



**AN BILLE UM CHEARTAS COIRIÚIL (CIORRÚ BALL
GINIÚNA BAINEANN), 2011
CRIMINAL JUSTICE (FEMALE GENITAL MUTILATION)
BILL 2011**

EXPLANATORY AND FINANCIAL MEMORANDUM

Purpose of Bill

The main purpose of the Criminal Justice (Female Genital Mutilation) Bill 2011 is to prohibit female genital mutilation; along with providing for related offences — some of which apply to certain extra-territorial jurisdictions.

Financial Implications

As the offences and penalties for this Bill come under the Department of Justice and Law Reform they have informed us that it is not possible to disaggregate the cost of any specific offences, but that any costs that may arise as a result of this legislation are not expected to be significant.

Section 1 — (Interpretation)

Section 1 provides for the definition of certain terms used in the Bill.

Section 2 — (Offences of female genital mutilation, etc.)

This section criminalises the act of doing female genital mutilation; it also provides for the offence of attempting to do an act of female genital mutilation. The offences of aiding, abetting, counselling, or procuring the commission of female genital mutilation are already provided for in the general criminal law Acts on the grounds that a person is liable to be tried and punished where s/he aids, abets, counsels or procures the commission of an indictable offence; *section 5* of the Bill provides that doing or attempting to do female genital mutilation is an indictable offence. The general criminal law Acts concerned are:

- Criminal Law Act 1997;
- Criminal Justice Act 2006;
- Criminal Justice (Amendment) Act 2009.

And in a similar vein, the offence of conspiring with another person to do female genital mutilation is covered by the same general criminal law.

Subsection (2) provides for various exemptions from the offence of female genital mutilation in *subsection (1)*. Firstly, the subsection provides that a registered medical practitioner is exempt when doing

a surgical operation that is required for the protection of the physical or mental health of a girl or woman; secondly, a midwife — or a person training to be a midwife — along with a registered medical practitioner, are exempt when doing a surgical operation on a woman in labour or after she has just given birth, provided that the operation is related to the labour or birth; thirdly, a girl or woman who self-mutilates does not commit an offence — though a person who aids and abets such a girl or woman to do female genital mutilation can be tried for an offence under the general criminal law mentioned at subsection (1) above; and fourthly, a person is exempt when doing an act on a woman who is over 18 years and there is no resultant bodily harm.

With respect to the exemption for a midwife above, it is provided here that any kind of mutilation that is equivalent to female genital mutilation following delivery, such as re-infibulation — even at the request of the woman — would also constitute an offence under these provisions.

Subsection (3) precludes the possibility of invoking reasons of custom or ritual — or the consent of the girl/woman herself or her parents/guardian — in any defence to proceedings for the commission of the general offence in subsection (1).

Section 3 — (Offence of removal from State for purpose of female genital mutilation)

This section contains offences that relate to removing a girl or woman from the State for the purposes of doing female genital mutilation to her.

Subsection (1) makes it an offence for a person to take a woman or girl from the State where one of the purposes of taking her is to do female genital mutilation to her; a similar offence for attempting removal is also created.

Subsection (2) provides for various exemptions for the offence created under *subsection (1)*. Firstly, the subsection provides that a person who has been professionally trained to do surgery, or who is qualified to do so under the law of the place where the surgery is done, is exempt when doing a surgical operation on the girl or woman concerned that is required for the protection of her physical or mental health; secondly, a person who carries out functions that correspond to work done by a midwife — along with a registered medical practitioner — are exempt when doing a surgical operation on a woman in labour or after she has just given birth, provided that the operation is related to the labour or birth; and thirdly, a person is exempt when doing an act on a woman who is over 18 years and there is no resultant bodily harm.

Subsection (3) creates a presumption about the reasons a person removes a girl or woman from the State in the event of proceedings for an offence under *subsection (1)*. In effect, this provides that where it can be reasonably inferred that an accused person took a woman/girl out of the country for, among other reasons, to do female genital mutilation to her, and that an act of female genital mutilation was done to her in the related period that she was abroad, there shall be a presumption that the accused took the woman/girl out of the State in order to have female genital mutilation done to her — unless the contrary is shown.

Similar to *section 2(3)*, *subsection (4)* precludes the possibility of invoking reasons of custom or ritual — or the consent of the

girl/woman herself or her parents/guardian — in any defence to proceedings for the commission of the general offence in *subsection (1)*.

Subsection (5) defines circumstances that come within the meaning of the phrase *remove girl or woman from the State* for the purposes of this section.

