

PS/Cabinet Secretary for Justice and Home Affairs

PUBLICATION OF CONSULTATION ANALYSIS REPORT: MISOGYNY BILL

Priority and Purpose

1. **Routine.**
2. To invite you to agree the publication on the Scottish Government website of consultation analysis report and consultation responses on the draft provisions of the Misogyny Bill
3. **[REDACTED]**

Recommendation

4. That you agree the publication of the attached consultation report and consultation responses.

Context and Issues

5. The Scottish Government consulted on the draft provisions outlined in Baroness Kennedy's "Misogyny: A Human Rights Issue" report, which was published on 8 March 2022.
6. **[REDACTED]**
7. **[REDACTED]**

Misogynistic Harassment

8. **[REDACTED]**
9. **[REDACTED]**
10. **[REDACTED]**

Misogynistic Behaviour

11. **[REDACTED]**

12. [REDACTED]

13. [REDACTED]

Threatening and Abusive Communications

14. [REDACTED]

15. [REDACTED]

16. [REDACTED]

Statutory Aggravation

17. [REDACTED]

18. [REDACTED]

Stirring Up Hatred

19. [REDACTED]

20. [REDACTED]

21. [REDACTED]

Bute House Agreement Implications

22. None.

Financial and Legal Considerations

23. The cost for the consultation analysis has been met from resources of the Justice Directorate. There are no legal considerations arising.

Sensitivities

24. [REDACTED]

25. [REDACTED]

26. [REDACTED]

27. [REDACTED]

Quality Assurance

ANNEX A – CONSULTATION ANALYSIS REPORT

[REDACTED]

This email is for the official record and confirms a Ministerial Decision. This email must be placed in the official record (eRDM) by your team [in line with SG records management policy](#).

Hi [REDACTED]

Ms Constance has seen your note and is content in principle re publication, but requests further specific advice on timing and handling re publication. Cab Sec commented that we should definitely do so soon but in a planned manner taking account of other business/announcements.

Many thanks.

[REDACTED] (he/him)

Private Secretary to Cabinet Secretary for Justice and Home Affairs : Angela Constance MSP

T: [REDACTED] | M: [REDACTED] | E: cabsecJHA@gov.scot

The Scottish Government | St Andrew's House, Regent Road, EDINBURGH EH1 3DG

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From: [REDACTED]

Sent: Tuesday, April 16, 2024 3:18 PM

To: Cabinet Secretary for Justice & Home Affairs

Cc: Minister for Victims & Community Safety ; [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]

Subject: PUBLICATION OF CONSULTATION ANALYSIS REPORT: MISOGYNY BILL

Private Office,

Please find attached a submission on the above.

Thanks,

[REDACTED]

[REDACTED] (she/her)

Senior Policy Officer | Criminal Law, Practice and Licencing Unit
Criminal Justice Directorate | GW.15 St Andrew's House

From [REDACTED]

Criminal Justice Division
25 August 2023

Cabinet Secretary for Justice and Home Affairs

MISOGYNY AND THE CRIMINAL LAW – NEXT STEPS FOLLOWING CLOSURE OF CONSULTATION

PRIORITY AND PURPOSE

1. **Routine – for information.** The consultation on misogyny and the criminal law, seeking views on draft legislative provisions to implement the recommendations of Baroness Kennedy’s independent report, *Misogyny – A Human Rights Issue* (“the report”) closed at the end of June 2023. This note:
 - Provides a high level read out of the key themes of the consultation responses; and
 - Sets out next steps for provision of more detailed policy advice requiring Ministerial decisions on the key issues raised during the consultation.

CONTEXT

2. The report, which was published on 8 March 2022, made four recommendations for reform of the criminal law to address misogynistic abuse, which were:
 - A new offence of public misogynistic harassment;
 - A new offence of issuing threats of, or invoking, rape or sexual assault or disfigurement of women and girls online and offline;
 - A new statutory sentencing aggravation relating to misogyny; and
 - A new offence of stirring up hatred against women and girls.
3. Using the report, the Scottish Government developed legislative provisions and undertook a consultation between 8 March 2023 and 23 June 2023.
4. The general approach taken in developing the legislative provisions for the purpose of the consultation was to seek to produce provisions that implemented, as faithfully as possible, the recommendations contained in the report.
5. However, the recommendations contained in the report were presented at quite a general level and did not provide the degree of detail required to serve as a complete policy blueprint for producing criminal law provisions. As such, there were a number of areas where policy was developed using the recommendations contained in the report as a starting point in order to produce workable and comprehensive criminal law provisions.
6. This was especially the case with the recommendations for offences of public misogynistic harassment and threatening or invoking rape, sexual assault or disfigurement of women and girls. For the statutory aggravation relating to misogyny and the offence of stirring up hatred of women and girls, the blueprint

provided by the Hate Crime and Public Order (Scotland) Act was used to inform the development of policy for these two criminal law reforms.

7. A summary of the approach taken to each of the draft provisions consulted on, and the key issues that the consultation sought views on, can be found at **Annex A**. The draft provisions themselves are attached at **Annex C**.

Outcome of consultation process

[REDACTED]

Issues raised about specific provisions – summary

8. A high level summary of the key points raised by consultation respondents for each of the provisions consulted on is at **Annex B**.
9. Issues that arose which were not specific to the individual provisions include:

[REDACTED]

ADVICE ON NEXT STEPS

[REDACTED]

BUTE HOUSE AGREEMENT IMPLICATIONS

10. In line with the Bute House Agreement, there is a need to engage with the Green Party as policy for the Bill develops. Maggie Chapman MSP met on a number of occasions with officials and the then Cabinet Secretary for Justice and Veterans as the consultation was developed. Ms Chapman was content with the approach taken in the SG consultation. Your monthly meetings with Maggie Chapman are a useful vehicle for such discussions and if necessary, these can be supplemented with meetings on specific policy aspects.

QUALITY ASSURANCE

This Submission has been approved by [REDACTED], Deputy Director Criminal Justice Division.

Conclusions and next Steps

11. You are invited to note the main issues arising from the consultation as discussed at paragraphs 9 to 13 and in **Annex B** and note the proposed plan for providing you with further policy advice as set out in paragraph 14.

[REDACTED]

Annex A – Summary of main issues on which views were sought in the consultation

Separate offences of misogynistic harassment and misogynistic behaviour

1. In response to Baroness Kennedy's report recommendation to create an offence of 'public misogynistic harassment' two separate offences of misogynistic harassment and misogynistic behaviour were consulted on.

2. This reflected the view that the behaviour described as under one offence proposed by the report sought to criminalise two different forms of behaviour which could better be provided for in two separate offences.

Misogynistic harassment offence

3. The first is what is considered to be misogynistic harassment. That is to say, misogynistic behaviour that is directed at a specific woman or girl, or group of women and girls, which amounts to harassment of that individual or group. This could include shouting sexually abusive remarks to a woman in the street, using abusive language to a woman in the context of unwanted advances, or rubbing up against a woman in a crowded public place.

4. Though not referred to in the report's recommendation, the provision restricts the scope of the offence to behaviour that is misogynistic. Without such provision, it is considered that the offence could inadvertently criminalise behaviour which is likely to cause (in particular) fear and alarm to women and girls (but not only to women and girls) but which is not misogynistic in character (e.g., abusive behaviour between rival groups of football fans).

5. The misogynistic harassment offence provides that, for the offence to be committed, the behaviour must be directed at a woman or girl (or group of women and girls), at least in part, by reason of their being a woman or girl. It is considered this is a good way of distinguishing misogynistic behaviour – behaviour that is directed at women and girls because they are women and girls – from generic abusive behaviour which might be equally likely to be directed anyone, regardless of gender.

6. Following careful consideration of the circumstances in which misogynistic harassment may occur, with particular regard to how the offence could be committed in an online environment, it was decided that the offence should not be limited to public places. It is not clear why harassment of a woman or girl in a private place should be treated differently from where this occurs in public and this is especially apparent when considering 'online' abuse, where it is not clear why the offence should be committed where someone is harassed in a 'public' internet forum, but not where someone is harassed by the sending of 'private' direct messages.

7. The consultation paper sought views on:

- The principle of creating an offence of misogynistic harassment

- The proposed structure of the offence including the test that the behaviour must be likely to cause the victim to experience fear, alarm, degradation, humiliation or distress and restricting to misogynistic harassment using the test that the behaviour must be directed at the victim in whole or in part because they are a woman or girl.
- Whether the offence should be capable of being committed both in public and in private
- The proposed penalties for and defences to the offence

Misogynistic behaviour offence

8. The second type of conduct described in the report is that which can best be characterised as 'misogynistic behaviour'. This is not necessarily directed at any particular identifiable victim but is nonetheless likely to harm those who may encounter it. This could include, for example, watching pornography in a public place where it is clearly visible or audible to others, or having loud graphic sexual conversations describing sexual activity with women in a misogynistic or abusive way in a place where others can hear.

9. As with the offence of misogynistic harassment, the provision restricts the scope of the offence to behaviour that is misogynistic. However, as the behaviour does not require to be directed at a specific victim, a different test is used. The draft consulted on provides that for the offence to be committed, the offence must either be motivated by contempt for, or malice and ill-will towards, women and girls, or it must be of a character such that a reasonable person would consider it to be contemptuous of women and girls.

10. As with the offence of misogynistic harassment, it was decided that the offence should not be limited to public places. While the offence may, in practice, be much more likely to be committed in public (or at least, to be detected where it occurs in public) there is no clear policy reason why such behaviour should not amount to a criminal offence solely because it occurs in a place that is not public. For example, if misogynistic behaviour takes place at a large 'house party' held on private domestic premises, it is not clear why the law should treat this differently from where this occurs on the street.

11. As this offence, in common with the stirring up of hatred offence, extends to behaviour that is not directed at any specific identifiable victim, a 'protection of freedom of expression' provision of the same kind as for that offence has been included.

12. The consultation sought views on:

- The principle of creating an offence of misogynistic behaviour
- The proposed structure of the offence including the test that the behaviour must be likely to cause a reasonable woman or girl to experience fear, alarm, degradation, humiliation or distress and that for the offence to be committed, the behaviour must be motivated by, or demonstrate, contempt for or malice and ill-will towards women or girls.

- Whether the offence should be capable of being committed both in public and in private
- Views on proposed penalties and defences.

Offence of threatening or abusive communications to women and girls which reference rape, sexual assault or disfigurement

13. This offence implements the report's recommendation to create an offence to specifically criminalise issuing threats of, or invoking, rape or sexual assault or disfigurement of women and girls online and offline.

14. In considering how best to define what the report has in mind when it refers to 'invoking' rape, sexual assault and disfigurement, and taking account of the examples cited in the report of the behaviour that the offence should criminalise, the view was taken that this can best be achieved by criminalising the conveying of messages that are threatening or abusive (or both) which make reference to rape, sexual assault or disfigurement.

16. In practice, it may not be clear when a threat of violence likely to result in disfigurement is or is not a threat of disfigurement. The draft provision takes a broad approach to how threats of disfigurement are defined and provides that it shall include both explicit threats/abusive messages of disfigurement and threats/abusive messages of violence likely to result in disfigurement.

17. For the offence to be committed, the message has to be conveyed to the person to whom the threat/abusive message relates. The means by which this can be done is defined widely. Two defences to the offence are provided for. The first is a defence of 'reasonableness'. This might apply where, for example, someone communicates a message that contains e.g., a threat of sexual violence, for the purpose of making the subject of such a threat aware of the fact that others are making threats of this kind against them.

18. The second is a defence of 'improbability'. The provision implements the report's recommendation that there should be no requirement for the accused to have a particular intent in sending the message. This is in contrast with the offences of misogynistic behaviour and misogynistic harassment where the accused must at least be reckless as to whether their behaviour is likely to cause harm. This defence is intended to apply in a case where the accused had no reason to believe that their message would ever be seen or heard by the person to whom it relates.

19. The consultation sought views on:

- The principle of legislating to create an offence of sending threatening or abusive messages concerning rape, sexual assault or disfigurement
- The approach that has been taken to implementing the recommendation contained in the report – i.e., that 'invoking' rape, sexual assault and disfigurement is captured by reference to threatening or abusive messages
- The approach taken to defining messages that relate to disfigurement – i.e., including reference to injury likely to result in disfigurement
- Views on proposed penalties and defences.

Aggravation of offences by misogyny

20. The approach taken to the statutory aggravation is broadly in line with that proposed in the report. The draft provision consulted on adopts a slightly different approach proposed in the report

21. The draft provision provides that the offence is aggravated if the offender demonstrates contempt or malice and ill will towards the victim based on their being a woman or girl, or, whether or not there is a victim, the offence is motivated by contempt or malice and ill will towards women and girls.

22. This differs slightly from the formulation proposed in the report, which proposed using a test of “prejudice, contempt or malice”. The term ‘ill-will’ has been added to the test for consistency with other statutory aggravations. The term ‘prejudice’ is not used because no circumstances were envisaged where prejudice that did not also manifest as contempt or malice and ill-will would motivate or be demonstrated by a person committing a criminal offence.

23. While prejudice is wider in its meaning than ‘malice’, ‘ill-will’ or ‘contempt’ in that it can cover discriminatory views that are much milder than malice, ill-will or contempt (e.g. a belief that women are not as suited as men to certain roles in society or in the workplace) it doesn’t appear that such beliefs, on their own, could motivate or be demonstrated by a person committing a criminal offence.

24. The draft provision implements the recommendation that the aggravation should not be capable of being used for certain offences which the working group consider are intrinsically misogynistic. The report stated that this should include sexual offences and offences relating to domestic abuse. In addition to these, the schedule also lists offences concerning female genital mutilation, forced marriage, virginity testing and hymenoplasty.

25. The consultation paper sought views on:

- The principle of a statutory aggravation concerning misogyny;
- The test to be applied by the court in determining whether an offence is aggravated by misogyny;
- Whether certain offences should be excluded from the scope of the aggravation on the grounds that they are intrinsically misogynistic;
- Whether consultees agree with the list of such offences contained in the annex.

Offence of stirring up hatred against women and girls

26. The approach taken to the draft offence provision is modelled on the offences concerning stirring up of hatred on grounds of religion, sexual orientation, transgender identity, disability, age and variations in sex characteristics. In line with the report’s proposed approach of producing ‘gendered’ law specifically to protect women and girls, there is one key difference.

27. In contrast with most of these characteristics, where everyone theoretically has protection (e.g., a person without a religion is protected, a heterosexual person is protected and a person of any age is protected) the provision applies only to the stirring up of hatred against women and girls. This approach is however in keeping with provisions on transgender identity and disability, which do not protect people from stirring up hatred against able-bodied people and cis-gender people.

28. In line with the report's recommendation, provision is made for a 'freedom of expression' provision similar to that included in relation to stirring up of hatred on grounds of religion, sexual orientation, trans-gender identity, disability, age and variations in sex characteristics. It makes clear, for the avoidance of doubt, that behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes discussion or criticism of issues relating to women and girls. This ensures, for the avoidance of doubt, that criticism of, for example, equal pay for women or the right to maternity leave would not, in and of itself, be considered to be (threatening or) abusive

29. The consultation paper sought views on:

- The principle of legislating to create an offence of stirring up hatred of women and girls
- The definition of the offence as being committed where a person behaves in a threatening or abusive manner or communicates threatening or abusive material, with the intention of stirring up hatred of women and girls
- The proposal to include provision concerning freedom of expression, similar to that contained in the Hate Crime and Public Order (Scotland) Act 2021.

