



## EXPLANATORY NOTES

---

### **Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020 (asp 9)**

£6.90



# **FEMALE GENITAL MUTILATION (PROTECTION AND GUIDANCE) (SCOTLAND) ACT 2020**

---

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020. They do not form part of the Act and have not been endorsed by the Parliament.

2. These 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. The purpose of the Act is to strengthen statutory protections for those at risk of female genital mutilation (FGM). Specifically, the Act creates a new female genital mutilation 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 Act makes it a criminal offence to breach a female genital mutilation protection order or an equivalent UK order. The Scottish Ministers must issue statutory guidance relating to female genital mutilation protection orders and the Act also makes provision enabling the Scottish Ministers to issue statutory guidance in relation to FGM generally. 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**

4. Section 1 of the Act 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**

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

- preventing, or reducing the likelihood of, an identified person or persons of a certain description being subjected to an act of genital mutilation,

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

6. Subsection (2)(a)(ii) makes clear that in relation to preventing or reducing the likelihood of FGM being performed, an order may be used to protect a described group of persons (who need not be individually identified). This could be used to protect attendees at a communal child care group, at a regular religious service or at a community group, or protect members of a described family unit either in a general age range or who are yet to be born at the time of making the order.

7. The purposes set out in subsection (2)(c) also permit the court to make an order which either deals solely with or includes provisions to prevent or reduce the likelihood of an offence under section 1 or section 3 of the 2005 Act being committed. This allows the court to make provision in an order, otherwise than for the protection of identifiable victims of FGM, or to prevent or reduce the likelihood of an identifiable person or persons of a certain description being subjected to an act of genital mutilation. An example of such a purpose would be a police or local authority intelligence led order, either partly or solely designed to target and disrupt the general FGM related activities of a potential or known perpetrator of FGM, without the need for that order (or the part of the order which relates to that purpose), to identify a victim or described group of victims.

8. As paragraphs (a) and (b) of subsection (2) refer to an act of FGM rather than to an FGM offence, there is therefore no need for the court to undertake a consideration of whether an offence under the 2005 Act will be, is likely to be, or has been committed. For example, if the risk is that of an act of FGM taking place in another jurisdiction and in circumstances which would fall outwith any offence (perhaps because the practitioner is not a UK resident or national), then an order can still be granted in relation to that risk.

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

10. 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 person should the order be made by the court. This applies only 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.

11. 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.

12. Subsections (6) and (7) provide that, where a person who would be a protected person were a female genital mutilation protection order made is not ordinarily

resident in Scotland, the court may make a female genital mutilation protection order only where the person is in Scotland when the order is applied for or made.

13. Subsection (8) 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 2005 Act being performed in relation to the whole or any part of a person’s genitals mentioned in section 1(1) of the Act (so cumulatively comprising FGM). 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.

14. Subsection (8) 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. The definition does not include persons falling within a description of persons where an order is granted for the purpose set out in subsection (2)(a)(ii).

#### **Inserted section 5B: Contents of orders**

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

16. Subsection (2) makes it clear that the terms of the order may relate to actions outwith Scotland and to persons who have subjected, or may attempt to subject, someone to an FGM offence and other persons involved in other respects. Subsection (7) 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.

17. The lists in subsections (2) and (7) 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.

18. 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.

19. Subsection (4) expressly indicates that, in addition to those matters, a court may require a Scottish public authority to consider what support and assistance the authority may be able, in exercise of its functions, to provide to the protected person or to another person.

20. Subsection (5) restricts the power in subsection (4) so that it can be exercised only on the request of a party to the proceedings in respect of the female genital mutilation protection order (or those who would have been a party to such proceedings, where an emergency or interim order is being made).

21. Subsection (6) makes it clear that where a requirement is made under subsection (4), the authority to whom the requirement applies must, so far as reasonably practicable, provide such support and assistance as the authority considers appropriate. The provision of such support and assistance (as opposed to the consideration of such support and assistance) is therefore mandated by way of this subsection and not by way of the order.

### **Inserted section 5C: Power to make orders on application**

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

23. 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 an act of FGM, a person who has been subjected to an act of FGM, the Lord Advocate, a relevant local authority (see paragraph 23 to 25 below), the Chief Constable of Police Scotland, or any other person with the permission of the court.

24. 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).

