

SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

TERRITORIAL EXTENT

Part 5: Protection of Children and Others

Background

248. Section 1 of the Children and Young Persons Act 1933 (“the 1933 Act”) provides for an offence of child cruelty. The offence is committed where a person over the age of 16, who has responsibility for a child under that age, wilfully assaults, ill-treats, abandons, exposes or neglects that child, in a manner likely to cause unnecessary suffering or injury to health.
249. In April 2012 the charity, Action for Children, launched a campaign calling for a reform of section 1 of the 1933 Act. It published a report, “Keeping children safe: The case for reforming the law on child neglect”¹, which argued that the criminal law on child cruelty was out of date and failed adequately to protect children. In particular, Action for Children argued that the existing offence, as interpreted by front line professionals, only covered physical and not psychological harm.
250. In support of the campaign, the late Paul Goggins MP tabled a new clause for debate at Committee stage of the Crime and Courts Bill on 12 February 2013 (Public Bill Committee, Official Report, column 444 to 456). In response to that debate, the then Minister for Policing and Criminal Justice, Damian Green MP, undertook to consider evidence that the current law is not working. Subsequent to this, Mark Williams MP introduced a Private Member’s Bill – the Child Maltreatment Bill² – in June 2013, but the Bill made no further progress. In October 2013, the Ministry of Justice undertook a targeted engagement exercise seeking views from a range of professionals. In the light of that exercise, the Government accepted that the offence could be more clearly expressed so as to include psychological suffering or injury. Section 66 amends section 1 of the 1933 Act to this end. The section also updates the deeming provision in section 1(2) of the 1933 Act which relates to the suffocation of an infant under three years when the child is in bed with a drunken person.
251. At Lords Third Reading, the Home Office Minister, Lord Bates, undertook to consider further an amendment tabled by Lord Harris of Haringey which sought to enhance the protection of children by creating a new offence to criminalise adults who communicate sexually with children (Hansard, 5 November 2014, columns 1621-1633). Lord Harris’s amendment was prompted by the “Flaw in the Law” campaign by the National Society for the Prevention of Cruelty to Children which argued that a new offence was needed to capture those who communicate sexually with a child or who invite a child to communicate sexually with them.
252. There are a number of existing offences that could be prosecuted in relation to this kind of behaviour, depending on the circumstances. For example:

¹ <http://resourcecentre.savethechildren.se/sites/default/files/documents/5896.pdf>

² <http://services.parliament.uk/bills/2013-14/childmaltreatment.html>

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- Sections 8 and 10 of the Sexual Offences Act 2003 make it an offence to cause or incite a child under 13 or 16 respectively to engage in sexual activity. These offences could apply where a communication with a child (whether sexual or not) could be shown to have caused or incited some kind of sexual activity by the child including, for example, naked or semi-naked posing.
- Section 127 of the Communications Act 2003 makes it an offence to send a message by means of a public electronic communications network (including the internet) if its content is grossly offensive, indecent, obscene or menacing. Depending on the content of the message, this offence could apply where sexual messages or messages seeking a sexual response are sent to a child by some form of electronic communication, such as text, e-mail or phone (although it would not cover non-electronic written messages or verbal communication, or electronic messages sent by a private network such as a school intranet).
- The publication of sexual material to a child or children may amount to an offence under the Obscene Publications Act 1959.

These existing offences are, however, unlikely to apply if a communication (for example in the form of an e-mail or a text message) sent to a child contains sexual content but does not in any way ask the child to engage in sexual activity and does not contain grossly offensive, indecent, obscene or menacing content. In addition, a conviction for an offence under section 127 of the Communications Act 2003 or under the Obscene Publications Act 1959 does not automatically trigger the notification requirements in Part 2 of the Sexual Offences Act 2003 (that is, to sign on the “sex offenders’ register”).

