**‘’Extending the concept, or extending the characteristics? Misogyny or Gender?**

**Introduction**

Since March 2019 the Law Commission has been reviewing hate crime legislation, and in particular whether a sufficient range of characteristics are protected by the hate crime legislation. The review is considering, amongst other issues, whether the criminal law responds adequately to hostility based on sex or gender characteristics (with misogyny being a particular concern). It will also consider the current range of specific offences and aggravating factors in sentencing, and the most appropriate models to ensure that the criminal law provides consistent and effective protection from conduct motivated by hatred of protected groups or characteristics. The report is expected in 2021. (Law Commission nd)

This chapter will engage with several crucial issues regarding hate crime: its misconception, the arguments for potential extension to include misogyny, or alternatively gender, and the difficulty of proving bias. ‘Hate Crime’ is a term overused by many groups, not least politicians, the public, the police, victims and victim advocates. The term hate crime does not exist in the legislation. ‘Hate’ itself is not a factor in law. The various hate crime provisions, specifically including the Crime and Disorder Act 1998 and the Criminal Justice Act 2003 do not require proof that the accused ‘hates’ the recipient; rather that they are motivated by hostility or demonstrate hostility *towards certain protected characteristics*. Currently the UK identifies the following such characteristics, for prosecution as: race, religion, sexual orientation or transgender identity and disability. This chapter is considering the above legislation requirements. Whislt police forces can extend the protected characteristics for the purposes of recording, these cannot legal be prosecuted within the legislation as it exists at the time of writing this chapter. Moreover, this chapter does not engage with legislation regarding online abuse, or the ‘stirring up’ offences.

Perceptions from not just the lay public, but also politicians, (as discussed below) reveal misunderstanding regarding the ‘hate ‘element, what constitutes a ‘hate crime,’ and the criteria for successful prosecution. Hate is not an element in the legislation, which depends upon ‘hostility’. Currently, successful prosecution for a ‘hate crime’, as per the Crime and Disorder Act 1998 s28, or the Criminal Justice Act s146, depends upon proving firstly a criminal act, and that at the time of committing the offence, or immediately before or after doing so, the offender

a) demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a [protected group]; or

(b)the offence is motivated (wholly or partly) by hostility towards members of a [protected group] based on their membership of that group.

The ability to convict based upon *demonstration of hostility* to a protected characteristic is crucial. This section of the legislation was included because prosecution was found to be problematic in the United States, where proof rests upon proving motivation. This is one reason, discussed below, why ‘misogyny’ will prove difficult to prosecute, and why the author prefers gender as a protected characteristic. This chapter argues that however offensive beliefs may be, and these include misogyny, without any accompanying act the perpetrator cannot be convicted. In common with Jenness and Grattet it also argues that ‘gender’ as a protected characteristic, would be an acceptable route for prosecution, based upon an actual crime. (Jenness and Grattet 2001).

However, drawing upon international comparisons, this chapter also proposes that new and specific legislation may be needed to address certain offences, particularly those predominantly experienced by women and girls for example, sexual harassment. Finally, it will briefly discuss the difficulty of perceiving gender bias, and hence the potential limitations of legislation, and the need for accompanying awareness raising initiatives.

**Misogyny**

Recent discussions regarding extensions to existing hate crime legislation have conflated misogyny with hate crime. On March 9th 2020, for example, [Wera Hobhouse](https://members.parliament.uk/member/4602/contact), the MP for Bath in south-west England, presented her [Hate Crime (Misogyny) Bill (2020)](https://services.parliament.uk/Bills/2019-21/hatecrimemisogyny.html) addressing misogyny – which is defined therein as “the dislike of, contempt for, or ingrained prejudice against women”. The Bill is intended to make motivation by misogyny an aggravating factor in criminal sentencing; to require police forces to record hate crimes motivated by misogyny; and for connected purposes.

In January 2019 a coalition of campaign groups and MPs, including MPsJo Swinson, Stella Creasy and Peter Bottomley, the former home secretary [Jacqui Smith](https://www.theguardian.com/politics/jacquismith), the Nottinghamshire police and crime commissioner, Paddy Tipping**,** Citizens UK, Women’s Aid and the Fawcett Society, called on the Metropolitan police commissioner, Cressida Dick, to make misogyny a hate crime. Their demands, however, conflated gender [[1]](#endnote-1) and misogyny, stating that: ‘gender hate incidents were at least as common as any hate crime recorded by police. There were 67,000 such incidents last year, with 57,000 of them [targeted at women](https://www.theguardian.com/society/2018/sep/05/first-step-to-misogyny-becoming-a-hate-called-amazing-victory), according to figures from the Crime Survey of England and Wales. People aged between 16 and 44 were most commonly targeted.’ (Topping, *The Guardian*, 2019).

*The Guardian* quoted the letter as saying: “Women are targeted with harassment on the street and online on an everyday basis …Accepting this as normal creates an environment in which one in five women have experienced sexual assault, and each week two women are murdered by a partner or ex-partner.” (Topping, *The Guardian*, 2019). Since 2016, Nottinghamshire police have introduced misogyny hate crime recording, although it cannot be prosecuted as such, never being a legally accepted concept for such. An online survey of Nottinghamshire residents found that [87% supported the move](https://www.nottingham.ac.uk/news/pressreleases/2018/july/overwhelming-public-support-for-misogyny-hate-crime-policy.aspx). (Topping, *The Guardian*, 2019). Many people do not consider the legality of such initiatives and are thus disappointed when prosecution does not follow. A Misogyny Hate Crime Review in 2018, by the University of Nottingham and Nottingham Trent University noted that: "Much of this behaviour on this spectrum is criminal behaviour, there's no doubt about that. People could have gone to the police about it before. But because of the culture we have it's just acceptable to intimidate women on the street, to go up to a woman and touch her backside, or to comment on her body and put her in fear of an assault." (BBC News, 2018) More recently, work by Loretta Trickett and Louise Mullaney have continued to highlight misogyny or gender bias.

There have been fears by some groups that utilising ‘gender’ rather than misogyny would downplay the in-built prejudice argued to be a factor in violence against women. In 2018, for example, the Fawcett Society’s Westminster Hall Debate briefing paper stated that: ‘It is important that the hate crime in question is misogyny hate crime, not gender hate crime, recognising the direction of the power imbalance within society and the reality of the endemic scale of violence against women and girls.’ (Fawcett Society 2018) However, in 2019 the language changed, with their website stating: ‘New Fawcett data reveals gender is the most common cause of hate crime for women. ‘(Fawcett Society 2019)

**Misogyny would require a reconceptualization of the current ‘hate crime’ concept**

Hence, many believe that ‘misogyny’ *per se* could constitute a hate crime, or would initially have preferred this concept, but this would be a significant change to the current operation of hate crime legislation. This is because for current ‘hate crimes’ a demonstration of hostility *towards a protected characteristic* is an aggravating feature of an actual crime, it is not a crime in itself. For prosecution, there is no need to prove motivation, since demonstrating hostility suffices. In practice proving motivation is more difficult that demonstrating hostility. Furthermore, as noted above, ‘hatred’ is not a requirement of ‘hate crime’ legislation. Whilst misogyny is specifically female focussed, gender includes all genders, and those with no gender. However, it is important to note that the most prevalent offences against women are domestic violence and sexual harassment, discussed further below. Not all these offences will include a gender bias, nor a ‘misogynist’ mindset, nor be a demonstration of these, but many may. This chapter will argue that to ensure that offences against women could be recognised as including bias, ‘gender’ as a protected characteristic would suffice, and would also cover prejudice towards men, the non-binary, and the gender free.

Whilst not denying that misogyny exists, the author argues that to include misogyny as a hate crime characteristic would be to completely reconceptualise the current concept of ‘hate crime’. This is because it would criminalise a perpetrator’s attitude towards a group, rather than seeing this attitude as an aggravating factor in base crimes committed against a particular protected characteristic. Indeed, misogyny is defined in the Collins English Dictionary, [[2]](#endnote-2)- and in the Hate Crime (Misogyny) Bill 2020 as: ‘dislike of, contempt for, or ingrained prejudice against women’. Hence, this refers to an internal belief, attitude or position.

As noted above, current ‘hate crime’ legislation requires there to be a designated ‘protected characteristic’ associated with a ‘base crime’ to be committed against that group, being either motivated by hostility, or demonstrating hostility, to that identity. Hence misogyny does not fit within current conceptions of a hate crime: it may be a motivation of the perpetrator, but it is not a protected characteristic of the victim. However, if ‘gender’ became a protected characteristic, hostility towards this characteristic may suggest an internal misogynistic bias, and hence ‘misogyny’ would be addressed. This is analogous to combatting homophobia, not by making homophobia illegal, but by making sexual orientation a protected characteristic. However, as with all ‘hate crimes’ gender hostility would still need to be proven or demonstrated at the time a perpetrator commits a *base offence.*

**Scotland**

Whilst this chapter is focussing upon England and Wales it is useful to draw comparison with Scotland. This is because they have already completed their review of Hate Crime, considered extending the characteristics, and reported in 2018. (Scottish Government 2018. 4.12) Whilst the legal jurisdiction varies, there are political, social and cultural links, and a shared issue with gender-based violence. In the Scottish report Lord Bracadale chose gender over misogyny, not least because, as he commented, there are multiple interpretations of the term misogyny. Lord Bracadale thus urged ‘… caution in considering exactly what is meant in the particular context.’ He noted that ‘Engender define it as “systems or actions that deliberately subordinate women and reflect the actor’s understanding that women are not their equals.” Some use the terms ‘misogyny’ and ‘sexism’ as synonymous, while others would argue that misogyny is often more targeted or negative and used to assert male dominance over women.’ (Scottish Government 2018 4.12)

Lord Bracadale noted how many conflate misogyny with ‘sexism’ and, if used as a basis for a criminal offence, it could lead to prosecutions for ‘unacceptable beliefs’: for example, those that express contempt based on gender. (Scottish Government 2018 4.12). Literature and examples from history have long emphasised the inherent dangers in prohibiting thought or belief, or internal motivation, *per se*, not least under totalitarian regimes: Assessing ‘genuine’ conversion has proven problematic. (Corner, 2009)

As noted above, hatred or contempt are not currently crimes in the UK, provided one does not act upon these sentiments to the detriment of others. Lord Bracadale thus chose gender over misogyny, with recommendation nine adhering to current interpretations of ‘hate crime’, including those of England and Wales, i.e, that there was an offence, and that it was *motivated by hostility* based on (gender), *or demonstrated hostility* based on (gender).’ (Scottish Government 2018. 4.12)

If legislation included misogyny, the argument could be made that any thought, any hint of sexism, could potentially be prosecuted. That the law could be so widened has arguably weakened legitimate calls for gender violence to be recognised, as individuals disseminate examples of overzealous policing of ‘hate incidents’ against currently protected characteristics. Indeed, much publicity has been given to ridiculing the prosecution of ‘wolf whistling’ in the street. Popular TV programmes, for example ‘*Loose Women’* debated ‘Does a wolf whistle put a spring in your step?’ (Loose Women 2019) The conclusion of the panel was that context was important. For some, this act is seen as an innocuous method of showing attraction, or is amusing, but to others it is demeaning, offensive, intimidating and potentially threatening: not least because no one knows what else the perpetrator may do, particularly if they felt their act had not had the desired effect (whatever that might be).

