

EQUAL OPPORTUNITIES COMMITTEE

Tuesday 30 November 2004

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2004.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Tuesday 30 November 2004

Col.

PROHIBITION OF FEMALE GENITAL MUTILATION (SCOTLAND) BILL: STAGE 1	683
--	------------

EQUAL OPPORTUNITIES COMMITTEE

18th Meeting 2004, Session 2

CONVENER

*Cathy Peattie (Falkirk East) (Lab)

DEPUTY CONVENER

*Nora Radcliffe (Gordon) (Liberal Democrats)

COMMITTEE MEMBERS

*Shiona Baird (North East Scotland) (Green)

Frances Curran (West of Scotland) (SSP)

*Marlyn Glen (North East Scotland) (Lab)

Marilyn Livingstone (Kirkcaldy) (Lab)

*Mrs Nanette Milne (North East Scotland) (Con)

*Elaine Smith (Coatbridge and Chryston) (Lab)

Ms Sandra White (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

Jackie Baillie (Dumbarton) (Lab)

Linda Fabiani (Central Scotland) (SNP)

Patrick Harvie (Glasgow) (Green)

Carolyn Leckie (Central Scotland) (SSP)

Mr Jamie McGrigor (Highlands and Islands) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

Hugh Dignon (Scottish Executive Justice Department)

Susie Gledhill (Scottish Executive Justice Department)

Paul Johnston (Scottish Executive Legal and Parliamentary Services)

Valerie Montgomery (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Steve Farrell

ASSISTANT CLERK

Roy McMahon

LOCATION

Committee Room 1

Scottish Parliament

Equal Opportunities Committee

Tuesday 30 November 2004

[THE CONVENER opened the meeting at 10:31]

Prohibition of Female Genital Mutilation (Scotland) Bill: Stage 1

The Convener (Cathy Peattie): Good morning and welcome to the 18th meeting in 2004 of the Equal Opportunities Committee. As we are meeting on St Andrew's day, it only fitting that the committee recognises that St Andrew's day is the day on which people officially campaign against racism in Scotland. We need to record that.

Our first and only agenda item is to take evidence on the Prohibition of Female Genital Mutilation (Scotland) Bill. I welcome our witnesses. Hugh Dignon and Susie Gledhill are from the bill team and Paul Johnston and Valerie Montgomery are from the office of the solicitor to the Scottish Executive. The committee will consider a number of issues. If we ask questions that the witnesses feel that it would be more appropriate for a minister to answer, they should feel free to indicate that. We will have the opportunity to question one of the justice ministers as part of the stage 1 process.

I will begin the questioning. Will you explain the reasons behind the change in the name of the offence from female circumcision, which formed part of the name of the relevant legislation—the Prohibition of Female Circumcision Act 1985—to female genital mutilation?

Susie Gledhill (Scottish Executive Justice Department): There were a number of reasons for that. First, circumcision falsely implies an analogy with male circumcision. Given that a significantly different degree of injury is involved, we did not want anyone to think that the two procedures were in any way similar. The word "mutilation" more accurately describes the degree of harm that is involved. FGM is the term that is most commonly used for such procedures throughout the United Kingdom and its use was recommended at the Westminster all-party parliamentary group hearings in 2000.

Elaine Smith (Coatbridge and Chryston) (Lab): Has the consultation revealed any problems with the terminology? Is there any sensitivity to the proposed change in the terminology?

Susie Gledhill: From my recollection of the consultation, no one was unhappy about the use of the term "FGM".

The Convener: Although the explanatory notes to the bill make it clear what practices the bill is targeting, the use of the phrase "or otherwise mutilates" in section 1 leaves some scope for interpretation. That could include practices such as piercing and elective surgical procedures. Will it be left to the courts to decide what constitutes mutilation?

Susie Gledhill: Yes, it will be for the courts to decide what constitutes mutilation. That will depend on the individual circumstances of the case, but the definition in the bill, which sets out what is illegal, will be taken into account.

Valerie Montgomery (Scottish Executive Legal and Parliamentary Services): The prosecutor would have to take into account the circumstances in which the act was carried out before the matter even got to court, so they would have to have a reasonable belief that the act fell within the offence of mutilation as defined in section 1 of the bill before they would consider a prosecution. Ultimately, it would be for the court to decide what constituted mutilation.

The Convener: Is there a danger that the increasing prevalence of elective cosmetic procedures could lead to prosecutions, or do you believe that decisions on such matters would be taken before they got anywhere near a court?

Valerie Montgomery: That would depend on the circumstances of the cosmetic procedures that had been carried out and on who had carried them out but, ultimately, those issues would be taken into account before a prosecution was brought—if, indeed, the matter was ever referred to the prosecutor.

Elaine Smith: The bill is obviously about providing legal protection and strengthening the existing protection but, in my view, part of it is about raising awareness that FGM is an unacceptable practice that constitutes violence against women and children. The policy memorandum states:

"The Scottish Executive is committed to doing what it can to ensure that this cruel and unnecessary practice is eradicated."