Annex B – summary of issues raised by consultation respondents in response to each of the legislative provisions

[REDACTED]

Annex C – draft provisions included with the consultation

[REDACTED]

PS/Cabinet Secretary for Justice and Home Affairs

MISOGYNY BILL – OFFENCE OF MISOGYNISTIC HARASSMENT

Priority and Purpose

1. To provide the Cabinet Secretary with advice on a number of issues arising from the consultation on the proposed offence of misogynistic harassment and seek her view on her preferred approach to these issues.

Recommendation

2. Recommends that the Cabinet Secretary: note the advice contained in this submission and offer any views she has on the following:

[REDACTED]

Context and Issues

3. The misogynistic harassment offence is one of five separate pieces of criminal law that were included in a Scottish Government consultation published earlier this year. The consultation included draft provisions which has greatly helped in receiving focused and relevant feedback in the consultation exercise. The SG consultation was based on policy recommendations made by Baroness Kennedy.
4. This is the first of several submissions which will cover each of the items of criminal law consulted upon, and a separate submission on the definition and scope of the term 'women and girls' in the Bill. These submissions will give an update on key issues raised in the consultation and invite the Cabinet Secretary to agree with how the policy for the individual items of criminal law can be finalised for inclusion in the Bill.
5. The misogynistic harassment offence was presented in the consultation in the terms as detailed in the annex. In simple terms, the misogynistic harassment offence is designed to cover situations where misogynistic conduct is directed at a specific woman or girl, or a group of women or girls, which amounts to **harassment** of that woman or girl, or group of women or girls.
6. Examples of behaviour of this kind cited in Baroness Kennedy's report include shouting sexually abusive remarks at a woman on the street, deliberately rubbing up against a woman in a crowded place, showing extreme pornography on a phone to a group of women in a nightclub or using abusive language to a girl who does not want to be 'chatted up'.

7. The benefit of developing a misogynistic harassment offence is to:
 - ensure the criminal law can be used to deal with harassment of women and girls experienced as per above,
 - allow for the law to be used so that offending behaviour is appropriately labelled as misogynistic offending (rather than using more general existing offences); and
 - change behaviour of men and boys through the creation of a specific offence of, helping to ensure it is clearly understood such harassing conduct is unacceptable.
8. It should be noted that in any given case, it will be a matter for the prosecutor to determine the appropriate charge. Depending on the facts and circumstances of the particular case, the prosecutor may decide, for example, that a charge of e.g. threatening or abusive behaviour with a misogyny aggravation may be more appropriate than a charge of misogynistic harassment (as in such a case, if the court were to reach the view that the offender did engage in abusive behaviour that is likely to cause a reasonable person to suffer fear or alarm, but is not satisfied that it has been proven there was a misogynistic element, the court could still convict the offender for the substantive offence, while finding the aggravation has not been proven.)

Discussion and advice - possible refinements to the draft misogynistic harassment offence

[REDACTED]

Bute House Agreement Implications

9. In line with the Bute House Agreement, there is a need to engage with the Green Party as policy for the Bill develops. Maggie Chapman MSP met on a number of occasions with officials and the then Cabinet Secretary for Justice and Veterans as the consultation was developed. Ms Chapman was content with the approach taken in the SG consultation. Your monthly meetings with Maggie Chapman are a useful vehicle for such discussions and if necessary, these can be supplemented with meetings on specific policy aspects.

Quality Assurance

This Submission has been approved by [REDACTED], Deputy Director Criminal Justice Division.

Conclusions and next Steps

10. You are invited to note the advice contained in this submission.

11. We invite views on the following:

[REDACTED]

12. Officials would be happy to meet with you to discuss.

[REDACTED]

Justice Directorate: Criminal Justice Division

Ext [REDACTED]

23 October 2023

Cabinet Secretaries and Ministers Copy List	For Action	For Information Portfolio interest	For Information Constituency interest	For Information General awareness
Lord Advocate		X		
Solicitor General		X		
Minister for Victims and Community Safety		X		
Minister for Equalities, Migration and Refugees		X		

Officials Copy List

[REDACTED]

ANNEX – TEXT OF THE DRAFT OFFENCE AND CONSULTATION TEXT IN RELATION TO MISOGYNISTIC HARASSMENT OFFENCE

[REDACTED]

Recommendation: An offence of Public Misogynistic Harassment

At the end of the first part of this chapter and the second part of this chapter, there is a draft provision indicating how the Scottish Government have developed the recommendation into draft pieces of law. The text below provides a summary of what the report recommended, key issues in the development of the draft provision and questions. Readers may wish to consider the text below in conjunction with the relevant draft provision before considering the questions.

What the report recommends

The report recommends the creation of a new criminal offence of public misogynistic harassment. It recommends that it should be committed where a person engages in any sexual or abusive conduct which is likely to cause fear, alarm, humiliation, degradation or distress to a woman or women, where either the accused intends to cause that effect or is reckless as to the likely effect of the conduct.

The report recommends that the test of whether conduct is likely to cause fear, alarm, humiliation, degradation or distress to a woman or women should be objective and that it should not be necessary to prove that any woman or group of women actually suffered any of these effects and there should be no requirement that the conduct is directed towards a particular woman or group of women.

The report recommends that behaviour should be defined as being 'sexual' if a reasonable person would consider it to be sexual. The writers of the report note that the term 'abusive' is regularly interpreted by the courts and indicate that they do not think it requires further definition.

Approach taken in developing two separate offences

In considering the report's recommendation, we have come to the view that the offence which the report proposes to create is seeking to criminalise two quite different forms of behaviour.

The first can best be described as **misogynistic harassment**. That is to say misogynistic behaviour that is directed at a specific woman or girl, or group of women or girls, which amounts to harassment of that woman or girl, or group of women or girls.

Examples of behaviour of this kind cited in the report would include shouting sexually abusive remarks at a woman on the street, deliberately rubbing up against a woman in a crowded place, showing extreme pornography on a phone to a group of women in a nightclub or using abusive language to a girl who does not want to be 'chatted up'.

The second type of behaviour which the report considers should be covered by their proposed offence can be described as **misogynistic behaviour** which is not necessarily directed at any particular identifiable victim or group of victims.

Examples of behaviour of this kind cited in the report would include watching pornographic material in a public place where it is clearly visible or audible, or having loud, graphic sexual conversations about women in a public place where they can be heard by others. While it may well be that specific identifiable victims were caused to suffer fear, alarm, degradation, humiliation or distress by the behaviour, the behaviour is not directed at them by the perpetrator. It can best be thought of as a kind of public order offence like the offence of threatening or abusive behaviour, but specifically concerned with misogynistic behaviour.

We consider that these two different types of behaviour are sufficiently different that the working group's recommendation for an offence of 'public misogynistic harassment' can best be implemented by the creation of two distinct offences: an offence of misogynistic harassment and one of misogynistic behaviour.

This allows for better clarity as to the conduct being criminalised through the structure of each offence and for any statutory defences that might be required to be appropriately tailored to the specific conduct that each offence is intended to criminalise. These two proposed offences are considered in more detail below.

An offence of misogynistic harassment

This offence is intended to criminalise behaviour which is misogynistic and amounts to harassment of a particular person or group of people.

The structure of this offence is similar to that used for existing offences such as stalking at section 39 of the Criminal Justice and Licensing (Scotland) Act 2010) and abuse of a partner or ex-partner at section 1 of the Domestic Abuse (Scotland) Act 2018. It sets out a five-part test for when the offence is committed.

The offence of misogynistic harassment is committed where the accused person:

- behaves in a manner that is threatening, sexual or abusive (or a combination of those things); and
- the behaviour is directed at a particular person or group of people; and
- it is so directed at that person or group of people by reason of their being, or one or more members of the group being, or presumed to be, a woman or girl; and
- a reasonable person would consider that the behaviour would be likely to have the effect of causing the person or a member of the group to suffer, fear, alarm, degradation, humiliation or distress; and
- the accused either intends their behaviour to have one of these effects, or else is reckless as to whether their behaviour is likely to have one or more of these effects on that person (there is no requirement that the behaviour must actually have this effect).

PS/Cabinet Secretary for Justice and Home Affairs

MISOGYNY BILL – OFFENCE OF MISOGYNISTIC BEHAVIOUR

Priority and Purpose

1. To provide the Cabinet Secretary with advice on a number of issues arising from the consultation on the proposed offence of misogynistic behaviour and seek her view on her preferred approach to these issues.

Recommendation

2. Recommends that the Cabinet Secretary note the advice contained in this submission and offer any views she has on the following:

[REDACTED]

Context and Issues

3. The misogynistic behaviour offence is one of five separate pieces of criminal law reform that were included in a Scottish Government consultation published earlier this year. The consultation included draft provisions which has helped in receiving focused and relevant feedback in the consultation exercise. The Scottish Government consultation was based on policy recommendations made by Baroness Helena Kennedy.
4. As was noted in the consultation, in converting those recommendations into draft law, the Scottish Government has split up the most important recommendation - that of a public misogynistic harassment offence - into two separate offences that cover the conduct intended to be criminalised by the recommendation. They are a misogynistic harassment offence and a misogynistic behaviour offence. The misogynistic behaviour offence was presented in the consultation in the terms described in the annex.
5. In simple terms, the misogynistic behaviour offence is designed to cover situations where misogynistic conduct - which is not necessarily targeted at a specific woman or girl or group of women and girls - is nonetheless likely to have a significant negative impact on women and girls who see, hear or otherwise encounter the behaviour. The offence, therefore, in contrast with the misogynistic harassment offence, does not require there to be a specific victim (though there can be one).
6. There are two specific examples of behaviour of this kind cited in Baroness Kennedy's report which, in our view, would amount to 'misogynistic behaviour' rather than 'misogynistic harassment'. Firstly, talking in graphic terms about what should be done sexually to a woman or women where others may be present

who can hear what is being said e.g., on a train or a bus, and secondly, watching pornography in a public place (such as a train or bus etc.) where it is clearly visible and/or audible. Other examples of behaviour that could amount to this offence include posting abusive derogatory comments about women and girls on a public internet site where they may be seen by women and girls (e.g. saying that women who dress in a particular way deserve to be raped¹) or singing or chanting derogatory remarks about women outside a pub or nightclub.

