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**Delegated Powers and Law Reform Committee**  
**Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh**  
**Lagh**

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



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# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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# Committee Membership



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**Stuart McMillan**  
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**Tom Arthur**  
Scottish National Party



**Convener**  
**Graham Simpson**  
Scottish Conservative  
and Unionist Party



**Jeremy Balfour**  
Scottish Conservative  
and Unionist Party



**Mary Fee**  
Scottish Labour

# Introduction

1. At its meetings on 3 September and 29 October 2019, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill (“the Bill”).<sup>i</sup>
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.
3. The Scottish Government has provided the Parliament with a memorandum on the delegated powers provisions in the Bill.<sup>ii</sup>

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<sup>i</sup> The Bill as introduced is available [here](#).

<sup>ii</sup> The Delegated Powers Memorandum is available [here](#).

## Brief overview of the Bill

4. The Bill is a Government Bill comprising 11 sections. It was introduced by the Cabinet Secretary for Social Security and Older People, Shirley-Anne Somerville MSP, on 29 May 2019. The lead committee is the Equalities and Human Rights Committee.
5. The policy objective of the Bill is to further strengthen the existing legal protection for those at risk of female genital mutilation (“FGM”). The Bill follows on from a Scottish Government National Action Plan to work towards eradicating FGM, published in February 2016.
6. FGM has been a specific criminal offence in the UK since the Prohibition of Female Circumcision Act 1985. The Prohibition of Female Genital Mutilation (Scotland) Act 2005 re-enacted for Scotland the provisions of the 1985 Act, gave extra-territorial effect to those provisions, and increased the maximum penalty for FGM in Scotland from 5 to 14 years imprisonment. The Bill adds to and amends the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (“the 2005 Act”).
7. The Policy Memorandum states that since the 1985 Act, no FGM criminal prosecutions have been brought in Scotland.<sup>iii</sup> However, between 1 April 2013 to September 2016, there were 52 referrals for child welfare concerns made to the police from partner agencies due to concerns that girls were at risk of being subjected to FGM. These concerns were investigated and no criminality was found.
8. In general terms, the Bill creates a new “female genital mutilation protection order” (“FGMPO”), which can impose conditions or requirements on a person or persons for the purpose of protecting them from FGM, safeguarding them from further harm if FGM has already occurred, or to otherwise prevent or reduce the likelihood that FGM offences will occur.
9. The Bill also makes it an offence to breach a FGMPO, or an equivalent UK order. The Scottish Ministers must issue statutory guidance relating to FGMPOs, and Ministers may also issue statutory guidance in relation to FGM more generally. Relevant public bodies must have regard to the guidance, in exercising their functions.

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<sup>iii</sup> The Policy Memorandum is available [here](#).

# Delegated Powers

10. When the Committee considered this Bill at its meeting on 3 September 2019, it was content with the delegated powers in the following provisions:
  - Section 1 (inserting section 5O(4)(b)(ii) of the 2005 Act)– Offences relating to UK orders
  - Section 7 (inserting section 7B of the 2005 Act)– Ancillary provision
  - Section 10 – Commencement
11. The Committee sought further information from the Scottish Government in relation to the following provisions:
  - Section 2 (inserting section 5P of the 2005 Act) - Guidance relating to female genital mutilation
  - Section 3 (inserting section 5Q of the 2005 Act)– Guidance relating to female genital mutilation protection orders
12. The full correspondence with the Scottish Government can be found in the Annex.
13. The Committee then reconsidered the delegated powers in these provisions at its meeting on 29 October 2019.

## **Section 2 (inserting section 5P of the 2005 Act) - Guidance relating to female genital mutilation**

### **Power conferred on: the Scottish Ministers**

### **Power exercisable by: Guidance**

### **Parliamentary procedure: None, but published**

#### Provision

14. Section 2 (Guidance relating to female genital mutilation) of the Bill inserts a new section 5P into the Prohibition of Female Genital Mutilation (Scotland) Act 2005 ("FGM Act").
15. The section enables the Scottish Ministers to give guidance about the effect of the FGM Act or any other matters relating to FGM. It provides that a person exercising public functions to whom guidance is given must have regard to it. Subsection (3) provides that the Scottish Ministers cannot give guidance under this section to any court or tribunal, the Lord Advocate or a "procurator fiscal".
16. This can be contrasted with section 78 of the Age of Criminal Responsibility (Scotland) Act ("ACRA"), which requires the SMs to carry out a review to consider the future age of criminal responsibility. Section 79 (provision of information) provides that, for the purposes of such a review, the Scottish Ministers may require certain persons to provide them with information they hold. Those persons include the Crown Office and Procurator Fiscals Service (COPFS"). No exception is made

for procurators fiscal, who will therefore be subject to the requirement to provide information.

