



OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Equalities and Human Rights Committee

Thursday 14 November 2019

Session 5



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Pàrlamaid na h-Alba

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EQUALITIES AND HUMAN RIGHTS COMMITTEE

27th Meeting 2019, Session 5

CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Angela Constance (Almond Valley) (SNP)

*Mary Fee (West Scotland) (Lab)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Oliver Mundell (Dumfriesshire) (Con)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Christina McKelvie (Minister for Older People and Equalities)

Trevor Owen (Scottish Government)

David Stewart (Highlands and Islands) (Lab)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 14 November 2019

[The Convener opened the meeting at 09:17]

Petitions

Access to Justice (Environment) (PE1372)

The Convener (Ruth Maguire): Good morning, everyone, and welcome to the 27th meeting in 2019 of the Equalities and Human Rights Committee. I ask everyone to switch off and put away their mobile devices.

Agenda item 1 is consideration of two public petitions. I refer members to paragraph 2 of paper 1, which sets out the actions that are available to us.

Petition PE1372, by Duncan McLaren, on behalf of Friends of the Earth Scotland, is on access to justice on environmental matters. It calls on the Scottish Government to clearly demonstrate how access to the Scottish courts is compliant with the Aarhus convention. I invite members' comments.

Oliver Mundell (Dumfriesshire) (Con): I am keen to keep the petition open, because I am not satisfied that we have got as far as we can get with it. We should at least wait until the Scottish Government publishes its response to its consultation on the matter. I am also keen that we take further action, perhaps by writing to the Scottish Civil Justice Council, to seek clarification on how courts plan to reform and how that will impact access to justice on environmental matters.

Mary Fee (West Scotland) (Lab): I remember considering the petition when I was a member of the Equal Opportunities Committee in the previous session. It raises a long-standing issue, and we need to keep it open; we need to find a resolution. I agree with Oliver Mundell's suggestions.

The Convener: As there are no further comments, is everyone content to take those actions?

Members indicated agreement.

Access to Justice (PE1695)

The Convener: Petition PE1695, by Ben and Evelyn Mundell, is on access to justice in Scotland. The petition calls on the Scottish Parliament

“to urge the Scottish Government to take action to ensure that access to justice, including access to legal advice from appropriately trained lawyers and financial support through legal aid, is available to enable people in Scotland to pursue cases where they consider a human rights breach has occurred.”

I welcome Dave Stewart MSP, who is a member for the petitioners' region, and invite him to speak.

David Stewart (Highlands and Islands) (Lab): Thank you, convener. I welcome Evelyn and Ben Mundell, who are in the public seats.

Members will know from the committee papers that I have spoken on the petition at the Public Petitions Committee about three times. I will give some basic background information. As I said to the PPC, the case looks highly complicated—and elements of it are complicated. On the surface, the issue is the ring fencing of dairy farmers' milk quotas in the southern isles ring-fenced area. However, for me, the issue is much more fundamental: it is about how ordinary families on a modest income can seek redress and justice. I think that this committee accepts that that is important; I noticed that, in your annual report last year, the convener made the point that human rights are vital.

The simple answer is that families should seek redress through the legal system. That, of course, is right. However, members will know from my presentations to the PPC that the Mundells have been in touch—in person or by phone—with more than 50 law firms, but they have found that the vast majority of them will not deal with human rights cases. That is the first problem.

The second problem is that many firms that deal with such cases restrict their involvement to issues to do with prisoners or immigration. That is a big restriction. One lawyer agreed to take up the case but wanted an up-front payment of £25,000 before proceeding; at the time, that amount was double the family's yearly disposable income.

The Mundells have told me that many farmers in the ring-fenced area were placed in an impossible situation, given that the milk price was below the cost of production, which led, in effect, to the forfeit of their property. At the time, the quota was worth about £450,000, which is a massive sum relative to the family's income. As I said to the PPC, my view is that the situation is a potential breach of article 1 of protocol 1 of the European convention on human rights.

Let me give you some context. At the time of the ring fencing, in the United Kingdom as a whole, 36,000 dairy farmers had the asset of the milk quota and were perfectly free to realise the full value of the quota, to assist their businesses. Fewer than 200 people, who were in the ring-fenced area, were denied the right to trade, swap

or sell on their milk quota, for complicated reasons to do with the ring fencing. I consider that to be a breach of their rights.

I am conscious of time, convener, so I will finish with a couple of quotations. I was pleased that the First Minister set up the advisory group on human rights leadership. In its report, the group said:

“Progress then has evidently been made on Scotland’s journey. However, it is critical to acknowledge that there are gaps and shortcomings too ... too many people are not enjoying their rights in everyday life.”

The advisory group went on to say:

“All of this leads to a denial of access to justice ... It is a matter of political choice and priorities. What is needed is the political will to implement the solutions.”

When Judith Robertson from the Scottish Human Rights Commission—she is well known to the committee—appeared before the House of Commons and House of Lords Joint Committee on Human Rights in 2018, she said:

“The cheapest way to ensure that rights are delivered is to ensure that they are not breached.”

She went on to say:

“It is difficult for anybody to take a case in Scotland. As I said, we have no power to support anybody to do that; in fact, we are expressly disallowed.”

In a sense, we are at a disadvantage in Scotland. The UK body has different powers.

I have read the committee’s paper 1 and urge the committee to consider the recommendations in paragraph 43. It is suggested that the committee write to the Human Rights Consortium Scotland and JustRight Scotland, that it considers the consultation on legal aid and that it writes to the Faculty of Advocates, in particular about legal advice.

Those are sensible suggestions. There is a huge gap that is unfinished business for Scottish human rights. That is well illustrated by the Mundells’ case, but I stress that they are just an example of the families who have been affected. I do not have a complete track of them all, but many have gone out of business because of this disastrous position. They were not trading illegally or with a subsidy; they had great assets. The irony is that, in many parts, we are now short of dairy farmers and short of milk.

