EQUAL OPPORTUNITIES COMMITTEE

Tuesday 3 May 2005

Session 2

£5.00

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

CONTENTS

Tuesday 3 May 2005

EQUAL OPPORTUNITIES COMMITTEE
7th Meeting 2005, Session 2

CONVENER

*Cathy Peattie (Falkirk East) (Lab)

DEPUTY CONVENER

*Nora Radcliffe (Gordon) (LD)

COMMITTEE MEMBERS

*Shiona Baird (North East Scotland) (Green)
Frances Curran (West of Scotland) (SSP)
*Phil Gallie (South of Scotland) (Con)
*Marlyn Glen (North East Scotland) (Lab)
*Marilyn Livingstone (Kirkcaldy) (Lab)
*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 ALSO ATTENDED:

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Zoé Tough

ASSISTANT CLERK

Roy McMahon

LOCATION

Committee Room 2

Scottish Parliament

Equal Opportunities Committee

Tuesday 3 May 2005

[THE CONVENER *opened the meeting at 10:04*]

Item in Private

The Convener (Cathy Peattie): Good morning and a warm welcome to the seventh meeting in 2005 of the Equal Opportunities Committee. I remind those present to turn off their mobile phones. I have an apology from Phil Gallie and an indication that Marilyn Livingstone will be a bit late. If members are agreed, we will take item 5 in private, as it deals with a draft report, which has not yet been agreed by the committee.

Members *indicated agreement*.

Prohibition of Female Genital Mutilation (Scotland) Bill: Stage 2

10:05

The Convener: Item 2 is stage 2 of the Prohibition of Female Genital Mutilation (Scotland) Bill. I welcome the Deputy Minister for Justice, Hugh Henry, and Valerie Montgomery, Susie Gledhill and Hugh Dignon from the Executive. Members should have in front of them a copy of the bill, the marshalled list of amendments and the groupings list.

It might be helpful to point out a few things before we commence. First, when an amendment comes to be disposed of, a member who does not wish to move their amendment should simply say, "Not moved." Any other member can move the amendment at that point, but I will not specifically invite members to do so. Assuming that no other member moves the amendment, I will simply go to the next amendment on the marshalled list. Secondly, if a member who has already moved an amendment wishes to withdraw it, I will ask whether anyone objects to the amendment being withdrawn. If any member objects, I will immediately put the question on the amendment. Finally, if I am required to use my casting vote, I intend to use it for the status quo, which on this occasion is for the bill as drafted.

Section 1—Offence of female genital mutilation

The Convener: Amendment 5, lodged in my name on behalf of the committee, is grouped with amendments 6, 7, 1, 9, 13, 14, 19, 15, 3 and 20.

Elaine Smith (Coatbridge and Chryston) (Lab): This is all a wee bit complicated, so I will do my best not to lose the plot. Amendments 5 and 14 would provide for different acts of mutilation to be included in the definition of the offence of FGM and the offence of aiding someone to carry out FGM. The amendments add the words "incises", "infibulates", "re-infibulates", "stretches" and "cauterizes". Amendments 7 and 15 add another part of the female genitalia to the definition to make it clear that mutilation of the prepuce will also count as FGM. The clitoral hood is separate to the clitoris and is removed under the surgical procedure of prepucioplasty, which I believe is carried out to enhance the sexual pleasure of the individual. The prepuce is mentioned in the World Health Organisation definition of FGM, which is why the amendments are important.

The original intention of the committee was to lodge an amendment that would place the entire WHO definition in the bill, but when we considered the matter further it became clear that duplicate terms with similar meanings should be used,

because of some difficulties with the legal standing of the WHO definition and the fact that it could be replaced at any time. The inclusion of references to procedures and parts of the genitalia and the Executive's amendments to add the words "or vagina", coupled with the catch-all "otherwise mutilates", are intended to cover the entire WHO definition.

We heard evidence that the definition of FGM in the bill—

"excises, infibulates or otherwise mutilates the whole or any part of the labia majora, labia minora or clitoris"—

could be too narrow and would not cover all forms of FGM. A number of witnesses recommended that we include the WHO definition in the bill, which is why, initially, the committee pursued that option.

At stage 1, the Deputy Minister for Justice confirmed that not all type IV procedures would be prohibited by the bill as drafted. Although it is fair to say that we must be cautious not to make the definition of FGM too specific in case it fails to include some forms of FGM or confuses FGM with some medical procedures, Dr Baumgarten of the World Health Organisation told us that the WHO definition should be used as a reference point because

"The WHO definition is internationally recognised as the standard definition".—[*Official Report, Equal Opportunities Committee*, 18 January 2005; c 775.]

Also, Efua Dorkenoo told the committee:

"It is important to use the WHO terminology to spell out what is allowed and what is not allowed."—[*Official Report, Equal Opportunities Committee*, 14 December 2004; c 717.]

That is why we made a recommendation to that effect in our stage 1 report.

The deputy minister agreed to consider the matter further and, as a result, the Executive has lodged amendments 1 and 3, which will include the words "or vagina" in the definition. I am pleased at that, as are other committee members. At stage 1, the deputy minister also said that the Executive would consider whether guidance could be put in place. I look forward to hearing his comments on that when he responds to the debate.

To sum up, we feel that the definition of FGM in the bill is too narrow and we welcome the Executive amendments that will widen that definition. Doctors and other professionals have told us that the bill should use the WHO definition of FGM. Legislation should be clear and use the correct terms; the committee amendments would insert the terms that are used in the WHO definition. We welcome Executive amendments 1 and 3, which will add the words "or vagina", but amendments 7 and 15 will ensure that all procedures that are included in the WHO definition are covered by the bill.

