INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these Revised Explanatory Notes are published to accompany the Prohibition of Female Genital Mutilation (Scotland) Bill as amended at Stage 2. The Bill was introduced on 29 October 2004.

2. 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

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 In England, Wales and Northern Ireland, the Female Genital Mutilation Act 2003 repealed and re-enacted the provisions of the 1985 Act, gave them extra-territorial effect and increased the maximum penalty for FGM.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

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 Bill would apply to a person who has female genitalia as a result of gender reassignment surgery.
7. 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 grounds that a person’s mental health would suffer if they did not conform with their community’s prevailing custom.

8. 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

9. Subsection 2(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.

10. 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.

11. 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.

12. 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

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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. 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.

Section 4 – Penalties for offences

19. 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

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

Section 6 – Amendment and repeal

21. Section 6 adds the offences in the Bill committed against a child under the age of 17 to the list of offences in Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to which special provisions apply.

22. This provides the additional powers of arrest without warrant specified in section 21 of the 1995 Act in respect of those offences.

23. 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.

24. 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.
This document relates to the Prohibition of Female Genital Mutilation (Scotland) Bill as amended at Stage 2 (SP Bill 29A)

PROHIBITION OF FEMALE GENITAL MUTILATION (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES