



PALGRAVE HATE STUDIES

# Violence Against Women, Hate and Law

Perspectives from  
Contemporary Scotland

Kim Barker  
Olga Jurasz

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# Palgrave Hate Studies

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Scotland

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Kim Barker  
Law School  
The Open University  
MILTON KEYNES, UK

Olga Jurasz  
Law School  
The Open University  
MILTON KEYNES, UK

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*To the late Emma Ritch—  
with thanks and feminist solidarity.*

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February 2022

KB & OJ

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# Introduction: Becoming Angry (Or Why This Book and Why Now)

Every book has a story. For many, it is arguably the story of the book's becoming which sparks more curiosity than the book itself, but it is also crucial in understanding the shape, content and story filling the pages that follow. It is no different with this book.

## The Becoming of This Book

This book is about violence against women (VAW), hate crime and law in post-Devolution Scotland. But that story is the tale that follows. The immediate story (before we get to that) is a story of becoming: becoming angry with relentless, pervasive, everyday acts of violence; becoming increasingly frustrated with the law's stagnation in addressing it and becoming terrified by the speed with which, especially during the final months of writing this book, the footnotes of the manuscript overflowed with reports of misogynistic police behaviours as well as deaths of women such as Sabina Nessa or Ashling Murphy who “just” were going about their everyday life. In some respects, this is a story of the problem with “just”: “just” women but now just(ice) for women. None of this is new for anyone involved in researching and writing about VAW, but the constant and invasive barrage of these reports, killings, and ‘announcements’ made us wonder—frequently—‘why do we bother’/‘what is *really* going

to change'. It also made us angrier whilst providing the motivation to keep going.

As such, this book is more than merely a collaborative research output (to use the despised academic 'descriptor'...). It is written by women, about women. It presents women's challenge to the law over its inaction in light of the VAW women face in everyday life and across the spaces they occupy. The categorisations and diversifications aside, the core problem of legal inaction and pervasive VAW remain. It is not enough to have glossy campaigns and promised law reform. Read it as our version of 'personal is political', if you will—it's something of a 'call to arms', but more of a provocation to 'do better'.

It is also written in spite of the challenges that have been thrown in our direction: the questioning of this research's value, the repeated querying of the 'impact' on our academic career progression ('Are you sure you want to be known for *that*?') or equally on the collaboration underpinning this research ('It may be worth writing something by yourself'; 'Is it still written with X?'). It is unlikely that similar remarks would have been encountered by other colleagues working on other topics. It's important to us, to women, and to the subject, to highlight the context in which (or, rather, in spite of which) research on VAW, especially that with a feminist angle, is situated, including this book. But there is a cost—the cost of *not* 'doing' the research, and as a result, *not* challenging the existing dialogue around VAW—and the attitudes towards not just it, but discussions of it, is greater than the cost of doing it. Women (particularly us) will not stop.

Challenges (and anger) aside, this book is built on five years of engagement with VAW in various forms and fora in Scotland. We have witnessed, as researchers, the unfolding debates and discussions, particularly in Scotland. We have submitted evidence to, and engaged with, the Scottish Cabinet. We have made our expert opinions known to the Bracadale Review, in response to the One Scotland Consultation, but also to the Justice Committee on the Hate Crime and Public Order Bill (Scotland) 2020. We met with the (then) Cabinet Secretary for Justice and the Minister for Equalities in 2019. We gave evidence to the Misogyny and Criminal Justice Working Group in 2021. While we may disagree with the direction law reform has ultimately taken, we have not come at

this from a standing start. This book tells part of that story, but also the story of VAW in Scotland.

This book also documents a story of Scotland's efforts to combat VAW and women's activism to make VAW and gender inequality a 'historical curiosity' which continuously makes all the difference. In *Living a Feminist Life*, Sara Ahmed wrote that "we have to make sense of what does not make sense. [...] In making sense of things that happen, we also draw on histories of thought and activism that precede us."<sup>1</sup> Others who came before us were instrumental in documenting Scottish women's voices on this subject—Evelyn Hunter, Dr Esther Breitenbach, Professor Fiona MacKay, to name but a few. We were fortunate to be able to draw on their expertise and work in this book whilst bringing in perspectives from our own research.

But it is also 'our voice'. It will not take long for you as the reader to (perhaps) wonder why two non-Scots wrote a book about VAW in Scotland. This book would probably not have come to fruition if not for challenges thrown in our direction. First, from Professor James Chalmers who politely made us aware of the Bracadale Review (and indirectly sent us down this path), but more recently from the late Emma Ritch (the former Executive Director of Engender) during the launch of our previous book, *Online Misogyny as Hate Crime: A Challenge for Legal Regulation* in Edinburgh in 2019. Emma, who generously took the time to read the book and speak at the launch, remarked that the "[e]ntire time I was reading this timely and important book, I wished that there was an equally robust analysis of the law done for Scotland." We accepted—eventually—that challenge, especially given Emma's unparalleled support. The challenge took on a new meaning given the growing attention to matters surrounding gender and hate crime reform (both in Scotland and in south of the border) as well as attempted developments in law and policy on VAW. In finishing this book, and the 'call to arms' we hope it sounds for Scotland, we note with great sadness that Emma will not see the outcome of the challenge she threw us, nor the analysis of the law for Scotland that it ultimately presents. We hope she would be satisfied with it.