It was a very poor decision. The only way that people can address the matter is through the court system and, ultimately, the European Court of Justice. However, if they cannot get to first base, they cannot do that.

I am happy to answer questions, if I can, convener.

The Convener: Thank you. Do committee members have any comments?

Oliver Mundell: I fully support the points that we have just heard, which were set out well. I am content for us to take the actions that are suggested in paragraph 43 of paper 1. I am also keen for us to ask the Scottish Government for its views on the more general issues that the case raises and to ask when it expects the analysis of the legal aid consultation to be published. I am keen that we keep the petition open.

Mary Fee: I am grateful to Mr Stewart for his helpful remarks. I am keen that we keep the petition open and that we write to the Human Rights Consortium Scotland and JustRight Scotland. Given that this is a human rights issue and that the Mundells are one of many families who have been affected, will Mr Stewart detail some of the personal impact that the case has had on the Mundells? I think that it would be helpful for the committee to hear about that.

David Stewart: I am happy to do that. I have dealt with the family for about seven years, and the case is one of the most tragic cases that I have dealt with in my 12 years in Parliament. The Mundells have a great history in farming in the area. Ben Mundell told me yesterday that he has been a farmer for 50 years. If I remember rightly, he said that he is 74. Farming is in his blood, as his father farmed; I think that his grandfather has a farming history, too.

The quota issue has, in effect, ruined the farm. Yesterday, the Mundells told me—I am sure that they will not mind me telling you this—that they have great assets in the farm, including houses and farming facilities, yet they are in a position whereby they cannot afford to maintain their home. It is going to wrack and ruin, which is a real tragedy, considering its history. They are keeping the farm going, in effect, for their son, who also has medical issues. It is a tragedy that a good business has, in effect, been ruined by a bureaucratic decision with unintended consequences.

It would be interesting if we could track the 200 families. I suggest that, probably, very few of them are now in farming.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I agree with what has been said and with the recommendation that we keep the petition open. I wonder whether, as well as writing to the organisations that have been mentioned, we should write to the Law Society of Scotland and ask for its views on the matter.

The Convener: I am told that the Law Society of Scotland has provided its views to the Public Petitions Committee. We can reference them.

Fulton MacGregor: Okay. Thank you.

Alex Cole-Hamilton (Edinburgh Western)

(LD): I welcome the Mundells to the gallery. I had not fully anticipated from reading the committee papers the human cost of the mistake, and I have been quite shocked by what David Stewart has told us about the history of the case.

I think that, in addition to writing to the Government, and based on what it comes back with, we should give representatives of the Government an opportunity to come in for further questioning on the subject. We should not only keep the petition open; as it is a live and pressing human issue, we should ask questions about it in open committee.

David Stewart: May I add something?

The Convener: Yes. Please be brief, Mr Stewart.

David Stewart: It is on an issue that I perhaps did not highlight sufficiently. The committee might well have addressed previously the role of the Scottish Human Rights Commission. It is an excellent organisation, but my quote from Judith Robertson was, in effect, about the fact that its hands are tied in relation to dealing with cases directly. Has the committee addressed that issue? If not, it might be useful for it to do so. A change to the regulations could allow direct representation, which happens in the UK body, if my memory serves me correctly. It would certainly be worth while to look at why there is an impediment, because that is the problem that we have. People cannot access the law.

The Convener: I think that all those issues are live to the committee.

We seem to have consensus on the actions that we will take. Is everyone in agreement?

Members indicated agreement.

The Convener: Thank you. I suspend the meeting briefly, to allow a change of witnesses.

09:29

Meeting suspended.

09:30

On resuming—

Female Genital Mutilation (Protection and Guidance) (Scotland) Bill: Stage 1

The Convener: Agenda item 2 is an oral evidence session on the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill. I welcome, from the Scottish Government, Christina McKelvie, Minister for Older People and Equalities; Trevor Owen, bill team leader; and Nicholas Duffy, senior principal legal officer.

Minister, we have approximately one hour to question you, so we are going to be disciplined in our questions and I know that you will give concise answers. I invite you to make an opening statement of up to three minutes.

Christina McKelvie (Minister for Older People and Equalities): Good morning, and thank you for having me along to the committee. I am pleased to be giving evidence today on the bill. As we know, FGM is a physical manifestation of deep-rooted gender inequality. It is an illegal and unacceptable practice that violates the human rights of girls and young women. The Government's position is absolutely clear: FGM is simply unacceptable and we are committed to preventing FGM and protecting all girls and women who are at risk from it.

I want to be clear that the law and non-statutory guidance that we have in place at the moment work, but the bill takes things a wee bit further by strengthening the law and placing a greater focus on prevention and the protection of women and girls who are at risk. The bill puts in place a specific FGM measure—a protection order—which means that our public services and courts can focus on the need to protect those persons who are at risk. Building on the experience of other jurisdictions in the United Kingdom, and reflecting on the support of our consultation, this is an effective and proven approach to reducing risk to potential victims.

Under the bill, FGM protection orders will be made by a court and will be unique to each case. They will contain conditions to protect girls and women from FGM. They will also be able to be used by law enforcement agencies against those who wish to perpetrate this terrible crime, restricting their activities, even when no potential victim has been identified. To support the new protection orders, the bill places a duty on ministers to issue statutory guidance on the protection orders, and provides a power to issue guidance on FGM more generally. Crucially, public

bodies will be required to have regard to that guidance. That is an important point.

As evidence given to the committee has shown, the bill must be part of a holistic approach to tackling FGM. There is no single solution to ending the practice. The bill is part of our national action plan for preventing and eradicating FGM. We are making progress in implementing that plan, and the year 3 progress report, which was published last Friday, provides more detail. The report was provided to the committee last week; I hope that it was helpful.

