

Strengthening protection from Female Genital Mutilation (FGM)

A Scottish Government consultation

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MINISTERIAL FOREWORD



The practice of Female Genital Mutilation (FGM) is a physical manifestation of deep rooted gender inequality. It is an illegal and unacceptable practice which violates the human rights of women and girls. We have made our position crystal clear - this is simply unacceptable and we are committed to protecting all girls and women who are at risk of this.

Figures from the World Health Organisation tell us that more than 200 million girls and women alive today have been subject to FGM in 30 countries across Africa, the Middle East and Asia¹. This gives us a sense of the scale of the challenge and the extent to which the practice remains rooted in some parts of the world. Whilst we know that many countries have taken steps to make the practice illegal, there remains more to do - and we in Scotland need to play our part in protecting women and girls.

We know that there are no quick fixes to tackling FGM and there is no single solution to ending the practice. Therefore our approach to tackling it in Scotland is considered, collaborative and community based. In this way we can make sure that what we do helps prevent FGM, provides protection to those at risk, provides the support that those affected require and through participation gives a voice to communities affected by this practice.

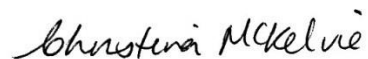
We have already taken forward work in this area. In February 2016, we published a National Action Plan to Prevent and Eradicate FGM. We're making progress in implementing the actions in the Plan, including the recent publication of multi-agency guidance for professionals. We've also provided funding for projects who are working within communities to raise awareness of FGM and support women and girls who are at risk or who have already been subject to FGM. And the Programme for Government published last month committed us to bringing forward legislation in this area.

So we know that we have more to do to ensure that those at risk are better protected and that perpetrators of this practice are held to account. The Scottish Parliament took an important step in 2005 by making the practice

¹ http://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf

illegal, and in 2015 the Parliament gave legislative consent to an important provision in the Serious Crime Act 2015 to ensure that extra-territorial jurisdiction applied to the Female Genital Mutilation (Scotland) Act 2005.

The Serious Crime Act also included a number of additional provisions which now apply in other parts of the United Kingdom, and I am keen that we consider whether or not we should take similar further steps in in Scotland. This consultation paper therefore seeks to explore these issues further and I would welcome the views of all with an interest so that we can make further progress towards ensuring that no-one ever has to be subject to this fundamental breach of human rights.



Christina McKelvie
Minister for Older People and Equalities

Part 1: THE CONSULTATION

Why we consult

Consultation is an essential part of the policy making process. It gives us the opportunity to get your opinion and expertise on a proposed area of work. You can find all Scottish Government consultations online at <https://consult.scotland.gov.uk/>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post. After a consultation is closed we publish all responses where you have given us permission to do so. Responses are analysed and used as part of the policy making process, along with a range of other available information and evidence. Responses to this consultation will help to inform the potential development of stronger protections for individuals at risk of Female Genital Mutilation (FGM).

Deadline

The consultation was published on 4 October 2018 and closes at midnight on 4 January 2019.

How to Respond

You can respond to this consultation online, by email, or by post. Our preference is to receive responses online.

Respond Online

To respond online please use the Scottish Government's Consultation Hub, [Citizen Space](#). You can save and return to your response at any time while the consultation is open, but please ensure that your response is submitted before the consultation closes at midnight on 20 December 2018. You will automatically be emailed a copy of your response after you submit it. If you choose this method you will be directed to complete the Respondent Information Form. The Respondent Information Form lets us know how you wish your response to be handled, and in particular whether you are happy for your response to be made public.

Other Ways to Respond

If you prefer you can also submit a written response in hard copy to The Equality Unit, 3H-North, Victoria Quay, Edinburgh EH6 6QQ or, by email to fgmconsultation@gov.scot. If you would like to submit your response by email or by post, please ensure that you complete the Respondent Information Form provided at Annex B and attach it alongside your response. The Respondent Information Form lets us know how you wish your response to be handled, and in particular whether you are happy for your response to be made public. It is helpful if you can be clear which question you are responding to so that we can make sure that we take your views into account in the right place.

Next Steps

After the consultation has closed we will analyse all the responses received and use your feedback to help inform policy in this area. Where permission has been given, we will make all responses available to the public at <https://consult.scotland.gov.uk/>. The responses to the consultation and analysis will be published in due course. Impact assessments will also be carried out in relation to developing policy proposals.

Complaints

If you have a complaint about how this consultation has been conducted you can send your query by email to Trevor.Owen@gov.scot, or by hard copy to Trevor Owen, The Equality Unit, Area 3H-North, Victoria Quay, Edinburgh, EH6 6QQ.

Part 2: INTRODUCTION

Female genital mutilation (FGM) involves procedures which include the partial or total removal of the external female genital organs for cultural or other non-therapeutic reasons.

FGM has been a specific criminal offence in the UK since the passage of the Prohibition of Female Circumcision Act 1985 (“the 1985 Act”). In England, Wales and Northern Ireland, the Female Genital Mutilation Act 2003 (“the 2003 Act”) repealed and re-enacted the provisions of the 1985 Act, gave them extra-territorial effect² and increased the maximum penalty for FGM. The Female Genital Mutilation (Scotland) Act 2005 (“the 2005 Act”) passed by the Scottish Parliament, 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 (“the 1995 Act”) (offences against children under 17 to which special provisions apply). Further information on the 2005 Act is at Annex B.

The Serious Crime Act 2015 is a UK wide act, and introduced a number of additional provisions in relation to FGM, only one of which applies to Scotland (section 70). These are as follows:

Provision	Description
Section 70: Offence of female genital mutilation and extra-territorial acts	Amended sections 3 and 4 of the 2005 Act so that they apply to UK nationals and residents rather than, as was UK nationals and permanent UK residents. This section made similar amendments to the 2003 Act.
Section 71: Anonymity for victims of female genital mutilation	Made provision for the anonymity of victims of FGM, 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, counseling and procuring the “principal offence”. The prohibition lasts for the lifetime of the alleged victim.