Given that there have been no prosecutions in Scotland or the UK under the existing legislation, I suspect that we are not expecting a large number of prosecutions to be brought once the bill is passed. Is the Executive planning activities that are additional to the bill that would assist with the eradication of FGM once the bill is enacted, such as the provision of guidance to local authorities and health professionals on services that they can offer to victims of FGM?

Susie Gledhill: Many different areas are involved, such as health, teaching and social work. The Executive is using the bill as an opportunity to raise awareness among our colleagues and to explain to them what needs to be done.

In addition, a lot of work is being done outside the Executive. On Friday, I visited the Somali women's action group, which is working with the Glasgow violence against women partnership, and it was mentioned that you had been to speak to its members. They did a play to raise awareness of FGM, which they wanted to put on for doctors and other people who work with them. A lot of awareness-raising work is going on outwith the Executive.

Elaine Smith: If health service professionals do not understand the nature of FGM, problems can arise, especially if a woman is pregnant. I heard about some of those problems when I spoke to the Somali women's action group. Awareness raising is important. Without other initiatives, would the bill on its own be able to eradicate FGM?

Hugh Dignon (Scottish Executive Justice Department): No. The bill by itself is not expected to do that; its purpose is to strengthen the legal framework surrounding FGM. I do not think that the Executive is under any illusion that the bill by itself will eradicate FGM, but it will strengthen the legal framework by increasing the penalties and by addressing the issue of extraterritorial jurisdiction, which we will no doubt come on to discuss. That will deal with situations in which it is suspected that girls are being taken abroad to evade the law. That is what the bill is about. As Susie Gledhill has said, it also represents an opportunity for us to raise awareness of the dangers of FGM throughout the medical and education communities.

Elaine Smith: The bill is sending a strong message, but given that we are not expecting many prosecutions to be brought, the whole idea of it is to help to raise awareness of the unacceptability of the practice and, we hope, to eradicate it through such action. In that context, how do you envisage the bill being publicised among the communities in Scotland to which it might be most relevant? Are you considering publication in particular languages and formats, which is a suggestion that was made when I met the Somali women's action group? The people who deliver training could also be helpful in that regard. From what I heard, it would be better to do such work within communities so that you are not seen to be dictating to them about FGM.

Susie Gledhill: We do not yet have a fixed plan in place for how we will publicise the bill. Our plan is very much to take the lead from the community and to listen to what it thinks will be most effective. It would be pointless for us to say that we will run

television advertisements if it would be much better to work with the targeted community.

Elaine Smith: I do not know whether this is an appropriate question, but do you think that resources will be available for doing that?

Hugh Dignon: I cannot speak about resources that will be available through the Health Department or the Education Department. The proposals are part of the sexual health strategy and it would be reasonable to conclude from that that resources will be available to raise awareness and deal with issues as they arise. However, we are from the Justice Department and our focus is on justice issues. I would not feel comfortable saying what resources might be available in other parts of the Executive.

The Convener: We will want to ask the minister that question.

Nora Radcliffe (Gordon) (LD): Are copies of the bill available in a language that is accessible to the community that is affected?

Susie Gledhill: We do not think that handing out the bill in its current form will particularly help anyone. Something much more explanatory about what would be an offence, for example, is needed. I do not think that there are many bills that we could just hand out as they were and expect everyone in the world to understand.

Nora Radcliffe: No. However, I want to pursue the point. We are talking about primary legislation and the letter of the law, if you like, and it is not only women who might want to access the bill—the whole community might want to do so. The proposals might carry more weight with community leaders if they thought that they were getting the substantive bill in a language that they understand.

Hugh Dignon: A minister will ultimately decide what will and will not be done, but my guess is that we would probably look favourably on any request to provide the bill in any community language that would help people. We would not want to think that the bill is targeted at one particular community and that we should therefore issue it only in a particular language, but we would certainly be receptive to any requests that came to us.

The Convener: The bill also has guidance notes and so on for explanation.

Hugh Dignon: I mean all the accompanying documents as well as the bill.

Mrs Nanette Milne (North East Scotland) (Con): We have been talking about communities. The policy memorandum states:

"There is no evidence that this practice is widespread within communities in Scotland".

However, it also recognises the often private nature of the practice. Has any work been done, or is any work being done, to establish the current or expected scale of the problem in Scotland?

Susie Gledhill: No research is currently being done to try to establish that. The only group that came to our knowledge through the consultation was the Somali group, which is almost all in Glasgow.

Mrs Milne: I wondered about that. I know that everyone speaks about the Somali group, but have you heard of any other communities or groups in Scotland that might be affected by the practice?

Susie Gledhill: No. We have not heard of anyone and no one in the consultation said that they thought that another group was affected.

Mrs Milne: Given that there was no separate Scottish legislation previously, are there differences between the Scottish bill and the UK Female Genital Mutilation Act 2003? If not, why was having a separate Scottish bill considered necessary?

