

PROHIBITION OF FEMALE GENITAL MUTILATION (SCOTLAND) ACT 2005

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive to assist the reader of the Prohibition of Female Genital Mutilation (Scotland) Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE ACT

3. Female genital mutilation (FGM) involves procedures which include the partial or total removal of the external female genital organs for cultural or other non-therapeutic reasons.
4. FGM has been a specific criminal offence in the UK since the passage of the Prohibition of Female Circumcision Act 1985 (“the 1985 Act”). In England, Wales and Northern Ireland, the Female Genital Mutilation Act 2003 repealed and re-enacted the provisions of the 1985 Act, gave them extra-territorial effect and increased the maximum penalty for FGM.
5. Like the Female Genital Mutilation Act 2003, the Act repeals and re-enacts for Scotland the provisions of the 1985 Act, gives extra-territorial effect to those provisions and increases the maximum penalty for FGM in Scotland from 5 to 14 years’ imprisonment. Further, it makes additional forms of FGM unlawful, allows the Scottish Ministers to modify the procedures which are offences and adds the offences under the Act to Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”)(offences against children under 17 to which special provisions apply).

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.

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 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.

*These notes refer to the Prohibition of Female Genital Mutilation (Scotland) Act 2005
which received Royal Assent on 1 July 2005*

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.

SUMMARY OF OFFENCES

28. The tables below summarise the offences created by this Act and give references to the relevant subsections. In this table, a UK person means a UK national or a permanent UK resident, as defined by section 5; a non-UK person means any other person.

| Committing an act of female genital mutilation | Reference |
|-------------------------------------------------------|------------------------------------------|
| Any person who carries out FGM in Scotland | Section 1(1) |
| A UK person who carries out FGM outside the UK | Section 1(1) as extended by section 4(1) |

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| Aiding and abetting an act of female genital mutilation which takes place in Scotland | Reference |
|----------------------------------------------------------------------------------------------|---------------------------------------------|
| Any person in Scotland who aids and abets FGM in Scotland | Section 3(1)(a) |
| A UK person outside the UK who aids and abets FGM in Scotland | Section 3(1)(a) as extended by section 4(1) |

| Aiding and abetting an act of female genital mutilation which takes place outside the UK | Reference |
|-------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| Any person in Scotland who aids and abets a UK person to carry out FGM outside the UK | Section 3(1)(a) (aiding and abetting an offence under section 1 as extended by section 4(1)) |
| A UK person outside the UK who aids and abets a UK person to carry out FGM outside the UK | Section 3(1)(a) (aiding and abetting an offence under section 1 as extended by section 4(1)) as extended by section 4(1) |
| Any person in Scotland who aids and abets a non-UK person to carry out FGM outside the UK | Section 3(1)(c) |
| A UK person outside the UK who aids and abets a non-UK person to carry out FGM outside the UK | Section 3(1)(c) as extended by section 4(1) |

| Aiding and abetting an act of self-mutilation | Reference |
|----------------------------------------------------------------------------------------|---------------------------------------------|
| Any person in Scotland who aids and abets another person anywhere to self-mutilate | Section 3(1)(b) |
| A UK person outside the UK who aids and abets another person anywhere to self-mutilate | Section 3(1)(b) as extended by section 4(1) |

PARLIAMENTARY HISTORY

29. The following list sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings and hyperlinks to those references. The table also sets out the date on which the Committee Report was published, the reference to that Report and a hyperlink to it.

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Introduction

29 October, 2004 SP Bill 29A (Session 2)

Stage 1

(a) Equal Opportunities Committee

18th Meeting, 2004 30 November 2004 Cols 683 - 702

19th Meeting, 2004 14 December 2004 Cols 703 - 741

1st Meeting, 2005 11 January 2005 Cols 743 - 769

2nd Meeting, 2005 18 January 2005 Cols 771 - 803

3rd Meeting, 2005 1 February 2005 Cols 824 - 853

4th Meeting, 2005 22 February 2005 Private Meeting

2nd Report, 2005 23 February 2005 SP Paper 294

(b) Consideration by the Parliament

3 March, 2005 3 March 2005 Cols 15030 - 15059

Stage 2

(a) Equal Opportunities Committee

7th Meeting, 2005 3 May 2005 Cols 900 - 920

Bill (as amended at Stage 2) SP Bill 29A (Session 2)

Stage 3

(a) Subordinate Legislation Committee

17th Meeting, 2005 24 May 2005 Col 1061

Letter to Subordinate Legislation

Committee SL/S2/05/17/6

(b) Consideration by the Parliament

26th May, 2005 26 May 2005 Cols 17323 - 17346

Bill passed, 26 May 2005 Bill as passed SP Bill 29A (Session 2)

Royal Assent

1 July, 2005 2005 asp 8