Our amendments have been drafted in a way that ensures that the definition is not too specific. We acknowledge that it would be inappropriate for the bill to refer to a WHO definition, which is a statement rather than a set of regulations or conventions. Our intention is to make the bill clearer. The bill would still have the catch-all term "otherwise mutilates", which will ensure that other forms of mutilation are covered. The definition would still be wide enough and would not be too narrow.

Amendments 6, 9, 19 and 20 deal with re-infibulation. Amendment 6 is a fallback amendment to ensure that, if amendment 5 is disagreed to, the words "or re-infibulates" will still be inserted. Amendment 9 would ensure that the bill stated explicitly that no doctor may legally perform an operation to re-infibulate someone after the birth of a child. Amendment 19, which would make assisting someone to re-infibulate themselves a specific offence, is a fallback in case amendment 14 is disagreed to. Amendment 20 provides a definition of re-infibulation that is derived from the booklet "Female Genital Mutilation—also known as Female Circumcision—Information for Health Professionals" by Comfort Momoh, who gave evidence to the committee.

The background to amendments 6, 9, 19 and 20 is that the bill as drafted does not specifically outlaw re-infibulation; the phrase "infibulates or otherwise mutilates" only implies that re-infibulation would be unlawful. Section 1(2) provides that registered medical practitioners may lawfully carry out procedures such as the removal of a cancerous growth, an episiotomy or stitching up after childbirth. Although such procedures might be considered to be FGM, any doctor who performs them will be exempt from prosecution under the bill. However, written evidence from Dr Mary Hepburn suggests that the bill's current wording is not explicit enough and might lead to confusion if a woman asked to be re-infibulated following childbirth. Given the concern that common operations such as episiotomy, restitching after episiotomy or tearing could be confused with re-infibulation, the committee agrees with the international centre for reproductive health report, which states:

"To avoid confusion, re-infibulation needs to be defined and specific law provisions should be very clear about re-infibulation."

The committee feels strongly that re-infibulation should be referred to on the face of the bill as an unlawful practice.

To sum up, re-infibulation is not specifically made an offence in the bill as drafted. The

committee heard evidence that that might lead to confusion among medical practitioners and midwives about what procedures are acceptable after and during childbirth if, for example, an episiotomy needs to be performed. Concern was also expressed that re-infibulation and an episiotomy might be confused and that pressure might be put on medical staff to re-infibulate a woman after childbirth. The committee felt that we should define re-infibulation. The purpose of amendments 6, 9 and 19 are to state that re-infibulation or assisting someone to re-infibulate is unlawful and that it is not an operation that can be performed in connection with the birth of a child. Amendment 20 provides a definition.

The deputy minister has argued that the bill was already clear and that re-infibulation was already an offence, but the evidence that the committee received seemed to show that there was some confusion in medical circles as to what can and cannot be performed. The purpose of the amendments is specifically to include re-infibulation in the bill. The committee thinks that greater clarity would provide reassurance to medical professionals about what procedures they can and cannot perform.

I move amendment 5.

10:15

The Deputy Minister for Justice (Hugh Henry): Like the committee, I want to ensure that girls and women in Scotland are protected from every type of female genital mutilation. I am satisfied that the current offence in section 1 of the bill makes types I, II and III of the WHO's classification of FGM unlawful. However, some forms of FGM that fall into the WHO type IV category involve procedures being carried out on the vagina that are not currently within the scope of the offence in section 1.

Amendment 1 will ensure that the forms of FGM that involve mutilation of the vagina are also unlawful. Various procedures that are commonly carried out on the vagina are intended to enhance rather than to impair sexual sensation and pleasure. I want to explain for the record that there is no intention to make such procedures unlawful. For example, some women choose to have vaginal tightening procedures if they are particularly large or to correct laxity after childbirth. In most cases, it is unlikely that those procedures would be considered to fall within the terms of section 1, because they do not have a mutilating effect. [*Interruption.*]

The Convener: Someone in the public gallery is taking photographs. It is not appropriate to take photographs at the committee meeting.

Hugh Henry: However, if the procedure were thought to fall within the scope of section 1, the exemptions from the offence in relation to operations that are necessary for physical or mental health are likely to apply to any procedure carried out for those purposes. Those are my reasons for having lodged amendments 1 and 3.

I will speak to the other amendments in the group. First, on amendments 5 and 14, I appreciate the efforts that the committee has made to try to ensure that each and every form of FGM is made unlawful. I agree that genital mutilation in the ways that are described in amendments 5 and 14 should be an offence. Mutilation by incision, stretching and cauterization would already be offences under the bill, because they would fall within the phrase "otherwise mutilates". I therefore consider those amendments to be unnecessary.

In addition, if we were to make the definition of the offence more specific, as amendments 5 and 14 would do, that could impact on the actions that are not specified. Greater specification of the things that amount to the offence diminishes the flexibility of "otherwise mutilates". For example, if something as specific as cauterization is included, that may suggest that other forms of damage by burning through the introduction of a substance are not included. The existing offence provides more flexibility to ensure that the bill covers all current and future forms of FGM. For that reason, I ask Elaine Smith to withdraw amendment 5 and not to move amendment 14.

Amendments 6, 9, 19 and 20 are about re-infibulation. I agree with the committee that re-infibulation should be an offence, but I believe that it will already be an offence under the bill. Section 1 of the bill uses the term "infibulates" and re-infibulation amounts to infibulation of the labia, which, as I said, is an offence under section 1. Guidance from the British Medical Association, the Royal College of Obstetricians and Gynaecologists and the Royal College of Midwives is clear that re-infibulation is already unlawful.

