

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

EXPLANATORY NOTES

FEMALE GENITAL MUTILATION PROTECTION ORDERS

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.