



# JustRight Scotland's Written Evidence to the Equalities and Human Rights Committee Female Genital Mutilation (Protection and Guidance) (Scotland) Bill September 2019

**JustRight Scotland (JRS)** is Scotland's legal centre for justice and human rights. We use the law to defend and extend people's rights. We have expertise in refugee and immigration law and the protection of the rights of women and children. You can find out more about us here: [www.justrightscotland.org.uk](http://www.justrightscotland.org.uk)

## Introduction

1. We are providing evidence by drawing on our lawyers' longstanding practical experience and expertise in providing legal information, advice and representation to women and children who are seeking international protection and who have survived gender-based violence. We work with women and children across a number of areas of UK and Scots law, including immigration and asylum, child protection and human trafficking and exploitation. We sit on the Scottish Government's Implementation Group of the National Action Plan to prevent and eradicate female genital mutilation (FGM). Through the [Scottish Women's Rights Centre](#) (SWRC) we also have extensive experience in advising on and obtaining protective orders for women affected by gender-based violence, including Forced Marriage Protection Orders (FMPOs).
2. We welcome the opportunity to respond to the call for views on the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill ("the Bill"). On 12 September 2019, the head of our [Scottish Refugee & Migrant Centre](#), Andy Sirel, will be giving oral evidence to the Equalities and Human Rights Committee. This written evidence, further to our response to the Scottish Government's Consultation (Appendix 1), is a summary of our position on the proposals in the Bill.

### Scotland's Legal Centre for Justice and Human Rights

JustRight Scotland is a Scottish Charitable Incorporated Organisation (SC047818) which provides legal services through its limited liability partnership, JustRight Scotland LLP which trades as JustRight Scotland (SO305962). This firm has been authorised to act as solicitors by the Law Society of Scotland (Registered No 53703). Our Registered Office is: Suite 3/1, 3rd Floor, Forsyth House, 111 Union Street, Glasgow, G1 3TA.

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**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.**

3. As the Committee will be aware, one of the most difficult aspects of tackling FGM in Scotland is that we do not have a reliable picture of its prevalence. The Scottish Refugee Council's 2014 report '*Tackling FGM in Scotland: A Scottish model of intervention*' provided us with useful statistics about the size and location of communities originally from FGM-practicing countries, but it was not able to provide concrete information about the existence of FGM in Scotland. This is not a criticism of the authors of the report, who are excellent and well-respected professionals, but rather a sign of just how challenging it is to obtain data around FGM.
4. FGM has been a criminal offence in the UK for 34 years, and in Scotland it is specified in the Prohibition of Female Genital Mutilation (Scotland) Act 2005. Whilst making FGM a criminal offence sends a clear message of intolerance, a criminal response by itself will not eliminate FGM. It is telling that, to date, there have been no criminal prosecutions brought in Scotland. In England, the first successful prosecution occurred only this year (February 2019). This data, in conjunction with our own experience of working with individuals, families and communities where there is a risk of 'honour-based violence', tells us that we require to re-think our approach to combating FGM.
5. We believe that 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.
6. The above said, we support the measures set out in the Bill. We agree that Female Genital Mutilation Protection Orders (FGMPOs) would be a useful and important tool in this area for protection and prevention. Our primary experience of providing legal representation and advice to women and girls who have survived or are at risk of FGM comes through their interaction with the asylum process. In our answer to Question 4 below we discuss the interrelation between protection orders and the asylum process. We also work with women and girls who are at risk of other forms of honour-based violence, such as forced marriage. To some extent, many of the same cultural and social factors are at play. Through the SWRC, our solicitors have first-hand experience of Forced Marriage Protection Orders (FMPOs) and the importance of this remedy. We believe that FGMPOs add value to the current approach because:

- 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 is very common for women and girls to express fear of criminalising family members. Although the breach of an FGMPPO would be a criminal offence, there is merit in the fact that the procedure is not based in a criminal process. We are cognisant, however, of the way in which the types of restrictions in an order have been interpreted by courts in England & Wales. In the context of granting one of the first FGMPPOs in 2015, the High Court emphasised that FGMPPOs should be used to extend more general protection to the mother of an at-risk child, where those restrictions could be obtained through another remedy or protection order.<sup>1</sup> Of course, it will be up to the courts to decide on the types of restrictions which may be put in place in an order, but we would like to see a holistic, pragmatic approach which places the victim/survivor at the centre.
- 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. In our broader work with survivors of gender-based violence, women have voiced the advantages they have felt from being able to instruct their own legal representation and maintain a voice in the legal process, as opposed to the criminal procedure whereby the victim/survivor is a witness.
- The scope of the Bill in setting out who may apply for an FGMPPO is welcomed. Often 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). The fact that an order can therefore be requested by, for example, a local authority is positive. In question 4 below we reflect on our practical experience in this area.
- 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. That said, there requires to be more FMPO applications in order to come to a common understanding of the evidential threshold. It has been commented that the experience of the first reported Scottish case concerning an application for a FMPO, which

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<sup>1</sup> Re E (children) (FGM protection orders) [2015] EWHC 2275 (Fam)

was dismissed, has been viewed as creating a high evidential threshold.<sup>2</sup>

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7. Priority must be given to ensure a robust, independent risk assessment process. We believe that the introduction of statutory guidance – together with a comprehensive programme of training – will serve to increase the effectiveness of FGMPOs and other related safeguarding mechanisms for women and girls at risk of FGM. For example, it is critical to recognise the risk of victim/survivors being pressured to request the removal of such an order or suddenly changing their position in terms of risk. We note that the Bill refers to the need to “have regard” to the views and wishes of an individual at risk “to such extent as the court considers appropriate”.

**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, and communicating with communities?**

8. With respect to anonymity of victims, we understand that we were in the minority of respondents to the Consultation who were not in favour of specific anonymity provisions. 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.
9. We are strongly in favour of greater clarity and improvement of 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. For instance, the rules in the criminal procedure 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. Furthermore, with the modern ways of news reporting – including powerful social media – we

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<sup>2</sup> City of Edinburgh Council v S 2015 S.L.T. (Sh Ct) 69

<sup>3</sup> <https://brodies.com/blog/public-law/understanding-forced-marriage-in-scotland/>, last accessed 9 September 2019

do not believe that it is appropriate to rely on media self-regulation when reporting on victims of sexual offences.

10. As indicated in our Consultation response, we are not in favour of an offence of failure to protect a girl at risk of FGM. Given the limited evidence showing the successes around criminalisation, we believe that the negative impacts associated with an offence of failure to protect outweigh the arguments in favour. A legal response needs to be human rights-based and should anticipate the impact through a gendered lens, as well as the impact on children's rights and welfare. We therefore share the concerns highlighted by the Scottish Government around the potential 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. 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. A duty to notify could well have a chilling effect on disclosures and undermine positive community engagement in this area. There are existing child protection procedures which should instead be applied.

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

12. The Bill will provide us with an important tool to continue our work in advising and representing women and girls who are survivors or at risk of FGM. We would only add that the continued provision of free specialist legal information and advice will need to be accessible in this area, and consideration should be given to the funding required to ensure this remains the case.

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

*Protection for 16+ year olds*

13. In our Consultation response we noted our concern 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 SPICe Briefing on the Bill contains a concise

section on child protection which sets out the various policies and mechanisms in place to protect children in Scotland. It also touches on the definition of a child, which we believe continues to be a problematic aspect of Scots law. For the avoidance of doubt, we acknowledge the aspirational intention behind defining a child as under 16 in some circumstances. However, our experience tells us that there is a gap in child protection at the ages of 16 and 17 which may affect those at risk of FGM.

14. Section 199 of the Children's Hearings (Scotland) Act 2011 contains a detailed overview of the definition of a child for the purposes of that legislation. In essence, the Children's Hearing System applies to children under 16 years old. However, Part 2 of the Children (Scotland) Act 1995, which is titled '*Promotion of Children's Welfare by Local Authorities and by Children's Hearings etc.*' and also applies to circumstances where children can become looked after by local authorities, defines a child as under 18 years old.
15. Many of the refugee, asylum seeking and migrant children we work with are aged 16-18. Unaccompanied asylum seeking and trafficked children in Scotland, including 16 and 17 year olds, are looked after by local authorities under section 25 of the Children (Scotland) Act 1995. Scottish local authorities are under a duty set out in section 17 to promote and safeguard the welfare of children in care. Through our experience with forced marriage, we have identified a gap in practice as to whether and how protection orders are applied for to keep these children safe. We have worked with 16 and 17 year old children, known to or in the care of local authorities, who have been identified as at risk of forced marriage. On the basis that they are over 16, we have not seen Child Protection Orders made or any other orders from the Children's Hearing System. In our experience, we have yet to see protective orders issued via vulnerable adult protection procedures; we speculate, but this may be because these children are looked after by children and families social work departments. The above pattern of practice makes the existence of FMPOs all the more critical as a tool for local authorities to keep children in their care safe.
16. However, between November 2011 and January 2017, only 12 FMPOs were issued in Scotland.<sup>4</sup> The Forced Marriage Unit gave advice or support to 30 cases in Scotland in 2018.<sup>5</sup> These statistics could be read as indicating that not many FMPOs are being applied for. Our experience in practice has shown us that local authorities have been reluctant to proceed with an application for

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<sup>4</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2017/01/understanding-forced-marriage-scotland/documents/00513514-pdf/00513514-pdf/govscot%3Adocument/00513514.pdf> ,p.8, last accessed 9 September 2019

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/804044/Forced\\_Marriage\\_Unit\\_Statistics\\_2018\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804044/Forced_Marriage_Unit_Statistics_2018_FINAL.pdf), last accessed 9 September 2019

an FMPO. Whilst we appreciate the difficulties in assessing the evidential threshold and balancing the views of a 16 or 17 year old, often such a protection order is the best tool to keep the young person safe. Indeed, from a child protection perspective it is at times the only tool.

17. We are keen to see that this practice gap is addressed and not replicated in the context of protecting vulnerable young people against FGM. We appreciate that children at risk of FGM are most often younger children, but risks persist for teenage children as well. Certainly, the cultural, social and familial barriers to young people at risk of forced marriage accessing adequate protection also apply in the context of risk of FGM.
18. 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. 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. 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.

#### Additional positive impact of FGMPOs

19. We will finish our written evidence by raising to the Committee the positive impact that the ability to secure FGMPOs may have in the asylum claims for women and girls in the UK. To be recognised as a Refugee under the Refugee Convention 1951, an individual must show that they would be at real risk of persecution on return to their home country for reason of race, religion, nationality, membership of a particular social group (PSG) or political opinion. They must also show that the state cannot protect them or that they cannot live elsewhere in their country away from the alleged harm. Modern case-law has shown that women fleeing FGM, or protecting their children from the risk of FGM, may form a PSG.
20. Our solicitors have significant experience in working with women and children seeking international protection by reason of the risk of FGM. It is well documented that decision-making in the UK asylum system can be erratic and problematic. We believe that the ability to obtain an FGMPO in the Scottish courts to secure immediate safety and protection here in Scotland could be of assistance in showing a demonstrable risk on return, thus securing international protection. Indeed, the Court of Appeal has stated that although the Home Office is not bound by such orders of family courts but that they must be taken

into consideration.<sup>6</sup> The Home Office published guidance titled ‘*Gender issues in the asylum claim*’ (April 2018) states the following with respect to FGMPOs:

- *“The fact that a protection order has been made by the Family Court may provide strong evidence of risk of persecution or serious harm. However, the order may not provide evidence about risk on return to their country, so does not in itself mean that refugee status should automatically be granted. The asylum claim must still be considered on its individual merits, taking into account that the Family Court has made an order and the reasons for it doing so. Such orders must be considered in the round and given appropriate weight in reaching your decision on future protection needs.”<sup>7</sup>*

21. We see this as an example whereby the measures in the Bill may serve to advance the rights of vulnerable women and girls, currently in a precarious position due to their risk of FGM, and help to secure their safety and international protection here in Scotland. As such, we feel this is yet another reason to support the measures set out in this Bill.

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](mailto:info@justrightscotland.org.uk).

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<sup>6</sup> SSHD v GD (Ghana) (Rev 1) [2017] EWCA Civ 1126

<sup>7</sup> [Home Office Guidance, ‘Gender issues in the asylum claim’](#), April 2018, last accessed 9 September 2019