Section 4 — (Acts etc. done outside State)

Section 4 relates to the issue of extra-territorial jurisdiction in relation to doing or attempting to do female genital mutilation. *Subsection (1)* provides the circumstances in which a person commits an offence of doing or attempting to do female genital mutilation outside the State; and it includes an Irish citizen or a person who is ordinarily resident in the State who does or attempts to do female genital mutilation in another jurisdiction where they constitute offences. *Subsection (4)* defines the expression *ordinarily resident in the State* as a person who has had his or her principal residence in the State for the period of 12 months preceding the alleged commission of the offence.

Subsection (2) provides for various exemptions from the offence created under *subsection (1)*. Firstly, the subsection provides that a person who has been professionally trained to do surgery, or who is qualified to do so under the law of the place where the surgery is done, is exempt when doing a surgical operation on the girl or woman concerned that is required for the protection of her physical or mental health; secondly, a person who carries out functions that correspond to work done by a midwife — along with a registered medical practitioner — are exempt when doing a surgical operation on a woman in labour or after she has just given birth — provided that the operation is related to the labour or birth; thirdly, a girl or woman who self-mutilates does not commit an offence — though a person who aids and abets such a girl or woman to do female genital mutilation under the circumstances in *subsection (1)* shall be tried for an offence under the general criminal law mentioned at *section (2)* above; and fourthly, a person is exempt when doing an act on a woman who is over 18 years and there is no resultant bodily harm.

Similar to *section 2(3)*, *subsection (3)* precludes the possibility of invoking reasons of custom or ritual — or the consent of the girl/woman herself or her parents/guardian — in any defence to proceedings for the commission of the general offence in *subsection (1)*.

Subsection (5) is a standard provision under which where proceedings are commenced for an offence committed outside the State, they may be taken in any place in the State.

Section 5 — (Punishment for offences under sections 2, 3 and 4)

Section (5) sets out the penalties for offences committed under *sections (2), (3) and (4)* of this Bill. It provides for penalties for both a summary conviction and a conviction on indictment.

Section 6 — (Proceedings)

This provides that proceedings for an offence under this Bill may only be commenced either by or with the consent of the Director of Public Prosecutions.

Section 7 — (Double Jeopardy)

This is a standard provision under which a person cannot be proceeded against for an offence under this Bill if the person has been acquitted or convicted of a similar offence in another country.

Sections 8, 9, 10 and 11

The privacy of the victim is going to be infringed or looked at in the event that there are no measures in the Bill to properly safeguard it; hence the privacy of the victim for such criminal cases is paramount. For this purpose, the Bill incorporates the extensive provisions in both the Criminal Law (Rape) Amendment Act 1990 with respect to the provisions governing the exclusion of the public from hearings, and the measures in the earlier Criminal Law (Rape) Act 1981 with respect to the provisions that safeguard the anonymity of the victim.

Section 8 — (Exclusion of the public from hearing)

This *section* deals with excluding members of the public from any court hearing on a criminal case under this Bill. Subsection (1) gives the Judge the power to exclude all persons from the court when hearing a case for offences committed under *sections 2, 3 or 4* — except for officers of the court, anyone involved in the hearing, genuine representatives of the Press, and anyone else that the Judge decides may remain. The discretion of the Judge is subject to *subsection (2) and (3)*.

Subsection (2) permits a parent, relative or friend of the victim to remain in the court for the duration of the hearing, or a parent, relative or friend of the person accused of committing the offence if the accused is not of full age.

Subsection (3) provides that in any hearing to which *subsection (1)* applies, the verdict and the sentence of the court — where applicable — shall be announced in public.

Section 9 — (Anonymity of girl or woman concerned)

This *section* provides that, once a person is charged with an offence under this Bill, no matter likely to lead members of the public to identify a girl or woman as the person against whom the offence is alleged to have been committed, may be published in a written publication available to the public (ie in particular, a newspaper) or be broadcast except as authorised by a direction under the *section*. The general prohibition is in *subsection (1)*.

Subsection (2) enables a person who is to be tried for an offence (or another person who is likely to be tried at the same trial for that or another offence and against whom the girl or woman may be expected to give evidence at the trial) to apply before the commencement of the trial to a judge of the High Court or Circuit Court for a direction permitting disclosure of the girl's/woman's identity on the ground that this is necessary for the purpose of inducing potential witnesses to come forward and that the conduct of the applicant's defence is likely to be adversely affected if the direction is not given. If the judge is satisfied on these matters, the judge will give the direction. Since the *subsection* provides that the judge shall direct that the prohibition "shall not apply to such matter relating to the girl or woman as is specified in the direction", the judge will be able, in an appropriate case, to give a direction that will permit only a partial disclosure of the identify of the girl or woman.

Subsection (3) enables a person on trial for an offence (or co-accused at the trial) to apply to the judge for a direction similar to that under *subsection (2)*. In this case the person on trial will have to satisfy the judge that there was good reason for his not having made the application before the commencement of the trial.

