

# Female Genital Mutilation (Protection and Guidance) (Scotland) Bill

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## Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

### Outline of Bill provisions

2. The purpose of the Bill is to strengthen statutory protections for those at risk of female genital mutilation (FGM). Specifically, the Bill creates a new FGM Protection Order which can impose conditions or requirements upon a person or persons for the purposes of protecting a person or persons from FGM, safeguarding them from further harm if FGM has already occurred, or otherwise preventing or reducing the likelihood that FGM offences will occur. The Bill makes it a criminal offence to breach an FGM Protection Order or an equivalent UK order. The Scottish Ministers must issue statutory guidance relating to FGM Protection Orders and the Bill also makes provision for the Scottish Ministers to choose to issue statutory guidance in relation to FGM. Relevant public bodies must have regard to the statutory guidance in the exercise of their functions.

### Rationale for subordinate legislation

3. The Bill contains delegated powers which are explained in more detail below. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

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- the need to make proper use of valuable Parliamentary time;
- the need to provide the flexibility to respond to changing circumstances and to make changes quickly without the need for further primary legislation.
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

4. The relevant provisions are described in detail below. For each provision the memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

## Delegated Powers

Section 1 - inserted section 5O(4)(b)(ii) – Offences relating to UK orders

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

5. Section 1 of the Bill will insert a new section 5O into the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (the “2005 Act”) making it a criminal offence to breach a relevant UK order in Scotland. A relevant UK order is an FGM Protection Order under schedule 2 of the Female Genital Mutilation Act 2003 and an order which appears to the Scottish Ministers to be equivalent or similar to a female genital mutilation protection order under this Bill and is of a type specified in regulations made by the Scottish Ministers. Subsection (4)(b)(ii) gives the Scottish Ministers the power to make regulations specifying which orders made under the law of England and Wales or Northern Ireland are relevant UK orders for the purposes of

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section 5O. This includes the power under subsection (6) to make different provision for different purposes and to make any incidental, supplementary, consequential, transitional, transitory or saving provision as appropriate.

Reason for taking power

6. The power provides flexibility by ensuring that any future relevant UK FGM Protection Order created after the legislation has come into force can be included so that it would be an offence to breach that order in Scotland. This power may give rise to a need for a range of ancillary changes. Without the power to make incidental, supplementary, consequential, transitional, transitory or saving provision, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with technical, operational or implementation matters clearly within the scope and policy intentions of the original Bill.

Choice of procedure

7. The regulation will be subject to the affirmative procedure, which is considered to be an appropriate level of parliamentary scrutiny for regulations that will make it a criminal offence to breach a relevant UK order in Scotland.

**Section 2 – inserted section 5P – Guidance relating to female genital mutilation**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: guidance**

**Parliamentary procedure: none**

**Provision**

8. Section 2 inserts new section 5P into the 2005 Act to provide the Scottish Ministers with a power to issue guidance in relation to the effect of the 2005 Act or any provision of it or on any other matter relating to FGM. A person exercising public functions to whom guidance is given must have regard to it in the exercise of those functions.

Reason for taking power

9. It is considered helpful for Ministers to issue guidance for services, agencies, organisations, practitioners and individuals who work with persons at risk of, or affected by FGM, or who deal with its consequences. The guidance will be a resource to provide support and will describe best

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practice and the main elements of a sensitive and suitable response to matters relating to FGM. Those exercising public functions will be obliged to have regard to such guidance and this will better ensure that public bodies work effectively and collaboratively. Guidance provides a responsive and flexible way of supporting those who must have regard to it and is considered appropriate in these circumstances, where the content is operational and practical in nature. The level of detail that is required in the guidance is beyond that which would normally be contained in primary legislation and it is considered that such an operational resource should not take up parliamentary time.

Choice of Procedure

10. There is no parliamentary procedure.

**Section 3 – inserted section 5Q – Guidance relating to female genital mutilation protection orders**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: guidance**

**Parliamentary procedure: none**

Provision

11. Section 3 inserts new section 5Q into the 2005 Act to require Scottish Ministers to publish guidance about female genital mutilation protection orders and to specify to whom the guidance applies. The section provides that a person exercising public functions to whom guidance is given must have regard to it.

Reason for taking power

12. It is considered necessary for Ministers to issue guidance in relation to FGM Protection Orders. The guidance will ensure that there is clarity about the responsibilities of those covered by the Bill under FGM Protection Orders. Those exercising public functions will be obliged to have regard to such guidance and this will better ensure that public bodies work effectively and collaboratively. Guidance provides a responsive and flexible way of supporting those who must have regard to it and is considered appropriate in these circumstances, where the content is operational and practical in nature. The level of detail that is required in the guidance is beyond that which would normally be contained in primary legislation and it is

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considered that such an operational resource should not take up parliamentary time.

Choice of Procedure

13. There is no parliamentary procedure.

**Section 7 – inserted section 7B – Ancillary provision under the 2005 Act**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations**

**Parliamentary procedure: Affirmative procedure if it amends the text of an Act, otherwise negative procedure**

**Provision**

14. Section 7 inserts new section 7B into the 2005 Act which provides the Scottish Ministers with the power to make supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with or for giving full effect to the 2005 Act.

**Reason for taking power**

15. A body of new law such as that inserted into the 2005 Act by section 1 of the Bill may give rise to a need for a range of ancillary provisions. This power is necessary to allow flexibility as provisions in the Bill are brought into force. The power, whilst potentially wide is limited to the extent that it can only be used if Scottish Ministers consider it appropriate to do so. This power could, for example enable Scottish Ministers to deal with unforeseen events which may arise in the interaction between the Female Genital Mutilation Protection Order process and the wider court system. Without the power to make ancillary provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with technical, operational or implementation matters in order to give full effect to the original Bill. That would not be an effective use of either the Parliament's time or resources.

**Choice of procedure**

16. Where the power is used to modify primary legislation, it would require the level of Parliamentary scrutiny attached to the affirmative procedure. Other uses will require the negative procedure which would be

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the normal procedure for the exercise of these powers. These procedures are typical for ancillary powers.

## Section 10 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: laid only

Provision

17. Section 10(1) provides that the sections of the Bill listed come into force on the day after Royal Assent. Other provisions of the Bill will come into force at a time set by the Scottish Ministers through regulations. Section 10(3) provides that such regulations may include transitional, transitory or savings provision and make different provision for different purposes.

Reason for taking power

18. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. It is also necessary to ensure that commencement regulations can also make provision for effective transitional arrangements when provisions of the Bill are brought into force and to ensure that provisions of the Bill can be commenced for different purposes.

Choice of procedure

19. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010.

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