



OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 27 April 2022

Session 6



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CRIMINAL JUSTICE COMMITTEE

15th Meeting 2022, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

- *Katy Clark (West Scotland) (Lab)
- *Jamie Greene (West Scotland) (Con)
- *Fulton MacGregor (Coatbridge and Chryston) (SNP)
- *Rona Mackay (Strathkelvin and Bearsden) (SNP)
- *Pauline McNeill (Glasgow) (Lab)
- *Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Baroness Helena Kennedy QC (Chair, Misogyny and Criminal Justice in Scotland Working Group)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 27 April 2022

[The Convener opened the meeting at 09:34]

Misogyny and Criminal Justice in Scotland Working Group: Final Report

The Convener (Audrey Nicoll): Good morning, and welcome to the 15th meeting in 2022 of the Criminal Justice Committee. We have not received any apologies this morning.

Our main item of business is an evidence session on the final report of the misogyny and criminal justice in Scotland working group. I refer members to papers 1 and 2. It is my real pleasure to welcome to our meeting Baroness Helena Kennedy QC, chair of the misogyny and criminal justice in Scotland working group; and Mr Bill Brash, misogyny working group team leader with the Scottish Government. I invite Baroness Kennedy to make some brief opening remarks.

Baroness Helena Kennedy QC (Chair, Misogyny and Criminal Justice in Scotland Working Group): First of all, it is great to be here. I want to thank you all because, although you might not realise it, you had considerable input into the group's work. That is not least because of your debates before the group was established, but also because, when I came to meet some of you, you helped to stimulate certain ideas, which the working group then took further forward. In the course of this discussion, I will explain the ways in which I was helped by the committee.

You know the history, so I will not rehearse why the working group was established. We worked very hard over the past year to take this moment to do something that I think is progressive and will establish much greater trust in the criminal justice system on the part of women. Men should support it as well, because they should see that it is an opportunity to get the system on to a much better and stronger footing.

We were shocked by the evidence that we heard. I say that as somebody who is a pretty dyed-in-the-wool criminal lawyer who thought that she had heard it all. Indeed, I came up to Scotland to do a report here on human trafficking. Then, in hearing about sexual trafficking, I was hearing new things, too.

The report comes at a particular period of time. We cannot deny that something is happening at

the moment that meant that every single woman or group that appeared in front of us said that something has to be done. That is the message that I come to all of you with: there is a very strong sense among women in the Scottish public that something has to be done about the high level of harassment and misogyny that they experience in their daily round. It is affecting girls and women in their lives, and it really does, in a very serious way, undermine their sense of self-confidence and self-worth, the ways in which they conduct their lives and their aspirations.

I wanted to say at the start that the evidence was shocking, because that therefore allows us to justify certain departures from normal ways of dealing with criminal matters. I say that, because I know how the legal profession responds to things. There is a sense in which we always seek to play change inside the normal set of rules, and we do not want to depart from them. However, I want to explain why I think that having a piece of legislation specifically for women is justified, even in the context of the equality legislation, which of course informs how we deal with things. We are talking about doing something that justifies a departure from the normal view that all law is neutral, because of the high level of targeted behaviour that is directed at women. I will be happy to be tested on that issue.

The thing that came across to me very strongly was that social media has changed our environment—we now operate in a different ecology because of it. For some of us who are of an older generation, social media does not play the same part in our lives as it does for the young. One thing that has happened as a result of social media is that there has been a disinhibition with regard to what people are prepared to say to and throw at one another. Let me immediately say that men receive horrible messaging, too, but there is something particular about the ways in which women and girls from a very young age experience social media, and how it impacts on their lives.

That online disinhibition has spread its wings and is now in the public square and happens in public spaces, too, in stuff such as threats of rape and speaking in very hostile, abusive language that is undermining and, in many ways, almost pornographic—and, at times, actually pornographic. It is now live on the streets, in our playgrounds and in clubs, bars and places where people gather.

Things are said that some of you have probably never experienced and would never know about. Young women who have gone out with friends to an event and come out of a club or place where they have been socialising are met with groups of men, sometimes individual men, who invite sexual

congress. I cannot use the language that would be necessary to display the full invasiveness, sense of encroachment and transgression involved. They talk about sexual matters and describe women in sexual ways. They talk about what they would like to do to the individual, and when they are told to get lost they insult and further abuse the women. They tell them how ugly, unattractive, fat and unwanted they are. That has an impact on the self-worth of young people; you cannot underestimate the impact of it on the lives of more than half of our population.

The Convener: Thank you very much, Baroness Kennedy. That is a helpful overview, and it leads us neatly on to questions. I would like to start off by asking you a question about the legislation that you propose in your report. You recommend the creation of a statutory aggravation of misogyny that operates separately from hate crime legislation. I am interested in your view on the aggravating factor working and in why misogyny should not be dealt with as a type of hate crime.

Baroness Kennedy: It had to be emphasised from the very start that hate itself is not a crime, and nor should it be. We have to hold on to that as it is very important that we protect ideas, the imagination and what goes on inside people's heads. The purpose of criminal law is not to criminalise that which people think. Giving expression to ideas or thoughts that are unattractive should not, in any way, be criminalised—save where it moves into the area of harm. That is a foundational principle of criminal law. We seek to criminalise the acts and behaviours that flow from hate.

It became very clear to us that there is something significantly different about what women experience in the form of misogyny. Misogyny does not follow the normal track of hatred, which is basically about wanting to see the disappearance of minorities in our community and not have any truck with them. For example, hatred of people whose sexuality is different is about dealing with them as if they did not exist at all—hatred is about eliminating.

That is not true for women. Misogyny is about wanting women to behave in a way that is suitable to the man who is being misogynistic. We came to believe that it was something different from actual hatred—it was about male entitlement, keeping women in their place and the maintenance of a sense of male primacy, which lead to the subordination and disempowerment of women. It is rather different from hate, and it is important to make that clear.

09:45

Moreover, this is not a minority issue. With most hate crime, the need is to create protections from harm for minorities in a majoritarian system, which democracy inevitably is. However, women make up 52 per cent of the population, and the evidence of the extent and endemic nature of this led us to feel that there needed to be a misogyny aggravation. Aggravations exist in domestic violence, for example, but they do not have to exist in a hate framework. We felt that such an aggravation should exist in a piece of legislation on its own.

I also want to emphasise that I am recommending the creation of a piece of legislation with the terms “misogyny” and “criminal justice” in the title, because it makes a radical statement about wanting the criminal justice system not only to embrace women and regain their confidence but to highlight these issues and to shift the dial to ensure that we look at the behaviours that are atrophying women's advancement.

The Convener: You mentioned domestic abuse and the aggravation that applies in that type of crime, but, interestingly, you say in your report that the aggravation that you are proposing should not apply to rape, sexual offences, domestic abuse and so on. That might appear to some as being at odds with the spirit of what you are proposing. The rationale for your position is partly that those offences and crimes are already “imbued with misogyny” to a certain extent. Is there a possibility of some confusion in that respect? How do we articulate this particular position?

Baroness Kennedy: I would start by arguing that these offences are not imbued with misogyny “to a certain extent”. Rape and domestic violence are misogynistic crimes, because they either keep women in their place or transgress their autonomy without their consent. Those are misogynistic offences, as I think most of us will recognise.

Some people seem to imagine that rape is about lust and desire. We can all be subject to lust and desire, but it is actually about one person's will overriding another's and about power and control in the context of the status of men and women in society. You can get women who are complicit in the crime of rape, but you do not very often get women committing rape, and there are all kinds of reasons for that.

These are offences of misogyny that already exist. Indeed, your criminal law explicitly creates an aggravation in relation to domestic violence. We have struggled in many recent decades to have rape taken much more seriously and to ensure that its seriousness receives an appropriate sentence, with the result that you do

not need an aggravation in that respect. However, what women in particular—and men, too, because rape is not an experience confined to women; however, it is mainly women—will say to me is, “We’re not even getting these cases into the courts or beyond the threshold. We’re not getting convictions.” However, that is all to do with the fact that the system—the thing that we are trying to struggle with—is absolutely imbued with misogyny, and we therefore have to find ways of dealing with misogyny in our wider society and our criminal justice system to create the subsoil, if you like, that will make it much more possible to get higher conviction rates and better prosecution and investigation of rape cases. The starting point is getting this right and dealing with the underlying problem, which is misogyny.

Russell Findlay (West Scotland) (Con): I thank both witnesses for coming. How might the Scottish Government’s proposed reform of the Gender Recognition Act 2004 play against or impact on what you are proposing?

Baroness Kennedy: One of the first things that I say in my introduction to the report is that many people would have seen it as a “hospital pass”: why did I want to get involved in a debate that would inevitably involve the great schism, if you like, that seems to have taken place between many women who have struggled for a very long time on women’s rights and the whole issue of trans rights? I really do not think that the piece of legislation that I propose has anything to do with that. It really does not.

Parliament makes its own decisions and, as parliamentarians, you will all make your decisions on the business of transgender recognition and how that should be done. That was not my job. My job was to deal with the fact that women—more than 50 per cent of the population of Scotland—are experiencing this stuff all the time. All of us have, as women, and I am sure that trans women will experience misogyny, too, as they live out their lives.

It was interesting that there was a debate in the House of Lords about an amendment that was being put into a bill, and a number of people raised that issue, saying that there is already protection for trans women, so why should they be covered by a piece of legislation whose purpose is to prevent misogyny or misogynistic harassment? The answer to that is that, in harassment, you have to look at the facts in the individual case, as we lawyers know.

If someone is being traduced in the streets and shouted at, “You are not a real woman,” that would fall under the hate crime aggravation that is to do with being transgender. However, in other cases, a transgender woman might experience somebody saying, “I want to do whatever to you,” and

describing in detail what they would like to do to that person, disregarding, and perhaps oblivious to, anything to do with the past history of that woman. It will depend on the facts of the case.

I have made it very clear that I am not going to be lifting people’s skirts to see what their genitalia are. That is not our purpose. No one should be having to prove that they are a woman in order to bring down that type of protection from abusive behaviour.

Russell Findlay: I completely understand that perspective. However, if the reforms to the 2004 act do what they say they might do, does that not cause a problem? In *Holyrood* magazine, you said:

“that’s for other people to fight over”.

Like it or not, there is going to be that fight, which could risk undermining what you propose.

Baroness Kennedy: Give me an example of how you think it will be a problem.

Russell Findlay: If the reforms to the 2004 act come into being in the way that is proposed, individuals, including complainers and victims, will be able to self-identify their sex. I believe—and I think that some of the women’s groups are saying—that that could be in conflict with what the proposal for misogyny legislation seeks to do.

Baroness Kennedy: In what way?

Russell Findlay: If an individual says, “I am a female,” because the new gender recognition legislation allows them to do so, if they are a complainer, that fundamentally alters how the misogyny law comes into play—

Baroness Kennedy: You do not need a complainer—

Russell Findlay: —or if they are a perpetrator.

Baroness Kennedy: We should look at the offences that are included in the proposed legislation. If someone is assaulted or experiences threatening behaviour, or if a brick is thrown through their window, or if their car is smashed up or scraped, with abuse written on the side of it such as, “You’re an effing C”, and the person reports that to the police, I hope that the dial will be shifted so that, immediately, when police officers are dealing with something that involves a woman at the receiving end, one of the questions that they have to ask themselves is whether misogyny is involved.

In many cases, misogyny will not be involved. If somebody breaks into a shop and assaults the shopkeeper in order to steal something, they would do that to the person behind the counter whether they were male, female or whoever. In that context, the assault on a woman is not a

misogynistic crime that would draw down the aggravation. If you throw a bottle, in rage, into a pub that you are being expelled from, the fact that it hits a woman on the head does not make that a misogynist crime.

In investigating such things, the police are forced to shift the dial and to start asking whether misogyny is present. Is it being done to a woman because she is a woman and is the man letting the woman know that? Is a man saying to a woman, as he is kicking her on the ground, “You’re an effing C”? That is a very different thing. If someone is doing that to someone who happens to be a trans woman, why should that be any different?

This “problem” of whether this should apply to someone who is a woman or who is perceived to be a woman is not a problem. It depends on the facts of the individual case. Hate crime always involves looking at what is being said at the time or at what we know about the perpetrator. That is what informs whether we think a crime is racist or homophobic—it is what is being said when someone is assaulted or threatened.

I do not see how being trans in any way complicates things. When I said in an interview that that would have to be fought out, I meant that it would be dealt with in a courtroom. Someone might say, “But I didn’t open my mouth as I kicked that woman. Why are you saying that it is misogynistic?” The reason why we will know that it is misogynistic is that he has a badge on his lapel that says, “F all women.” How do we know?

In the end, when you are delivering justice, the law always requires looking at the facts of an individual case. In individual cases, a trans woman will experience misogyny too, but sometimes she will experience transphobia. The court, and the prosecuting authorities, will draw down the appropriate piece of legislation in order to deal with that.

The Convener: Pauline McNeill has a follow-up question and then I will bring in Fulton MacGregor.

Pauline McNeill (Glasgow) (Lab): I want to say in public what I have said in private: the work that you have done is tremendous and I thank you for it.

I am on record as voting for sex to be an aggravator in the Hate Crime and Public Order (Scotland) Bill. I felt strongly that that was missing from the legislation. However, I think that the rationale for not doing that seems to make sense. What problems do you think that we, as legislators, might come up against when we have to define something that is not already defined? The simple part of it is that sex is defined in the Equality Act 2010, whereas we will have to look at the idea of misogyny in some detail.

The working group’s definition of misogyny includes

“male entitlement, while subordinating women”,

and it is important that you talk about male power. To me, that is central to everything that the committee is doing, not only on this legislation but as it looks at the range of things that the Parliament should do. I know that you agree.

Do you have any concerns about how we go about defining? We obviously have to define misogyny and I presume that we also have to define ideas such as the subordination of women. We have an ordinary understanding of what that means, but we know that, when it comes to legislation, things may not be as simple as they first appear to be. Do you want to say anything about that to the committee? We will be dealing with it further down the line.

Baroness Kennedy: I know that they go by a different title in Scotland, but parliamentary draftsmen and those who draft legislation are particularly skilled at drawing out the subtle ways in which things can be misunderstood. I was not playing parliamentary draftsman in the report; I was trying to deal with what we know is the lived experience of women.

I am happy to see a number of men on the committee. I have discussed this issue with all my male colleagues in the law, who are, by and large, fairly progressive on issues of equality. Even in conversations with people across the divide in the House of Lords, including cross-bench members and those on the Conservative benches, we have all taken the view that something has to be done about this kind of behaviour. It is about power; people recognise that it is about women being disempowered and maintaining that—even if, as a young man, you do not know that that is your purpose. Something happens in the way in which we grow up, which informs the genders in different ways. We are trying to shift that dial.

10:00

That is why I have introduced the word “contempt”. “Contempt” helps us to deal with the issue of subordination. There is a question about whether we should move away from the wording at all. We discussed it in the working group, which included some terrific lawyers who would bang away at particular issues. We discussed whether we should keep the same language as that in the hate crime legislation, which is the tests of “prejudice and” so on. I have introduced the word “contempt”, because contempt is about treating someone as lesser and not respecting them as another human being. I see it as being about misogyny and human rights. Human rights are about treating other people with dignity and

respect because they are human beings. This is about that business of being somehow lesser, and I persisted with wanting to include the word “contempt” because it dealt with those ideas of being lesser and maintaining someone not being equal to you. That was very important.

Another difficult thing in relation to misogyny is that, when I discuss things with colleagues, men will often say something like, “I have no problem with women, I love women, I am married to one, I’ve got sisters and daughters, I care about women.” However, then they will say, “The women that I don’t like are feminists” or “mouthy women who are pushy.” They will say, “I like women, but I don’t like women who are aggressive.” It is always in that order. They then start telling you that the kind of women that most of us are should not be included in their idea of worthy women. That is why we must not get bogged down in what womanhood is in that sense.

Under the legislation, it should not matter whether a woman is being attacked because she is a lesbian or a woman who campaigns on certain issues. The underlying thing is about reducing another human being and the status of that other human being. It is about power.

I believe strongly that shifting the dial is very difficult and involves nuance and subtlety. However, I am hoping that, with enough good will on the part of parliamentarians and the legal world, we can make it work.

The Convener: Katy Clark, did you want to come in on this topic?

Katy Clark (West Scotland) (Lab): I am happy to come in later.

The Convener: In that case I will bring in Fulton MacGregor, who has been waiting patiently.

Fulton MacGregor (Coatbridge and Chryston) (SNP): The work has been really good and I welcome your opening statement, Baroness Kennedy. You challenge men to support the legislation that you are proposing; I support it and I am sure that others do, too. I am sure that I speak for colleagues—members, clerks and other workers—when I say that we should feel uncomfortable as men. That is important. Bill Brash is sitting there smiling.

Baroness Kennedy: Bill has been on a long journey with us.

Fulton MacGregor: It is very important. We might not be those men who have said those things or done those things, but we have all been men for all our lives. We have been younger men and may have been in situations where we could have done more. That is why work such as this is important in changing the culture and society that

we live in and in challenging men. We have got a big role in that change. I thank you for that.

On a personal note, I became dad to a daughter in the past year. When you were speaking about some of the things that it was reported to you that people were saying to others outside nightclubs for example, it sent shivers down my spine to think that, if we do not do something to change that culture, someone who I love so much could be in that position, too. It changes your mindset. Thank you for challenging us in that way and for making us feel uncomfortable. I say that on behalf of all the men around the table today.

My question is about funding. You have said that you think that the Scottish Government will need to provide additional funding in support of the legislation. Where specifically do you think that that funding should go?

Baroness Kennedy: One of the first things that all of us would agree on is that work will need to be done on education and training. It is inevitable that police training on the issue will have to be introduced. With new legislation, additional police training is always required. We would also want there to be education on the issue in schools, in those parts of the curriculum where the whole business of what is at risk here can be appropriately raised.

Police Scotland gave evidence to us, on the record and off the record. I had meetings with women in the Scottish police who did not want to go public, because they felt that, if they did, it would make life in their working environment more difficult. They spoke about their own experiences and about what they felt was needed. They all said—I have great sympathy with this view—that they did not want to criminalise boys while they are still young for that strutting thing of wanting to be part of the gang and wanting approval from their pals, as a result of which they can be drawn into behaviours that could lead to their having a conviction, which would have long-term consequences.

At the same time, we cannot make that a rule. There will be circumstances in which an older teenage boy has been behaving in a disgraceful way towards girls of 11 and 12 who are still at school, by showing them sexual material and stuff that is just horrible, but also by being abusive. There is evidence of that in the report.

There is a principle here, and money will have to be put into the training of sheriffs and so on about the legislation. I imagine that there will have to be a bit of additional resource there. We recognise that.

Fulton MacGregor: Do you think that the additional resources will have to be tailored specifically to criminal justice? I am thinking, for

example, of diversion schemes that would deal with misogyny for young people who get involved in that kind of trouble. Alternatively, do you think that more general work on changing the culture needs to be done in schools? Do we need a bit of both?

Baroness Kennedy: I think that we need to do both. There is something that I would like to see being developed. We had on our group a terrific guy called John Devaney, who is a professor at the University of Edinburgh. His whole thing is dealing with male violence and looking at alternative strategies, such as courses that bring people up close with the impact that such behaviour has on people's lives.

That relates to your experience of having a baby daughter, which makes you think, "Do I really want my child, when she is eight or nine, to suddenly be confronted with hard-core porn being shown to people on phones? Do I really want there to be ways in which she is made vulnerable, which mean that we have to tell her not to go to the park or to other places where she might be at all vulnerable, and that she must start tailoring her life, in response to the threat of what could happen to her?"

Once we introduce into girls' lives the idea that they have to be frightened, because they could be raped and made pregnant, not just by strangers but by people they know, we become particularly concerned about our daughters and we do not spend enough time saying to our boys, "You shouldn't be doing that," or, "You should think about how it might feel to experience that behaviour."

We need to do something about those early stages. We need to have training programmes to divert people away from such behaviour, such as an addressing misogyny programme—I do not know what it would be called. There are effective ways of letting young people see the impact of what they are doing. I think that that is one of the things that we should be doing. We should also be doing it with men in their 20s who behave in that way, although, of course, such behaviour is not confined to those age groups. It is about finding ways of diverting people and forcing them to confront their own behaviour—where it is coming from, what their attitudes towards women are and so on.

There are ways to do that. Terrific people are working in the field, particularly men who are addressing male violence—and it is a form of violence. This is about violence, really; it is about aggressive behaviour that is, somehow, about an idea of masculinity, which also has to be addressed.

The Convener: We have a number of questions to get through, so I ask for questions and answers that are as brief as possible.

Baroness Kennedy: Sorry—this is my subject, I am afraid.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, Baroness Kennedy and Mr Brash. Have you had discussions with the Scottish Government about the timing of the introduction of a bill to implement your proposals?

Baroness Kennedy: That is out of my hands. I have indicated that, if that is not done in a timely way, it will be a great disappointment to the women of Scotland—certainly those I heard from. There is an urgency about this, and I hope that time is somehow found for it in the parliamentary timetable. I hope that it is not sidelined and pushed into a different track by being turned into a discussion that somehow pits the rights of women against the rights of trans people—I do not think that that is at all helpful, and I think that some of the language with which that discussion has been conducted has been unhelpful.

I share many of the concerns that Pauline McNeill expressed, given women's experience of abuse and struggle—we are not there yet and trying to get equality for women, so that women can live their lives without this stuff, is unfinished business. We must make sure that we do not end up forgetting the work that still has to be done on securing protections for women and girls—look at our girls and remember that.

With regard to your question, Rona, I do not think that I have that influence. Members of this committee will have much greater influence.

Rona Mackay: Thanks for that.

I want to ask about the representation of women in the media. Just last week, a newspaper subjected a woman politician to blatant misogyny. Does that make you think that we have a long, long way to go? Do you foresee a time when the media will not use misogyny to discredit women, including for political reasons?

Baroness Kennedy: I think that we are going through a period of change. Of course there are hard bits of our world that will take longer to change. However, just think about it: we would not have been talking about misogyny, even five years ago, I think, and now we are talking about it. The number of women who are speaking publicly about things that they have experienced has changed things considerably. That has come out of the me too movement and women feeling that they have to give voice to what has happened to them—and that they have to be supported in doing that.

I am more hopeful than you sound. Of course we are going to get the kind of nonsense that you referred to, and it is disappointing that it is still so prevalent. However, I feel that there is a shift in the air, which meant that the Prime Minister immediately had to apologise to a woman on the Opposition benches about someone saying something that was really diminishing of her.

That was about contempt. It is contemptuous to say that someone is not smart enough and has to use their sexuality. Those old tropes about women using their sexuality to get things have been used for ever. We were seeing something that persists.

We have a lot of work to do, particularly with the young, to ensure that we do not just repeat all the old problems. We have not made enough headway.

The idea that we all have equality and therefore do not need legislation that is specifically for women—that we are there now—is just so unreal. That is why I challenge the idea of neutral law. Neutral law is right across most of the board, but when it comes to the experience of women, we need targeted law to deal with what is targeted at women.

10:15

Rona Mackay: Your point that the backlash would probably not have happened five or 10 years ago is encouraging. If that article had been published in a Scottish newspaper—if there are still such things—could the publisher have been prosecuted under the new law?

Baroness Kennedy: No—this law would not be designed for that. There would be an aggravation, which could be used in relation to some things that are online. If somebody was being abused online, you could say that it is misogynistic, and use the aggravation to enhance the sentence that is available under the Communications Act 2003.

There is also the business of stirring up hatred, which is really about the groups that now exist, particularly of young people, that are encouraging hostility towards women who are in public life, such as politicians and journalists. That stuff has to be dealt with. There is more of it—in the past year, it has multiplied sixfold.

The third aspect is public harassment, which is crying out to be dealt with. I really hope that Scotland leads on that. I think that, before long, it will happen in England anyway, but leading on the issue would give energy to it happening in other parts of the United Kingdom.

The fourth aspect is threatening rape or disfigurement. That came out of my meeting with the Criminal Justice Committee—I met some of you; I know that not all of you could attend. In the

discussion that took place, members of the committee raised the fact that there is a prevalence of such behaviour, and it reminded one of the ways in which women, particularly women from minority communities, can be threatened with an acid attack. It often involves a threat along the lines of, “Nobody will look at you when I’m finished with you”, “Nobody’s going to want you when I’m finished with you,” or, “Somebody should take that smile off your face permanently.” We deliberately couched the recommendation in language that is about invoking a threat, because sometimes it is not a direct threat such as, “I’m coming to get you to rape you,” or, “I’m going to come and disfigure you”; rather, it is, “Somebody should do this to you.” That leaves the person who is at the receiving end with a feeling of fear because, although this person might not be able to do that to them, the threat is now being jumped on by lots of other people, and there might just be some mad person out there who will do it.

It starts with women closing down their activities and their willingness to participate. The committee raised that issue, we did some research and we found out that that was absolutely right. The committee drew to our attention the fact that threats to disfigure are a serious problem, and we found that there is a significant presence of such threats online. I attribute to the committee that contribution to the recommendations. We expanded the rape threat to include disfigurement, because we did research to see whether that is supported by evidence, and it is.

I make it clear that the report is evidence based. None of it came out of the blue. We looked at whether there is a problem, whether the problem is remediable by law or whether law is not necessary. We found that there is a role for the law to play.

The Convener: I will bring in Katy Clark.

Katy Clark: I will ask about drafting and the importance of having precise wording in any legislation that we consider, which I suspect this committee will do in detail in due course.

The same debate is happening in many other jurisdictions—unfortunately, it is not just a Scotland-wide problem. Have you considered the debates that are happening in other countries, and what options did you look at with regard to how the legislation could be drafted? You specifically use the terms “prejudice” and “contempt”.

What advice would you give the committee on how we can ensure that the legislation is as robust as possible and that it covers as many scenarios as possible, which may mean a longer definition with different options? How should we be looking at these issues? Is there anything in particular that

we might want to look at to make sure that the legislation is usable and makes a difference?

Baroness Kennedy: The lawyers on the group—Bill Brash will confirm this—had a lot of debates. This was not easy—we struggled. We went on a journey. The easy course would have been for the sex characteristic to be added in as an aggravator. However, we were hearing more and more evidence on whether that would cure the problems that we are talking about. It became very clear to us that it would not.

When we got down to the fine print, the struggle was incredible. Many drafts went back and forth. Then we argued about the different points. As I mentioned earlier, I held out for the word “contempt”, because we are trying to describe something that is hard to describe around somehow diminishing somebody. It is about trying to get at the subtlety that there can be around misogyny. It is why it is about human rights—it is about not recognising the full humanity of somebody.

We tried to make it broad but, at the same time, get that subtlety into it, and it was not easy, I can tell you. I am sure that the committee will have many debates about it. I would be very happy for any of you to contact me when you are struggling with any one of those bits and to take you back to some of the discussions. It did not come easy—I cannot pretend that it did. We really struggled. We tried different combinations and different things and then, in the end, we felt that we got consensus from everybody.

Mona Rishmawi, who was there from the United Nations, is looking at this because, as you say, this is an issue that is not confined to the UK. We did not find legislation anywhere else that helped us enough. That is why this would be groundbreaking if Scotland leads the way on it. Of course, that then places a particular burden on us to make sure that the legislation works and that it works well. Mona Rishmawi was interested in how it could play out in different jurisdictions that are not based on the situation that we have, where law develops according to common-law precedent. She was thinking of countries that are further flung, where these issues are serious problems, and where a law such as this one could be used. I think that she ended up being very impressed with the outcome.

Jamie Lipton was there without carrying a badge for anything—he was there to answer law questions and point out the problems. We sat with other lawyers—it was not just us—but it was interesting to see Jamie Lipton go on that journey that Fulton MacGregor was talking about. Jamie is a civil servant whose position is, “I don’t go there,” but, in the end, he said, “You couldn’t listen to this

evidence and not feel that something has to be done, sharpish.”

It was interesting to see how we all got to different places. Dr Chloe Kennedy is a highly intellectual academic lawyer. She was very rigorous and demanding of us all. At one stage, she was asking what we should do about threats of rape online, because gay men also receive threats of rape online; those threats are not confined to women. Initially, she was asking whether we could make it about gay men as well. However, the prevalence of such threats towards women shifted the balance. Eventually, she got to a point where she agreed with the position that we arrived at. I think that one of the things about this is that it starts to shift people’s thinking about all the ways in which people are experiencing abuse.

Jamie Greene (West Scotland) (Con): Good morning.

Baroness Kennedy: It is lovely to see you, Jamie.

Jamie Greene: It is lovely to see you, too—it is always a pleasure.

We do not have a lot of time, unfortunately, so I will try to keep my questions brief and to get through as much as I can.

I want to ask a more fundamental question. People who are watching from the outside, and who might not have been as involved in this topic as we on the committee or you as head of the working group on the report have been, might wonder what we are trying to do. They might have reservations about where the legislation might end up, because the Hate Crime and Public Order (Scotland) Bill was hugely controversial. How do we ensure that we, as legislators in a Parliament, are not passing law for law’s sake as a direct response to public mood or pressure on a live issue that could be dealt with in other ways, such as through education or enforcement of other pieces of legislation? How do you think that we could scrutinise the new legislation in detail in such a way that we cannot be accused either of not supporting the principle of dealing with misogyny or of being misogynistic ourselves?

Baroness Kennedy: That is one of the things that I met even before embarking on this. I spoke to a number of different people in the legal world in Scotland, and some of my Scots colleagues were saying, “Do we need more law?” That would come from women, too—they would say, “We don’t need a law on misogyny.” The truth is that we are trying to deal here with the normalising of behaviours that lead to the more grievous kinds of behaviour. One response is, “Do we need more law? Shouldn’t we just be concentrating on trying to get rape and domestic violence dealt with properly? Do we really need to be dealing with lesser stuff?

There is already law that can deal with that, including laws on breach of the peace and all sorts of things.” The point is that those behaviours are the seedbed of all the worse stuff. If you normalise lots of those kinds of behaviour, you miss the signs of stuff that is going to become more serious.

The perfect example is the police officer in the horrifying case of the young woman Sarah Everard. Here was a man who had committed sexual offences, and the evidence is that he had been flashing at people. Of course, flashing is a source of hilarity to many people; they think that it is deeply amusing—

Jamie Greene: It is also illegal already.

Baroness Kennedy: It is also illegal already, of course, but it is not very often dealt with by the police. People do not report it, because they do not think that it will be dealt with seriously by the police. The police did not deal with it when it was their own colleague who was being accused of it. That is all part of the normalising of stuff that is going on.

If you do not deal with the subsoil of misogyny and aggressive behaviour that is so sexualised, I am afraid that it gives rise to all the other stuff. You must find a way of concentrating police minds—and sending people on a training course does not do it—so that a police officer on the ground is having to say, “Something has happened to a woman—is misogyny part of it?” and has to think about what misogyny is and whether someone has done that to her because she is a woman. I cannot give you examples on morning television and in Parliament, but it is shocking what women are exposed to in terms of the language and vitriol and sexual explicitness of it all. It is so demeaning and degrading in what it does to women’s self-confidence, and it does create harm—

Jamie Greene: Sorry—just to press on—

Baroness Kennedy: To deal with your question about whether there is law in existence and we can just deal with it, there is not the law to deal with the particular element of targeting women. The law does not do that and, as a result, we do not get the data. Out of all the law that we have, we cannot collect data on how much of this behaviour is towards women and how much of it has misogyny as part of the rationale for doing it. We are not able to look at the reasons.

10:30

In criminal law, we do not need to know what the motive for something is. We can convict somebody for shooting someone and never know why they did it. The why is not an essential

element. Juries like to know why—most of us like to know why—but you do not have to know why. It is enough that they did it and the evidence shows that they did it.

However, in this respect, we want the police to ask why and to ask whether misogyny is part of it. That very process will shift the dial away from the victim. There has always been an examination of whether a woman has made something happen to her, whether she encouraged it and whether her skirt was up to her bottom and therefore there was no reason why it would not happen to her—“She should have known better.” Instead of doing that, we want to shift the dial towards why he was doing it. That is what we want to happen and it is what women want to happen: a shift in the nature of how lawyering and the law operate.

Jamie Greene: In principle, you are saying that there are holes or gaps in the existing legislation, hence the need for new legislation. That is the fundamental argument in favour of new legislation.

Baroness Kennedy: That was our driving commitment. I think that Bill Brash would agree. We asked whether there is a gap or enough law to deal with the issue, because we did not want to make more law. That was our starting point. We then came to the position that there needs to be law, and the best way was to signal what the law is for—its purpose—which we do by labelling it clearly and driving it by the ways in which the offences are framed.

Jamie Greene: I suspect that the debate will centre on what is and is not in the legislation—what it does and does not cover—and, more importantly, on how the law will be applied and enforced. Parliaments pass laws every day, but those laws are not always up to scratch and are often open to challenge. We like to avoid that in advance of passing a law.

How has the proposed legislation been received by the key stakeholders that will be involved in its application, delivery and enforcement? For example, how have Police Scotland and the Scottish Police Federation—the police will have to deal with inquiries and complaints on the front line—the Law Society of Scotland, the Faculty of Advocates and the Lord Advocate responded to the practicalities of the legislation? Have they raised any concerns with you?

Baroness Kennedy: One of the ways in which police usually respond is to say that they provide a policing service and that they respond to the laws that Parliament and society make for them. However, if you speak to women police officers, you find that they are very positive about the proposal, because they think that we need to change the environment around misogyny. They would say that it happens in their own organisation

and, therefore, they would like mechanisms that help to focus people's minds. This is about focusing minds on misogyny—the minds of those who investigate, prosecute and defend, as well as the courts and judges.

Law has an important role in our society in creating change. It does not work on its own—by itself, having a law on the books does not work—but we need law. Telling boys that something is bad behaviour and that they should not do it will not create change, but if they think that their behaviour could have long-term consequences, that will create change. There will come a time when anything in your behaviour that reflects a misogynistic nature will be a serious blot on your copybook, and people will not want to have that. That is good and positive.

In the same way—when I appeared before the committee previously, we discussed this—in other parts of our society, there is a process of change that is about respecting difference and recognising that we are all different. In some ways, we have to do something in particular about the long, historical disadvantages that exist for women.

Pauline McNeill: I was going to ask you about international examples, but you said that Scotland would be groundbreaking if we introduced such legislation.

To illustrate what you have told the committee, I note that there was another example of male power yesterday—the case of Tim Westwood, who has been a well-known DJ for 30 years. There are such examples every day. It is a global issue.

Can you point to any countries that are doing something similar? You mentioned Mona Rishmawi from the United Nations. If the committee wanted, could we get access to her through you? If Scotland is going to be groundbreaking, it would be helpful to get an international perspective, because it is a global issue.

Baroness Kennedy: Annex 3 in the report includes the frameworks from different places, and we got lessons from some of those places. Washington has introduced a set of changes, and its legislation defines street harassment as

“any disrespectful, offensive or threatening statements, gestures or other conduct directed at individuals in a high risk area”.

It is about harassment in public spaces without the individual's consent. The focus of the legislation is on prevention and intervention rather than criminalisation. Washington had a big fear because it has a massive race problem; it was worried about putting any powers into the hands of police, because there was a concern that they might be used in a seriously discriminatory

manner towards black men. We had discussions with people in Washington about that.

Paris introduced a public harassment offence so that police on public transport and so on can give on-the-spot fines to men who, for example, rub themselves up against women—all that stuff. There are a lot of plain-clothes police on the underground and so on in Paris, and they will fine people there and then.

We were disinclined to go down that route, because we did not think that that was the way to create the kind of change that we want to see, but we were informed by those experiments taking place. As we can see, that reflects the fact that the problem is everywhere, not just here.

Australia is very interested in this stuff, and some of the states have been experimenting. We had evidence from people in Australia, who will follow what we do closely, because they want to introduce measures at state level, following whatever Scotland seeks to do. Have a look at the report, because it pans out those changes.

I go back to the issue that Jamie Greene raised, because Bill Brash has reminded me that the Law Society gave evidence and interacted with us on that issue. It said that there are occasions when women can behave in rather ribald ways in public spaces. They can, of course, be charged with behavioural offences, breach of the peace and so on, but it tends to involve raucous public behaviour and the stuff that we know drunken folk can do. The Law Society talked about hen nights. Try being a taxi driver in Glasgow dealing with those on a hen night—people say that that is not a great thing to experience. We have law to deal with that sort of thing. We do not need special law to protect men from that because we already have law that protects people from that.

However, we do not have stuff to deal with, for example, a guy sitting closely beside someone on a public tram or bus and watching hard-core porn on his phone, and directing his phone screen at them so that they are exposed to that and are discomfited and made to feel unhappy and worried. Another example is a man engaging with a woman when she does not want to be engaged with. The woman might be frightened to get off the bus because she thinks that she will be followed home, and she might be worried about ringing anybody in the man's presence in case he does something. All that stuff is in the report. We could have filled several books with the evidence that we heard.

I particularly want to mention young women of colour, which is really important in relation to intersectionality—the ways in which there are multiple layers of discrimination. For example, men come up to young Muslim women at bus

stops and whisper into their ears the stuff that they would like to do to them, how they will not get that from their own men and suggestions of what they might look like naked. That is really shocking and abusive behaviour. We have to make a public statement about how that kind of thing is simply unacceptable and will not be permitted.

The Convener: Sadly, we have time only for one final question. I ask Russell Findlay to be brief, if he can.

Russell Findlay: I will be very quick.

When speaking to women who have been the victims of sexual violence, domestic violence, stalking or other crimes of that nature, we hear that they enter a criminal justice system that can almost revictimise them. That is a common theme. There is also the sense that it can be a male-dominated world and quite an intimidating environment.

