

SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

TERRITORIAL EXTENT

Part 5: Protection of Children and Others

Commentary on Sections

Section 72: Offence of failing to protect girl from risk of genital mutilation

287. *Subsection (2)* inserts a new section 3A into the 2003 Act which creates a new offence of failing to protect a girl under the age of 16 from risk of genital mutilation. A person is liable for the offence if they are responsible for a girl at the time when an offence under section 1, 2 or 3 of the 2003 Act is committed against the girl (and genital mutilation has actually occurred) (new section 3A(1)). The term “responsible” is defined in new section 3A(2) to (4) and (7). It covers two classes of person. First, a person who has parental responsibility for the girl and has frequent contact with her. Parental responsibility is defined in section 2 of the Children Act 1989 (in the case of England and Wales) and includes the mother and father of a child where they were married at the time of the child’s birth, the mother of a child where she was not married to the father at the time of the child’s birth, and the father of a child where he was not married to the mother at the time of the child’s birth but had subsequently acquired parental responsibility in accordance with the provisions of the Children Act 1989. More than one person may have parental responsibility for the same child at any one time so, for example, both birth parents could be liable for the offence. A person with parental responsibility for a girl would not be liable for the offence if that person did not have frequent contact with the girl. So, for example, where the parents of a girl were separated and lived apart with one parent having little or no contact with the daughter, that parent would not be liable for the offence. It would be for the courts to determine on the facts of the case whether the level of contact amounted to “frequent contact”.
288. The second class of person who may be held to be responsible for a girl who has been subject to genital mutilation is any adult who has assumed responsibility for caring for the girl in the manner of a parent. This might include, for example, grandparents where the girl has gone to stay with them for an extended summer holiday. In such circumstances those persons with parental responsibility for the girl would continue to be liable for the offence as a result of new section 3A(7). Conversely, a babysitter who was looking after a girl overnight could not be said to have assumed responsibility for the girl in the manner of a parent.
289. New section 3A(5) and (6) provide for two defences. The first defence is that the defendant did not think that there was a significant risk of the girl being subject to FGM and could not reasonably have been expected to be aware that there was any such risk. What constitutes a “significant” risk will take its ordinary meaning. The second defence is that the defendant took reasonable steps to protect the girl from being the victim of FGM. What would constitute reasonable steps would depend on the circumstances of the case. It would be for the magistrate or the jury to decide, as the case may be, whether the risk was “significant” or whether any steps taken to prevent FGM taking place were

*These notes refer to the Serious Crime Act 2015 (c.9)
which received Royal Assent on 3rd March 2015*

reasonable. The evidential burden will apply to the defence, that is, it will be enough for a defendant to produce sufficient evidence for the matter to be considered by the jury; it would then be for the prosecution to demonstrate to the criminal standard of proof, namely beyond reasonable doubt, that the defence has not been made out.

290. *Subsection (3)* amends section 4 of the 2003 Act so that the new offence has extra-territorial application.
291. *Subsection (4)* amends section 5 of the 2003 Act so as to provide for the penalties for the new offence. The new offence will be triable either way. As a result of new section 5(2) of the 2003 Act and the transitional provision in section 86(14)(c), the maximum penalty on summary conviction of the offence in England and Wales and Northern Ireland will be six months' imprisonment. On the commencement of section 154(1) of the Criminal Justice Act 2003, the maximum sentence on summary conviction in England and Wales will rise to 12 months. On conviction on indictment, the maximum sentence is seven years' imprisonment.