Past, present and future: the roadmap to eradicating FGM in England and Wales

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Female genital mutilation (FGM) according to the World Health Organisation, is a procedure that involves the total or partial removal of the external female genital organs for non-medical reasons. With only one conviction to date despite its prevalence within some communities in the country, it is apparent that the law as it stands in England and Wales is ineffectual in tackling FGM, and more must be done. Historically, the law on FGM was purely designed to penalise where an offence had occurred, and while this began to change with the introduction of female genital mutilation protection orders (FGMPO), analysis of the applications for such orders will demonstrate that the majority of girls at risk are not utilising them. It must, therefore, be considered what else can be done to tackle FGM in England and Wales. A multi-agency approach will be proposed, in which a duty to report risk, education and medical examinations are all considered as options available, alongside FGMPOs and criminal sanctions. Although criminal sanctions in relation to perpetrators are not new, proposing positive obligations and criminal sanctions on certain professionals for failing to report, will offer a distinctive contribution to the eradication of FGM.

Introduction

Female genital mutilation (FGM) is a culturally rooted practice that is carried out on predominantly young girls, and while it is mainly concentrated in some countries in Africa, the Middle East and Asia, it is also common in migrants from these areas and is thus a global concern. The World Health Organisation stated in 2020 that more than 200 million girls and women alive today have been subjected to the practice and more than 3 million girls are estimated to be at risk annually.[1] Gathering recent accurate figures of those at risk in England and Wales is difficult, but research suggests that the numbers are moderate, and could be around 65,000, alongside around 170,000 who have already undergone FGM.[2] With only one conviction in England and Wales to date, and an incredibly low rate of prosecution, little has changed since the Committee on the Elimination of Discrimination Against Women (CEDAW)'s observation in 2013, in which it stated that it was concerning that there still had not been any convictions:[3] '[T]he international community has demanded a legal and non-legal approach to the eradication of FGM and has criticised the United Kingdom for failing to deal with the

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1 World Health Organisation, *Female Genital Mutilation* (3 February 2020), available at: www.who.int/news-room/fact-sheets/detail/female-genital-mutilation. Last accessed 21 July 2021.

2 J Bindel, *An Unpunished Crime: The Lack of Prosecutions for Female Genital Mutilation in the UK* (The New Culture Forum, 2014).

3 CEDAW, *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland* CEDAW/C/GBR/CO/7 (2013).

matter adequately'.[4] Whilst there has been a conviction since the CEDAW observation, there has only been one to date, and the CPS report for 2018–2019 indicates that there had only been two prosecutions for FGM in that period, one which lead to the conviction and the other to an acquittal. Crucially there has also been no conviction for breach of a female genital mutilation protection order (FGMPO) in that timeframe either.[5] Clearly, more must be done. Thus, the law on FGM in England and Wales will be critically examined by first developing an understanding of the historical development of the law, in order to identify proposals to not only ensure that those involved in FGM are prosecuted, but to help prevent FGM in the first place.

The article will begin by looking at the law on FGM in England and Wales and how it has developed to create a specific offence of FGM, and in time, FGMPOs. The problems with the law and the low rate of conviction will then be analysed before looking at how it might be reformed. It will advocate a multi-agency approach, recognising the role certain professions play alongside community engagement in addition to changes in the law. The aim will be to not only increase prosecutions where offences have been committed, but to better identify girls at risk and prevent FGM. In exploring the roles of teachers and medical professionals, education and the community, alongside the legal mechanisms already in place, a collegiate pathway to eradicating FGM will be proposed. The proposal will build on the pre-existing multi-agency approach in suggesting that a positive obligation is placed on medical professionals and teachers to report risk and avert FGM, with the introduction of criminal sanctions for failing to report. Support for the approach will be garnered from analysis of other omission-based offences within the Terrorism Act 2000 and the approach taken to tackle FGM in Norway.

The evolving criminalisation of FGM: from the past to the present

Prior to 1985 there was no specific offence of FGM in England and Wales and any attempts to prosecute would have had to have been brought under more general Acts, such as the Offences Against the Person Act 1861[6] or potentially the Children and Young Persons Act 1933.[7] The disadvantage of utilising such Acts is that it fails to send a clear message that FGM is unlawful, and indeed, no prosecutions for FGM have ever been brought under the Offences Against the Person Act 1861.[8] In a bid to tackle FGM, a specific criminal offence was created under the Prohibition of Female Circumcision Act 1985. The Act prohibited any person to 'excise, infibulate or otherwise mutilate the whole or any part of the labia majora, labia minora or clitoris of another person or to aid, abet, counsel or procure the performance of any of those acts on that other person's own body'.[9] The maximum sentence for such an offence was five years imprisonment[10] but there were no convictions.

Recognising its narrow scope, the Female Circumcision Act was replaced with the Female Genital Mutilation Act (FGMA) 2003.[11] Section 1(1) of the FGMA appears to largely mirror section 1(1)(a) of the 1985 Act, before the FGMA goes on to extend the offence to extra-territorial acts. Section 3 makes it an offence to aid, abet, counsel or procure a non-UK

4 R Gaffney-Rhys, 'From the Offences Against the Person Act 1861 to the Serious Crime Act 2015 – the development of the Law Relating to Female Genital Mutilation in England and Wales' (2017) 39(4) *Journal of Social Welfare and Family Law* 417, 420.

