Why it is time for an FGM Commissioner – practical responses to feminised issues

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Articles

Why it is time for an FGM Commissioner – practical responses to feminised issues

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In its 'Sustainable Development Goals', the United Nations sets out its goal of eradicating Female Genital Mutilation ('FGM') to achieve gender equality.[1] The UK government's commitment to ending FGM is embedded in the cross-government Ending Violence against Women and Girls ('VAWG') Strategy: 2016 to 2020.[2] The issue is not about education alone. Criminal and Family law has developed in the UK to the point that there has been a successful prosecution for FGM on a young child and a number of cases where Family Courts have made FGM protection orders ('FGMPOs') to prevent a child being cut. However, our research has shown that FGM continues to occur, evaluation of data has been lacking and there are continuing concerns about discrimination, including in Immigration proceedings where apparently compulsory medical examinations when applying for asylum on grounds of FGM[3]. Moreover, there is real concern that the Home Office does not keep a record of the number of girls and women claiming asylum on the grounds of FGM, nor is there a record of the numbers of applicants whose claims have been refused or are successful. Many of these individuals are left without recourse to public funds and at risk of removal from the UK to a high prevalence FGM country. Whilst it is important that child abuse in all its forms is prevented[4] and when FGM is performed, prosecuted, the single prosecution seems to have been worryingly set in a context of witchcraft – or at least the perceived motivation for the offence was witchcraft. This has not been seen since the demonising of women in infanticide cases pre-19th century.[5] In addition, five years on, FGMPOs are not being utilised as much as was anticipated but they have assisted in protecting less than 500 girls and women from FGM. This article accepts the value of education processes but specifically reflects on these areas of law and proposes the creation of an independent FGM commissioner to review law, policy and procedures around FGM and ensures that there are both health and law mechanisms in place to support families and protect those at risk of FGM, to include oversight of developments in criminal, family and immigration jurisdictions. It is our view that

1 https://sustainabledevelopment.un.org/?menu=1300
2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522166/VAWG_Strategy_FINAL_PUBLICATION_MASTER_vRB.PDF
3 Annemarie Middelburg and Alina Balta. 'Female genital mutilation/cutting as a ground for asylum in Europe.' *International journal of refugee law* 28.3 (2016): 416–452
4 Prinz RJ. Parenting and family support within a broad child abuse prevention strategy: Child maltreatment prevention can benefit from public health strategies. Child abuse & neglect. 2016 Jan;51:400
5 https://www.jstor.org/stable/2173842?seq=1

there is a need for an FGM Commissioner with sufficient powers for at least the following three reasons:

(1) to lead public health interventions to prevent FGM;

(2) to evaluate the effectiveness of FGMPOs as a preventive measure; and

(3) to ensure that the laws are applied in a non-discriminatory way.

FGM as a crime

FGM is a procedure where the female genitalia are altered, damaged or removed without medical indication.[6] [7] [8] FGM is commonly performed on girls between the ages of four and twelve years old, often as a rite of passage to womanhood[9]. However, the age when FGM is performed varies, and can be at a significantly younger age.[10] It is thought that the cutting of younger children is being employed to avoid detection.[11] FGM can be performed both in the UK, and on girls taken to countries of origin. It can be performed by both lay people and medical practitioners alike. The persons performing FGM are commonly known as 'excisors' or 'cutters'. Girls who are subjected to FGM overseas are usually taken abroad at the start of the school holidays, typically in the summer, in order for them to recover before returning to school. This is often referred to as the 'cutting season'.[12] It is widely accepted that this form of child abuse is suitable for criminal law intervention although in many countries there is still no specific law prohibiting the practice of FGM[13] and it is only through public awareness that some change is being generated.[14]

In the UK, FGM is a crime contrary to the FGM Act 2003 which was amended and updated by the Serious Crime Act 2015. It applies anywhere in the world, to any woman or child who is a national or resident in the UK, and/or when performed by a British national or resident (an extra-territorial offence). The Crown Prosecution Service ('CPS') has committed to prosecuting such offences and accepts FGM is a form of violence against women and girls, and in the latter case it is child abuse, and all CPS decisions – whether to charge or not – must be approved by a Director of Legal Services[15]. There are four FGM offences under the 2003 Act:[16]

- It is a criminal offence to 'excise, infibulate or otherwise mutilate' the whole or any part of a girl's labia majora, labia minora or clitoris, contrary to s 1(1). This is an offence even where the act is done outside the United Kingdom, where it is done by a United Kingdom national or resident;
- Assisting a girl to 'excise, infibulate or otherwise mutilate' her own genitals: contrary to s 2;
- Assisting a non-UK person to mutilate a girl's genitals overseas, contrary to s 3; and
- Failing to protect a girl from the risk of FGM, contrary to s 3A.