Hugh Dignon: The issue is within the devolved competence of the Scottish Parliament, so the default position is that the Scottish Parliament will legislate. Whether the issue would be suitable for a Sewel motion was considered, but I think that there were issues to do with the timing of the Scottish parliamentary elections. I think that the UK bill was going through some time in spring 2003, so the processes would not have worked well in that context. It was therefore decided to have Scottish legislation.

The only substantive policy difference between our bill and the UK act is that our bill applies in a gender-neutral way—you will have noticed that the language used is gender neutral—whereas the UK act applies specifically to women only. The bill and the act are different in various details, but the policy intention is the same. The differences in detail reflect the different construction of the bill by Scottish parliamentary draftsmen to make it fit in better with Scots law.

10:45

Mrs Milne: Is there a reason for making the bill gender neutral, given that female genital mutilation is the really concerning issue?

Hugh Dignon: As you know, it is the policy preference of the Parliament that legislation be drafted in gender-neutral language. We thought long and hard about how that would apply in this case. It is conceivable that there are circumstances—albeit rare—in which a person might have the relevant genitalia but not be a legal female. The bill will provide protection for those

persons in the same way as it will provide protection for legal females.

Susie Gledhill: The Equality Network in its consultation response welcomed the fact that the bill was drafted in gender-neutral terms to cover people in those admittedly rare circumstances.

Mrs Milne: There is obviously an increasing prevalence of elective cosmetic surgical procedures, which might not be recognised as constituting FGM. Is it likely that those could lead to prosecutions, beyond what is intended in the bill?

Susie Gledhill: Section 1 of the bill sets out the specific procedures that are unlawful. If a procedure were carried out that met that definition and was not required for medical reasons it would constitute an offence. As Valerie Montgomery said earlier, it would be for the prosecutor to decide whether to prosecute on the basis of the facts of the case.

Mrs Milne: So the bill sets out specifically what would be an offence.

Elaine Smith: I just want to ask a quick supplementary on the previous point. Some of the research that we have seen reports that FGM is practised in 28 African countries. I do not imagine that it is practised only among the Somali community. The bill might help to bring that out as we proceed through stage 1. Obviously, the issue is a private and sensitive one for people to talk about.

Can we differ in Scotland? We are not legislating through a Sewel motion for the various reasons that Hugh Dignon outlined. Given that we are considering legislation for Scotland, I presume that if we wish to make it slightly different from the UK legislation, we can do so.

Hugh Dignon: Absolutely, as long as any changes that are made are within the Parliament's competence. There is no reason for the bill to follow the UK model. However, it is always helpful to have a consistent regime north and south of the border on such issues so there is not a differential whereby people moving north or south can do different things or find that different things are criminal. Nevertheless, that is not a determining reason why one should not make changes, if they are thought necessary, to make the legislation different in some way, as long as it is within the competence of the Parliament to make such changes.

Elaine Smith: I want to pursue the competence issue, about which I know questions were asked previously, because that does not cover asylum seekers. Although we have separate Scots law and we are a separate legislature, I understand that we cannot change the law if it impacts on a

reserved issue. Is it technically possible for us to consider covering people who are in this country seeking asylum, who could be here for a number of years while that process is on-going? I am not saying that we would want to do that but, if we did, would it be competent?

Hugh Dignon: My legal colleagues will correct me if I get any of the details wrong. Essentially, the main issue for the bill is the need for a link to Scotland. In other words, we need to ensure that the bill does not attempt to change the law on matters where there is no such link, which means that the main consideration is the need for a degree of residence in or connection to the country. If that condition is met, I see no reason why asylum seekers, for example, should not be included in the bill's provisions. I should point out that section 29(2) of the Scotland Act 1998 states that the law must be changed with respect to functions that are

"exercisable ... in or as regards Scotland".

Paul Johnston (Scottish Executive Legal and Parliamentary Services): I agree with everything that has been said. However, on the question of reserved and devolved matters, we would need to be clear that any change would alter devolved criminal law, not asylum and immigration law. Moreover, under international law, there needs to be a tangible link between the person over whom jurisdiction is being exercised and the state that is seeking to exercise that jurisdiction. The question that members should examine at this stage and at stage 2 is whether any changes would maintain that tangible link between the person and Scotland.

Elaine Smith: Before we move on with our stage 1 consideration, we should perhaps receive a briefing note or some clarification on the issue. After all, we might not want to do what has been suggested, but we should still find out whether it can be done.

The Convener: It would be helpful if we could get a briefing note on the implications of such a decision.

Susie Gledhill: I want to make it absolutely clear that while asylum seekers are in Scotland—or, for that matter, the rest of the UK—they are covered by the terms of the bill. Some of the consultation responses confused the bill's overall powers with extraterritorial powers. Asylum seekers will not be covered by the bill if they leave the UK. However, we expect that they will be in the UK most of the time because, if they leave, their asylum appeals will be thrown out.