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<sup>1</sup> Ahmed (2017, pp. 20–21).

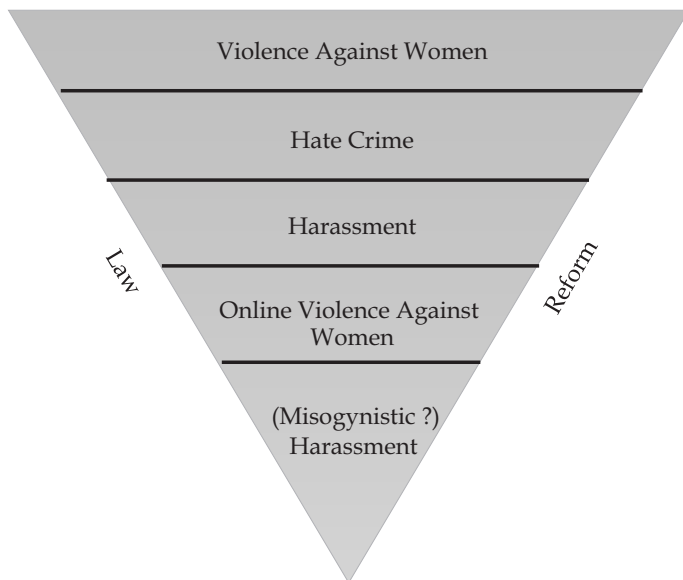
This book is ours, and the mistakes in it are ours too. While writing it we've tried to keep our voices in it, as well as presenting a reasoned legal discussion. Before it gets to a detailed discussion of hate crime and harassment, the first two chapters set the scene in Scotland. They tell the story of post-Devolution Scotland and the unfolding approach to tackling VAW. They also engage with what have historically been difficult issues. In this book, we take VAW and Scotland from pre-Devolution politics to discussions of misogynistic harassment, and beyond, with proposals for an alternative approach to harassment generally. In offering this alternative vision, we outline legislative proposals that we *hope* can offer a different society for women, and a different approach to VAW.

Our book examines the phenomenon of VAW—online and offline—and law and policy responses to it in post-Devolution Scotland. In doing so, it incorporates discussions of Scotland's contemporary efforts to address VAW in the context of hate crime, which, over the course of the past five years of so, have not only dominated public debate but also severely polarised it. We engage with the question of Scotland's legislative progressivism in the last two decades and bring the discussion to considerations of the proposed standalone offence of misogynistic harassment and the work of the Working Group on Misogyny and Criminal Justice in Scotland.

## The Structure of This Book

A cautious reader may observe that the length of chapters decreases as we progress through the book. This is reflective of the narrowing down of issues examined in the discussions that follow, whilst highlighting the breadth of topic that VAW in Scotland is (Fig. 1).

We do not approach VAW from a siloed nor isolated perspective. We address—as you will see—VAW, hate crime, online VAW (OVAW), misogyny, and harassment. In bringing together these perspectives, we embrace a more holistic discussion—it is also a discussion we had hoped to find in the existing work on VAW in Scotland. In not finding it, we've written it instead.



**Fig. 1** Pyramid of VAW in Scots Law illustrating the approach taken in this book

Our discussion starts with the exploration of the phenomenon of VAW in Chap. 1 where we analyse the relationships between VAW and concepts of misogyny and hate speech/hate crime, which emerged in the context of recent law reform of the hate crime frameworks in Scotland and in other jurisdictions of the UK. The discussion draws on a variety of influences—local, national and global—which have shaped the law, policy and actions against VAW in Scotland, including the constitutional settlement (Devolution), developments in international law and human rights, and, more recently, the rise of #MeToo. Given the focus on Scotland, it would be difficult (especially for two women lawyers!) to ignore the impact of Devolution on law and policy making in Scotland, especially post-1999. In Chap. 2, we discuss whether the post-Devolution settlement has heralded a new way of doing things and a more progressive approach for women, and their rights, in Scottish society, in Scots Law and in Scotland. In particular, we question whether the frequently claimed ‘different’ ways of doing things in Scotland reflect political rhetoric rather than legal reality.