7. The benefit of developing a misogynistic behaviour offence is to:
 - Ensure that the criminal law can be used to respond effectively to behaviour that can all too often have a negative impact on women and girls by making certain places – in public or private, both offline and online – hostile to be in simply for being a woman or girl;
 - Allow for the law to be used so that offending behaviour is appropriately labelled as misogynistic offending rather than using more general offences such as breach of the peace or threatening or abusive behaviour; and
 - Change unacceptable behaviour of men and boys through the creation of a specific offence of sexual or abusive misogynistic behaviour which results in certain places being hostile for women and girls.

8. In developing this offence, we were aware that there is considerable overlap between this new offence and several existing offences. These include breach of the peace, threatening or abusive behaviour and (where the behaviour occurs online) offences at section 127 of the Communications Act 2003 concerning misuse of a public electronic communications network. As with all the new items of criminal law being developed for the Bill, it will always be a matter for independent prosecutors to determine in each individual case what the most appropriate charges are, taking account of all the relevant facts and circumstances of the case.

Discussion and advice – possible refinements to the draft misogynistic behaviour offence

[REDACTED]

Bute House Agreement Implications

9. In line with the Bute House Agreement, there is a need to engage with the Green Party as policy for the Bill develops. Maggie Chapman MSP met on a number of occasions with officials and the then-Cabinet Secretary for Justice and Veterans as the consultation was developed. Ms Chapman was content with the approach taken in the Scottish Government consultation. Your monthly meetings with Maggie Chapman are a useful vehicle for such discussions and, if necessary, these can be supplemented with meetings on specific policy aspects.

Quality Assurance

Officials Copy List

[REDACTED]
[REDACTED]
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**ANNEX – TEXT OF THE DRAFT OFFENCE AND CONSULTATION TEXT IN
RELATION TO MISOGYNISTIC HARASSMENT OFFENCE**

[REDACTED]

Recommendation: An offence of Public Misogynistic Harassment

At the end of the first part of this chapter and the second part of this chapter, there is a draft provision indicating how the Scottish Government have developed the recommendation into draft pieces of law. The text below provides a summary of what the report recommended, key issues in the development of the draft provision and questions. Readers may wish to consider the text below in conjunction with the relevant draft provision before considering the questions.

What the report recommends

The report recommends the creation of a new criminal offence of public misogynistic harassment. It recommends that it should be committed where a person engages in any sexual or abusive conduct which is likely to cause fear, alarm, humiliation, degradation or distress to a woman or women, where either the accused intends to cause that effect or is reckless as to the likely effect of the conduct.

The report recommends that the test of whether conduct is likely to cause fear, alarm, humiliation, degradation or distress to a woman or women should be objective and that it should not be necessary to prove that any woman or group of women actually suffered any of these effects and there should be no requirement that the conduct is directed towards a particular woman or group of women.

The report recommends that behaviour should be defined as being 'sexual' if a reasonable person would consider it to be sexual. The writers of the report note that the term 'abusive' is regularly interpreted by the courts and indicate that they do not think it requires further definition.

Approach taken in developing two separate offences

In considering the report's recommendation, we have come to the view that the offence which the report proposes to create is seeking to criminalise two quite different forms of behaviour.

The first can best be described as **misogynistic harassment**. That is to say misogynistic behaviour that is directed at a specific woman or girl, or group of women or girls, which amounts to harassment of that woman or girl, or group of women or girls.

Examples of behaviour of this kind cited in the report would include shouting sexually abusive remarks at a woman on the street, deliberately rubbing up against a woman in a crowded place, showing extreme pornography on a phone to a group of women in a nightclub or using abusive language to a girl who does not want to be 'chatted up'.

The second type of behaviour which the report considers should be covered by their proposed offence can be described as **misogynistic behaviour** which is not necessarily directed at any particular identifiable victim or group of victims.

Examples of behaviour of this kind cited in the report would include watching pornographic material in a public place where it is clearly visible or audible, or having loud, graphic sexual conversations about women in a public place where they can be heard by others. While it may well be that specific identifiable victims were caused to suffer fear, alarm, degradation, humiliation or distress by the behaviour, the behaviour is not directed at them by the perpetrator. It can best be thought of as a kind of public order offence like the offence of threatening or abusive behaviour, but specifically concerned with misogynistic behaviour.

We consider that these two different types of behaviour are sufficiently different that the working group's recommendation for an offence of 'public misogynistic harassment' can best be implemented by the creation of two distinct offences: an offence of misogynistic harassment and one of misogynistic behaviour.

This allows for better clarity as to the conduct being criminalised through the structure of each offence and for any statutory defences that might be required to be appropriately tailored to the specific conduct that each offence is intended to criminalise. These two proposed offences are considered in more detail below.

An offence of misogynistic harassment

This offence is intended to criminalise misogynistic behaviour that is not directed at a particular person or group of people and can be seen as a 'public order' offence concerned specifically with misogynistic behaviour.

This offence is committed where the accused person

- Behaves in a manner which is sexual or abusive (or both); and
- The behaviour is motivated (wholly or partly) by contempt or malice and ill-will towards women and girls, or of a character such that a reasonable person would consider it to be contemptuous of women and girls; and
- The behaviour would be likely to cause a reasonable woman or girl to suffer fear, alarm, degradation, humiliation or distress; and
- The person intends by their behaviour to cause a woman or girl one of these effects, or else is reckless as to whether their behaviour has that effect.