Elaine Smith: I am sorry to push the matter, but I feel that I need to. We are talking generally about girls between five and seven years old. What would happen if, for example, their grandparents,

other relatives or friends took them abroad while their parents stayed to seek asylum in the country? Would the bill make such an action illegal?

Susie Gledhill: I do not know the immigration laws in detail and would have to check whether children between five and seven must have asylum claims in their own right or whether they can form part of a family claim.

The Convener: We would welcome some clarity on that matter.

Marlyn Glen (North East Scotland) (Lab): The bill will increase the penalty on indictment from five to 14 years' imprisonment. On what basis was that increase decided? For example, was the offence assessed in relation to comparable offences?

Hugh Dignon: As I said earlier, one of the bill's purposes was to seek to restate the law and to strengthen the legal framework and, by increasing the penalty to 14 years, we were signalling that the offence was regarded as being particularly serious. We chose that sentence primarily to ensure consistency with UK legislation, which had already set the penalty at 14 years. We are also perfectly happy that it is consistent with penalties for other offences under Scots law.

Marlyn Glen: Is it possible that the proposed penalties will prevent women from coming forward for fear of the risk to members of their families?

Hugh Dignon: I accept that there is always a risk that that sort of thing might take place, but we need to strike a balance. We see the balance being struck in favour of sending out the message that FGM is a serious offence and will be dealt with appropriately. There is clearly a risk, however, that some people might be deterred. We hope that that will be addressed through the support and education programmes that Susie Gledhill referred to.

The Convener: The courts sentence retrospectively. If a young woman came forward at the age of 25 and her parents were responsible for the act being carried out, would the courts consider prosecuting? Are we talking about acts now or acts that happened in the past?

Valerie Montgomery: The bill will apply only to acts committed after the bill is passed, but anyone who has committed an act that is an offence under the previous legislation could still be prosecuted under that legislation, even though that legislation is repealed in the bill. That is due to provisions in the interpretation order that applies to the interpretation of all acts of the Scottish Parliament.

Nora Radcliffe: The committee would appreciate some clarification of who the bill aims specifically to protect and of what evidence there is, if any, that those people will be protected.

Susie Gledhill: The bill aims to protect all women who are at risk of being mutilated. As we have made clear, we do not have specific figures on prevalence. The practice is very private, so it would not be possible to get that kind of data.

Nora Radcliffe: So it will be difficult to measure the effectiveness of the bill.

The bill provides for an exception to the offence in the case of

“a surgical operation ... which is necessary for that other person’s physical or mental health”,

but it does not really define what that means. Is there a reason why the bill is not more specific about what is meant by that exception?

Hugh Dignon: On whether it would be sensible to be more specific about exceptions, it was decided that there might be a number of circumstances that could not be foreseen and we had no wish to attempt at this stage to prejudge the sort of issues that might arise. The preferred approach was to set down what the offence was and what the medical exceptions were and to allow a court to decide, if necessary, whether any procedures that had been carried out fell within those exceptions. I guess that a number of possible circumstances could arise, sometimes at relatively short notice, when decisions need to be taken by medical practitioners. We would not want to have people attempting to decide whether or not those procedures fell within some precise definition; we would leave that to medical judgment at the time.

Nora Radcliffe: Do you see any merit in some sort of caveat, such as there having to be two medical opinions, or is it safer just to leave the matter open and leave it to the courts to create precedents if any are needed?

Hugh Dignon: We considered that as a potential way forward, but we are happy with the structure of the provision at present. It allows for a medical practitioner to take a decision on the basis of the facts as he or she sees them at the time. It is conceivable, as I said, that a medical practitioner may need to make a decision quickly on whether a procedure should be carried out. In the unlikely event of that leading to a prosecution, it would be for the court to decide whether the medical practitioner had acted appropriately. We are perfectly content with that construction.

Paul Johnston: The term “physical or mental health” is used elsewhere in the statute book and the courts are well versed in considering it.

Nora Radcliffe: That is useful clarification.

11:00

Shiona Baird (North East Scotland) (Green): One of the key changes that the bill proposes is

the extraterritorial provision. Given that there have been no prosecutions under the existing legislation and that normally children are sent abroad for the procedure, is it likely that there will be more prosecutions once the bill is enacted?

Hugh Dignon: I would not like to speculate on whether there will be more prosecutions. I imagine that it is unlikely that there will ever be a large number of prosecutions. It is possible that under the bill there will be more prosecutions than there have been in the past. The intention in introducing the bill is not to seek to prosecute large numbers of people, but to send a clear message and to make it clear that Scots law applies when a child is taken abroad, as well as to procedures that are carried out in this country.

Shiona Baird: Can you clarify exactly how the extraterritorial provision will work in practice?

Susie Gledhill: If we want to get a witness or evidence from abroad, we can apply to other countries for mutual legal assistance—we can get more detailed information in writing from the Crown Office, if members wish. We can ask another country to issue a warrant to get evidence or a witness. Witnesses are able to give evidence from other countries through closed-circuit television links and so on. We are able to gather evidence from abroad for use in Scottish courts.