Medical procedures necessary for her physical and mental health, if performed by a registered medical practitioner, are exempted from the offence (ss 1(2) to 1(5) of the FGM Act 2003). This includes purposes connected with the labour or birth. The first ever FGM prosecution brought

6 https://www.cps.gov.uk/legal-guidance/female-genital-mutilation-prosecution-guidance
7 https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation
8 https://learning.nspcc.org.uk/child-abuse-and-neglect/fgm
9 According to &&Assaad, M. B. (1980). 'Female circumcision in Egypt: social implications, current research, and prospects for change.' *Studies in family planning*: 3–16., some FGM-performing communities believe 'that a woman is not fully a woman until her ugly genitalia are removed' (6),
10 Dorkenoo, E. (1994). Cutting the rose: female genital mutilation: the practice and its prevention, Minority rights publications London
11 &&&&&&Furst, A C a. J. (4 February 2020). FGM 'increasingly performed on UK babies'. BBC News.
12 https://www.nhs.uk/conditions/female-genital-mutilation-fgm/
13 https://www.equalitynow.org/the_law_and_fgm
14 https://www.unicef.org/french/media/files/Interagency_Statement_on_Eliminating_FGM.pdf
15 https://www.cps.gov.uk/legal-guidance/female-genital-mutilation-prosecution-guidance
16 Female Genital Mutilation Act 2003, http://www.legislation.gov.uk/ukpga/2003/31/section/1 accessed 10 June 2020

before the courts resulted in an acquittal of a doctor accused of a non-medically justified procedure.[17] In *R v N (Female Genital Mutilation)* a woman whose three-year-old daughter was subjected to FGM became the first person in the UK to be convicted for the practice.[18] Her claim that her daughter had fallen from a kitchen worktop onto a cupboard door while trying to get a biscuit was rejected by a jury and she was sentenced in March 2019 to 11 years imprisonment.[19] The child's father was accused as an accessory but was acquitted. Much of the trial was bogged down in evidence of witchcraft.[20] This followed an unsuccessful prosecution of a doctor for FGM when suturing a woman who had suffered FGM overseas after the birth of her first child.[21] The call for the first prosecution began in earnest in 2012 after work by the CPS to promote law and practice through the Association of Women Barristers.[22] Reasons why the law had failed were identified by lawyers in 2014.[23] This included the disempowering of survivors, the difficulties faced by children complaining against their parents, lack of witnesses where relatives who face social ostracism and physical threats, lack of training amongst and poor reporting by front line professionals, lack of police intelligence in relation to otherwise loving and law-abiding parents, forensic challenges to prove a) who inflicted the injury and b) who was party to it, and significant legal loopholes. Those legal loopholes were largely closed following the Bar Human Rights Committee Report[24] whose recommendations were largely adopted in the changes made by the updated by the Serious Crime Act 2015, including applying the law to all children not just residents and citizens in order to ensure the UK meaningfully honoured its international FGM obligations to protect and empower women and girls.[25] Ultimately, though, protection is better than prosecution because that means a child is not cut. An FGM Commissioner could assist in reviewing the operation of criminal justice processes to ensure that investigations are effective, non-discriminatory and balanced.

FGM protection orders

FGMPOs were introduced through the Serious Crime Act 2015; which inserted a new Sch 2 to the FGM Act 2003. FGMPOs can be sought through a designated Family Court in England and Wales that deals with FGM or in courts in Northern Ireland or Scotland.[26] An order can be made to protect either a girl or woman at risk of FGM, without immediate criminal sanctions for parents unless the order is breached[27]. Breach of the order is a criminal offence. The terms of such an order can be broad and flexible, enabling the court to include whatever terms it considers necessary and appropriate to protect the person at risk. These include, for example, provisions requiring a person to surrender his or her passport. An application for a FGMPO can be made by the protected person or a relevant third party as defined by the Lord Chancellor (s 2(2) of the FGM Act 2003) or any other person with permission of the court (s 2(3) of the FGM Act 2003). Children may have a 'next friend' or someone to assist them, but they do not have to, if they have a legal representative, or if the court agrees. The application will either be heard in public or private. If the court hears the application in public, the