 In Uk legislation offensive thoughts are not eligible for prosecution. Even offensive acts must meet strict criteria. Indeed, no current UK legislation prosecutes thought without accompanying criminal acts, although the ability to report perception of hate incidents exists, as recording of ‘misogyny’ illustrates. However, perception of incidents does not automatically translate into ‘offences’. As noted above, successful prosecution will depend upon proof of a criminal offence, with the accompanying motivation or demonstration of hostility to the protected characteristic.

**Gender as a protected characteristic**

Currently sexual orientation is an existing UK ‘Hate Crime’ characteristic, as is transgender. This chapter argues that although sexuality and transgender differ from gender identity, the causes for victimisation are often similar. Perpetrator behaviour may be motivated by or demonstrating hostility to the victim because they perceive the latter is in some way ‘transgressing ‘imagined gender boundaries, or indeed, is representative of these. This author argues that including gender as a protected characteristic years earlier could have avoided introducing separate groups for sexual orientation and transgender. This is not to dispute that these groups have specific issues, merely that much hostility may actually be based upon ‘gender’ rather than ‘sexual orientation’, for example. Moreover, current laws do not *explicitly* protect those who are non-binary, or gender free: including gender would cover a wide variety of gender identities, including those who feel themselves to be nongendered, analogous to the fact that religious hate crime covers those who do not identify with a religion.

 Including gender would potentially provide a more nuanced understanding of certain types of violence and would not be exclusive to violence against women. However, this chapter is not now arguing for the removal of sexual orientation or transgender, since these characteristics have been recognised as protected for some time.

**Conceptualising Gender.**

The English Oxford Dictionary defines gender as:

 “either of the two sexes (male and female), especially when considered with reference to social and cultural differences rather than biological ones. The term is also used more broadly to denote a range of identities that do not correspond to established ideas of male and female.”

Whilst ‘gender’ and ‘sex’ are often confused, or used interchangeably, this chapter utilises the idea of gender as a social construct, referring to societal interpretations and perceptions of humans, based upon presumed biological sex. (Kessler and McKenna 1978). This includes ‘Femmephobia’ – denigration and negation of assumed sex-attributed aspects. (Hoskin 2019) Clearly these are binary definitions. As such, it could be argued femmephobia is representative of misogyny. However, this chapter argues that Femmephobia can be more fully defined as a subset of sexism that suggests that femininity and things regarded as feminine are inherently inferior, bad, weak, stupid, non-preferable, valueless, disempowering: those deemed representative of ‘masculinity’ are seen as inherently good, strong. Hence, all persons exhibiting such ‘feminine’ qualities would be perceived in this way, not solely women and female-presenting people; this has implications for some gay men. (Levitt et al 2003) Given that femininity is only an associative, relational term, referring to things that are culturally associated with women, denigration of that which is feminine is to denigrate that which is female-ish. (Levitt, Gerrish and Hiestand 2003). As Hoskin notes:

 Since the 1970s social science researchers have documented the cultural devaluation of femininity and its impact on experiences of discrimination among sexual and gender minorities. Yet, despite the continued and accumulating evidence demonstrating the role of anti-femininity (or femmephobia) in these experiences, little research has specifically examined femininity as an intersecting component of discrimination. (Hoskin 2019: 686)

 Whilst academic study has debated interpretations of ‘gender,’ (Perry 2001; Chakraborti and Garland 2009), this chapter considers criminal acts that may be perpetrated because of perceptions of such characteristics andrelating to women only. Regarding which acts specifically, it is useful to note that as early as 1993 the United Nations defined violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life." (Resolution 48/104 1993).

**Specific arguments for inclusion/exclusion of gender as a characteristic.**

Arguments for perceiving all gender-related crimes as capable of being bias crimes are evinced in the idea that ‘... at least some degree of hatred, hostility, or disrespect for all women... (is present)’(Copeland and Wolfe 1991; Gaffney 1997). Whilst this may sound redolent of misogyny, it is argued here that potential misogyny motivated offences can be covered by gender as a protected characteristic, and thus within ‘hate crime’ legislation. Assuming a bias may exist is similar to calls for the recording of incidents involving disability to be initially so considered: often these are unrecognised as such, and assumed to be related to the ‘vulnerability’ of the victim. (CPS disability case reviews nd) However, as Jenness notes, such a position does not automatically assume that a bias is necessarily present ...’(Jenness 2003) Hence, I argue that, as with all ‘hate crimes’, the requirement to demonstrate hostility to the characteristic, at the time of the offence, or proof of bias motivation would still exist.

