

This document relates to the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill (SP Bill 47) as introduced in the Scottish Parliament on 29 May 2019

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

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill introduced in the Scottish Parliament on 29 May 2019.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 47–EN);
- a Financial Memorandum (SP Bill 47–FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 47–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

4. The Scottish Government is clear that all forms of violence against women and girls is a fundamental violation of human rights. The practice of female genital mutilation (FGM) is an illegal and unacceptable practice and a physical manifestation of deep rooted gender inequality. The policy objective of this Bill is to further strengthen the existing legal protection for those at risk of female genital mutilation.

5. Specifically, the Bill includes provision for:

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- Female Genital Mutilation Protection Orders: a form of civil order which can impose conditions or requirements upon a person for the purpose of protecting a person or persons from FGM, safeguarding them from harm if FGM has already occurred, or for the general purpose of reducing the likelihood that FGM offences will occur.
- Guidance: a power for Scottish Ministers to issue statutory guidance about FGM, or any matter relating to FGM, and a duty on Scottish Ministers to issue statutory guidance on FGM Protection Orders. Those persons exercising public functions will be obliged to have regard to the statutory guidance.

Background

6. The Scottish Government recognises FGM to be a fundamental breach of human rights, and is committed to preventing and eradicating it. The World Health Organisation defines FGM as ‘all procedures involving partial or total removal of the female external genitalia or other injury to the female genital organs for non-medical reasons’.¹

7. FGM has no health benefits. It involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions of girls’ and women’s bodies. All forms of female genital mutilation carry serious health consequences, including death. No religion requires female genital mutilation and the practice is not limited to any religious group.

8. FGM has been practised across different continents, countries, communities and belief systems for over 5,000 years. This includes Europe, America, Asia, the Middle East and central Africa. It is most concentrated today from the west coast of Africa to the Horn of Africa. However, global migration patterns mean that FGM can be found all over the world. While the exact number is unknown, at least 200 million girls and women in 30 countries are estimated to have undergone FGM. The actual figure is not known because there are little reliable data on prevalence.

¹ <https://www.who.int/reproductivehealth/topics/fgm/overview/en/>

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FGM in Scotland

9. A Scottish Refugee Council report in 2014² analysed census, birth register and other data in an attempt to estimate the size and location of communities in Scotland which might be affected by FGM. It found that:

- In 2011, around 24,000 men, women and children living in Scotland were born in a country where FGM is practised to some extent.
- There are communities potentially affected by FGM in every local authority area, with the largest communities in Glasgow, Aberdeen, Edinburgh and Dundee.
- Between 2001 and 2012, 2,750 girls were born in Scotland to women born in countries where FGM is practised to some extent.
- There is no data on ethnicity or other variables which influence the practice of FGM in local communities, so it is not known how many people in those communities are directly affected.

10. In the Scottish Government's view, the approach to tackling FGM is considered, collaborative and community-based. In February 2016, the Scottish Government published a National Action Plan to work towards eradicating FGM.³ The purpose of the National Action Plan is to foster an environment of prevention in Scotland and to improve the welfare and quality of life of FGM survivors, with a focus on the linked areas of prevention, protecting girls at risk of FGM, and provision of appropriate support and sensitive services for survivors of FGM. The Scottish Government wants to prevent FGM, provide protection to those at risk, provide the support that those affected require and through participation give a voice to communities affected by this practice.

11. The Scottish Government is making progress in implementing the plan, including the publication of multi-agency guidance for professionals. The Scottish Government is providing funding for projects working with communities to raise awareness of FGM and support. Currently, the

²

http://www.scottishrefugeecouncil.org.uk/assets/0000/9061/FGM_Report_FINAL_A4portrait.pdf

³ <https://www.gov.scot/publications/scotlands-national-action-plan-prevent-eradicate-fgm/>

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prevalence of data available on FGM in Scotland is limited, with much of our current information coming in the form of anecdotal evidence from stakeholders.

FGM legislation in Scotland

12. FGM has been a specific criminal offence in the UK since the passage of the Prohibition of Female Circumcision Act 1985. The Prohibition of Female Genital Mutilation (Scotland) Act 2005 repealed and re-enacted for Scotland the provisions of the 1985 Act, gave extra-territorial effect to those provisions and increased the maximum penalty for FGM in Scotland from 5 to 14 years imprisonment. Further, it made additional forms of FGM unlawful, and allowed the Scottish Ministers to modify the procedures which are offences and added offences under the Act to Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply).