Chapters 3 and 4 take a slightly different focus by bringing a hate crime lens to the book, exploring VAW in the context of hate crime and hate crime reform in Scotland which dominated public debate in Scotland over the course of the past five years or so. The exploration of the history of hate crime in Scotland (Chap. 3) sets the background to the (still) controversial question of whether, and if so how and to what extent, gender ought to be captured within the hate crime framework. Chapter 4 focuses exclusively on exploration of this issue, carefully and critically examining consecutive, but incremental, steps of hate crime law reform in Scotland—from the Independent Review of Hate Crime Legislation in Scotland led by Lord Bracadale, through the passage of the Hate Crime and Public Order (Scotland) Act 2021, to the ambit of the Working Group on Misogyny and Criminal Justice in Scotland led by Baroness Helena Kennedy QC and proposals to create a stand-alone offence of ‘misogynistic harassment’. Intrigued by this concept, we explore it in greater depth in Chap. 5, setting it against the history of the evolution of harassment in law, from the 1970s to the present. We question whether misogynistic harassment is a desirable avenue of addressing the harassment of women which is motivated by gender-based hate, and whether it merits anything other than praise for legislative creativity. In exploring discussions of harassment, we turn our attention to the often overlooked, but equally important, online context. Chapter 6 offers an analysis of the current provisions capable of applying to forms of OVAW in Scots Law, by examining the communications misuse offences, threatening and abusive behaviours, and other, more nuanced forms of OVAW, including image-based sexual abuse and text-based (sexual) abuse. It suggests that there is a need for an alternative approach, as well as legislation to capture OVAW in particular.

In probing these discussions, but joining together VAW, hate, and harassment, (including their online forms), difficult issues are combined. The polarisation of the debate surrounding sex/gender, especially in relation to hate crime reform, has not made this research particularly easy but challenged us to take a position—unlike the Scottish Government—on the issue. Throughout the book, we advocate for the inclusion of gender as a protected characteristic in the hate crime framework in Scotland and we view VAW, following CEDAW and the Istanbul Convention, as a



form of gender-based violence and discrimination. We provide our rationale for this approach, which also forms the basis for our recommendations for alternative law reform in Chap. 7.

As such our book contributes to several debates in history, literature, law and society. Uniquely, it combines several legal perspectives on VAW (Scottish, UK, international, post-Devolution) with discussions surrounding hate crime reform and new dimensions of VAW (online and technologically related) to propose a tangible set of recommendations for alternative law reform in these areas. It does so by engaging with substantive legal issues, some of which have dogged Scotland for decades. This book is not, cannot and should not be the last word on VAW, and Scottish legal responses to it. We may not have *the* answer, but we *do* have the discussion (and some practical recommendations for the way forward).

We have, as we said above, benefitted from the women that have come before us. We have also benefitted from the campaigns, the women's movement and women who were prepared to fight for their voice and their rights. This book is testament to those women—without them, our voices would not appear here. In the 1970s, women Reclaim(ed) the Night; in recent years, women have Reclaim(ed) These Streets and attempted to Reclaim the Internet. We pay their efforts forward and Reclaim the Debate on ending VAW in Scotland.

February 2022

KB & OJ

## Reference

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# 1

## The 'Historical Curiosity' of Violence Against Women in Scotland

### 1.1 Introduction

The marginalization of women is a process generated not only by forces inside Scotland—it is also generated by forces outside its borders. Thus, while we do need to explore how Scottish culture and society is gendered, we also need to understand how that culture has been formed in relation to other cultures, in other parts of Britain, in Europe, and throughout the world, particularly through its participation in imperialist domination. We need to understand what it shares with other cultures and how it has been shaped by these, especially by the relationship with England and the consequences of English political and cultural hegemony.<sup>1</sup> (Esther Breitenbach, Alice Brown, Fiona Myers)

Violence against women (VAW) is neither a new phenomenon nor one specific to Scotland. The discussions of law reform in Scotland (or anywhere else for that matter) require consciousness of the broader sociocultural and geopolitical contexts. The beginning of the twenty-first century was a milestone for Scotland becoming a devolved jurisdiction and

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<sup>1</sup> Breitenbach et al. (1998, pp. 47–48).

substantively progressing in building its vision for a fair and equal society. However, whilst these developments have a specific focus on Scotland, they have been affected by broader societal problems, phenomena and political changes. The collective ripple effects of these are not to be underestimated and go to show the interconnectedness between global and local spaces of activism, protests and action, specifically against VAW.

Despite decades of women's activism in Scotland (and worldwide) to raise awareness of, and to combat, VAW, it continues to thrive, emerging in new forms, new fora and in response to global phenomena. The sheer volume of VAW, its contexts, types and the spaces in which it is occurring, is not only overwhelming but also supports the well-documented point about its widespread, disproportionate and everyday nature. It is therefore not an exaggeration to say that women experience violence *everywhere*: in the home, at work, in the family, in healthcare, in the intimate partner context, on the streets and online. The types of violence also differ from verbal to written, physical to psychological, sexual to economic, 'private' to 'public' and/or structural.

