

JustRight Scotland and Scottish Women's Rights Centre Response to FGM Consultation

JustRight Scotland (JRS) is Scotland's legal centre for justice and human rights. We have expertise in refugee and immigration law as well as protection the rights of women and children. You can find out more about us here: www.justrightscotland.org.uk.

The **Scottish Women's Rights Centre (SWRC)** is a collaboration between Rape Crisis Scotland, JustRight Scotland and the University of Strathclyde Law Clinic that provides free legal information, advice and representation to women affected by violence and abuse. You can find out more about us here: www.scottishwomensrightscentre.org.uk.

Introduction

1. We are responding to this consultation by drawing on our lawyers' longstanding practical experience and expertise in providing legal information, advice and representation to women and girls affected by gender-based violence, including survivors of FGM and those at risk from FGM.
2. Our response has further been informed by our clear position that a human rights-based approach is critical to effectively respond to FGM. FGM is a serious violation of the rights of women and girls. However, its causes are also deeply rooted within human rights violations and inequalities.
3. Any response must therefore be victim-centred, gender and child sensitive, proportionate and respect:
 - The international legal human rights framework (including those treaties the UK government has signed but not ratified, for example the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention));
 - Domestic (UK and Scottish) human rights legislation; and

Scotland's Legal Centre for Justice and Human Rights

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- National policy including that contained within the Equally Safe strategy.
4. Whilst making FGM a criminal offence sends a clear message of intolerance, a criminal response by itself will not eliminate FGM. Instead, a broader focus on creating positive social change is required and law is only one tool in this process. Effective elimination of FGM therefore requires a collaborative and supportive focus on other interventions within the civil, child protection and community sphere which identify, protect and prevent those at risk of FGM. Preventative work, in this context, requires engagement with communities and young people to tackle behavioural and cultural norms which facilitate FGM and ensure long term and sustained positive social change.

Questions 1 & 2: Anonymity for Victims of Female Genital Mutilation

5. At present, we are not persuaded that there should be specific anonymity provisions for those who are affected by FGM. To be clear, this is not because we think the current provisions around accessing anonymity and other special measures are themselves sufficient in relation to FGM but because we are not persuaded of the merit of creating a lifelong exception for FGM specifically and the criteria that would apply to such an exception.
6. It is our position that the better response is to have greater clarity and improvement with the current provisions on anonymity for **all** survivors of gender-based violence and not just those affected by FGM. Our experience from the SWRC tells us that a lack of certainty over whether anonymity is available and how to obtain it is a powerful deterrent to any engagement with the criminal justice process. Clear provisions on anonymity, with greater clarity on how and when they will be used, will therefore provide reassurance and certainty to **all** women and girls affected by gender based violence.
7. We would therefore welcome further exploratory work in this area such as through the Victims Task Force chaired by the Justice Secretary. For instance, the rules as they stand rely on the Crown Office & Procurator Fiscal Service (COPFS) seeking anonymity, and/or the complainer/victim being told that this is a potential option. An alternative option to a specific provision for anonymity for those at risk of FGM could be a COPFS policy to the effect that there is a presumption to seeking anonymity and other special measures such as closed courts with guidance/instructions on how this could be applied.

Question 3: Offence of Failing to Protect a Girl from Risk of Genital Mutilation

8. We do not think that an offence of failure to protect should be introduced in Scotland. We are not persuaded by any evidence of its potential impact and efficacy in relation to the elimination of FGM.

9. Indeed, it is generally understood that criminal measures in terms of early intervention and prevention are blunt tools. Criminalisation of the act sends a clear societal message but nothing else. A legal response needs to be human rights-based and complement the longer term work around societal change such as training, education and other key preventative work within the community. Therefore any legal response should be limited to sending a clear message of intolerance (which the current criminal offence does in our submission) whilst providing legal tools around protection and support.
10. Against this background, we therefore share the concerns highlighted by the Scottish Government in their consultation paper around the potential unintended but adverse consequences of such an offence, bearing in mind the deeply rooted gender inequalities which are linked to FGM. We also require to be cognisant of gender bias within some communities on parenting roles, which may expose women to prosecution even when they have little choice in the matter. This could have a disproportionate impact on women who are themselves potentially at risk of/ have experienced gender-based violence, including FGM.
11. In our submission, the introduction of this offence is not in line with the overarching legal framework and policy position adopted within Scotland and is not in line with a victim-centred approach that is based on human rights and which is sensitive to gender and children. It would furthermore undermine other positive steps that have already been taken to prevent and protect FGM in Scotland.