253. The Prime Minister announced at the ‘WeProtect’ Summit³ on 11 December 2014 that the Government would bring forward an amendment to the Bill that became this Act to provide for a new offence of sexual communication with a child. Section 67 provides for such an offence.
254. The Female Genital Mutilation Act 2003 (“the 2003 Act”), which extends to England and Wales and Northern Ireland, and the Prohibition of Female Genital Mutilation (Scotland) Act 2005, which extends to Scotland, and before them the Prohibition of Female Circumcision Act 1985, provide for an offence of female genital mutilation (“FGM”). FGM involves procedures which include the partial or total removal of the external female genital organs for non-medical reasons. The practice is medically unnecessary, extremely painful and has serious health consequences, both at the time when the mutilation is carried out, and in later life. Section 4 of the 2003 Act provides that the section 1 offence of FGM (and the related offences, in sections 2 and 3 of the 2003 Act, of helping a girl to perform FGM on herself and of assisting a non-UK person to perform FGM overseas) extend to acts done outside of the UK by UK nationals or permanent UK residents. There has not yet been a conviction under the 2003 Act.
255. On 18 December 2013, the Home Affairs Select Committee launched an inquiry into FGM, including the effectiveness of the current legislative framework. The Committee published the written evidence it had received on 25 February 2014⁴. That evidence included separate submissions from the Director of Public Prosecutions, Association of Chief Police Officers and Metropolitan Police which argued for, amongst other things, a change in the law to enable prosecutions under the 2003 Act of non-permanent UK residents.

³ <https://www.gov.uk/government/speeches/weprotect-children-online-global-summit-prime-ministers-speech>

⁴ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/140225-fgm-memos/>. The Home Affairs Select Committee subsequently published its report on the conclusion of its inquiry – “Female genital mutilation: the case for a national action plan”, Second Report of Session 2014-15 (HC 201). The Government response was published in December 2014 (Cm 8979).

256. On 6 February 2014, the Government announced a **range of measures to combat FGM** to mark the International Day of Zero Tolerance⁵. Those measures included a commitment to consider any recommendation from the Crown Prosecution Service to strengthen the criminal law on FGM. Section 70 amends the 2003 Act (and the Prohibition of Female Genital Mutilation (Scotland) Act 2005) to extend extra-territorial jurisdiction for the offences under that Act to persons habitually resident in the UK.
257. The Government announced further measures to tackle FGM at the “Girl Summit” on 22 July 2014, including granting victims of FGM lifelong anonymity from the time an allegation is made, a new offence so that parents can be prosecuted if they fail to prevent girls being subjected to FGM and, subject to consultation, a new civil protection order and the introduction of a duty on certain professionals to report “known” cases of FGM. The Ministry of Justice launched a consultation on the day of the Girl Summit on whether and how a civil protection order could work alongside the criminal legislation to protect potential victims of FGM. The consultation closed on 19 August 2014; 88 responses were received⁶. The Home Office launched a second consultation on 5 December 2014 on how to introduce mandatory reporting for FGM. The consultation closed on 12 January 2015; 147 responses were received⁷. Sections 71 to 75 give effect to these further proposals.
258. The Home Office launched a consultation on 20 August 2014 seeking views on whether the law on domestic abuse needs to be strengthened. The consultation closed on 15 October 2014; 757 responses were received⁸. On 18 December 2014, the Home Secretary announced in a written ministerial statement (Hansard, columns 132WS-133WS) that the Government would be tabling amendments to the Bill that became this Act to strengthen the protection afforded to the victims of domestic abuse. Section 76 provides for a new domestic abuse offence.

Commentary on Sections

Section 66: Child cruelty offence

259. This section makes four changes to the offence of child cruelty in section 1 of the 1933 Act.
260. *Subsection (2)* clarifies that the ill-treatment limb of the offence is engaged whether the ill-treatment is physical or non-physical in nature.
261. *Subsection (3)* makes it explicit on the face of section 1 what is already implicit, namely that the section 1 offence applies regardless of whether the suffering or injury caused to a child as a result of one or more acts of abuse or neglect was physical or psychological in nature. At the same time, the amendment made by this subsection removes the non-exhaustive list of the type of injury which the conduct must be likely to cause (on the grounds that “injury to or loss of sight, or hearing, or limb, or organ of the body” all self-evidently amount to physical harm) and the reference to “mental derangement” (on the grounds that the term is archaic and rendered redundant by the express reference to psychological suffering or injury).
262. *Subsection (4)* replaces the outdated reference in section 1(1) of the 1933 Act to “a misdemeanour” with a reference to “an offence”; section 1 of the Criminal Law Act 1967 abolished the then distinction between a felony (a term applied to more serious crimes) and a misdemeanour.