PS/Cabinet Secretary for Justice and Home Affairs

MISOGYNY BILL – OFFENCE OF STIRRING UP HATRED AGAINST WOMEN AND GIRLS

Priority and Purpose

1. To provide the Cabinet Secretary with advice on a number of issues arising from the consultation on the proposed offence of stirring up hatred against women and girls, and to seek her views on her preferred approach to these issues.

Recommendation

2. Officials recommend that the Cabinet Secretary note the advice contained in this submission and offer any views she has on the following:

[REDACTED]

Context and Issues

3. The offence of stirring up hatred against women and girls is one of five separate pieces of criminal law reform that were included in a Scottish Government consultation published earlier this year. The consultation included draft provisions which has helped in receiving focused and relevant feedback in the consultation exercise. The SG consultation was based on policy recommendations made by Baroness Helena Kennedy's Working Group.
4. The Working Group recommend an offence of 'stirring up hatred of women and girls' is created (the wording of which can be found in Annex A, and the detail of which is contained in Annex B). While in many circumstances, behaviour intended to stir up hatred against women and girls may amount to an offence of misogynistic behaviour or misogynistic harassment, these latter offences are concerned with the direct effect of behaviour on women and girls towards whom it is directed, or who may otherwise see or hear it.
5. By contrast, behaviour intended to stir up hatred against women and girls may take place in all-male spaces, including online. This offence is concerned with the effect that the behaviour may be likely to have on the (probably male) people in whom the perpetrator is seeking to stir up hatred of women and girls.
6. There are a number of stirring up hatred offences contained in the Hate Crime and Public Order (Scotland) Act 2021 (the 2021 Act). As with the 'stirring up of hatred' offences concerning religion, sexual orientation, transgender identity, age, disability

or variations in sex characteristics in the 2021 Act, this proposed offence is committed where the accused behaves in a threatening or abusive manner, or communicates threatening or abusive material, with the intention of stirring up hatred against women and girls. This is different to the stirring up racial hatred offence which adopts an alternative approach, which also captures behaviour that is 'insulting' and objectively likely to stir up hatred even in the absence of an intent to do so, reflecting the fact that offences concerning stirring up racial hatred have operated in this way since the Public Order Act 1986 came into effect (the other stirring up hatred offences are new in the 2021 Act).

7. The offence can cover behaviour intended to stir up hatred of particular groups of women and girls as well as hatred being stirred up against women and girls in general. For example, where there is an intention to stir up hatred against women and girls who, say, dress a particular way, or women and girls who campaign for or against women's rights. It applies where the accused intends to stir up hatred of women and girls as a group because of their gender. That is to say, the offence is not committed simply because the accused stirs up hatred against a group of people which is predominantly comprised of women and girls.

[REDACTED]

Discussion and advice – possible refinements to the draft offence

[REDACTED]

Bute House Agreement Implications

8. In line with the Bute House Agreement, there is a need to engage with the Green Party as policy for the Bill develops. Maggie Chapman MSP met on a number of occasions with officials and the then-Cabinet Secretary for Justice and Veterans as the consultation was developed.
9. Ms Chapman was content with the approach taken in the SG consultation. Your monthly meetings with Maggie Chapman are a useful vehicle for such discussions and, if necessary, these can be supplemented with meetings on specific policy aspects.

Quality Assurance

This Submission has been approved by [REDACTED], Deputy Director, Criminal Justice Division.

Conclusions and next Steps

10. You are invited to note the advice contained in this submission.
11. We invite views on the following:

[REDACTED]

12. Officials would be happy to meet with you to discuss.

[REDACTED]

Criminal Justice Division

Cabinet Secretaries and Ministers Copy List	For Action	For Information Portfolio interest	For Information Constituency interest	For Information General awareness
Lord Advocate		X		
Solicitor General		X		
Minister for Victims and Community Safety		X		
Minister for Equalities, Migration and Refugees		X		

Officials Copy List

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

ANNEX A: SUMMARY OF PROVISION

[REDACTED]

ANNEX B: ADDITIONAL WORDING ON PROVISION

[REDACTED]

From: [REDACTED]

Criminal Justice Division
27 November 2023

PS/Cabinet Secretary for Justice and Home Affairs

MISOGYNY BILL – AGGRAVATION OF OFFENCES BY MISOGYNY

Priority and Purpose

1. **Routine:** To provide the Cabinet Secretary with advice on a number of issues arising from the consultation on the proposal to create a statutory aggravation by misogyny, and seek her view on her preferred approach to these issues

Recommendation

2. Recommends that the Cabinet Secretary note the advice contained in this submission and offer any views she has on the following:

[REDACTED]

Context and Issues

3. The statutory aggravation by misogyny is one of five separate pieces of criminal law reform that were included in a Scottish Government consultation published earlier this year. The consultation included draft provisions which has helped in receiving focused and relevant feedback in the consultation exercise. The SG consultation was based on policy recommendations made by Baroness Helena Kennedy.
4. The misogyny aggravation was presented in the consultation in the terms described in the annex. In simple terms, it provides that an offence is aggravated by misogyny where, at the time of committing the offence, the offender demonstrates contempt or malice and ill-will towards the victim and that contempt or malice and ill-will is based on the victim being, or being presumed by the perpetrator to be, a woman or girl, or, whether or not there is a specific victim of the offence, the offence is motivated by contempt, or malice and ill-will towards women and girls.
5. Where the aggravation is proven, the court is required to take account of this when sentencing the offender and state what difference this made to the sentence imposed, or where there is no difference, the reasons for this and record the conviction in a way that shows that the offence is aggravated by misogyny.
6. There is a 'carve out' from the aggravation for offences, such as domestic abuse and sexual offences, where the misogynistic element is widely acknowledged and

will routinely be taken into account when determining the appropriate sentence. This approach avoids the need for prosecutors and the court to have to determine whether individual domestic abuse or sexual offence cases are or are not aggravated by misogyny.