#### Committee Consideration

17. The Committee wrote to the Scottish Government to ask why the exceptions in section 2 of the Bill apply to procurators fiscal, rather than the COPFS (or to both). In other words, why there was a different approach taken in the Bill, as compared to section 79 of ACRA.
18. The Government has explained that procurators fiscal are exempt from the requirement to have regard to guidance issued about the effect of the FGM Act because any such requirement could be seen as interfering with the independence of procurators fiscal who will be responsible for taking decisions as to whether to prosecute offences committed under that Act.
19. The Committee is content with the Scottish Government's response on this matter.
20. The Committee is content with this power in principle and that it will not be subject to any parliamentary procedure.

### **Section 3 (inserting section 5Q of the 2005 Act)– Guidance relating to female genital mutilation protection orders**

#### **Power conferred on: the Scottish Ministers**

#### **Power exercisable by: Guidance**

#### **Parliamentary procedure: none, but published**

#### Provision

21. Section 3 (Guidance relating to female genital mutilation protection orders) of the Bill inserts a new section 5Q into the FGM Act.
22. Proposed new section 5Q enables the Scottish Ministers to publish guidance about female genital mutilation protection orders. It provides that a person exercising public functions to whom guidance is given must have regard to it. Subsection (3) provides that the Scottish Ministers cannot give guidance under this section to any court or tribunal, the Lord Advocate or a “procurator fiscal”.
23. The DPM explains that this guidance will ensure there is clarity about the responsibilities of those covered by the Bill under FGMPOs. Guidance aims to provide a responsive and flexible way of supporting those who must have regard to it, and the content would be operational and practical. The Government considers that the level of detail required in the guidance would be beyond that normally contained in primary legislation.

#### Committee Consideration

24. The Committee asked the Scottish Government the same question regarding section 3 as it did in relation to section 2, which is discussed above (why the

exceptions in section 3 of the Bill apply to procurators fiscal, rather than the COPFS (or to both)).

25. The response provided by the Scottish Government in relation to section 2, applies equally to the question regarding section 3. We are content with the Government's response.

26. The Committee is content with this power in principle and that it is subject to no parliamentary procedure.

# Annex

## Letter to the Scottish Government dated 6 September

The Delegated Powers and Law Reform Committee considered the above Bill on 3 September 2018 and seeks an explanation of the following matters:

### **Section 2 (inserting section 5P of the 2005 Act)– Guidance relating to female genital mutilation**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: Guidance**

**Parliamentary procedure: None, but published**

The Committee accepts that it could be helpful for Ministers to issue guidance under this section.

However, the new section 5P(3) sets out that guidance may not be given to any court or tribunal, the Lord Advocate, or a procurator fiscal. The DPM does not explain why this exclusion is not extended to the Crown Office and Procurator Fiscal Service (COPFS) as a body, as well as the individual fiscals.

An example of a recent Bill provision which refers to COPFS rather than fiscals, although not relating to guidance, is section 79 of the Age of Criminal Responsibility (Scotland) Act 2019. That section relates to obligations of COPFS to provide information to the Scottish Ministers in relation to a review of the age of criminal responsibility.

**Why is it provided that guidance may not be given to a procurator fiscal, rather than to the Crown Office and Procurator Fiscal Service (or to both that Service and the individual fiscals)?**

### **Section 3 (inserting section 5Q of the 2005 Act) - Guidance relating to female genital mutilation protection orders**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: Guidance**

**Parliamentary procedure: none, but published**

The Committee accepts that issuing guidance under this section could be suitable in principle.

New section 5Q(4) provides that guidance under this section cannot apply to any court or tribunal, the Lord Advocate or a procurator fiscal. In a similar way to the new section 5P(3), COPFS as a body is not listed as a person or body to whom guidance cannot apply.

**Why is it provided that the guidance may not apply to a procurator fiscal, rather than to the Crown Office and Procurator Fiscal Service (or to both that Service and the individual fiscals)?**

I'd be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Tuesday 1 October 2019.

Response from the Scottish Government dated 1 October

Thank you for your letter of 6 September to James Hynd. I have been asked to reply as Bill team leader. You ask why guidance being issued in relation to (i) FGM generally and (ii) FGM protection orders does not list the Crown Office and Procurator Fiscal as one of the bodies excluded from being given any guidance. You note that such a provision was included in the Age of Criminal Responsibility (Scotland) Act 2019, which created an obligation upon COPFS to provide information to the Scottish Ministers in relation to a review of the age of criminal responsibility.

It is provided in the Bill that guidance may not be given to a procurator fiscal, rather than providing that such guidance may not be given to the Crown Office and Procurator Fiscal Service (COPFS) (or to both that Service and the individual fiscals), because of the particular functions of the office of 'procurator fiscal'. The reference to the exclusion of that office from being subject to guidance recognises its independence and the independent exercise of the functions within it, particularly in the context of particular prosecution decisions. It is considered that any functions of the procurator fiscal exercised through COPFS remain vested with the office of procurator fiscal and not the department, and are therefore excluded from the scope of the guidance. With regard to the difference of approach between the references in the Bill and in the Age of Criminal Responsibility (Scotland) Act 2019; COPFS is referred to in the Act due to its role in collating statistical data, a role not carried out by the office of procurator fiscal.

I hope this helps to clarify the position, and would be happy to discuss further if helpful.