Jamie Greene has already asked about the delivery of the law, but what can be done about the culture, within the courts, the prosecution service and even the police, that women experience? How can work be done on that? I know that that is perhaps not within your remit, because you are looking at legislation. I also know the direction of travel and that there have been great improvements. Nonetheless, will you give us your thoughts on that?

Baroness Kennedy: When reading the report, you will see that we think that this concentrates minds on misogyny. You will go through a process of introducing legislation in Parliament and having debates and discussions about what misogyny is, and lots of learning will take place as a result of that. Awareness training will almost take place by virtue of the discussions that will take place. Those discussions will take place around dinner tables, in homes and in workplaces. Some people will dismiss what is proposed and other people will say that they are in favour of it, but those discussions will inevitably lead to heightened awareness and will concentrate minds. That will start to shift things and create cultural change. Although that will not happen overnight, it will happen by virtue of the sort of debates and discussions that will happen.

We have to try to enable equality between the sexes. Our work is not yet finished; we have a way to go. It cannot finish while any kind of abusive behaviour is targeted at women. Most men with whom I have that discussion agree with that, and the views of most men will start to shift.

There was a time when judges—everywhere, not just in Scotland—would have said that rape was an offence of sex. Their view was purely that, like a washing machine, once a man was turned on, there was no going back; the cycle had to be completed, and women were responsible if they

had in some way triggered that sexual arousal. Nowadays, judges would be bemused at the idea that that is what rape is about. They understand that it is about power and the absence of consent, and that a person can be willing initially but then withdraw consent because of how they are being treated. Judges recognise all that now—that journey has happened.

Of course, there is also a generational issue. New generations bring new learning. That is how cultures change, and the law has a contribution to make in creating cultural changes.

The Convener: Thank you very much. Sadly, I have to bring the session to a close. I am sure that we could have asked many more questions and had a much longer discussion. I express my grateful thanks to Baroness Kennedy and Mr Brash for joining us. If committee members want to pick up on issues with Baroness Kennedy, we will do that in writing.

We will have a short suspension to allow our witnesses to leave.

10:44

Meeting suspended.

10:48

On resuming—

Subordinate Legislation

Electronic Monitoring (Relevant Disposals) (Modification) (Scotland) Regulations 2022 (SSI 2022/93)

The Convener: The next item is consideration of a Scottish statutory instrument. I refer members to paper 3. Do members have any comments to make, or are we content with the instrument?

Jamie Greene: I appreciate that negative instruments are usually waived through nice and quickly, so I apologise for taking up time. However, I want to refer to the policy note that accompanies the instrument. In essence, the instrument is about changes to electronic monitoring and bail conditions. Under the policy objective section, it says that the instrument makes

“a technical change to ensure that the policy intention of having electronically monitored bail includes specific reference to ... two further ways in which a person on bail can have conditions varied.”

What are those “two further ways”? What variations would the change induce?

The policy note says that there has been extensive consultation with the Scottish Courts and Tribunals Service, but neither the consultation nor the SCTS’s response is contained in the note. It also says:

“Extensive impact assessments were undertaken”,

and that the change will have

“limited ... impact on the wider ... use of electronic monitoring of bail.”

How will we know whether that will be the case? The note does not quantify or, indeed, define the change.

I do not know how much of an issue the change is, which is part of the problem. I would have preferred the Government to have explained what the variations are and the resulting potential changes to bail. Ministers could have done that in person, although I appreciate that doing so would be unusual for an instrument subject to the negative procedure. However, they could have at least done that in writing. As a committee, we are none the wiser as to what we would be agreeing to, so I am uncomfortable with agreeing to the instrument for that reason.

I appreciate that annulment is the only option that is available to us. However, I want to put on record that I do not think that it is suitable to simply provide a one-page policy note that does not

explain what we are being asked to agree to. I am sorry, but that sets a bad precedent.

The Convener: I take your points. The best suggestion that I can make is that we follow up your queries in writing with the Scottish Government. Do members agree to do that?

Members indicated agreement.

The Convener: I see that no one else has any comments. Presumably, we will come back next week to reconsider the matter.

Stephen Imrie (Clerk): The committee does not need to return to the issue next week specifically. Obviously, the committee has agreed to follow up the matter in writing. The clerks will do that on your behalf, and we will get a response back to you as soon as possible. We will try to make sure that that is in time for next week’s meeting. On the basis of that response, if any member felt that they were still unable to support the instrument, we would invite them to speak to the chamber desk about lodging a motion to annul. That could be dealt with at next week’s meeting. There is still time to do that—the instrument must be disposed of by 9 May. I am not suggesting that any member lodges such a motion, but time is available, should anyone wish to do so. We will ask the Government for a response in writing, and members can decide what to do on that basis.

The Convener: Thank you.

Pauline McNeill: I thank Jamie Greene for raising the issue. The policy note could have been clearer. It refers to

“two further ways in which a person on bail can have conditions varied.”

I am struggling to determine what those two variations are. If that is the substance of the SSI, I do not understand why that has not been set out to the committee.

It looks as though the Government is saying that the instrument will just make a technical change, that we do not need to worry about it and that, as Jamie Greene has suggested, we just need to rubber stamp it. I suggest that the Government should note for future reference that, when we get an SSI policy note, there needs to be a bit more information in it. We need to know what we are being asked to sign off.

The Convener: Thank you for raising that issue. We can include that in our correspondence to the Scottish Government.

That concludes the public part of our meeting.

10:52

Meeting continued in private until 13:32.

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