

This document relates to the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill (SP Bill 47) as introduced in the Scottish Parliament on 29 May 2019

Female Genital Mutilation (Protection and Guidance) (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill, introduced in the Scottish Parliament on 29 May 2019.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 47–FM);
 - a Policy Memorandum (SP Bill 47–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 47–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

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The Bill

5. The purpose of the Bill is to strengthen statutory protections for those at risk of female genital mutilation (FGM). Specifically, the Bill creates a new FGM Protection Order which can impose conditions or requirements upon a person or persons for the purpose of protecting a person or persons from FGM, safeguarding them from further harm if FGM has already occurred, or to otherwise prevent or reduce the likelihood that FGM offences will occur. The Bill makes it a criminal offence to breach an FGM Protection Order or an equivalent UK order. The Scottish Ministers must issue statutory guidance relating to FGM Protection Orders and the Bill also makes provision for the Scottish Ministers to choose to issue statutory guidance in relation to FGM. Relevant public bodies must have regard to the statutory guidance in the exercise of their functions.

Female genital mutilation protection orders

Section 1: Female genital mutilation protection orders

6. Section 1 of the Bill amends the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (the “2005 Act”) to insert new sections that make provision for female genital mutilation protection orders.

Inserted section 5A: Female genital mutilation protection orders

7. Subsections (1) and (2) create the female genital mutilation protection order, which can be made by a court for the purposes of:

- preventing, or reducing the likelihood of, a person or persons being subjected to an act of genital mutilation,
- protecting a person who has been subjected to an act of genital mutilation,
- preventing, or reducing the likelihood of, an offence under section 1 or section 3 of the 2005 Act being committed.

8. Subsection (3) refers to the subsequent inserted sections under which an order may be made.

9. Subsection (4) sets out that the court must consider the circumstances surrounding the potential order, including the health, safety and well-being of any person or persons who might become a protected

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person should the order be made by the court. This only applies to orders made under inserted sections 5C, 5E(1) and 5G(2). Therefore it does not apply when the court is considering whether to make an interim female genital mutilation protection order under inserted section 5F. Section 5F(3) sets out the matters the court must have regard to in relation to interim orders.

10. Subsection (5) provides that the court must consider the wishes and feelings of any protected person to such an extent as the court considers appropriate, taking into account the person's age and understanding.

11. Subsection (6) defines an "act of genital mutilation" by reference to the existing provisions of the 2005 Act. It refers to the actions mentioned in section 1(2) of the Act being performed in relation to the whole or any part of a person's genitals mentioned in section 1(1) of the Act. It:

- excludes a surgical operation by an approved person as provided for under section 1(4) of the 2005 Act, (or by an equivalent person outside the UK), but
- includes an action performed by a person on themselves when another person aids, abets, counsels, procures or incites them to perform that action under section 3(1)(b) of the 2005 Act.

12. Subsection (6) further defines a "protected person" as being a person identified in a female genital mutilation protection order where that order has been made in respect of a specific person or persons.

Inserted section 5B: Contents of orders

13. Subsection (1) provides that the court may make an order containing any terms that are considered appropriate for the purposes of the order.

14. Subsection (2) makes it clear that the terms of the order may relate to actions outwith Scotland and to persons who have, or may attempt, to subject someone to an FGM offence and other persons involved in other respects. Subsection (4) provides examples of other involvement such as conspiring to commit an offence of FGM and aiding, abetting, counselling, procuring or inciting another person to commit such an offence.

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15. The lists in subsection (2) and subsection (4) are non-exhaustive and do not limit the broad scope of subsection (1). For example, a court might consider it appropriate to require a relevant local authority to do something under a female genital mutilation protection order.

16. Subsection (3) sets out the matters that an order may require a person to do or refrain from doing. The list is not exhaustive. It includes:

- taking the protected person to a place of safety,
- taking the protected person to any other place (for example, the court could require that the protected person be taken to a GP surgery or hospital),
- refraining from violent, threatening or intimidating conduct,
- refraining from taking a protected person to certain places, as the court specifies,
- submitting documents to the court, including passports and travel documents.

Inserted section 5C: Power to make orders on application

17. Subsection (1) provides that a court may make a female genital mutilation protection order when an application has been made to it.

18. Subsection (2) sets out the persons who can apply to the court for a female genital mutilation protection order: a person at risk of being subject to FGM, a person who has been subjected to FGM, the Lord Advocate, a local authority in whose area the person to be protected is present, the Chief Constable of Police Scotland, or any other person with the permission of the court.

19. Subsection (3) provides that any person who may apply for a female genital mutilation protection order can also with the court's agreement, join in proceedings relating to an application made by another person mentioned in subsection (2).