In preparation for stage 2, we sought additional advice from several medical experts and organisations that deal with FGM and no confusion was expressed about whether re-infibulation was unlawful, so I argue that the amendments are unnecessary. However, I understand that it must be distressing for a woman who has been closed for almost as long as she can remember suddenly to be open. We must ensure that such women are supported at such a difficult time and that they are counselled about why re-infibulation should not and cannot be performed.

Adopting a consistent position on re-infibulation throughout the United Kingdom has advantages. For example, guidance for professionals and communities will be uniform. The danger is that

including re-infibulation in our bill may lead people wrongly to believe that re-infibulation is lawful in the rest of the United Kingdom, because the definition in the Female Genital Mutilation Act 2003 does not include re-infibulation. That would be a matter for the UK Government, but we do not want to take the chance of putting any vulnerable women at risk anywhere in the UK. As re-infibulation is already clearly unlawful, I ask Elaine Smith not to move amendments 6, 9, 19 and 20.

I want to ensure that our protection against FGM is as strong as possible and I welcome the committee's intention in lodging amendments 7 and 15. Our medical advice is that the clitoral hood can be considered to be separate from the clitoris. It is right to include it in the definition of the offence. However, "prepuce" is a term that can refer to the female clitoral hood and the male foreskin. As a result, the amendments may be interpreted as making male circumcision unlawful. We do not wish to make male circumcision unlawful. Such an interpretation would be most unlikely, but we intend to lodge a stage 3 amendment to ensure that the reference to prepuce is restricted to the female prepuce, to avoid any doubt. On that basis, I am happy to support amendments 7 and 15.

Amendment 13 would create an order-making power. We have all worked hard to try to construct a definition of the offence of FGM that includes all the forms of FGM set out by the World Health Organisation and does not criminalise various elective genital procedures that consenting adults may request. I recognise that the task has been difficult. We are satisfied that the bill deals with those issues, but I am conscious that several changes could occur in future that could give rise to the need to amend the offence of FGM or the exclusions from that offence. For example, the World Health Organisation has said that it will revise its definition of FGM; new cosmetic genital procedures may be developed; the regulation of cosmetic surgery may change; and new forms of FGM may be discovered.

I understand what the committee is trying to achieve by anticipating the future. However, I am concerned that the committee's amendment 13 is too wide in scope and would not limit ministers' powers to amend the bill. An order-making power to change a criminal offence is extremely unusual. A more focused power would be more appropriate and would be likely to be more acceptable to the Parliament. Several technical drafting concerns also need to be addressed.

I assure the committee that we will consider the matter further. Before stage 3, we will reflect on what could be lodged to address the committee's concerns. On the basis of that assurance, I hope that Shiona Baird will not move amendment 13—I think that amendment 13 is in her name.

Elaine Smith asked about guidance. We acknowledge that guidance will be needed. We need to work with colleagues in the Health Department and professionals to develop guidance, which will take time. We welcome Comfort Momoh's offer of assistance and we will keep the committee fully informed as the process develops.

Shiona Baird (North East Scotland) (Green): Amendment 13 addresses concerns that have been raised about future flexibility. The committee suggested a number of changes to the bill in relation to what constitutes the offence of FGM, while acknowledging that the law in the area is developing. We wanted to ensure that other procedures could be dealt with in future and we decided that the Scottish ministers should have an order-making power to update the definition of the offence. Amendment 13 would allow Scottish ministers to do that by adding a new procedure or by adding a new exception to the offence—for example, a new cosmetic surgical procedure. Scottish ministers could also update the definition of "approved persons" for the purposes of section 1(3)—for example, in relation to any future legislation to regulate body piercing.

The order for which amendment 13 provides would be subject to the affirmative procedure, so it would undergo the strict scrutiny of the Subordinate Legislation Committee and the Parliament before changes could be made to the primary legislation. The order could also be considered by the Equal Opportunities Committee. Amendment 13 has important implications and would enable us to adapt to changes. I urge the Executive to accept the amendment, which would give the bill the flexibility that the minister thinks it does not currently have.

Ms Sandra White (Glasgow) (SNP): I thank the minister for his explanation and for his offer to provide further clarification on some of the matters that are raised by the amendments. However, I am concerned by the Executive's approach to amendments 5, 14 and 13.

The bill should mention re-infibulation, because the procedure should be regarded as type III FGM in the World Health Organisation's classification of different types of FGM. Re-infibulation is a horrific experience—I will not go into too much detail. After incisions are made to enable a woman who has undergone infibulation to deliver a baby, tremendous pressure can be put not just on the mother to agree to re-infibulation, but on the surgeon to carry out the procedure. For that reason, I am concerned that the minister does not accept amendments 5 and 14, which address the committee's recommendation that re-infibulation be included in the bill.

I feel strongly about the matter. Dr Mary Hepburn and the international centre for

reproductive health expressed concern that re-infibulation is not mentioned in the bill. There are two angles to the matter: we should protect not just the women who are under pressure to undergo the procedure and go back to having something the size of a pinhole, but the professionals who are under pressure to carry out the procedure—they, too, should be protected by the law. I ask the Executive to reconsider the matter, whether or not the committee decides to press the amendments, and to have further talks with the committee about re-infibulation.

Amendment 13 would give the ministers powers to change the definition of "approved persons" if circumstances changed. There would also be the protection that the order would have to come to the Parliament, where members would be able to see exactly what was happening. The amendment is good and I ask the minister to look again at it. I hear what he is saying, but I ask him to look at the issues that I have raised and to give further clarification. I feel especially strongly that the bill should specifically mention re-infibulation.

10:30

The Convener: The committee feels strongly about the issue of re-infibulation. The minister has indicated his interest in looking at the work in which Comfort Momoh has been involved. Guidance is important, but some of the work that she has done has been about informing communities about the issues and we have highlighted the need for training, advice and information. Although guidance is vital and we welcome it, the wider information going out is also vital, because the pressure to have FGM done often comes from within communities.