17 Dyer C. Surgeon acquitted of carrying out female genital mutilation in a prosecution criticised by obstetricians. bmj 2015;350:h703
18 http://nationalfgmcentre.org.uk/resources/r-v-n-female-genital-mutilation-sentencing-remarks-of-mrs-justice-whipple/
19 http://nationalfgmcentre.org.uk/resources/r-v-n-female-genital-mutilation-sentencing-remarks-of-mrs-justice-whipple/
20 https://www.independent.co.uk/news/uk/crime/fgm-first-uk-conviction-mother-three-year-old-female-genital-mutilation-witchcraft-london-a8758641.html
21 https://www.theguardian.com/society/2015/feb/04/doctor-not-guilty-fgm-dhanuson-dharmasena
22 https://www.theguardian.com/law/2012/nov/13/female-genital-mutilation-prosection-uk
23 https://www.theguardian.com/commentisfree/2014/feb/07/fgm-female-genital-mutilation-prosecutions-law-failed
24 http://www.barhumanrights.org.uk/wp-content/uploads/2015/07/FGM-report.pdf
25 https://www.unwomen.org/en/news/stories/2012/12/united-nations-bans-female-genital-mutilation/
26 For a list of designated FGM Family Courts see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778582/fgm700-eng.pdf [accessed 2 June 2020].
27 See, *Re X (Female Genital Mutilation Protection Order) (No 2)* [2019] EWHC 1990 (Fam).

case is usually subject to reporting restrictions, thereby ensuring that the family is not identified. If the court proceeds to grant an order it may include conditions such as:

- Surrender of travel documents of the protected person at risk;
- Mandatory medical examination;
- Travel ban imposed on the protected person which can be worldwide;
- Prohibition of specific persons from entering arrangements in the UK or abroad which would facilitate FGM; and/or
- Prohibition of contact to individuals who are, or may become involved in, committing FGM against the woman at risk.

Once granted, FGMPOs can be extended, added to, or revoked. The wording of Sch 2 of the FGM Act 2003 allows for orders to be made against unnamed individuals. This allows orders to be granted without delay if the prospective offenders cannot be suitably identified. An FGM Commissioner could evaluate the use of FGMPOs and enable understanding of any barriers to their use, including the education of the judiciary.

Mandatory reporting of FGM

Relevant stakeholders have a mandatory duty to report FGM when it is discovered on anyone aged under 18 years. The National Institute for Health and Care Excellence ('NICE') already produces guidance[28] in relation to decisions by health professionals to report child abuse and neglect which includes risk of FGM. Cases in family law show that front line professionals can be useful in identifying the risk of a child being subject to FGM.[29] Additionally, courts will balance the qualified right of private and family life (Art 8 European Convention on Human Rights (ECHR)) and the absolute right not to be subject to FGM (Art 3 ECHR).[30]

Recently, in *Re X (Female Genital Mutilation Protection Order) (No 2)* [2019] EWHC 1990 (Fam), [2020] 1 FLR 470 and *Suffolk County Council v RD and Others* [2020] EWHC 323 (Fam), [2020] 2 FLR 77, the court set out what were referred to as 'contextual considerations' under the heading micro and macro factors. These factors require consideration when evaluating risk of FGM to a child and when deciding whether to grant an FGMPO. Frameworks such as this are useful to standardise the application of FGMPOs.

Contextual considerations / 'Macro' factors[31]

(i) What is the prevalence of FGM in the country to which it is proposed that the child will be taken?

(ii) ii) What are the societal expectations of FGM in the country?

(iii) If known, what is the prevalence of FGM in the specific region of the country to which it is proposed that the child will be taken?

(iv) Is FGM illegal in the country to which it is proposed that the child will be taken?

(v) If illegal, how effective are the authorities in the country in question in enforcing the prohibition on FGM?

(vi) Given the extra-territorial reach of the 2003 Act, and the fact that the act of carrying out FGM (and aiding and abetting, counselling or procuring the act) is a crime punishable on indictment to imprisonment not exceeding 14 years, is there an extradition treaty between the UK and the country to which the child will be taken (Egypt in the instant case) in the event that there is evidence of a breach of the order?

(vii) What formal safeguards are available in the country to which it is proposed to take the child to mitigate the risks

28 https://www.nice.org.uk/guidance/ng76
29 *M v F and another* [2017] EWHC 3566 (Fam); *Re X (Female Genital Mutilation Protection Order) (No 2)* (above).
30 See *M v F and another* (above); *Re X (Female Genital Mutilation Protection Order) (No 2)* (above).
31 Para [91] of Cobb J's judgment in); *Re X (Female Genital Mutilation Protection Order) (No 2)* (above)

(access to local tourist police, FCO representatives / consular assistance, NGO workers)?

(viii) At what age are girls commonly cut in the country to which it is proposed that the child will be taken? (how does this compare with the age of the subject child?).

Individual considerations / 'Micro' factors

(ix) Is there a history of FGM in the child's wider family, or in the family to which the child will be exposed abroad?

(x) If so, on which generation or generations of women has this been perpetrated? Specifically, what is the position in relation to the younger generation(s)?

(xi) What are the attitudes of the mother and/or father to FGM generally, and/or in relation to their daughter?

(xii) Is FGM / circumcision regarded as a woman's issue or a man's issue within the family? Where is the power-balance in the family?

(xiii) What are the attitudes of the wider family to female circumcision generally, and/or in relation to the subject child?

(xiv) What safeguards can the family themselves devise and impose to mitigate the risk?

(xv) How well have the family co-operated with the authorities?

(xvi) What is the professional assessment of family relationships and of the capabilities of the parents?

(xvii) Are there any other specific features of the case which make FGM more or less likely?

These are useful factors for frontline health professionals to consider in any reporting of a child at risk in accordance with the requirements of that professional's regulator ('discretionary reporting'). It is not for health professionals to give legal advice but to support families to seek the appropriate care and advice. Nonetheless, in order to do that it is worth knowing the law. FGMPOs are not automatically granted but, once in place, there is oversight. Breaching of a FGMPO is a criminal offence and can be prosecuted or dealt with as Contempt of Court. Both of these routes face potential imprisonment, or a fine, or both. Notably, both parents in *Re X (Female Genital Mutilation Protection Order) (No 2)* and *Suffolk County Council v RD and Others* (both above) declared they had no intention to subject their child to FGM and that they did not support the practice, yet frontline professionals considered there was a risk to the child of other family members performing FGM. The importance of inter-agency cooperation has been emphasised by the government (see Multi-Agency Statutory Guidance on FGM).[32] An FGM Commissioner could monitor the Family Court responses to FGMPO applications, particularly where there are complexities such as simultaneous criminal allegations and immigration issues.

FGM and medical examination

It is understood that in asylum cases in some countries women and girls whom claim to have undergone FGM or not to have undergone FGM (but claim to be at risk of being cut) undergo medical examinations to prove their cut status.[33] This has become increasingly common in cases where there might be a risk of FGM overseas and family members might undergo medical examinations to prove that they have not been cut and consequently there is support for their attitudes against FGM.[34] Whilst there is no specific UK policy on medical examinations, any trend towards

32 R Gaffney-Rhys (2019). Female genital mutilation: the law in England and Wales viewed from a human rights perspective. *The International Journal of Human Rights*, 1–26.

33 KC McKenzie (2014) Medical Evaluation of Asylum Seekers. In: A Annamalai A (ed) *Refugee Health Care*. Springer, New York, NY

34 See, *A London Borough v B and others (Female genital mutilation: FGM)* [2016] EWFC B111 where the girl would be medically examined after holidays abroad not more than once per year. See, *Re X (Female Genital Mutilation Protection Order) (No 2)* (above) where the paternal family underwent medical examinations in Egypt to prove they had not been cut and to show that they disproved of FGM however the credibility of the examinations was called into question. See,

medical examinations to the extent that such examinations are implied by the courts or public authorities as necessary to prove their un/cut status is very concerning and needs monitoring. Data collection and monitoring in these contexts can assess discriminatory effect and impacts upon girls and women's rights to a private and family life protected by Art 8 of the European Convention on Human Rights ('ECHR') and Art 14 ECHR right not to be subject to discrimination. Moreover, undergoing medical examinations can be traumatic for women and girls whom might already be suffering with Post-traumatic Stress Disorder ('PTSD') as a result of undergoing FGM, which could result in a breach of Art 3 ECHR which prohibits torture, and inhuman or degrading treatment or punishment. Oversight of the operation of law and policy is crucial to enable proper consideration of how these processes impact upon the lived realities of women and girls at risk of FGM as well as efforts to deter FGM. If immigration policies conflict with the government's wider stance to end FGM in a generation this needs to be known so that any inconsistency with FGM commitments are tackled with the best interests of children as the priority.

Further, an FGM Commissioner could assist in reviewing Home Office guidance and policy on asylum claims for FGM and no recourse to public funds for applicants. It is imperative that guidance on these issues is consistent across jurisdictions to ensure that women and girls are not subject to FGM regardless of their immigration status.

FGM Commissioner as a public health intervention

The public health adage of 'prevention is better than cure'[35] is even more apparent in FGM, which in many cases has no cure once performed. Whilst some physical damage may be rectified, tissue cannot be replaced, nor can psychological injury be easily healed. FGM prevention, is as much a public health matter as it is a matter of personal health for those affected by it.

Public health prevention strategies can be categorised according to the stage in disease progression at which they aim to prevent disease, these are known as: primordial, primary, secondary and tertiary. Primordial interventions are defined as actions to minimize future hazard to health.[36] These can range from introducing legislation to education campaigns. In this context we consider FGM legislation to be a primordial intervention.