² The legal ability of a government to exercise authority beyond its normal boundaries.

Provision	Description
Section 72: Offence of failing to protect girl from risk of genital mutilation	Creates a new offence of failing to protect a girl under the age of 16 from risk of genital mutilation. A person is liable for the offence if they are responsible for a girl at the time when an offence under section 1, 2 or 3 of the 2003 Act is committed against the girl (and genital mutilation has actually occurred). The term “responsible” covers two classes of person (i) a person who has parental responsibility for the girl and has frequent contact with her; and (ii) any adult who has assumed responsibility for caring for the girl in the manner of a parent. Defences are provided for in that (i) the defendant did not think that there was a significant risk of the girl being subject to FGM and could not reasonably have been expected to be aware that there was any such risk and/or (ii) that the defendant took reasonable steps to protect the girl from being the victim of FGM.
Section 73: Female genital mutilation protection orders	Provides that the High Court or the family court in England and Wales may make an order (an “FGM protection order”) for the purposes of protecting a girl against the commission of a genital mutilation offence. That it may contain such prohibitions, restrictions or requirements and such other terms as the court considers appropriate to protect the girl in question. A breach of an FGM protection order is a criminal offence, however it may also be dealt with as a contempt of court and carries a potential prison term of up to 5 years.
Section 74: Duty to notify police of female genital mutilation	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.
Section 75: Guidance about female genital mutilation	Confers a power on the UK Secretary of State to issue, and from time to time revise, guidance about the effect of any provision of that Act or about other matters relating to FGM.

More detail on these provisions can be found in the relevant explanatory notes for the Serious Crime Act 2015³.

At the time of the Act’s passage, the Scottish Government and the UK Government agreed a legislative consent motion which amended the 2005 Act in respect of section 70. The Scottish Government indicated that it would consider further whether section 71 to 75 were appropriate for introduction in Scotland. The Scottish Government conducted some targeted stakeholder engagement in 2016, which this paper goes into more detail in Annex A.

³ <http://www.legislation.gov.uk/ukpga/2015/9/notes/contents>

Following that period of engagement, this formal public consultation seeks views on these provisions, as well as whether there are further steps we should be considering that help to strengthen protection for those at risk of FGM.

Part 3: BACKGROUND

Physical description of Female Genital Mutilation (FGM)

The World Health Organisation (WHO) 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’. WHO classifies the practice into four types⁴:

- Type 1: Often referred to as clitoridectomy, this is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals), and in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
- Type 2: Often referred to as excision, this is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva).
- Type 3: Often referred to as infibulation, this is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy). Deinfibulation refers to the practice of cutting open the sealed vaginal opening in a woman who has been infibulated, usually to allow intercourse or to facilitate childbirth.
- Type 4: This includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area. It can cover vaginal elongation, the practice of stretching the vulva using weights for aesthetics or enhancement of sexual pleasure.

Terminology

‘Female genital mutilation’ or ‘FGM’ is an internationally-recognised term⁵. It is supposed to convey the severe harm caused to women and girls by the practice. However, it should be noted that women affected by FGM may not describe themselves as ‘mutilated’ and may not recognise the term. Although ‘FGM’ or ‘cutting’ are common, they are not universally understood because they are English words. However, the term ‘female circumcision’ is anatomically incorrect and also misleading because it implies parity with non-medical male circumcision.

Health Impacts

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. Generally speaking, risks increase depending on the severity of the procedure. Immediate complications can include severe pain; excessive bleeding

⁴ <http://www.who.int/reproductivehealth/topics/fgm/en/>

⁵ <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2017/policy-note-female-genital-mutilation-cutting-and-violence-against-women-and-girls-en.pdf?la=en&vs=905>

(haemorrhage); genital tissue swelling; fever; infections such as tetanus; urinary problems; wound healing problems; injury to surrounding genital tissue; shock; and death. Long-term consequences can include urinary problems (painful urination, urinary tract infections); vaginal problems (discharge, itching, bacterial vaginosis and other infections); menstrual problems (painful menstruations, difficulty in passing menstrual blood, etc.); scar tissue and keloid; sexual problems (such as pain during intercourse, or decreased satisfaction); increased risk of childbirth complications (such as difficult delivery, excessive bleeding, caesarean section, or need to resuscitate the baby) and new-born deaths; need for later surgeries; and psychological problems (such as depression, anxiety, post-traumatic stress disorder, and low self-esteem).

Perpetrators of FGM

FGM is often performed by older women, for whom it can be a lucrative source of income and prestige. It is often without medical expertise, anaesthesia or attention to hygiene. In some communities, health professionals are performing FGM because they think that, if they do it, it will protect women from infection and pain. Despite the harm it causes, many women think it is in the best interests of their daughters for reasons of faith, chastity, status, honour, marriageability, belonging, tradition, cleanliness or desirability. It can be claimed as a religious practice, but no religion condones it and faith leaders have condemned it. In some communities, women who oppose FGM or who try to protect their daughters from it are abused or ostracised, and their daughters shunned or stigmatised. Local structures of power and authority, such as community leaders, religious leaders, circumcisers, and even some medical personnel can contribute to upholding the practice. In most societies, where FGM is practised, it is considered a cultural tradition, which is often used as an argument for its continuation. And in some societies, recent adoption of the practice is linked to copying the traditions of neighbouring groups. Sometimes it has started as part of a wider religious or traditional revival movement.

Countries where FGM takes place

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.

FGM in Scotland

Whilst survivors of FGM are found in some communities in Scotland, not all women and girls born in countries or communities where it is practised are affected or at risk. In its report, "Tackling FGM in Scotland: towards a Scottish model of intervention

(2014)⁶, the Scottish Refugee Council 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 respectively.
- 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.

