



Law Society  
of Scotland



# Call for Evidence

Female Genital Mutilation (Protection and Guidance)  
(Scotland) Bill

30 August 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

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 Child and Family Law subcommittee welcome the opportunity to consider and respond to the Scottish Parliament's Equalities and Human Rights Committee's Call for Evidence in relation to the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill (the Bill). We have the following comments to put forward for consideration.

### **Question 1: Will protection orders and statutory guidance be more effective in preventing FGM and safeguarding those at risk of FGM than the current approach? Please explain your reasons.**

The Bill includes provisions to introduce Female Genital Mutilation Protections Orders (the Orders) to Scotland and to bring forward statutory Guidance to which those exercising public functions will require to have regard. The Bill's purpose is to strengthen "the law to extend protection to those at risk and to sanction perpetrators"<sup>1</sup> and follows Scotland's commitment in the National Action Plan to Prevent and Eradicate Female Genital Mutilation (FGM) published in 2016. The Bill seeks to build on the existing legislation in Scotland comprising the Female Genital Mutilation (Scotland) Act 2005 (2005 Act).<sup>2</sup>

FGM is an "illegal and unacceptable practice."<sup>3</sup> It is an international issue, affecting some of the most vulnerable in society. There are no quick fixes to tackling FGM as it is a complex and substantially hidden issue which requires solutions to be adopted at different levels which include education and legislation.

We consider that there are significant implications arising from the Bill for certain communities in Scotland in relation to raising awareness of FGM being an unacceptable practice here in Scotland and providing support for those at risk. We would suggest that those at risk may well not have their first language as

<sup>1</sup> <http://www.gov.scot?resource/0049/00493752.pdf>

<sup>2</sup> Along with section 70 of the Serious Crime Act 2015 (2015 Act) that applies to Scotland

<sup>3</sup> Paragraph 4 of the Policy Memorandum

English so they may experience problems in communicating and understanding. That is coupled with a lack of knowledge and confidence as to whom, how or where to report and thereafter for commencing subsequent procedures that may be involved and required to be followed.

We query exactly how the Bill would be shown to be more effective in preventing FGM and safeguarding those at risk. The Bill is described and should in our view be seen as “complementary” (our emphasis) to the current measures existing in the criminal justice system.<sup>4</sup> In our response to the earlier consultation,<sup>5</sup> we highlighted the failure to identify any specific gap in legislation, the actual need for further legislation and the absence, for instance, of robust data to support how FGM is an issue for Scotland and that how existing measures are not working. That includes the lack to date of any prosecutions in Scotland for FGM under the 2005 Act.<sup>6</sup> Exactly why there have been no criminal prosecutions in Scotland is definitely a complex issue but without that information, it is hard to illustrate its current effectiveness or otherwise at present or provide a comparator for the future.

Additional legislation would normally address where there are perceived gaps in protection provision. The Bill should provide a benefit in the promotion of consistency across the United Kingdom by creating these Orders in Scotland. FGM does not just arise within one jurisdiction so these should widen provisions available to those in Scotland that fall into the requisite category.

We note that 321 Orders<sup>7</sup> have been made from 2015 when the English and Welsh legislation commenced. Following the implementation of the Bill, the number of Orders sought and made in Scotland would provide some measurable evidential base for the future. It would not provide a direct comparison as the purpose of such Orders in Scotland seems to differ slightly from the existing similar provisions in England and Wales.<sup>8</sup> The 2015 Act refers to making an order (an “FGM protection order”) for the purposes of:

- (a) protecting a girl against the commission of a genital mutilation offence, or
- (b) protecting a girl against whom any such offence has been committed.

Under section 1 of the Bill, these outline such Orders are to be obtained:

- “to prevent or reduce the likelihood of, an act of genital mutilation being performed ....” or
- “to prevent or reduce the likelihood of, an offence .....being committed”

<sup>4</sup> Paragraph 14 of the Bill

<sup>5</sup> Scottish Government consultation on “Strengthening protection from Female Genital Mutilation” published 4 October 2018

<sup>6</sup> Paragraph 13 of the Policy Memorandum

<sup>7</sup> Paragraph 27 of the Policy Memorandum

<sup>8</sup> Section 73 of the Serious Crime Act 2015

We are not sure how the proposed difference in approach between England and Scotland will affect the way in which such Orders can or would be obtained.

We welcome the benefit of producing statutory guidance. It should help to clarify different organisations' responsibilities with regarding to the sharing of information on and in relation to raising awareness of FGM. Including a specific requirement as to consulting before such Guidance is produced and published could be better expressly stated.

For scope of the proposed guidance, we would refer to the outcomes set in the Scottish Government's policy of Getting it Right for Every Child (GIRFEC)<sup>9</sup> and under current child protection procedures.

**Question 2: What more could the Scottish Government and public services do to strengthen FGM prevention and protection, for example on: anonymity of victims, failure to protect a girl at risk of FGM, duty to notify the police of FGM, additional protections, communicating with communities.**

We have grouped the various provisions together as they all formed the content of the recent consultation. Many of these provisions reflect the additional measures existing within sections 71-75 of the 2015 Act that were not previously enacted in Scotland.