 From a social change perspective, many academics, for example Bornstein, see gender as ‘central to the perpetration of homophobic and transphobic violence’, although, as stated above, these have been recognised separately as bias categories. Some academics place particular emphasis upon patriarchy, with Bornstein defining such violence as a ‘gender defender’ concept, perpetuating ‘the violence of male privilege and all its social extensions.’ (Bornstein 2006) Many, for example Jenness and Grattet, argue that bias crimes are ‘message crimes’ and the legislation is therefore equally a message – the social denigration of unacceptable attitudes and beliefs (Jenness and Grattet 2001). Conversely, failing to recognise potential bias may be seen as acceptance of these prejudices. Hodge argues that gender bias can be defined if the motive for the crime is to reinforce supremacy and intimidate women, [or men], as a group. (Mason-Bish, 2010 in Chakraborti 2010, 58-77)

 However, as the author’s own research, (McGuire 2013) supporting the earlier work of Mason-Bish, argues, there is a perception that those excluded from bias legislation are given a lower priority in the eyes of policing, and the criminal justice system, than those included (Mason-Bish 2010 in Chakraborti 2010, 58-77). Including gender would therefore emphasise that victims were worthy of redress (McPhail 2002). Moreover, including gender could *emphasise* a positive obligation on the state to maintain the confidence of subjects, to offer protection, and to properly investigate offences. This would be synonymous with recent human rights cases involving racism and ethnic hatred. Indeed, according to Karen Reid in The Practitioner’s Guide to The European Convention on Human Rights (Reid, 2020): ‘there has been a recent emphasis on the condemnation of racism and ethnic hatred with corresponding positive obligations on the state to maintain the confidence of minorities in the ability of the authorities to protect them from racist violence, and to investigate properly incidents of racial hatred (Menson v United Kingdom, App No 47916/99) ECHR 2003).’ Furthermore, as McCollum argues, ‘without a full consideration and integration of power relations ‘hate crimes can be depoliticised as motivated by irrational prejudice, rather than domination, exclusion and control.’ (McCollum 2010) Such recognition is crucial in intimate partner violence contexts as a plethora of academic texts, over decades, evidences.( Heise LL. 1998: Jewkes R, Flood M, Lang J. 2015: McCarthy KJ, MehtaR, Haberland 2018)

**US comparison**

Perhaps tellingly, no jurisdictions worldwide include misogyny as an offence. As noted, the UK does not include gender as a bias crime, and despite an increasing awareness of and concern about violence towards women worldwide, few jurisdictions do so include. Even fewer convictions have occurred. In 2018 32 US states, plus the District of Columbia, include gender, with a further 18 including ‘gender identity.’ (Anti Defamation Legaue, ADL 2004-2018) In her 2003 article, Jenness described the 2002 televised press conference in which the US Justice Department announced they had invoked the federal hate crimes statute for the first time to charge (an) alleged murderer (Rice) with hate crime because ‘Criminal acts of hate run counter to what is best in America, our belief in equality and freedom ... we will pursue, prosecute, and punish those who attack law-abiding Americans out of hatred for who they are.’ (Jenness 2003)

 Jenness describes this as the ‘first federal prosecution of hate crime based on gender,’ but also that ‘evidence suggests the ‘source of hatred’ is twofold: sexuality and gender.’ The victims were lesbians, and in the UK this may have been defined as a case of ‘sexual orientation’ bias crime, although the perpetrator evinced hatred for all women, and especially ‘lesbians and gays’. Chakraborti and Garland frequently argue for hate crime to be ‘attuned to the intersectional nature of identity ... harassment of lesbians may be caused by homophobia and misogyny.’ (Chakraborti and Garland 2013, 6)

However, I argue that gender would encompass homophobia and misogyny, because such crimes are often perpetrated due to the perpetrator’s belief that the victim had in some way transgressed ‘acceptable’ socially constructed boundaries of male or female behaviour. Whilst multiple reasons may exist, prosecution is more likely to be successful if it focuses upon one identifiable protected characteristic to enable sentence enhancement. This has similarities with early feminist work on the primary locus of oppression – such work did not deny intersectionality but highlighted a dominant factor in oppression. (Evans et al 2005: Goodman et al 2009). This is not to dispute, as Schiek argues, there has been critique of anti-discrimination legislation that fails to appreciate intersectionality. (Schiek 2018) Arguably, single focus is promoted to enable prosecution.

 In the US case above, multiple interpretations of motive were voiced. The defendant, Rice, told law enforcement officials that he intentionally selected women to assault “because they are more vulnerable than men,” that he “hates gays,” and that the victims in this case “deserved to die because they were lesbian whores.”(As cited in Jenness, 2003, 74). The defendant made ‘... numerous physical and verbal assaults upon randomly selected women, including acts of road rage, physical assaults, demeaning sexual comments, and threats of injury or death....’ (Jenness 2003, 74). Not all the latter fit neatly within interpretations of ‘vulnerability,’ or sexual orientation.

Whilst intersectionality may exist, *gender bias* can be missed if legislation does not include this, as is evident in the UK case of Levi Bellfield. According to UK police and media reports Bellfield‘... spoke of ‘hatred’ and ‘intense loathing’ of women; a former girlfriend described how he had confessed that he would wait in alleyways wanting to: "hurt, kill, stab or rape women." (Long 2010) Bellfield had a reputation for sexually harassing under-age girls, pestering them from a van with blacked-out windows in which he kept a mattress, blankets and a baseball bat.’ As Long argues,’... if Bellfield’s hate-motivated violence had been directed at victims on the basis of their perceived race, religion or belief, sexual orientation, disability or transgender identity, his crimes would clearly have been recognised as hate crimes.' (Long 2010). Notably, Long is focusing upon the violent act, the characteristics of the victim, the motivation of the perpetrator, within the context of existing ‘hate crime’ legislation.