⁶ http://www.scottishrefugeecouncil.org.uk/assets/0000/9061/FGM_Report_FINAL_A4portrait.pdf

Part 4: POLICY AND LEGISLATIVE CONTEXT

The Scottish Government's work in this area is underpinned by a legislative framework and guided by a number of strategic documents:

Equally Safe: Scotland's strategy to prevent and eradicate violence against women and girls

The Scottish Government and COSLA's strategy was first published in 2014, updated in 2016⁷ and is complemented by a Delivery Plan published in 2017⁸. It has been developed in close collaboration with a number of stakeholders, many of whom have drawn on the voices and experiences of women and children impacted by gender based violence.

The strategy sets out a vision of a strong and flourishing Scotland where all individuals are equally safe and respected, and where women and girls live free from all forms of violence and abuse, as well as the attitudes that perpetuate it. It articulates a shared understanding of the causes, risk factors and scale of the problem. It highlights the need to prioritise prevention, and it sets out how we will develop the performance framework which allows us to know whether we are realising our ambitions. We are committed to working collaboratively with partners and achieve change by making best use of available resources and with a clear governance framework underpinning delivery. A Joint Strategic Board has been established to oversee progress and identify emerging issues, and a Joint Delivery Group is in the process of being established to drive progress and embed collaborative working nationally.

The United Nations' own definition of violence against women and girls⁹ has guided the development of policy in this area for many years; it recognises that this violence is both cause and consequence of gender inequality. Our definition, drawn from the UN definition, states that:

“Gender based violence is a function of gender inequality, and an abuse of male power and privilege. It takes the form of actions that result in physical, sexual and psychological harm or suffering to women and children, or affront to their human dignity, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. It is men who predominantly carry out such violence, and women who are predominantly the victims of such violence. By referring to violence as 'gender based' this definition highlights the need to understand violence within the context of women's and girl's subordinate status in society. Such violence cannot be understood, therefore, in isolation from the norms, social structure and gender roles within the community, which greatly influence women's vulnerability to violence.”

When we talk about violence against women and girls, we refer to a continuum of violence which includes domestic abuse, rape and sexual assault, sexual

⁷ <https://www.gov.scot/Publications/2018/04/5766>

⁸ <https://www.gov.scot/Publications/2017/11/5647>

⁹ <http://www.un.org/documents/ga/res/48/a48r104.htm>

harassment, commercial sexual exploitation (such as prostitution), and so called 'honour based' violence (such as Female Genital Mutilation and Forced Marriage). Tackling FGM is therefore firmly located within our work to prevent and ultimately eradicate all forms of gender based violence.

Scotland's National Action Plan to prevent and eradicate Female Genital Mutilation

Female Genital Mutilation falls under the broader umbrella of so called 'honour based' violence, and forms part of the continuum of gender based violence. . The Scottish Government recognises FGM to be a fundamental breach of human rights, and is committed to preventing and eradicating it.

The Scottish Government recognises that communities and individuals affected by FGM must be at the heart of work to change the attitudes and practices behind it, and that long-term change requires sustained commitment from all partners. Scotland's National Action Plan to Prevent and Eradicate Female Genital Mutilation (FGM)¹⁰ was published in February 2016, and it sets out a range of actions to be taken forward by the Scottish Government and its partners to:

- prioritise prevention / protection from FGM
- improve the provision of services and support to those affected by FGM
- strengthen the law to extend protection to those at risk and to sanction perpetrators
- inform those at risk that FGM is illegal in Scotland and a violation of their human rights
- work with communities to understand FGM and its impact
- support communities to change perceptions, attitudes and behaviours related to FGM
- enable the provision of information, guidance and training to the statutory and third sectors

A national implementation group was established to drive progress, and meets on a regular basis. A Year One progress report¹¹ was published in 2017, highlighting progress to implement the Plan. The implementation plan contains a commitment to engage with potentially affected communities and other relevant stakeholders to consider the potential for and impact of further legislation in this area. It also contains a commitment to liaise with the UK Government to consider the efficacy of legislation introduced under the Serious Crime Act 2015. And it contains a commitment to consider legislation in relation to the practices of 'elongation' and cosmetic genital piercings.

FGM and the law

European and International

FGM contravenes human and women's rights under various international treaties. It has been recognised as a form of gender-related persecution under the 1951

¹⁰ <https://www.gov.scot/Resource/0049/00493752.pdf>

¹¹ <https://www.gov.scot/Publications/2017/10/8829>

Refugee Convention on the grounds of political opinion, membership of a particular social group or religious beliefs and may therefore form the basis of a successful asylum claim. 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 (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention Against Torture (CAT), Convention on the Elimination of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC), as well as regional human rights instruments including the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union.

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

UK

The Prohibition of Female Circumcision Act was introduced in 1985 providing specific legislation to make FGM unlawful across the UK.

The Serious Crime Act 2015¹² contains six FGM-related legislative provisions for other parts of the United Kingdom apart from Scotland as set out earlier in this consultation document. The Scottish Parliament granted legislative consent for Section 70 of that Act to apply to Scotland, which means that extra-territorial offences in the Prohibition of Female Genital Mutilation (Scotland) Act 2005 now apply to habitual (as well as permanent) UK residents.

Scotland

[The Prohibition of Female Genital Mutilation \(Scotland\) Act \(2005\)](#) (“the 2005 Act”) makes it unlawful for a person to carry out specified FGM procedures on another person. The legislation also makes it an offence for a person to aid, abet, counsel, procure or incite:

- Another person to commit an offence of FGM;
- Another person to carry out FGM on herself; or
- Another person who is not a UK national or UK resident to carry out FGM outside of the UK (e.g. to arrange by telephone from Scotland for their daughter to have an FGM operation carried out abroad by a non UK national or UK resident)

¹² <http://www.legislation.gov.uk/ukpga/2015/9/contents/enacted>

The provisions of the Act extend to cover acts carried out outside of the UK by a UK national or UK resident. It therefore means that a UK national or UK resident would be committing an offence under Scots law were they to travel to another country and carry out FGM – even if FGM was not illegal in that country. Similarly it would be an offence for a UK national or UK resident to travel outwith the UK and aid, abet, counsel, procure or incite another person to carry out FGM in that country – again even if FGM was not illegal in that country. The penalty on conviction on indictment is up to 14 years' imprisonment.