20. Subsection (4) provides that in deciding whether to grant permission to a person making an application, the court must have regard to all the circumstances including the applicant's connection with and knowledge of the person to be protected, the wishes and feelings of that person and any

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reason why the application is being made by the applicant and not the person to be protected. Subsection (5) provides that the court need only consider the wishes and feelings of the person to be protected to such an extent as the court considers appropriate, taking into account the person's age and understanding.

Inserted section 5D: Applications for orders: jurisdiction

21. This section determines the court to which an application for a female genital mutilation protection order is to be made. Subsection (2) provides that applications may be made to the sheriff in whose sheriffdom any person who may become a protected person following the application ordinarily resides. If there is no such person, subsection (3) provides that the application may be made to the sheriff in whose sheriffdom any person on whom prohibitions, restrictions or requirements would be imposed by the order ordinarily resides. Subsection (4) provides that in other cases the application is to be made to the sheriff of the sheriffdom of Lothian and Borders at Edinburgh. This would cover cases where, for example, the person is not ordinarily resident in Scotland.

22. Subsections (6) to (9) allow for the transfer of proceedings between sheriffdoms.

Inserted section 5E: Power to make orders without application

23. Subsection (1) enables the court to make a female genital mutilation protection order where civil proceedings are already before the court, without having received an application under section 5C. The court can do this if it considers that an order should be made and provided that any person who would be affected by such an order is also a party to the civil proceedings currently before the court.

24. Subsection (2) allows the court to make a female genital mutilation protection order if it considers that an order should be made even if no person who would be affected by the order is a party to the civil proceedings. Further provision is therefore made in subsection (4) to enable those persons who were affected but were absent when the order was made, to make representations relating to that order.

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25. Under subsection (3), the court can make orders in these ways either on its own initiative or at the request of a party to the civil proceedings.

Inserted section 5F: Interim orders

26. Section 5F enables the court to make an interim version of a female genital mutilation order after either receiving an application under section 5C or, where an application has not been made to it, where civil proceedings are already before it.

27. Subsection (2) and (3) set out that the court may only make an interim order where it considers it just, on the balance of convenience, to do so. In deciding whether to make an interim order, the court must have regard to all the circumstances including the risk of significant harm to a person if the order is not made immediately, the risk of a protected person being taken outside the UK for a purpose connected with FGM, and the risk that the person who applied for the order will be deterred or prevented from pursuing the application. This is not an exhaustive list.

28. Subsection (4) and (5) also enable an interim female genital mutilation protection order to be made in the absence of a person who is, or would be, a party to proceedings for the order, provided that they are subsequently given an opportunity to make representations about the interim order as soon as is just and convenient.

29. Subsection (6) provides that an interim female genital mutilation protection order has effect only for a fixed period specified in the order. An interim order ceases to have effect once a determination of the original application under section 5C has been made, or where no application was made on the determination of any court proceedings which came about from the opportunity given to parties who were absent when the order was made, to make representations about it.

Inserted section 5G: Power to make orders on sentencing etc.

30. Section 5G enables a court to make a female genital mutilation protection order in respect of a person who:

- has been convicted of an FGM offence,

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- has been acquitted of an FGM offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (criminal responsibility of persons with mental disorder), or
- has been found to be unfit for trial under section 53F of the 1995 Act where the court has determined that the person's actions constitute an FGM offence,

instead of or in addition dealing with the person in any other way.

31. Subsection (3) provides that the court may make a female genital mutilation protection order on its own initiative or on a motion of the prosecutor.

32. Subsection (4) provides that a female genital mutilation protection order made under this section is to be treated as if made in civil proceedings, in order to bring it within the ambit of the subsequent provisions on variation, discharge and extension of orders, and to make it subject to the appeal provisions of the Courts Reform (Scotland) Act 2014.

Inserted section 5H: References by criminal court to Lord Advocate

33. Section 5H provides that where criminal proceedings are before a criminal court and it considers that a female genital mutilation protection order should be made, the court may refer the matter to the Lord Advocate who can apply for a female genital mutilation protection order or take other steps as the Lord Advocate considers appropriate.

Inserted section 5I: Duration of orders

34. Section 5I provides that where the court specifies in a female genital mutilation protection order a period for which it is to have effect, the order has effect until the expiry of that period (unless the order is discharged under section 5J or extended under section 5K). If no period is specified the order has effect until the order is discharged under section 5J.