 The fact remains, however, that perceptions of hate crime, whether by the victim or another, are areas of current confusion, partly due to a lack of awareness, but also to confusion over the meaning, the legal definitions, the protected characteristics. Extending protected characteristics to include gender will not automatically resolve these issues, without accompanying education, unfortunately beyond the remit of this chapter.

**Examples of violence against women: should gender bias be considered?**

In 2017 the Crown Prosecution Service published a [Violence Against Women and Girls (VAWG) Strategy for 2017-2020](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/VAWG-Strategy-2017-2020-R01.pdf) providing a framework outlining an overarching framework to address crimes: ‘…that have been identified as being committed primarily but not exclusively by men against women. These crimes include domestic abuse, rape, sexual offences, stalking, harassment, so-called ‘honour-based’ violence including forced marriage, female genital mutilation, child abuse, human trafficking focusing on sexual exploitation, prostitution, pornography and obscenity.’ (VAWG strategy 2017) The Crown Prosecution Service recognises VAWG as a form of discrimination against women and a fundamental issue of human rights arising from gender inequality.

The framework is in line with the CPS’s Public Sector Equality Duty and draws upon the UK’s ratification of relevant United Nations Conventions on Violence Against Women (United Nations 2009), and the [Government’s strategy on ending VAWG 2016-2020](https://www.gov.uk/government/publications/strategy-to-end-violence-against-women-and-girls-2016-to-2020). Article 40 of the Istanbul Convention—which the UK Government signed in 2012 and is committed to ratifying, although as of 2020 it has not, sets out obligations on sexual harassment:

‘Parties [to the Convention] shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non‐verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.’ (Istanbul Convention Art 40)

 Many, including the White Ribbon Organisation, argue that ratification ‘would commit the UK government to following a strong set of minimum standards to protect and support women, prosecute perpetrators and prevent violence against women.’ (White Ribbon Organisation, 2020).

Below the chapter will consider domestic violence and sexual harassment, and will argue that a gender bias potential should be considered in the former, via gender as a protected characteristic. However, it will argue that specific legislation may be required for sexual harassment cases, as created by other jurisdictions. Whilst not all domestic abuse will be gendered, clearly some will. Indeed, domestic abuse is a prevalent form of abuse for women, often accompanied by verbal demonstrations of hostility based upon gender. The Office for National Statistics, ‘Domestic abuse victim characteristics: year ending March 2019, states that, according to the Crime Survey for England and Wales [March 2019] 7.5% women and 3.8% men declared themselves victims of domestic violence. 75% of domestic related crimes recorded by the police to March 2019 were female, and 74% of domestic homicides were female in the two years to March 2018. (UK Domestic abuse characteristics 2019). Estimates from the Crime Survey for England and Wales could not be obtained for the year ended June 2020 due to the Covid 19 lockdown and collection concerns about confidentiality and respondent safeguarding, since information was taken via the telephone. However, there was a 9% increase overall in domestic abuse reported to the police (774,491 offences, excluding Greater Manchester police)– some of this reflects improved recording, although there was a rise in demand for domestic abuse related services, for example by Refuge. (Office for National Statistics October 2020)

Numerically, the statistics show that in the year ending March 2018, an estimated 2.0 million adults aged 16 to 59 years experienced domestic abuse in the last year (1.3 million women, 695,000 men). The police recorded 599,549 domestic abuse-related crimes in the year ending March 2018. This was an increase of 23% recorded from the previous year, although less than self reported incidents. Many do not report to the police, and many reports are not recorded by the police: it is argued here that recognition of gender bias may serve to raise awareness of the unacceptability of such practices – both the abuse, and its under recognition . The police made 225,714 arrests for domestic abuse-related offences (in the 39 police forces that could supply adequate data). This equates to 38 arrests per 100 domestic abuse-related crimes recorded. The percentage of convictions secured for domestic abuse-related prosecutions is at its highest level since the year ending March 2010. In the year ending March 2018, 76% of prosecutions resulted in a conviction (Office for National Statistics 2018). However, reported figures may well underestimate actual offences, the widely accepted ‘dark figure of crime’ (Biderman et al 1967).

Violence against women is a major social problem, but often ‘normalised’ within domestic relationships, or media representations. However, including domestic violence within hate crime is contentious amongst hate crime scholars and those working or researching in the field of gender-based violence, for the points discussed below.

Since such violence is widespread there have been fears that inclusion of gender would swamp hate crime statistics. Moreover, that including gender would detract from, and diminish other bias categories (McPhail 2003). This is, however, in complete contrast to rights-based arguments, for example those of the EU, with the emphases on fundamental rights, the promotion of human dignity, freedom, and human rights. Others argue that inclusion into the realm of hate crime might distract from violence against women as a specific area of criminality needing extra resources and policing training. Proving gendered bias within domestic violence would require evidence of demonstrating hostility towards women (in general), or the violence being motivated by this. However, domestic or ‘partner violence’, has historically often been perceived as a dispute between two persons, thus proof of repeated behaviour of an offender, over several relationships may be required for conviction of a gender bias crime, as has been the case in the US. These issues will be discussed further below.

**Consideration of ‘gender bias’ in domestic abuse cases**

Whilst this chapter argues for gender to be the protected characteristic, it is focussing specifically upon women and girls, due to the larger numbers reported, recorded, prosecuted, and in historical context. However, as noted above, this gender focus is also driven by rejection of ‘misogyny’ within legislation- seen as a concentration on the internal belief of the perpetrator, and by recognition that gender has wider considerations. The latest figures from the Crime Survey for England and Wales, published October 2020, and covering to June 2020, show the continued prevalence of abuse against women including domestic abuse.

 In July 2020 the first reading in the House of Lords of the Domestic Abuse (Misogyny) Bill took place, (Domestic Abuse Bill 124-EN). As noted above, in 2019 Stella Creasy MP had called for Amendment 84, requiring recording of misogyny in domestic abuse cases. However, the Bill read in 2020 did not specifically refer to gender, sex, or misogyny, nor any requirement to so record. (Domestic Abuse Bill 124-EN ) I argue that rather than include within the Bill, making gender a protected characteristic would enable this potential bias element to be considered within all offences, including domestic violence.

With no specific mention of gendered violence, the Domestic Abuse Bill as a standalone piece of legislation fails to highlight such offences as potentially containing a ‘hate crime’ element. However, utilising ‘hate crime’ legislation would be in keeping with the piecemeal approach to protecting women, but also an extension of this, and a useful ‘supplement’ to a Domestic Abuse Bill. If successful, the criminal act would be the domestic abuse, the aggravating factor would be the demonstration of hostility, or motivation, based upon the protected characteristic of gender. This could equally apply to same sex relationships, as these are not immune to violence, nor to hostility towards the gender identity of the victim. (Ristock 2002) Historically, the protection of women has tended to come via anti-discriminatory legislation, or various pieces of protective measures and legislation, not ‘hate crime.’ [[3]](#endnote-3) In 2009, the UK Government launched ‘Together we can End Violence Against Women and Girls: a strategy’. The aims of this were to enable women to ‘live their lives free from harassment or violence’ and ‘to live a life without fear of violence and to live in a culture where violence against women is unacceptable.’ (Home Office 2009)

Legal redress for women did not include tackling gender-based offences, or indeed, misogyny, by making gender a protected bias characteristic, but by several distinct pieces of legislation, as mentioned above. How this is perceived varies, with many arguing that this approach is preferable to creating a ‘hate crime’ characteristic: it is seen as wider ranging in dealing with the particularities of gender crimes, and therefore the victimisation against women receives greater quality of service by such means (Mason Bish 2011) Indeed, inclusion of gender as a bias crime in the US was resisted by the Anti-Defamation League who argued that ‘although gender–related crime represents a serious threat to society ... it is a distinct type of victimisation ... (and should not be addressed as a bias crime)’ (Chen 1997). Others argue that gender fits the hate crime paradigm because women are indiscriminately selected due to gender, the assault is often unprovoked, there is no other motive, and gender based epithets often accompany the act. (McPhail 2002)

However, as Mason-Bish argues, historically the UK has fixated upon domestic violence, underplaying the other forms of violence against women. (Mason-Bish 2011: Kelly and Lovett 2005) Moreover, as Goodey notes, victims of domestic violence include both men and women, as a focus upon ‘gender’ would acknowledge (Goodey 2005). Crucially, a distinction must be made ‘… between an approach that ‘is sensitive to complex gendered dynamics and a *definition* of domestic abuse that focuses on only one particular gendered dynamic.’ (Dempsey 2011) The latter, may, for example, focus only upon an assumption of male-on-female violence which would, as Dempsey argues, make ‘abuse in same-sex relationships … marginalised at best and more often simply invisible.’ (Dempsey 2011, 390).

The Domestic Abuse Bill 2020 aims to create a statutory definition of domestic abuse, based on the existing cross-party definition.

Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse”if—(a)A and B are each aged 16 or over and are personally connected to each other, and(b)the behaviour is abusive.(3)Behaviour is “abusive” if it consists of any of the following—(a)physical or sexual abuse;(b)violent or threatening behaviour;(c)controlling or coercive behaviour;(d)economic abuse (see subsection (4) (e)psychological, emotional or other abuse; and it does not matter whether the behaviour consists of a single incident or a course of conduct. (The Domestic Abuse Bill 124-EN Part 1)

 I would argue that a focus upon ‘gender’ bias *per se*, rather than related specifically to domestic violence (although it would include such violence) would illuminate bias, and contribute to the tackling of this abuse. It is recognised, as discussed above, for example, that ‘Femmephobia’ exists within lesbian, gay, bisexual and transgender communities. (Levitt et al 2003). Moreover, domestic violence is often portrayed by the police and criminal justice services as ‘a problem of individual men and their relationships... (rendering) the gendered aspect invisible and (obscuring) any focus on wider issues of misogyny’ (Stanko 2001). Arguably the very use of the term ‘domestic’ suggests little link with wider *public order* issues - a driving force for previous bias legislation as discussed above. However, as long ago as the 1990s, academics were arguing for a reinterpretation of domestic abuse as a shared concern ‘...wrongs not just against their individual victims, but against all of us insofar as we identify with those victims as our fellow citizens—they are wrongs in which we collectively share, and which we make ‘ours.’ (Marshall and Duff, 1998). Such comments support the argument for inclusion within ‘hate crime legislation’ – acknowledging a public interest in such protection.