The numbers alone are concerning, even more so given the generally common underreporting of VAW across the world. For example, it is estimated that globally 736 million (and up to 852 million) women have been subjected to either or both physical and/or sexual violence at least once since the age of 15,<sup>2</sup> and 83 million to 102 million women across the EU have experienced sexual harassment since the age of 15.<sup>3</sup> In 2020–21 in Scotland, the police recorded 65,251 incidents of domestic abuse where "80% of the incidents had a female victim and a male accused,"<sup>4</sup> and in 2019–20, 2343 cases of rape and attempted rape were reported.<sup>5</sup> The violence is also experienced by girls, both online and offline: 58% of 14,000 girls surveyed worldwide have been harassed online on social media platforms,<sup>6</sup> and 50% said that they experience more online harassment than street harassment.<sup>7</sup>

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<sup>2</sup>WHO (2021, p. xvi).

<sup>3</sup>European Union Agency for Fundamental Rights (2014, p. 95).

<sup>4</sup>Scottish Government (2021a).

<sup>5</sup>Rape Crisis Scotland (2021).

<sup>6</sup>Plan International (2020, p. 16).

<sup>7</sup>Ibid., p. 38.

In 2021, at the height of the COVID-19 pandemic, the UN Secretary General António Guterres reflected on the widespread and significant detrimental impact of the pandemic on women by calling it “a crisis with a woman’s face.”<sup>8</sup> This alarming rise in the frequency of VAW has long-term individual and societal impacts: it not only contributes to a significant backlash against women’s rights<sup>9</sup> but also slows down (admittedly already stagnated) progress and any hard-won gains in the global fight against VAW. But does it truly take a global pandemic to conclude this? Or is it rather the lived, everyday experience of a range of violent acts—physical, sexual, psychological, verbal, textual, on- and offline, in conflict or in ‘peacetime’—being disproportionately directed at and endured by women that is (or at least, should be) sufficiently serious to warrant global concern and prioritise action?

The experience of the COVID-19 pandemic has further highlighted the commonplace occurrence of VAW. The rapidly rising rates of, particularly, domestic violence and online and technologically facilitated VAW,<sup>10</sup> both globally and domestically, have led the UN to call VAW a “shadow pandemic.”<sup>11</sup> In the UK alone, the 24-hour National Domestic Abuse Helpline, run by Refuge, reported a 65% increase in logged reports of domestic violence between April and June 2020, with a further 700% increase in visits to their Helpline website.<sup>12</sup> A similar pattern has been recorded in Scotland,<sup>13</sup> across Europe<sup>14</sup> and worldwide too.<sup>15</sup> Furthermore, the pandemic has demonstrated how laws can be used to legitimise VAW and to oppress women, especially in times of crisis.<sup>16</sup> Uniquely, the COVID-19 pandemic also highlighted a shared concern about VAW across all four nations of the UK, albeit showing somewhat divergent

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<sup>8</sup> Guterres (2021a).

<sup>9</sup> Barker and Jurasz (2023, forthcoming).

<sup>10</sup> Barker and Jurasz (2020d); Price (2020); World Wide Web Foundation (2020).

<sup>11</sup> UN Women (2020).

<sup>12</sup> Office for National Statistics (2020).

<sup>13</sup> BBC News (2020); Scottish Government (2020c); Crown Office & Prosecutor Fiscal Service (2021).

<sup>14</sup> Gunka and Snitsar (2020).

<sup>15</sup> UN Women (n.d.: <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19>).

<sup>16</sup> Barker and Jurasz (2023, forthcoming).

approaches to addressing VAW, and women's rights generally, in unprecedented times. This contrast was particularly evident between England and Scotland,<sup>17</sup> with the latter generally being more responsive to the challenges facing women—be it in the context of reproductive health<sup>18</sup> or providing financial support for services for women subjected to VAW.<sup>19</sup>

According to the United Nations Population Fund,<sup>20</sup> this is not a short-term challenge given that the pandemic is likely to result in a one-third reduction in the progress towards ending gender-based violence<sup>21</sup> (GBV) by 2030—a target set by the UN Sustainable Development Goals agenda—with a predicted additional 15 million cases involving GBV globally every three months of lockdown. The pandemic-related rises in GBV and VAW also come at a significant cost. For example, in July 2021, the Scottish Government allocated an additional £5 million to frontline services for women in Scotland affected by GBV,<sup>22</sup> on top of the announcement of the Delivering Equally Safe Fund to tackle VAW in 2020.<sup>23</sup> The personal costs of harms suffered by women subjected to violence, together with the broader societal harms<sup>24</sup> and costs, significantly exceed the available resources, but especially budgets.<sup>25</sup>

This pessimistic status quo is by no means a reflection on women's activism to break the continuum of VAW—rather, it is a painful reminder of how deeply entrenched VAW is in the fabric of society and how the

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<sup>17</sup> Ibid.

<sup>18</sup> Scottish Government (2020a).

<sup>19</sup> Scottish Government (2020d).

<sup>20</sup> United Nations Population Fund (2020).

<sup>21</sup> Throughout this chapter, terms gender-based violence and violence against women are used. Violence against women is understood here as a form of gender-based violence, as categorised by the CEDAW Committee and the Council of Europe convention on preventing and combating violence against women and domestic violence 2011: see Council of Europe Convention on preventing and combating violence against women and domestic violence (opened for signature 11 May 2011, entered into force 1 August 2014) CETS 210 (Istanbul Convention) Preamble and art 3(a). For clarification of terms used in this book, please see *The Introduction*.

<sup>22</sup> Scottish Government (2021e).

<sup>23</sup> Scottish Government (2020b).

<sup>24</sup> Barker and Jurasz (2021d, pp. 256–259).

<sup>25</sup> Women's Aid estimated that a minimum of £393 million annually is required to fund domestic abuse services in England alone. This figure does not capture the cost of services needed to assist women who have been subjected to other forms of VAW. See Women's Aid (2019).

forces of sexism, gender stereotypes, patriarchy and misogyny continuously fuel its existence on a daily basis. It is also a reflection on how crucial integrated law, social and economic policy and gender-responsive budgeting are to tackling VAW at local, national, regional and international levels. Importantly, given the pervasiveness of VAW, Scotland cannot tackle it alone.

The integration of VAW into law and policy responses is now common, although questions remain about their design, cohesion and effectiveness. Whilst VAW has always been a significant social problem, its visibility and recognition within law and policy is relatively recent.<sup>26</sup>

## 1.2 Violence Against Women: Law and Policy

The recognition of VAW as a legal and human rights issue in the 1990s, giving rise to State obligations to prevent, combat and remedy such acts, started a seismic shift in relation to how society approached VAW. The emergence of a human rights-based approach to tackling VAW was the result of decades of international campaigning for women's rights and calls to end VAW which continue to this day. The defining moment for the anti-VAW and women's rights movements was the 1995 Fourth World Conference on Women in Beijing where 189 countries unanimously adopted *The Beijing Declaration and the Platform for Action*, which set strategic objectives and actions for the achievement of gender equality and the advancement of women in 12 key areas, including the commitment to tackle VAW.<sup>27</sup> It provided a universal global framework against which the progress in the 12 areas can be monitored and reported upon.<sup>28</sup> The significance of *Beijing Declaration* and its influence on shaping Scotland's policy responses towards VAW has grown in post-Devolution

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<sup>26</sup> See, for example, Crown Prosecution Service (2012).

<sup>27</sup> Whilst *Beijing Declaration and Programme for Action* was crucial in making a global commitment to tackle VAW, it focused on a number of areas which were – and continue to be – of significant importance and concern to women, including women and the environment, women and the economy, women and the media, the girl child.

<sup>28</sup> See, for example, Engender (2015).

Scotland and is further evidenced by the subsequent reliance on and commitment to its standards.<sup>29</sup>

Since Devolution, not only have Scotland's commitments to international standards concerning VAW become more prominent, but tackling VAW in Scotland has become an important feature of social policy, backed by governmental funding and supported by successive Scottish Governments.<sup>30</sup> Published in 2014, the original *Equally Safe* strategy is a blueprint for Scotland's plan to combat VAW "once and for all."<sup>31</sup> It views VAW as having "no place in our vision for a safe, strong, successful Scotland."<sup>32</sup> Scotland has also been leading the way in implementing initiatives to help tackle VAW—especially where law is concerned. This has included putting forward progressive legislative proposals (e.g., to create an offence of misogynistic harassment, discussed in Chap. 5) and implementing modern laws—such as the Domestic Abuse (Scotland) Act 2018 (asp 5)—somewhat countering the well-established patterns of law generally lagging behind the recognition of women's experiences of violence.<sup>33</sup> The success of the Scottish *Equally Safe* strategy has also had clear impact beyond Scotland, with Northern Ireland proposing to develop and introduce an Equally Safe strategy to tackle violence against women and girls "as an Executive priority."<sup>34</sup>

Despite these clear areas of legislative progressivism, the law and policy responses to VAW in Scotland have been inherently affected by the broader sectoral, societal and attitudinal problems. The UK-wide crisis of the loss of public/women's confidence in the police protecting women from violence and responding to reports of VAW has deepened. The kidnapping, rape and murder of Sarah Everard by the police officer Wayne Couzens<sup>35</sup> is just one—high-profile—example. Other debacles damaging

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<sup>29</sup> UK Government Equalities Office and UN Women (2020).

<sup>30</sup> *Ibid.*, p. 13.

<sup>31</sup> Scottish Government and COSLA (2014, p. 48).

<sup>32</sup> *Ibid.*, p. 5.

<sup>33</sup> This point has been made in late 1980s by Liz Kelly and still applies today, especially in relation to legislating on contemporary forms of violence, such as online and technologically facilitated VAW. See Kelly (1988, p. 74).

<sup>34</sup> Department of Health, Department of Justice, and The Executive Office (2022).

<sup>35</sup> Dodd and Siddique (2021).

women's trust in the police include investigations into the inappropriate use of social media by some police officers, including contacting victims of crime for sexual activity<sup>36</sup> and sharing grossly offensive and misogynistic messages on WhatsApp groups,<sup>37</sup> resulting in a wave of dismissals;<sup>38</sup> the use of force by Metropolitan Police against women protesting against VAW while paying tribute at Sarah Everard's vigil;<sup>39</sup> and the sexist, derogatory and violent treatment of Dr Konstancja Duff;<sup>40</sup> these are only a few contemporary examples demonstrating police attitudes and institution-alised VAW. Police Scotland has also been criticised for problematic attitudes towards sexual violence,<sup>41</sup> despite being praised for the 'Don't Be That Guy' campaign tackling sexual violence.<sup>42</sup> Concerns have also been raised in relation to the sexist culture in Scotland's armed police, following express recognition of it by the Employment Tribunal in *Malone v. The Chief Constable of the Police Service of Scotland*.<sup>43</sup> Issues of discriminatory attitudes amongst Police Scotland and concerns over the level of their awareness of the experiences of women and together with the needs of specific groups have been highlighted as a barrier to reporting hate crime.<sup>44</sup> Specifically, the reported existence of homophobia, racism and misogyny within Police Scotland has undermined public confidence in, and the credibility of, processes for reporting hate crime.<sup>45</sup> Collectively, this undermines Scotland's other work in tackling VAW, especially amidst claims for progressivism beyond modernising legislation. The mixed messaging resulting from the clash between public commitments to tackling VAW by Police Scotland (for example, the 'Don't Be That Guy' campaign) and the pervasive discriminatory attitudes and practices (such as

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<sup>36</sup>Independent Office for Police Conduct (2021).

<sup>37</sup>Hamilton (2021).

<sup>38</sup>Dodd (2021); Priestley (2021).

<sup>39</sup>Graham-Harrison (2021).

<sup>40</sup>Gayle (2022).

<sup>41</sup>Bussey (2021).

<sup>42</sup>Mackie (2021).

<sup>43</sup>Judgment of the Employment Tribunal (Edinburgh) (Case No: 4112618/18, 4 October 2021).

<sup>44</sup>HM Inspectorate of Constabulary in Scotland (2021, p. 49).

<sup>45</sup>Ibid., p. 59.



the evident lack of concern for women's public safety during COP26 in Glasgow in November 2021)<sup>46</sup> further reinforce this point. Importantly, the juxtaposition of these attitudes puts in question whether Police Scotland can legitimately claim to have any commitment to, or a progressive approach towards, tackling VAW in Scotland.

Whilst these issues in policing VAW are not new,<sup>47</sup> their implications are significant. These institutionalised discriminatory attitudes towards women, the disbelief in women's experiences of violence and, importantly, the law, its enforcement and the criminal justice system not taking action against VAW effectively, put women's lives in jeopardy. This is especially so given the long history of associating VAW with a socially constructed private/feminine sphere (and therefore outside the scope of legal regulation), rather than public/masculine sphere,<sup>48</sup> which has stood as a barrier to women reporting violence or, even when reported, legal action being taken against the perpetrators. Moreover, it supports the existence and operation of a system whereby the law and institutions of the justice system neither universally nor effectively protect women from violence, but in and of itself reinforce it. This relationship between law, power and violence is neither particular to Scotland nor to VAW. Rather, it is a relationship of a structural nature that crosses geopolitical and cultural boundaries, as illustrated by the images of the police using force against women at Sarah Everard's vigil in London, Black Lives Matter protests or during the Women's Strike in Poland. More crucially, it raises questions about the suitability and even the ability of the law—especially criminal law<sup>49</sup>—to work for women given the deeply entrenched biases of the justice system and its actors, which are reflected in the failure to conceptualise, prosecute, punish and redress the harms suffered by women and the ignorance of their experiences.<sup>50</sup>

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<sup>46</sup> Grant (2021).

<sup>47</sup> See, for example, Donaldson (2020).

<sup>48</sup> Boyd (1997); Chinkin (1999).

<sup>49</sup> See, for example: Bibbings and Nicolson (2000); Kotiswaran (2014); Cowan (2019).

<sup>50</sup> Barker and Jurasz (2021c, p. 795).

As the Scottish poet Tom Leonard<sup>51</sup> said:

*And their judges spoke with one dialect,  
But the condemned spoke with many voices.*

*And the prisons were full of many voices,  
But never the dialect of the judges.*

*And the judges said:  
"No one is above the Law."*

Given the long history of law's gender bias and the marginalisation of women's voices and their experiences, it is hardly surprising that women's trust in the justice system and in the police, especially following Sarah Everard's murder, is rapidly declining.<sup>52</sup> However, the rise of the human rights-based approach to VAW, especially the articulation of due diligence obligations with respect to combatting VAW (discussed in Sect. 1.1.2.1), helped clarify the scope of positive duties to protect women from violence and establish accountability where these duties are not met—including by the police force. For example, the UK Supreme Court clarified in *Commissioner of Police of the Metropolis (Appellant) v. DSD and Another (Respondents)*,<sup>53</sup> a case involving the 'black cab rapist,' John Worboys, that the police have a positive duty under Article 3 of the Human Rights Act 1998 (prohibition of torture or inhuman or degrading treatment or punishment) to investigate crimes which involve serious violence to the individual—here, allegations of rape and sexual assault. Furthermore, the judgement sums up a number of structural problems with regard to policing of VAW: institutional disregard for written policies concerning recognising and dealing with cases of VAW (here, drug-induced rape), failure to treat women's/claimants' complaints with sufficient gravity and care and internal/institutional pressure to write off certain types of cases involving VAW.<sup>54</sup>

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<sup>51</sup> Leonard (1995, p. 17).

<sup>52</sup> End Violence Against Women (2021).

<sup>53</sup> [2018] UKSC 11.

<sup>54</sup> Ibid., para. 140.

These factors combine to contribute to the legitimisation of VAW, which further reinforces the created hierarchies of VAW (and, what follows, hierarchies of harm)<sup>55</sup> which prioritise certain acts of VAW over others or attribute it a higher degree of importance. This can be observed not only in how the law is applied, how women are treated by the criminal justice systems and the manner in which reported cases of VAW are handled, but also within the legislative process. The manner and time efficiency with which laws concerning VAW are created and enter into force is in itself reflective of aforementioned hierarchies. For instance, the legislative expediency of incorporating image-based sexual abuse into the law across the UK<sup>56</sup> compared with the lethargy of addressing online text-based abuse<sup>57</sup> is illustrative of this dynamic.<sup>58</sup> This is despite the hypervisibility of text-based abuse, as well as not dissimilar harms (online and offline) associated with both image-based and non-image-based abuse,<sup>59</sup> including cultural harms,<sup>60</sup> emotional distress, violation of privacy and reputational harms. The legislative dualism between these two forms of online and technologically facilitated abuse has a real and tangible impact on women who are subjected to text-based abuse, leaving them without appropriate and effective avenues of redress. Furthermore, such legislative gaps make women and their experiences of text-based (sexual) abuse invisible within the legal system (or, the ‘formal’ record), contributing to the erasure of the full narrative of online violence against women (OAW)<sup>61</sup> from the legal system and normalisation of such abusive behaviours.<sup>62</sup>

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<sup>55</sup> Barker and Jurasz (2021d, p. 251).

<sup>56</sup> England and Wales: Criminal Justice and Courts Act 2015, s. 33. Scotland: Abusive Behaviour and Sexual Harm Act 2016, s. 2 (asp 22). Northern Ireland: Justice Act (Northern Ireland) 2016, s. 51.

<sup>57</sup> Barker and Jurasz (2022, forthcoming).

<sup>58</sup> Barker and Jurasz (2021d, p. 251).

<sup>59</sup> For a comprehensive overview of harms arising in relation to text-based (sexual abuse), see Barker and Jurasz (2021d, pp. 256–258).

<sup>60</sup> McGlynn and Rackley (2017).

<sup>61</sup> For discussion of OAW, see Chap. 6.

<sup>62</sup> Barker and Jurasz (2021d, p. 251).

## 1.2.1 Violence Against Women: What's in a Name?

In general, VAW is defined differently amongst law and policy documents as well as across various disciplines. More contemporary definitions of VAW—especially those that draw on international law/international human rights approaches to VAW—tend to capture it as gender-based, occurring in private and public life, and focus on a number of types and impacts of such violence, beyond acts sexual in nature and those associated with women's physicality. For example, the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention),<sup>63</sup> which is generally acknowledged as a modern and progressive treaty on VAW and domestic violence,<sup>64</sup> defines 'violence against women' as

a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>65</sup>

As such, it draws heavily on the two early definitions of VAW in international law, which pre-date Devolution in Scotland—namely the definition of VAW in General Recommendation 19 of the Committee on Elimination of All Forms of Discrimination Against Women (CEDAW Committee) that captures VAW as gender-based violence and “a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men,”<sup>66</sup> as well as Article 1 of the Declaration on the Elimination of Violence Against Women:

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

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<sup>63</sup>Council of Europe Convention on preventing and combating violence against women and domestic violence 2011, Council of Europe Treaty Series—No. 210.