Shiona Baird: Would there have to be a legal link? I have forgotten the correct phrase.

Nora Radcliffe: Do you mean reciprocal arrangements?

Shiona Baird: Yes, but there is another phrase for it.

Hugh Dignon: Do you mean dual criminality?

Shiona Baird: It is something simpler than that. It will come to me as soon as I walk out the door. Would the procedure be based on some sort of reciprocal arrangement with the other countries involved?

Susie Gledhill: There are specific arrangements with some countries. I can check with the Crown Office and come back to the committee on this point, but I understand that Scotland may ask any country whether it is willing to help to gather evidence for us. It is for the Government concerned to decide whether to accept our request.

Shiona Baird: Elaine Smith has raised some of the issues that I wanted to discuss. Reference is made to the consultation with the Scottish Refugee Council. From what you have said, it is clear that there is some concern about the implications of the strict definition of who will be held to account—the term “United Kingdom national”. The Scottish Refugee Council stated:

"This means that children seeking asylum in Scotland will not be covered or protected by this legislation, unless, or until they are given leave to remain."

What is your reaction to that comment?

The Somali women's action group expressed similar concerns. It said:

"We cannot believe that what you deem a criminal offence against a 'UK national or a permanent UK resident' is not a criminal offence if committed against asylum seeker women and children. We are distraught. Some Somali girls will have been granted refugee status owing to their well founded fear of FGM. Why will the Scottish Parliament not protect us?"

How can you address those concerns?

Susie Gledhill: That comes back to the extraterritorial issues that we discussed earlier. It is clear that, while people are in Scotland, they are covered. However, an issue arises if people leave the UK to have FGM performed in another country. Those who do not have indefinite leave to remain do not have the same strong link back to the UK as people who have been given indefinite leave to remain, such as refugees. That is the justification for the way in which the line has been drawn. We must perform a careful balancing act between trying to protect as many people as we can and staying within the bounds of international law. Paul Johnston spoke earlier of the need for people to have a direct connection to Scotland.

Shiona Baird: We will need to investigate that issue further.

The Convener: You may want to ask the minister about it when you have the opportunity to do so. Does Elaine Smith want to pursue the issue?

Elaine Smith: Shiona Baird says that there are not many prosecutions. I have heard that people are not practising FGM in Scotland because of the fear of prosecution, although the General Medical Council has found a few doctors guilty of it in the past. I would not subscribe to this view, but I imagine that, rather than sending their children abroad, where dirty knives or bits of glass are used, people may seek out medically qualified people thinking that they are doing the right thing for their children—whatever we think, that is the tradition. Although the evidence suggests that the practice is not being carried out in Scotland at the moment, I presume that parents might be sending girls abroad for that purpose and perhaps the bill can help to stop that.

Can the Executive, as part of the awareness-raising process, ask the immigration authorities to consider the possibility of recognising FGM as a good reason for granting asylum? There has been press coverage of the fact that women who have been refused asylum have been anxious about returning to their country because that would

mean putting their daughters in danger of FGM. Can the Executive also point out somewhere—perhaps in guidance—that, although women will be reluctant to volunteer such information, they will provide it if they are asked the question directly? Is there any scope for the Executive to take that kind of action in raising awareness of the bill?

Susie Gledhill: I will ask Hugh Dignon to talk about whether we can feed into the immigration process, which is a reserved matter. My understanding is that FGM is a reason for which refugee status can be claimed in specific circumstances, but I will have to check that.

Elaine Smith: The problem is that women would have to volunteer the information. Are they asked for it? That makes a big difference. Perhaps the Executive can pursue that question.

The Convener: Do you want to comment, Hugh?

Hugh Dignon: I do not have a lot to add. As Susie Gledhill says, immigration policy is reserved under the Scotland Act 1998. However, there is no reason why we would not be able to suggest to the Home Office that it might be helpful if immigration officials were to ask that question. They would be under no obligation to take that on board, but it might be a helpful suggestion. I see no reason why we should not do that.

Marlyn Glen: I presume that, in the absence of any provision for consent, it will remain an offence to carry out certain elective cosmetic surgical procedures that, as was discussed earlier, are becoming more common. Would it not have been possible to include a provision for consents in the bill, which would have ensured protection for those who needed the protection while allowing adults the freedom to undergo procedures that they wished to undergo for cosmetic reasons?

Susie Gledhill: Again, we considered that and it is mentioned in the policy memorandum. There were several reasons why we decided to go down the route that we did. First, allowing adults to consent would undermine the strong message that we are trying to send out that FGM is extremely harmful and unjustifiable—it could undermine the bill's deterrent effect.

Secondly, the purpose of the bill is to strengthen the protection that is already offered against FGM. If we introduced a consent provision, it would weaken that protection, as FGM would no longer be illegal in some circumstances in which it was illegal before.