Inserted section 5J: Variation and discharge of orders

35. Section 5J provides for the variation and discharge of orders.

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36. Subsection (1) sets out the persons who may apply to the court to vary or discharge a female genital mutilation protection order: a party to the proceedings for the order, a protected person, any other person affected by the order, the Lord Advocate, a local authority in whose area the protected person is present, the Chief Constable of Police Scotland, or any other person with the permission of the court.

37. Subsection (2) provides that any person who may apply to vary or discharge a female genital mutilation protection order can also, with the court's agreement, join in proceedings relating to an application made by any other person mentioned in subsection (1).

38. Subsection (3) provides that in deciding whether to grant permission to a person to make an application or to join in proceedings, the court must have regard to all the circumstances including the applicant's connection with and knowledge of the person who is a party to the proceedings for the order, a protected person, or a person affected by the order (as the case may be), the wishes and feelings of that person and any reason why the application is being made by the applicant and not that person. Subsection (4) provides that the court need only consider the wishes and feelings of that person to such an extent as the court considers appropriate, taking into account the person's age and understanding.

39. Subsection (5) enables a court, if it considers it just to do so, to vary or discharge a female genital mutilation protection order even when no application to vary or discharge the order has been made.

40. Subsection (6) prevents an application to vary an order from being used to extend orders which have been made for a specified period. The extension to orders made for a specified period is dealt with in section 5K.

Inserted section 5K: Extension of orders

41. Section 5K provides for extensions to be made to orders which have been granted for fixed periods.

42. Subsection (3) sets out the persons who may apply to the court to extend a female genital mutilation protection order: a party to the proceedings for the order, a protected person, any other person affected by the order, the Lord Advocate, a local authority in whose area the protected

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person is present, the Chief Constable of Police Scotland, or any other person with the permission of the court.

43. Subsection (4) provides that any person who may apply to extend a female genital mutilation protection order can also, with the court's agreement, join in proceedings relating to an application made by any other person mentioned in subsection (3).

44. Subsection (5) provides that in deciding whether to grant permission to a person to make an application or join in proceedings, the court must have regard to all the circumstances including the applicant's connection with and knowledge of the person who is a party to the proceedings for the order, a protected person, or a person affected by the order (as the case may be), the wishes and feelings of that person and any reason why the application is being made by the applicant and not that person. Subsection (6) provides that the court need only consider the wishes and feelings of that person to such an extent as the court considers appropriate, taking into account the person's age and understanding.

45. Subsection (7) enables a court, if it considers it just to do so, to extend a female genital mutilation protection order even when no application to extend the order has been made.

46. A female genital mutilation protection order may include a range of different provisions with different effects. Subsection (8) applies this section to a female genital mutilation protection order which provides for some of its provisions to be for fixed periods, but not the whole order, so that those provisions which apply for a fixed period may be extended.

Inserted section 5L: Variation, discharge and extension of orders: further provision

47. Subsection (1) provides that the matters to be considered under sections 5A(4) and (5) when making a female genital mutilation protection order must also be considered by the court when considering variation, discharge or an extension of an order.

48. Subsection (2) provides that the provisions determining jurisdiction set out in section 5D also apply to applications to vary, discharge or extend an order.

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49. Subsection (3) provides that the court may, pending its disposal of an application for a variation or extension of an order, chose to do so on an interim basis.

Inserted section 5M: Notification of applications and orders

50. Section 5M sets out that the court must notify the Chief Constable of Police Scotland and the relevant local authority of all applications and orders made under the preceding sections, unless they are already party to the proceedings in respect of the application or the order.

Inserted section 5N: Offences relating to orders

51. Section 5N makes it a criminal offence to breach a female genital mutilation protection order under the circumstances described in the section.

52. The section makes it an offence at subsections (3) and (4) to knowingly do a thing which another person is prohibited from doing under an order, or to knowingly hinder a person from carrying out an obligation they are required to do under an order. Accordingly, where an order prevents a person from allowing a child at risk contact with a known FGM perpetrator it will be an offence for another person to do so if they know that an order is in place prohibiting that contact. Similarly, if an order were to require that a parent take a child to the doctor for a regular check-up, it would be an offence for a grandparent to prevent that if they know that an order is in place requiring that check-up take place.

53. Subsection (5) sets out that if conduct or failure to act which would constitute an offence takes place outwith Scotland, the offence may be prosecuted in Scotland as if the conduct or failure to act took place in the sheriff court district in which the person is apprehended or in custody, or in a sheriff court district determined by the Lord Advocate.

54. Subsection (6) prevents conduct or failure to act which leads to conviction for an offence under this section from being punished as a contempt of court. As a female genital mutilation protection order will be a form of civil order, a person who knowingly breaches it could be held in contempt of court at common law. This section prevents there being double punishment for the same conduct or failure to act.