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/295056/HMG_FGM_Declaration.pdf

⁶ The consultation and summary of responses is available at: https://consult.justice.gov.uk/digital-communications/female-genital-mutilation-proposal-to-introduce-a/consult_view

⁷ A summary of the responses to the consultation is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380125/MultiAgencyPracticeGuidelinesNov14.pdf

⁸ The consultation response is available at: <https://www.gov.uk/government/consultations/strengthening-the-law-on-domestic-abuse>

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263. *Subsection (5)* amends subsection (2)(b) of section 1 of the 1933 Act, which deals with the suffocation of a child under three years when the child is in bed with a drunken person. The origin of subsection (2)(b) was concern about mothers becoming drunk on gin. Where it is proved that a child has died of suffocation whilst sharing a bed with a person who went to bed under the influence of drink, subsection (2)(b) deems that person to have neglected the child in a manner likely to cause injury to its health under subsection (1). Subsection (5) amends section 1(2)(b) of the 1933 Act to extend the circumstances under which the death of an infant under three occurs so that the deeming provision also applies where the infant was sleeping with a person aged 16 or over who was under the influence of a prohibited drug. New subsection (2B) of section 1 of the 1933 Act (as inserted by *subsection (6)*) defines a prohibited drug as a drug the possession of which immediately before taking it constituted an offence under section 5(2) of the Misuse of Drugs Act 1971 (“the 1971 Act”); that provision makes it an offence for a person to have a controlled drug in their possession, subject to any defence in section 28 of the 1971 Act or exceptions prescribed in regulations made under section 7 of that Act. The [Misuse of Drugs Regulations 2001 \(SI 2001/3998\)](#) provide, amongst other things, that a person may lawfully possess a controlled drug for administration for medical, dental or veterinary purposes in accordance with the directions of the prescriber (unless the drug was obtained by fraud). Accordingly, the modified deeming provision would not apply where a person had taken prescribed medication in accordance with his or her doctor’s instructions.
264. Subsections (5) and (6) also amend section 1(2)(b) of the 1933 Act so that it covers circumstances where an infant suffocates whilst an adult is lying next to him or her on any kind of furniture or surface being used for the purpose of sleeping. It also has effect where the adult in question went to sleep under the influence of the relevant substance (drink or a prohibited drug) irrespective of the state the adult was in when they and the child first occupied the furniture or other location where they were sleeping together.
265. Section 1 of the 1933 Act as amended will read as follows (additions in italics) –
- “(1) If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats (*whether physically or otherwise*), neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated (*whether physically or otherwise*), neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement) (*whether the suffering or injury is of a physical or psychological nature*), that person shall be guilty of a misdemeanour *an offence*, and shall be liable—
- (a) on conviction on indictment, to a fine or alternatively, or in addition thereto, to imprisonment for any term not exceeding ten years;
- (b) on summary conviction, to a fine not exceeding the prescribed sum, or alternatively, or in addition thereto, to imprisonment for any term not exceeding six months.
- (2) For the purposes of this section—
- (a) a parent or other person legally liable to maintain a child or young person, or the legal guardian of a child or young person, shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf;
- (b) where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant) while the infant was in bed with some other person who has

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attained the age of sixteen years, that other person shall, if he was, when he went to bed *or at any later time before the suffocation*, under the influence of drink *or a prohibited drug*, be deemed to have neglected the infant in a manner likely to cause injury to its health.

- (2A) *The reference in subsection (2)(b) to the infant being “in bed” with another (“the adult”) includes a reference to the infant lying next to the adult in or on any kind of furniture or surface being used by the adult for the purpose of sleeping (and the reference to the time when the adult “went to bed” is to be read accordingly).*
- (2B) *A drug is a prohibited drug for the purposes of subsection (2)(b) in relation to a person if the person’s possession of the drug immediately before taking it constituted an offence under section 5(2) of the Misuse of Drugs Act 1971.*
- (3) A person may be convicted of an offence under this section—
- (a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;
 - (b) notwithstanding the death of the child or young person in question.”