Shiona Baird: The legislation in England was brought about through a private member's bill. The minister suggested that there would be discrepancies between the English bill and our bill. Will there not be opportunities for Westminster to recognise that our bill is an improvement on its bill and to upgrade that legislation, rather than for us to go back to comply with the Westminster bill?

The Convener: I invite the minister to comment on that and on any of the other issues that have been raised.

Hugh Henry: I shall deal with the last point, which was raised by Shiona Baird, first. It is, of course, possible that Westminster might re-examine that legislation—or any legislation—at some point in the future if it thought that that was appropriate. However, the difficulty would be in our having to rely on another legislature either finding the time for that or making it a priority. We could not have any guarantee that Westminster would want to return to it, be able to return to it or have the time to return to it. Therefore, I am unable to give any indication of or commitment to what may or may not be possible elsewhere. It would be wrong of me to do so.

We must work on the presumption that Westminster believes that it has a workable piece of legislation. As the committee will see, we propose to go further—commendably—than Westminster. Nevertheless, I do not know whether that would be sufficient reason for Westminster to decide that it wanted to revisit its legislation, so I do not think that we should build anything into that.

I am sympathetic to Shiona Baird's wider point about amendment 13, which is why I suggested that we return to the matter at stage 3. There are two reasons why I urge the committee not to accept amendment 13 at this stage. First, there are technical problems with its drafting, which we would need to consider. Secondly, we want to ensure not only that the bill is technically competent, but that whatever we do is proportionate. The Subordinate Legislation Committee and the Parliament would be cautious about introducing—even through an affirmative procedure—something that, ordinarily, would require significant primary legislation.

I recognise that, because of the pressures on the Parliament to find legislative slots, it could be difficult in future to find time to introduce the primary legislation that would be required to make the changes that are being discussed. Both the Subordinate Legislation Committee and the Parliament may want to reflect on whether there is a balance to be struck, in terms of proportionality, in using the affirmative procedure to effect change. We will return to the issue at stage 3 and, I hope, come up with something that is acceptable not just to the committee, but to the Parliament as a whole.

On Sandra White's points, I emphasise again that re-infibulation is an offence. Our worry is that going down the route that has been proposed and having greater specification of what constitutes the offence might diminish the flexibility of the phrase "otherwise mutilates". By putting something in the bill that on the surface appeared commendable and would be something that we would want to do—but which I would argue is already covered—we might unintentionally weaken the concept that we want to be enforced in legislation.

We have addressed the specific issue—we have retained flexibility and we intend to take action wherever we can. I urge the committee to look beyond the specific words under consideration to all the words in the bill, because I believe that they provide the protection that members seek.

Elaine Smith: I commend the Executive for lodging its amendments, especially amendment 1,

with its reference to "or vagina", and for accepting amendments 7 and 15, with their reference to "prepuce", on the understanding that a further amendment will be lodged at stage 3 to clarify the matter. Is that correct, minister?

Hugh Henry: Yes.

Elaine Smith: Thank you very much for that.

I realise that any definition of these matters and the concept of re-infibulation itself are complex and I hear what the minister is saying in that respect. However, it was thought that "otherwise mutilates" would be a catch-all phrase and that, far from diminishing its force, our amendment would ensure that everything was covered. I accept that the minister's position is different.

Some of the difficulty results from the fact that the medical opinion that the minister has received differs from the evidence that we have received. However, I am sure that the committee agrees that we all want exactly the same thing, which is to ensure that the bill makes all forms of FGM illegal. I will seek to withdraw amendment 5 with the caveat that the committee might lodge an amendment on the issue at stage 3. That might not happen, but we will certainly seek further talks with the Executive on the matter before that stage. After all, we are all aiming for the same end result and I realise that the law in this area is complex.

Hugh Henry: I am happy to put on the record my assurance that we will have further discussions.

The Convener: Does any member object to amendment 5 being withdrawn?

Ms White: Although I take on board the points that the minister and Elaine Smith have made, I would like to press amendment 5.

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

White, Ms Sandra (Glasgow) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Radcliffe, Nora (Gordon) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)

ABSTENTIONS

Baird, Shiona (North East Scotland) (Green)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 5 disagreed to.

Amendment 6 moved—[Ms Sandra White].

The Convener: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

White, Ms Sandra (Glasgow) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Radcliffe, Nora (Gordon) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)

ABSTENTIONS

Baird, Shiona (North East Scotland) (Green)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 6 disagreed to.

Amendment 7 moved—[Elaine Smith]—and agreed to.

Amendment 1 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 8, lodged in my name on behalf of the committee, is in a group on its own.

Nora Radcliffe (Gordon) (LD): The purpose of amendment 8 is to add the requirement for a second approved person to agree that an operation is for the good of a person's physical or mental health before any operation that could be interpreted as being FGM is carried out. The bill as drafted requires only one registered medical practitioner's opinion before an operation that could be construed as being FGM can be carried out. The caveats in the bill are that the operation may be carried out only for physical or mental health reasons and that no cultural practices may be taken into account when it is agreed to perform such an operation.

In the light of the evidence that it considered, the committee came to the view that, to allow such an exception to the law, the circumstances in which an operation would be allowed to proceed would have to be robust. During evidence at stage 1, the committee highlighted the response from the Royal College of Physicians of Edinburgh to the Scottish Executive's consultation. The response called for a second medical opinion to be required before an operation could be carried out. The committee agreed with that view and recommended in its stage 1 report that a second medical opinion would strengthen the provisions in the bill and reduce the chance of abuse of those provisions.

Amendment 8 would require the opinions of two approved persons before an operation could go ahead. It has been argued that that could introduce unnecessary complexities and delays, but I feel that the issue of delays is a red herring. For operations under section 1(2)(a), the requirement for a second medical opinion would be built into the procedure and so should not result in delays.

It has further been argued that the requirement for a second medical opinion might lead to difficulties and to challenges in court of any decision by two approved persons to agree to the treatment. I am unclear why there should be difficulties; I would welcome clarifications from the minister on the reasons behind the argument.

As I say, the purpose of amendment 8 is to add the requirement for the agreement of a second approved person, which would make the law more robust.

I move amendment 8.

Hugh Henry: I understand what Nora Radcliffe and the committee are driving at, and I understand why people want to build in as many safeguards as possible to protect young women and girls. However, I have a number of concerns about amendment 8. I think that, paradoxically, the amendment could put people at risk. It could make it more difficult to take a quick decision in certain emergency medical situations—especially if two relevant specialists were not available. That argument is not about trying to make it easier to have access to FGM; it is about not wanting to risk lives by delaying emergency operations.

There could also be concerns in the medical profession because there has not been full consultation on amendment 8 and because such an amendment could create additional bureaucracy for the profession. It could be argued that the amendment is disproportionate: the number of valid procedures that are necessary for physical or mental health is vastly greater than the potential number of FGM procedures. If the amendment were agreed to, two opinions would be needed for genital cancer biopsies, labial reduction, gender reassignment surgery and other medical procedures that might sufficiently concern a medical practitioner. In my view, the level of control is not justified. As I have tried to explain, it could have unfortunate consequences for necessary procedures.

10:45

I understand the committee's concern that a girl might be considered not to be marriageable or a part of her community if she is not mutilated and that there are grounds for arguing that not having FGM could affect her mental health. However, for the exemption for a surgical operation to apply, it will have to be shown that the operation is, as a matter of fact, necessary for a girl's "physical or mental health". I am concerned that the effect of amendment 8 might be to weaken the test of whether a procedure is necessary for physical or mental health. The result of the amendment would be that the court would no longer need to be satisfied that the operation was, in fact, necessary for the person's physical or mental health; the court would need to be satisfied only that two medical practitioners thought that the operation was necessary.

Whether someone believes that one or two doctors should be involved, the fallback of the court is an important check. The doctors concerned should know that, if they proceed, they are liable to prosecution. I am worried that the court would be able to consider only whether the two medical practitioners thought that the operation was necessary and not whether the operation was, in fact, necessary. None of us wants to create a situation in which two doctors who support FGM can say that an operation was, in their opinion, necessary. If that were to happen, a girl would have been mutilated and nothing more could be done to challenge the medical opinion. Surely we do not want to take away the sanction of the court, whether we are talking about the opinion of one doctor or two doctors.

I firmly believe that the current formulation whereby the court acts as the fallback is the right one. If a doctor carries out FGM and it is felt that their judgment was flawed and that the operation was not required for the patient's physical or mental health, the decision can be challenged and prosecuted in court. I also worry about the introduction of a requirement for two doctors to agree because of the complexities and problems that could be caused elsewhere in the medical profession.

I hope that my explanations allow Nora Radcliffe to seek the committee's agreement to withdraw amendment 8.

Marlyn Glen (North East Scotland) (Lab): The minister's arguments are persuasive. When we first considered the issue, our aim was to try to balance different people's rights. Having heard the minister's explanation, all I can say is that we do not want to make the offence more difficult to prosecute. It is already extremely difficult to prosecute FGM offences in Europe and the rest of the world.

Marilyn Livingstone (Kirkcaldy) (Lab): I concur with much of what Marlyn Glen has said. We need to have the ability to bring the courts into a situation when necessary. The courts need to act as a deterrent. In the case of amendment 8, I am persuaded by the minister's arguments.

Nora Radcliffe: I welcome the minister's clarification of the issues around whether opinions can be challenged in court. What he said has clarified my thinking on the matter. I now see that the provisions of amendment 8 could shift the focus from the rights and wrongs of what has been done to a person to whether the procedure that was undertaken was undertaken correctly. That is entirely where we do not want to go. As other committee members have said, the minister's arguments were persuasive.

The minister also made the point that the provisions of amendment 8 could create difficulties in other areas. Although the committee has not heard formal evidence on the subject, as the committee's lesbian, gay, bisexual and transgender reporter, I have heard the LGBT community's concerns about the difficulties that the provisions of amendment 8 could put in the way of gender reassignment.

I am persuaded by both arguments, and I seek leave to withdraw amendment 8.

Amendment 8, by agreement, withdrawn.

Amendment 9 moved—[Ms Sandra White].

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

White, Ms Sandra (Glasgow) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Radcliffe, Nora (Gordon) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)

ABSTENTIONS

Baird, Shiona (North East Scotland) (Green)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 9 disagreed to.

The Convener: Amendment 10, lodged in my name on behalf of the committee, is grouped with amendments 11 and 12.

Marlyn Glen: The purpose of amendments 10, 11 and 12 is to exempt cosmetic surgical procedures from being offences under the bill. It is of great concern to the committee that the bill seems to make certain cosmetic surgical procedures, and perhaps genital piercing or tattooing, illegal. I understand that such procedures are increasingly common. Our aim should be to make the legislation efficient, effective, up to date, clear and understandable. I listened carefully to the minister's answer on the first group of amendments and I appreciate his point about keeping the legislation flexible, but I urge him carefully to consider the point, because there is still confusion.

There is still particular concern about genital piercing. In a baby girl or a very young woman, genital piercing would obviously be mutilation and it would be covered by the World Health Organisation's type IV definition of FGM, which includes pricking or piercing. The case of an adult woman who gives consent to the procedure is less clear, but it seems that such cases would be covered by the bill and would be illegal. We need clarity on that.

