proportion of these behaviours is focused.⁴²

49. Proportionality is a critical consideration for application of the provision to real life circumstances. Examples highlighted in the Kennedy Report such as the French Street Harassment Law⁴³ and legislation enacted in Washington DC⁴⁴ have focused on the use of administrative fines as an appropriate sanction. We note that the approach in the consultation proposes a wide range of harmful circumstances that could be brought into the scope of this provision, and penalties for severe offences may include the maximum penalty of 7 years imprisonment on conviction. This is, as the consultation document notes, in line with the racially aggravated harassment offence in the Hate Crime and Public Order (Scotland) Act 2021.⁴⁵ However, we would welcome further information about sentencing guidelines and appropriate diversions focused on perpetrator behaviour that may be alternatives to prosecution.
50. We are also mindful of the Kennedy Report's proposition that misogyny is widely tolerated and highly normalised, including by criminal justice actors. We would suggest that the legislation should be accompanied by further information on how gender-sensitivity will be articulated in prosecutorial and sentencing guidance.⁴⁶
51. In this context, further information is required on when the 'reasonableness defence' proposed by the consultation document may

⁴² See the work of Dr Kim Barker and Dr Olga Jurasz in relation to hate crime online, [Dr Olga Jurasz | OU people profiles \(open.ac.uk\)](#)

⁴³ Law No. 2018-771 of September 5, 2018 ([LOI n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes \(1\) - Légifrance \(legifrance.gouv.fr\)](#)) (French) .

⁴⁴ The Street Harassment Prevention Act (SHPA)

⁴⁵ s.3 [Hate Crime and Public Order \(Scotland\) Act 2021 \(legislation.gov.uk\)](#)

⁴⁶ Coordination with the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) to develop appropriate training on gender sensitivity is encouraged.

be employed before the overall human rights compatibility of the scheme could be assessed.

4.2. An Offence of Misogynistic Behaviour (Chapter 1)

52. We understand the rationale for the proposed separation of the Kennedy Report's recommendation into a harassment and a public order offence. The Misogynistic Behaviour public order offence is modelled on existing and well understood structures for a section 38 offence under the Criminal Justice and Licensing (Scotland) Act 2010, which criminalises threatening or abusive behaviour.
53. In our view, this public order offence is likely to be harder to apply consistently with human rights in practice. The possible scope of misogyny behaviour is set out as thus:

Behaviour that is sexual or abusive (or both), motivated (wholly or partly) by contempt, or malice and ill-will, toward women and girls, of a character such that a reasonable person would consider it to be contemptuous of women and girls and would be likely to cause a reasonable woman or girl to suffer fear, alarm, degradation, humiliation, or distress, and the person intends by the behaviour to cause one of these harms to a woman or girl or is or is reckless as to whether the behaviour has that effect.

This definition is complex and may prove difficult for the public to anticipate in practice. As a result, we are concerned that the provision may not offer sufficient clarity to potential perpetrators, the public or criminal justice actors to ensure consistency with the requirement for legal transparency in accordance with the law. Ensuring sufficient clarity is essential and supporting measures, such as an information campaign that accompanies the implementation of such a provision would be crucial and should be identified in advance.

54. Potential alternatives to the inclusion of the public order offence include broadening the scope of the harassment offence and to remove the requirement for a direct victim or group of victims. Such options may be capable of capturing the majority of the behaviours the Scottish Government intends to cover in the misogynistic behaviour offence while allowing for a greater degree of certainty and

foreseeability. We note that the consultation paper states that other behaviours of sufficient severity might also be captured by the stirring up offence. We suggest that the Scottish Government should specifically evaluate such options and their human rights compatibility as part of the legislative development process.

4.3. Additional comments

55. We recommend that lessons be drawn from the implementation of the Domestic Abuse (Scotland) Act 2018. A recent post-legislative review of the implementation of that Act found that although the law better reflected how adults experience domestic abuse, its impact has been limited by poor understanding of what constitutes criminal behaviour amongst the public (including victims/witnesses) and the professionals involved.⁴⁷

5. Conclusion

56. In the Commission's analysis, the aims of the draft legislation reflect the requirement on states to prevent and address gender-based violence against women under international human rights law, including the ECHR.. Accordingly, the human rights of individuals and corresponding obligations of the state under treaties to which the UK is a party should not pose a barrier to legislating in this area.
57. In our assessment, the proposed Bill is in general consistent with human rights standards and may advance respect for human rights in the Scottish justice system; however clarification and further development is required in some areas. In particular, we consider it essential that the law is sufficiently predictable and that interference with freedom of expression is proportionate to the need to respond to gender-based violence against women and girls, articulated as misogyny in the legislation. We would therefore welcome further information on proposals for sentencing, diversion and administrative

⁴⁷ [Domestic Abuse Court Experiences Research: the perspectives of victims and witnesses in Scotland \(www.gov.scot\)](http://www.gov.scot)

sanction that may accompany significant criminal penalties for severe cases.

58. Implementation of the law must balance the competing need for prosecutorial discretion to ensure application is proportionate with the intended disruption of the pervasive, normalised and unrecognised forms of violence against women that the Kennedy Report argues exists. While reliance on social tolerance on gender norms is not a justification for failure to act, funding for implementation which includes gender-sensitive training and education on the new law for police, prosecutors, judges and the general public will be essential to its human rights compatibility.