The 2005 Act does allow an approved person to carry out a surgical operation on someone, if necessary for the latter's physical or mental health, or on a person in labour or who has just given birth, for reasons connected with the birth.

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

Part 4 of the National Child Protection Guidance¹³ provides for child protection in specific circumstances, and sets out the required response for a professional if they come across FGM, and notes that FGM should always trigger child protection concerns that local guidelines should be in place to ensure a co-ordinated response from all agencies and highlight the issue for all staff that may have contact with children who are at risk from female genital mutilation. As with other forms of child protection work this should be done as far as possible in partnership with parents/carers unless they themselves are the source of the risk.

Where a child has been a victim of FGM or is at risk of becoming a victim of FGM (e.g. they live in the same household as a victim of FGM or as a person who has previously committed an offence involving FGM), then that child may be referred to the Reporter to a Children's Hearing. The referral can be made by the police, the local authority, health services, schools or by any other person or agency who has concerns about the child. The court has a specific power to refer affected children where a person has been convicted by that court of an offence which involves FGM. Local authorities are subject to a particular responsibility under section 60 of the Children's Hearings (Scotland) Act 2011¹⁴ 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.

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 having FGM performed on them. These concerns were fully investigated and no criminality found. Cutting had not taken place in any of the cases referred

¹³ <https://www.gov.scot/Resource/0045/00450733.pdf>

¹⁴ <http://www.legislation.gov.uk/asp/2011/1/contents>

Part 5: CONSIDERATION OF ADDITIONAL PROTECTIONS

In order to inform thinking on potential legislative provisions in Scotland, the Scottish Government developed a questionnaire to gather the views of key stakeholders. The survey was sent to all members of the Scottish Government's then Short Life Working Group on FGM in 2014, and a total of 32 completed questionnaires were received. Key findings were as follows:

- The only provision that received significant support (21 out of 32 respondents were in favour, and a further 9 were 'not sure') was the provision for lifelong anonymity for victims. However, greater clarity on what this meant was called for.
- Just under half of respondents (15 out of 32) supported introducing a mandatory duty for doctors, teachers and others to report cases of FGM to the police if they believe they have seen that FGM has occurred.
- For the three remaining legal provisions under consideration, the most common response was 'not sure': 15 respondents were not sure whether Scotland should introduce an offence so that parents can be prosecuted if they fail to prevent their daughter being subjected to FGM; 15 were not sure if Scotland should place the existing FGM guidance for professionals on a statutory basis; and 19 were not sure about introducing a specific civil protection order for potential victims of FGM.
- Many respondents called for further consultation with communities affected by FGM, and for further detail on what the legislation would entail and how it would be implemented. The need for consistency with other related legislation (child and adult protection) was also highlighted, and some respondents suggested that better enforcement of existing legislation should be the focus, rather than the introduction of new legislation.

A more detailed summary of the survey findings is at **Annex A**.

Part 6: PROPOSALS TO STRENGTHEN PROTECTIONS AND QUESTIONS

The Scottish Government has developed initial views on strengthening protections, and would welcome views from interested stakeholders on how we should proceed in this area.

Anonymity for victims of female genital mutilation

The justice system in Scotland is generally based on justice being open and accessible. This means cases dealt with through the criminal courts are normally open for members of the public and the media to witness as well as families of those involved in a case. There are however some exceptions that have been made to this where this key justice principle of openness has been set aside to help protect the dignity of those involved in a case and help ensure the best evidence can be given.

It is a long-standing convention in Scotland that alleged victims of sexual offences are not named in the media. This position has been in place for many years and it is very closely adhered to by the media when reporting sexual offence cases. It is not underpinned by legislation and so operates on the basis of a decision made by the media to self-regulate in terms of how they report sexual offence cases.

Separate from this self-regulation, there are statutory provisions that empower the criminal courts to put in place measures to protect the identities of those involved in a case. These provisions are found in sections 271N – 271Z of the Criminal Procedure (Scotland) Act 1995¹⁵ and are available to the court where either party applies to the court for a witness anonymity order. This requires specific measures to be taken to protect the anonymity of a witness in criminal proceedings, including withholding the name or other identifying details of the witness, the removal or name etc from materials disclosed to the court, the use of a pseudonym by the witness, and the use of screens or modulation of the voice of the witness. These measures are available only where the court is satisfied that it is necessary to protect the witness or another person from real harm; where it is consistent, in all the circumstances, with a fair trial; and if the evidence of the witness is so important that it is in the interests of justice for him or her to testify and he or she would not do so without such an order. The judge is obliged to direct the jury to ensure that the existence of the order does not prejudice the accused.

By contrast to the witness anonymity order, which must be applied for, s47 of the Criminal Procedure (Scotland) Act 1995¹⁶ provides that (with some exceptions) no newspaper report of any proceedings in a court shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of an person under the age of 18 years concerned in the proceedings either as the accused or a witness.

We consider that the courts have what would appear to be the necessary powers at their disposal to ensure the protection of a victim or complainer's identity in any

¹⁵ <https://www.legislation.gov.uk/ukpga/1995/46/part/XII/crossheading/witness-anonymity-orders>

¹⁶ <https://www.legislation.gov.uk/ukpga/1995/46/section/47>

relevant case. Given that no cases of FGM have ever proceeded to court, we note that this is untested and so while we would propose to keep this under review, the Scottish Government is not persuaded that the introduction of lifelong anonymity is an appropriate action at this time.