<sup>64</sup>Jurasz (2015).

<sup>65</sup>Istanbul Convention, art. 3(a).

<sup>66</sup>Committee on the Elimination of Discrimination against Women (1992, para. 1).

threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>67</sup>

Depending on the disciplinary as well as sectoral focus, definitions of VAW are likely to further vary. Whilst they remain generally focused on the gender-based nature of violence and underlying human rights aspects, their focus, typology and emphasis may fall on different aspects of the problem. For instance, Public Health Scotland, whilst focusing on the gender-based and human rights aspects of VAW, draws attention to gender inequality as a root cause of VAW as well as multiple risk factors (for example, financial dependency, insecure immigration, poverty) which exacerbate the likelihood of experiencing such violence.<sup>68</sup>

The conceptually broader definitions of VAW engage not only with its typology but also with the root causes, such as gender inequality, gender stereotypes or structural violence.<sup>69</sup> The *Equally Safe* definition of VAW reflects such an approach by focusing on the social angle especially, viewing it as a form of violence that is rooted in social norms, structures and unequal power relations between men and women:

Gender based violence is a function of gender inequality, and an abuse of male power and privilege. It takes the form of actions that result in physical, sexual and psychological harm or suffering to women and children, or affront to their human dignity, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. It is men who predominantly carry out such violence, and women who are predominantly the victims of such violence. By referring to violence as “gender based” this definition highlights the need to understand violence within the context of women’s and girl’s subordinate status in society. Such violence cannot be understood, therefore, in isolation from the norms, social structure and gender roles within the community, which greatly influence women’s vulnerability to violence.<sup>70</sup>

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<sup>67</sup> Declaration on the Elimination of Violence against Women, UNGA Res 48/104 (20 December 1993), art 1; reaffirmed by the UN General Assembly in the 2006 resolution on violence against women: Intensification of efforts to eliminate all forms of violence against women, Res 61/143 (19 December 2006) UN Doc. A/RES/61/143, para. 3.

<sup>68</sup> Public Health Scotland (2021).

<sup>69</sup> Galtung (1969).

<sup>70</sup> Scottish Government and COSLA (2018, p. 10), updated from 2016.

*Equally Safe* provides a positive example of a progressive definition of VAW not least because legal and policy definitions relatively rarely engage with its structural and root causes. At an international level, the CEDAW Committee acknowledged the central role of prejudice, patriarchal attitudes<sup>71</sup> and gender stereotypes in furthering VAW and as its root causes.<sup>72</sup> These practices, if unaddressed, reinforce and perpetuate interconnected cycles of discrimination, inequality and violence which “is a critical obstacle to the achievement of substantive equality between women and men and to the enjoyment by women of their human rights and fundamental freedoms.”<sup>73</sup>

Despite being increasingly debated as a factor fuelling violence and VAW specifically,<sup>74</sup> misogyny does not generally feature as a root cause in legal and policy definitions of VAW (discussed at 1.2.2.). Writing about domestic violence in India, Nigam observes that patriarchy and misogyny are not only interconnected but also rooted in the “old practices which facilitated patriarchy to reign [...] despite the constitutional guarantees of equality and justice.”<sup>75</sup> This is accompanied and strengthened by the various portrayals of misogyny embodied in “privileges; discrimination; sexual assaults; belittling of women, commodification and objectification of women; and denial of basic rights to women, including suppression of their right to survive, and their right to life.”<sup>76</sup> In contrast, Kelly notes that whilst misogyny exists, it does not provide “an adequate explanation or theoretical framework for understanding *all* violence against women, especially when we examine the intersections with race/ethnicity, age, disability and sexuality.”<sup>77</sup>

VAW is both a cause and an effect of gender inequality, frequently reinforced by discriminatory social norms and attitudes, gender stereotypes, discriminatory laws and institutionalised discrimination and

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<sup>71</sup> Committee on the Elimination of Discrimination against Women (2017, para. 30(a)).

<sup>72</sup> *Ibid.*, para. 26.

<sup>73</sup> *Ibid.*, para. 10.

<sup>74</sup> For example, the link between misogyny and violence has been raised in a response to the Plymouth shootings in 2021, see Rawlinson (2021).

<sup>75</sup> Nigam (2021, p. 4).

<sup>76</sup> *Ibid.*

<sup>77</sup> Kelly (n.d.: <https://www.troubleandstrife.org/new-articles/the-trouble-with-hate/>).