



Law Society  
of Scotland

# Consultation Response

Scottish Government: Strengthening protection from Female Genital Mutilation (FGM)

4 January 2019



## Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee and Family Law sub-committee welcome the opportunity to consider and respond to the Scottish Government's consultation: Strengthening protection from Female Genital Mutilation (FGM) (consultation). The committees have the following comments to put forward for consideration.

## General

The practice of FGM is unacceptable in Scotland. FGM is a significant issue and is recognised internationally as a violation of the human rights of girls and women and a form of discrimination against women. It is nearly always carried out on minors and is a violation of the rights of children<sup>1</sup>.

The advantage of any further legislation (which is part of the reasoning lying behind this consultation) would be to indicate that the Scottish Government is committed to taking issues of FGM seriously and to make its reporting easier as required under Article 3 of the European Convention on Human Rights (prohibition of inhuman or degrading treatment or punishment). However, it is necessary to make relevant evidence available to underline how significant the issues of FGM are in Scotland when considering a number of the consultation's questions.

We fully agree that there is an obligation to support women and children who are at risk so that those promoting or seeking to be involved in such practices can be held accountable. Those who are affected by FGM are some of the most vulnerable in society. There may be cultural or practical reasons why they do not know or trust the authorities or those with whom they come into contact. Their families may well be

<sup>1</sup> <http://www.scotland.police.uk/whats-happening/campaigns/2015/female-genital-mutilation>

complicit in the commission of FGM and may not have English as a first language and/or are foreign nationals unfamiliar with whom or where to report. These all represent significant barriers to reporting.

All organisations and agencies who become involved with those that may be or are the victims of FGM need to encourage reporting and to provide support for what takes place thereafter. Enhancing awareness of FGM and the practices affecting those living in Scotland is crucial. When considering what awareness means in this context, we would suggest that it would involve what practices FGM includes, who is involved in perpetrating FGM and how and where such concerns should be reported.

The main Scottish legislation regarding FGM is the Female Genital Mutilation (Scotland) Act 2005 (2005 Act). The Serious Crime Act 2015 (2015 Act) is UK legislation where currently, only section 70 of that Act applies to Scotland.

One of the purposes of this consultation is to consider whether Scotland requires to implement additional measures reflecting those contained in sections 71-75 of the 2015 Act, as such measures currently apply only to England and Wales. Presumably, for these sections to apply, this would require primary legislation.

It is important to remember that there are “no quick fixes to tackling FGM” since it is a “complex and hidden issue”<sup>2</sup> which requires multi-layered solutions. It is international in its scope as recently; the US has faced issues on banning FGM as being unconstitutional<sup>3</sup>.

Scotland’s National Action Plan to Prevent and Eradicate Female Genital Mutilation<sup>4</sup> was published in February 2016. It sets out a number of actions for the Scottish Government to consider including: -

- Strengthening the law to extend protection to those at risk and to sanction perpetrators

We would urge that before extending any legislation to create new criminal offences in Scotland, there should be a need to demonstrate that these provisions are actually required. That means that there is:

- a need for such conduct (that can be identified or categorised as FGM) to be criminalised
- the existing legislation is not sufficient or there are any gaps
- the creation of criminal offences is required.

We recognise that there may well be a need for legislation to bring in civil measures to give greater support to victims when required to give evidence and in creating new types of orders as outlined in Question 5.

The consultation mentions that there was a commitment to liaise with the UK Government to consider the efficacy of the 2015 Act. Presumably, although the consultation does not specifically state this, efficacy

<sup>2</sup> <http://www.gov.scot/publications/2017/8829>

<sup>3</sup> <https://khn.org/morning-breakout/congress-lacks-authority-to-enforce-decades-old-genital-mutilation-law-judge-rules/> November 2018

<sup>4</sup> <http://www.gov.scot/Resource/0049/00493752.pdf>

means how these additional provisions as set out in sections 71-75 of the 2015 Act are working. It would be interesting for any relevant information to have been provided on exactly how often any of these sections have been utilised in successful prosecutions in England and Wales since these provisions were commenced. Any further information on efficacy would have been appropriate to consider as well in relation to the consultation.

The Report on Scotland's National Action Plan to prevent and eradicate FGM: Year One Report<sup>5</sup> refers to a "long-term goal" being when:

"Advice has been sent to the Cabinet Secretary for Communities, Social Security and Equalities offering advice as to the timing and scope of any additional potential legislation on FGM and Harmful Traditional Practices".

Exactly what a long-term goal in this context means and what the advice provided comprises is not known. That again would have been helpful to provide in relation to this consultation, especially as we note that the consultation refers to the fact that no FGM criminal charges have been brought in Scotland. What exactly that means is unclear.

