

CHILDREN ACT 1989 (AMENDMENT) (FEMALE GENITAL MUTILATION) BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Children Act 1989 (Amendment) (Female Genital Mutilation) Bill [HL] as brought from the House of Lords on 19 November 2018 (Bill 294).

- These Explanatory Notes have been prepared by the Ministry of Justice, with the approval of the sponsors of the Bill (Lord Berkeley of Knighton and Zac Goldsmith MP) in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1. The purpose of the Bill is to amend section 8(4) of the Children Act 1989 (“the 1989 Act”) to add proceedings for Female Genital Mutilation Protection Orders (“FGMPOs”) in England and Wales, under Part 1 of Schedule 2 to the Female Genital Mutilation Act 2003, to the list of proceedings which are “family proceedings” for the purpose of the 1989 Act.
2. The effect of the amendment proposed by the Bill would be to allow an applicant for an FGMPO to also apply for a care or supervision order (or other such appropriate order under the 1989 Act) as part of the same proceedings, rather than having to issue separate proceedings for such orders as at present. It would also enable a judge to exercise certain powers under the Children Act 1989 within the existing FGMPO proceedings.

Policy background

3. Female Genital Mutilation (FGM) is an extremely painful and harmful practice that blights the lives of many girls and women.
4. FGM has been a specific criminal offence in this country since 1985. Other powers are available to the courts including Female Genital Mutilation Protection Orders (FGMPO) which is a civil law measure, designed to protect those at risk of FGM.
5. This Bill relates to a small, technical amendment to close a gap in the law in relation to proceedings for female genital mutilation protection orders. It will mean that when a court is dealing with an application for an FGMPO, it will also have powers available under the Children Act 1989 to make other orders regarding the welfare of the child. This will improve the ability of the court to act quickly to protect children at risk.

Legal background

6. The legislation relating to FGM is contained in the Female Genital Mutilation Act 2003, as amended, in relation to FGMPOs, by the Serious Crime Act 2015.

Territorial extent and application

7. Clause 2(1) sets out the territorial extent of the Bill, that is the jurisdiction of which the Bill forms part of the law. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect. The provisions of the Bill extend and apply to England and Wales only, as does section 8 of the 1989 Act which it seeks to amend.
8. See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions.

Commentary on provisions of Bill

Clause 1: Amendment to the Children Act 1989

9. Clause 1 amends section 8 of the Children Act 1989 by inserting a reference to Part 1 of Schedule 2 to the Female Genital Mutilation Act 2003 (other than paragraph 3 of that Schedule).
10. Schedule 2 to the 2003 Act (at Part 2) makes provision for FGMPOs in Northern Ireland, but the Bill only extends to England and Wales and so it refers only to Part 1 of Schedule 2, the Part which makes provision for FGMPOs in England and Wales.
11. Paragraph 3 of Schedule 2 to the 2003 Act provides for circumstances in which FGMPOs may be made by the court during criminal proceedings. The exception in relation to paragraph 3 of Schedule 2 is to make clear that such criminal proceedings are not to be defined as “family proceedings” for the purpose of the 1989 Act.

Clause 2: Extent, commencement and short title

12. Clause 2(1) provides that the extent of the Bill is England and Wales only.
13. Clause 2(2) sets out the commencement provisions as explained in more detail below.
14. Clause 2(3) confirms the short title of the Bill.

Commencement

15. The Act will come into force on the day on which it is passed.
16. The policy and public interest justification for proposing that the Bill should come into force on Royal Assent is to ensure that, if any FGMPO proceedings were ongoing at the time that the legislation was passed, the Family Court and the High Court would have the power to make interim care and supervision orders in those proceedings, without separate proceedings having to be issued, so that the level of immediately available protection given to any children at risk of significant harm could be increased.

Financial implications of the Bill

17. FGM protection orders were introduced on 17 July 2015. Since then, family courts have dealt with a relatively small frequency of FGM cases each year.
18. It is not known how many cases currently need to be adjourned for care proceedings to commence in the family court. In the 12 months to September 2016, 63 FGMPOs were made, in the 12 months to September 2017, 98 FGMPOs were made and in the 12 months to 2018, 117 orders were made.¹ It is not possible to estimate the proportion of FGM cases that would be impacted by this policy. However, the relatively low frequency of cases does imply that, regardless of the proportion of these cases impacted by care proceedings, the overall volume of cases impacted is likely to be

¹ Family Court Statistics Quarterly

small.

19. We expect that there will be one-off familiarisation costs for the agencies involved in FGM cases in family courts (Local Authorities, LAA, Cafcass, HMCTS, Judges, as well as others involved in FGMPO proceedings).
20. For those cases in which this applies, it is expected that family court hearings would be reduced as care proceedings would now be able to be heard alongside FGMPO hearings. This could reduce adjournments and improve timeliness in these cases.
21. Overall, it is expected that the overall financial impact of this policy is likely to be minimal, given the relatively low frequency of FGMPO cases in family courts.

Parliamentary approval for financial costs or for charges imposed

22. The Bill does not require a Money resolution or a Ways and Means resolution.

Compatibility with the European Convention on Human Rights

23. The Bill could potentially engage Convention rights, particularly Article 8 (the right to respect for private and family life) and Article 6 (the right to a fair trial) but, to the extent that those rights are engaged, the Government does not consider that they are interfered with by the Bill.
24. The Bill defines proceedings for Female Genital Mutilation Protection Orders as “family proceedings” for the purposes of the 1989 Act. This means that an application for a care or supervision order in relation to a child at risk of significant harm, could be made during those proceedings. This would avoid potential delay. Other powers of the Family Court, including powers to make, for example, an interim care order, a prohibited steps order, special guardianship order or family assistance order, would also be available in FGMPO proceedings.

Article 8 ECHR

25. A care order places the child with respect to whom the application is made in the care of a designated local authority and a supervision order puts the child under the supervision of a designated local authority.
26. The placement of a child in local authority care, or under the supervision of a local authority, engages the Article 8 rights of both the child and their parents or guardians. However, any interference with these rights is considered to be justified. Such a decision would be in accordance with the law and is considered necessary in a democratic society in the interests of protecting the health and rights and freedoms of the child. Under section 31(2) of the 1989 Act, a court can only make a care order or supervision order (or interim orders) if it is satisfied that the child concerned is suffering, or is likely to suffer, significant harm and that the harm, or likelihood of harm, is attributable to the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him.
27. The powers to make care and supervision orders in cases involving female genital mutilation already exist. This Bill enables applications for such orders to be made in the same set of proceedings and widens the powers of the court, reducing the potential for delay. It is therefore

the Government's view that the provisions of the Bill have a minimal impact on the Article 8 rights of the parties and, in any event, is justified by the legitimate aim of reducing delay and inefficiency in the system to the benefit to the child concerned.

Article 6 ECHR

28. Defining FGMPO proceedings as "family proceedings" for the purpose of the 1989 Act does not, in itself, result in the determination of a civil right or obligation and, in any event, any decision to make a care order or a supervision order will be made by the court in Article 6 compliant proceedings.
29. The Bill is, therefore, assessed to be compatible with the ECHR.

Annex A – Territorial extent and application in the United Kingdom

Extends to E & W and applies to England?	Extends to E & W and applies to Wales? ²	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 1	Yes	No	No	N/A	N/A	N/A	No
Clause 2	Yes	No	No	N/A	N/A	N/a	No

² The existing section 8 will be repealed in Wales when the new section 8, which applies only to England, comes into force.

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