25. Subsection (4) provides that in deciding whether to grant permission to a person to make 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 reason why the application is being made by the applicant and not by the person to be protected.

26. 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.

27. Subsection (6) defines a "relevant local authority" for the Act as a whole (except for inserted section 5P) and does so in terms of an application for a new order and in terms of applications relating to an existing order (such as applications under section 5M (to vary or discharge an order)).

28. In the case of a potential "protected person" if an order were to be made, or in the case of an existing "protected person" under an existing order, the relevant local authority is the authority for the area where that person is present.

29. In the case of an order relating to a person potentially falling within a specified description of persons if the order were to be made, or in the case of an existing order, a person actually falling within a specified description of persons, the “relevant local authority” is any of the local authorities for the area where any of those persons are present. This means that where persons potentially or actually falling within the description live in different local authority areas, then any of those local authorities can be a “relevant local authority” in respect of that order.

#### **Inserted section 5D: Applications for orders: jurisdiction**

30. 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.

31. 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, or where the application is by the local authority, to the sheriff in whose sheriffdom the local authority is situated.

32. Subsection (4) provides that in any 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, in the absence of an identifiable potential victim, but with general intelligence pointing towards a risk of an offence being committed, an order is made against a potential perpetrator who is not ordinarily resident in Scotland.

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

#### **Inserted section 5E: Power to make orders without application**

34. Subsection (1) enables the court to make a female genital mutilation protection order where civil proceedings are already before the court, and without having received an application under inserted 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.

35. Subsection (2) also 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.

36. 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**

37. Section 5F enables the court to make an interim version of a female genital mutilation protection order after either receiving an application under inserted section 5C

or, where an application has not been made to it, where civil proceedings are already before it.

38. Subsections (2) and (3) set out that the court may make an interim order only 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.

39. Subsections (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.

40. 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 inserted 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.

41. Subsection (7) specifies that any references in the 2005 Act to female genital mutilation protection orders include references to interim female genital mutilation protection orders.

**Inserted section 5G: Anonymity: proceedings relating to making of female genital mutilation protection order**

42. This section requires the court, when dealing with civil proceedings relating to the making of a female genital mutilation protection order (that is, proceedings on an application under inserted section 5C or proceedings under inserted section 5E), to consider whether an anonymity order should be made. The court is also given the power to make such an order.

43. Subsection (2) sets out what an anonymity order is. An anonymity order is an order requiring measures to be taken to ensure that the identity of the person, who would be a protected person were the female genital mutilation protection order made, is not disclosed and that other information (for example details of another person) is not disclosed. An anonymity order may also protect the identity of another person (perhaps a relative of the protected person) and may also be used to exclude the public from any proceedings relating to the female genital mutilation protection order.

44. Subsection (3) provides that the court may make an anonymity order only if it considers it just to do so taking into consideration all the circumstances including the need to protect the health, safety and well-being of someone who would be a protected person if the female genital mutilation protection order were made.

45. Subsection (4) sets out that, in considering whether to make an anonymity order, the court must seek the views of any person in respect of whom the court is considering making the anonymity order and of the protected person (if different) and to have regard to those views to the extent the court considers it appropriate, taking into account the person's age and understanding.

46. Subsection (5) makes it clear that a person's failure to provide views when sought by the court under subsection (4) should not be taken as an indication of that person's opposition to an anonymity order being made.

47. Subsection (6) obliges the court to also consider exercising its existing powers under section 11 of the Contempt of Court Act 1981 (which allows the court to impose reporting restrictions).

48. Subsection (7) emphasises that nothing in this section overrides any existing power the court has to provide for anonymity.

49. Subsection (8) disapplies the requirement to seek views in subsection (4) in cases where the making of an interim female genital mutilation protection order is being considered.

50. Subsection (9) has the effect of requiring the court to consider making an anonymity order where an application for a female genital mutilation protection order has not been received, but the court is considering whether or not to grant a female genital mutilation protection order under inserted section 5E.

#### **Inserted Section 5H: Anonymity orders: other proceedings relating to female genital mutilation protection orders**

51. This section gives the court power to make an anonymity order in other proceedings relating to a female genital mutilation protection order (such as proceedings to vary or extend an existing order), and largely replicates the provisions of inserted section 5G. Unlike section 5G, this section does not direct the court to consider making an anonymity order, as the court will have already done so in terms of section 5G when the order was first made. The anonymity order may be made on the application of a person who is or would be a party to the proceedings on the female genital mutilation protection order. An anonymity order may also be made by the court where no application has been made but the court considers it is just to do so.

