

# SERIOUS CRIME BILL

## EUROPEAN CONVENTION ON HUMAN RIGHTS

### SUPPLEMENTARY MEMORANDUM BY THE MINISTRY OF JUSTICE

#### **Introduction**

This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to further Government amendments to the Serious Crime Bill tabled for Lords Report stage. The memorandum has been prepared by the Ministry of Justice.

#### **Failure to protect a girl at risk of Female Genital Mutilation (“FGM”)**

1. New clause “*Offence of failing to protect girl from risk of genital mutilation*” amends the Female Genital Mutilation Act 2003 (“the 2003 Act”) by inserting a new section 3A. This contains a new offence of failing to protect a girl at risk from becoming a victim of FGM. This new offence is intended to strengthen protection for those at risk of FGM.

#### ***Article 3 and 8***

2. By strengthening protection for those at risk of FGM, the Government considers that the amendment will advance both a person’s Article 3 rights not to suffer inhuman or degrading treatment, and also Article 8 rights to bodily integrity.

#### ***Article 6***

3. In relying on the defences under new section 3A(5), the accused will be required to discharge an evidential burden to ensure his or her defence is in issue. The Government is satisfied that the placement of an evidential burden on the accused is compatible with his or her Article 6 rights: see *R v Bianco* [2001] EWCA Crim 2516 and *Sheldrake v DPP* [2005] 1 AC 264.

#### ***Article 7***

4. The Government is similarly satisfied that Article 7 rights are protected, by the transitional provision in an amendment to clause 71. By virtue of that transitional provision, the reference to a genital mutilation offence in new section 3A(8) will not include an FGM offence committed before the coming into force of new clause “*Offence of failing to protect girl from risk of genital mutilation*”. Further, the prosecution may not rely on acts or omissions which occurred during a period of time before the coming into force of the new clause in order to defeat an accused’s defence that he or she took reasonable steps to protect the girl from being a victim of an FGM offence.

### *Article 8*

5. The offence will most often be committed by people with a close familial or personal relationship to the victim. The Government has therefore considered possible interference with the accused's Article 8 family rights. Article 8 rights may be limited to the extent necessary in a democratic society for the protection of the rights and freedoms of others. The Government is clear that this new offence is a necessary and proportionate measure to offer enhanced protection to those at risk of suffering FGM, aimed as it is at protecting the rights and health of girls at risk of FGM. The Government is satisfied that the offence would not represent an unnecessary interference with an accused's right to respect for family life.

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6. Insofar as the measure criminalises the behaviour of those who do not adequately protect children from FGM, it supports the United Kingdom's commitments, in particular those under Articles 19 and 24(3).

### **Anonymity of victims of FGM**

7. An amendment to clause 67 inserts new Schedule 1 into the 2003 Act. This provides for anonymity for the alleged victim where an allegation has been made that an offence under the 2003 Act has been committed. Publication of matter that is likely to allow the public to identify the alleged victim is prohibited, and those responsible for the publication are guilty of a criminal offence.

### *Article 10*

8. Article 10 provides the right to freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference.
9. Paragraph 2 of new Schedule 1 to the 2003 Act makes it an offence to include in any publication any matter likely to lead members of the public to identify a person who is alleged to be the victim of an FGM offence. This engages Article 10.
10. Public knowledge of the indignity and violation which the person is alleged to have suffered may be extremely distressing and harmful. The risk of publicity can operate as a significant deterrent to a victim reporting an offence and to securing evidence at court. Restrictions on reporting matters that would lead to identification of the victim pursue the legitimate aims under Article 10 of protecting the rights of the victim as well as that of preventing crime. Paragraph 1(4) of new Schedule 1 to the 2003 Act, however, also allows a court to disapply the reporting restriction, by direction, where a person's defence would be substantially prejudiced if the direction was not made or the effect of the anonymity provision is to impose a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to remove or relax the restriction.

11. The Government is therefore satisfied that any restriction on Article 10 rights is justified as a proportionate means of achieving the legitimate aim of protecting a victim's rights, while increasing the possibility of bringing proceedings against people accused of FGM offences (see by way of analogy *Gordon Brown v UK* (2002) E.H.R.R. 35).

#### **Article 6**

12. The offence of breaching the prohibition on publication as drafted is constructed as a strict liability offence with statutory defences. However, the Government recognises that paragraphs 3(2) and (3) of new Schedule 1 to the 2003 Act may be viewed as imposing a reverse legal burden on the defence, and so Government has considered the compatibility of paragraph 3(2) with Article 6.

