

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

EXPLANATORY NOTES

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

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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:

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- 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.

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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

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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).