5 *Violence Against Women and Girls Report 2018–2019*, available at: www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf. Last accessed 15 September 2021.

6 For instance under s 47 (assault occasioning ABH), s 20 (wounding or GBH) or s 18 (wounding or GBH with intent).

7 For example, a parent who organised FGM could have been prosecuted under s 1(1).

8 Gaffney-Rhys, above n 4. Bringing a prosecution of FGM under the Act could also be considered an inappropriate use of the Act as FGM was not something that was in contemplation by Parliament at the time of writing, much like *R v Brown* [1994] 1 AC 212 utilising the same Act to prosecute sado-masochism.

9 Prohibition of Female Circumcision Act 1985, s 1(1).

10 Ibid, s 1(2).

11 Hereafter referred to as FGMA.

national or resident to commit an act of FGM overseas and section 4 extended sections 1–3 to acts done outside of the UK by a UK national or resident. In providing extra-territorial effect the international nature and cultural aspects of FGM are recognised. FGM may occur in the UK, however, it is often the case that girls are taken abroad for this to happen during summer holidays, on the basis that this will give them time to recover in a bid to prevent detection upon their return to school. The FGM itself will usually be done by the village cutter within the community of that family, and it is imperative this falls within the remit of the Act. The Act was further expanded by the Serious Crime Act 2015 with the introduction of section 3A which makes failing to protect a girl from FGM a criminal offence for those with parental responsibility and frequent contact with the girl,[12] or where they have assumed responsibility of a parental nature for the girl.[13] The offence carries a lesser sentence of seven years as opposed to the 14 years for offences under sections 1–3, but 'it highlights the fact that parents have a responsibility to protect their children from FGM and can be punished if they do not do so'.[14] Regardless of these improvements to the law to ensure it offers greater protection, the fact that there has only been one conviction in over 30 years despite the evidence that FGM continues to happen to girls in the UK, tells us the law as it stands is not working. Bindel referred to it as the 'unpunished crime'[15] and further exploration is needed to determine the issues and how they can be overcome.

One of the key issues recognised by researchers,[16] academics[17] and the Home Affairs Committee[18] in processing offences of FGM is the lack of evidence. This is a two-fold issue. Firstly, victims of FGM are often children, which leads to issues with reporting. Many children who undergo FGM are young, with the average age being between 5 and 8 years old, and as a result may not know that what has happened to them is wrong, let alone a crime.[19] For those who may be a little older and more aware, they often do not report the incident for fear of what will happen to their family and possibly, as a consequence, themselves.[20] Evidence for both of these issues can be seen in research carried out by Bindel, in which various parties, including health professionals, police forces and the CPS were sent freedom of information requests and surveys regarding FGM. The surveys asked for reasons for the lack of prosecutions and 29 percent said it was due to the low level reporting by the victim or others, and a further 29 percent identified issues with persuading those who are often child victims to testify against the perpetrator, which usually includes their parents.[21] The second difficulty stems from the inherent challenge with the other key evidence being medical evidence which is difficult to obtain due to its intimate nature within FGM cases. Much has, historically, relied on victims self-reporting which is far from conducive to successful prosecutions. As Layla Hussein recognised: 'No child is going to come out and testify against their parents'.[22] It would therefore seem to leave the law on FGM at an impasse that is all too familiar within family law due to other familial based offences such as forced marriage. As the Southall Black Sisters have noted, 'the overwhelming majority of our service users, while wanting to escape a forced

12 FGMA, s 3A(3).
13 Ibid, s 3A(4).
14 Gaffney-Rhys, above n 4, 423.
15 Bindel, above n 2.
16 Bindel, above n 2.
17 R Gaffney-Rhys, above n 4.
18 House of Commons Home Affairs Committee, *Female genital mutilation: the case for a national action plan*, HC 201 (TSO, 2014) and *Female genital mutilation: abuse unchecked*, HC 390 (TSO, 2016).
19 *Female genital mutilation: the case for a national action plan*, ibid, 25.
20 Ibid.
21 Bindel, above n 2, 11.
22 L Hussein, 'Day of the Girl: A Survivor's Journey After Female Genital Mutilation' *Independent*, 11 October 2013, available at: www.independent.co.uk/voices/comment/day-of-the-girl-a-survivors-journey-after-female-genital-mutilation-8874232.html. Last accessed 24 May 2021.

marriage do not wish to criminalise their parents and family members and would not come forward if they felt that this would be the result of their complaint'.[23] A similar concern was raised by Home et al in relation to FGMPOs, in which they described the criminal prosecution as a double victimisation of the girl; firstly, as a victim of FGM and secondly, by having her parents as suspects within the criminal justice system rather than gaining family support.[24] However, this cannot mean that FGM is not tackled, as it remains something that girls need protection from and 'we need to exercise the law because FGM is a human rights violation and those girls deserve justice'.[25] It will, therefore, be explored whether FGMPOs, also introduced by the Serious Crime Act 2015, are a 'helpful alternative'[26] with prevention, as opposed to punishment, as the goal.

FGM protection orders: prevention over punishment?