 From a numerical standpoint, as Hodge argues, not being a stigmatized *minority* group hinders acceptance into the ‘bias category’. However, her study of New Jersey also revealed the resistance to include rape, sexual assault and domestic violence as bias crimes, partly due to perceived differences in the offences, but also the difficulty of *proof*. (Hodge 2011) Clearly gender hate crime covers a wide range of offences, not solely domestic abuse. Making gender a protected characteristic would not require a reinterpretation of all domestic abuse cases as containing a gender bias element, but it might lead to a recognition of this element of many such cases. Whilst ‘proving gender animus’ in domestic abuse cases may be problematic, this is not sufficient reason for exclusion, although existing attempts have their own difficulties. In Massachusetts, for example, the Attorney General instituted a policy whereby gender-based hate crime require at least two previous restraining orders issued to protect two different domestic partners.’ (Jenness 2003)

**Sexual Harassment**

It is important to note other common experiences of violence against women. A recent House of Commons report on sexual harassment highlighted that ‘… the prevalence and impact of sexual harassment is not recognised or understood in the same way by many men.’ (House of Commons 2017, 5) Moreover, that law and policy send conflicting messages on the issue. (House of Commons 2017, 5) A survey published by Ipsos Mori on International Women’s Day in March 2018 showed ‘…that respondents in Britain thought that, from more than 20 options, sexual harassment and sexual violence were respectively the second and fourth most important issues facing women and girls in Britain today’. (Mori 2018)

There is no specific criminal offence of sexual harassment in the UK, unlike in some other countries, for example Portugal, New Zealand and France. Portugal was the first signatory to the Istanbul Convention, and street harassment and catcalling are already illegal in Portugal by Article 170 of the Penal Code:

“Whoever harasses another person, practising before her acts exhibitionist in character, formulating proposals of a sexual tenor or embarrassing her with contact of a sexual nature, is punished with a penalty of imprisonment of a year, or a penalty fine of up to 120 euros if a more serious penalty is not applicable under any other legal provision.” (Article 170 Penal Code Portugal)

 Section 4 of New Zealand’s 1981 [Summary Offences Act](http://www.legislation.govt.nz/act/public/1981/0113/latest/whole.html) states that anyone who “uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or addresses any indecent or obscene words to any person" can be fined up to $1,000.

 France introduced a ‘sexist outrage’ law allowing for on-the-spot fines of between €90 and €750 for behaviour such as obscene gestures and noises, degrading comments or following someone insistently in the street. (Tidley 2019) The Law amends the Penal code, and covers, amongst other things, sexist insults, degrading or humiliating comments, or hostile and offensive “sexual or sexist” behaviour towards a person in public areas, schools or workplaces.[[4]](#endnote-4) Its introduction came weeks after the widely publicised sexual harassment and physical violence against Marie Laguerre in Paris in 2018. The legislation had been mooted for some time, and was passed in a climate of change, and amidst widespread protest against such behaviour, not least by the #MeToo movement and its French equivalent #BalanceTonPorc ("rat on your pig"). Ms Schiappa, France's gender equality minister, had argued for a French bill in 2017, saying that it was "completely necessary because at the moment street harassment is not defined in the law... We can't currently make a complaint". (BBC News 2017)

**The need for awareness raising**

Whether the UK would benefit from such specific sexual harassment legislation is debatable, not least because it already has a plethora of legislation that could potentially be used, as noted above. (see also endnote). These do not, however, specifically address gendered violence. I therefore argue that introducing such legislation could be an extra measure alongside making gender a hate crime characteristic, highlighting the gendered nature of much female victimisation. Moreover, despite existing legislation, albeit not specifically gendered, few seem aware, or willing to report such behaviour in the UK, or elsewhere. (McGuire 2013)

Indeed, in Portugal, the necessity for a measure to combat verbal abuse toward women was first proposed by the non-profit organisation UMAR (Union of Women for Alternatives and Answers), which received funding in 2010 from the Dutch government to travel around the country and raise awareness of the issue. The report noted that “… most women had been verbally assaulted on the street and also that both men and women confused sexual assault with seduction or praise.” UMAR head Maria Jose Magalhaes. “They didn’t know what assault was. There was an idea that it wasn’t serious because sexism is so ingrained in our culture.” (quoted in  [Peláez](https://www.equaltimes.org/marina-watson-pelaez) 2016)

As the discussion on the popular TV programme ‘Loose Women’ above, demonstrated, and academics such as Hilary McCollum have argued, victims do not necessarily recognise themselves as such. McCollum relates this to knowledge of the perpetrator in some cases, but I also relate this to perceptions of the act, partly due to cultural norms and expectations. McCollum links under-recognition of ‘hate crimes’ to the use of the word ‘hate’ which she argues ‘can feel too big a word, especially for crimes committed by people known to the victim.’ (McCollum 2010) The Ministry of Justice Report of 2014 similarly highlighted the difficulty police officers had in recognising disability bias crimes, including those by persons known to the victim, because of the evocative nature of the term ‘hate’. (Ministry of Justice 2014) I argue that social norms can make identification of bias difficult in some cases, not least the gendered. Hence awareness raising, not least by legislation, is necessary.

Historically and/or culturally, offences involving female victims have not been identified as demonstrating hostility or motivated by hostility, based upon gender. Indeed, religious and legal traditions often justify and legalise the right of men to control and chastise their intimate partner. Men’s violence against women (domestic, sexual, and in public) is still reinforced in many contexts and media representations, despite significant social and legal changes.

