These documents relate to the Prohibition of Female Genital Mutilation (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 29 October 2004.

PROHIBITION OF FEMALE GENITAL MUTILATION (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Prohibition of Female Genital Mutilation (Scotland) Bill introduced in the Scottish Parliament on 29 October 2004:

   • Explanatory Notes;
   • a Financial Memorandum;
   • an Executive Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 29–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE BILL

4. 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.

5. 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 In England, Wales and Northern Ireland, the Female Genital Mutilation Act 2003 repealed and re-enacted the provisions of the 1985 Act, gave them extra-territorial effect and increased the maximum penalty for FGM.

6. Like the Female Genital Mutilation Act 2003, the Bill would repeal and re-enact for Scotland the provisions of the 1985 Act, give those provisions extra-territorial effect and increase the maximum penalty for FGM in Scotland from 5 to 14 years’ imprisonment.

COMMENTARY ON SECTIONS

Section 1 – Offence of female genital mutilation

7. 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 Bill would apply to a person who has female genitalia as a result of gender reassignment surgery.

8. Subsections (2) and (3) provide that 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. Subsection (4) 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
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grounds that a person’s mental health would suffer if they did not conform with their community’s prevailing custom.

9. The Bill 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 – Aiding and abetting female genital mutilation

10. Subsection 2(1)(a) makes it an offence for a person in Scotland to aid, abet, counsel or procure another person to carry out FGM in Scotland.

11. It is not an offence under the Bill to carry out FGM on oneself, but subsection (1)(b) makes it an offence for another person to help that to be done.

12. Subsection (1)(c) makes it an offence for a person in Scotland to aid, abet, counsel or procure a person who is not a UK national or permanent UK resident to carry out an FGM procedure on a UK national or permanent UK resident outside the UK. This means that a person who arranges by telephone from Scotland for their UK national daughter to have an FGM operation carried out abroad by a foreign national (who does not live permanently in the UK) commits an offence.

13. Subsection (3) provides for the same exception in relation to surgical operations as provided in section 1(2) and (3).

Section 3 – Extension of sections 1 and 2 to extra-territorial acts

14. Section 3 extends sections 1 and 2 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.

15. 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.

16. Subsection (2) ensures that the extra-territorial effect given to section 1 does not criminalise those carrying out necessary surgical procedures outside the UK. 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.

17. The effect of the extension of section 2(1)(a) is that it is 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.
It will also be an offence, by virtue of the extension of sections 1 and 2(1)(a), for a person in Scotland or a UK national or permanent UK resident outside the UK to aid, abet, counsel or procure 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.

18. The effect of the extension of section 2(1)(b) is that it will be an offence for a UK national or permanent UK resident outside the UK to aid, abet etc a person of any nationality to self-mutilate, wherever that operation is carried out.

19. The effect of the extension of section 2(1)(c) is that it will be an offence for a UK national or permanent UK resident outside the UK to aid, abet etc a foreign national to carry out an FGM operation outside the UK on a UK national or permanent UK resident. For example, a permanent UK resident who takes their permanent UK resident daughter to the doctor’s surgery in another country so that an FGM operation can be carried out will commit an offence.

Section 4 – Penalties for offences

20. 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 5 – Definitions

21. Section 6 defines a UK national and a permanent UK resident for the purposes of the Bill.

FINANCIAL MEMORANDUM

INTRODUCTION

22. Given the very private nature of FGM, there is no reliable data about the prevalence of people undergoing FGM in Scotland or being taken abroad for the purposes of FGM. Producing an estimate of numbers of likely future investigations and prosecutions is therefore very difficult. The Bill is intended to deter FGM being carried out with a view to eradicating FGM, and there have been no prosecutions in Scotland or the rest of the UK under the Prohibition of Female Circumcision Act 1985. Therefore very few, if any, investigations and prosecutions are expected as a result of this Bill. Nevertheless, where possible estimates of the cost of a case are given.

COSTS ON THE SCOTTISH ADMINISTRATION

Police investigations

23. The cost of a police investigation would depend very much upon the particular case, and few, if any, investigations are anticipated. Given that FGM is mostly carried out on children,
any investigation with respect to a child’s welfare would most likely be dealt with through child protection procedures, led by social work departments.

**Prosecution, court costs and legal aid costs**

24. Offences under the Bill can be prosecuted in a summary court or on indictment. Given the lack of FGM investigations and prosecutions under the 1985 Act, few, if any, prosecutions are anticipated under this Bill, and any prosecution should be able to be met from within planned budgets. Nevertheless, approximate costs for one prosecution per year are given. The most appropriate court would depend on the particular case: the average cost of a summary court case is £1,260 (including prosecution costs) and the average indictment cost is £9,650.

25. There will also be additional legal aid costs. The average legal aid cost for a summary case would be £675; while the average for a solemn case would be £4,000. Appeals against convictions would also have an impact on legal aid.

**Prison costs**

26. If an offender were sentenced to a term of imprisonment there would also be costs to the Scottish Prison Service. Based on 2003-4 figures the average annual cost per prisoner place is £33,244. This figure is the Scottish Prison Service’s annual costs divided by the annual average number of prisoners; it is not the marginal cost of an extra prisoner. Again, such costs are extremely unlikely to arise.

**Potential savings generated**

27. FGM has serious health consequences, both in the short and long term. This Bill is expected to act as a deterrent, thus reducing the number of people in Scotland on whom FGM is carried out, and reducing the number of people suffering illnesses or complications as a result of FGM. However as the NHS does not collect statistics about the number or type of illnesses and complications caused by FGM at present, this potential saving cannot be quantified.

**COSTS ON LOCAL AUTHORITIES**

28. Social work departments would already be expected to deal with any reported cases of FGM in respect of the child’s welfare (including if a child had been taken out of Scotland in order to have FGM performed) and to meet the associated costs of social work investigation, child protection measures, care and support. Therefore no additional cost to the local authority social work system is anticipated.

**COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

29. Individuals who are convicted of a new offence will be expected to pay any fine imposed on them by the court as a result of that conviction. There are no costs for other bodies or businesses.
EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

30. On 27 October 2004, the Minister for Justice (Cathy Jamieson MSP) made the following statement:

“In my view, the provisions of the Prohibition of Female Genital Mutilation (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

31. On 27 October 2004, the Presiding Officer (Rt Hon George Reid MSP) made the following statement:

“In my view, the provisions of the Prohibition of Female Genital Mutilation (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
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