QUESTION 1: do you believe that a provision for anonymity for victims of FGM should be introduced? Please explain your answer.

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?

Offence of failing to protect a girl from risk of genital mutilation

In the rest of the United Kingdom, 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. The maximum penalty for this offence is seven years' imprisonment or a fine or both. To be "responsible" for a girl, the person either has parental responsibility (such as mothers, fathers married to the mothers at the time of birth and guardians) and have frequent contact with her, or where the person is aged 18 or over they will have assumed responsibility for caring for the girl "in the manner of a parent"-for example family members to whom parents might send their child during the summer holidays. The requirement for "frequent contact" was intended to ensure that a person who in law has parental responsibility for a girl, but who in practice has little or no contact with her, would not be liable. Similarly, the requirement that the person should be caring for the girl "in the manner of a parent" is intended to ensure that a person who is looking after a girl for a very short period – such as a baby sitter – would not be liable. It is a defence for an accused to show that at the relevant time, they did not think that there was a significant risk of FGM being committed, and could not reasonably have been expected to be aware that there was any such risk; or they took such steps as he or she could reasonably have been expected to take to protect the girl from being the victim of FGM. If evidence is led which raises this defence then the onus is on the prosecution to prove the contrary beyond reasonable doubt.

The Scottish Government considers that there would be a number of challenges in introducing a specific offence in this area. Prosecution of such an offence would be predicated on proving an absence of action where the person could have reasonably acted, which is difficult to prove (as opposed to a specific course of conduct). Noting the social context in which risk of FGM may exist, we are also concerned about a number of adverse consequences in relation to potentially criminalising individuals who do not have the agency to protect girls (as opposed to being held accountable for a proactive course of conduct) and potentially reinforcing the hidden nature of the practice. However, we would welcome views on this.

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 subjected to FGM? Please explain your answer.

Female genital mutilation protection orders

FGM protection orders (or equivalent) do not currently exist in Scotland. There are a range of civil protection orders available in Scotland, such as interdicts to protect against domestic abuse, and forced marriage protection orders. The Scottish Government is minded to develop and introduce provisions for the creation of Female Genital Mutilation Protection Orders. We think that this would help to improve protections for women and girls at risk. We note that in England and Wales the introduction of FGM Civil Orders appears to have worked well.

The introduction of a civil protection order in respect of female genital mutilation would give the courts in Scotland a power to make an order (an “FGM protection order” or “FGMPO”) for the purposes of protecting a girl against the commission of an offence. An FGMPO may contain such prohibitions, restrictions or requirements and such other terms as the court considers appropriate to protect the girl in question. The provisions on forced marriage protection orders in the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 provide a model to follow.

A number of individuals and organisations could apply for an FGMPO, namely the person who has had or is at risk of FGM; a local authority; or any other person with the permission of the court (for example, the police, a teacher, or a family member). Persons under 18 would be able to apply; and they could do so without a formal need for assistance. Section 2(4A) of the Age of Legal Capacity (Scotland) Act 1991 provides that “a person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding.” Applications would be made to the Sheriff Court and the Scottish Government would develop guidance to support those wishing to apply. There would be no court fee in relation to applying. A Business Regulatory Impact Assessment is being developed and this will set out consideration of the costs involved in setting up and running such a system.

Each FGMPO would be specific to the individual case. The conditions within the orders could vary, but might include the following (this list is non-exhaustive):

- that the person causing the risk does not take the person to be protected abroad with the purpose of committing or attempting to commit FGM
- that the person causing the risk does not enter into any arrangements in the UK or abroad for FGM to be performed on the person to be protected
- that the person causing the risk surrenders their passport or any other travel documents and/ or the passport of the person named in the application.

An application to vary, extend or discharge (end) a FGMPO at a later time could also be made. Legal aid would be available for applicants for FGMPOs, subject to the usual criteria.

If the conditions in the FGMPO are not followed this would constitute a breach and would be a criminal offence. The maximum penalty for breaching an FGMPO would be set with in legislation and likely to mirror the penalty for breaching forced marriage protection orders (which is in the case of convictions without a jury, up to 12 months in prison, a fine of up to £5000, or both; and in the case of a conviction with a jury, up to 5 years in prison, an unlimited fine, or both.

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

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

Duty to notify police of female genital mutilation

In England and Wales, regulated health and social care professionals and teachers are required to report cases of FGM in girls under the age of 18, which they identify in the course of their professional work, to the police. In Scotland, agencies should respond to FGM using existing child and adult protection structures, procedures and policies, including multiagency arrangements. There are sections in guidance on reporting¹⁷ covering a range of agencies.

The Scottish Government considers that there are a number of challenges in relation to introducing such a duty in Scotland. We are mindful of the importance of not inadvertently placing barriers in the way of those who would seek to access support services but be dissuaded from doing so in the knowledge those services have a duty to report to the Police. We are not sure that introducing such a duty would support a policy objective whereby someone who has experienced FGM has access to support, and we think that services would be better to focus on this rather than notifying the Police. We note that child protection procedures are already in place for those under 16 and would expect that these would be activated in the event of FGM being identified by a professional. However, we would welcome views on this.

QUESTION 7: Do you think the Scottish Government should introduce a duty to notify Police of FGM? Please explain your answer.

Guidance about female genital mutilation

In November 2017, the Scottish Government published “Responding to Female Genital Mutilation (FGM) In Scotland - Multi Agency Guidance¹⁸”. This guidance provides a framework within which agencies and practitioners can develop and agree processes for working collaboratively and individually to promote the safety and wellbeing of women and girls and supplements agencies and organisations own policies and procedures on FGM. It covers how to identify whether a girl (including an unborn girl) or young woman may be at risk of FGM; how to identify a girl or woman who has undergone FGM; how to protect those at risk and support those already affected; and how to prevent and end FGM. The current guidance is not statutory.