A key component of the plan is to improve the provision of services and support to those who are affected by FGM and to ensure that people in communities play a central role in shaping the services, policy and statutory guidance. The evidence to the committee has been clear that the involvement of communities is key to the success of the programme of work, and I agree with that. I am committed to implementing a comprehensive programme of engagement and involvement as we implement the bill. Nothing about them without them is my watchword.

Our approach to tackling FGM in Scotland, through the national action plan, must be considered, collaborative and based in the community. In that way, we can ensure that what we do helps to prevent FGM, provides protection for those who are at risk, provides the required support and, through participation, gives a voice to the people and communities who are affected by the practice. Alongside the national action plan, the bill has the right mix of prevention and protection.

I am happy to take your questions.

The Convener: Thank you.

What evaluation did you undertake to ensure that the measures proposed in the bill—the protection orders—are necessary?

Christina McKelvie: The committee will know about the work of the national action plan, which has been on-going for a number of years, and about the organisations, groups and young women who have been involved in that. Continuing from that, we held a statutory consultation in which 80 per cent of the stakeholders suggested that we needed the two measures, and we started our work from that. The bill will ensure that a protection order is in place so that young people—specifically young women—are not put at risk. Given that we worked with the stakeholders and they came back with such a resounding result on the consultation, we felt that the best approach was to bring forward a tight bill with two provisions in it, on statutory guidance and protection orders.

The Convener: We have heard evidence that there is a gap in child protection for 16 and 17-year-olds. Do you agree and have you identified any other gaps in current practice?

Christina McKelvie: I have heard that evidence about the gap for 16 and 17-year-olds. The bill provides targeted protection for under-16s and for those over 16 who fall outwith the child protection system who are perhaps not deemed vulnerable enough to be part of the adult protection system. Crucially, we want to wrap around and continue the level of protection for a girl at risk, even when she moves on from the child protection system and becomes a young adult. The care, attention, support and protection will all continue.

The Convener: You mentioned that the protection orders will be unique to each case. Will you explain to the committee how they will work in practice and perhaps give an example? We are keen to hear what a protection order will mean for a young girl or woman at risk and how it will help them.

Christina McKelvie: There are case studies in the policy memorandum. We looked at examples, because I like to see how something will work for real people. We looked at how things have worked in other jurisdictions. You are right that we have to ensure that we understand all the issues, and we used some of the case study evidence to do that. I direct the committee to the policy memorandum, which might be helpful.

The Convener: Who can raise an order and what will the process be?

Christina McKelvie: In the new section 5C that the bill will insert into the Prohibition of Female Genital Mutilation (Scotland) Act 2005, there is a list of the people—individuals and organisations—who can raise a protection order. The list is not exhaustive and is pretty open, but we suspect that it will mostly be local authorities and perhaps, on rare occasions, individuals themselves who will look for a protection order.

The Convener: In England, it is mandatory to record FGM in a patient's healthcare record, and from September 2014 it became mandatory for acute trusts to collate and submit basic anonymised details every month to the Department of Health and Social Care about the number of patients whom they have treated who have had FGM. Guidance from the chief medical officer advises clinical staff in Scotland to record cases of FGM, and that information is monitored by the Information Services Division of NHS Scotland. Can you update us on that?

Christina McKelvie: The committee will know that the chief medical officer issued that guidance in a letter to all health boards and national health service authorities in 2014. The service is most

likely to come across the condition in those places. The diagnosis and recording of the types of FGM are clinical matters, which is why the chief medical officer takes responsibility. However, our current multi-agency approach contains an expectation that all agencies should gather, record and collate that data.

We are working, through the FGM action plan, on ways that we can do that. The implementation group is important in that work, because we want to ensure that we record the data that we need in a sensitive way that helps us to understand the issue, and helps professionals to understand it so that they can give the right support. We are working closely with NHS boards and data collection agencies to do that appropriately, through the implementation group, which is working alongside the community to make sure that we get it right.

The Convener: That is helpful.

Alex Cole-Hamilton: The Law Society of Scotland told the committee that children's hearings should be able to grant FGM protection orders, although Liz Owens from Social Work Scotland expressed doubts about that and suggested that the court process would provide a more sensitive approach. What is your view on whether children's hearings should be able to grant FGM protection orders?

Christina McKelvie: You will know that children's panels and hearings are called for a specific purpose, which relates to compulsory supervision orders and all the things that go along with them. All the issues that would lead to a child being referred to a panel would be taken into account. FGM is a schedule 1 offence, which would trigger a referral to the panel. That measure is already in place. The Law Society has raised an important point but, because FGM is treated as a schedule 1 offence, there is an automatic trigger. There are other ways in which to trigger a referral to a panel.

Child protection is child protection and child abuse is something from which we should protect our children. If a compulsory supervision order and the intervention of a panel are needed, there are mechanisms in place to make that happen.

Alex Cole-Hamilton: Given the scarcity of examples of FGM, most panellists will not come across it in the entire duration of their service on the children's panel. There are also particular cultural sensitivities around FGM. Is there a plausible case for having particular training for panel members on that?

Christina McKelvie: There are always opportunities for training. As a former social work training officer, I would always say that people should take up those opportunities. The committee

heard evidence from the principal reporter of the Scottish Children's Reporter Administration, who suggested that the measures that are in place are enough and that the normal processes of the children's hearing panels, such as compulsory supervision orders, are sufficient.

There are always opportunities for training. Part of the training on the wider aspects of protection orders and the guidance will be addressed in the work of the implementation group. I assure members that, if there are bodies that think that they should be involved in that, we will consider that and work to ensure that we get that information out to all the right places, so that—as Mr Cole-Hamilton says—on the rare occasion that FGM comes up, people are ready for it.