In addition to this categorisation, interventions can be further labelled by the level of practice the intervention occurs. Capewell and Capewell describe these as either 'upstream', or 'downstream' approaches.[37] In their description, downstream approaches are individualised, catering to specific needs. In FGM, this could be a home-visit by a social worker, or a safeguarding referral for an at-risk child. Upstream approaches are system-wide, such as the introduction of FGMPOs.

Whilst often seen at the time as a heavy-handed approach by policy makers, evidence suggests that the effectiveness of upstream interventions improves over time, as resistance to change fades and subsequent generations grow up with changes normalised.[38] Such examples of this include the English Sugar Tax, and vehicle seatbelt legislation. Additionally, upstream interventions tend to be cheaper with better health outcomes.[39] This may offer reassurance to the longitudinal effectiveness of FGMPOs, however it would be imprudent to hope their effectiveness increases over time without any additional interventions.

M v F and another (above) where the court suggested that the father's sister undergo a medical examination to prove her uncut status to reaffirm the father's suggestion that FGM is not performed.

35 http://www.makingthelink.net/node/248

36 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311333/

37 https://academic.oup.com/jpubhealth/article/40/2/350/3835800

38 https://academic.oup.com/jpubhealth/article/40/2/350/3835800

39 http://www.euro.who.int/en/health-topics/Health-systems/public-health-services/policy/the-10-essential-public-health-operations/epho5-disease-prevention,-including-early-detection-of-illness2

The Minnesota Department of Health, for example, suggests the optimal way to implement population-based public health interventions is to take a blended approach, encompassing interventions at a systems, community and individual level.[40]

As a Public Health intervention, the introduction of FGMPOs was well intentioned, but as seen in our research article in the British Journal of Midwifery,[41] it would appear that they have been limited in their effectiveness. Relying solely on legislation to change generations of behavioural patterns is short-sighted. In John P Kotter's *Leading Change*,[42] it is suggested that strong leadership and oversight is required to effect substantive lasting change. We propose a further public health intervention, the introduction of an FGM commissioner. The oversight and accountability this role would provide is essential in coordinating interventions across all levels of society and government, helping enact meaningful change to protect women and girls. The concept of introducing a Commissioner with statutory powers and responsibilities is not new – for example, Commissioners exist in relation to Children's Rights.[43] [44] [45] [46] [47] [48]

FGM Commissioner to evaluate data

It has been estimated that approximately 60,000 girls aged 0–14 were born in England and Wales to mothers who had undergone FGM.[49] Additionally, 137,000 women and girls born in countries where FGM is performed are permanent residents in England and Wales. In September 2014, the Health and Social Care Information Centre (now NHS Digital) began collecting data on FGM within England, on behalf of the Department of Health and Social Care and National Health Service (NHS) England. The aim of this initiative was to improve the NHS response to FGM and provide evidence for the commissioning of services to support women and girls. However, the statistics are only based on the number of women and girls treated by specific NHS medical practices, rather than an accurate reflection of the prevalence rates in England.[50] It was only in April 2018 that the Home Office changed data collection provisions to collect FGM data separately from other assaults. Accordingly, actual figures for the risk of FGM are difficult to establish.[51] Data received in our recent research, found 21510 recorded cases, resulting in 43005 attendances to health services. However, only 375 applications for FGMPOs have been made within the same time period, of which, 418 FGMPOs have been granted with multiple orders having been granted stemming from a single application. A single conviction for FGM, taken with the low FGMPO figures, suggests that women and girls are not being protected and FGMPOs are not being utilised.[52]

Between April 2015 and September 2019, a total of 45950 attendances to health services occurred in England by individuals who have been identified to have suffered FGM, or where the attendance to services was due

40 https://www.health.state.mn.us/communities/practice/research/phncouncil/docs/PHInterventionsHandout.pdf
41 J Home, A Rowland, F Gerry, C Proudman, K Walton, A review of the law surrounding Female Genital Mutilation Protection Orders. *British Journal of Midwifery*. 2020. July 2
42 Leading Change, John P Kotter
43 https://www.childrenscommissioner.gov.uk/about-us/the-childrens-commissioner-for-england/
44 https://www.niccy.org/about-us/the-commissioner/meet-koulla/
45 https://www.childcomwales.org.uk/about-us/
46 https://cypcs.org.uk/about/
47 https://victimscommissioner.org.uk/victims-commissioner/
48 https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-commissioner-factsheet
49 AJ Macfarlane and E Dorkenoo (2015) Prevalence of female genital mutilation in England and Wales: National and local estimates. City University London in association with Equality Now.
50 C Proudman (2017). *The Impact of Criminalisation on Female Genital Mutilation in England: From the Perspective of Women and Stakeholders* (Doctoral dissertation, University of Cambridge).
51 https://www.magonlinelibrary.com/doi/full/10.12968/bjom.2018.26.6.377
52 J Home, A Rowland, F Gerry, C Proudman, K Walton, A review of the law surrounding Female Genital Mutilation Protection Orders. *British Journal of Midwifery*. 2020. July 2