In the light of the minister's comments on the possibility of some aspects of the bill being interpreted as also applying to men, it seems even more important to clarify the situation. It is important that FGM is not confused with circumcision. At the beginning of our consideration of the bill, we considered the terminology and—like the UK Government—we rejected the term "circumcision" in favour of "female genital mutilation". It is important that we are clear about what will be an offence under the bill and what will not. I urge the minister to give us that clarity, either now or at stage 3.

I appreciate that we are not talking about the regulation of cosmetic surgical procedures, although perhaps that should be done with some urgency. From the evidence that we have been given, it seems that certain cosmetic procedures are increasingly common, but they should not be muddled up with FGM. We need the bill to be clear about exactly what is being made an offence.

The other difficulty that the committee has is on discrimination. The bill must not appear to discriminate by permitting surgery that is requested for Western cultural reasons while making unlawful procedures that are requested for African cultural reasons. From the Equal Opportunities Committee's point of view, it is essential that we are crystal clear on those points.

I move amendment 10.

Hugh Henry: The amendments in group 3 seek to make specific exclusions from the offence in section 1 for two specific cosmetic surgery procedures and for genital piercing and tattooing. For the record, I make it clear that we have no intention of making any of those procedures unlawful. I am sympathetic to the calls to ensure that the FGM offence does not catch cosmetic surgery procedures that are carried out on the female genitalia. We have heard persuasive arguments from the medical profession that there should be no ethical or legal difference between elective operations on other areas of the body, such as the breast, and those carried out on the

genitalia at the request of a freely consenting adult who fully understands the risks and consequences.

As the bill stands, the term "otherwise mutilates" implies that in order to be an offence, the excision, infibulation or other procedure that is carried out on the genitalia must have some mutilating effect. FGM procedures are likely to permanently damage or disfigure the genitalia. Cosmetic surgery procedures, on the other hand, are unlikely to be described as disfiguring or damaging. We do not intend the offence in section 1 to catch genital cosmetic surgery. In our view, those procedures would not be considered to fall within the offence.

The offence in section 1 of the Prohibition of Female Circumcision Act 1985, which is broadly similar, has not resulted in any difficulty as far as cosmetic surgery is concerned. Nevertheless, I have listened to the request to provide a better distinction between FGM and genital cosmetic surgery. At stage 1, I agreed to consider whether it would be possible to make it crystal clear that cosmetic surgery procedures carried out on the female genitalia are not an offence. We studied the FGM laws in other countries and sought the opinion of medical experts, but each option we considered resulted in a position that could have had the effect of making some forms of FGM lawful.

We introduced the bill to strengthen the law against FGM, so we cannot support an amendment that would weaken the protection against FGM that we offer to vulnerable women and girls. I am grateful to the committee for giving us the opportunity to discuss what is clearly a difficult issue, but we cannot support the amendments in the group, and I shall outline further our reasons for taking that stance.

Our overriding consideration is that making an exception for cosmetic surgery procedures could weaken the protection that the law offers against FGM. Some type I FGM procedures are similar to the specified cosmetic procedures. Those FGM procedures would become lawful if the person consented and if the reasons given for the procedure were cosmetic. A child under 16 could consent in that way. We and the committee have heard about how young girls and women are pressurised, and although the word "consent" might be used legally, we would still have concerns about how consent has been developed in the face of pressure.

I understand that the FGM organisations are concerned that a specific exception could mean that a woman might travel to Scotland for FGM, as the law here would be more lax than in the rest of the United Kingdom, or indeed in other parts of Europe. We are also concerned that, by making a specific exclusion for two particular elective genital procedures, amendment 10 would create an implication that all other elective genital procedures are unlawful, as well as any new procedures that might be developed in future. Further, we feel that it would be inappropriate for the bill to regulate one type of cosmetic surgery in isolation, particularly as there has been no public consultation on what could be a highly contentious issue.

I recognise that the issue is difficult, and we must concentrate on what will happen in practice. The concerns about piercing, tattooing and cosmetic surgery have not been borne out to date. There have been no investigations since the passing of the Prohibition of Female Circumcision Act 1985, 20 years ago. We also need to remember the context of any criminal offence. A conviction would require a report to the police, a decision by a procurator fiscal that prosecution would be in the public interest and a decision of the court that the outcome of the piercing, tattooing or cosmetic surgery was mutilating. There will have been three levels of safeguard before there could be a conviction, so I believe that, in practice, a conviction would be extremely unlikely.

I am sure that no member of the committee would want to weaken the protection that we offer against FGM, and I hope that members will understand that that is why we are so determined to resist the amendments in this group. I point out to the committee also that, following a consultation in April 2001, an order to regulate better piercing and tattooing will be introduced at some point in the future. Regulation of genital piercing and tattooing would be more appropriately done in the context of all body piercing and tattooing. We will have an opportunity to come back to the issue through such regulation, but for now we have concerns about amendment 10.

11:00

Marlyn Glen: I will seek leave to withdraw amendment 10 on the basis of the assurances that the minister has given about the levels of safeguard, because it is certainly not the committee's intention to weaken the bill in any way. I hope that the regulation of cosmetic surgery will be considered at the earliest opportunity. The consultation to which the minister referred took place in 2001. We are talking about introducing an order to regulate better piercing and tattooing at some point in the future, but we are already in 2005, so perhaps it should be introduced with some urgency.

Amendment 10, by agreement, withdrawn.

Amendments 11 and 12 not moved.

Shiona Baird: I will not move amendment 13, with the caveat that I understand that the minister will reconsider the matter before stage 3.

Amendment 13 not moved.

Section 1, as amended, agreed to.

Section 2—Aiding and abetting female genital mutilation

The Convener: Amendment 2, in the name of the minister, is in a group on its own.

Hugh Henry: This technical amendment would change the wording of the aiding and abetting offences in section 2 to reflect the usual formulation of such provisions in Scots law, which is "aids, abets, counsels, procures or incites". The bill currently follows the wording in the Prohibition of Female Circumcision Act 1985, which extended to the whole of the United Kingdom. However, now that we have our own Scottish bill, it is more appropriate to follow the usual wording of existing Scots law provisions on aiding and abetting.

I move amendment 2.

Amendment 2 agreed to.

Amendments 14 and 19 not moved.

Amendment 15 moved—[Elaine Smith]—and agreed to.

Amendment 3 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 16, in the name of Elaine Smith, is grouped with amendment 17.

Elaine Smith: Amendments 16 and 17 would ensure that it is an offence for a person in Scotland or a UK national or permanent UK resident to aid and abet another person in carrying out FGM overseas regardless of the nationality or status of the victim. It would do so by removing the restriction in section 2(2)(a) that makes it an offence to aid and abet FGM overseas only if the victim is a UK national or a permanent UK resident, so it changes the bill substantially.

Amendments 16 and 17 are designed to protect girls who are not UK nationals or permanent UK residents by making it an offence for anyone else to arrange that such a girl be taken overseas to undergo FGM. At the moment, the bill makes it an offence to take a girl abroad for FGM only if the person who carries out the FGM or the victim is a UK national or a permanent UK resident. As a result, many of the girls who are most at risk of FGM would not be protected against being taken abroad to be mutilated because they do not have indefinite leave to remain in the UK and so would not be covered by the definition of a permanent UK resident. The daughters of asylum seekers and students would be among those who would not be protected unless the amendments are agreed to.

The provision in the bill is the same as that in the Female Genital Mutilation Act 2003, which extends to the rest of the UK. The amendments would give girls in Scotland more protection than those in the rest of the UK have. Westminster may want to reconsider the issue, but that is a matter for it.

The Somali women's action group talked about asylum seekers in its written submission to the committee and in my first meeting with it. Its written submission said that the bill

"will not protect many of our members who are most at risk—**asylum seeker women and children**. 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."

We have addressed the issue as much as we can.

Throughout the preparation and scrutiny of the bill, the consensus among the Executive, the committee and many who responded to the Executive's consultation and gave evidence to the committee was that, if possible, we should protect all girls from FGM, regardless of their official status. On the committee's behalf, I am grateful to all those who highlighted that important issue. In particular, I thank the Somali women's action group.

As we know, international law difficulties relate to any further extension of the already wide extraterritorial provision in the bill that would be needed to protect all girls. The minister has discussed the difficulties at various stages. As the minister said, international law requires a direct and substantial link to the UK when taking extraterritorial powers, In our stage 1 report, the committee noted that the Executive was exploring

"what steps might be taken to extend the provisions of the Bill to provide further protection for asylum seeker children from FGM".

In February, the minister told us that he was consulting the Home Office on the difficulties and that the issue was not easy to resolve, but that it was being pursued. I am sure that I speak on the committee's behalf when I thank the Executive for taking the matter seriously and investigating all the legal complexities. I am glad that it has resolved many of its concerns so that I could lodge the amendments to protect all girls from FGM, regardless of their nationality or status.

I move amendment 16.

Hugh Henry: Many of the people in Scotland who are in communities in which FGM may be practised are not permanent UK residents—they may be asylum seekers or students or may have

been granted humanitarian protection. As the bill stands, those people would have been able to arrange for their daughters to be taken abroad to be mutilated without committing an offence.

I was keen to protect those vulnerable girls from FGM. The committee and the vast majority of those who responded to our consultation and gave evidence to the committee also wanted the extraterritorial protection to extend to such girls. However, as I explained at stage 1, taking extraterritorial jurisdiction is unusual. Extending such jurisdiction as the bill does to permanent UK residents in countries in which the act is not an offence is extremely rare indeed.

I gave my word to the committee that we would consider the complex legal issues further to see whether we could do more to protect the girls who are most at risk. We have done that. I am pleased to say that we can support amendment 16, which will remove the restriction in section 2(2)(a) that makes aiding and abetting FGM overseas an offence only if the victim is a UK national or permanent UK resident. Removing that will extend protection to the category of girls whom Elaine Smith described.

As I said, that is unusual and goes further than the Westminster act. The committee and others are to be commended for their work to make that possible. We have discussed with our colleagues at Westminster and they have confirmed that it is competent for us to extend the jurisdiction without prejudice to anything else. We should not underestimate the significance of the step that has been taken. The amendments are a great step towards protecting all girls from being taken abroad to be mutilated.

Elaine Smith: It is hugely significant that the Executive has explored the matter and has been able to accept amendments 16 and 17. Children and women who seek asylum might well be the group in most need of the bill's protection. I am pleased that the Executive has been able to support my amendments.

Amendment 16 agreed to.

Amendment 17 moved—[Elaine Smith]—and agreed to.

Section 2, as amended, agreed to.

Sections 3 and 4 agreed to.

Section 5—Definitions

Amendment 20 not moved.

Section 5 agreed to.

Section 6—Repeal

The Convener: Amendment 4, in the name of the minister, is in a group of its own.

Hugh Henry: Amendment 4 adds offences under the bill committed against children under the age of 17 to the list of offences in schedule 1 to the Criminal Procedure (Scotland) Act 1995.

I have lodged the amendment to increase the protection against FGM that we can offer to the girls who are most at risk—those girls who live in the same household as a girl who has been mutilated or a person who has been convicted of carrying out or arranging FGM. The amendment will allow the convicting court to refer those children to the reporter to the children's panel under section 48 of the 1995 act. The reporter could then refer the child to a children's hearing, which is able to impose measures to protect the child.