Thirdly, concerns have been expressed by some of the pressure groups and non-governmental organisations that work on FGM, which feel that in some cases meaningful consent to FGM is impossible. They say that, because women are

financially bound into their communities and emotionally tied into them, it would be difficult to establish meaningful consent.

We are not alone in taking that route. Of the countries that have banned FGM, only Tanzania, Canada and America have consent clauses. All the other countries say that the practice is illegal regardless of age and consent.

Marlyn Glen: Thank you. That is helpful.

Nora Radcliffe: I have some questions about the consultation process. The Scottish Executive good practice guidance says that consultations should take at least 12 weeks. However, the policy memorandum indicates that the consultation period for the draft bill was 20 July to 31 August. Was there a reason for that? Was there also a reason why the consultation was carried out during a holiday period?

Hugh Dignon: I do not think that there was any reason for making the consultation period particularly short. The bill was proposed because we were anxious to offer the protection that had been offered to girls and women in other parts of the UK as soon as possible.

There was also a feeling that the issue is of fairly limited range and interest. In other words, a limited number and range of people would be interested in the legislation and it would be reasonably easy for the Executive to focus and make sure that those people were addressed and consulted over a relatively short period of time. We therefore felt reasonably comfortable with a relatively short consultation period, especially given the perceived need to get a move on and to get the legislation on to the statute book as soon as possible.

Nora Radcliffe: How many consultation papers were issued? What targeting was carried out? I want to know a wee bit more about the process and how it was undertaken.

Susie Gledhill: I do not have the number with me at the moment. The consultation papers were sent to the national health service boards, local authorities, ethnic minority groups, women's groups and domestic abuse groups.

Hugh Dignon: We thought that the groups that Susie Gledhill mentioned would have a targeted interest in the subject, which is fairly specialised. In addition, we went to the usual people whom we consult on justice issues, such as the police, prosecutors and the Law Society of Scotland. As Susie Gledhill mentioned, the people who will come up against the issue are representatives of ethnic minorities, the various women's groups and health professionals. Those are the people whom we were able to target during the consultation.

Nora Radcliffe: Was the consultation in English alone or was a range of languages used?

Susie Gledhill: The consultation was in English. I cannot remember whether translations were offered.

Hugh Dignon: I would have to check on the details of that. Certainly we were not under the impression that there was a call for translations from anyone. I am sure that we would be perfectly happy to provide information in any community language on the Executive's position in relation to the bill and its accompanying documents.

Nora Radcliffe: The policy memorandum notes that most respondents welcomed the bill and that no changes were made as a result of the consultation. Were any changes suggested by respondents?

Susie Gledhill: There were no changes. Virtually everyone strongly welcomed the principles of the bill. The committee clerks have a short report on the consultation, although we are waiting for the final confidentiality statements to come in before that report can be made public. Three themes ran through the responses, which were comments rather than calls for changes. They were, first, to consider the exemptions on physical and mental health, which we have discussed; secondly, to consider the extraterritorial powers, particularly in relation to protection for asylum seekers; and, thirdly, to clarify whether piercing and so on would be unlawful. Those were the main issues that were raised.

Nora Radcliffe: That will all come out in the full report.

Susie Gledhill: Yes. The Scottish Parliament information centre researcher and your clerks have draft copies of it. Once we get clearance for the quotations in it, it will be on the website.

Nora Radcliffe: It will all be in the public domain. That is fine.

Elaine Smith: Susie Gledhill said that, if prosecutions take place, it will be possible to link up with other countries and perhaps take evidence by video link. Did you consult countries where FGM is prevalent and where girls are likely to be sent? If you did not, would it have been useful to consult them via embassies?

11:15

Susie Gledhill: We did not specifically target any other countries. We targeted minority groups that were already in Scotland to see what issues they had come up with.

Elaine Smith: Might it be helpful for the committee to take evidence on the bill from countries where girls might be sent, which will become illegal under the bill?

Hugh Dignon: Any evidence is useful in considering how the bill might best be taken forward, but we would not rely on the attitude of or approach taken in other countries in exercising the extraterritorial jurisdiction. Prosecutions under the extraterritorial jurisdiction could take place in Scotland where the person who committed the offence returned to Scotland and where the evidence was also to be found in Scotland. The fact that the offence had taken place abroad would not necessarily mean that we would seek much co-operation from other countries.

Clearly, the judicial co-operation and extradition routes that Susie Gledhill talked about are well established; they are followed for a variety of offences and we would be happy to use them in relation to the bill. However, they are not strictly necessary. In the unlikely event that the issue comes up, we may be able to prosecute under extraterritorial jurisdiction without recourse to anything like extradition or mutual legal assistance arrangements.

Elaine Smith: I am speaking more about awareness than legality. If we find out more from people who are based in countries where FGM is common practice and not illegal and where the girls are sent, that might help in determining how to pitch any guidance or awareness campaigns. This has to be the stage at which that is done, whether by the Executive through consultation or by this committee at stage 1. The evidence that can be drawn out now can inform you on the guidance at a later date.