to a consequence of suffering FGM.[53] During this period, a total of 22500 individuals have been recorded to have undergone FGM although it is not clear from that data when the individual underwent the FGM. Any individuals who have presented to health services on more than one occasion due to complications associated with FGM have only been recorded in this figure once. Family Court data was available for July 2015 to September 2019. During this period a total of 408 applications for FGMPOs were made to the Family Court in England and Wales. From these applications 489 orders were made. The disparity between these statistics is due to occasions where multiple orders have been granted stemming from a single application.[54] The discrepancy between NHS Digital data (showing the number of FGM cases) and FGMPO data is further highlighted on a micro-basis as well as a macro-basis. For example, in the quarter April 2019 to June 2019, there were 35 FGMPO applications made. This is a stark contrast to the NHS Digital figure of 995 newly recorded FGM cases in the same period.[55] The authors recognise that the NHS Digital dataset is not completely comparable to the Family Court Quarterly Statistics. This is due to NHS Digital data recording attendances and individuals in England only, whereas the Family Court data includes both England and Wales[56]. Family Court data is available from July 2015 to September 2019 and NHS Digital data is available from April 2015 to September 2019. Notwithstanding that, it is clear that there is a substantial difference between the number of women and girls who have been subjected to FGM living in the United Kingdom, and the number of applications for FGMPOs submitted. Given the current very low number of FGMPO applications, it is likely (although further work is necessary in another study to ascertain the level of understanding amongst healthcare professionals, including midwives, about FGMPOs) that an educational e-learning module on FGMPOs for healthcare professionals could be beneficial in increasing awareness.[57]

Training and knowledge of the law surrounding FGMPOs gives stakeholders the opportunity to provide vital information to parents or guardians, or the relevant local authority, and to consider whether a referral should be made because a child is at risk of harm. Guidance on such referrals is essential and coincides with the challenges that arise in relation to professional care and, perhaps, reluctance to report to the police. These are clearly challenging situations for professionals and patients alike.

Problems with the numbers of prosecutions and convictions continue, whilst estimated numbers of women and children affected by FGM remain high.[58] FGMPOs act as a form of protection for women and girls. However, it is concerning that the number of cases of FGM recorded in the NHS far exceeds the number of applications for FGMPOs. This suggests that some women and girls who have undergone FGM could have been protected by an FGMPO, had an application been made to the court. In addition, the cases suggest that Courts remain reluctant to grant FGMPOs, perhaps understandably when faced with evidence of parents that FGM is not contemplated. This is particularly evident when the risk is abroad and a child does not have secure British immigration status.[59] An FGM Commissioner may be a useful intervenor to assist in the objective analysis of factors by the court as against the specific evidence of the parties.

53 NHS Digital, 2019
54 Ministry of Justice, 2019
55 NHS Digital, 2019
56 Ministry of Justice, 2019
57 J Home, A Rowland, F Gerry, C Proudman, K Walton, A review of the law surrounding Female Genital Mutilation Protection Orders. *British Journal of Midwifery*. 2020. July 2
58 C Proudman (2017). *The Impact of Criminalisation on Female Genital Mutilation in England: From the Perspective of Women and Stakeholders* (Doctoral dissertation, University of Cambridge).
59 *Re A (A Child: Female Genital Mutilation: Asylum)* [2019] EWHC 2475, [2020] 1 FLR 253 and www.theguardian.com/commentisfree/2019/sep/25/britain-girls-fgm-female-genital-mutilation-asylum-immigration https://www.counselmagazine.co.uk/articles/fgm-asylum-claims

In this instance, we propose an FGM Commissioner would be useful to collect data including demographics such as ethnic group, FGM related medical complications and family history. There is an ongoing need to collect better data in relation to FGM and FGMPOs, led by a national FGM Commissioner. It is essential that such an exercise is performed in a manner that does not target particular communities or create additional vulnerability for women and girls. For example, all pregnant women and girls could be asked explicitly if they have undergone FGM, regardless of their ethnic group. This might, for example, reveal inappropriate labiaplasty as well as traditional FGM procedures. Not only would this normalize the question, but would allow appropriate adjustments to birth plans. It could also trigger risk reporting. Another example is where a patient presents with flu like symptoms. Asking all women the FGM question may assist in appropriate health treatment. Thus, training and guidance on how to approach such questioning is important. As noted above it is inappropriate for health professionals to provide their patients with legal advice but the intersection between health and law in the FGM context makes for the need for an overlap in guidance and process.