FGMPOs were introduced by the Serious Crime Act 2015 by inserting Schedule 2 into the FGMA. Mirrored on the forced marriage protection order and in essence non-molestation orders, they are designed to protect girls from the commission of FGM,[27] and indeed those whom any such offence has already been committed against.[28] The orders may, as set out in para 1(3) of the Schedule, contain prohibitions, restrictions, requirements or other terms that the court considers appropriate, and can cover conduct both inside and outside of England and Wales.[29] They are designed to prevent not only the mutilation itself, but aiding and abetting, procuring, encouraging, counselling or assisting in the commission of FGM.[30] They therefore provide a tool to assist in the prevention of FGM as opposed to the solely punitive approach previously available. However, despite the civil nature of the order, like forced marriage protection orders and non-molestation orders, the breach of a FGMPO is a criminal offence.[31] With the potential for FGMPOs to result in a conviction, the extent to which they are an effective tool must be analysed.

The nature of FGM makes it difficult to predict how many cases occur in England each year, and many of the statistics that do exist are now out of date. Notwithstanding that, even a slight indicator of the scale of the problem is helpful in analysing the effectiveness of FGMPOs. In 2011, research carried out by Bindel suggested that at that time around 170,000 women and girls in the UK had undergone FGM and around 65,000 girls aged 13 and under were at risk of mutilation.[32] While these figures are likely to have varied between then and now, such variation alone would not account for the significant difference in the number of girls at risk versus the amount of FGMPOs made. Since FGMPOs came into effect in July 2015, up to the end of December 2020 only 676 FGMPOs had been made.[33] This suggests that FGMPOs are not sought for every girl at risk or even a significant proportion.[34] When analysing the effectiveness of FGMPOs, Home et al recognise that the low levels of applications may be indicative of a

23 Southall Black Sisters, Forced Marriage Campaign (2013): http://Southallblacksisters.org.uk/campaigns/forced-marriage-campaign, last accessed 24 May 2021.
24 J Home et al, 'A Review of the Law Surrounding Female Genital Mutilation Protection Orders' (2020) 28(7) *British Journal of Midwifery* 418, 420.
25 Hussein, above n 22.
26 Home, above n 24, 420.
27 FGMA, Sch 2, para 1(1)(a).
28 Ibid, Sch 2, para 1(1)(b).
29 Ibid, Sch 2, para 1(4)(a).
30 Ibid, Sch 2, para 1(5).
31 Ibid, Sch 2, para 4.
32 Bindel, above n 2.
33 Family Court Statistics, 'Applications and Disposals of FGMPOs, England and Wales' annually (2016–2020) and quarterly (Q3 2015 – Q4 2015).
34 This same argument, using alternative statistics, has also been made by Home, above n 24, 423–424.

lack of awareness of the measures available to protect women and girls from FGM amongst the public and professionals.[35] In addition to acknowledging the point made by Home et al regarding awareness of FGMPOs, this research will unpick these statistics a little further. The next section will then go on to consider a multi-agency approach, and how this may be a more successful approach to ending FGM. This is, however, on the premise that these professionals are aware of FGM and their duties in relation to reporting.[36]

Further analysis of the 676 orders that have been made demonstrates that 480 applications were made and of these only 18 applications (3.75 percent) were made by the person to be protected.[37] This is perhaps further demonstration of the suggestion that children do not want their families prosecuted, which will be looked at in further detail, and that preventing FGM falls heavily on others such as the local authority as the relevant third party[38] and the likes of teachers, medical professionals and other family and friends with the permission of the court. The low number of applications made by the person to be protected may also be as a result of the age of some of the girls, meaning they do not feel able or know how to make the application and so confide in a third party to help them. However, as will be discussed below, the low number of applications on the whole demonstrates that many are choosing not to confide in anyone.

The suggestion that children, in this case young girls, do not wish to see their families prosecuted, is something that has been noted in other areas of law. One such area is that of forced marriage which acts as the closest possible comparison given that it too often involves young girls testifying against their families. Historically, forced marriage itself was not a criminal offence and whilst the Forced Marriage (Civil Protection) Act 2007 created a civil remedy by way of forced marriage protection orders, breach was dealt with by way of contempt of court. This was changed in 2014 by the Anti-Social Behaviour, Crime and Policing Act which not only made it an offence to breach a forced marriage protection order[39] but also created the offence of forced marriage.[40] Despite the criminal offences ultimately being created, they were not favourable with everyone. Anne-Marie Hutchinson, a solicitor specialising in forced marriage, stated that 'the majority of young women who seek protection under the civil process only do it under the absolute assurance that they are not getting their families into trouble',[41] an assurance that can no longer be made. The move towards criminalisation was also opposed by many organisations that represent victims of forced marriage such as: Women's Aid, Southall Black Sisters, Rape Crisis and the NSPCC, as a consequence of the fears victims have around criminalising their families.[42] With clear parallels between FGM and forced marriage it is propounded that it is a reasonable assertion that with the potential for criminal sanctions, young girls may not seek the assistance offered by way of an FGMPO. Furthermore, while comparisons with forced marriage are helpful, the girls in cases of FGM may be significantly younger than those in instances of forced marriage and so a lack of reporting could be as a result of age-related factors such as being unaware of what has happened or being unaware that what has happened is wrong, as opposed to a desire to protect their parents.