13. The imposition of a reverse burden does not in principle represent an infringement of a defendant's rights under Article 6(2) (*Gordon Brown v UK* (2002) 35 E.H.R.R.). In *Sheldrake v DPP* [2005] 1 AC 264, the House of Lords held that both *Lambert* [2002] 2 AC 545 and *Johnstone* [2003] 1 WLR 1736 should be regarded as the primary domestic authorities on reverse burdens. The domestic authorities make it clear that whether statutory provision imposing a reverse legal burden is compatible with Article 6(2) varies according to the particular offence and the underlying policy objective in question. An assessment must be made of whether the provision is objectively justified and proportionate (*Lambert*).

14. In the case of *Lambert* Lord Steyn approached the question of a reverse burden's compatibility with Article 6 in three stages. First, whether the provision interfered with Article 6(2) ECHR. Secondly, whether there was an objective justification for such interference. Thirdly, whether the interference was proportionate.

15. In reviewing the offence, regard must be had to the punishment which may result and to the extent and nature of the factual matters which the defendant must prove, how readily provable by him or her they are and their relative importance to the matters required to be proved by the prosecution (*Johnstone*).

16. The Government is satisfied about the compatibility of these provisions with Article 6 under the relevant case law. There exists a clear and objective justification for the reversal. The policy aim behind the offence is to encourage victims to report FGM offences committed against them, and to increase the number of prosecutions for FGM, by helping to ensure the victim feels safe in their anonymity if they report a crime against them. There is a strong public interest in achieving this. FGM is an abhorrent practice, and this is an important part of a package of measures to further the Government's commitment to prevent and end it. The reverse burden imposed invites the defendant in a particular case to justify their publication of matter identifying the alleged victim of FGM on the basis that they were not aware and did not suspect or have reason to suspect that an allegation had been made or that the publication contained matter likely to lead members of the public to identify the alleged victim. These matters to be proven on the balance of probabilities are matters within the knowledge of the defendant.

17. In these circumstances, and bearing in mind the consequences of a breach and the nature of the penalty which can be imposed, the Government considers that this burden on the defence is both justified and proportionate.

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18. The measure supports the United Kingdom commitments, in particular those under Articles 16, 19 and 24.

### **Female Genital Mutilation Protection Orders**

19. New clause “*Female genital mutilation protection orders*” amends the 2003 Act by inserting new section 5A and Schedule 2. These provide for FGM protection orders. The provisions closely follow the model of forced marriage protection orders provided for in Part 4A of the Family Law Act (as inserted by the Forced Marriage (Civil Protection) Act 2007). The new clause also gives the court the power to make an FGM protection order in criminal proceedings for a genital mutilation offence without an application being made to it. These new provisions are intended to strengthen protection for those at risk of FGM.

### ***Article 3 and 8***

20. The Government considers that in affording enhanced protection for those victims, and potential victims, of genital mutilation offences the new FGM protection orders will advance both a person’s Article 3 rights not to suffer inhuman or degrading treatment, and also Article 8 rights to bodily integrity.

### ***Article 6***

21. Paragraph 5 of new Schedule 2 provides for ex parte FGM protection orders to be made in England and Wales (paragraph 22 of the Schedule makes similar provision for Northern Ireland). The respondent will subsequently be given an opportunity to make representations as to such an order at an on notice hearing as soon as just and convenient (paragraph 5(3) and (4)). The respondent is also able to vary or discharge an FGM protection order in accordance with paragraph 6 of new Schedule 2. The government is satisfied these provisions are compliant with a respondent’s Article 6 rights.

### ***Article 8***

22. FGM protection orders will often be made in relation to respondents with a close familial or personal relationship to the victim. The Government has therefore considered possible interference with the respondent’s Article 8 family rights. Article 8 rights may be limited to the extent necessary in a democratic society for the protection of the rights and freedoms of others. The Government is clear that this new provision is a necessary and proportionate measure to offer enhanced protection to those at risk of suffering FGM, aimed as it is at protecting the rights and health of girls at risk of FGM. The Government is satisfied that the provision

would not represent an unnecessary interference with a respondent's right to respect for family life.

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23. The measure supports the United Kingdom commitments, in particular those under Articles 19 and 24.

**Ministry of Justice**

**20 October 2014**