Section 67: Sexual communication with a child

266. This section inserts a new section 15A into the Sexual Offences Act 2003 which provides for an offence of sexual communication with a child. The offence criminalises conduct where an adult intentionally communicates (for example, by e-mail, text message, written note or orally) with a child under 16 (whom the adult does not reasonably believe to be aged 16 or over) for the purpose of obtaining sexual gratification if the communication is sexual or intended to encourage the child to make a communication that is sexual (new section 15A(1) and (2)). Scenarios likely to be covered by the offence include talking sexually to a child via a chatroom or sending sexually explicit text messages to a child as well as inviting a child to communicate sexually (irrespective of whether the invitation is itself sexual). The new offence is designed to ensure that it does not criminalise, for example, ordinary social or educational interactions between children and adults or communications between young people themselves. The term “sexual gratification” is already used in the context of the offences at sections 11 and 12 of the Sexual Offences Act 2003 which prohibit engaging in sexual activity in the presence of a child and causing a child to watch a sexual act respectively. It is clear from case law in relation to the section 12 offence that this wording would support a successful prosecution where either a defendant made a relevant communication in order to obtain immediate sexual gratification or the obtaining of such gratification was part of a longer term plan or both. The case law also confirms that the term has a wide meaning, stating that the sexual gratification which is alleged may take any of the myriad forms which sexual pleasure or indulgence may take. It is expected that the courts will interpret the reference to sexual gratification in the sexual communication with a child offence in the same way.
267. By virtue of new section 15A(3), and the transitional provision in section 86(14), the maximum penalty on summary conviction of the offence will be six months’ imprisonment. On the commencement of section 154(1) of the Criminal Justice Act 2003, the maximum sentence on summary conviction will rise to 12 months. The maximum penalty on conviction on indictment is two years’ imprisonment.

Section 68: Child sexual exploitation

268. *Subsections (1) to (6) amend the Sexual Offences Act 2003 to remove anachronistic references to “child prostitute”, “child prostitution” and “child pornography”. These terms appear in the titles of sections 48 (causing or inciting child prostitution or pornography), 49 (controlling a child prostitute or a child involved in pornography) and*

50 (arranging or facilitating child prostitution or pornography) of the Sexual Offences Act 2003, while the terms “prostitute”, “prostitution” or “pornography” also appear in the body of those sections (and also in section 51, which defines those terms). The amendments to those sections replace these terms with references to the sexual exploitation of children (and so recognising children as victims), but do not alter the scope of the relevant offences.

269. *Subsection (7)* amends section 1 of the Street Offences Act 1959 so that the offence of loitering or soliciting for the purposes of prostitution applies only to persons aged 18 and over. It, in effect, decriminalises under-18s selling sex in the street and in doing so again recognises children as victims in such circumstances rather than consenting participants (buying sex from an under-18 in any circumstances would remain illegal).

Section 69 and Schedule 3: Possession of paedophile manual

270. This section creates a new offence of possession of a paedophile manual, that is any item containing advice or guidance about abusing children sexually (*subsection (1)*). There are already a number of criminal offences that seek to prevent the possession, creation and distribution of indecent images of children, and the dissemination of obscene material. In particular:

- section 2 of the Obscene Publications Act 1959 makes it an offence to publish (for gain or otherwise) or to possess for publication for gain an obscene article;
- section 1 of the Protection of Children Act 1978 makes it an offence for a person to take, permit to be taken, make, distribute or show, or have in his or her possession with a view to showing or distributing any indecent photograph or pseudo-photograph of a child;
- section 160 of the Criminal Justice Act 1988 makes it an offence to possess an indecent photograph or pseudo-photograph of a child;
- section 63 of the Criminal Justice and Immigration Act 2008 makes it an offence to possess extreme pornographic images; and
- section 62 of the Coroners and Justice Act 2009 makes it an offence to possess a prohibited image of a child.

These existing offences do not criminalise mere possession of material containing advice and guidance about grooming and abusing a child sexually. The new offence plugs this gap in the law.

271. *Subsection (8)* defines the terms “item”, “prohibited item” and “abusing children sexually”. The term “item” has a wide meaning and includes both physical and electronic documents (for example, emails or information downloaded to a computer).

272. *Subsection (2)* sets out a series of defences to the offence of possession of a paedophile manual. They are the same as for other comparable offences, for example, the possession of indecent images of children under section 160(2) of the Criminal Justice Act 1988 and for the possession of extreme pornographic images under section 63 of the Criminal Justice and Immigration Act 2008 (see section 65 of that Act). They are:

- that the person had a legitimate reason for being in possession of the item; this would be a question of fact for the jury to decide on the individual circumstances of a case. It could cover, for example, those who can demonstrate that they have a legitimate work reason for possessing the item;
- that the person had not seen (or listened to) the item in his or her possession and therefore neither knew, nor had cause to suspect, that it contained advice or guidance about abusing children sexually; and

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- that the person had not asked for the item - it having been sent without request - and that he or she had not kept it for an unreasonable period of time; this will cover those who are sent unsolicited material and who act quickly to delete it or otherwise get rid of it.

The standard of proof in making out the defence is the balance of probabilities.