As a multifaceted problem, data collection for FGM would require engagement and cooperation with different individuals from multidisciplinary health and social care teams. An FGM Commissioner could also be responsible for keeping the pedal on the prosecutorial necessity; contributing to successful prosecutions. Again, all processes could be contemporaneously reviewed to mitigate against over-stigmatisation. An FGM Commissioner could also lead the anti-FGM measures necessary, using the recognised public health levels of intervention in the UK and cooperating with overseas jurisdictions.

FGM Commissioner to examine discriminatory aspects

It has been argued by FGM experts that the over-zealous focus on prosecuting cases of FGM has resulted in communities feeling targeted[60] and has perhaps resulted in communities resisting anti-FGM initiatives. Anti-FGM laws were introduced in 1985 with subsequent amendments in 2003 and 2015. The law-makers responsible for introducing legislation and law enforcement officers responsible for implementing legislation are not representative of FGM-performing communities. Communities are likely to feel distanced and disenfranchised from the legislative process, as the laws are enforced from a top-down approach upon marginalised communities.[61] Research conducted by anti-FGM non-government NGO 'FORWARD' and others, found that many women feel angry about anti-FGM laws because of the accompanying rhetoric which brands communities as barbaric and cruel.[62] The law and media narratives fail to apply an intersectional perspective[63] which takes into account the inequalities that women from FGM-performing communities experience on grounds of gender, race, class, nationality, religion and culture. Often anti-FGM narratives brand communities as backwards and consequently reinforce communities' marginalisation and oppression[64]. Whilst FGM is not an Islamic practice and it has no roots in any religious practice, FGM is often associated with people of Islamic faith and may have led to further Islamophobia; this is an area that requires further research

60 SM Creighton, Z Samuel, N Otoo-Oyortey and D Hodes (2019). Tackling female genital mutilation in the UK, British Medical Journal Publishing Group.

61 J &&&Rogers (2013). Law's Cut on the Body of Human Rights: Female Circumcision, Torture, and Scared Flesh, Routledge.

62 K Norman, SB Gegzabher and N Otoo-Oyortey (2016). 'Between Two Cultures': A Rapid PEER Study Exploring Migrant Communities' Views on Female Genital Mutilation in Essex and Norfolk, UK. FORWARD & National FGM Centre Report

63 && K Crenshaw (1991). 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color.' *Stanford Law Review* 43(6): 1241–1299

64 M Dustin (2010). 'Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies.' *European Journal of Women's Studies* 17(1): 7–23

by professionals and academics.[65] Certainly, some political groups have used FGM as a means of arguing against immigration due to cultural practices from overseas.[66]

It has long been understood that the law can often have unintended consequences of reinforcing a cultural practice that it intended to eliminate.[67] In resisting laws, which are perceived as quasi-racist or neo-colonial, the law has become a source of power and strength amongst communities as it reinvigorates them to continue the practice underground. The law on its own is not sufficient to eliminate FGM. The law must have community support if it is to have effect. During the British Empire in Sudan, FGM was prohibited. Rather than ending FGM, the law was seen as an oppressive force and was resisted by women and men and more women and girls were cut as a consequence[68]. Proudman[69] found that many women from FGM-performing communities supported and defended FGM for a variety of reasons and were openly angry about anti-FGM legislation which they felt labelled them as child abusers. Many women described their hostility towards the double legal standard in permitting female genital cosmetic surgery but criminalising FGM for adult women. Inconsistencies in the law and the failure of anti-FGM initiatives to include women from FGM-performing communities has created a disjoint between those that seek to end FGM and FGM-performing communities. Rather than uniting in the elimination of FGM, communities feel distanced from such initiatives and under fire from the media's portrayal of heinous parents performing FGM. Whilst the first FGM conviction is welcomed by many anti-FGM campaigners, the language used by the media is likely to have closed discussions about FGM down. For example, *The Daily Mail* headline read, ' "You betrayed her": Judge jails first mother in Britain to be convicted of FGM for 13 years after the "barbaric" Ugandan, 37, cut her daughter, 3, then "tortured" an OX TONGUE to "silence her accusers by witchcraft" '.[70] An FGM commissioner could also encourage a more conducive narrative about FGM and monitoring the impact of anti-FGM narratives on the end FGM campaign.