13. Since the 1985 Act was introduced and subsequently replaced and updated through the 2005 Act, no FGM criminal prosecutions have been brought in Scotland.

FGM Guidance in Scotland

14. There is a robust and effective system of child protection in Scotland, covered by both legislation, guidance and the children's hearings system. The proposed FGM Protection Orders and statutory guidance will complement this system and provide further options to strengthen the existing legal protection for those at risk of FGM.

15. Part 4 of the National Guidance for Child Protection provides for child protection in specific circumstances.⁴ It sets out the required response for a professional if they come across FGM, notes that FGM should always trigger child protection concerns, notes that local guidelines should be in place to ensure a co-ordinated response from all agencies, and highlights the issue for all staff that may have contact with children who are at risk from FGM. As with other forms of child protection work this should be done

⁴ <https://www.gov.scot/publications/national-guidance-child-protection-scotland/>

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as far as possible in partnership with parents/carers unless they themselves are the source of the risk.

16. This is reinforced in '*Responding to Female Genital Mutilation in Scotland Multi Agency Guidance*'⁵ published in 2017. The guidance highlights the importance of responding to risk of FGM and sets out the three levels of response:

- Immediate/urgent action.
- Active/ongoing child protection with social work lead.
- Information sharing between agencies with a child's plan effected.

17. Local authorities are subject to a particular responsibility under section 60 of the Children's Hearings (Scotland) Act 2011 in that if they think it likely that (i) a child requires protection, guidance, treatment or control, and (ii) that it might be necessary for a compulsory supervision order to be made for the child, then they must make all necessary inquiries into the child's circumstances. If, following those investigations, the local authority thinks that (i) and (ii) apply then they must make a referral to the Reporter. The police are subject to a similar duty under section 61 of the 2011 Act. On occasions where the risk is such that it is not practicable for a Child Protection order or other relevant order to be applied for, Section 56 of the Children's Hearings (Scotland) Act 2011 provides for emergency measures, specifically a constable's power to remove a child to a place of safety.

18. Between 1 April 2013 to September 2016, there were 52 referrals or child welfare concerns made to the police from partner agencies about FGM, which initiated an Inter-Agency Referral Discussion (IRD). In all 52 cases, the referrals related to concerns that girls were at risk of being subjected to FGM. These concerns were fully investigated and no criminality found. Cutting had not taken place in any of the cases referred.

⁵<https://www.gov.scot/publications/responding-female-genital-mutilation-fgm-scotland-multi-agency-guidance-978-1-78851-364-7/>

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Female Genital Mutilation Protection Orders

Proposed approach

19. The Bill will amend the Prohibition of Female Genital Mutilation (Scotland) Act 2005 to provide the courts with powers to make a Female Genital Mutilation Protection Order and associated interim orders should they be required.

20. Under the Bill a court can make an FGM Protection Order for the purposes of:

- Preventing or reducing the likelihood that a person, persons or class of persons are subjected to FGM.
- Protecting a person who has already been subjected to FGM.
- Otherwise preventing or reducing the likelihood of a FGM offence being committed.

21. The Bill provides that a court can impose prohibitions, restrictions or requirements in an FGM Protection Order that it considers appropriate. This can include requiring a person to give up their passport or restrict them from taking a protected person to a specified place, including outwith Scotland.

22. There are a number of ways under the Bill that an FGM Protection Order can be made: by application; under other civil proceedings already before the court; and at the conclusion of criminal proceedings where there has been a conviction for a FGM offence.

23. An application can be made by:

- A person who may be at risk from being subjected to FGM.
- A person who has been subjected to FGM.
- Local authorities.
- The Chief Constable of Police Scotland.
- The Lord Advocate.
- Any other person but only with the permission of the court.

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24. The court can specify the duration during which the FGM Protection Order is to have effect. The court can set different time limits for different conditions or with regard to different people who may be subject to the order. Once an FGM Protection Order has been made it can be varied, discharged or extended by the court on application by those listed above, by the court itself and also by any person who is affected by the order.

