

Serious Crime Bill

Delegated Powers – Supplementary Memorandum by the Home Office

The Government has tabled further amendments to the Serious Crime Bill for Lords Report stage; these include a number of new delegated power. This supplementary memorandum explains why the powers have been taken and the reason for the procedure selected.

New clause “Female genital mutilation protection orders” – paragraph 2(7) and 19(7) of new Schedule 2 to the Female Genital Mutilation Act 2003: Power to specify relevant third parties who may apply for an FGM Protection Order

Power conferred on: The Lord Chancellor/Northern Ireland Department of Finance and Personnel

Power exercisable by: Regulations made by statutory instrument/ Order made by statutory rules

Parliamentary procedure: Negative resolution

2. New clause “Female genital mutilation protection orders” (which inserts new section 5A and Schedule 2 into the Female Genital Mutilation Act 2003 (“the 2003 Act”)) provides for FGM protection orders. The provisions follow closely the model of forced marriage protection orders provided for in Part 4A of the Family Law Act 1996 (as inserted by the Forced Marriage (Civil Protection) Act 2007).

3. An application for a FGM protection order may be made by the person to be protected (the victim) or a “relevant third party” without the leave of the court or any other person with the leave of the court (paragraph 2(2) and (3) of new Schedule 2 to the 2003 Act in relation to England and Wales and paragraph 19(2) and (3) of new Schedule 2 in relation to Northern Ireland). An order may contain such prohibitions, restrictions or other requirements as the court considers appropriate for the purposes of the order, that is for the purpose of protecting a girl against the commission of an FGM offence or a girl against whom any such offence has been committed. This could include, for example, provisions to surrender a person’s passport or any other travel document; and not to enter into any arrangements, in the UK or abroad, for FGM to be performed on the person to be protected. Breach of an order would be a criminal offence with a maximum penalty of five years’ imprisonment (but with provision, as an alternative, for a breach to be dealt with in the civil court as a contempt punishable by up to two years’ imprisonment).

4. A “relevant third party” is defined in paragraph 2(7) of new Schedule 2 as a person specified, or falling within a description of persons specified, by regulations made by the Lord Chancellor. (In the case of Northern Ireland, the power is exercisable by order made by the Department of Finance and Personnel – see paragraph 19(7) of new Schedule 2.) Allowing a third party to apply for an FGM protection order on behalf of a victim may be helpful in situations where the victim is unable to do so, for example, because she is too young (most victims of FGM are young girls, typically

aged five to eight) or because they are too scared to take such action themselves. By specifying relevant third parties, the regulation-making power will enable agencies or persons with the requisite skills or experience to make applications for FGM protection orders without seeking the leave of the court, thereby speeding up the application process. The majority of respondents to the recent consultation about the proposal for a FGM civil protection order felt that local authorities and health care professionals should be specified as a “relevant third party” in any such civil measure. The equivalent power in section 63C(7) of the Family Law Act 1996 has been exercised so as to specify local authorities (see the Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order 2009 (SI 2009/2023)).

5. Providing for the list of relevant third parties in secondary legislation, rather than on the face of the legislation, provides flexibility for the list to be revised quickly without the need for primary legislation. This would, for example, allow new organisations established to assist victims and potential victims of FGM to be added to the list as appropriate.

6. By virtue of paragraph 2(8) and 29(2) of new Schedule 2 to the 2003 Act, the regulation/order-making powers are subject to the negative resolution procedure. This mirrors the level of parliamentary scrutiny provided for in section 63C of the Family Law Act 1996 in relation to forced marriage protection orders. Given the legislation itself will establish the concept of a “relevant third party” and confer on them the right to make applications for an FGM protection order without the leave of the court, the negative procedure is considered to provide an adequate level of parliamentary scrutiny in respect of the designation of such bodies.

New clause “*Female genital mutilation protection orders*” – paragraph 24(4) and (5) of new Schedule 2 to the Female Genital Mutilation Act 2003: Power to allocate proceedings between courts

Power conferred on: Department of Justice in Northern Ireland

Power exercisable by: Order made by statutory rule

Parliamentary procedure: Negative resolution

7. Paragraph 24(1) provides for FGM protection orders to be made in Northern Ireland by either the High Court or a county court. 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, after consultation with the Lord Chief Justice, to specify, by order, 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. Such detailed arrangements for the allocation of business between different courts is typically left to secondary legislation, as is the case with court orders made under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 and Schedule 1 to the

Forced Marriage (Civil Protection) Act 2007 (paragraph 8(3) and (4) of that Schedule makes equivalent provision to that contained in paragraph 24(4) and (5) of new Schedule 2 to the 2003 Act).

8. In line with the precedents referred to above any order made under Article 34(3) 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, will be subject to the negative resolution procedure (by virtue of paragraph 29(2) of new Schedule 2). Given the very similar nature of these powers it is not considered that any change to the level of scrutiny by the Northern Ireland Assembly is appropriate in this case.

New clause “*Female genital mutilation protection orders*” – paragraph 25(1) of new Schedule 2 to the Female Genital Mutilation Act 2003: Power to confer jurisdiction on courts of summary jurisdiction

Power conferred on: Department of Justice in Northern Ireland

Power exercisable by: Order made by statutory rule

Parliamentary procedure: Draft affirmative

9. As indicated above, paragraph 24(1) provides for FGM protection orders to be made in Northern Ireland by either the High Court or a county court. 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. As with the power to provide by order for the allocation of proceedings, this order-making power mirrors provision at paragraph 9 of Schedule 1 to the Forced Marriage (Civil Protection) Act 2007. 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. As with the provisions of the Forced Marriage (Civil Protection) Act 2007, this order-making power ensures that there is the flexibility to extend to courts of summary jurisdiction the power to make FGM protection orders should it be considered appropriate to do so in the light of experience of the operation in the High Court and county courts of the provisions of Part 2 of new Schedule 2 to the 2003 Act. The requirement to consult the Lord Chief Justice ensures that the senior judiciary are engaged before any such order is made. Given that any extension of the power to grant FGM protection orders to courts of summary jurisdiction would be a significant change from the scheme provided for on the face of new Schedule 2 to the 2003 Act and the fact that this is a Henry VIII power, (by virtue of paragraph 29(3) of new Schedule 2) any order is subject to the affirmative procedure (as is the case for the equivalent order-making power in the Forced Marriage (Civil Protection) Act 2007).

New clause “*Female genital mutilation protection orders*” – paragraph 28(1) of new Schedule 2 to the Female Genital Mutilation Act 2003: Power to determine circumstances in which appeals may be made against decisions to transfer proceedings

Power conferred on: Department of Justice in Northern Ireland

Power exercisable by: Order made by statutory rule

Parliamentary procedure: Negative resolution

10. This power enables 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 by virtue 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. This order-making power mirrors that in paragraph 12(1) of Schedule 1 to the Forced Marriage (Civil Protection) Act 2007. As in that case, it is considered appropriate for this level of detail to be set out in secondary legislation (the appeal rights in question relate only to decisions as to the transfer of proceedings between courts and not in respect of more substantive issues around the grant or refusal of an FGM protection order) and for the negative resolution procedure to apply.

**Home Office
20 October 2014**