Subsection (4) provides for a case where the trial judge is satisfied that the effect of the prohibition under the section is to impose a “substantial and unreasonable restriction” on the reporting of the trial and that it is in the public interest to remove or relax the restriction. For example, the identity of the girl or woman may be a matter of public knowledge owing to the circumstances surrounding the offence or the subsequent investigations of it, in which case there would be no point in requiring the press to pretend to conceal her identity. If the judge is satisfied as mentioned, s/he will give a direction as under *subsection (2)* or *(3)*; and again the judge will be able to restrict the extent of the disclosure.

Subsection (5) enables a person who has been convicted of an offence, and is appealing against their conviction, to obtain a direction from the appellate court similar to that provided for by *subsection (2)* in order to obtain evidence in support of their appeal. The subsection will apply both to an appeal against a conviction on indictment and to an appeal against a conviction by a juvenile court.

Subsection (6) specifies the persons who will be guilty of an offence in the event of a publication or broadcast in contravention of *subsection (1)*.

Subsection (7) defines “a broadcast” and “written publication” for the purpose of the section.

Subsection (8) contains two savings: Paragraph *(a)* provides that the section shall not prohibit the publication or broadcasting of a report of legal proceedings other than a trial for an offence under this Bill (or preliminary or appellate proceedings). Paragraph *(b)* provides that the section shall not affect any other prohibition or restriction imposed by statute on a publication or broadcast.

Subsection (9) ensures that any liability which has been incurred by reason of the disclosure of information in contravention of *subsection (1)* will not be affected if disclosure of the information is later permitted by a direction under *subsection (2)*, *(3)* or *(4)*.

Subsection (10) provides that, in the event of a retrial of a person for a female genital mutilation offence, the commencement of any previous trial shall be disregarded for the purposes of *subsections (2)* and *(3)*. Thus the accused will be able to apply for a direction under *subsection (2)* at any time before the commencement of the retrial without having to satisfy the judge that there was good reason for his not having made the application before the commencement of the first trial.

Section 10 — (Anonymity of accused person)

This *section* imposes a prohibition on the publication or broadcasting of matter likely to lead members of the public to identify a person being charged with an offence under the Bill. The prohibition is similar *mutatis mutandis* to that under *section 9* in respect of the identification of the girl or woman as the person against whom the offence is alleged to have been committed. The differences are described in the next paragraph.

The prohibition will cease to apply if the accused is convicted (*subsection (1)(b)*). The accused (A) will have the right to have the prohibition lifted on application to a High Court judge before the trial or to the judge at the trial (*subsection 2(a)*); but the judge shall not give the direction to have the prohibition lifted if it leads to the public being able to identify the victim — unless the judge is satisfied that a direction under *section 9* (Anonymity of girl or woman

concerned) could be given. Any other person (B) who is to be charged with an offence under this Bill at the trial will be able to apply before the trial, and any co-accused (C) will be able to apply at the trial, for a direction lifting the prohibition in respect of (A) on the ground that this is necessary in order to induce witnesses to come forward as mentioned under *section 9. Subsection (8)* provides that a High Court judge can lift the prohibition on public interest grounds, on application by the Director of Public Prosecutions at any time after the person is charged with an offence under the Bill.

Section 11 — (Punishment for offences under sections 9 and 10)

Subsection (1) provides for the penalties that may be imposed for a summary conviction and a conviction on indictment for an offence of publishing or broadcasting unauthorised matter in contravention of *section 9 or 10*.

Subsections (2) and (3) are provisions of the usual kind for the liability of directors and others officers of a body corporate in the case of an offence such as mentioned in the immediately preceding paragraph above when committed by the body corporate.

Section 12 — (Evidence in proceedings for offences outside State)

Section 12 provides for evidentiary matters relating to a person being deemed to be an Irish citizen at the time that an offence is alleged to have been committed in any proceedings that refer to an offence under *section 4(1)(c)* of the Bill; it also allows for evidence by certificate.

Section 13 — (Amendment of Bail Act 1997)

Section (13) amends the Schedule to the Bail Act 1997. The Schedule lists the offences that are defined as “serious offences” and *section 2* of the Bail Act provides for the circumstances in which bail may be refused for such offences. As a result of this amendment, the offences in this Bill that relate to *sections (2), (3), and (4)* will be added to the Bail Schedule.

Section 14 — (Amendment of Children Act 2001)

Section (14) amends Schedule 1 to the Children Act 2001, inserting the offences relating to female genital mutilation at *section (2), (3), and (4)* of the Bill into this Schedule of Offences Against Children .

Section 15 — (Short Title)

This contains the Short title of the Bill.

*Department of Health and Children,
January, 2011.*