We would support the introduction of some/any of these measures if strong and robust evidence was produced which demonstrated a gap or identified a problem in Scotland. Again, there is the issue of any perceived inconsistency across measures currently being available in England and Wales and not in Scotland which these additional provisions would cover. The Bill does consider the cross-border case with the inclusion of an offence relating to UK orders<sup>10</sup> which is a reciprocal provision allowing for prosecution of a UK order in Scotland.

We did, on balance, favour the introduction of provisions to secure the anonymity for victims of FGM. Though there are some current measures within existing Scottish legislation that protect the anonymity of victims, there is not the certainty as in England and Wales<sup>11</sup> where they have specific provisions<sup>12</sup> to deal with the anonymity of the FGM victims.

Similar provisions if provided for Scotland, bearing in mind the need to ensure equality of arms for the defence who must have the right to challenge any victim's evidence, would have the benefit of clarity and certainty in providing legal protection for such victims. As we highlighted in our consultation response,<sup>13</sup> we

<sup>9</sup> <https://www.gov.scot/policies/girfec/>

<sup>10</sup> Section 5N of the Bill

<sup>11</sup> Section 71 of the 2015 Act

<sup>12</sup> 2015 Act

<sup>13</sup> [https://www.lawscot.org.uk/media/361568/crim-strengthening-protection-from-female-genital-mutilation-fgm-4-january-2019\\_.pdf](https://www.lawscot.org.uk/media/361568/crim-strengthening-protection-from-female-genital-mutilation-fgm-4-january-2019_.pdf)

would wish to avoid any uncertainty where, as an example, the press could seek perhaps to try out boundaries by publishing an adult FGM victim's name. (The position of children tends to be better protected by means of current legislation as well as where the court is involved under section 47 of the Criminal Procedure (Scotland) Act 1995.)

As paragraph 8 of the Bill's Policy Memorandum identifies, establishing actual figures for the incidence of FGM internationally, let alone in Scotland, is very challenging. Measures that help to guarantee anonymity is one to support. Avoidance of any humiliation for such victims must be paramount and in line with the Scottish Government's objectives under their Victims Taskforce.<sup>14</sup>

We understand that framing an offence of failure to protect a girl from FGM may have challenges. If seeking to create any new criminal offences, it must be clear exactly what the mischief is that is required to be addressed and that the sanctions for failure should be criminal. This highlights the difference between active and passive actions in criminal prosecutions. Perhaps the creation or need for such offences will be easier to identify once the Bill comes into force where evidence can be produced to demonstrate any requirement for such additional criminal offences.

Statutory guidance does seem to address clear identification of responsibilities which is the first stage.

This may be followed by a duty to report which could be included in guidance. If there was to be a failure to comply with such a duty to protect, this could be considered when organisations are sure what they are required to do. Any offences would need to be clear and a need for criminal sanctions to be clearly articulated.

### **Question 3: How will the Bill impact on you, your community or organisation?**

Our members are Scottish solicitors. They include:

- private practice solicitors involved in advising clients and those at risk of FGM on the terms of the Bill, whether it is in seeking or defending an application for such an Order
- COPFS and the defence solicitors being involved in the relation to any prosecution of offences created in the Bill
- Inhouse lawyers for organisations being involved in providing advice about their responsibilities to be outlined in the Guidance

As the Bill creates new provisions, legal aid will be required to cover these new processes and procedures to ensure all legal advice and assistance will be properly funded.

<sup>14</sup> <https://www.gov.scot/groups/victims-taskforce/>

**Question 4: Please highlight any relevant equalities and human rights issues you would like the Committee to consider, in particular any potential barriers to accessing the provisions of the Bill or any rights which might be advanced or adversely impacted.**

In our consultation response, we highlighted the role of education and training required when seeking to strengthen legal protection for those at risk of FGM. This is essential in raising and ensuring cross-cultural awareness of the FGM practices which may be acceptable elsewhere but not in Scotland. The same observation applies to enforcement provisions in ensuring that they are accessible to all concerned.

These seem to us of importance when looking both at the framing of the statutory guidance and how the Bill is to be rolled out and implemented.

There may be implications arising from the sharing of the information as proposed by the Bill and compliance with the requirements of the data protection legislation.

## **Miscellaneous**

Although this is an issue predominantly affecting young children, the proposals may not well targeted at that group. We suggest that it would be more effective to introduce a ground of referral to the children's hearings system and amend the powers of the panel to ensure that it was able to make relevant orders. The ground of referral would be similar to that which exists for forced marriage under the Children's Hearings (Scotland) Act 2011. This approach would be simpler, provide better support to those affected, and make it easier to protect others associated with the child who may also be at risk. In our previous response to the Scottish Government consultation on strengthening protection from FGM, we proposed the following new ground of referral:

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.

**For further information, please contact:**

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