¹⁷ <http://www.gov.scot/Resource/0052/00528145.pdf>

¹⁸ <http://www.gov.scot/Publications/2017/11/5793>

The Scottish Government is minded to make provision for Scottish Ministers to issue statutory guidance about the effect of any provisions of this Bill, any provisions of the 2005 Act or about any matter relating to FGM. Any person to whom the guidance was given and who was exercising a statutory function would have a duty to have regard to such guidance when exercising that function. The guidance would only be able to be made by Ministers after they had consulted with relevant stakeholders.

The effect of the duty to 'have regard' would be that the public bodies subject to it would have to take the guidance into account in their processes and decision making in this area, and have good reasons should they decide to depart from it.

The purpose and content of the guidance would be similar to that published in November 2017, but by placing it on this particular form of statutory footing we believe that it will better ensure that public bodies work effectively together to ensure that women and girls are protected.

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.

QUESTION 9: Using existing non-statutory guidance as a basis, what should be covered by statutory guidance?

Other issues

Vaginal elongation

Vaginal elongation (also known as labia stretching) is the act of lengthening the *labia minora* (the inner lips of the female genitals) through manual manipulation (pulling) or physical equipment (such as weights). It is a familial cultural practice in parts of Africa and a body modification practice elsewhere. It is performed for sexual enhancement of both partners, aesthetics, symmetry and gratification. It has been compared to Female Genital Mutilation, and some stakeholders have provided anecdotal evidence of it taking place in Scotland. We are not currently persuaded of the need to include specific protections in this area, but would welcome views along with any evidence of whether this practice is taking place in Scotland.

QUESTION 10: Do you consider that additional protections need to be introduced in Scotland in respect of the practice of vaginal elongation? Please explain your answer.

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

Breast ironing

Breast ironing, also known as breast flattening, is the pounding and massaging of a pubescent girl's breasts, using hard or heated objects, to try to make them stop developing or disappear. It is typically carried out by the girl's mother who will say she is trying to protect the girl from sexual harassment and rape, to prevent early

pregnancy that would tarnish the family name, or to allow the girl to pursue education rather than be forced into early marriage. It is mostly practiced in parts of Cameroon, where boys and men may think that girls whose breasts have begun to grow are ready for sex. Some reports suggest that it has spread to the Cameroonian diaspora. As with vaginal elongation, some stakeholders have provided anecdotal evidence of it taking place in Scotland. We are not currently persuaded that we would wish to include protections in this area, but would welcome views along with any evidence of whether this practice is taking place in Scotland.

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.

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

Cosmetic genital piercings

Women can seek to obtain cosmetic genital piercings for various reasons. The mandatory reporting practices introduced in England and Wales mean that health services will seek to record cosmetic genital piercings as a form of FGM, to identify where this has been done in an abusive context. Cosmetic genital piercings are not prohibited under FGM legislation, but neither is it explicitly exempted from requirements to record and report. Recognising the complexity of this issue, we are developing our views on how to best reflect this going forward.

QUESTION 14: Do you have views in relation to the place of cosmetic genital piercings in relation to protections and guidance?

General

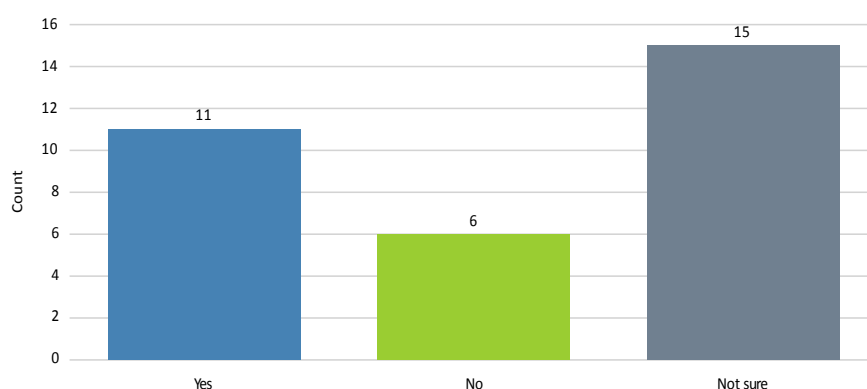
QUESTION 15: In relation to the issues covered within this consultation, are there any other points you would wish to make that are not already included under other answers?

RESULTS OF FGM STAKEHOLDER SURVEY CONDUCTED IN 2015

A New Offence

Level of support

Do you think that Scotland should introduce an offence so that parents can be prosecuted if they fail to prevent their daughter being subjected to FGM?



Almost half of respondents (15 out of 32) were 'not sure' about introducing a new offence; 11 were in favour, and 6 against.

Arguments in favour

Stakeholders arguing in favour of introducing a new offence emphasised that this would send out a very strong message to parents and communities that FGM is unacceptable in Scotland. They also noted its potential to change mind-sets and cultural values positively whilst acting as a strong deterrent which reinforces the parental duty of care and gives children legal protection.

Arguments against

Argument against were broadly in three areas. First concerns that a blanket offence would not be able to pick up the nuances of individual cases and would prosecute parents when they did not have the knowledge, opportunity, capability, power or resources necessary to prevent FGM from taking place. Secondly, that current legislation allows for prosecution of any individual who abuses/allows a child to be abused which makes the prevention of FGM the responsibility of everyone under Child Protection. Thirdly, that it may cause more harm by reducing reporting and engagement with services by victims or parents for fear of reprisals. Finally they argued that it would be difficult to enforce in practice.

