

FORCED MARRIAGE ETC. (PROTECTION AND JURISDICTION)(SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Forced Marriage Protection Orders

Section 1: Forced marriage protection orders

5. Subsection (1) enables the Court of Session or a sheriff to make a forced marriage protection order for the purposes of protecting a person from being forced or from any attempt to force the person into a marriage, or protecting a person who has been forced into a marriage.
6. Subsections (2) and (3) set out the issues that the court must consider when deciding whether to make an order and the type of order that should be made.
7. Subsection (4) describes what a forced marriage means for the purposes of Part 1. Subsection (5) makes it clear that the conduct which forces a person into marriage does not have to be directed against that person and includes, for example, circumstances in which the perpetrator threatens to commit suicide if the person does not submit to the marriage.
8. Subsection (6) defines “force” to include coercion by physical, verbal or psychological means, threatening conduct, harassment or other means. This would include, for example, coercion by the threat of blackmail and coercion by other means which may involve the use of deception. It is also “force” to knowingly take advantage of a person’s incapacity to consent to marriage or to understand the nature of the marriage.

Section 2: Contents of orders

9. Subsection (1) provides that the court may make an order containing any terms that are considered appropriate for the purposes of protecting a person from being forced into a marriage or who has been forced into a marriage. Subsection (3) gives some examples.
10. Subsection (2) makes it clear that the terms of the order may relate to conduct outwith, as well as within, Scotland. It also makes it clear that, in addition to persons who force or attempt to force a person to enter into a marriage, the terms of the order may relate to persons who are, or may become, involved in other respects. Subsection (4) provides examples of such involvement.

Section 3: Applications for orders

11. Subsection (1), read with subsection (2), provides that the person to be protected or a relevant third party can apply for a forced marriage protection order without leave to the court. Subsection (7) defines “relevant third party” to mean a local authority, the Lord Advocate or a person specified by order made by the Scottish Ministers.

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12. Subsection (2) provides that any other applicant must first get the permission of the court before they are able to make an application and subsection (3) sets out the criteria that the court must consider in deciding whether to grant permission.
13. Subsections (5) and (6) provide that applications to a sheriff are to be made by summary application to the sheriff in whose sheriffdom the person to be protected is ordinarily resident or, if the protected person is not ordinarily resident in Scotland, to the sheriff of the sheriffdom of Lothian and Borders at Edinburgh.

Section 4: Power to make orders without application, etc.

14. Subsection (1) enables the court to make a forced marriage protection order on its own initiative if, in civil proceedings before the court, the court considers that an order should be made to protect a person, provided that a person who would be a party to any proceedings for the order is also a party to the civil proceedings currently before the court. In subsection (1), “court” means the Court of Session or the sheriff.
15. Subsection (2) provides that, in criminal proceedings before the sheriff or the High Court of Justiciary, if the court considers that a forced marriage protection order should be made to protect a person, the sheriff or the High Court may refer the matter to the Lord Advocate who may apply for an order or take such other steps as are appropriate.

Section 5: Interim orders

16. This section enables the court to make interim orders in the absence of a person who is, or would be, a party to proceedings for the order where it considers it is equitable to do so. In deciding whether to make an interim order, the court must have regard to all the circumstances including any risk of significant harm if the order is not made immediately.

Section 6: Duration of orders

17. This section provides that where the court specifies, in a forced marriage 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 recalled under section 7 or extended under section 8). If no period is specified, the order has effect until it is recalled.

Section 7: Variation and recall of orders

18. This section provides for the variation and recall of orders. A person mentioned in subsection (1) who wishes to vary or recall an order must apply to the court. But, under subsection (4), no application is necessary in the case of orders made by virtue of section 4(1). The court can vary or recall such orders on its own initiative.
19. “Other persons affected by the order”, for the purposes of section 7(1)(c), may include individuals who are not directly involved in an order but are otherwise affected by it. For example, applicants for variation or recall of an order might include persons such as a sibling of someone who is required to be taken to a place of safety and other persons who are required to disclose certain information or take steps to facilitate the protection of a person.