#### **Inserted Section 5I: Variation and discharge of anonymity orders**

52. This section provides the court with power to vary or discharge an anonymity order when it is already in effect.

53. Subsection (2) allows the court to vary or discharge the anonymity order on the application from any party who was a party to proceedings for the relevant female genital mutilation protection order, and any person (in the event of the female genital mutilation protection order being made on an interim or emergency basis) who would have been a party. It also allows the court to vary or discharge the anonymity order even if an application has not been made to the court to do so.

54. Subsection (3) provides that, in deciding whether or not to vary or discharge an anonymity order, the court may do so where it considers it is just having regard to all the circumstances, including the need to protect the health, safety and wellbeing of any protected person.

55. Subsection (4) requires the court, prior to taking a decision, to seek the views (as far as they are ascertainable) of any person in respect of whom the anonymity order was made, and of any other protected person. It further requires the court to have regard to those views, taking into account the protected person's age and understanding.

56. Subsection (5) makes it clear that a protected person's failure to give their views when sought by the court should not be taken as an indication of opposition to an anonymity order being made.

#### **Inserted section 5J: Power to make orders on sentencing etc.**

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

- has been convicted of an FGM offence,
- 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 Criminal Procedure (Scotland) Act 1995 where the court has determined that the person's actions constitute an FGM offence,

58. 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.

59. Subsections (4) and (5) provide that a female genital mutilation protection order made under this section may be appealed as if it were a sentence and that, on such an appeal being made, the court may suspend the order pending disposal of the appeal. This means that the appeal is heard by the criminal court.

60. Subsection (6) provides that a female genital mutilation protection order made under this section is otherwise to be treated as if made in civil proceedings. This means that once the order is made it is brought within the ambit of the provisions on variation, discharge and extension of orders in the civil court.

#### **Inserted section 5K: References by criminal court to Lord Advocate**

61. Section 5K 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. An example of this could be where the criminal court has come to this considered view, but cannot use its powers under section 5J; either because the criminal proceedings are

other than for an FGM offence, or where the criminal standard of proof has, notwithstanding that view, not been met in a prosecution for an FGM offence.

### **Inserted section 5L: Duration of orders**

62. Section 5L 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 inserted section 5M or extended under inserted section 5N). If no period is specified the order has effect until the order is discharged under inserted section 5M. Where some provisions of the order are subject to time periods and other provisions are not, the order as a whole has effect until it is discharged.

### **Inserted section 5M: Variation and discharge of orders**

63. Section 5M provides for the variation and discharge of orders.

64. 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 relevant local authority, the Chief Constable of Police Scotland, or any other person with the permission of the court. “Relevant local authority” takes its meaning from inserted section 5C(6) and will be the local authority in whose area a protected person is present or, in the case of an order protecting a described group, the local authority in whose area any person in that group is present.

65. 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).

66. 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 (where applicable) 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.

67. 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.

68. 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.

69. 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 inserted section 5N.

**Inserted section 5N: Extension of orders**

70. Section 5N provides for the court to extend female genital mutilation protection orders which have been granted for fixed periods.

71. 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 relevant local authority, the Chief Constable of Police Scotland, or any other person with the permission of the court. “Relevant local authority” takes its meaning from inserted section 5C(6) and will be the local authority in whose area a protected person is present or, in the case of an order protecting a described group, the local authority in whose area any person in that group is present.

72. 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).

73. 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 (where applicable) 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 other (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.

74. 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.

75. 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.

76. 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 5O: Variation, discharge and extension of orders: further provision**

77. Subsection (1) provides that the matters to be considered under inserted section 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.

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

79. 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.

80. Subsection (4) provides that, where the court varies or extends a female genital mutilation protection order on an interim basis, the provisions of inserted section 5F(2) to (5) apply, except as follows.

81. Insofar as any references are to an application for a female genital mutilation protection order then they should be read as references to an application to vary or extend a female genital mutilation protection order. Insofar as any references are to the making of an interim female genital mutilation protection order then they should be read as references to a female genital mutilation protection order being varied or extended on an interim basis. Finally, references to a person who would be a protected person were the order made are similarly to be taken as references to a person who is a protected person under the order to which the application to vary or extend relates.

### **Inserted section 5P: Notification of applications and orders**

82. Section 5P sets out that the court must notify the Chief Constable of Police Scotland and the relevant local authority of all applications and orders made and decisions taken under the preceding sections unless they are already party to the proceedings in respect of the application or the female genital mutilation protection order. It should be noted that the “relevant local authority” for the purposes of this section takes a slightly different meaning than that set out within inserted section 5C(6). In this section that term applies only in the case where there is an identifiable person to be protected or an identifiable protected person. This is because an order obtained to protect a group of persons falling within a specified description may have a fluid membership and it may not be possible to identify every local authority within whose area a person, protected by that type of order, is present.

### **Inserted section 5Q: Offences relating to orders**

83. Section 5Q makes it a criminal offence to breach a female genital mutilation protection order (by action or failure to act) under the circumstances described in the section.

84. The section makes it an offence at subsections (3) and (4) to knowingly do a thing which another person is prohibited from doing by a female genital mutilation protection order, or to knowingly hinder a person from carrying out an obligation they are required to do under such 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 to take place.

85. 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.

86. 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.

87. Subsection (7) sets out the penalties that may be imposed, namely:

- 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 5R: Offences relating to UK orders**

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

89. Subsection (5) sets out the penalties that may be imposed for such an offence, namely:

- 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).

### **Section 2: Guidance relating to female genital mutilation**

90. Section 2 of the Act amends the 2005 Act to insert a section (section 5S) 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 Act and about any other matters relating to FGM.

91. Subsection (2) provides that a person exercising public functions to whom guidance is given must have regard to it. This means that the recipient of the guidance needs to consider the guidance when carrying out its functions, but it falls short of a requirement for that person to make that guidance the only or top priority when doing so. Accordingly, a person must demonstrate it has considered the Scottish Ministers' guidance but it may act contrary to it where the circumstances of a case suggest that other considerations may outweigh its effect.

92. Any decision or action taken which does not follow the guidance will not be unlawful so long as the person can demonstrate that the guidance was taken into

consideration and there was a clear and case-specific reason for the departure from its terms.

93. 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.

94. Subsection (4) gives the Scottish Ministers power, from time to time, to revise any guidance given, and subsection (5) indicates that subsections (2) and (3) would have effect in relation to any such revised guidance. Subsection (6) indicates that the Scottish Ministers must publish such guidance in a manner they think fit.

### **Section 3: Guidance relating to female genital mutilation protection orders**

95. Section 3 of the Act amends the 2005 Act to insert a section (section 5T) 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 to whom the guidance applies. The guidance must be published by the day mentioned in subsection (7), being the earliest day on which inserted section 5C, 5E or 5J is brought into force.

96. Subsection (2) provides that a person exercising public functions to whom guidance is given must have regard to it. This means that the recipient of the guidance needs to consider the guidance when carrying out its functions, but it falls short of a requirement for that person to make that guidance the only or top priority when doing so. Accordingly, a person must demonstrate it has considered the Scottish Ministers' guidance but it may act contrary to it where the circumstances of a case suggest that other considerations may outweigh its effect.

97. Any decision or action taken which does not follow the guidance will not be unlawful so long as the person can demonstrate that the guidance was taken into consideration and there was a clear and case-specific reason for the departure from its terms.

98. 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.

99. Subsection (5) gives the Scottish Ministers power, from time to time, to revise any guidance given, and subsection (6) provides that subsections (2) and (4) would have effect in relation to any such revised guidance.

### **Section 4: Offences: consequential modification**

100. Section 4 of the Act modifies section 5 of the 2005 Act to take account of the new offences created by this Act, 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 Act at inserted sections 5Q(7) and 5R(5).

## **Section 5: Definitions of expressions in the 2005 Act**

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

## **Section 6: Crown Application of the 2005 Act**

102. The Act 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 Act therefore inserts a new section into the 2005 Act (section 7B) which provides for Crown application to a limited extent.

103. Subsection (1) of inserted section 7A 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.

104. The Children's Hearings (Scotland) Act 2011 (amended by section 8 of the 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**

105. Section 7 inserts a new section into the 2005 Act. Inserted 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**

106. 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 Act amends section 62(5) to include all the proceedings (including variation, extension and discharge) in relation to female genital mutilation protection orders or interim female genital mutilation protection orders as "relevant proceedings".

## **Section 9: Jurisdiction of summary sheriff in relation to female genital mutilation protection orders**

107. This section amends the Courts Reform (Scotland) Act 2014 to ensure that summary sheriffs have competence to oversee civil proceedings in relation to female

genital mutilation protection orders and interim female genital mutilation protection orders.

### **Section 10: Meaning of the “the 2005 Act”**

108. Section 9 sets out that references in the Act to “the 2005 Act” means the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

### **Section 11: Commencement**

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

### **PARLIAMENTARY HISTORY**

110. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Act published by the Parliament during the Act’s parliamentary passage.

<i>Proceedings and reports</i>	<i>Reference</i>
<b><i>Introduction</i></b>	
Bill as introduced	<a href="#"><u>Female Genital Mutilation (Protection and Guidance) (Scotland) Bill [as introduced] (2019)</u></a>
Stage 1	
(a) Equality and Human Rights Committee	
Oral Evidence Session	<a href="#"><u>Official Report of the Equalities and Human Rights Committee, 12 September 2019</u></a>
Oral Evidence Session	<a href="#"><u>Official Report of the Equalities and Human Rights Committee, 19 September 2019</u></a>
Oral Evidence Session	<a href="#"><u>Official Report of the Equalities and Human Rights Committee, 10 October 2019</u></a>
Oral Evidence Session	<a href="#"><u>Official Report of the Equalities and Human Rights Committee, 7 November 2019</u></a>

*These notes relate to the Female Genital Mutilation (Protection and Guidance) (Scotland) Act  
2020 (asp 9)  
which received Royal Assent on 24th April 2020*

<b><i>Proceedings and reports</i></b>	<b><i>Reference</i></b>
Oral Evidence Session with Minister for Older People and Equalities	<a href="#">Official Report of the Equalities and Human Rights Committee, 14 November 2019</a>
Committee Stage 1 Report	<a href="#">Equalities and Human Rights Committee 2019, Stage 1 Report on the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill</a>
<b>(b) Delegated Powers and Law Reform Committee</b>	
Meeting to Consider Female Genital Mutilation (Protection and Guidance) Bill	<a href="#">Official Report of the Delegated Powers and Law Reform Committee, 3 September 2019</a>
Meeting to Consider Female Genital Mutilation (Protection and Guidance) Bill	<a href="#">Official Report of the Delegated Powers and Law Reform Committee, 29 October 2019</a>
<b>(c) Consideration by the Parliament</b>	
Stage 1 Debate – 18 December 2019	<a href="#">Official Report of the Delegated Powers and Law Reform Committee, 18 December 2019</a>
<b>Stage 2</b>	
Equality and Human Rights Committee	<a href="#">Official Report of the Equalities and Human Rights Committee, 23 January 2020</a>
Bill as amended at Stage 2	<a href="#">Female Genital Mutilation (Protection and Guidance) (Scotland) Bill [as amended at Stage 2] (2020)</a>
<b>Stage 3</b>	
Stage 3 Debate – 19 March 2020	<a href="#">Official Report of Stage 3 Parliamentary Debate 19 March 2020</a>
Bill as passed – 19 March 2020	<a href="#">Female Genital Mutilation (Protection and Guidance) (Scotland) Bill [as passed] (2020)</a>
Royal Assent – 24 April 2020	<a href="#">Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020</a>

© Crown Copyright 2020

Printed and published in the UK by The Stationery Office Limited under the authority and superintendence of Jeff James, the Queen's Printer for Scotland.





a Williams Lea company

Published by TSO (The Stationery Office), part of Williams Lea,  
and available from:

**Online**

[www.tsoshop.co.uk](http://www.tsoshop.co.uk)

**Mail, Telephone, Fax & E-mail**

TSO

PO Box 29, Norwich, NR3 1GN

Telephone orders/General enquiries: 0333 202 5070

Fax orders: 0333 202 5080

E-mail: [customer.services@tso.co.uk](mailto:customer.services@tso.co.uk)

Textphone: 0333 202 5077

**TSO@Blackwell and other Accredited Agents**

ISBN 978-0-10-592035-9



9 780105 920359