We assume that it means that there have been no prosecutions but not necessarily that there have been no criminal investigations or reports made to Crown Office and Procurator Fiscal Service. We refer to this issue under Question 15 of the consultation where we identify that there is a need for statistics and research to be collated and published.

Exactly why there have been no charges brought in Scotland is no doubt complex. It is a disadvantage when considering the role and efficacy of existing legislation or considering the creation of any new criminal offences to not be able to test whether the existing legislation is sufficient for the purposes of Scotland meantime.

However, as we refer to below, we are concerned to ensure that FGM is dealt with effectively in Scotland and that Scotland should not be out of line with practices or support available in England and Wales.

We reply to the consultation questions as follows:

### **Question 1: Do you believe that a provision for anonymity for victims of FGM should be introduced? Please explain your answer.**

What this question is aimed at is making it easier for the Scottish criminal justice system to support those victims of FGM to come forward at the outset, to give evidence when required in court and to be supported

<sup>5</sup> <https://www.gov.scot/publications/scotlands-national-action-plan-prevent-eradicate-female-genital-mutilation-fgm/pages/5/>

during the adversarial trial process. Securing such support for victims of FGM is vital but there needs to be equality of arms respected where victims require to give their account and for the defence to challenge such evidence where and if relevant. There are different stages in the court process that should be considered:

#### Evidence and trial:

Openness and transparency are vital to promoting confidence in a fair system of justice. The majority of criminal cases are therefore conducted in open courts. Where possible, that practice should be adopted and is to be preferred.

However, there are a number of detailed statutory provisions that are used to protect people that are due to appear in court as witnesses. There is no reason to suppose that special measures could and would not be deployed successfully for the victims of FGM. These provisions are likely to be extended on the assumption that the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill<sup>6</sup> is passed which will in due course apply potentially to victims of FGM who would also be able to give evidence by commission.

#### Reporting of cases:

In order to deter those who commit FGM offences and to heighten the public's awareness of such crimes, cases need to be reported, especially in relation to the sanctions (sentence) that are applied. That educates the public on the FGM issue, its extent, and the potential consequences for those who become involved or support such practices. When those convicted of offending are named and their actions and sentences are publicised, it can act as a future deterrence for those who may become involved.

In England and Wales, Schedule 1 of the Female Genital Mutilation Act 2003<sup>7</sup> (2003 Act) deals with anonymity for victims of FGM. Subparagraph (2) of Schedule 1 states:

“No matter likely to lead members of the public to identify the person, as the person against whom the offence is alleged to have been committed, may be included in any publication during the person's lifetime”.

There may well be a benefit when dealing with FGM to set out that the victim should remain anonymous. By making this a statutory assumption, this removes any uncertainty from the issue and provides the complainer, as in England and Wales, with certainty and those who breach with clear penalties. That

<sup>6</sup> <http://www.parliament.scot/parliamentarybusiness/Bills/108702.aspx>

<sup>7</sup> Inserted by s 71 of the 2015 Act

avoids any temptation for those who might seek to publish from pushing out the boundaries and testing the position. Once the identity of the victim of FGM is out in the media, it cannot be withdrawn easily.

Schedule 1 of the 2003 Act also allows for exceptions if the conduct of a person's defence at a trial of an FGM offence would be substantially prejudiced if the direction regarding anonymity was not given. There is then no disadvantage to the defence in any circumstances where the name needs to be disclosed as given the nature of FGM, the victim is going to be known to the accused.

The consultation indicates that FGM offences have similar issues as those that arise from the reporting of serious sexual offences. We agree and understand that the names of victims in sexual offences are not generally reported. However, it does happen on occasion. There just needs to be one breach of the convention which will then have significant consequences for the community in others seeking to report incidences of FGM.

The consultation considers how anonymity is secured at present. It indicates that the circumstances of publication of victims of FGM is covered adequately by the statutory measures set out in sections 271N-271Z of the Criminal Procedure (Scotland) Act 1995 (1995 Act). These provisions seek to protect the identities of those involved in a case. Under section 271 R (3) of the 1995 Act conditions are set out which require to be satisfied before such an order is made which include Condition A that the proposed order is necessary—

(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or

(b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities or otherwise).

In cases of FGM, it is unlikely that sub-paragraph (a) will necessarily be satisfied so reliance will require to be made on sub-paragraph (b). Is publication necessarily going to cause real harm to the public interest?