35 Home, above n 24, 425.
36 The awareness levels of various professionals and whether further training is needed is something that could be researched further but falls outside the remit of this work.
37 Above n 33.
38 Female Genital Mutilation Act 2003, Sch 2, para 2(2)(b).
39 Anti-Social Behaviour, Crime and Policing Act 2014, s 120.
40 Ibid, s 121.
41 R Gaffney-Rhys, 'The Development of the Law Relating to Forced Marriage: Does the Law Reflect the Interests of the Victim?' (2014) 16(4) *Crime Prevention and Community Safety* 269, 286–287 citing 'Forced Marriage to be Criminalised Despite Opposition' (2012) 156(23) *Solicitors Journal*.
42 Gaffney-Rhys, ibid.

In acknowledging that some girls may not apply for a FGMPO in order to protect their families and potentially themselves,[43] it ought to be considered that this may also impact upon third party applications. Although it is apparent that the overwhelming majority of applications are made by third parties, the low numbers of applications as a whole may also be affected by girls who are not confiding in anybody. Moreover, there will be a proportion who are unaware that FGM is wrong as they may consider it a normal undertaking and thus see no reason to speak out. It is both of these issues, alongside the previously mentioned difficulties with obtaining evidence that make it challenging for the third parties to identify girls at risk. When considering the United Nations Convention on the Rights of the Child 1989 this is an alarming picture as it demonstrates that the current laws and procedures may not be effective. In accordance with Article 19 of the Convention, the legislation and protective measures ought to protect the child from all forms of physical violence, injury or abuse. All of this in turn suggests that whilst FGMPOs may be a helpful tool in the arsenal of defences, they are not a silver bullet, and instead we must now turn to explore how else FGM can be eradicated.

A multi-agency approach and the roles within

In exploring how FGM can be better tackled, it is suggested that a multi-agency approach is the best way forward. To a limited extent, a multi-agency approach is already required under the FGMA as those within a regulated profession have a duty to notify the police if they discover FGM appears to have been carried out on a girl under the age of 18.[44] Health and social care professionals and teachers are all considered to be within a 'regulated profession' for the purposes of the Act[45] and thus have a duty to report. This duty is problematic on two fronts, firstly some professionals are reluctant to report due to issues surrounding confidentiality, which will be further explored below, and secondly, whilst making the report may lead to a possible conviction, it also represents a case of FGM that we have failed to prevent and a child we have failed to protect: the duty simply comes too late in the day.[46] Instead, the roles the various professions and society can play must be analysed, along with steps taken by other countries to demonstrate how an improved multi-tiered system can begin to tackle FGM in England and Wales once and for all.

The elements to the approach

Teachers

As a regulated profession, teachers currently have a duty to report where FGM has been performed on a girl under the age of 18. This author proposes that the duty could be extended to include the risk of FGM. It was recognised by the Home Affairs Committee that teachers may be the first people to become aware of a potential risk and thus that they could play an important role in preventing the FGM.[47] FGM is most commonly performed between the ages of five and eight, and while FGM occurs in this country, it is still commonplace for a child to be

43 *FGM the facts* leaflet, available at: assets.publishing.service.gov.uk/government/uploads/system/upload/attachment_data/file/783684/FGM_The_Facts_A6_V4_web.pdf, in which there is a case study that describes children being told not to talk about what has happened or else the Government will take them away.

44 FGMA (as amended by the Serious Crime Act 2015), s 5B(1).

45 Ibid, s 5B(2).

46 This point is made in relation to cases of FGM performed on girls resident in the UK at the time of the FGM, as opposed to those who may have moved to the UK at some point after the FGM. A similar point was made in the research by Home et al when analysing the number of women and girls affected by FGM in accordance with NHS data when compared with the number of applications for FGMPOs: 'this may suggest that there are some women and girls who have undergone FGM who might, perhaps, have been able to have been protected by an FGMPO had an application been made to the court': Home, above n 24, 425.

47 *Female genital mutilation: the case for a national action plan*, above n 18, [58]

taken to their, or their parent's, country of origin for the FGM to be performed within a particular community. This often happens during the six-week holidays to allow time for the girl to heal in the hope of evading detection upon her return to school. Therefore, if a primary school teacher becomes aware that a girl from a country in which FGM is prevalent is returning to that country for an extended summer holiday, this may be something they need to explore further through conversation with the child, and if need be report their suspicions to children's social care and the police in the same way they would if they suspected any other forms of child abuse. While this may indicate that the risk of FGM would be reported in the same way all concerns around safeguarding would be, and thus the duty to report risk need not be set out in the FGMA, recent research suggests this is not the case. In Baillot et al's research into FGM, an NGO participant, when discussing issues around protection in relation to the UK stated: '[There is a] disconnect between safeguarding children from FGM . . . over and over again you get a situation where safeguarding professionals go to training [and] there is no mention of FGM . . . so professionals don't see it as part of their role or responsibility . . . '.[48] In fact, multiple participants in the research identified that issues with reporting and safeguarding were around not understanding the referral process. Although this does not relate to teachers specifically, teachers, as already discussed, may be one of the first people to become aware of the risk of FGM and so understanding their duty to report is vital. By setting out the duty to report risk explicitly in the Act, it is hoped this would be a step in the right direction towards preventing FGM.[49] It may also lead to more proactive conversations around possible indicators that FGM might be about to happen such as long holidays, ceremonies or parties to celebrate becoming a woman, which may all provide opportunities to prevent FGM.

Alternatively, where concerns arise upon return from such a holiday and these concerns are further added to by conversations or visual signs of pain or discomfort, this should be reported in accordance with the duty in section 5B(1) of the FGMA. While teachers may feel uneasy taking such action due to cultural sensitivities and fears of accusations of racism, the Government has made it clear that such concerns 'must not get in the way of preventing and uncovering this terrible form of child abuse'.[50] In addition to reporting risk, or suspected FGM, it is recognised that teachers should play an important role in educating young children on FGM, and this will be returned to later in this article.

Medical professionals

Medical professionals are an obvious category of persons upon whom a duty to report already falls, however it is within this profession that tension exists around the duty to report versus patient confidentiality. In research involving focus groups within Kenyan, Nigerian, Somalian and Sudanese communities, the duty on health professionals to report FGM was singled out as particularly counter-productive, as it affected the way the communities perceived interactions with their GPs, as they feared confidentiality was no longer guaranteed.[51] Likewise, the Home Affairs Committee in 2016/2017 set out that some clinicians had raised concerns about

48 H Baillot, N Murray, E Connelly and N Howard, 'Addressing Female Genital Mutilation in Europe: A Scoping Review of Approaches to Participation, Prevention, Protection and Provision of Services' (2018) 17 *International Journal for Equity in Health* 10 (https://doi.org/10.1186/s12939-017-0713-9).

49 While the actual process of reporting and how these reports are then handled may also need addressing, that is outside the remit of this piece.

50 Written evidence submitted by the Government for the House of Commons Home Affairs Committee, *Female genital mutilation: the case for a national action plan*, HC 201 (TSO, 2014). Written evidence available at: data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/female-genital-mutilation/written/6056.pdf [2], last accessed 15 September 2021.

51 E Plugge et al, 'The Prevention of Female Genital Mutilation in England: What can be Done? (2018) 41(3) *Journal of Public Health* 261, 264.

mandatory reporting breaching the fundamental principle of patient confidentiality, and that some healthcare professionals simply did not accept that it was their responsibility.[52] Meanwhile, in alternative research involving women in affected communities, there was strong support for a more interventionist approach on the premise that community-based solutions would not in themselves bring FGM to an end,[53] demonstrating a desire to tackle FGM by all means possible. With medical professionals able to play such a crucial role in preventing FGM, it is argued that while community initiatives can and should form part of the preventative tools, the duty on medical professionals to report has to remain.

In a bid to ensure that the duty to report is adhered to, particularly in the face of concerns around breach of patient confidentiality or views, it does not fall within one's remit, tougher sanctions for failing to report ought to be considered. At present, sanctions are not covered within the Act, nor are they criminal in nature, instead, they are dealt with within the existing performance procedures of the relevant profession.[54] This is a problem that has been raised by the Home Affairs Committee in both the 2014/2015 and 2016/2017 reports,[55] stressing that the duty to report must not be seen as optional and that the Government ought to introduce tougher sanctions.[56] One way this could be achieved is by the criminalisation of the failure to report. Criminalising omissions is one of the key debates within criminal law, with Andrew Ashworth in favour of extending criminal liability for omissions from a social responsibility perspective, and Glanville Williams supporting the opposing conventional approach.[57] It is, however, important to note that the argument is not around whether all omissions or no omissions should be punished, but rather which, and in some instances a failure to report is already a criminal offence. Section 19 of the Terrorism Act 2000 requires all those who, in the course of employment within the regulated sector have information that leads them to believe or suspect a money laundering offence under the Terrorism Act, to report that belief or suspicion. Failure to do so is an offence, and it carries a maximum possible sentence of five years imprisonment.[58] Furthermore, section 38B of the Terrorism Act 2000 makes it an offence to fail to disclose information which a person knows or believes might be of material assistance in: (a) preventing the commission by another person of an act of terrorism; or (b) securing the apprehension, prosecution or conviction of another person for an offence involving terrorism. The maximum sentence for this failure to disclose is a possible 10 years imprisonment.[59] Both examples demonstrate that failing to report can be criminalised. In assessing whether criminalisation is appropriate for a particular omission Ashworth states that the countervailing arguments must be considered first, of which he sets out eight: conflict with the right to liberty, conflict with fundamental rights, 'de minimis' and 'substantial risk', unlikely to be effective, high cost of enforcement, bringing the law into disrepute, probable creation of criminal markets and requiring too much of ordinary citizens.[60] Ashworth helpfully goes on to consider whether there should be a statutory duty to report child abuse or neglect just as there is to report FGM, and whether failure to report should be criminalised. In determining that there should be a statutory duty but that it should be enforced by professional discipline, Ashworth was