Other academics have considered gender bias and awareness of this. Reiser, for example, considers the socio-cultural norms, socialization, class and age differences as factors that may help to explain why both men and women may fail to acknowledge the potential of bias within the act committed. (Reiser 2001: Dunbar 2006) Recent research by Promundo found ‘…that young men who sexually harass come from all income levels, all educational backgrounds and all ages, but that the strongest factor in the perpetration of sexual harassment was attitudes about what it means to be a man.’ (Promundo 2018). Hegemonic masculinity may be a useful concept here, premised upon the existence of a dominant form of masculinity, and one that emphasises strength, toughmess, hereosexuality. Early criticism of the concept came from the gay liberation movement, who emphasised the oppression of men, as well as by men, linked to such gender stereotypes. (Connell et al 2005:831).

McCollum, focusing upon women, doubts that defining violence against women and girls as hate crime would help its victims access services and redress. Partly this is due to the difficulty of the term ‘hate’. (McCollum 2010) I argue that utilising ‘misogyny’ would further exacerbate any self recognition as a victim, because it is associated with ‘hatred of women’ in the eyes of many. There is no doubt that there is a need to raise awareness if gender is included as a potential bias characteristic, not least because information widely disseminated to the public often includes ‘gender’ as though it were already a protected characteristic, drawing upon equality legislation.

**Conclusion**

The existence of protected characteristics, and the extension to include gender, may help to change socio-cultural norms by acknowledging the unacceptability of such bias, although the work of Conaghan and McGuire argues for the minor role of legal discourse in achieving societal change. (Conaghan in Grabham et al 2009, 21-48, McGuire 2013). Hence I would also argue for wider publicity and greater education on these issues, although beyond the remit of this chapter to discuss.

As a representative of the criminal justice service stated:

‘... building a case based on evidence of hostility is not just about semantics. Parliament did not pass this law (Criminal Justice Act 2003) in some misguided bout of political correctness. ...The way that we prosecute sends a message. The messages we send have real consequences. The wrong message damages the confidence of ... people. The wrong approach also undermines that fundamental principle of equality before the law that all prosecutors should be spending their working lives trying to uphold.’ (Respondent in McGuire 2013)

 The ‘hate crime’ legislation is arguedby academics and legislators to contain a critical ‘symbolic’ message, saying that ‘... this behaviour is deeply criminal and has to be punished severely’ (Respondent in McGuire 2013) (s146)’... says we're going to uphold ... people's rights as free citizens in a civilised society.’ Moreover, by failing to recognise such crimes, the opportunity ‘... to condemn the prejudice and hostility of the offender is missed.’ (McGuire 2013)

 If sufficiently well promoted, legislation can send a particular message, and may encourage a change in society. Sentence enhancement is but one issue to consider, and may not be the most effective method of dealing with all such crimes. As noted, there may be a need for specific crimes for example of ‘sexual harassment’ in public, similar to France or Portugal. However, including gender as a protected characteristic for any crime would widen the protection and raise awareness more. It may encourage victims to report, and perpetrators to desist. Whilst the law does not necessarily promote a change in attitudes it would at least provide an avenue of redress. However, if a potential bias element is under recognised, being lost in and to perception, so too will the potential to effect change.

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1. Gender differs from misogyny, being defined by the Oxford dictionary as: “either of the two sexes (male and female), especially when considered with reference to social and cultural differences rather than biological ones. The term is also used more broadly to denote a range of identities that do not correspond to established ideas of male and female.” [↑](#endnote-ref-1)
2. Definition from Collins English Dictionary- the origin is Mid 17th century from Greek misos ‘hatred’ + gunē ‘woman’, extended in 2002 to include dislike of, contempt for, or ingrained prejudice against women’ [↑](#endnote-ref-2)
3. There are a range of different criminal offences . These include sexual assault and voyeurism under the Sexual Offences Act 2003, harassment and stalking under the Protection from Harassment Act 1997, and ‘revenge porn’, where the distribution of a private sexual image of someone without their consent and with the intention of causing them distress is an offence under the Criminal Justice and Courts Act 2015. The Public Order Act 1986 is also relevant legislation if a victim felt harassment, alarm or distress as a consequence of sexual harassment in public. [↑](#endnote-ref-3)
4. 1 MINISTÈRE DE LA JUSTICEParis, le3 septembre 2018France N°NOR :JUSD1823892CN° CIRC: CRIM/2018-10/H2-03.09.2018N/REF: CRIM N°2018-00014 OBJET : Présentation de la loi n°2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistesMOTS CLEFS : agression sexuelle ; atteinte sexuelle ; cour d’assises ; cyber harcèlement ; drogue du violeur ; harcèlement sexuel ; harcèlement moral ; inceste ; infractions au sein du couple ; mineurs ; non dénonciation ; omission de porter secours ; outrage sexiste ; prescription ; raids numériques ; stage de lutte contre le sexisme ; viol ; voyeurisme ARTICLES CREES OU MODIFIES : art. 7, 9-1, 21, 41-1, 41-2, 351, 351-1, 706-47, 706-53 et 706-53-7 du code de procédure pénale ; art. 131-16, 132-80, 222-8, 222-10, 222-12, 222-13, 222-22-1, 222-23, 222-24, 222-28, 222-29, 222-30, 222-30-1, 222-31, 222-31-1, 222-33, 222-33-2- 1, 222-33-2-2, 223-6, 226-3- 1, 227-25, 434-3 et 621-1 du code penal. [↑](#endnote-ref-4)