Surely, the purpose of considering further legislation relates to encouraging the reporting of FGM. We consider that on balance anonymity should support the victim of FGM. We need to have confidence that the victims of FGM will not be publicly humiliated. The trial can be reported as can the result. Just not the victim's name. If we seek to rely on these measures for obtaining a witness anonymity order, we need to be confident that they will operate effectively and if they need to be applied for, they will be granted. Care should be taken to ensure that there are no unnecessary barriers to obtaining a witness anonymity order. It may be appropriate for consideration to making them automatic for victims of FGM.

Similarly, the court itself under section 47 of the 1995 Act deals with restrictions on press reporting. Child victims will be protected in any event by the restrictions in the 1995 Act so the concerns lie with adult victims.

**Question 2: If anonymity is not introduced and having regard to existing convention and powers of the courts, what further steps do you consider could be taken to ensure protection of victims and complainers of FGM in the justice system?**

Anonymity can potentially be obtained through invoking the measures outlined in our answer to Question 1. However, we have concerns that the current statutory provisions may not be adequate to ensure anonymity for all victims of FGM. FGM should not necessarily be equated with sexual offence since it arises as a result of procedures where the female genitals are deliberately cut, injured or changed, but where there's no medical reason for this to be done<sup>8</sup>.

**Question 3: Do you think that Scotland should introduce an offence so that individuals can be prosecuted if they fail to protect a person they have caring responsibilities for being subject to FGM? Please explain your answer.**

We agree that there would be a number of challenges in introducing a specific offence.

The consultation highlights the difference between active and passive actions and the difficulty they can present in prosecution. Before introducing any new offence, there is a need to demonstrate the mischief and the scale of the problem which exists and requires to be addressed by prosecution. We would suggest that there needs to be evidence produced on how exactly such an offence would operate.

**Question 4:**

The consultation paper did not include a Question 4.

**Question 5: Do you think that the Scottish Government should introduce Female Genital Mutilation Protection Orders? Please explain your answer.**

Yes. We agree that the creation of such orders would help women and girls at risk. There seems every reason to follow the approach in England and Wales where such orders do currently exist. We also consider that there should be consistency of practice across the UK as FGM does not respect jurisdictional boundaries.

Women and girls in Scotland should have access to the same type of protections as exist elsewhere.

<sup>8</sup> <https://www.nhs.uk/conditions/female-genital-mutilation-fgm/>

We support increasing the tools available to deal with FGM. The model of the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 (2011 Act) provides an appropriate model to follow.

There would be, as the consultation recognises, a need for guidance to be published to support such applications.

Legal aid would be required to ensure access to justice in respect of applications for such orders.

### **Question 6: What do you think the penalty should be for breach of a FGMPO?**

We support that the breach of any order being treated in a similar fashion to that of those orders obtained under the 2011 Act. That includes the penalties being broadly similar.

We would observe that there are no sentencing guidelines in Scotland that would deal with the penalties for the breach of such orders.

When guidance is published, it should be publicly available. We would emphasise that the scope of the penalties has to reflect the seriousness of the offence. In setting out penalties in statutory form, the courts are able to take account of that in understanding how seriously such offences are to be viewed<sup>9</sup> though each sentence will need to reflect the facts and circumstances of the relevant case.

### **Question 7: Do you think that the Scottish Government should introduce a duty to notify police of FGM?**

There are a range of existing mechanisms by which the circumstances of FGM should be notified to the police by various agencies in Scotland. That includes child protection procedures for those under 16. These seem adequate at present.

Though we can understand considering that a duty could be imposed, it is more practical to ensure that guidance is issued to make agencies aware of what they should report and to whom. This is particularly important given the sensitivity that FGM practices will involve.

<sup>9</sup> Paragraph 3 of *James Shanks v Procurator Fiscal, Glasgow* [2018] SAC (Crim) 18

"We note the statutory offence introduced by .... provides for a maximum sentence of 12 months imprisonment on summary complaint or up to 5 years imprisonment if prosecuted on an indictment. It is therefore clear that Parliament views these offences extremely seriously."

If the Scottish Government is minded to consider the introduction of a duty in line with the practices in England and Wales, much would depend on the exact detail of what the scope of such a duty would entail, on whom it would be imposed and what actions would result from any established failure to report. We are not aware of evidence that there are currently significant failures to report arising where there are circumstances of FGM.

What is more important is to ensure awareness of FGM to ensure that the appropriate reporting mechanisms and support are deployed.

We are aware that there is a need to achieve consistency of practices across England, Wales and Scotland.

It would seem relevant to establish exactly how that duty is framed in England and Wales and how it is working. Evidence would then show if that has brought in any practical changes which Scotland could and should consider adopting.

**Question 8: Do you agree that the Scottish Government should issue statutory guidance for professionals in relation to female genital mutilation? Please explain your answer.**

Yes. We refer to our answer to Question 7. FGM is a complex issue so making sure that all who may become involved in the FGM issues are aware of the incidence and circumstances of FGM is vital. Thereafter the actions and responsibilities of their organisations should be set out clearly. This is especially relevant if new offences are created.

In addition, there should be a separate ground of referral to the children's hearings system for FGM similar to that which exists for forced marriage under the 2011 Act. The more useful tools that exist, the better equipped agencies will be who have to deal with the problems that FGM present. The categories to consider would include where:

1. the child has been, or is likely to be, subjected to female genital mutilation
2. the child is or is likely to become a member of the same household as a person who has been subjected to female genital mutilation.
3. the child is or is likely to have, a close connection with a person who has carried out, arranged, or facilitated female genital mutilation.

**Question 9: Using existing non-statutory guidance as a basis what should be**

## covered by statutory guidance?

We would refer to the outcomes set out in the Scottish Government's policy of Getting it Right for Every Child (GIRFEC)<sup>10</sup> and under current child protection procedures.

### **Question 10: Do you consider that additional protections need to be introduced in Scotland in respect of vaginal elongation?**

There is a need for awareness of the practice to be developed so there is better knowledge and recognition when the practice occurs. This appears to be a matter of education rather than the creation of new statutory provisions. Existing child protection measures would apply in relation to children.

If professionals become aware of the possibility that this may be arise, there should be appropriate mechanisms to make referrals. Support should also be provided for mothers where they have been themselves involved in such practices as that may render their own children to be at more risk. This may come from within their communities, Scottish Government and the NHS.

### **Question 11: Do you have any evidence to suggest that individuals in Scotland have been subject to the practice of vaginal elongation?**

We have no comment to make.

### **Question 12: Do you consider that additional protections need to be introduced in Scotland in respect of the practice of breast ironing? Please explain your answer.**

Again, we see this as being a matter of education for the appropriate organisations so that they recognise and act where and when this is happening. Existing child protection measures would apply in relation to children.

If professionals become aware of the possibility that this may be arise, there should be appropriate mechanisms to make referrals. Support should also be provided for mothers where they have been themselves involved in such practices as that may render their own children to be at more risk. This may come from within their communities, Scottish Government and the NHS.

<sup>10</sup> The national approach in Scotland to improving outcomes and supporting the wellbeing of our children and young people by offering the right help at the right time from the right people. It supports them and their parent(s) to work in partnership with the services that can help them.

**Question 13: Do you have any evidence to suggest that individuals in Scotland have been subject to the practice of breast ironing?**

We have no comment to make.

**Question 14: Do you have any views in relation to the place of genital piercings in relation to protections and guidance?**

The issue of piercings is already covered under existing legislation where there are requirements for the licensing of those operating such procedures. Whether these protections need to be extended by including them in the criminal law is not known.

We refer to our comments at the outset about evidence base in bringing forward any changes.

**Question 15: in relation to the issues covered within this consultation, are there any other points you would wish to make that are not already covered under other answers?**

With regard to the various questions dealing with specific examples such as vaginal elongation and breast ironing, we are not aware if there is evidence of the commission of such activities in Scotland. That highlights overall what we feel is lacking from the consultation which is relevant research and statistical information demonstrating the extent of these issues in Scotland and allowing for the impact of any new legislative or non-legislative programmes to be measured.

We are aware that there is *Female Genital Mutilation (FGM) - April 2018 to June 2018, Experimental Statistics Report*<sup>11</sup> available for England and Wales. Though such information may not exist in Scotland, given the differences highlighted with the legislation in England and Wales, comparative information would be useful to use where it is available. This would be useful to ascertain the propensity and scale of any problems.

Were legislation to be brought forward, there would need to be awareness for all concerned (victims, persons in charge, those at risk, perpetrators, organisations and agencies and communities) of the relevant offences as well as of the relevant penalties that could be imposed.

Any such legislation must be clear. Activities or practices which are not permitted do not necessarily need to be set out by name (indeed all relevant names may not be known) as long as there are generic

<sup>11</sup> <https://digital.nhs.uk/data-and-information/publications/statistical/female-genital-mutilation/april-june-2018>

provisions which could be applied where such conduct clearly amounts to criminal activity and should be subject to criminal sanctions.

Support for the communities in which FGM may occur is vital to raise cross-cultural awareness and understanding that such practices are not tolerated in Scotland.

We have highlighted the role of education. What appears available as far as e-learning packages appears on the UK Government website which deals with FGM on the England and Wales position. It may be worth linking on that information to Scottish resources<sup>12</sup>.

For further information please contact

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<sup>12</sup> <https://www.gov.uk/government/collections/female-genital-mutilation>