Questions 5 & 6: Female Genital Mutilation Protection Orders

12. We agree that Female Genital Mutilation Protection Orders would be a useful and important tool in this area for protection and prevention and we agree that these should be introduced.
13. Our learning in this area comes from our experience with Forced Marriage Protection Orders (FMPO) and the importance that this remedy can mean for individuals.
14. In our view these orders would be an important remedy for the following reasons:
 - Like FMPOs, the types of restrictions which the order can provide may not be crimes in and of themselves (e.g. surrender of a passport, removal from the country), this means such orders can be preventative, protective tools;

- It can give the victim/survivor control if they are requesting the order themselves which is important as a means of empowering the victim/survivor;
- Often, however, the victim/survivor does not feel able to take a case against their family members (which can be particularly difficult when there are the additional cultural factors that are at play in cases of FGM, like in cases of forced marriage). An order can therefore be requested by, for example, a local authority;
- The different, lower standard of proof (“balance of probabilities”) means that a case may be possible where there isn’t sufficient evidence to criminally prosecute. In addition, victims/survivors may be more inclined to engage with a civil process rather than feeling as though they are criminalising their family members.

15. Priority should be given to ensure a robust, independent risk assessment process. This would require to recognise the risk of victim/survivors being pressured to request the removal of such an order or to not comply with the request.

16. Other protections for FGM should mirror those in place for forced marriage, including the penalties for breach.

17. It is important, however, to recognise that in order to be effective, robust training and guidance will be required around the effective implementation of this remedy and when and how it should be applied. We are mindful of the implementation gaps we see with FMPOs such as a reluctance to apply for children over the age of 16 and a failure to undertake robust risk assessments when a child is transitioning to adulthood and there is a change of circumstances, or where a child/young woman suddenly adopts a different stance in relation to any risk.

18. Furthermore, the continued provision of free specialist legal information and advice will need to be accessible in this area.

Question 7: Duty to Notify Police of Female Genital Mutilation

19. We do not think that a duty to notify should be introduced in Scotland. We are not persuaded that there is evidence to suggest that this is required and that there would be any additional positive impact in relation to the elimination of FGM. Furthermore, it is not in line with the overall objectives from the legal framework and policy in this area that we have set out further below.

20. The communities in which there exists a risk of FGM are tight-knit. Evidence demonstrates that there is a culture of suspicion of the role of police and social work services. A duty to notify could well have a chilling effect on disclosures and undermine positive community engagement in this area.
21. Existing child protection procedures should instead be applied as noted by the Scottish Government in their consultation paper. However, we do think there is a gap in terms of children who are aged 16+ and transitioning into adulthood at 18. This is not, however, a gap that would be met by introducing a duty to notify and instead clearer guidance – such as in the form of statutory guidance – would be a better remedy.

Questions 8 & 9: Statutory Guidance about Female Genital Mutilation

22. We would welcome the introduction of statutory guidance were it to provide clarity and certainty in terms of the practical frameworks applicable around risk, identification, protection and prevention. We do think robust and clear guidance is an important and complementary tool in the protection and prevention of violence against women and girls.
23. We would be particularly keen for the guidance to ensure that it meets implementation gaps which cannot or should not be remedied by legislative changes or the introduction of further offences or duties. For instance:
- We are concerned about gaps which exist for children aged 16+ which are applicable to other areas of gender-based violence and are not specific to FGM. The consultation paper itself refers to child protection safeguards applying to those aged under 16 and we are not persuaded that the current non-statutory guidance provides clarity in this area given that the international legal framework in relation to FGM denotes it a violation of human rights which demands special protections for children (defined as under 18).
 - We would want the guidance to provide further clarity around the risk assessments that should be undertaken in this area and when legal orders **must** be applied for in order to protect children and vulnerable adults.
 - We would want the guidance to make a clear statement around education and community engagement which is required to ensure long term social change which has been proven to be the best method to ensure the elimination of FGM.

24. The guidance should cover comprehensive access to support, including local authority support, and robust referral pathways to access free legal information and advice (with referral pathways to entities providing free information, advice and representation being clearly disseminated).

25. The guidance would necessarily link in with other, related issues like domestic abuse and forced marriage, as well as the Equally Safe national strategy.

Questions 10-14: Other Issues

26. We don't have expertise or knowledge to comment in relation to these issues.

Should you require any further information in respect of this response, please do not hesitate to contact JustRight Scotland on 0141 406 5350 or at info@justrightscotland.org.uk.

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