273. As a result of *subsection (3)* and the transitional provision in section 86(14)(b), 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 three years' imprisonment.
274. *Subsection (4)* requires proceedings to be instituted by or with the consent of the Director of Public Prosecutions.
275. *Subsection (5)* applies, in relation to England and Wales, the entry, search, seizure and forfeiture powers in section 4 of and the Schedule to the Protection of Children Act 1978 to paedophile manuals. *Subsection (6)* makes equivalent provision for Northern Ireland.
276. *Subsection (7)* introduces *Schedule 3* to the Act which is designed to ensure that the provisions outlined above which make it an offence to possess a paedophile manual are consistent with the UK's obligations under the E-Commerce Directive⁹.
277. Under Schedule 3 providers of information society services who are established in England and Wales or Northern Ireland are covered by the new offence even when they are operating in other European Economic Area states. Paragraphs 3 to 5 of the Schedule provide exemptions for internet service providers from the offence of possession of a paedophile manual in limited circumstances, such as where they are acting as mere conduits for such material or are storing it as caches or hosts.

Section 70: Offence of female genital mutilation: extra-territorial acts

278. Section 3 of the 2003 Act provides that aiding, abetting, counselling or procuring a person who is not a UK national or permanent UK resident to do a relevant act of female genital mutilation outside the UK in relation to a UK national or permanent resident is an offence. Section 4 of the 2003 Act provides that sections 1 to 3 extend to acts done outside the UK by UK nationals or permanent UK residents.
279. Section 6(3) of the 2003 Act defines a "permanent UK resident" as an individual who is settled in the UK within the meaning of the Immigration Act 1971. Section 33(2A) of the Immigration Act 1971 provides for when a person is to be regarded as settled in the UK. It states:

"Subject to section 8(5) above, references to a person being settled in the United Kingdom are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain.

Section 33(2) explains when a person is to be treated as ordinarily resident and states that:

"Except as otherwise provided a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws.

280. *Subsection (1)(a) and (b)* amends both sections 3 and 4 of the 2003 Act so that they apply to UK nationals and residents rather than, as now UK nationals and permanent UK residents. *Subsection (1)(c)* replaces the definition of a permanent UK resident in

⁹ http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm

section 6(3) of the 2003 Act with a definition of a UK resident; that definition provides that a UK resident is someone who is habitually resident in the UK. The term habitually resident covers a person's ordinary residence, as opposed to a short, temporary stay in a country. To be habitually resident in the UK it may not be necessary for all, or any, of the period of residence here to be lawful¹⁰. Whether a person is habitually resident in the UK will be determined on the facts of a given case. Taken together, paragraphs (a) to (c) of subsection (1) have the effect of broadening the extra-territorial jurisdiction provided for in the 2003 Act so that it will now be possible to prosecute a non-UK national for an offence under sections 1 to 3 of that Act where that person is habitually resident in this country, rather than permanently resident as now. Correspondingly, the section 3 offence will now cover situations where the victim of the FGM procedure is habitually resident. All the offences will continue to apply to UK nationals as is currently the case.

281. The Prohibition of Female Genital Mutilation (Scotland) Act 2005 makes similar provision to the 2003 Act. *Subsection (2)* makes similar amendments as subsection (1) to sections 3, 4 and 6 of that Act.

Section 71: Anonymity for victims of female genital mutilation

282. This section inserts a new section 4A and Schedule 1 into the 2003 Act which make provision for the anonymity of victims of FGM. The provisions are modelled on those in the Sexual Offences (Amendment) Act 1992 which provides for a scheme to protect the anonymity of victims of certain sexual offences, such as rape. Paragraph 1 of new Schedule 1 to the 2003 Act prohibits the publication of any matter that would be likely to lead members of the public to identify a person as the alleged victim of an offence under the 2003 Act (including the new offence provided for in section 72, as well as aiding, abetting, counselling and procuring the "principal offence"). The prohibition lasts for the lifetime of the alleged victim. The prohibition covers not just more immediate identifying information, such as the name and address or a photograph of the alleged victim, but any other information which, whether on its own or pieced together with other information, would help identify the alleged victim. "Publication" is given a broad meaning (see paragraph 9(1) of new Schedule 1) and would include traditional print media, broadcasting and social media such as Twitter or Facebook.
283. Paragraph 1(4) to (8) of new Schedule 1 makes provision for a trial judge to disapply the restrictions on publication. The power to waive the restrictions is limited, in effect, to the circumstances necessary to allow a court to ensure that a defendant receives a fair trial in accordance with Article 6 of the ECHR or to safeguard freedom of expression in accordance with Article 10 of the ECHR.
284. Paragraph 2 of new Schedule 1 makes it a summary offence to contravene the prohibition on publication. The maximum penalty in England and Wales is an unlimited fine (or a level 5 fine (currently £5,000) in Northern Ireland). This is a strict liability offence so it will not be necessary for the prosecution to show that the defendant intended to identify the victim. In relation to newspapers or other periodicals (whether in print form or online editions) and radio and television programmes, the offence is directed at proprietors, editors, publishers or broadcasters rather than individual journalists. Any prosecution for the offence requires the consent of the Attorney General or the Director of Public Prosecutions for Northern Ireland as the case may be.
285. Paragraph 3 of new Schedule 1 provides for two defences. The first is where the defendant had no knowledge of the content of the publication or of the allegation. The second is where the victim (where aged 16 or over) had freely given written consent to the publication. These defences impose a reverse burden on the defendant, that is, it is for the defendant to prove that the defence is made out on a balance of probabilities, rather than imposing a requirement on the prosecution to show, beyond reasonable doubt, that the defence does not apply. The policy aim behind the offence is

10 See *Mark v Mark* [2005] UKHL 42

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. 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 proved on the balance of probabilities are matters within the knowledge of the defendant.

286. Paragraphs 4 to 8 of new Schedule 1 are designed to ensure that the offence provided for in paragraph 2 of the Schedule is consistent with the UK's obligations under the E-Commerce Directive¹¹. Under paragraphs 4 to 8 providers of information society services who are established in England and Wales or Northern Ireland are covered by the new offence even when they are operating in other European Economic Area states. Paragraphs 6 to 8 of the new Schedule provide exemptions for internet service providers from the offence in limited circumstances, such as where they are acting as mere conduits for prohibited material or are storing it as caches or hosts.

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

¹¹ http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm

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 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.

Section 73: Female genital mutilation protection orders

292. *Subsection (1)* inserts new section 5A into the 2003 Act which introduces new Schedule 2 to the 2003 Act (as provided for in *subsection (2)*) which makes provision for FGM protection orders in England and Wales (Part 1 of new Schedule 2) and Northern Ireland (Part 2 of new Schedule 2).
293. Paragraph 1(1) of new Schedule 2 to the 2003 Act provides that the High Court or the family court in England and Wales may make an order (an “FGM protection order”) for the purposes of protecting a girl against the commission of a genital mutilation offence (that is, an offence under sections 1 to 3 of the 2003 Act) or protecting a girl against whom such an offence has been committed (sub-paragraph (1)). An order can be made either to protect a girl at risk of FGM or to protect a girl against whom FGM has been committed. In deciding whether to make an order the court must have regard to all the circumstances including the need to secure the health, safety, and well being of the girl to be protected (sub-paragraph (2)). A ‘girl’ is defined in section 6(1) of the 2003 Act to include a woman.
294. An FGM protection order may contain such prohibitions, restrictions or requirements and such other terms as the court considers appropriate to protect the girl in question (sub-paragraph (3)). This would ensure that the power to make an FGM protection order is broad and flexible and enables the court to include whatever terms it considers necessary to protect the girl. Such terms might include, for example, provisions requiring a person to surrender his or her passport or any other travel document and/or the passport of the girl the order is intended to protect, and prohibiting specified persons from entering into any arrangements, in the UK or abroad, for FGM to be performed on the person to be protected. Such terms may relate to: conduct within and outside England and Wales; to respondents who commit or attempt to commit an FGM offence against a girl; and to others who may become involved in other respects (sub-paragraph (4)). Paragraph 1(5) provides examples of involvement in other respects to include aiding, abetting, counselling, procuring, encouraging or assisting another person to commit, or attempt to commit, a genital mutilation offence or conspiring to commit or attempt to commit such as offence.
295. **Paragraph 1(6)** provides that an FGM protection order may be made for a specified period or to continue indefinitely until varied or discharged (in accordance with the provisions in paragraph 6). This would help to ensure that long-term protection from mutilation remains in place, for example, where the girl to be protected is very young.
296. **Paragraph 2** provides that the court may make an FGM protection order on an application by the person to be protected (the victim), a “relevant third party” (a person,

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

or someone within a class of persons, specified by regulations (subject to the negative resolution procedure by the Lord Chancellor) without needing the leave of the court. The court may also make an FGM protection order on an application by ‘any other person’ with the leave of the court. This paragraph also provides for the court to make an order without an application being made to it, in certain other family proceedings before that court.

297. [Paragraph 3](#) makes provision for a court before which there are criminal proceedings for a genital mutilation offence to make an FGM protection order, without an application being made to it, if a person who would be a respondent to any proceedings for an FGM protection order is a defendant in the criminal proceedings. This would ensure protection for a victim or potential victim of FGM where a defendant is not convicted of the offence but it has emerged that there is a risk of action by the defendant to carry out, procure, abet or assist FGM against the victim (or a person other than the victim); or the defendant is convicted and there is such a risk. An FGM protection order can be made in criminal proceedings to protect a girl at risk, whether or not the girl is the victim of the offence in relation to the criminal proceedings. For example, the younger sister of the victim of a genital mutilation offence could also be protected by the court in criminal proceedings.
298. [Paragraph 4](#) provides that breach of an FGM protection order would be a criminal offence subject to a maximum penalty of five years’ imprisonment on conviction on indictment or a maximum of six months’ imprisonment on summary conviction (rising to 12 months’ imprisonment on commencement of section 154(1) of the Criminal Justice Act 2003 (see the transitional provision in section 86(14)(d)). As an alternative to a prosecution, a breach of an FGM protection order may be dealt with by the civil route as a contempt of court punishable by up to two years’ imprisonment (sub-paragraph (4)).
299. [Paragraph 5](#) provides for ex-parte orders so to allow for the making of an FGM protection order without notice of the proceedings having been given to the respondent, where the court considers it just and convenient to do so. Such an order without notice may be appropriate where there is reason to believe that a respondent may seek to harm a potential victim or remove her from the jurisdiction if given notice of such a hearing or before an on notice hearing could be listed. If an order is made without notice, the respondent must be given an opportunity as soon as just and convenient, to make representations about the order at a return hearing on notice.
300. [Paragraph 6](#) makes provision for the variation and discharge of FGM protection orders. An order may be varied or discharged on an application by any party to the order; the girl being protected by the order; or any other person affected by the order. The court may also vary or discharge an order on its own initiative.
301. [Paragraph 7](#) makes provisions for arrest under warrant. It provides for an interested party to apply to the relevant judge (as defined in paragraph 17(1)) for the issue of a warrant for the arrest of the person if the interested party considers that the person has failed to comply with an FGM protection order; or is otherwise in contempt of court in relation to such an order. This paragraph defines an interested party as the girl being protected by the order; the person who applied for the order or any other person (with leave).
302. [Paragraph 8](#) makes provision about remand of someone arrested as described in paragraph 7. Paragraph 9 makes provision about medical examination and report under remand of such a person. Paragraphs 10 to 14 make further provision for remand.
303. [Paragraph 15](#) provides that the powers of the court in relation to contempt of court arising out of a person’s failure to comply with an FGM protection order, or otherwise in connection with such an order, may be exercised by the relevant judge (defined in paragraph 17(1)).

304. [Paragraph 16](#) makes it clear that nothing in Part 1 of new Schedule 2 to the 2003 Act affects any other protection or assistance available to a girl who is or may become a victim of an FGM offence. For example, there will be occasions where it is appropriate to have prohibited steps orders, non-molestation orders or other protective orders in relation to children in place, alongside FGM protection orders.
305. [Paragraph 17](#) deals with interpretation of the terms in relation to FGM protection orders.
306. Part 2 of new Schedule 2 to the 2003 Act makes equivalent provision, with appropriate modifications, for FGM protection orders in Northern Ireland. In Northern Ireland, the relevant court for making FGM protection orders is either the High Court or a county court (paragraph 24(1)). This is subject to any provision made by virtue of sub-paragraphs (4) or (5) of paragraph 24. Those sub-paragraphs apply, with modifications, the provisions of Article 34(3) to (10) of the [Family Homes and Domestic Violence \(Northern Ireland\) Order 1998 \(SI 1998/1071\)](#) which enable the Department of Justice in Northern Ireland, after consultation with the Lord Chief Justice, to specify, by order (subject to the negative resolution procedure), proceedings which may only be commenced in a specified level of court, a court which falls within a specified class of court, or a particular court determined in accordance with, or specified in, the order. This order-making power would therefore enable the Department of Justice to ensure that proceedings in relation to FGM protection orders are heard in the most appropriate court.
307. [Paragraph 25\(1\)](#) confers a power on the Department of Justice in Northern Ireland, after consultation with the Lord Chief Justice, to enable courts of summary jurisdiction to hear proceedings in respect of FGM protection orders. An order made under paragraph 25(1) may, in particular, make provision in relation to courts of summary jurisdiction corresponding to that made in the Family Homes and Domestic Violence (Northern Ireland) Order 1998, where courts of summary jurisdiction are relevant courts for the purposes of proceedings under that Order (see paragraph 25(2)). Paragraph 25(3) of new Schedule 2 enables an order to make necessary modifications to Part 2 of new Schedule 2 or any other enactment as a consequence of conferring jurisdiction on courts of summary jurisdiction. The order-making power is subject to the affirmative procedure (see paragraph 29(3)).
308. [Paragraph 27](#) makes provision for appeals from the county courts to the High Court. Paragraph 28 confers an order-making power (subject to the negative procedure) on the Department of Justice, after consultation with the Lord Chief Justice, to specify the circumstances in which appeals may be made against decisions to transfer, or propose to transfer, proceedings as a result of an order made under Article 34(5) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998, as applied by paragraph 24(4) and (5) of new Schedule 2 to the 2003 Act.