25. The Bill provides a power for the court to make interim FGM Protection Orders for those situations where there is an immediate risk of significant harm or that the person to be protected may be taken out of the United Kingdom for FGM purposes.

26. The Bill also makes it a criminal offence to breach a female genital mutilation protection order. This includes when a person knowingly does something which they or another person is prohibited from doing under an FGM Protection Order, or a person knowingly hinders a person from carrying out an obligation they are required to do under an order. The penalties provided in the Bill are:

- On summary conviction: imprisonment for a period of no longer than 12 months, a fine not exceeding the statutory maximum, or both.
- Conviction on indictment: imprisonment for a term not exceeding five years or a fine, or both.

Experience from England and Wales

27. Since 2015, 321 FGM Protection Orders have been made in England and Wales. The illustrative examples below from case law in England and Wales provide an idea of the types of cases that may come before a Scottish court for decision.

Example One

The girl is under one year old. Her mother had initially raised concerns with the police that the child would be taken abroad for FGM by family members. The mother herself had been subjected to FGM and was concerned that the father would not prevent FGM from taking place. The father denied he would subject his daughter to the procedure. The

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application for an FGM Protection Order was made by the local authority to prevent the father from taking the girl abroad.

Example Two

A complicated case involving a family of four boys and an infant girl. Following a family holiday which diverted to his home country, the father decided he did not want to return to the UK. The mother was able to return to the UK with the daughter but had to leave her sons behind. There was a concern that should the girl return to the country abroad that she may be subject to FGM. The mother was under pressure to go abroad and the local authority applied for an FGM Protection Order to prevent the girl leaving the UK.

Consultation

28. There was strong support for the creation of FGM Protection Orders. Of those who responded 85% agreed that the Scottish Government should introduce FGM Protection Orders. They were felt to be a fast, responsive method and proven approach to reducing the risk to potential victims. Another benefit highlighted was that they offered a civil law mechanism which a range of parties could apply for, including women and girls at risk of FGM.

Alternative approaches

29. The alternative approach would be to make no legislative change. This would mean that there is not a specific civil legal protection mechanism to deal with FGM in Scotland. Persons at risk of being subjected to FGM would continue to be dealt with using existing child protection and adult legislation, support and protection structures and procedures and policies, including multi-agency arrangements.

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Guidance

Proposed approach

30. The Bill places a duty on the Scottish Ministers to give guidance relating to FGM Protection Orders and a power to issue guidance in relation to FGM more generally. As mentioned above there is non-statutory advisory multi-agency guidance already in place for FGM in Scotland. Statutory guidance will ensure that there is clarity about the responsibilities of those covered by the Bill under FGM Protection Orders. The fact that those exercising public functions will be obliged to have regard to such guidance will better ensure that public bodies work effectively and collaboratively. The Bill does not set out the detail of what the guidance will contain as that will be for consultation following the passage of the Bill.

Consultation

31. There was strong support for the creation of statutory guidance. Of those who responded, 79% agreed that the Scottish Government should provide for statutory guidance on FGM. This was seen as potentially improving inter-agency working, fill knowledge gaps, reducing regional differences in knowledge and offering clarity and certainty in engaging in FGM.

Alternative approaches

32. The alternative approach would be to make no legislative change. The multi-agency FGM guidance would continue to be in place to help inform public bodies and practitioners responsible for protecting and promoting the health and welfare of women and girls, albeit those exercising public functions would not be obliged to have regard to it.

Consultation

33. A consultation 'Strengthening protection from Female Genital Mutilation (FGM)' was published on 4 October 2018 and closed on 19 January 2019.⁶ The consultation set out the Government's initial views on strengthening protections. 71 responses to the consultation were received from a mix of individuals, public bodies and organisation involved in FGM. Analysis of responses found that the Scottish Government's proposals

⁶ <https://consult.gov.scot/violence-against-women-team/female-genital-mutilation/>

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were warmly welcomed and there is strong support for FGM Protection Orders and the power to issue statutory guidance as indicated above. The consultation and analysis can be found on the Government's website.