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55. Subsection (7) sets out the penalties that may be imposed:

- on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
- on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

Inserted section 5O: Offences relating to UK orders

56. Section 5O makes it a criminal offence to breach a relevant UK order in Scotland. A relevant UK order is an FGM protection order under schedule 2 of the Female Genital Mutilation Act 2003, and any other order which appears to the Scottish Ministers to be equivalent or similar to a female genital mutilation protection order under this Bill and is of a type specified in regulations made by the Scottish Ministers.

57. Subsection (5) sets out the penalties that may be imposed:

- on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
- on conviction on indictment, to imprisonment for a term not exceeding five years or a fine (or both).

Section 2: Guidance relating to female genital mutilation

58. Section 2 of the Bill amends the 2005 Act to insert a section that makes provision for guidance relating to FGM. This section enables the Scottish Ministers to give guidance about the effect of the 2005 Act as it has been amended by this Bill or any other matters relating to FGM.

59. Subsection (2) provides that a person exercising public functions to whom guidance is given must have regard to it.

60. As it would be inappropriate for ministerial guidance to be read in any way as interfering with the independence of the courts, tribunals or prosecution service, subsection (3) provides that the Scottish Ministers cannot give guidance under this section to any court or tribunal, the Lord Advocate or a procurator fiscal.

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Section 3: Guidance relating to female genital mutilation protection orders

61. Section 3 of the Bill amends the 2005 Act to insert a section that makes provision for guidance relating to female genital mutilation protection orders. This section requires the Scottish Ministers to publish guidance about female genital mutilation protection orders and to specify who the guidance applies to.

62. Subsection (2) provides that a person exercising public functions to whom guidance is given must have regard to it.

63. As it would be inappropriate for ministerial guidance to be read in any way as interfering with the independence of the courts, tribunals or prosecution service, subsection (4) provides that the Scottish Ministers cannot give guidance under this section to any court or tribunal, the Lord Advocate or a procurator fiscal.

Section 4: Offences: consequential modification

64. Section 4 of the Bill modifies section 5 of the 2005 Act to take account of the new offences created by this Bill, to ensure that that section only applies to offences under section 1 or 3 of the 2005 Act. There are separate penalty provisions for the new offences created by this Bill at section 5N(7) and section 5O(5).

Section 5: Definitions of expressions in the 2005 Act

65. Section 5 of the Bill inserts into section 6 of the 2005 Act definitions for terms used in the new sections being inserted by the Bill into the Act.

Section 6: Crown Application of the 2005 Act

66. The Bill binds the Crown by virtue of section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 (ILRA), but that is of no practical consequence as its substantive provisions will be inserted into the 2005 Act and into the Children's Hearings (Scotland) Act 2011. The 2005 Act, being pre-ILRA, did not bind the Crown when enacted, and so any amendment of it will not bind the Crown. Section 6 of the Bill therefore inserts a new section into the 2005 Act which provides for Crown application to a limited extent.

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67. Subsection (1) provides that the sections relating to female genital mutilation protection orders apply to the Crown. Subsection (2) provides that the Crown cannot be held criminally liable for breaching a female genital mutilation protection order or equivalent UK order. Subsection (3) provides that the Court of Session may, on an application by the Lord Advocate, declare unlawful any such breach by the Crown.

68. The 2011 Act does not require to be amended in this way as it is governed by ILRA and already applies to the Crown.

Section 7: Ancillary provision under the 2005 Act

69. Section 7 inserts a new section into the 2005 Act. New section 7B provides that the Scottish Ministers may by regulations make such ancillary provision (that is, incidental, supplementary, consequential, transitional, transitory and saving provision) as they consider appropriate in connection with the 2005 Act. Such regulations may amend primary legislation, including the 2005 Act itself. Where they do so, they will be subject to the affirmative procedure. Where they do not, the negative procedure will apply.

Section 8: Amendment of the Children's Hearings (Scotland) Act 2011

70. Section 62 of the Children's Hearings (Scotland) Act 2011 provides for a court in the course of relevant proceedings to be able to refer a case to the principal reporter. Section 8 of the Bill amends section 62(5) to include all the proceedings in relation to female genital mutilation protection orders or interim female genital mutilation protection orders as "relevant proceedings".

Section 9: Meaning of the "the 2005 Act"

71. Section 9 sets out that references in the Bill to "the 2005 Act" means the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

Section 10: Commencement

72. Section 10 provides that the sections of the Bill listed come into force on the day after Royal Assent. Other provisions of the Bill will come into force at a time set by the Scottish Ministers through regulations.

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