7. Subject to this exception, it would be a matter for COPFS to decide whether to libel the statutory aggravation in any given case, and, in particular, whether, taking account of the facts and circumstances of the particular case, there is sufficient evidence to demonstrate that an accused was motivated by, or demonstrated malice and ill-will towards, or contempt for, women and girls and, if so, whether it is more appropriate to charge them with an offence of e.g. misogynistic harassment or misogynistic behaviour, or an existing offence with the statutory aggravation.
8. The benefits of developing a misogyny aggravation are to:
 - Benefit the victims of offences with additional protection under the law where they have been targeted for, say, an assault due to the misogynistic mindset of the perpetrator,
 - Help to encourage behavioural change by those who may consider committing offences due to their misogynistic mindset, given the court will need to have regard to the nature of the offending when sentencing,
 - Provide a means of recording where criminal offences such as common law assault or breach of the peace are aggravated by misogyny, helping improve understanding of the extent of this type of offending while also bringing parity with crimes motivated by, for example, racial hatred, homophobia or religious prejudice, and
 - Ensure that where crimes are motivated by misogyny, the court is required to take this into account when the offender is sentenced, with the perpetrator and the victim seeing any difference this made to the sentence.

Discussion and advice – possible refinements to the draft misogyny aggravation

[REDACTED]

Bute House Agreement Implications

9. In line with the Bute House Agreement, there is a need to engage with the Green Party as policy for the Bill develops. Maggie Chapman MSP met on a number of occasions with officials and the then-Cabinet Secretary for Justice and Veterans as the consultation was developed. Ms Chapman was content with the approach taken in the SG consultation. Your monthly meetings with Maggie Chapman are a useful vehicle for such discussions and, if necessary, these can be supplemented with meetings on specific policy aspects.

Quality Assurance

Officials Copy List

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**ANNEX – TEXT OF THE DRAFT PROVISION AND CONSULTATION TEXT IN
RELATION TO AGGRAVATION OF OFFENCES BY MISOGYNY**

[REDACTED]

Recommendation: A statutory aggravation relating to misogyny

[REDACTED]

PS/Cabinet Secretary for Justice and Home Affairs

**MISOGYNY BILL – OFFENCE OF COMMUNICATIONS WHICH ARE
THREATENING OR ABUSIVE TO WOMEN AND GIRLS AND WHICH
REFERENCE RAPE, SEXUAL ASSAULT OR DISFIGUREMENT**

Priority and Purpose

1. To provide the Cabinet Secretary with advice on a number of issues arising from the consultation on the proposed offence of communications which are threatening or abusive to women and girls and which reference rape, sexual assault or disfigurement, and to seek her views on her preferred approach to these issues.

Recommendation

2. Officials recommend that the Cabinet Secretary note the advice contained in this submission and offer any views or comments she has on the following:

[REDACTED]

Context and Issues

3. The offence of communications which are threatening or abusive to women and girls and which reference rape, sexual assault or disfigurement (“the offence of threatening or abusive communications”) is one of five separate pieces of criminal law reform that were included in a Scottish Government consultation published earlier this year. The consultation included draft provisions which has helped in receiving focused and relevant feedback in the consultation exercise. The SG consultation was based on policy recommendations made by Baroness Helena Kennedy.
4. The offence of threatening or abusive communications was presented in the consultation in the terms described in Annex A. Further, a supplementary document was provided alongside the draft provision, which offers further detail of the offence, and can be found in Annex B.
5. The Working Group heard during their evidence-gathering phase that a particular issue faced by women and girls is the experience of messages threatening or invoking rape, sexual assault and disfigurement being used to intimidate or

silence women, especially online, with the effect of discouraging women from participating in public debate.

[REDACTED]

Discussion and advice – possible refinements to the draft offence

[REDACTED]

Bute House Agreement Implications

6. In line with the Bute House Agreement, there is a need to engage with the Green Party as policy for the Bill develops. Maggie Chapman MSP met on a number of occasions with officials and the then-Cabinet Secretary for Justice and Veterans as the consultation was developed.
7. Ms Chapman was content with the approach taken in the SG consultation. Your monthly meetings with Maggie Chapman are a useful vehicle for such discussions and, if necessary, these can be supplemented with meetings on specific policy aspects.

Quality Assurance

8. This Submission has been approved by **[REDACTED]**, Deputy Director, Criminal Justice Division.

Conclusions and next Steps

9. You are invited to note the advice contained in this submission.

10. We invite views on the following:

[REDACTED]

11. Officials would be happy to meet with you to discuss.

[REDACTED]

Criminal Justice Division

ANNEX A: SUMMARY OF PROVISION

[REDACTED]

ANNEX B: SUPPLEMENTARY INFORMATION ON PROVISION

[REDACTED]