Other issues raised in consultation

34. The 2018 consultation also explored other options for legislation set out below.

Anonymity for victims of female genital mutilation

35. Scottish courts have a number of powers at their disposal to ensure the protection of a party's identity in any relevant case. For England, Wales and Northern Ireland the law changed in 2015 and Schedule 1 of the Female Genital Mutilation Act 2003 now makes provision for the anonymity of victims of FGM, it prohibits the publication of any matter that would be likely to lead members of the public to identify a person as the alleged victim of an offence under the 2003 Act as well as aiding, abetting, counselling and procuring the "principal offence". The prohibition lasts for the lifetime of the alleged victim.

36. The 2018 consultation showed support for provision on anonymity of victims. Of those who responded 75% agreed that the Bill should provide for provision on anonymity of victims. It was felt that this would enhance the dignity of victims and encourage reporting.

37. The justice system in Scotland is based on justice being open and accessible with courts having powers to ensure the protection of the identity of parties in a relevant case. This includes both civil and criminal proceedings. When a child is involved in the proceedings there are further statutory prohibitions available and in some cases the identity of the child is automatically prohibited from being published. Given the statutory protections already in place the Scottish Government is not proposing to bring forward legislation on this topic, however, recognising the feedback from the consultation the Government would propose to keep this under review and would welcome the views of the scrutinising committee and stakeholders.

Duty to notify police of female genital mutilation

38. In Scotland, agencies respond to FGM using existing child protection and adult support and protection structures, procedures and policies,

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including multiagency arrangements. Places a duty on persons who work in a “regulated profession” in England and Wales, namely healthcare professionals, teachers and social care workers, to notify the police when, in the course of their work, they discover that an act of female genital mutilation appears to have been carried out on a girl who is under 18.

39. The 2018 consultation showed that respondents were divided on the inclusion of provisions in the Bill with no clear majority. 48% of those who responded did not support new legislation on a duty to notify with 35% supporting new legislation. Respondents who were against inclusion of the duty emphasised the risk that such a duty might dissuade individuals from accessing health and support services. Other respondents emphasised the symbolic nature of such a duty would highlight the seriousness of the crime and could raise the likelihood of reporting.

40. The Scottish Government is not proposing to bring forward legislation on this topic. As raised by some respondents in the consultation it is important not to put obstacles in the way of people, including vulnerable individuals, who would seek to access support services and could be dissuaded from doing so in the knowledge those services would be under a duty to report FGM to the police.

Failure to Protect

41. In England, Wales and Northern Ireland the law changed in 2015 so that section 3A of the Female Genital Mutilation Act 2003 now makes it a specific offence to fail to protect a girl from risk of genital mutilation. If an offence of FGM is committed against a girl under the age of 16, then each person who is responsible for the girl at the time FGM occurred may be liable to conviction unless specific defences can be shown to apply. The maximum penalty is seven years’ imprisonment or a fine or both. We are not aware of any prosecutions being brought under this offence in England, Wales or Northern Ireland.

42. The 2018 consultation showed that respondents were divided on the inclusion of provisions in the Bill with no clear majority. 48% of those who responded did support provision on a failure to protect and 33% did not support new legislation. Respondents who were in favour emphasised the potential deterrent effect and that enablers of FGM could be held to account. Other respondents had concerns that this could potentially impact

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on primary caregivers, especially women, who may have limited power and agency to effectively influence events.

43. The Scottish Government is not proposing to bring forward legislation on this topic. While we appreciate the need to hold enablers of FGM to account we agree with respondents to the consultation who felt that this could potentially impact negatively on individuals, especially women, who do not have the power or agency to protect persons who may be at risk of FGM.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

44. An Equality Impact Assessment has been published alongside the Bill. The Scottish Government considers that the Bill will have a positive impact on women and girls who are at risk of or have been subjected to FGM, with no negative impacts identified. The primary positive impacts are an improvement in protection for women and girls, improvements in the health of women and girls as a result of reduced risk of being subject to FGM (including pregnancy and maternal health), and better relations between different generations in affected communities.

45. FGM constitutes a severe form of discrimination against women and girls and reflects deep rooted gender inequality. FGM is an extremely harmful practice that carries short and long term health consequences, including psychological impacts. FGM also increases the likelihood of severe complications during pregnancy and child birth. The practice of FGM is often closely linked to fixed gender roles and is partly practiced to control the sexuality of women, including lesbian and bisexual women. FGM is a cultural practice that does not have any basis in any religion, although there is a misconception in some affected communities that it is a religious requirement.