Susie Gledhill: As was said, any evidence is going to be useful. I have received the general impression that there can be changes in attitudes when immigrants are faced with a new set of cultural pressures. If you want to gather evidence from elsewhere, you might want to consider places with large immigrant populations that have faced the problems for longer than Scotland has, such as London or some of the Scandinavian countries.

Elaine Smith: I am sorry to go on, but I am saying that we know the reasons for FGM—the main one is that the girl is not marriageable if it is not done. That is a huge cultural and traditional issue and you can imagine that trying to overcome it is difficult. However, in countries where FGM is performed on practically 100 per cent of women, we may find that there are other issues that would inform the drawing up of guidance and the determination of what training to give. We can sit here in Scotland and say, “Okay, the reasons for doing this are cultural and traditional. The issue is about whether someone is marriageable or not.” However, we might not be able to see the other issues that are involved.

Hugh Dignon: We need to be clear that the bill is saying that, in the eyes of the law, traditional

and cultural reasons are not sufficient for FGM to be carried out. The Executive does not see its primary role as researching the reasons why the procedure might be carried out in other countries. The primary concern of the Justice Department is to ensure that the legal framework in Scotland is sufficiently strong for us to be able to send out the clear message that I gave in the earlier part of my answer.

Colleagues in other parts of the Executive might feel the need to have more information on the cultural and background issues, because the information might help them in putting together guidance and training material for professionals. If that is the case, I guess that they would be prepared to consider doing that work.

The Convener: A fair amount of work has been done in London on the subject. We may well want to look at that and draw from the experiences on all sides. The SPICe briefing has highlighted some of the written evidence from other countries and we might want to look at that as well.

Elaine Smith: I am a wee bit disturbed about the last point that Hugh Dignon made. Surely the intention behind the bill is to provide protection. I know that huge numbers of prosecutions are not expected—there have been none under the 1985 act—and the practice is illegal in this country. However, I thought that a major part of the bill was awareness raising, training, education and that kind of thing. If the Executive is going to inform that process, it will surely have to look a bit further afield than Scotland.

Shiona Baird: Following on from that point, one of the things that came out of the consultation document was the fact that people who live in African countries are putting pressure on people who live in Scotland to have FGM carried out on their children. If we want to eliminate the practice, we need to look at what is happening in those countries.

My final question concerned costing, but we have addressed that already. Although charges that the bill will incur extra costs are being dismissed, the significant fact is that—ultimately and hopefully—it will prevent FGM. We need to ensure that sufficient funds are made available to raise awareness and fund the social work departments that will work in this area. That brings me full circle to the issue that Elaine Smith raised about the amount of work that is being done globally to raise awareness of and eradicate the practice, which in turn brings me to the World Health Organisation's listing of the different types of FGM. As far as I can see, type IV FGM is not included in the bill. Why have we included some, but not all elements of the practice? If we deem the practice to be bad because it damages young women, why are we not including all the WHO definitions?

Susie Gledhill: As we heard earlier, there has been no change in the definition from that which is given in the 1985 act. We understand that the prevalence of type IV FGM is marginal in Scotland—indeed, we know of no community in Scotland that practises type IV. The main community we know about is the Somali community, which practises type III infibulation.

We have taken note of evidence that was given at the time that the English and Welsh bill went through. The Royal College of Gynaecologists and Obstetricians was asked about type IV FGM because it has a wide definition that catches many different kinds of procedures, from inserting corrosive substances into the vagina to cuts and so on. The Royal College said that it would be complicated and difficult to come up with a legal definition that encompassed all type IV procedures and yet did not infringe on other medical procedures.

Shiona Baird: Perhaps that is another matter that we need to examine further. Type IV FGM can cause as much suffering as any other type and I do not understand why we cannot use different wording. The approach seems negative.

Valerie Montgomery: I do not think that type IV procedures would not be covered in any circumstances. The offence in section 1 relates to excising, infibulating or otherwise mutilating. The phrase “otherwise mutilates” represents a broader category than excision or infibulation. Mutilation suggests an element of violence. In some circumstances, the bill may cover a type IV procedure. It is hard to give examples of what would and would not be covered, because that depends on the individual circumstances and severity of a case.

Shiona Baird: The meaning of mutilation depends on interpretation, but it implies incision. The introduction of a corrosive substance can have a devastating effect without being mutilating.

The Convener: I take that still to be mutilation, but that is my assumption.

Shiona Baird: That is okay.

Susie Gledhill: The dictionary definition of “mutilate” includes to maim and to damage or spoil beyond recognition. That would probably cover the practice that Shiona Baird described.

Shiona Baird: That is fair enough.

The Convener: That is my understanding.

Elaine Smith: I want the position to be clear, because we are dealing with what will be legislation. I have sympathy with what Shiona Baird says, but I approach the matter from a different angle. Type IV procedures include cutting the vagina. Could that be mixed up with

procedures that occur during labour, when cutting and stitching may take place? In some cases, if that went wrong, some mutilation might occur, but women might have to have incisions and stitching during labour.

