

PROHIBITION OF FEMALE GENITAL MUTILATION (SCOTLAND) ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1 – Offence of female genital mutilation

6. Subsection (1) makes it an offence for a person to carry out the specified female genital mutilation procedures on another person. The procedures are offences if they are performed upon anyone who has specified genitalia, regardless of whether or not that person is, legally, of the female gender. Therefore the Act applies to a person who has female genitalia as a result of gender reassignment surgery. Subsection (2) lists the mutilating procedures which are unlawful.
7. Subsections (3), (4) and (5) set out the circumstances in which an offence is not committed. It is not an offence for a registered medical practitioner to carry out surgical operations which are necessary for a person's physical or mental health or for a registered medical practitioner, registered midwife, or person training to be a registered medical practitioner or midwife to carry out operations in connection with labour or childbirth. An example of an operation necessary for physical health could be the removal of relevant cancerous areas. An example of an operation necessary for mental health could be gender reassignment surgery and this also could include, for example, cosmetic surgery resulting from the distress caused by a perception of abnormality.
8. Subsection (6) provides that when assessing a person's mental health, no account is to be taken of any belief that FGM is needed as a matter of custom or ritual. So an FGM operation could not be carried out legally on the grounds that a person's mental health would suffer if they did not conform with their community's prevailing custom.
9. The Act does not make specific provision in relation to when a surgical operation will be considered to be necessary for a person's mental or physical health. Ultimately, that will be a matter for the Scottish courts to determine on the facts of the case if a prosecution is brought.

Section 2 – Modification of section 1

10. Subsection (1) provides an order making power for the Scottish Ministers to amend section 1 of the Act in the following ways:
 - to add or remove an action to or from the list of actions of mutilation listed in section 1(2) which are offences in terms of the Act or to vary those actions;
 - to add to the circumstances in which an offence is not committed set out in section 1(4) and (5) and to remove or vary any circumstances added.

The order making power does not allow for modification of the circumstances in which no offence is committed currently set out in section 1(4) and (5) of the Act.

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(Scotland) Act 2005 (asp 8) which received Royal Assent on 1 July 2005*

11. Subsections (2) and (3) provide that any order made under this section will be made by statutory instrument and subject to the affirmative resolution procedure.

Section 3 – Aiding and abetting female genital mutilation

12. Subsection (1)(a) makes it an offence for a person in Scotland to aid, abet, counsel, procure or incite another person to carry out FGM in Scotland.
13. It is not an offence under the Act to carry out FGM on oneself, but subsection (1)(b) makes it an offence for another person to help that to be done.
14. Subsection (1)(c) makes it an offence for a person in Scotland to aid, abet, counsel procure or incite a person who is not a UK national or permanent UK resident to carry out an FGM procedure outside the UK. This means that a person who arranges by telephone from Scotland for their daughter (irrespective of her nationality or status) to have an FGM operation carried out abroad by a foreign national (who does not live permanently in the UK) commits an offence.
15. Subsection (3) ensures that it is not an offence to aid, abet, counsel procure or incite a procedure carried out in circumstances equivalent to those in which no offence would be committed by virtue of the exceptions provided for in section 1(3), (4) and (5).

Section 4 – Extension of sections 1 and 3 to extra-territorial acts

16. Section 4 extends sections 1 and 3 so that any of the prohibited acts done outside the UK by a UK national or permanent UK resident will be an offence under domestic law and triable in the Scottish courts.
17. The effect of the extension of section 1 is that it will be an offence for a UK national or permanent UK resident to carry out an FGM operation outside the UK.
18. Subsection (2) ensures that the extra-territorial effect given to section 1 does not criminalise those carrying out procedures outside the UK in circumstances which are equivalent to those in which no offence would be committed by virtue of section 1(3), (4) and (5). It is not unlawful for the overseas equivalent of a registered medical practitioner to carry out necessary surgical procedures, or for the equivalents of registered medical practitioner, midwife, or person training to be a registered medical practitioner or midwife to carry out operations in connection with childbirth outside the UK. There is no fixed procedure for determining whether a person carrying out an FGM procedure outside the UK is an overseas equivalent of a medical practitioner etc for the purpose of subsection (2). If a prosecution is brought, this will be a matter for the Scottish courts to determine on the facts of the case.
19. The effect of the extension of section 3(1)(a) is that it will be an offence for a UK national or permanent UK resident outside the UK to aid and abet any person to carry out FGM in Scotland. The extension of section 1 means that it will be an offence for a person in Scotland to aid, abet, counsel, procure or incite a UK national or permanent UK resident to carry out an FGM operation outside the UK. For example, if a person in Scotland advises their UK national brother over the telephone how to carry out an FGM operation abroad, they would commit an offence. It will also be an offence, by virtue of the extension of sections 1 and 3(1)(a), for a UK national or permanent UK resident outside the UK to aid, abet, counsel, procure or incite a UK national or permanent UK resident to carry out an FGM operation outside the UK.
20. The effect of the extension of section 3(1)(b) is that it will be an offence for a UK national or permanent UK resident outside the UK to aid, abet, counsel, procure or incite a person of any nationality to self-mutilate, wherever that operation is carried out.
21. The effect of the extension of section 3(1)(c) is that it will be an offence for a UK national or permanent UK resident outside the UK to aid, abet, counsel, procure or incite a foreign national to carry out an FGM operation outside the UK. The nationality

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and status of the victim is immaterial. For example, a permanent UK resident who takes their daughter to the doctor's surgery in another country so that an FGM operation can be carried out will commit an offence.

Section 5 – Penalties for offences

22. On summary conviction the penalties for the new offences will be the same as those that currently apply under the 1985 Act. However on conviction on indictment, the maximum penalty is increased from 5 to 14 years' imprisonment. These are the same penalties as apply in England, Wales and Northern Ireland under the Female Genital Mutilation Act 2003.

Section 6 – Definitions

23. **Section 6** defines a UK national and a permanent UK resident for the purposes of the Act.

Section 7 – Amendment and repeal

24. **Section 7** adds the offences in the Act committed against a child under the age of 17 to the list of offences in Schedule 1 to the 1995 Act to which special provisions apply.
25. This provides the additional powers of arrest without warrant specified in section 21 of the 1995 Act in respect of those offences.
26. Further, by virtue of section 48 of the 1995 Act, the listing of FGM offences in Schedule 1 to the 1995 Act will allow a convicting court to refer a child who was the victim of an FGM offence as well as any child living in the same household as the victim or person convicted of the offence to the reporter to the children's panel.
27. The listing of FGM offences in Schedule 1 to the 1995 Act will also give the reporter grounds of referral to refer a child who was the victim of an FGM offence, as well as any child living in the same household as the victim or person convicted of the offence, to a children's hearing. In addition to a referral at the time of the offence, the listing will also allow the reporter to refer to a children's hearing children who are or become or are likely to become members of the same household as either the victim or the offender, even where there was no subsequent conviction with regard to those children, under section 52(2)(d), (e) or (f) of the Children (Scotland) Act 1995.