Rather than defining FGM as an aberration of the individual – FGM is portrayed as a cultural practice which creates perceptions of communities as child abusers. Academics have argued that FGM should not be viewed as a cultural practice because it (a) results in professionals fearing to intervene in so-called cultural cases which are seen as legitimate; and (b) it stigmatises communities as performers of child abusive practices. Instead, FGM should be viewed as violence against women and girls along with other forms of abusive practices such as domestic abuse.[71]

There are also significant concerns that the single successful prosecution[72] focussed too closely on witchcraft[73] rather than representing so-called 'conventional' cases of FGM. The parents of the girl who was cut did not come from a background that supported FGM and the mother had not been cut. Whilst it is important to draw

65 J Rogers (2016). 'The first case addressing female genital mutilation in Australia: Where is the harm?' *Alternative Law Journal* 41(4): 235–238

66 F López-Alves and DE Johnson (eds.). (2018). *Populist nationalism in Europe and the Americas*. Routledge in which they analyse UKIP's anti-immigration rhetoric and UKIP's stance on FGM.

67 . E Burman (2003). 'From difference to intersectionality: Challenges and resources.' *European Journal of Psychotherapy & Counselling* 6(4): 2

68 O Nnaemeka (2005). African Women, Colonial Discourses, and Imperialist. Female circumcision and the politics of knowledge: African women in imperialist discourses, Praeger: 27–46.

69 Proudman interviewed 79 women and professionals and conducted two focus groups each with 11 women of Somali origin asking about their attitudes towards FGM and the law. See, C Proudman (2017). *The Impact of Criminalisation on Female Genital Mutilation in England: From the Perspective of Women and Stakeholders* (Doctoral dissertation, University of Cambridge).

70 https://www.dailymail.co.uk/news/article-6787267/Mother-convicted-FGM-daughter-3-jailed-13-years.html 9 March 2019

71 M &&&&&&&&Dustin and A Phillip s (2008). 'Whose agenda Is It? Abuses of women and abuses of 'culture' in Britain.' Ethnicities 8(3): 405–424

72 https://www.judiciary.uk/wp-content/uploads/2019/03/r-v-n-female-genital-mutilation-sentencing-remarks-whipple-j.pdf

73 https://www.bbc.co.uk/news/uk-england-london-47502089

attention to FGM as a gross violation of a girl's Art 3 ECHR rights, the first conviction of FGM does not represent cases of FGM that continue in family's for generations.[74] Furthermore, there are concerns that the prosecution witchcraft narrative could have alienated communities from anti-FGM laws rather than encouraging them to abandon FGM.

A 19th century case of infanticide involving witchcraft allegations was recently fictionalised in Hannah Kent's book *The Good People*.[75] It is a reminder of the terrible treatment of women of that era when accused of witchcraft. In that case the defendants were acquitted as the law had developed to a point of leniency after the witchcraft fever of previous centuries. However, in the 21st century, in the criminal prosecution of *R v N* (female genital mutilation) where a child was mutilated and a mother's defence that the child fell on a sharp kitchen door was rejected. The fact of conviction may be welcome, but the context is a concern.[76] It has created an association between FGM and witchcraft. Instead of focussing on how the injury was caused, evidence was also called that police found spells written inside fruit and meat with the apparent aim of keeping police, social workers and lawyers quiet. The judge said that it was not known why the woman inflicted FGM on her child but witchcraft was a possibility.[77] This demonises the mother and further entrenches FGM in stigma which may be a good argument for not relying on evidence of witchcraft, even if it is admissible. The stigmatisation of women is a particular problem around the issue of FGM and an FGM Commissioner could monitor or even have powers to intervene to maintain a balance between the need to criminalise but not demonise.

Conclusion

Reliance on law enforcement to deal with social problems has led to consequences of increased surveillance, removal of children by the state and prosecution. This can increase vulnerability of women and children in communities which continue to practise FGM. BASW (the professional association for social work and social workers) has warned: 'against blurring the boundaries between social work and other agencies such as the police and health'.[78] However, whilst it is vital not to target families in cultures which carry out FGM, as set out above, the law was extended to place a duty upon professionals to report FGM. This creates an extension of the boundaries of the criminal law so that stakeholders outside of the criminal justice system are responsible for implementation of FGMPOs in limited circumstances. This, combined with the threat of prosecution, can drive practices underground and deny women vital healthcare. These risks have been exacerbated rather than improved by the one conviction so far. It follows that whilst we accept that education is key, the push for eradication requires oversight and input from an FGM Commissioner to ensure there is both a process to eradicate and understanding for women and girls.

74 J Home, A Rowland, F Gerry, C Proudman, K Walton, A review of the law surrounding Female Genital Mutilation Protection Orders. *British Journal of Midwifery*. 2020. July 2

75 ISBN: 9781743534908

76 https://www.theguardian.com/society/2019/feb/01/fgm-mother-of-three-year-old-first-person-convicted-in-uk

77 https://www.theguardian.com/society/2019/mar/08/mother-of-three-year-old-is-first-in-uk-to-be-convicted-of-fgm

78 https://www.basw.co.uk/media/news/2015/feb/fgm-social-workers-should-not-take-role-police