The implementation group for the national action plan is well versed in working with other organisations and is doing a lot of awareness raising. The general policy has not changed: FGM has been illegal for a long time. There is already lots of training out there. For the purposes of the bill, we are considering how we can use protection orders and the statutory guidance to ensure that people understand their role in protecting girls and women.

Oliver Mundell: I want to ask about free legal aid and advice. The bill does not make that automatic, but we have heard from several witnesses that they would like it to be so, partly because of some of the difficulties that they have seen in bringing FGM cases in the past. They think that there is a special case for putting in place free legal aid in respect of FGM in the bill in order to prevent barriers to justice.

Christina McKelvie: That is a point well made. Perhaps I can give members some information on how our legal aid system works, as I think that some of the evidence that the committee took related to how legal aid works in other jurisdictions in the UK. In Scotland, we expect that, in the vast majority of cases in which an FGM protection order is sought, that will be done by a public body, so legal aid will not apply. There might be a situation in which the parents of a child wanted to bring a case, and they would go through the normal procedure of testing of their wealth and financial support. In most cases, I would expect people to be eligible to be supported by legal aid.

In 2018, the independent strategic review of legal aid, "Rethinking Legal Aid", highlighted that Scotland's current legal aid spend is the third highest per head in the European Union. We are spending quite a lot of money. In Scotland, about 75 per cent of people are financially eligible for some form of legal aid, compared to only about 25 per cent in the rest of the UK. We think that we have a robust system. Given that individuals as well as local authorities can apply for protection

orders, we think that we have the right measure of support and understanding. I suspect that people will get the support that they need to take forward a case.

It has just struck me that, if it is the young person who is applying rather than the parents, they would qualify for that type of support, too.

09:45

Oliver Mundell: To push back on that a little, I probably do not need to say to you that many people find frustration and delays with legal aid; they find the process complicated. Parents who might be going to come forward on the issue could be in particularly vulnerable situations and there might be a matter of urgency. I am concerned that the legal aid system might put a barrier in front of people when they are making very difficult decisions. That applies particularly to some of the people who we have met. Can anything extra be put in place to provide initial legal advice to get a case going?

Christina McKelvie: We can certainly consider that. That would take us a wee step further than the current arrangements, which I think are robust and supportive enough but, if you think that we should take other measures, I am happy to hear about them. I shall take that away, consider it and come back to you.

Oliver Mundell: That is helpful, and it links to my next question. We had evidence last week from the National FGM Centre, which covers England. Would you consider adopting its approach? We have the national implementation group, but could we have a service to provide support, in the early stages, to individuals who are taking forward protection orders under new section 5C without the support of a local authority or Government agency?

Christina McKelvie: We will certainly take that up with the implementation group and the groups that we are working with. We want to ensure that stakeholders and the communities that are affected are at the heart of all this. If they think that they need that—they have not raised it with us directly yet—I am happy to hear that and to see where we can work together on it.

Oliver Mundell: We heard generally about support through the National FGM Centre and we took evidence from Liz Owens on behalf of Social Work Scotland about the support that will surround FGM protection orders. How do you plan to meet broader support needs? We have heard concerns about housing and longer-term impacts on health. What support will be put in place to sit alongside the protection orders?

Christina McKelvie: That is wider than the scope of the bill, but I am happy to hear some of that. You will know that FGM has been an illegal practice for more than 10 years. Many social work settings—indeed, all of them, I suspect—are well-versed in the issues that arise, especially in communities where interventions are already in place. It strikes me that we need to do another piece of work with the implementation group to talk to some of the professionals. We have done that. We spent a really informative day in the summer with all the organisations to talk about some of the wider challenges.

I am not sure what you mean about housing and health. Do you want to drop me a wee note on the wider implications of that, or will the convener indulge you and let you go into that quickly now? I am not sure quite how it ties into the bill, which is about protection orders and guidance, but there may be a space in guidance for some of those issues.

Oliver Mundell: I can talk about that now. The convener was with me on a visit to an organisation in Edinburgh that works with some of the people who we hope the bill will help. Its concern is that the protection order could do the legal bit, but individuals who are sharing a house with someone who might want to go ahead with FGM practices would not feel confident in coming forward, because they might not have somewhere to live if that family relationship broke down. There are also concerns about how people might support themselves financially in cases where family relationships have broken down. Is part of protecting people making sure that they have access to other services that sit round about?

On health, we heard last week that a number of people would benefit from longer-term counselling or other support because, obviously, going through the legal process and revisiting traumatic experiences can be very difficult, particularly for people on the margins of society. Could an element of support be encompassed within the protection orders?

The Convener: Oliver Mundell mentioned our visit in the summer. To give a specific example, the choice—if it could be called a choice—that was available to a woman whose child was potentially affected was to move across the city to be in emergency temporary accommodation. We were struck by the fact that protection orders can give legal protection but the people involved have multiple challenges and issues—none of this happens in isolation. The woman was a victim of domestic abuse. We recognise that you are here to talk about the bill, but it is important for us to see how things join up in focusing on the women and girls whom the bill will protect, and that

protection orders will give them a choice and will help them.

Christina McKelvie: I absolutely understand where you are coming from. A protection order can direct local authorities to put such support in place. Members may be interested in the work that has just been announced on barring orders for domestic violence situations. You may also know that, where a schedule 1 offence has been committed, a perpetrator or potential perpetrator can be removed from a situation in order to protect a person who is at risk. Those measures will also be available. I hope that that gives members reassurance.

On the health issue, members might know from their visits that we currently fund Waverley Care, Saheliya and other organisations to do direct work to support people in a culturally sensitive way. Statutory authorities sometimes need the support of people who work in communities. Saheliya involves women who have lived experience of FGM or women who have supported people with lived experience of FGM or other culturally sensitive issues, such as honour-based violence. We look to them as the experts in ensuring that people get the right support. Local authorities can certainly direct people to that support, and a protection order can direct local authorities to take responsibility for ensuring that that happens.

Oliver Mundell: That is excellent. I am glad that we continued that discussion, because I think that the whole committee will be very pleased that that is the case.

My final question is a specific one. Last week, Leethen Bartholomew from the National FGM Centre highlighted his concerns that some paediatric doctors might not have the expertise to examine women and girls for FGM, that they might be reluctant to do so and that they might be reluctant to give evidence in court. How do you plan to ensure that professionals feel confident about dealing with such cases in Scotland?

Christina McKelvie: That issue had not been raised with us before. After I heard that evidence last week, I instructed officials to go away and look into the issue for us. Since then, we have reached out to the National FGM Centre to get more information on what Mr Bartholomew spoke about. We have taken those measures since we heard that evidence.

Currently, territorial health boards in Scotland have gender-based violence leads, so they have people who support the development of staff's capacity concerning FGM. Members can be reassured that people are taking the lead on that in each territorial health board.

Each board also has a clinical lead for FGM, and some boards have specialist midwives to work

with pregnant women who have a history of FGM, to ensure their safety and wellbeing during their pregnancy and delivery.

It would be good to ensure that that is firmly rooted in the statutory guidance that we will develop. As I have just explained, that will build on what we already have and where we might go next on ensuring that all our health professionals who might be on the front line on these issues have the necessary expertise, capacity and understanding. I am happy to hear from committee members if they have ideas on how we might do that. However, I also reiterate that we will be working with the implementation group to ensure that we get our approach absolutely right.

Mary Fee: I want to ask about the guidance, which you have just mentioned. I have three questions, which I will roll into one so that we can keep to our time.

The bill gives ministers the power to introduce statutory guidance. Why is it so important that the guidance is statutory and not advisory? What should be in both the general statutory guidance on FGM and the specific statutory guidance on FGM protection orders? Finally, who will be responsible for ensuring that the guidance is followed, and will it be monitored at the national level?

Christina McKelvie: Okay—those are three big questions rolled into one.

On statutory versus advisory guidance, the straight answer is that each set does exactly what it says on the tin. People must have due regard to statutory guidance, and adapt their understanding accordingly, whereas advisory guidance is open to interpretation. We want to work closely with the implementation group so that we can make the statutory guidance as sharp, clear and on point as possible, so that it contains no room for interpretation or misperception. We feel that statutory guidance, along with protection orders—which we already have in child protection and other aspects of adult protection—is best. Professionals then know exactly what they need to do and when and how they need to do it. Such guidance also makes the whole process much more supportive of them.

I am not sure what you mean when you ask what should be in both forms of guidance. If you have an idea to suggest in that area, I would be happy—and, indeed, keen—to hear it. We managed to publish our year three progress report a wee bit sharper than we anticipated, so that the committee could see it. Members will see how page 12 clearly highlights the sets of guidance and how they should be used. I ask Mary Fee to give me a wee bit of clarity on what she means in her question.

Mary Fee: There will be general statutory guidance on FGM and there will also be specific statutory guidance on the protection orders. I wondered whether there was any crossover and whether some things should be in both sets of guidance.

Christina McKelvie: I ask Trevor Owen to come in on that point.

Trevor Owen (Scottish Government): Thank you, minister. I will briefly take the committee through the two distinct sets of guidance.

The general guidance on FGM issues will cover the status of the guidance; relevant persons; the aims of the guidance; an overview of the Scottish Government's approach to tackling FGM; a comprehensive summary of the issues around FGM; actions for chief executives, directors and senior managers to whom the guidance will apply; and information on definitions and language.

The question was about crossover with the guidance on FGM protection orders. That guidance will go more into what such an order is and how it is underpinned by legislation. It will also cover the roles and responsibilities of the different actors in relation to such orders; costs; access to legal aid; how to apply; reporting a breach; supporting an individual who is at risk of FGM; and further information on indicators of risk, which is aimed at professionals.

Therefore, although there is certainly some crossover, there is also a strong distinction between the two sets of guidance. I hope that that has been helpful.

Mary Fee: It is very helpful. Although there will be a lot of crossover between the two sets, it would be good if they could stand alone but also reference each other. That way, when people look at one set and see that the other is referenced, they will be in no doubt about where they should go.

Christina McKelvie: That is a good point.

Mary Fee: That is very helpful—thank you.

What about the monitoring? Who will be responsible for ensuring that the guidance is adhered to?

10:00

Christina McKelvie: The national implementation group will monitor the work that we do around the guidance. As I have said throughout this morning, we intend to work closely with the group when developing the guidance, which means that it will have ownership of it as well as the responsibility to monitor it. That will also keep it a bit independent and keep us and the statutory authorities on our toes, if the guidance needs to be

updated and reviewed. We hope to have something that has been worked on really hard and comes across as absolutely clear, so that there are reference points and professionals know exactly where to go. It will also allow us to use the monitoring process to measure the difference that the bill is making.

Mary Fee: Last week we heard some very helpful evidence from Leethen Bartholomew of the National FGM Centre. He raised some issues around the training that professionals receive. Does the minister intend to roll out training to professionals, in addition to issuing the guidance? How will that training develop?

Christina McKelvie: The committee will have seen from the financial memorandum to the bill that we discussed training with the relevant bodies. We are looking for the most efficient and effective method of delivering accessible and specialist training on the provisions in the bill to local authorities and Police Scotland during the implementation phase. We are talking about the protection orders, which are pretty specialised, so it will involve a very small group of individuals across Scotland. We anticipate that some of that training will take place within local authorities and Police Scotland, so that they understand what they need to do. It is important that it is covered by the statutory guidance.

We are keen to work within the legal framework to gain a clear understanding of what we need to do and to work with the implementation group and other interested bodies to make sure that the training is absolutely right. There is on-going training about FGM and the wider policy area, but the new training will be on how to use protection orders. Some professionals know how to use them from having used forced marriage, child and adult protection orders, so it will not be an alien concept, but we need to look at how focused the training needs to be on the specific issue of FGM. We are working on that to make sure that we get it right.

Mary Fee: Another thing that we heard from Leethen Bartholomew was that health professionals often did not understand the threshold for obtaining the protection orders, which have been used as a last resort rather than a first resort. We obviously want to avoid that with this legislation. How will you ensure that professionals know that protection orders are a first resort and are aware of the thresholds?

Christina McKelvie: That ties into your earlier point about training, clarity and understanding. In 2017, we published multi-agency guidance on FGM in recognition of the fact that statutory organisations need to equip themselves and their workforce with the necessary skills to understand the issue, to know what to do next—what to do first rather than last—and to identify the issues

effectively and respond appropriately. We are now working with the implementation group to make sure that we get that right in the statutory guidance.

Angela Constance (Almond Valley) (SNP):

There has been a suggestion from some of our witnesses, based on the experience in England, that there is a risk that FGM protection orders could lead to racial profiling by professionals. Do you have a view on that? Do you agree that it is a risk and, if so, how would that be countered?

Christina McKelvie: I heard some of that evidence and I reject the assertion that the bill racially profiles people. The bill does not do that. We need to understand that FGM is a form of child abuse and gender-based violence and that everyone deserves to be protected from it. We know that FGM has been practised across many countries, continents, communities and belief systems for about 5,000 years. Because of global migration patterns, it now happens globally.

We agree with the evidence that the language used around the issue is incredibly important and that we need to be very careful about how we use language and frame the issue.

Having heard that evidence, we will consider very carefully how we should develop our statutory guidance, and we will again consult the communities closely. We do not want to create the idea that the bill could lead to racial profiling or racialisation of the issue. We know that FGM is child abuse, and everybody needs to be protected from that.

Angela Constance: On the issue of wider awareness, the committee heard examples where affected women—who were using maternity services, for example—were not offered support and professionals did not enter a dialogue. There has been a suggestion that, to avoid concerns about things such as racial profiling, maternity services should ask every woman the same core questions. Do you want to say anything about how we are raising awareness across the community and not just within what we perceive to be an affected community?

Christina McKelvie: That is why training and guidance for professionals—especially front-line professionals such as midwives, obstetricians, doctors and medical staff—is important. They need to be able to broach the subject with confidence. Whether they should ask everyone the same core questions is something that we can consider, but if someone is at risk, we need to equip our professionals with the tools that they need, and the careful use of language that I mentioned needs to be entrenched in that.

The work with the community and the organisations that support people in this situation

is key to making sure that we get it right. The last thing that we want is a situation where, because a professional does not feel confident or feels that they could be accused of racially profiling somebody or whatever, they do not ask the questions. That would be the most dangerous thing, because someone could be put at risk when, actually, a simple dialogue could resolve the situation.

Angela Constance: The committee heard in evidence that in England, there will be mandatory education on FGM from September 2020. We all know that in Scotland, we have a framework curriculum. What are your views on how education and awareness can be taken forward in school settings?

Christina McKelvie: As you know, we have the curriculum for excellence, and one of its pillars is health and wellbeing. You might know that, in September, the Deputy First Minister announced a review and new resources for relationships, sexual health and parenthood education. I never get that right; I get the letters RSHP mixed up, for some reason—they are in a different order in my head. The new guidance and resources for teachers provide for age-appropriate education for young people at all ages and stages. A lesson plan is included for the delivery of learning to third and fourth year pupils on sexuality and the idea of their rights, and that includes FGM, so it is embedded in the work that we are already doing.

We are working closely with Education Scotland to implement the national action plan to prevent FGM, which also contains measures, and you might know that the national improvement hub that has been created includes a page on FGM, which provides a brief description of the issue and guidance and support for senior leaders and practitioners on how to approach a case of FGM. Work to develop the hub is continuing, again in consultation—you have heard me use that word a lot this morning—with members of the national action plan implementation group to include all the issues that it feels could come up. That brand new resource is just over a month old and it is being used by educators across the sector, but we are still working with Education Scotland to make sure that we are refining this all the time.

Fulton MacGregor: Good morning, minister. While taking evidence on the bill, we have consistently heard about the importance of community involvement, particularly given the nature of FGM. You have mentioned that in your opening statement and in several answers. Will you expand on how the Government is engaging meaningfully with communities across the country and how it will continue to do so?

Christina McKelvie: Absolutely. Community engagement is imperative and it has to be at the

heart of everything that we do. On such a sensitive subject that has been hidden for a long time, it is sometimes really difficult, and in many cases people have to deal with it within families, so community engagement is, as I have said, at the heart of our approach to tackling FGM.

We want to empower communities and not disempower them. We also want to allow them to challenge and tackle outdated attitudes, which we think give rise to this gendered form of violence. I know that we need to do more in the area, and that is why those key groups are incredibly important in the work that we are doing.

We are also working in partnership with our third sector organisations and community-based groups, building on the good relationships that we already have. During the consultation on strengthening the law, we worked with all those stakeholders in engagement events in Edinburgh, Glasgow and Dundee. We received 74 responses to the consultation, 24 of which were from individuals, which shows a real balance and individual interest in the subject.

As I said in my opening statement, we will take forward a big piece of work on community engagement, because we want to ensure that when we develop the guidance and raise awareness of FGM protection orders, we get it right and, as I said in my wee catchphrase, we do nothing about them without them.

The national action plan implementation group will meet in the new year, on 20 January. We are not sitting on this. We are looking at how we will work with the groups to co-produce what we need to do, giving them ownership, seeking their help, reaching into the communities to make sure that we get this done in the right way, and having meetings out and about to make sure that we understand what is happening.

If you look at some of the young women who are involved, such as in the Kenyan Women in Scotland Association, you will see that they are hungry for action and are absolutely up for supporting us in doing that work. I am really grateful to them for that. In the same way, Waverley Care and Saheliya are really keen to get involved.

The community has to be at the heart of this. It cannot be about Government sending down guidance that does not reflect people's needs or wants or the real sensitivities in communities. That is incredibly important in this piece of work. I think that it is the biggest piece of work that we will do, and the most important piece, too.

Fulton MacGregor: Thank you for that answer—

The Convener: Fulton, before you move on to your next topic, we will go back to schools. This is down to my chairing and not colleagues' questioning. My deputy convener had a follow-up question on education.

Alex Cole-Hamilton: Thank you, convener. I will not take long. I am sorry to cut across you, Fulton, but I wanted to come back in with a question on education in schools.

Minister, you mentioned the guidance on relationships, sexual health and parenting education and its development in the curriculum in recent years. There is a lot to cover in those lessons, and families may seek to withdraw their children from that block of education in schools for cultural or religious reasons. That happens, so we need to be mindful that we might not reach the people whom we really need to reach when we cover FGM in RSHP. To that end, it strikes me that there are similarities with the need to communicate with pupils about child sexual exploitation. There has been an established workstream on that subject within Government. I wonder what input it has had and what learning points we can discern for FGM, perhaps using peer groups within schools to get that education out to children.

Christina McKelvie: That is a good point, and it leads back to what I said in my response to Fulton MacGregor. The education approach that we are taking is not the only approach that we are taking, and the work with communities is key. In areas where, as in the example that you used, parents may withdraw children from classes, there may be other ways to reach those individuals and groups through some of the community groups that are involved. That is why community involvement and the community driving some of the work that we are doing is important. I hope that, if we do not get the right support, information and understanding in one way, we will get it in another way. That is why we need to take a holistic, staged approach.

Peer groups—and how they work—are incredibly important. That is why I drew attention to the Kenyan Women in Scotland Association. It has been absolutely pivotal in ensuring that young women understand what their rights and responsibilities are. More importantly, it gives them support. Some young women challenge their own family structure, which can be incredibly difficult. Maybe that cannot be done in an education setting, but it can be done in a peer support setting. That is why that group and the work that it does are incredibly important and why it will be at the heart of everything that we do.

10:15

Fulton MacGregor: I want to follow up my earlier question about community involvement. The committee's work involved going out to community organisations throughout the summer. The organisation that I visited in Glasgow works with men specifically; it might be the only organisation in Scotland that does that on FGM, although it might be one of two. Have you or the Scottish Government specifically considered the role of men? It struck me on that visit that individual after individual told me that they were not aware that FGM was an issue in their family until they were well into adulthood—until they were 30, 40 or sometimes even older. That was powerful. It really struck me, and it got me thinking about how that specific issue could be addressed.

Christina McKelvie: That is a really good point. We have considered that issue, and we are investing funding to ensure that organisations are supported to do that work.

When you were on your visit, you might have heard about the on-going champions for change project, which involves men working with men. Men are supported to change the cultures in their communities. It is a bit like the work that White Ribbon Scotland does on domestic violence. We thought that it was incredibly important to ensure that men were involved, as well. I think that there is £75,000 over the next three years to ensure that that work continues.

If we are going to get cultural change on a deep-rooted issue that is very difficult for anybody to disclose, it is very important to have all the parts of the community on board. In some cases, men are the leaders in communities and are taking responsibility. Being a champion for change will drive forward the culture change that we need. I completely support your point.

Fulton MacGregor: I want to ask a question about asylum, which is topical, given the horrendous situation with Serco and asylum seekers in Glasgow. We have heard evidence in committee sessions that FGM protection orders could possibly be used to assist in asylum cases. Do you have any views on that? Have there been any discussions with the UK Government about that and how it might work in practice?

Christina McKelvie: Yesterday's news was not nice to hear. I was among the first members of the Glasgow campaign to welcome the refugees all those years ago when I was a lowly Unison representative, and it was quite worrying to see such a decision yesterday.

It is a worry for me in my role that public services that are delivered by a private company do not seem to be covered by the Human Rights Act 1998. I know that Ms Campbell, in her role as

Cabinet Secretary for Communities and Local Government, is taking that issue very seriously, and I will look at it from a human rights point of view.

We would fully expect that any risk for anyone, including a person who already holds an FGM protection order, should be taken into account in considering an application in the immigration system. We know that that happens in relation to protection orders in the rest of the UK. Our view is that a clear risk of FGM presents a strong argument for the individual not to be returned to their country of origin. Sadly, we have seen circumstances in which women and girls have been at risk. We hope that the protection orders that are now in place in England and Wales and those that will come into place in Scotland will protect those women from being sent back to somewhere where they could be at risk, and that the risk will determine their status, and not anything else.

Annie Wells (Glasgow) (Con): Good morning, minister. The Scottish Government has chosen to take a different approach from that of the UK Government by not introducing in the bill three provisions, which are on anonymity, the failure to protect and the duty to notify police. Will you explain your reason for that and set out the evidence on which your approach was based?

Christina McKelvie: The evidence is that the Scottish justice system is very different. We are very proud of the fact that it is open and accessible and that our courts have powers to ensure the protection of anyone in such a situation in a relevant case. In Scotland, such a power applies in both civil and criminal cases. I am very clear in my belief that automatically granting lifelong anonymity would cut across those principles. I am not convinced that providing anonymity by such means is the right way to go. However, the Scottish courts have at their disposal a number of powers to use anonymity for the protection of a person's identity, which include being able to provide it in circumstances in which it is justified.

If a child is involved in proceedings, further statutory prohibitions are available. In most cases, publication of the identity of a child is automatically prohibited.

Members might remember Neneh Bojang, the young woman who supported the launch of the bill. She gave evidence and did a lot of work on the issue in public. At that time, she told us that if she was not able to speak publicly about the issue, nothing would change. We need to think carefully about our approach. If we were to close down avenues for people to tell their stories, we might not understand the full impact of the issue.

Therefore, although we are not convinced that the bill should provide for the automatic granting of anonymity, we are absolutely convinced that the courts have the power to offer it when circumstances require it.

Annie Wells: The committee has taken a lot of evidence on those additional provisions. A number of witnesses have indicated their support for the automatic provision of anonymity, including the Law Society of Scotland, Police Scotland and Mr Bartholomew, who appeared before us last week. Would it not be worth while to have automatic anonymity there in the first place, from which people could then withdraw if they chose to? Based on the evidence that we have heard, I feel that such an approach could work better for them. Will you give your views on that? Could such an approach be considered as the bill is progressed?

Christina McKelvie: We are absolutely clear that the courts in Scotland have the power to grant anonymity when it is needed. We need to balance that with the views of the professionals that you have just listed and with what the stakeholders have told us. The stakeholders are not keen on anonymity, because it prevents them from telling their stories and thereby publicising the issue. We need to raise awareness of FGM, which has been a low-profile, secretive issue for such a long time. We might compound that if we were to put more measures in place when they were not necessary. It should not be for us, as politicians, to decide whether a person or their issue should remain anonymous; it should be for the courts to provide for that in the specific circumstances where it is necessary.

Therefore I am afraid that I am not convinced at all by the views of the organisations that you have mentioned. I am more convinced by what the stakeholders have told us that they need.

Oliver Mundell: I hear you say that it is for the courts to decide on the question of anonymity. FGM is a very personal issue for those who have gone through it, so I wonder why it should not be for victims to decide. Why we should leave such a decision to be made in a court setting by a group of people in Scotland who might be seen as not being representative of affected communities, rather than let the women and girls who are most affected by FGM decide whether it should be made public?

Christina McKelvie: They can decide to do so. If a woman or a girl—with the support of an organisation or her legal team—were to suggest that she needed anonymity, I suspect that a court would be quite happy to grant her request. It is important to get the balance right. We cannot just shut everything down. We should have a system in which people have choice—and they do. A local authority or an individual can make a request for

conditions of anonymity to be put in place, which I am sure that a court would not be averse to granting.

The Convener: Could a court refuse someone anonymity if they requested it?

Christina McKelvie: I have never experienced any case involving a vulnerable person or a child in which the court has rejected such a request. I suspect that it would not do so in an FGM case, given the sensitivities of the issue. Our courts are pretty well versed in the treatment of sensitive issues, and we should trust them to do the right thing.

The Convener: I am sorry, Oliver—I jumped in before your question.

Oliver Mundell: Minister, I was going to ask whether you recognise that in order for an individual to reach the point of their case going to court, they will have had to take the risk that they might not be granted anonymity. Some of the people with whom we have engaged perceive that they would first have to disclose quite a lot of information about themselves, with no guarantee of being granted anonymity, and that they would then have to justify why very intimate details about them should not be shared publicly.

Further to that, we also heard about issues with the existing provisions. Because of the nature of the communities that victims often come from, if the places where they live are identified, it is possible to identify them even if their names are not given. Other people might take an interest in reports of such cases, or even figure out the courts in which they might be heard. Has the Scottish Government given any thought to that aspect?

Christina McKelvie: It is tough to get the balance right on that. However, we already have the same circumstances in other situations where we currently have similar protections in place, such as in cases of rape or sexual assault. I am absolutely sure that a court would not put anyone at risk and would use its powers appropriately to ensure that they were protected.

We also have to get the balance right on your point about other people being able to identify a victim through identifying the community in which they live. I want to ensure that anyone who proceeded with a case had the right support to do so. That is where all the other aspects of our approach, including providing support and guidance on how protection orders work, would become paramount.

Anonymity would not be the first aspect on which victims would need support, but all the other aspects would have been dealt with before they went to court. If they did then seek anonymity—or

the case involved a child or a vulnerable person who was at risk—the court would take the right action. However, the circumstances would be tailored to that individual, which is the most appropriate way to deal such cases.

Annie Wells: Annie, before you come back in we will have some more supplementaries.

Angela Constance: There are obviously arguments for and against the automatic granting of anonymity, in the same way that there are for and against the automatic granting of legal aid. In your view, is it problematic or desirable for a change to be made in a bill for one particular group of survivors or victims? Would it be more productive for those who are advocating changes of that nature to seek more fundamental change in our legal system?

Christina McKelvie: The same people who gave evidence to the committee on one aspect of FGM, such as the Law Society of Scotland, would be interested if we were to open up and change the system for one aspect of, for example, gender-based violence, which could have ramifications for the whole of the justice system. That is where getting the balance right has to come into play. The procedures that we have in place in Scotland are very robust and supportive and our courts are well versed in them, so I consider that the provisions that we are now proposing are the right ones.

You are absolutely right that a small change in the law here could have ramifications across the justice system and in many areas might have unintended consequences that we would not want to see. I agree that we must get the balance right and understand that, but I feel that our current position is the right one.

The Convener: Minister, that draws our session to a close. I thank you and your officials very much.

The committee's next meeting will be on 21 November, when we will hold an evidence session on race equality in Scotland.

I move the meeting into private session.

10:29

Meeting continued in private until 11:12.

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The deadline for corrections to this edition is:

Friday 13 December 2019

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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