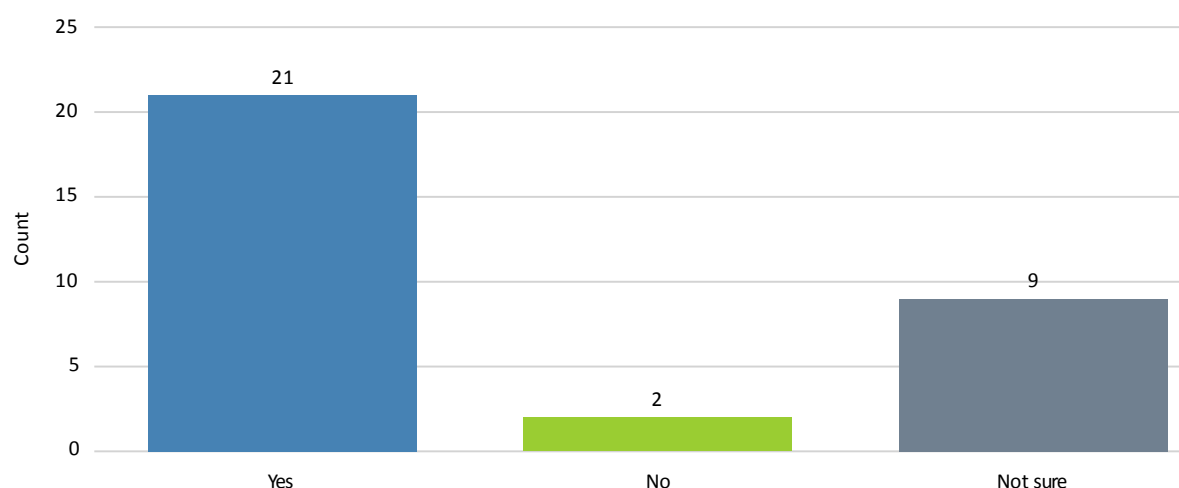
Other ways of providing the equivalent protection

Stakeholders noted that there were other ways of providing equivalent protection including engaging with public and communities to make sure they understand the rationale for making FGM an offence; advice and support for families travelling abroad on how to keep girls safe; better use of existing legislation; more robust adult and child protection services, in particular in community localities at risk of FGM practice; improved training and education for medical staff, teachers, social workers and for the children themselves and where appropriate robust information sharing between health / education / police.

Lifelong anonymity for victims

Level of support

Do you think that Scotland should grant victims of FGM lifelong anonymity from the time an allegation is made?



A majority of respondents (21 out of 32) supported granting victims lifelong anonymity; 9 were 'not sure', and 2 against.

Arguments in favour

Arguments in favour of anonymity noted that it would be intrusive and stigmatising for victims to have FGM status on records and that there were no public interest grounds to do so.

Arguments against

Arguments against noted that some women might choose not to have anonymity. For women who are victims of abuse it is extremely important that they are empowered and allowed to choose. Others required more clarity on what is meant by anonymity and whether it related specifically to court processes or media or wider services. Some argued that there might be a need to share information across partner agencies to both support victims and prevent future FGM practice.

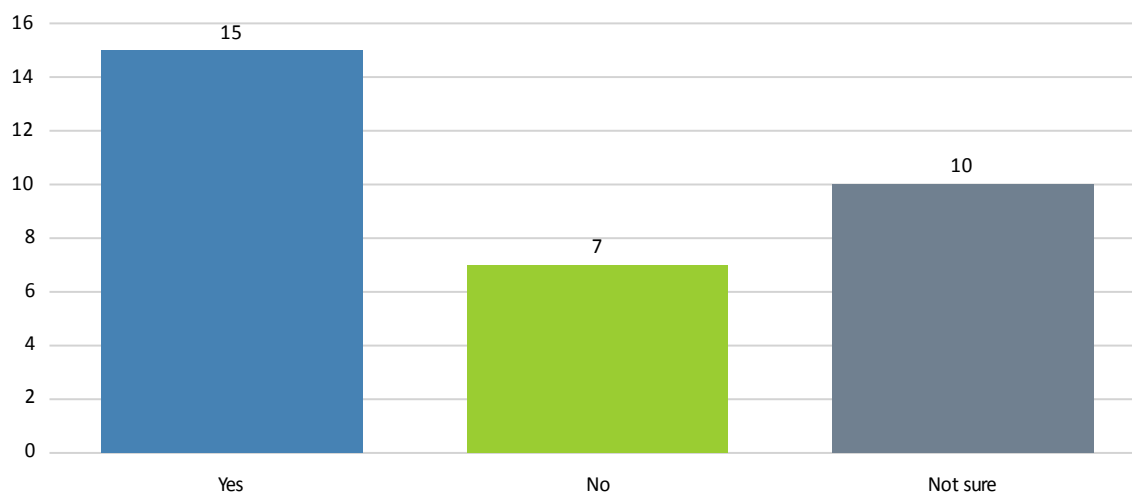
Implementation/enforcement

Stakeholders provided a range of views on how this could be implemented varying from providing new identity like a witness protection scheme to adopting current anonymity systems provided by Scottish law for minors and victims of rape or serious sexual assault. Some thought that the safeguards of existing data protection regulations around sensitive/confidential data would be sufficient.

Mandatory Duty to Report

Level of support

Do you think that Scotland should introduce a mandatory duty for doctors, teachers and others to report cases of FGM to the police if they believe they have seen that FGM has occurred?



Just under half of respondents (15 out of 32) supported introducing a mandatory duty; 10 were 'not sure', and 7 against.

Arguments in favour

Stakeholders said that it would give professionals a very clear mandate and remove any dubiety around their actions. For cases of girls under 16 it would also bring practice into line with child abuse/neglect duties of care. In addition it was noted that it would raise the profile of FGM potentially bringing more prosecutions and ensuring that children in communities and families related to a known FGM victim could be offered better protection.

Arguments against

Arguments against discussed how such a mandatory duty may well conflict with other duties to the client/patient/pupil related to confidentiality and choice as well as questioning the level of evidence of 'belief' required before reporting and the level of training and guidance that would be required for doctors and teachers. Some thought that it may prevent victims from engaging with health and other services for fear of unintended consequences and may even raise the potential for members of certain ethnic minority communities to be stigmatised. Finally one stakeholder questioned whether there was evidence that mandatory reporting either increases prosecutions or reduces abuse.

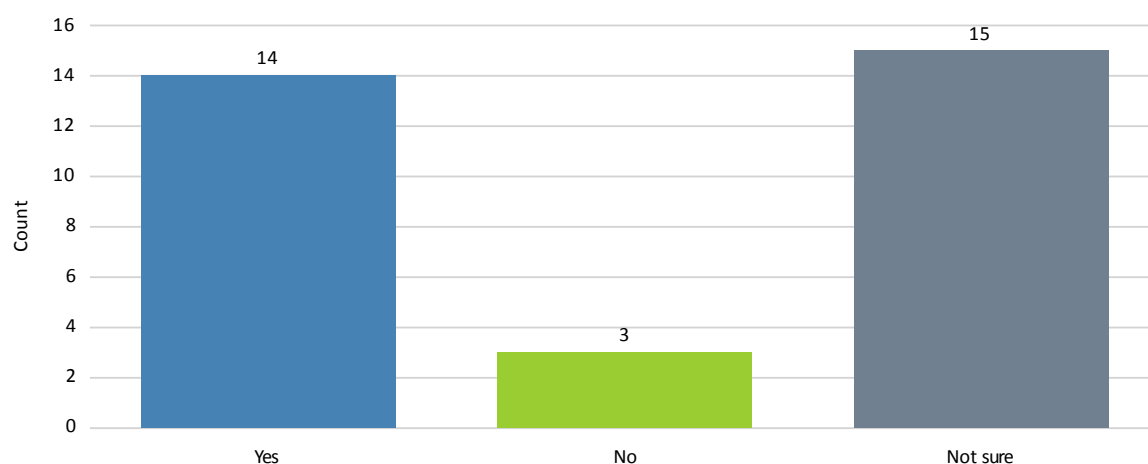
Alternatives

A range of alternatives were suggested including implementing robust adult and child protection services; providing specialist services for victims; providing in-depth and intense training and education for appropriate public services accompanied by a non-mandatory referral system; community engagement; use of existing systems and protocols governing the sharing of information between NHS, Police and other partners.

Statutory Guidance for Professionals

Level of support

Do you think that Scotland should place the existing FGM guidance for professionals on a statutory basis?



Just under half of respondents (15 out of 32) were 'not sure' about placing guidance on a statutory basis; 14 were in favour, and 3 against.

Arguments in favour

Stakeholders thought that statutory duties brought status, single guidance, clear accountability for implementation and a clear prevention message. It also prevented professionals 'hiding' behind patient confidentiality.

Arguments against

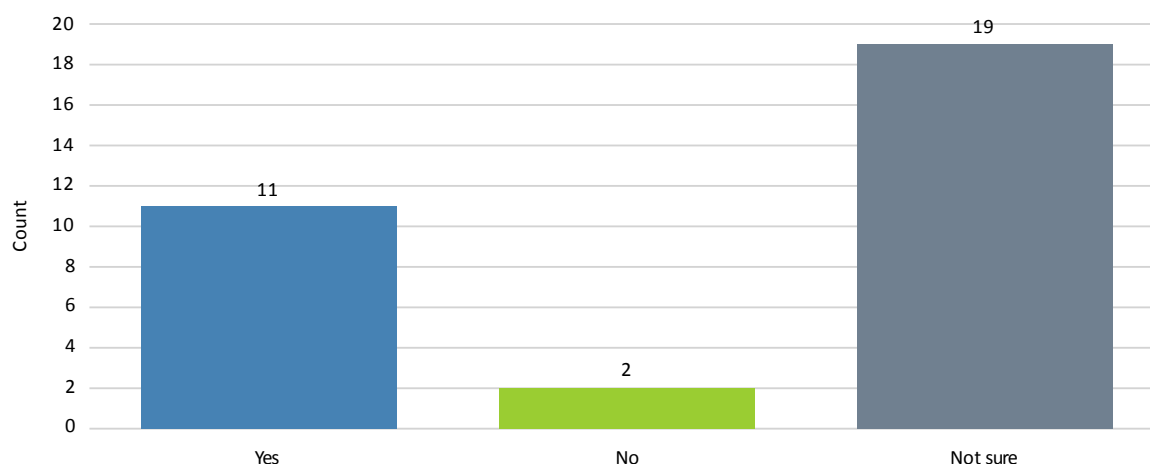
Stakeholders felt there was a need for greater clarity on how 'statutory' guidance would differ from other guidance, how it would fit with non-statutory child protection guidance and whether there would be space for discretion. Some stakeholders again felt that enforcing existing statutes would be more effective.

Alternatives

Stakeholders noted that alternatives could be intensive training and awareness raising, the promotion of existing child protection legislation and extending the existing 'violence against women' guidance to explicitly include FGM.

FGM Protection Orders

Do you think that Scotland should introduce a specific civil protection order for potential victims of FGM?



A majority of respondents (19 out of 32) were 'not sure' about introducing a specific civil protection order; 11 were in favour, and 2 against.

Arguments in favour

Some stakeholders felt that FGM is a unique phenomenon and its prevention requires a specific civil law measure. They argued that a protection order would empower women and/or families who are under pressure from others to undertake FGM, providing them an opportunity for positive choices and pre-emptive action.

Arguments against

Stakeholder noted that civil protection orders would require victims and potential victims to disclose themselves and that this is not currently happening. They felt that any legislation would need to be accompanied by a targeted prevention programme of community engagement and public education to influence a change in culture. Some stakeholders wanted further clarity on what conditions the order would impose or restrict whilst others noted that existing legislation may be adequate.

Views on how long the protection order should last

Some stakeholders felt that an order should last until adulthood / age of consent; some said it should last a lifetime whilst others said it would depend on the individual case and that the subject should be consulted.



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