Section 8: Extension of orders

20. This section provides for extensions to the period for which an order has effect. A person mentioned in subsection (3) who wishes to extend an order must apply to the court. But, under subsection (6), no application is necessary in the case of orders made by virtue of section 4(1). The court can extend such orders on its own initiative.
21. “Other persons affected by the order”, for the purposes of section 8(3)(c), may include the persons referred to above in relation to section 7(1)(c).

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Section 9: Offence of breaching order

22. This section makes it a criminal offence to breach a forced marriage protection order and sets out the penalties that may be imposed. It also provides that a constable may arrest without warrant any person the constable reasonably believes is committing or has committed an offence under this section.

Section 10: Power to apply Part to civil partnerships

23. This section enables the Scottish Ministers to make provision by order to apply the provisions (or particular provisions) in Part 1 to forced civil partnerships, with such modifications as are considered necessary.

Section 11: Guidance

24. This section provides that the Scottish Ministers must issue guidance to such persons as they consider appropriate about the effect of any of the provisions in Part 1 before section 1 comes into force. This section also provides that the Scottish Ministers may, if they wish, give guidance to such persons as they consider appropriate on other matters relating to forced marriage (such as practitioner guidance covering information sharing, data collection, risk assessment and safety planning that will assist those working with victims of forced marriage to ensure their safety). A person exercising public functions to whom any such guidance is given must have regard to it in exercising those functions.

Section 12: Other protection or assistance against forced marriage

25. This section provides that Part 1 does not affect any other protection or assistance already available including, in particular, the matters listed in subsection (2).

Section 13: Amendment of Children's Hearings (Scotland) Act 2011

26. This section amends section 62(5) of the Children's Hearings (Scotland) Act 2011 to enable the court, in the course of any proceedings under Part 1 of the Act, to refer certain matters to the Principal Reporter if it considers that any ground in section 67(2) of the 2011 Act applies. It also amends the grounds in section 67(2) to establish a separate ground in respect of a child being forced into a marriage, "force" being construed in accordance with section 1 of the Act.

Section 14: Interpretation of Part

27. This section defines various terms and expressions used in Part 1.

Part 2: Declarators of Nullity of Marriage in Sheriff Court

Section 15: Action of declarator of nullity in sheriff court: jurisdiction

28. This section amends section 8 of the Domicile and Matrimonial Proceedings Act 1973 to set out the jurisdiction of the sheriff courts in relation to declarators of nullity of marriage.

Part 3: General

Section 16: Ancillary provision

29. This section enables the Scottish Ministers, by order, to make incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes, or in consequence, of any provision of the Act.

Section 17: Subordinate legislation

30. This section regulates the powers conferred on the Scottish Ministers to make orders. It requires these powers to be exercised by statutory instrument and also establishes the type of Parliamentary procedure which applies to these instruments. This is modified by schedules 2 and 3 to the Interpretation and Legislative Reform (Scotland) Act 2010. Those schedules apply to Acts of the Scottish Parliament (including the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, the Bills for which were passed before 6 April 2011.

Section 18: Crown application

31. By virtue of section 20(1) of the Interpretation and Legislative Reform (Scotland) Act 2010, the provisions of the Act bind the Crown except in so far as section 18 provides otherwise. Section 18 provides that the Crown cannot be held criminally liable for breaching a forced marriage protection order (or for contravening any provision made by virtue of section 10, such as breaching a forced civil partnership protection order). However, the Court of Session may, on a relevant application, declare unlawful any such breach or contravention by the Crown. Subsection (3) provides that the Crown immunity under subsection (1) does not extend to persons in the public service of the Crown. Subsection (4) provides that nothing in the Act affects Her Majesty in her private capacity.

Section 19: Short title and commencement

32. **Section 19** (which comes into force on the day after Royal Assent) provides that the other sections of the Act come into force on such day as the Scottish Ministers may by order appoint. By virtue of section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010, this power may be exercised so as to appoint different days for different purposes for the coming into force of the provisions of the Act.