52 *Female genital mutilation: abuse unchecked*, above n 18, [42].
53 K Norman, J Hemmings, E Hussein and N Otoo-Oyortey, *FGM is Always with us: Experiences, Perceptions, Beliefs of Women Affected by Female Genital Mutilation in London: Results from a Peer Study* (Options UK and Forward, 2009).
54 Home Office, *Mandatory Reporting of Female Genital Mutilation – Procedural Information* (2020), 11.
55 Above n 18.
56 *Female genital mutilation: abuse unchecked*, above n 18, [45].
57 A Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 *Law Quarterly Review* 424 and G Williams, 'Criminal Omissions – The Conventional View' (1991) 107 *Law Quarterly Review* 87.
58 Terrorism Act 2000, s 19(8).
59 Ibid, s 38B(5).
60 A Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *Law Quarterly Review* 606, 613–615.

concerned by two of the above factors; unlikely to be effective and high cost of enforcement.[61] These concerns stemmed from a fear of increased reporting of unsubstantiated cases that deflect from cases that require attention. It is submitted that such concerns would be less relevant to reports of FGM due to the specifics of FGM and the smaller number of potential cases. Instead, it is promulgated that the factors listed above would very much support the criminalisation of failing to report FGM on a girl under the age of 18. There are no significant arguments that can be made regarding liberty or fundamental rights, the offence is designed to prevent a substantial risk of harm; factors four and five have been dealt with above; bringing the law into disrepute should not be a concern if all reports are dealt with in the same manner; creation of criminal markets appears irrelevant; and it cannot be said to be requiring too much of ordinary citizens when the duty would apply only to certain citizens, and is just a strengthening of a pre-existing duty.

The failure to report when FGM has occurred to those under the age of 18 puts children's lives at risk and makes that health professional complicit to a crime;[62] something they would unlikely be willing to do in the face of other forms of child abuse or indeed other crimes, and thus FGM should be no different. Support for a tougher approach can also be seen in the Norway model, whereby health professionals can face up to one year in prison for breaching their duty.[63] In addition to providing support for tougher sanctions, the Norway model also provides support for extending the duty to cover risk of FGM. In Norway, medical professionals have a duty to avert FGM, and similar to the suggestion made for teachers, it is asserted that a medical professional's duty should extend to reporting when there is a risk of FGM. Though more onerous in nature, it is important that wherever possible, the duty to report assists in preventing FGM rather than just punishing perpetrators. In addition to the Norway model supporting this expansion, analysis of section 38B of the Terrorism Act 2000 also provides vital support, given it is an offence to fail to disclose information which a person knows or believes might be of material assistance in *preventing* an act of terrorism.[64] While it is recognised that the scale of the potential harm may be much higher in cases of terrorism, this could be taken into account in sentencing, as like Norway, it is suggested that the maximum sentence for failing to report FGM or a risk of FGM on a girl under the age of 18 should be one year imprisonment. Finally, the inclusion of failing to report a risk of FGM is also in line with the view of the Home Affairs Committee: 'where a woman is identified as having undergone FGM or being from a country where FGM is practised, then her daughters, future children, younger sisters and other young female family members should be considered at risk, and preventative measures put in place'.[65]

It is argued that midwives have a unique ability in this regard. Baillot et al found that women from affected communities identified maternity services as a key awareness-raising intervention point.[66] At present, all expecting mothers go through a booking-in appointment with their midwife in which medical history, amongst other things, is gathered. This appointment happens up and down the country, and while the questions raised vary between Trusts, it is suggested that a mother's FGM status and her intentions regarding FGM, were she to have a girl, should become mandatory questions. Questioning the mother's FGM status not only provides an indicator of potential future risk to any daughters she may have, but also raises awareness of any complications the FGM may cause the woman in childbirth. Given the importance of the

61 Ibid, 622.
62 *Female genital mutilation: abuse unchecked*, above n 18.
63 Gaffney-Rhys, above n 4, 426.
64 Italics added for emphasis.
65 *Female genital mutilation: abuse unchecked*, above n 18, [56].
66 Baillot et al, above n 48.

question to ensure a safe delivery of the baby, it seems a logical time for a discussion surrounding FGM, without making any cultural presumptions based on the race or nationality of the woman.[67] It also allows for a more natural conversation around the risks and criminality of FGM should the conversation be needed, particularly the risk element given the risks and complications to the woman during labour. Hussain and Rymer demonstrate support for this type of approach. They propose that, when a case of FGM is identified, in the first instance the family should be educated and support and clinical care provided for the woman, before turning their attention to the legal duty to document the type of FGM in the clinical notes and record the data on the FGM enhanced dataset.[68] Further to the discussion, the midwife should be able to report any future risk in a way that is able to be tracked and followed after the birth and through the child's life, to ensure other relevant agents are also monitoring the risk. Hussain and Rymer suggest the child's personal health record (red book) for this, along with passing the information onto the GP and health visitor on discharge from hospital.[69] A similar approach was also considered by the Home Affairs Committee, with suggestions around automatic referrals to children's social care to girls born to mothers who have undergone FGM so an action plan can be put in place,[70] or documenting the risk in a specifically created section in the red book.[71]

The outlined measures may assist in ensuring any risk of FGM is carefully monitored, but could lead to issues around patient confidentiality. For instance, fears around the practice being pushed underground were raised when the duty to report was introduced,[72] and thus documenting the risk in the red book may make women less likely to disclose their FGM status or views on FGM in their antenatal appointments. One research participant commented on the stereotyping of communities and the upset caused by mandatory reporting: 'I run away from civil war, and I come and put my children on these lists'.[73] Research to date has demonstrated that the impact of those legislative changes is unknown in respect of uptake of services,[74] and thus it is difficult to predict the impact of reporting risk to children in this way. In addition to pushing the practice further underground, there could be concerns that pregnant women who have undergone FGM may not seek antenatal care, if they fear that it would be detected whether they disclosed it or not. This is particularly worrying given that some of the physical effects of FGM are urinary infections (which can be a cause for concern in pregnancy), prolonged labour, postpartum haemorrhage, increased risk of caesarean section, still birth and neonatal death,[75] all of which make medical support vital. It is therefore a balancing act as there are clearly risks involved in either event. With this in mind, it is crucial that the initial role the midwife takes is one around education and support, as set out above. It also makes the multi-agency approach all the more important, as much of the research around FGM has discussed the role education and the practising communities have to play alongside legislation eradicating FGM. It is therefore submitted that whilst reporting risk to a girl born to a woman who has had FGM is not without its concerns, if it is part of a series of initiatives that focus on education as opposed to punishment it is more likely to achieve the desired result.

67 Such an approach was also suggested by Home, above n 24, 426.
68 S Hussain and J Rymer, 'Tackling Female Genital Mutilation in the UK' (2017) 19 *The Obstetrician and Gynecologist* 273, 276.
69 Ibid, 276.
70 *Female genital mutilation: the case for a national action plan*, above n 18, 51.
71 Ibid, 53.
72 Plugge et al, above n 51, S Dixon et al, 'Female Genital Mutilation in the UK – Where are We, Where do We go Next? Involving Communities in Setting the Research Agenda' (2018) 4 *Research Involvement and Engagement*: https://doi.org/10.1186/s40900-018-0103-5 and Home, above n 24.
73 Plugge et al, above n 51, 263.
74 Dixon, above n 72.
75 Hussain and Rymer, above n 68, 274–275.

Education

In terms of education, a broad approach is promulgated, and so encompasses education of children and young people in schools and colleges, but also of communities in which FGM is more commonly practised. In respect of education in schools and colleges, the primary purpose is to raise awareness of the law on FGM so that children are aware that if somebody performs it on them or discusses them having it done, they know that it is wrong. It was raised above that one of the issues with children reporting FGM is that they may not know that what has happened is wrong, and thus it is something that needs to be addressed: educating and working with young people is vital if we expect young girls 'to come forward and express their fear of having FGM'.[76] It is therefore suggested that FGM should form a compulsory part of personal, social and health education (PSHE) and should be taught in the wider context of violence against women and children. A similar approach was taken in France, with Normandy including FGM in a module around sexuality and reproductive health, in which they also discuss forced marriage.[77] Incorporating FGM into children's education was also widely supported in the committee report, with the NSPCC stating it was 'perhaps the most important aspect of preventative work that could be done with young women because educating the current generation to question the practice has the potential to break the inter-generational cycle of FGM'.[78] They were also informed of countries such as the Netherlands and Sweden where such an approach is already taken[79] and found support for such an approach from the Assistant Commissioner of the Metropolitan Police who stated: 'it is education that changes it from being socially acceptable […] to socially unacceptable, which generates more witnesses and victims coming forward and would help achieve more prosecutions'.[80] The need to educate in schools as a form of prevention was also raised in Plugge et al's focus groups, with a participant stating that they believed change comes from new generations and that children needed to be taught about FGM in schools.[81] Finally, such an approach would also further assist in upholding Article 19 of the UNCRC by taking appropriate educational measures to protect the child.

In addition to educating children, education also needs to occur within communities where FGM is most prevalent. While some members of the community may be aware of the law on FGM, others may not and therefore it is important that in addition to punishment, there is also education. This education, as well as addressing the legal ramifications of FGM, should also discuss the risks posed to young girls. This approach was favoured by the participants in Plugge et al's research, with various forms of community engagement suggested, ranging from written materials such as leaflets to interactive sessions, to 'community champions'.[82] The role of the community in eradicating FGM has been propounded in other research projects, with women (including survivors) from affected communities being considered central to changing behaviour.[83] In tackling other forms of violence against women, involving the community has been favoured, recognising that a 'whole community approach' in discussing and renouncing a particular practice is more effective.[84] In looking at prevention within forced marriage, Idriss argues that preventative educational programmes can be delivered by those within communities

76 E Connelly, N Murray, H Baillot and N Howard, 'Missing from the Debate? A Qualitative Study Exploring the Role of Communities Within Interventions to Address Female Genital Mutilation in Europe' (2018) BMJ Open 5: https://bmjopen.bmj.com/content/8/6/e021430.info/.

77 Baillot et al, above n 48.

78 *Female genital mutilation: the case for a national action plan*, above n 18, 62.

79 Ibid.

80 Ibid.

81 Plugge et al, above n 51, 264.

82 Ibid.

83 Connelly et al, above n 76.

84 M Wind-Cowie, P Cheetham and T Gregory, *Ending Forced Marriage* (Demos, 2012), 45.

in which forced marriage is practised to 'empower communities to take action and . . . make them feel included within the debate'.[85] Education of this type therefore plays an important part in any future multi-tiered approach to abolishing FGM. It is vital that communities feel heard and can use the information and education to take a stand against FGM. Community engagement may also lead to increased prosecutions when the FGM has been performed, as it has been recognised that pressure not to report can come from communities due to fears around reduced marriage prospects, ostracism and violence if they do.[86] If communities are showing that they will not tolerate FGM, it might make a girl more likely to report it or confide in somebody who might.

In discussing the role of the community, the role of religious leaders ought to also be considered given the influential role faith leaders have within communities.[87] In a report on a UK Government-funded project about working effectively with faith leaders to challenge harmful traditional practices, the gatekeeping role faith leaders often play within a community was identified.[88] For this reason, involving faith leaders in any community projects around FGM may prove crucial. Furthermore, the project identified the importance of public health information in engaging faith leaders in relation to harmful traditional practices. It was recognised that knowledge of the physical effects of certain practices such as FGM was limited to non-existent amongst faith leaders, and that providing such an insight in an accessible and understandable way is sometimes all that is needed for a faith leader to start opposing a practice.[89] For that reason it is asserted that not only is engaging the community a vital element in any multi-agency approach to eradicating FGM, so too is involvement of the faith leaders within the effected communities.

Medical examinations

In France children up to the age of six generally undergo regular medical check-ups which include examination of the genitalia. Girls identified as being at risk of FGM are usually examined every year and when they return from a trip abroad. While these check-ups are not mandatory, receipt of social security is dependent upon it.[90] Introducing a similar concept as part of the multi-faceted approach to tackling FGM in England may be the most extreme and radical of the options discussed in this research, but may have a part to play. Rather than examining all children, it could be something that is adopted in high-risk cases, and indeed this was the view of the 2016/2017 Select Committee.[91] Although more divisive in nature, if used as part of the last line of defence for those girls more at risk, it could be an important tool in in the armour designed to end FGM in England and Wales. With more cases of FGM brought before the French courts, this approach has been labelled as a 'model of best practice',[92] and is certainly something that should be considered for the future approach to eradicating FGM.

It is clear that it is when these approaches are combined that the demise of FGM becomes possible. The multi-agency approach recognises that everyone has a part to play, from educating children and the community, to identifying and reporting risk before it is too late. Although some of the initiatives outlined above may make an impact on their own and lead to

85 M Mazher Idriss, 'Forced Marriage – The Need for Criminalisation?' (2015) 9 *Criminal Law Review* 687, 702.
86 *Female genital mutilation: the case for a national action plan*, above n 18, 25.
87 This was recognised in Connelly et al, above n 76, in which a participant stated 'in our community when we are worried about anything we contact our religious leaders'.
88 E Le Roux and B Bartelink, *No More 'Harmful Traditional Practices': Working Effectively with Faith Leaders* (Tearfund, 2017), section 6.2.
89 Ibid, section 6.3.
90 *Female genital mutilation: abuse unchecked*, above n 18, 29.
91 Ibid.
92 Bindel, above n 2, 37.

the number of cases of FGM to begin to decline, a united front alongside criminalisation, and utilisation of FGMPOs available under the FGMA will, it is submitted, offer the most effective approach to bringing FGM to an end in England and Wales.

Conclusion

This article has outlined the development of the law on FGM and how it could continue to develop in order to eliminate FGM in England and Wales. Any thoughts that a punitive approach would act as a deterrent, have been impeded by the lack of convictions. Although FGMPOs have appeared more successful, with 676 orders being made from their inception, the figure is still relatively low considering the number of girls at risk. A likely common factor in both of these low figures is an unwillingness of girls at risk, or indeed those who have been mutilated, to come forward and seek protection or support for fear of getting their family into trouble. Alternatively, it is recognised that some may be unaware that what has been done to them is wrong. In either event, reform is needed to ensure that girls at risk are identified. This is considered from a perspective of prevention as well as punishment. While the measures outlined around education may lead to more victims reporting, it is hoped that education and indeed much of the reform proposed would assist in preventing FGM from happening in the first place.

In building on the existing idea of a multi-agency approach, it is propounded that the duty to report on the likes of teachers and medical professionals is in need of development. The first development that is promulgated is the duty to report risk of FGM. This is then followed by the criminalisation of the failure to report, in a bid to ensure better safeguarding of children from FGM. Support for criminalisation is taken from a combination of the Terrorism Act 2000, Ashworth's view on social responsibility and the approach adopted in Norway. Stepping away from the duty to report, the role that education can play in eradicating FGM is also considered crucial. Firstly, in schools, the impact is twofold: making girls realise FGM is not the norm, in turn encouraging them to reach out about it if it has been or is going to be performed on them; secondly, in educating the next generation on why FGM should not be performed. Likewise, education has an important role within communities (including their faith leaders) in which FGM is prevalent, to educate them on the law on FGM along with the risks associated with the procedure. Finally, moving away from education, for those girls most at risk, medical examinations are proposed, to deter families from arranging the FGM in spite of the law. It is hoped that these developments alongside current provisions provided by the FGMA would offer a multi-layered approach to tackling FGM that is successful in ending the practice. With only one successful conviction to date and very little focus on prevention it is imperative that these next steps are taken.