Section 74: Duty to notify police of female genital mutilation

309. This section inserts a new section 5B into the 2003 Act. The new section would place a duty on persons who work in a “regulated profession” in England and Wales, namely healthcare professionals, teachers and social care workers, to notify the police when, in the course of their work, they discover that an act of female genital mutilation appears to have been carried out on a girl who is under 18 (new section 5B(1), (2) and (5)). The duty would not apply where a previous notification has been made by someone in the same profession in respect of a victim (new section 5B(6)). The term “discovers” in this context would cover circumstances either where the victim specifically discloses to the regulated professional that she has been the subject of FGM, or where the regulated professional has observed the physical signs of FGM (new section 5B(3) and (4)). A notification made under new section 5B would not breach any duty of confidence or other restriction on the disclosure of information (new section 5B(7)).
310. New section 5B(8) to (10) provides for a regulation-making power (subject to the affirmative procedure) to enable the Secretary of State to add to, remove from,

or otherwise alter, the description of persons regarded as working in a “regulated profession”.

Section 75: Guidance about female genital mutilation

311. This section inserts new section 5C into the 2003 Act which confers a power on the Secretary of State to issue, and from time to time revise, guidance about the effect of any provision of that Act or about other matters relating to FGM (new section 5C(1) and (6)). In preparing such guidance, the Secretary of State is required to consult the Welsh Ministers so far as the guidance is to a body exercising devolved Welsh functions, and such other persons as he or she considers appropriate (new section 5C(4) and (5)). Persons exercising public functions to whom the guidance is given would be under a duty to have regard to the guidance when exercising such functions (new section 5C(2)).

Section 76: Controlling or coercive behaviour in an intimate or family relationship

312. This section provides for a new offence criminalising controlling or coercive behaviour in an intimate or family relationship where the behaviour has a serious effect on the victim (*subsection (1)*). The new offence would not apply where the behaviour in question is perpetrated by a parent, or a person who has parental responsibility, against a child under 16 (*subsection (3)*). This is because the criminal law, in particular the child cruelty offence in section 1 of the Children and Young Persons Act 1933 as amended by section 66 of the Act, already covers such behaviour. *Subsections (8) to (10)* provide for a limited defence where the accused believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable. The defence would not be available where a victim has been caused to fear violence (as opposed to being seriously alarmed or distressed). This defence is intended to cover, for example, circumstances where a person was a carer for a mentally ill spouse, and by virtue of his or her medical condition, he or she had to be kept at home or compelled to take medication, for his or her own protection or in his or her own best interests. In this context, the person’s behaviour might be considered controlling, but would be reasonable under the circumstances. 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. By virtue of *subsection (11)*, and the transitional provision in section 86(14)(e), the maximum penalty on summary conviction of the offence will be six months’ imprisonment. On the commencement of section 154(1) of the Criminal Justice Act 2003, the maximum sentence on summary conviction will rise to 12 months. The maximum penalty on conviction on indictment is five years’ imprisonment.

Section 77: Guidance about investigation of offences under section 76

313. This section confers a power on the Secretary of State to issue, and revise, guidance about the investigation of offences under section 76.