46. Strengthening the legislative framework and protecting women and girls from FGM will have a positive effect on advancing equal opportunities and promoting equality.

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Human rights

47. FGM is an offence which has been held to be one which violates numerous conventions and legal norms worldwide. The EU Commission has noted⁷ that:

“FGM is internationally recognised as a violation of women’s human rights and a form of child abuse. In common with other forms of gender-based violence, “it constitutes a breach of the fundamental right to life, liberty, security, dignity, equality between women and men, non-discrimination and physical and mental integrity” [*as per Council Conclusions on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence adopted on 6 December 2012*]. It also violates the rights of the child as defined in the United Nations Convention on the Rights of the Child.”

48. FGM is recognised as a form of abuse and violence against women. The aims of the FGM Protection Order are legitimate ones in terms of the convention, falling clearly within the realms of the prevention of crime, the protection of public safety and the protection of health or morals and of the rights and freedoms of others. The carrying out of the practice of FGM on a person is recognised as an infringement of Article 3 ECHR, being described⁸ as:

“a human rights issue.....the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment within the meaning, not only of article 3 of the ECHR, but also of article 1 or 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 7 of the

⁷ Communication from The Commission to The European Parliament and The Council – “Towards the Elimination of Female Genital Mutilation” at Chapter 1, page 4, paragraph 2

https://ec.europa.eu/info/sites/info/files/fgm_communication_25112013_en_1.pdf

⁸ As per Lady Hale in *Secretary of State for the Home Department v K (FC): Fornah v Secretary of State Home Department* [2006] UKHL 46 at paragraph 94.

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International Covenant on Civil and Political Rights, and article 37(a) of the Convention on the Rights of the Child.”

49. The Bill will help to positively advance a number of relevant human rights, including the right to life, the right not to be subject to inhumane and degrading treatment, the right to be free from discrimination, and the right to the highest attainable standard of health.

50. FGM Protection Orders will engage article 6 and 8 of the European Convention on Human Rights, but the Scottish Government does not see the possibility that the provisions will be in breach of those articles.

51. FGM violates a number of human rights protected under international law, such as the right to physical and mental integrity; freedom from violence; the highest attainable standard of health; freedom from discrimination on the basis of sex; freedom from torture, cruel, inhuman and degrading treatment; and life, when the procedure results in death. These human rights are protected in the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention Against Torture, Convention on the Elimination of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child, as well as regional human rights instruments including the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. Concluding observations (CEDAW 2019) have encouraged the State Party to take further measures to effectively prosecute perpetrators of FGM, and that the State party step up its efforts to raise awareness that female genital mutilation is a form of child abuse and gender-based violence against women and girls.⁹

52. The UK has signed but not yet ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). The Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017 obliges the UK Government to report to Parliament annually on steps it is taking to move towards ratification. Article 38 of the Convention obliges states to criminalise FGM, and there

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GBR/CO/8&Lang=En

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are a number of other relevant Articles that FGM would form as part of general consideration in relation to implementation of the Convention.

Island communities

53. The Bill has no differential impact on island communities. The provisions will apply equally to all parts of Scotland.

Local government

54. As the current multi-agency guidance makes clear local authorities have a statutory responsibility to protect girls and young women at risk of FGM. They must ensure that policies and procedures are clear; staff are supported and equipped to undertake the duties expected of them; and there are clear lines of accountability.

55. The Bill strengthens the existing legal protection and provides that local authorities can make an application for an FGM Protection Order, this includes acting on behalf of persons who are unable or unwilling to take forward an application themselves. This very much fits with their statutory obligations in relation to adult support and protection and child protection.

56. The guidance relating to FGM Protection Orders and in relation to FGM more generally will also apply to local authorities. Local authorities will be a key partner during consultation on the guidance and in the implementation of the Bill.

Sustainable development

57. The Bill will have no negative impact on sustainable development. Through helping to advance the human rights of women and girls at risk of FGM, it can potentially help to improve their outcomes across a range of areas.

58. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

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