In addition, the reporter will be able to use the conviction as grounds to refer to a children's hearing any child who later lives in the same household as a girl who has been mutilated or a person convicted of carrying out FGM or aiding and abetting FGM.

Amendment 4 will also give the police additional powers of arrest without warrant for those they suspect of having committed FGM.

FGM is a very serious offence and it is right that it is given such priority in the child protection system. By making the offences in the bill schedule 1 offences, we are sending out a clear signal to social workers and everyone else who works with girls who might be at risk about the importance of protecting girls from FGM. The families who arrange FGM might well bring up their children happily and healthily in all other respects, so social work services might not be involved with them. The amendment will help to ensure that the girls at risk get the protection that they need.

Ms White: I am pleased with amendment 4, for which I thank the minister, as well as with amendments 16 and 17 about asylum-seeker children being taken abroad for FGM. Amendment 4 gives added protection.

Amendment 4 agreed to.

Section 6, as amended, agreed to.

Section 7 agreed to.

Long title agreed to.

The Convener: That ends consideration of stage 2 of the bill.

11:14

Meeting suspended.

11:22

On resuming—

Petition

Pornography (PE752)

The Convener: I welcome Phil Gallie to the committee for item 3, which deals with petition PE752 from Catherine Harper, on behalf of Scottish Women Against Pornography. The petition calls for pornography to be defined as incitement to sexual hatred and for such incitement to be made an offence similar to incitement to racial hatred. We have received responses to our correspondence on the matter from the Minister for Communities and the Justice 2 Committee. Do members have any comments on the clerk's paper?

Elaine Smith: Members will recall that, as the gender reporter, I have been tasked to look into this matter on behalf of the committee. I have asked the American intern who is working with me, Crystal Perl, to do some research for me on the issue, and she has done that. I would be happy for the committee to agree to the action that is suggested in the paper—to write to the minister, and so on. I would also like to meet the petitioners to have a further discussion about the way forward on the petition and to find out what their legislative objectives are. A lot of background work has been done on this and I think that it is time for the committee to have another look at the petition and decide on the way forward. I agree with the action points that are suggested in the clerk's paper.

Shiona Baird: The paper says that when the Justice 2 Committee considered a previous petition from SWAP there was

"a commitment by the Executive to consider undertaking research".

In her response to our letter, the clerk to the Justice 2 Committee says that that committee welcomes the fact that the Equal Opportunities Committee is considering this matter. However, the question that arises is, to what extent is a commitment a commitment? How can the Justice 2 Committee ignore the fact that a commitment was given? Surely it behoves that committee to follow through on the matter, independently of us. I am concerned that the Executive can make a commitment only to ignore or break it.

The Convener: Clearly, it is up to the Justice 2 Committee to prioritise its workload. We cannot tell another committee to do one thing or another.

Shiona Baird: Yes, but—

The Convener: I understand your frustration, Shiona, but it is not within our remit to do that. Elaine Smith has proposed that we take the action that is set out in the paper and that seems to be the wise approach for us to take.

Marilyn Livingstone: I take on board the points that Shiona Baird has made. However, the gender reporter has agreed to meet the petitioners to try to understand their objectives and that will go a long way to allaying the fears that Shiona Baird expressed. The proposal is a good one.

The Convener: And Shiona Baird agrees with it.

Shiona Baird: Yes, I do, but I remain concerned about when a commitment is not a commitment.

Phil Gallie (South of Scotland) (Con): I have not been involved in any of the committee's previous discussions on the matter, but I whole-heartedly support anything that cuts down on pornography. I recognise that the petition relates only to female pornography, yet it is obvious that males, too, can be involved. I hope that Elaine Smith could widen her discussions with the petitioners in that regard.

A phrase in the paper that worries me slightly is

"the media's sexualisation of girls and young women".

There is a strong dividing line between the fact that individuals can take pleasure from the natural differences between males and females, and pornography. I hope that Elaine Smith picks up on that aspect when she undertakes her report.

Elaine Smith: The issue is complicated and I am sure that none of us would say that it is not. I would like to have further discussions with the petitioners to see exactly where we want to go with petition PE752 in legislative terms. Legislation has to be the way forward. The issue is not about censorship or the debate about erotica versus pornography; it is about speaking to the petitioners about their petition and seeing how we can take forward legislation to address the issues that they raise.

Nora Radcliffe: The actions that are proposed in the paper are sensible and will move our consideration of the matter forward in a positive way. They will give us more information to consider at a later date, which will be helpful.

Marlyn Glen: I agree with what has been said. The subject is complicated. As a member of the Justice 1 Committee, I confirm how heavy the workloads of both justice committees are. If we want the issues to be given due consideration, it is important that this committee takes a proper part in the proceedings, whether or not that takes us into the area of legislation.

I agree with the first action point, which is to write to the minister requesting a response on the subject of timescales. It is important that we do so clearly.

The Convener: Okay. Are we agreed on the recommendations for action, including asking Elaine Smith to arrange to meet the petitioners?

Elaine Smith: I seek clarification from the convener. Do you want me to make a report after my meeting with the petitioners?

The Convener: Yes. That would be helpful. Are we agreed?

Members *indicated agreement*.

Gypsy Travellers

11:29

The Convener: Item 4 concerns any witness expenses that might arise in the committee's review of progress on the issue of Gypsy Travellers. As required by rule 12.4.3 of the standing orders, I seek the committee's agreement that authority for the payment of witness expenses be delegated to me. Are we agreed?

Members *indicated agreement*.

11:29

Meeting continued in private until 11:32.

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:

Wednesday 11 May 2005

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 committes 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