Susie Gledhill: Section 1(2)(b) contains a clear exception for that.

Elaine Smith: So it is clear that such a procedure would be acceptable.

Susie Gledhill: The exception relates to

“a surgical operation on another person who is in any stage of labour or has just given birth, for purposes connected with the labour or birth.”

Elaine Smith: Does that create a loophole for any kind of FGM?

Susie Gledhill: No. The type of FGM that is commonly associated with birth is the request for reinfibulation afterwards. The British Medical Association guidance tells doctors clearly not to infibulate a woman beyond what enables her to have sexual intercourse or beyond what is normal and natural. If a woman was infibulated before, doctors are not allowed to sew her back up as before, but only to what would be natural or would allow her to have sexual intercourse.

Elaine Smith: Do we have clear guidance about what is normal in those circumstances?

Susie Gledhill: That is in the British Medical Association guidance. I am not a doctor. The guidance sets out clearly what doctors are allowed to do.

Elaine Smith: You are happy that the bill is clear.

The Convener: We will take evidence from practitioners later, so we may be able to pursue those questions.

Shiona Baird: I do not know how relevant the French situation is. The SPICe briefing says that to counter the practice in France

“a legal duty was placed on doctors to report any incidences of child abuse to the police or a prosecutor. Further,

‘Doctors are not subjected to the professional code of secrecy when it comes to child abuse. Doctors now speak more openly to the families. Because of the trials, the taboo has been lifted.’”

I do not understand all the codes that doctors are bound by but, when I read that, I thought that it seemed to imply that we have a different code in Britain and that doctors are subject to a stronger code of secrecy that would mean that they would not comment if they felt that a child was being abused. Can anyone clarify what seems to be a major inconsistency?

11:30

Susie Gledhill: I cannot compare the situation with the French situation in great detail because I do not know enough about the specifics of the French situation, other than what is written in the SPICe briefing. Our understanding is that FGM would be treated as a form of child abuse and that the cases would be dealt with under the same child protection procedures that are in place for any form of child abuse.

There is an issue of patient confidentiality but the child protection guidance to health professionals states that, if doctors feel that a child is at risk, they have to have a discussion with the family about legal and health issues and can override the parents' right to control information about a child in order to protect the child from serious harm. Further, the BMA guidance sets out various issues that doctors need to consider. However, we would have to check with colleagues in the Education Department who deal specifically with child protection to answer your question fully.

The "It's everyone's job to make sure I'm alright" report goes for a multi-agency approach and encourages doctors to share information. I would have to check whether they have a specific duty in that regard, but I suspect that, if they think that the child is at risk of serious harm, there are steps that they have to take.

The Convener: It is my understanding that everyone who is involved in child protection should speak out if they think that a child has been abused in any sense.

Elaine Smith: The issue that we are discussing relates to empowering women, changing traditions and educating men to understand that FGM represents unacceptable control of women's bodies. I hope that we can eradicate the practice. Obviously, the bill will not be retrospective, but I am worried that, if the legislation comes into force next year, it might be that, in 10 years' time, a woman who had been a victim of FGM after the act had come into force might be scared to seek medical assistance if, for example, she were pregnant. Would pressure be put on that woman under the guidance that Shiona Baird was just talking about to tell doctors where and when this was done in an attempt to discover, for example, whether the mutilation had been carried out in this country or abroad? That might have an impact on women's health in the future.

Susie Gledhill: Again, we would have to check the medical guidance, but my understanding is that, particularly with adults, the patient-doctor relationship is confidential. I do not think that doctors would be able to break that confidentiality, but I would have to check. The requirement for confidentiality is clear, precisely because of the issues that you are talking about, which can arise not only in relation to FGM but also in relation to, for example, rape and domestic abuse. It is felt to be important to ensure that women can get the medical help that they need without being scared of the consequences if they do not want to press charges.

Nora Radcliffe: Another legal issue occurs to me. If a doctor treats a woman who has undergone FGM and is aware that the woman has children, what do they do about raising concerns if they worry that the children might also be subjected to FGM?

Susie Gledhill: Again, that would come down to the child protection procedures and would depend on the facts of the individual case. If, when talking to the doctor, the woman said what a terrible time she had had because of FGM and that she would never want to put her daughters through that, the doctor would come to the conclusion that those children were not at risk. If a different sort of conversation were had, the doctor might come to the conclusion that the female children were at risk and would follow the normal child protection procedures, alerting social services or whoever was most appropriate.

The Convener: I thank our witnesses. Your information has been helpful. I know that this is not a particularly easy subject to talk about. I think that we shall become more aware of that as we continue to discuss this legislation.

I record apologies from Frances Curran and Marilyn Livingstone.

Meeting closed at 11:35.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 14 December 2004

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at the Astron Print Room.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation
Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron