



**FAMILY LAW COUNCIL**

# **FEMALE GENITAL MUTILATION**

**A Report to the Attorney-General  
prepared by the Family Law Council**

**June 1994**

Commonwealth of Australia 1994

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## THE FAMILY LAW COUNCIL

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of Council are set out in sub-section 115(3) of the *Family Law Act* which states:

*It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -*

- (a) the working of this Act and other legislation relating to family law;*
- (b) the working of legal aid in relation to family law; and*
- (c) any other matters relating to family law.*

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## CONCLUSIONS AND RECOMMENDATIONS

### **Recognition of cultural and community pressures (para 2.30)**

Council has concluded that for at least one generation, women from countries which practise female genital mutilation will be under considerable pressures to continue this practice. This is especially relevant when considering strategies for eradication of the practice and requires that particular attention be given to the issue of community education.

### **Incidence of female genital mutilation in Australia (para 2.52)**

It is not possible to get reliable statistics on the practice of female genital mutilation in Australia. As the population who have come from countries which practise female genital mutilation is small it is likely that the incidence of the practice in this country at this stage is also small. Although evidence of the practice in this country is largely anecdotal, it is not unreasonable to conclude from that evidence that female genital mutilation is now being practised in Australia. Even a low incidence of the practice cannot be disregarded. Council further suggests that as the volume of migrants from the relevant countries increases cumulatively it might be expected that the incidence of the practice in Australia will increase.

### **Male circumcision (para 2.56)**

Council is aware that there are a significant number of persons in the community who consider that male circumcision should be banned. However, the issue is outside the terms of reference of the present study.

### **The effects of female genital mutilation (para 3.26)**

Council notes the physical, psychological, emotional, sexual and other implications of female genital mutilation and has concluded that it is damaging with persisting effects.

### **Women's and Children's Rights (para 4.17)**

Council notes the international treaties, declarations and statements which are supported by Australia. These instruments and declarations require Australia to work for the eradication of female genital mutilation. Council also notes that the *Declaration on Violence Against Women* urges nations to pursue without delay a policy

of eliminating all such forms of violence against women. Australia supported the declaration.

### **The practice of female genital mutilation in Australia (para 5.23)**

Council considers that there is wide opposition to the practice of female genital mutilation among Australians and has concluded that female genital mutilation is a practice which should not be accepted in Australia.

### **The importance of education (para 6.09)**

Council has concluded that the strategy for the elimination of female genital mutilation must be based on education of families from countries which traditionally practise female genital mutilation, as well as professionals and others within the general community.

### **Recommendation 1 (para 6.15) Education**

**Council agrees that education must be a first priority in any program for the elimination of female genital mutilation. To this end it recommends that:**

- (a) A national communication and education program on female genital mutilation be developed by the Commonwealth Department of Human Services and Health, in consultation with the States and Territories and the relevant communities, and that the campaign be integrated with Australia's health advancement and child value and protection agendas;**
- (b) The education program's primary focus be on members of communities coming from countries where female genital mutilation is practised and that wherever possible these education programs should be conducted by members of the communities themselves with the assistance of others, such as health workers;**
- (c) It is essential that vulnerable communities be involved in planning, as well as delivering education programs, and that adequate funds be provided for education.**
- (d) Other target groups for education include child protection workers, care providers (including doctors, midwives, nurses, educators, child and ethnic care workers, social workers and community workers), police and the Courts and legal profession.**
- (e) The Commonwealth Department of Immigration and Ethnic Affairs cooperate in the development and delivery of an effective information program for newly arrived migrants from countries which practise female genital mutilation ; and**

**(f) The Commonwealth Government provide adequate funds for community education.**

**Will education eliminate female genital mutilation?(para 6.22)**

Council has concluded that legislation is necessary because education alone will not result in the elimination of female genital mutilation, at least in an acceptable time frame.

**The need for legislation (para 6.41)**

Council considers that because of: (a) doubts about the adequacy of the existing laws, (b) the desirability of having a clear legislative statement on the issue, (c) existing doubt within the general community about the status of the practice in this country, and (d) the need to give the protection and support of the law to women and children who wish to resist the practice within their communities, there should be special legislation which makes it clear that female genital mutilation is an offence in Australia. One member dissented from Council's conclusion on the basis that she considers introduction of special legislation as not the most effective way of discouraging the practice and takes no account of the historical and cultural context of the practice and the likelihood of its being sent underground. Women in the affected communities are themselves taking action to eradicate the practice. This member sees legislation as a form of cultural imperialism which does not allow the affected communities to take responsibility for the elimination of female genital mutilation.

**International offences (para 6.64)**

There are doubts about the capacity of the present law to cope with international offences against the rights of the child. In the circumstances, and having in mind the serious consequences for the children concerned in relation to matters such as female genital mutilation, Council has concluded that legislation should be passed to put these issues beyond doubt and to provide as much protection as possible for the children and women concerned.

**Recommendation 2 (para 6.65) Commonwealth/State legislation**

**Council recommends that:**

**(a) In order to achieve uniform legislation without delay, the Commonwealth Parliament immediately pass legislation making it clear that the practice of female**

genital mutilation is a criminal offence and also that it constitutes child abuse under Australian child protection legislation;

(b) The Commonwealth pass legislation which provides children taken out of Australia with the same protections from female genital mutilation as they would have in Australia;

(c) The Standing Committee of Attorneys-General consider whether State/Territory legislation may also be necessary. Ultimately the matter is one for the States/Territories;

(d) Legislation cover those matters identified in Recommendation 4 below.

### Recommendation 3 (para 6.73) Timing of education and legislation

Council recommends that:

- (a) Immediate steps be taken to implement an education program along the lines proposed in recommendation 1; and
- (b) Criminalising aspects of the legislation should not become operative until the education program is satisfactorily established and operating.

### Recommendation 4 (para 6.80) Content of legislation

Council recommends that to be fully effective legislation should cover the following matters:

- (a) It should put the issue beyond doubt that female genital mutilation, in all of its forms, is a criminal offence;
- (b) It should be made clear that female genital mutilation, in all of its forms, constitutes child abuse under Australian child protection legislation;
- (c) The law should take into account the best interests, and protection, of the child in relation to imposing penalties on parents who allow this procedure to be carried out on their children. Other relevant factors should include whether the parent has offended previously, whether the parent acted in knowledge of the law and the type of procedure performed on the child;
- (d) There should be severe penalties, including imprisonment, for professionals who perform female genital mutilation;
- (e) There should be severe penalties, including imprisonment, for non-professionals (including relatives) who perform the procedure and for those

who aid and abet such persons, including those who arrange for children to be genitally mutilated;

- (f) Appropriate sanctions should apply to institutions at which female genital mutilation is carried out. Officers of the institution should be liable for criminal prosecution;
- (g) Mandatory notification should apply to State/Territory child protection authorities of prospective or actual incidences of female genital mutilation. Ideally, subject to Constitutional power, the widest possible list of persons required to notify should apply;
- (h) Legislation should make it an offence to take, or to propose to take, a child outside Australia to be genitally mutilated. The legislation should be based on the Canadian model; and
- (i) The legislation should acknowledge the importance of education programs and of counselling and other forms of assistance.

#### **Recommendation 5 (para 6.83) Child Protection Protocols**

Council recommends that the Joint Health and Community Services Ministerial Council be asked to develop protocols specifically for the purpose of dealing with instances of female genital mutilation.

#### **Recommendation 6 (para 6.88) Reconstructive surgery**

Council is of the view that further legislation is not necessary to enable young women to have reconstructive surgery where they so desire.

#### **Recommendation 7 (para 6.91) Counselling and support services**

Council considers that provision must be made for counselling and support services for women and children, including those who reject the practice of female genital mutilation.

#### **Recommendation 8 (para 6.94) Jurisdiction**

In Council's view there is no need for special legislation on the jurisdiction of the courts in relation to female genital mutilation. However, Council is of the view that proceedings relating to female genital mutilation should be conducted in a closed Court.

**Recommendation 9 (para 6.96) International action**

**Council urges the Government to participate in international forums and by other means to take part in the international campaign against female genital mutilation.**

## 1. BACKGROUND

1.01 *Terms of reference.* In September 1993 the Attorney-General asked the Family Law Council to examine the following:

The adequacy of existing Australian laws to deal with the issue of female genital mutilation, in particular:

- the adequacy and appropriateness of existing laws - not just criminal laws but also in child welfare and medical/health areas;
- consideration of Canada's 1993 Bill C-126, an Act to amend the Criminal Code and the Young Offenders Act, to protect children being removed from Canada with the intention of assault;
- whether, in light of the above, more Australian legislation is needed (i.e. Commonwealth, State or Territory) and what should its contents be; and
- which Court(s) should exercise jurisdiction.

1.02 Council decided that these matters should be examined by its Child and Family Services Committee and asked the committee to give priority to the matter.

1.03 *Child and Family Services Committee.* The members of the Child and Family Services Committee are:

Ms Jenny Bedlington *Convenor*  
 Dr Nigel Collings  
 Ms Margaret Harrison  
 Mr Bill Hughes *Director of Research, Family Law Council*  
 Mr Peter Trahair *Legal Officer, Family Law Council*

1.04 *Family Law Council.* The functions of the Family Law Council are set out in sub-section 115(3) of the *Family Law Act 1975*. That provision is set out on page iii of this report.

1.05 Members of the Family Law Council at the time of production of this report were:

Mr John Faulks *Chairman*  
 Ms Jenny Bedlington  
 Dr Nigel Collings  
 Mr Andrew Crockett  
 Associate Professor Regina Graycar  
 Ms Louise Hansen

Mr Richard Morgan  
 Ms Patricia Moroney  
 Ms Matina Mottee AM  
 The Hon Justice Sally Thomas  
 The Hon Justice W B Trevaud

1.06 **Public consultation.** Following its study of this matter the Family Law Council released a discussion paper (31 January 1994) and requested submissions from the public by 31 March 1994. The discussion paper received wide media publicity and considerable public attention was aroused by the media. Unfortunately, some media reports have sensationalised the issue and there has been a tendency to stereotype all people of particular nationalities or, in some cases, of particular religions as practising female genital mutilation. This has caused considerable confusion, fear and anger within the relevant communities and has seriously compromised the development and implementation of current and planned education strategies.

1.07 One group making a submission in response to Council's discussion paper has reported instances of public ridicule because the practice of female genital mutilation has been presented as a Muslim practice. The Independent Islamic Sisterhood says in its submission:

*As has probably been witnessed by all Australians, the media has been very quick to judge Islam and Muslims as the source of what can only be described as a barbaric custom. We, the Muslim women of Australia, have suffered a serious backlash, being sometimes treated with scorn or ridicule by ignorant members of the general public. This could, in some instances, be the catalyst for violence by those who seize upon negativity [which is] engendered by the less responsible members of the Australian media...*

1.08 The people mainly concerned in relation to this practice are generally refugees who are, in many respects, the most vulnerable people in the community. In its submission, the International Women's Development Agency said that they are mostly recent arrivals in Australia who have often come from war or conflict zones. Some have suffered trauma. Their immediate concerns are with survival, coping in a new country, getting income and learning a new language.

1.09 During the course of the consultation process, Council was advised of difficulties experienced by members of the relevant communities, especially communities from countries where female genital mutilation is practised. These difficulties were summed up by the Eritrean Community in Australia (ECA) in the following statement:

*The lack of adequate and informed consultation with the community has been of considerable concern to the ECA and its membership. It is the ECA's position that a cooperative approach with the community is more likely to attain the objective of eradicating female genital mutilation.*

*Such an approach would certainly require more than the 2 months that was allocated for submissions for the current discussion paper. In fact, this time frame essentially prevented adequate community consultation from taking place.*

1.10 The issue of female genital mutilation has been in the public arena in Australia for some time and did not commence with Council's discussion paper. As indicated elsewhere in this report, two State Government inquiries were conducted, the first being in Victoria, where the ECA is based, in 1987. The ECA's community education program is itself a response to concerns about the issue.

1.11 Nevertheless, Council is aware that there are substantial cultural, gender and language barriers within the affected communities in relation to female genital mutilation. Because of these factors the communities concerned are only now beginning to address the issue. Some groups within the communities have, until very recently, been unaware of the extent and nature of the practice within their own communities because the issue has not been one for open discussion.

1.12 Council appreciates that the tight time frame under which it has had to operate may have made it difficult for community leaders to consult with their communities when preparing their submissions to Council. Nevertheless, a number of submissions have been received from the communities and Council considers that it is well aware of the views of those communities. Cooperation with the vulnerable communities and more detailed consultation is a matter which will occur at the next stage of the process; that is, in developing community education programs.

1.13 Council appreciates the immediate relevance of this issue to the relevant communities. However, it stresses that the issue is one for the whole Australian community. Council is in no doubt that the Australian community's view as a whole on the issue of female genital mutilation is clear.

1.14 A complaint was also made to Council that its discussion paper was available only in English and that this prevented many members of the vulnerable communities (especially recently arrived refugees) from making their views known. Council does not have the funds to produce its discussion papers and reports in multi languages. Council considers, however, that in this instance funds should be provided to enable Council's final report to be produced in several languages. This would enable the report to be used more effectively in the education process within the relevant communities.

1.15 Council is gratified by the number of submissions received and the range of persons and organisations from whom submissions were received. A list of persons and organisations making submissions is provided at Appendix A.

1.16 In addition to submissions, Council received a number of letters from members of the public on the issue, as did the Attorney-General and other Ministers. These letters generally expressed strong opposition to the practice of female genital mutilation in Australia. Council is also aware that bodies, such as trade unions, have

also expressed their opposition to female genital mutilation. The matter has also been raised in the Commonwealth Parliament and in some of the State Parliaments where there would appear to be general opposition to the practice.

1.17 *Outline of this report.* This report addresses the issue of female genital mutilation under the following headings:

- Background to the Family Law Council examination of the issue.
- Female Genital Mutilation - an explanation of the practice.
- The Effects of Female Genital Mutilation.
- Relevant International Instruments on Women's and Children's Rights.
- Traditional Practices and Western Society.
- Strategies for the Future.

## 2. FEMALE GENITAL MUTILATION

*She pontificated at length about “the tradition” and how she was chosen by the village to perform circumcisions - gold, she said, was “poured” over her. Two bulls were killed. All the women before her had been circumcised. All those after her would be, also.*

**Excerpts from journal entries by Alice Walker, who witnessed a “circumcision” ceremony - as published in “A Legacy of Betrayal” in *Cosmopolitan*, February 1994, page 105.**

2.01 ***Female genital mutilation.*** Female genital mutilation “is the collective name given to several different traditional practices that involve the cutting of female genitals.”<sup>1</sup> It can involve any one of 4 procedures, although Armstrong<sup>2</sup> suggests that “in reality the distinction between the types of circumcision is irrelevant since it depends on the sharpness of the instrument used, the struggling of the child and the skill and eyesight of the operator”. Figure 1 illustrates the external female sex organs and the 4 procedures are explained below by reference to the effects of each of those procedures on the external genitalia of the young woman.

2.02 “Circumcision” of young women is a traditional cultural practice which is mainly performed in, but not confined to, a number of African countries. The global incidence of the practice is discussed later in this chapter. Those who oppose the practice call it “genital mutilation”. In this paper when the term “female genital mutilation” is used it is meant to embrace all types of the practice where tissue damage results; for example, damage manifested by bruising, contusion or incision. However, where a specific procedure is being discussed, that particular procedure will be specified. Much of the information available on female genital mutilation, and referred to in this paper, relates to the practice as it is performed in African villages. It is therefore necessary to keep in mind that where the practice occurs in western countries it may not be under the same conditions using the same instruments, although the basic processes and their effects are similar.

2.03 ***Ritualised circumcision.*** The first, and least severe form, is called ritualised circumcision. In this case the procedure may be wholly ritualised (e.g. where there is cleaning and/or application of substances around the clitoris). In other forms of ritualised circumcision the clitoris is scraped or nicked. This causes bleeding and may result in little mutilation or long term damage.

2.04 ***Clitoral circumcision.*** The second form is generally simply called circumcision. It has also been called “sunna”. The word “sunna” in Arabic means “tradition”, but it also means “tradition of Prophet Muhammad” which indeed is a serious misnomer because the practice is not associated with Islam. Use of the term

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<sup>1</sup>Toubia, Nahid, 1993, *Female Genital Mutilation: A Call for Global Action*, UN Working Group on Traditional Practices, page 9.

<sup>2</sup>Armstrong, Sue, 1991, “Female circumcision: fighting a cruel tradition”, *New Scientist*, 2 February 1991, page 22.

“sunna” can lead to the incorrect linking of clitoral circumcision with the Islamic religion and, therefore, Council uses the term “clitoral circumcision” in this report. Clitoral circumcision involves the removal of the clitoral prepuce - the outer layer of skin over the clitoris, which is sometimes called the “hood”. The glans and body of the clitoris are meant to remain intact. However, depending on factors such as the eyesight of the person performing the procedure, the type of implements used and the struggling of the child involved, it often can result in removal of the glans of the clitoris.

**FIGURE 1: Female external genitals (vulva) showing normal adolescent vulva in extension.**

2.05 *Clitoridectomy or excision.* A third form is called excision or clitoridectomy. This is said to be the most common form of female genital mutilation.<sup>3</sup> It involves removal of the glans of the clitoris, but usually the entire clitoris, and often parts of the labia minora as well.

2.06 *Infibulation.* The most severe form is infibulation or “Pharaonic”<sup>4</sup> circumcision. This involves removal of virtually all of the external female genitalia. The entire clitoris and labia minora and much of the labia majora is cut or scraped away. The remaining raw edges of the labia majora are then sewn together. In the villages acacia tree thorns are sometimes used and held in place with catgut or sewing thread. Sometimes a paste of gum arabic, sugar and egg is used to close the

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<sup>3</sup>Slack, Alison T, 1988, “Female Circumcision: A Critical Appraisal” in *Human Rights Quarterly*, 10 (1988) 437, page 441.

<sup>4</sup>“Pharaonic” circumcision is a term which is used in the Sudan. It dates back to the practice of infibulation in ancient Egypt.

vulva. The entire area is closed up with just a small opening, about the size of a match stick, left for passing urine and menstrual fluid. A straw, stick or bamboo is inserted in the opening so that as the wound heals the flesh will not grow together and close the small opening. It is understood that in recent years in some areas, some doctors who perform the procedure sew together the labia without cutting.

2.07 The strong opposition to the practice of female genital mutilation is often, but not always, a reaction to the extreme version, infibulation. It is, however, important to place the practice of infibulation in perspective in the Australian context. In Council's view, while there are women in Australia who have been infibulated, there is no evidence to support the conclusion that this particular procedure is being performed in this country. This issue is further discussed later in this chapter. It is also important, in discussing such matters as the effects of female genital mutilation, to keep in mind that much of the available literature relates to the more extreme versions of the practice.

2.08 *Other practices which result in genital mutilation.* Council draws the attention of the Government to the possibility that female genital mutilation may not be confined to the practices discussed above. It is possible that other practices which have the effect of genital mutilation may also occur in Australia. For example, other kinds of assault, such as child sexual assault, may also result in genital mutilation.

2.09 Information obtained by Council suggests that a range of female initiation ceremonies have been practised by Aboriginal Australians in the past, generally at the first signs of puberty. It is not known to what extent such practices persist today. The practices appear to have varied from one district to another. As far as is known, none of the ceremonies involve excision or infibulation, but they may have involved practices such as enlarging the vaginal orifice, cutting the perineum and breaking the hymen with a stick.<sup>5</sup> Some of these practices would result in mutilation of the genitalia.

2.10 Council is mindful of the possibility that there may be other community groups which follow practices which may result in genital mutilation. However, Council is unaware of whether these practices occur in Australia at the present time.

2.11 *Who performs female genital mutilation?* Female genital mutilation is believed to be performed almost entirely by women, generally midwives or elder women. In the village environment, women who perform the operation are often paid for their services and have a position of respect and authority within the community. The money earned from female genital mutilation is an important source of income for them. There is some evidence that health personnel in Somalia are carrying out these procedures on health service premises.<sup>6</sup> Many are also now advocating that

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<sup>5</sup>Berndt, RM and CH, 1992, *The World of the First Australians*, Aboriginal Studies Press, page 181.

<sup>6</sup>Dirie, MA et al, 1991, "A hospital study of the complications of female circumcision", *Tropical Doctor*, October, 21(4), pages 146-148.

the procedure be done in hospitals to reduce some of the risks involved and this is believed to be happening in some countries.<sup>7</sup>

2.12 A survey conducted in Cairo in 1985 indicated that female genital mutilation procedures were carried out in the girl's home in 79.3% of cases. The survey also indicated that 13.5% of operations were performed in a clinic, 4.1% in street booths (where a public declaration of the daughter's "circumcision" is desired by the family) and 3% in hospitals. Persons performing the operation were midwives (called "daya") in most instances (60.9%). Physicians performed 22.9% of female genital mutilations and barbers 16.2%.<sup>8</sup>

2.13 *When is female genital mutilation performed?* Female genital mutilation is generally performed between the ages of one week and fourteen years, and before the onset of menstruation. In most cases female genital mutilation occurs when the girl is about three to eight years of age. In some countries where infibulation is practised, women are re-infibulated after they have each child, after divorce or on the death of their husband.<sup>9</sup> During childbirth a tightly infibulated woman must be de-infibulated to allow the fetal head to crown. Among certain tribes the procedure can be performed on women after they die.<sup>10</sup>

2.14 In Mali infibulation may be performed on women after they have had their first child. In Kenya and Tanzania women have a clitoridectomy on their wedding night. In Mauritania, Nigeria and Ethiopia female genital mutilation is performed on newborn children, or within the first few weeks after birth.<sup>11</sup>

2.15 *The origins of female genital mutilation.* Female genital mutilation is not a religious practice. It is generally accepted as having pre-dated Islam, Christianity and other major religions. It is sometimes incorrectly thought that female genital mutilation has its origins in Islam. Some groups which practice female genital mutilation consider incorrectly that the practice is endorsed by Islam. However, there is no Islamic religious basis for the practice. Both Muslim and non-Muslim religious leaders overseas and in Australia have emphasised the absence of a religious foundation for the custom. The Al-Azhar University of Cairo, the principal authority ruling on Islamic practice, re-stated in 1986 that female genital mutilation is not an Islamic practice or teaching.

2.16 The Hadith, which is a collection of the sayings of the Prophet Mohammed recorded from oral histories after his death, also contains no justification for the

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<sup>7</sup>Boston Women's Health Book Collective, 1985, *The New Our Bodies, Ourselves*, Penguin Books, page 617.

<sup>8</sup>Badawi Mohamed, 1989, "Epidemiology of Female Sexual Castration in Cairo, Egypt", *The Truth Seeker*, July/August 1989,31-34, page 31.

<sup>9</sup>WHO, 1992, "Female Circumcision: Female Genital Mutilation", *Int J Gynecol Obstet*, 37, page 149.

<sup>10</sup>Myers, A et al, 1985, "Circumcision: Its nature and Practice Among Some Ethnic Groups in Southern Nigeria", *Social Science and Medicine*, 21, No 5, (1985):588 n.20.

<sup>11</sup>Slack, Alison T, 1988, "Female Circumcision: A Critical Appraisal", *Human Rights Quarterly*, 10 (1988) 437-486, pages 442-443.

practice. Islam clearly acknowledges women's sexuality and emphasises her right to sexual satisfaction, as long as this is confined to marriage.<sup>12</sup>

2.17 Female genital mutilation is not practised in predominantly Islamic countries such as Saudi Arabia, Kuwait, Algeria, Pakistan and the Gulf States. There is little doubt that female genital mutilation preceded Islam in Africa and it is likely that when Islam entered Africa the practice became linked with the new religion. It is also interesting to note that when Islam entered Asian countries through Arabia or Iran, it did not bring female genital mutilation with it, but when it was imported to Asia through Nile Valley cultures, female genital mutilation was a part of it. An example is the Daudi Bohra of India, a group which practises female genital mutilation and which was established by an Egyptian-based sect of Islam.

2.18 In Australia some Muslim religious leaders have come out strongly against female genital mutilation. Al Naggar <sup>13</sup>points out the status afforded to women in the Koran and asks how, in the light of this high status, parents could harm their female children "by removing parts of their body without this being necessitated by sickness or bad health, namely by performing excision?"

2.19 In a speech in the NSW Legislative Council on 10 March 1994, the Hon Franca Arena AM MLC said:

*...there is no Islamic religious basis for the practice. I want to emphasise this because many people, especially women, in the Islamic community are not prepared to bring the problem into the open because they think it will be used as an attack on their religion. I emphasise that it has nothing to do with Islam.*

2.20 As with the Koran, neither the Bible nor the Torah make specific mention of, nor advocate, female genital mutilation. The only Jews known to practise female genital mutilation are the Ethiopian Falashas.

2.21 Female genital mutilation is predominantly found in Africa and those countries which have been influenced by African culture. It seems likely that female genital mutilation began as a part of traditional puberty rites. Many myths apparently surround the practice. For example, Slack refers to the following: (1) the clitoris represents the male sex organ and, if not cut, will grow to the size of a penis; (2) females are sterile until they have been excised (i.e. had a clitoridectomy) and the operation actually increases fertility; and (3) the operation is a biologically cleansing process that improves the hygiene and/or aesthetic condition of female genitalia. In Sudan, it is believed that a woman is polluted and can only be cleansed and prepared for marriage and childbirth by excision.<sup>14</sup>

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<sup>12</sup>Toubia, Nahid, *Female Genital Mutilation: A Call for Global Action*, page 31.

<sup>13</sup>Al Naggar, Sheikh Dr Abdel Rahman, *Female Circumcision and Religion*, 1985, Translation of a Communication presented to the Inter-African Committee on Traditional Practices, Nairobi, 12 July 1985, pages 3-5.

<sup>14</sup>Slack Alison T, 1988, "Female Circumcision: A Critical Appraisal", *Human Rights Quarterly*, 10 (1988) 437-486, page 447.

2.22 In its submission the Ecumenical Migration Centre suggested that:

*Female circumcision is best understood as an expression of patriarchal social relations. When women's economic survival is dependent on marriage and an essential pre-requisite for marriage is virginity, circumcision becomes the symbolic and practical guarantee for a woman's future.*

2.23 **Why is female genital mutilation practised?** In 1985 a body associated with the UN Commission on Human Rights, the Working Group on Traditional Practices Affecting the Health of Women and Children, revealed that 54% of persons practising female genital mutilation advised that they did so because of tradition. Religion and diminution of women's sexual sensitivity were the next most common reasons for the practice. Other reasons given were reduction of women's sexual urges, increased sexual performance for men and protection of the health of babies. A similar result was obtained in a survey in Nigeria where the main reason given was tradition.<sup>15</sup> A form of clitoridectomy was practised in the USA and Europe during the last half of the nineteenth century as a "cure" for female masturbation and insanity.<sup>16</sup>

2.24 In the past there was a medical view in western countries that clitoral or labial alteration was sometimes necessary in cases to improve cosmetic appearance, enhance sexual enjoyment, cure marital problems and to cure psychosomatic illness<sup>17</sup>. Some women's magazines promoted such ideas in the mid-1970s<sup>18</sup>. The current medical view appears to be that such claims cannot be substantiated and it is unlikely that these procedures are being followed in recent years.

2.25 **Pre-marriage inspections.** In some countries where infibulation is practised, shortly before the woman is married it is often the practice for women from the groom's family to visit and examine the bride. The women check to ensure that the bride has been infibulated and that she is still a virgin.

2.26 **Cultural significance.** A major effect of the widespread practice of female genital mutilation in some communities is that women who have not been genitally mutilated are considered unclean and to have uncontrollable sexuality which is assumed will lead to promiscuity. In many communities the woman is likely to be ostracised and marriage within her community would be unlikely.

2.27 Toubia suggests that:

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<sup>15</sup>*Ibid.*, page 448.

<sup>16</sup>Barker-Benfield, GJ, 1976, *The Horrors of the Half-Known Life: Male Attitudes Towards Women and Sexuality in Nineteenth Century America*, Harper & Row, New York.

<sup>17</sup>See, for example, W G Rathmann, 1959, "Female Circumcision, Indications and a New Technique" in *GP*, Volume XX, No. 3, September 1959 at pages 115-120.

<sup>18</sup>See, for instance, *Viva: The International Magazine for Women*, March 1975, Vol. 2, No. 6 at pages 53-54 and 104-105.

*The thinking of an African woman who believes "[female genital mutilation] is the fashionable thing to do to become a real woman" is not so different from that of an American woman who has breast implants to appear more feminine.*

*...However, there is one very important difference between [female genital mutilation] and the way in which women alter their bodies in other cultures: [Female genital mutilation] is mainly performed on children, with or without their consent.<sup>19</sup>*

2.28 The Family Law Council considers that the cultural pressures on mothers, even when they move to completely different cultures, are a major consideration in the perpetuation of the practice. It is not a matter of simple choice for the women concerned. They will be under considerable pressure, on the one hand, from within their communities to continue the tradition and, on the other hand, from outside their community to resist the tradition. The problems will not end there. Pressures on them will no doubt persist so long as contact with relatives and friends in their country of origin remains, which will generally be for a life time.

2.29 Council is aware that the pressures on women to continue the practice of female genital mutilation on their children are significant. Some women have had to separate and divorce to protect their daughters from the practice. Others have been ostracised by their communities. These problems can only be addressed properly through a community education program. The education issue is fully examined in Chapter 6 (Strategies).

**2.30 Council's conclusions. Council has concluded that for at least one generation, women from countries which practise female genital mutilation will be under considerable pressures to continue this practice. This is especially relevant when considering strategies for eradication of the practice and requires that particular attention be given to the issue of community education.**

2.31 *Secrecy.* The secrecy surrounding the practice of female genital mutilation has begun to be lifted only in recent years. In Somalia, for instance, the Somali Women's Democratic Organisation has succeeded in getting a public campaign under way with the support of the Health Department and other departments, including Education. The campaign to eradicate genital mutilation is going on in the schools and on radio and television. The shroud of secrecy which surrounds the issue can be fully lifted only if women themselves speak out about the practice.

2.32 *The global incidence of female genital mutilation.* Female genital mutilation is practised in more than 40 countries, including 27 African countries, the southern part of the Arab Peninsula and the Persian Gulf.<sup>20</sup> There is evidence that it is practised by some people in India, Indonesia, Malaysia and Brazil. The number of countries where female genital mutilation is practised is increasing because of increasing migration to Western countries from countries where female genital

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<sup>19</sup>Toubia Nahid, *Female Genital Mutilation: A Call for Global Action*, pages 35-37.

<sup>20</sup>Slack, Alison T, *op cit*, page 443.

mutilation is traditionally performed. Countries with migrant populations, including the United Kingdom, France, Canada and Australia are examples of the last mentioned category.

2.33 Women in Mali, Sudan and Somalia are almost all infibulated. Excision, but also other forms of genital mutilation, is understood to be widespread in the other African countries.

2.34 The countries with the highest incidence of female genital mutilation are Somalia, Sudan and Ethiopia. Eighty to ninety percent of women in Somalia, Djibouti and Sudan are said to be infibulated.<sup>21</sup> In 1982, there were an estimated 74 million genitally mutilated women in Africa alone and a BBC television program in 1983 estimated the number as high as 84 million in 30 countries.<sup>22</sup>

2.35 In India the Daudi Bohra (an ethno-religious minority of half a million) practise excision. Other Muslim groups in India do not practise female genital mutilation.<sup>23</sup> In Indonesia genital cutting operations were done in the past, but it is understood they are no longer performed. Ritual ceremonies remain in which there is cleaning and applying substances around the clitoris, symbolic cutting or light puncture of the clitoris. Female genital mutilation is reported among some Muslims in Malaysia, but the situation in that country is unclear.<sup>24</sup>

2.36 *The incidence of female genital mutilation in Australia.* It is important to stress that the fact that a person comes from a particular country or holds a particular religious belief, does not mean that the person practises, or supports the practice of, female genital mutilation. Council wishes to repeat the concern it expressed in its discussion paper about media sensationalisation of this issue and about the possibility of people from a particular country or persons of a particular religious belief being vilified or victimised over the issue. It is an incorrect assumption that female genital mutilation is a Muslim practice. Similarly it is incorrect to assume, for example, that all Somali residents of Australia support the practice. At least one Somali community leader in Australia has expressed opposition to female genital mutilation.

2.37 The evidence relating to the incidence of female genital mutilation in Australia is mainly anecdotal. However, it would not be unreasonable to infer from recent developments in migration from African countries which practise female genital mutilation, that it is likely that the practice is now occurring in Australia. The extent of that practice, however, is not known.

2.38 The 1991 Census indicates that there were 75,968 women in Australia from countries which practise some form of female genital mutilation. Nearly 30%, or

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<sup>21</sup>Toubia Nahid, *Female Genital Mutilation: A Call for Global Action*, page 11.

<sup>22</sup>Note, "Female Circumcision", 1983, *The Lancet*, 12 March, page 569.

<sup>23</sup>Toubia, Nahid, *op cit*, page 26.

<sup>24</sup>Toubia, Nahid, *op cit*, page 26.

21,812, were from African countries. The Department of Immigration and Ethnic Affairs (DIEA) advises that during 1991-92 and 1992-93 a further 1,601 women arrived from African countries. Of these, 470 were girls under 16 years of age. Most were from Somalia where infibulation is practised and 150 were from the Sudan which also practises infibulation.

2.39 Migrants from the Horn of Africa began arriving in Australia in 1982-83. By 1989-90 their number had reached 1,355. A further 800 applications are expected to be processed by the end of 1993-94. Somalis in Melbourne number between 600-700. Most are single males under 30. Of the 226 Somalis granted visas during 1991 and 1992, 37% were women.

2.40 The occurrence of infibulation among the Somali and Sudanese populations is extremely high and it is possible that some young girls from these communities in Australia may be at risk of some form of female genital mutilation.

2.41 *Anecdotal evidence.* Information on the incidence of female genital mutilation in Australia is mainly anecdotal. Information gained by DIEA and made available to Council includes the following:

- Some women from the Somali community in Melbourne have indicated that they intend having clitoral circumcision performed on their daughters rather than excision or infibulation.
- Cutting the clitoral hood is practised in the Malaysian community in WA.
- Some WA residents from the Cocos and Christmas Islands, and some residents of the Cocos and Keeling Islands (which are a part of WA), perform a ritual circumcision ceremony - it is unclear whether this is purely symbolic or whether it involves clitoridectomy.
- Somali women in Victoria have reported that there are Egyptian women in Melbourne who perform female genital mutilation.
- Women are known to have approached doctors in the ACT and WA requesting operations for their daughters.
- The SA Children's Interest Bureau was told in December 1992 that a child was being admitted to a private hospital on Christmas Eve for female genital mutilation by a doctor.
- There are believed to be 2 cases of female genital mutilation having been done in NSW which are known to authorities in that State.
- A reliable spokesperson for the Somali community in SA alleges that the Somali community in Melbourne are using "old grannies" from the Somali community to practise genital mutilation on young Somali girls.

2.42 Council has had informal discussions which revealed that a Government Working Party, which recently looked into the incidence of female genital mutilation in NSW, concluded that the incidence of female genital mutilation in that State was low.

2.43 In Victoria in 1987, according to information informally provided to Council, there were calls for an investigation into alleged child abuse in Melbourne which specifically referred to female genital mutilation. Claims were made that babies were being circumcised by Melbourne doctors and that there were numerous young women who had undergone the operation in Melbourne. These claims led to an inquiry which examined hospital records at a number of Melbourne hospitals and had inquiries made among Victorian medical practitioners. These inquiries involved a review of medical records from 1976 to 1986 at a number of public hospitals. It indicated that, although a number of infibulated women were admitted to hospital for various medical procedures, there were no cases of girls being admitted as a direct consequence of excision, infibulation or other forms of female genital mutilation or with complications associated with the practice. There was also no evidence that doctors had performed female genital mutilation in Victoria.

2.44 Council is aware of the work of Inspector Vicki Fraser (formerly Sergeant Vicki Brown) who has had considerable experience with child abuse (including allegations of female genital mutilation) in Melbourne. Council's Secretariat was in contact with Inspector Fraser shortly after this study commenced and acknowledges the support and assistance given by her.

2.45 Some additional information was also provided to Council in submissions. An Australian born woman reported being "circumcised" to meet the requirements of her husband's family when she visited them overseas. Individual respondents and a number of organisations also reported on occurrences as follows. Organisations making reports are identified:

***South Australia.** Occasionally I have heard of female circumcision occurring in South Australia. The most recent being at the end of last year. This information was second hand and it is difficult to get proof.*

*A number of incidences have occurred within South Australia that led the committee to believe that female genital mutilation may be occurring in this State, although none of the cases that committee members were aware of had actually been confirmed. [SA Child Protection Council]*

***NSW and WA.** It is a cultural practice in Malaysia, Indonesia and other parts of southern Asia. We have received migrants from these countries and they continue with these practices in Australia. The Katanning Muslims in Perth in 1986 admitted to the practice of minor clitoral surgery on Frank de Chiera's documentary titled 'The Broken Silence'...I have a testimony from a man in Sydney who stated that Australian communities are sending the children overseas to have [female genital mutilation]...I*

*have information from a nursing sister who described young girls presenting to the casualty department of a Sydney Hospital between the ages of 5 and 8 with fresh clitoral incisions...[A Sydney Doctor]*

**Queensland.** *To our knowledge there is no such practice being actively carried out in the Queensland [Muslim] community...The only case which has come to our attention is that of a [non-Muslim] woman who stated quite openly that it was "terrible" that circumcision had been banned. [Independent Islamic Sisterhood]*

*There have been no known cases of female genital mutilation of children in Queensland. However, given the increase in immigration from countries where female genital mutilation is practised it is considered likely that the issue will occur in a child protection context in the future. [Queensland Department of Family Services and Aboriginal and Islander Affairs]*

**Victoria and Western Australia.** *Since becoming involved with [female genital mutilation] in early 1990, I have been given anecdotal evidence of [female genital mutilation] occurring in Melbourne, including two cases of infibulation; school teachers suspecting female students have been excised due to their sudden reluctance for physical activity over a few days; a doctor being asked to perform female genital mutilation and refusing. I have also been given anecdotal evidence of doctors who perform [female genital mutilation] as well as 'grandmas'. I have heard that [female genital mutilation] is also suspected to occur in Sydney and that the 'sunna' form is still carried out among the Malay, Cocos and Keeling Islands and Christmas Island communities in Western Australia...*

**Victoria.** *In 1987 Sergeant Vicki Brown (now Fraser) of the Victoria Police called for an inquiry into this practice; several primary school teachers reported that secondary haemorrhage occurred at school to girls after their genital 'surgery'.*

*I enclose a personal testimony from a lady, who after the birth of her child had a clitoridectomy performed. This was done without her permission by her general practitioner.*

**Western Australia.** *There is no direct evidence that female genital mutilation is being performed in Western Australia. Some recent anecdotal evidence suggests that children from a number of communities may be at risk. Anecdotal evidence suggests that a very small number of children may be taken outside Australia for [female genital mutilation] procedures.*

2.46 In a letter to the *Sydney Morning Herald* on 3 March 1994 Dr Caroline de Costa of the NSW State Committee of the Royal Australian College of Obstetricians and Gynaecologists, made the following point:

*...in 13 years of practice, I have seen one woman, a North African, who had a procedure done overseas. Discussions with the other 14 women gynaecologists in this city reveals that they also have encountered cases very infrequently, always in adults and done overseas. I have not been able to find a single gynaecologist, male or female, who has*

*been approached to perform such a procedure here or who has had to deal with the consequences of it having been performed in Australia.*

2.47 One respondent summed the position up as follows in his submission:

*It must be a matter of some concern that the extent of female genital mutilation practices in Australia is really unknown. There is enough anecdotal evidence, much of which is contained in your discussion paper, to create a concern that the practice in some communities is quite widespread. It would be difficult to hold an open inquiry, as doubtless the communities in which the practice is carried on would be unwilling to take part.*

2.48 **Summary.** There is no empirical evidence on the practice of female genital mutilation in Australia. The evidence is largely anecdotal. However, a number of factors need to be taken into account:

- It is not surprising that the evidence relating to the practice is mainly anecdotal, given the serious consequences for persons, including professionals, who might perform the procedure in this country;
- The anecdotal evidence is strong, particularly in relation to Melbourne, where it would appear there are persons who are prepared to do the procedure but also in relation to SA and WA;
- It is only in very recent years that numbers of migrants from countries which practice female genital mutilation have been arriving in Australia. It is not surprising, therefore, that more evidence is not available at this time;
- The practice involves deep-rooted beliefs and traditions that have been in place for centuries and it could not be expected that it was discontinued “overnight”;
- Anecdotal evidence from school teachers and others, including the police, give a strong indication that children have been genitally mutilated in this country; and
- In recent years there has been a significant number of migrants arriving in Australia from countries which practice female genital mutilation. Other countries with a migration intake from such countries (such as the UK, Canada, France and other European countries) are finding instances of the practice. It would be optimistic and naive to assume that somehow Australia is immune from the practice.

2.49 On the other hand, a number of contrary factors need to be taken into account. These include:

- There is no strong evidence of the need for medical intervention such as might be expected if infibulation were being performed here to any significant extent by non-professionals. Some of the communities with whom Council has been in contact are of the view that infibulation is not practised in Australia and is not advocated within their communities;
- Doctors generally are not reporting instances of children who are exhibiting signs of having recently been genitally mutilated; and
- Many of the persons involved are refugees and it is unlikely that children would be taken back to their country of origin for the procedure to be done unless and until it is safe for them to return.

2.50 Some respondents suggested to Council that there should be further inquiry into the incidence of female genital mutilation in Australia. For instance, the Immigrant Women's Speakout Association of NSW Inc. (Speakout) takes the view in its submission:

*We would submit to the Council that it is difficult to conclude anything without a comprehensive information base and documented case studies.*

It is interesting to note that in its submission Speakout endorses the view that "legislation would be counterproductive" but advocates a full inquiry into the incidence of the practice. Council considers that an effective inquiry into the incidence of a practice such as this among refugees, who are possibly the most vulnerable members of the community, would undoubtedly prove to be intrusive, insensitive and counterproductive.

2.51 Council does not advocate a more detailed study of the incidence of female genital mutilation in Australia. In Council's view for such an inquiry to be successful it would need to be resource intensive. It would be virtually impossible to conduct a thorough inquiry without alienating members of vulnerable communities.

**2.52 Council's conclusions. It is not possible to get reliable statistics on the practice of female genital mutilation in Australia. As the population who have come from countries which practise female genital mutilation is small it is likely that the incidence of the practice in this country at this stage is also small. Although evidence of the practice in this country is largely anecdotal, it is not unreasonable to conclude from that evidence that female genital mutilation is now being practised in Australia. Even a low incidence of the practice cannot be disregarded. Council further suggests that as the volume of migrants from the relevant countries increases cumulatively it might be expected that the incidence of the practice in Australia will increase.**

2.53 *Male circumcision.* Some suggest that clitoral circumcision is analogous to circumcision of the male, because it involves removal of the clitoral hood.<sup>25</sup> However, any possibility of comparison ends there. It has been said that in general the term “female circumcision” is misleading because circumcision implies the simple removal of a piece of skin, whereas the procedure on women almost always involves the removal of healthy organs.<sup>26</sup> Clitoridectomy and infibulation have no male comparisons. Clitoridectomy might be equated to the removal of most or all of the penis, but this is not a valid comparison because whereas the clitoris has a sexual, and not a reproductive, function, the penis has both functions. In male circumcision, the foreskin is removed in a relatively minor surgical procedure. In rare cases there are medical reasons for this, but usually it is a religious or social custom performed immediately after birth.

2.54 In Australia, male circumcision is not unlawful<sup>27</sup>. It has religious significance to persons of particular religious persuasions, such as those of the Jewish faith. It is also understood to be performed as an initiation rite on males entering adulthood in some Aboriginal communities.

2.55 A number of people who have written to Council have raised the issue of male circumcision. One writer said that in the case of both male circumcision and female genital mutilation “the child has no say and is quite at the whims of parent guardian or doctor”, a situation which he considered “repugnant and unacceptable for Australia” in 1994.

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<sup>25</sup>See, for instance, Armstrong S, 1991, “Female Circumcision: Fighting a Cruel Tradition”, *New Scientist*, February 1991, 22-26, page 22.

<sup>26</sup>Armstrong Sue, 1991, “Female circumcision: Fighting a cruel tradition”, *New Scientist*, February 1991, page 22.

<sup>27</sup>There has been debate in medical circles in recent years about the therapeutic value of male circumcision. See, for example, Schlossberg, NM and Irwin CE, 1992, “Early Adolescent Knowledge and Attitudes about Circumcision: Methods and Implications for Research”, *Journal of Adolescent Health*, 12 (1991) 293-297; Griffiths D and Frank JD, “Inappropriate circumcision referrals by GPs”, *Journal of the Royal Society of Medicine*, Vol 85, June 1992, 324-325; Ganiats TGet al, 1991, “Routine Neonatal Circumcision”, *Medical Decision Making*, No 4, Oct-Dec 1991, 282-293; Chessare JB, 1992, “Circumcision: Is the Risk of Urinary Tract Infection Really the Pivotal Issue?”, *Clinical Pediatrics*, February 1992, 100-104.

**2.56 *Council's conclusions on male circumcision.*** Council is aware that there are a significant number of persons in the community who consider that male circumcision should be banned. However, the issue is outside the terms of reference of the present study.

### 3. THE EFFECTS OF FEMALE GENITAL MUTILATION

*It is self-evident that any form of surgical interference in the highly sensitive genital organs constitutes a serious threat to the child, and that the painful operation is a source of major physical as well as psychological trauma. The extent and nature of the immediate and long-term mental disturbances will depend on the child's inner defences, the prevailing psychosocial environment, and a host of other factors.*

**Statement by Dr A H Taba, former Regional Director of WHO Eastern Mediterranean Region, at the 1979 World Health Organisation's Seminar on Traditional Practices Affecting the Health of Women and Children.**

3.01 In order to appreciate the physical, psychological, sexual and other effects of female genital mutilation on the girl concerned it is necessary to be aware of the circumstances under which the operation is performed and the way in which it is done.

3.02 *The instruments used.* In the African villages, the instruments traditionally used for female genital mutilation include kitchen knives, razor blades, glass and sharp stones. Instruments are not usually sterilised and wounds are dabbed with a range of treatments including alcohol, lemon juice, ash, herb mixtures or cow dung.<sup>28</sup> When performed in health clinics or public hospitals, scalpels would normally be used.

3.03 *Use of an anaesthetic.* In the usual situation where these procedures are performed, an effective anaesthetic would rarely, if ever, be available. An anaesthetic is more likely to be used where the operation is performed in a hospital or health clinic, however. Usually, the girl is held down by several women (often including the child's mother). In the SBS Program "Act of Love"<sup>29</sup> an African woman said:

*A Somali girl doesn't feel any pain when she is circumcised. It's an honour for her. She has become a woman. Circumcision doesn't have any adverse consequences. It's a joyful experience for a woman.*

3.04 However, the testimony of another woman reported by Toubia<sup>30</sup> was:

*The memory of their screams calling for mercy, gasping for breath, pleading that those parts of their bodies that it pleases God to give them be spared. I remember the fearful look in their eyes when I led them to the toilet..."Why mum, why did you let them do this to me?" Those words continue to haunt me.*

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<sup>28</sup>Armstrong S, 1991, "Female Circumcision: Fighting a Cruel Tradition", *New Scientist*, February 1991, 22-26, page 22.

<sup>29</sup>SBS Television, The Cutting Edge Series, 29 June 1993.

<sup>30</sup>Toubia, Nahid, *Female Genital Mutilation: A Call for Global Action*, page 8.

3.05 After infibulation the girl's legs are bound together until her wounds have healed. In West Africa the raw edges of the labia majora are not sewn together after the operation. Instead, the girl's legs are tied together in a crossed position, and the same result is said to be achieved. After infibulation the girl is immobilised until the wound of the vulva has closed. This is often a period of several weeks.

3.06 *The effects of female genital mutilation - overview.* There are many immediate and long-term health consequences of female genital mutilation, both physical and psychological<sup>31</sup>. There are also emotional and sexual implications. Complications from the procedure can result in infertility. Problems can stay with the woman into adulthood and lead to obstetrical difficulties which endanger the life of both the woman and her children. It is also understood to be common for infibulated women to under-eat during pregnancy so that they will have smaller children.

3.07 Doctors in Sudan have estimated that the number of fatalities due to infibulation is about one-third of all girls in areas where antibiotics are not available. Death due to female genital mutilation is one of many factors contributing to the high infant mortality rates in these countries. For example, Somalia, which has one of the highest percentages of circumcised women in the world, has the world's fourth highest infant mortality rate.<sup>32</sup>

3.08 The health problems associated with female genital mutilation are more significant with clitoridectomy and infibulation because those procedures involve more radical surgery.

3.09 *Physical effects.* The immediate effects of female genital mutilation procedures, especially infibulation, can include haemorrhage, shock, acute infection (owing to the instruments used and treatments placed on the wounds), septicemia, tetanus, damage to nearby organs and death. Sometimes after infibulation the girl's excrement is trapped by bandages and this exacerbates other problems. It has been suggested that over 100 million women are "missing" in Africa and Asia because of a lack of health care, medicines and nutrition.<sup>33</sup> A significant proportion of these could well be attributed to the practice of female genital mutilation.

3.10 With the less severe procedures of ritualised circumcision, sunna and excision, the adverse effects tend to be less severe. There can still be considerable pain, bleeding and infections. Also, if the girl struggles the result can be a more severe

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<sup>31</sup>World Health Organisation, 1992, "Female Circumcision", *European Journal of Obstetrics & Gynecology and Reproductive Biology*, 45 (1992) 153-154.

<sup>32</sup>Slack, Alison T, 1988, "Female Circumcision: A Critical Appraisal", *Human Rights Quarterly*, 10(1988) 437-486, page 451.

<sup>33</sup>Sen, Amartya, "More than 100 Million Women are Missing" in *New York Review of Books*, 20 December 1990, 61-4, 64, as cited in Funder, Anna, 1993, "De Minimis Non Curat Lex: The Clitoris, Culture and the Law", *Transnational Law and Contemporary Problems*, Volume 3, Number 2, Fall 1993, pages 418-467 at page 424.

form of mutilation than was originally intended. For example, clitoral circumcision can become a clitoridectomy.

3.11 Many young girls bleed to death because clumsy operators have cut into the pudendal artery or the dorsal artery of the clitoris. Other girls die of post-operative shock because of ignorance about how to revive the girls or the distance to the local hospital or clinic.

3.12 Studies carried out in the Sudan indicated that almost all infibulated women questioned reported significant problems in urinating. The average period of time it takes an infibulated woman to urinate is 10-15 minutes. They have to force the urine out drop by drop. Severe infections can lead to incontinence. Sometimes the hole left after infibulation is too small and prevents the flow of menstrual blood which collects in the abdomen. There have been instances where girls have been killed to preserve their family's honour when the swelling of their bellies and the absence of menstruation have been wrongly interpreted as pregnancy.<sup>34</sup> In a study in the Sudan in 1983 it was found that nearly all infibulated women reported agonising periods, in which the menstrual flow was all but totally blocked. This resulted in the build up of clotted tissue requiring surgical intervention.<sup>35</sup>

3.13 Difficulties in childbirth for infibulated women occur quite frequently and can be serious due to scarring and to hardened tissue blocking the passage at birth. Delayed births are common and there can be brain damage and death of the baby because of lack of oxygen. Sometimes the lives of both the mother and child can be threatened because the opening is too small.<sup>36</sup>

3.14 In Australia when infibulated women are admitted to hospital they are sometimes made to feel as though they are odd because they have been infibulated. It has also been suggested to Council that unnecessary operations are sometimes carried out because of incorrect assumptions, such as the assumption that all infibulated women need to have caesarian births.

3.15 *Psychological effects.* There do not appear to have been any longitudinal studies of the full psychological consequences of female genital mutilation to date, but suicides have been reported among young women in Burkina Faso.<sup>37</sup>

3.16 Slack<sup>38</sup> suggests that "it would seem logical that such extreme pain in an extremely delicate, complex and vital physical area, when experienced by young girls in their formative years could result in substantial psychological problems. Whether these problems would cause permanent emotional damage is not clear."

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<sup>34</sup>Armstrong, Sue, 1991, "Female circumcision: fighting a cruel tradition", *New Scientist*, 2 February 1991, pages 22-23.

<sup>35</sup>Slack, Alison T, *ibid*, page 452.

<sup>36</sup>Slack, Alison T, *ibid*, page 454.

<sup>37</sup>Hosken, Fran P, 1989, "Female genital mutilation - Strategies for eradication", *Truth Seeker*, July/August 1989, page 22.

<sup>38</sup>Slack, Alison T, *op cit*, page 454.

3.17 Where they are old enough to know what female genital mutilation involves, the girls often experience anxiety prior to, and in anticipation of the procedure. The event itself is also frightening as the girls are held down by force and often no anaesthetic is used. Pain is said to last for weeks and may recur throughout life; for example, the pain of menstruation, intercourse during the first months of marriage and at childbirth.<sup>39</sup>

3.18 It would appear that the psychological effects of female genital mutilation can become more acute when the young woman is in a western culture. In Britain, for example, social workers have found that women who have been infibulated become more conscious of their condition. They may even question their womanhood and feel abnormal after making friends with non-mutilated women of their own age.<sup>40</sup>

3.19 *Emotional effects.* Prior to having the procedure done, the conflict of feelings in the child are said to be considerable. "On the one hand, there is the desire to please parents, grandparents and relatives by doing something that is highly valued and approved of...there is the desire to be "normal" ...This feeling is juxtaposed to the girl's expectation of pain, the stories of suffering and the sheer terror of hearing the screaming of other children being circumcised. Finally, there is the experience itself: being held down by force while part of the body is cut off."<sup>41</sup>

3.20 Council has been advised of a number of fears experienced by women, including Australian women, married to men who believe their wives must be "circumcised". For example:

*Within a very short time of arrival, his mother insisted that I go through sunna. Naturally I was frightened and begged not to have to submit to the procedure.*

*My daughter is now fifteen and a half years old and was not circumcised. It is now most unlikely to happen to her. However, one of my acquaintances was not able to protect her daughter. The child was taken without the mother's knowledge to a...midwife and held down for the ritual. That child today, at nineteen years of age is totally afraid of men and sex...*

*I am in touch with a young woman who fears that her three year old daughter is in danger of being excised...The Family...Court has given the father overnight access. The mother complained that this puts her daughter at risk, but she was told that she would have to live with it...*

3.21 *Sexual implications.* The clitoris is the primary female sexual organ. The tip of the clitoris has a dense supply of nerve endings which are extremely sensitive to the touch. The vagina has minimal capacity for sexual response. Consequently, female

<sup>39</sup>Slack, Alison T, *op cit*, page 454.

<sup>40</sup>Hedley Rodney and Dorkenoo Efua, 1992, *Child Protection and Female Genital Mutilation*, Foundation for Women's Health Research and Development, page 9.

<sup>41</sup>Toubia, Nahid, *Female Genital Mutilation: A Call for Global Action*, page 40.

genital mutilation aims to remove the woman's sexual organ while leaving her reproductive function intact.<sup>42</sup>

3.22 Following marriage the husband must penetrate the infibulated vulva. Often penetration is difficult and an opening must be made with a knife. Some women go through a gradual process of penetration which can take two to three months. In some countries the infibulated vulva is opened routinely with a knife before the marriage is consummated. In Somalia the husband uses his fingers, a knife or a razor to enlarge the opening in his wife. In other cultures the husband's mother or grandmother measures his penis, makes a wooden replica of the same size and cuts the infibulated opening of the bride accordingly. This allows penetration, which in the early stages needs to be frequent, to prevent the opening wound from closing again.<sup>43</sup>

3.23 It is also apparent that a large number of circumcised women are afraid of sex because of the associated pain and they have little or no sexual enjoyment. On the SBS program "Act of Love"<sup>44</sup> a circumcised African woman living in a western culture said:

*"I'd like to be a complete woman but I'm not. That's a great problem for me."*

*When asked "Why?" she replied:*

*"I'm not a complete woman because ... Sometimes I'm afraid I'm not woman enough for my husband ... that I can't satisfy him..."*

3.24 A study conducted in Egypt in 1985<sup>45</sup> analysed the responses to sexual stimulation of genitally mutilated women (133 such women took part in the study) with women who had not been mutilated (26 such women). The study involved responses to stimulation of the clitoris or clitoral area, stimulation of the labial area and intercourse.

3.25 This study indicated that about eight times as many non-mutilated women experience sexual excitement from stimulation of the clitoris/clitoral area than did the mutilated women. Manual stimulation of the clitoris/clitoral area resulted in the experience of orgasm in 50% of the non-mutilated women and in 25% of the genitally mutilated women.<sup>46</sup>

**3.26 Council's conclusion. Council notes the physical, psychological, emotional, sexual and other implications of female genital mutilation and has concluded that it is damaging with persisting effects.**

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<sup>42</sup>Toubia, Nahid, *Female Genital Mutilation: A Call for Global Action*, page 17.

<sup>43</sup>Slack, Alison T, *op cit*, page 453.

<sup>44</sup>SBS *The Cutting Edge*, 29 June 1993.

<sup>45</sup>Badawi, Mohamed, 1989, "Epidemiology of Female Sexual Castration in Cairo, Egypt", *The Truth Seeker*, July / August 1989, page 32.

<sup>46</sup>Badawi, Mohamed, *op cit*, page 32.

## 4. WOMEN'S AND CHILDREN'S RIGHTS

*Violence against women shall be understood to encompass, but not limited to, the following:...female genital mutilation and other traditional practices harmful to women...States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women...*

**The Declaration on Violence Against Women adopted by the UN General Assembly in December 1993. Australia supports the Declaration.**

4.01 *International Declarations, Conventions and Protocols* A number of international instruments are relevant to the practice of female genital mutilation. Those considered in this chapter are:

- The Universal Declaration of Human Rights;
- The Convention on the Elimination of All Forms of Discrimination Against Women;
- The Declaration on Violence Against Women;
- The 1951 Convention and 1967 Protocol relating to the Status of Refugees; and
- The Convention on the Rights of the Child.

4.02 *Universal Declaration of Human Rights.* Australia supports the *Universal Declaration of Human Rights* (1948). The practice of female genital mutilation would appear to breach Articles 3 and 5 of the which are as follows:

Article 3. "Everyone has the right to life, liberty and security of person"

Article 5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

4.03 *Convention on the Elimination of All Forms of Discrimination Against Women.* Australia is a party to the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) which contains a number of Articles of relevance. Female genital mutilation is not a procedure which is medically necessary and in many countries it is performed in conditions which place the health of the girl concerned at grave risks. In the circumstances the following Articles of the Convention are relevant:

Article 10 State parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

...

- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 12(1) State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those relating to family planning.

Article 12(2) Notwithstanding the provisions of paragraph 1 of this Article, State Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 16(1) State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the rights of the children shall be paramount;

...

**4.04 Declaration on Violence Against Women.** The United Nations General Assembly adopted the *Declaration on Violence Against Women* in December 1993. Australia was significantly involved in the drafting of the Declaration and formally supports the declaration. It contains a number of provisions of relevance, including the following:

1. For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats

of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

2. Violence against women shall be understood to encompass, but not limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation (emphasis added);

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

4. States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

...

(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;

...

(j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;

...

4.05 *Convention relating to the Status of Refugees.* The 1951 UN *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees* enjoins signatory nations to provide protection to any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality,

membership of a particular social group or political opinion, is outside the country of the person's nationality and is unable or, owing to fear, is unwilling to avail himself of the protection of that country".<sup>47</sup> Australia is a party to the Convention and the Protocol.

4.06 There appear to have been no claims in Australia for refugee status on the grounds of fear of female genital mutilation although Council is aware of newspaper reports<sup>48</sup> of a Nigerian woman in the USA whose deportation order was cancelled by the Court because she feared that her two daughters would suffer genital mutilation if she was required to return to her native country. Such a claim in Australia could conceivably meet the Convention definition of a refugee, either by:

- construing the woman's opposition to a discriminatory cultural practice perpetrated against women as persecution because of political opinion; or
- treating women at risk of female genital mutilation as a gender-defined social group.<sup>49</sup>

4.07 ***Convention on the Rights of the Child.*** Australia is a party to the *Convention on the Rights of the Child* (1989). Of particular relevance is Article 24(3) of the Convention which states:

3. State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4.08 As indicated in Chapter 3, female genital mutilation can have serious physical, psychological and other effects and death of the child can, and does, occur as a result of the practice. Female genital mutilation is clearly a "traditional practice" and there is little doubt that Article 24(3) of the *Convention on the Rights of the Child* aims to eliminate such practices as female genital mutilation and requires Australia to take action accordingly.

4.09 ***World Health Organisation Resolution.*** In May 1993 the World Health Organisation (WHO) passed a resolution, drafted by Guinea, Kenya, Nigeria, Togo and Zambia, which urged all Member States to:

1. Continue to monitor the effectiveness of their efforts to achieve the goals and targets of the Strategy for Health for All, the World Summit for

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<sup>47</sup>Office of the United Nations High Commissioner for Refugees (1992) *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, page 11.

<sup>48</sup>See, for example, *The Age*, 25 march 1994.

<sup>49</sup>The Guidelines issued by the Canadian Immigration and Refugee Board in March 1993 (*Women Refugee Claimants fearing Gender-related Persecution*), discuss the position of "...women who fear persecution as the consequence for failing to conform to, or for transgressing, certain gender-discriminating...cultural laws and practices in their country of origin. Such laws and practices, by singling out women and placing them in a more vulnerable position than men, may create conditions precedent to a gender-defined cultural group". Page 3.

Children and the International Conference on Nutrition, with particular reference to eliminating harmful traditional practices affecting the health of women and children;

2. Determine systematically and seek operational solutions to the managerial, social and behavioural obstacles preventing satisfaction of the health and development needs of women and children.

4.10 The resolution requested the Director-General of WHO to assess progress on the implementation of the strategy and to report to the ninety-third session of the WHO Executive Board.

4.11 *International Council of Nurses.* In 1981 the International Council of Nurses released a policy statement on female genital mutilation. The Australian Nursing Federation supports the policy. The policy statement says that the International Council of Nurses:

Endorses the WHO/UNICEF position on the practice known as female excision, female circumcision and female mutilation; and

Works actively with appropriate colleagues and community groups for the abolition of this custom; and

Includes this subject in all maternal and child health programmes and health education programmes of ICN as appropriate.

4.12 The UNICEF position paper on female circumcision referred to in the policy statement concluded:

The abolition of widespread and deeply entrenched custom of such long standing - fraught as it is with complex cultural sensitivities - cannot, of course, be accomplished overnight. What should be emphasised is that the task is being undertaken carefully, but actively on several fronts and that UNICEF is seriously committed to the effort to overcome the practice of female excision.

4.13 *World Medical Association.* At the 45th World Medical Assembly in Budapest, Hungary, in October 1993, the World Medical Association (WMA) passed a motion condemning the practice of female genital mutilation and condemned the participation of physicians in the execution of such practices. The WMA made the following recommendations in relation to the practice:

1. Taking into account the psychological rights and 'cultural identity' of the people involved, physicians should inform women, men and children on [female genital mutilation] and prevent them from performing or promoting [female genital mutilation]. Physicians should integrate health promotion and counselling against [female genital mutilation] in their work.

2. As a consequence, physicians should have enough information and support for doing so. Educational programs concerning [female genital mutilation] should be expanded and/or developed.
3. Medical Associations should stimulate public and professional awareness of the damaging effects of [female genital mutilation].
4. Medical Associations should stimulate governmental action in preventing the practice of [female genital mutilation].
5. Medical Associations should cooperate in organising an appropriate preventive and legal strategy when a child is at risk to undergo [female genital mutilation].

4.14 The Australian Medical Association's policy on female genital mutilation condemns the practice, except for recognised medical procedures. The AMA also supports the World Medical Association's statement on "Condemnation of Female Genital Mutilation", which was adopted by the 45th World Medical Assembly in Hungary in October 1993.

4.15 The AMA's policy on female genital mutilation contains the following item:

6. The AMA regards any medical practitioner who engages in, encourages or condones the practice of any form of female genital mutilation as guilty of professional misconduct and recommends to the State and Territory Medical Boards that they regard the practice of female genital mutilation in that light.

4.16 *International Council of Women.* The National Council of Women of Australia drew Council's attention to the following resolution which was passed by the International Council of Women in Bangkok in 1991:

The ICW recommends to its affiliated National Councils that in respect of practices such as the operation of sunna, infibulation and female circumcision that they are:

1. to reinforce or set up national committees in all countries where these practices prevail;
2. to collect data and classify information with a view to updating statistics;
3. to develop specialised training programs for social workers, health professionals, traditional midwives, herbalists, practitioners of traditional medicine;
4. to increase awareness among educators and the mass media;

5. to organise public information campaigns and extensive community education programs through traditional and modern methods of communication;
6. it is urged that the government of the countries concerned by the problem to vote or implement specific laws prohibiting the practice of sexual mutilations.

**4.17 Council's conclusions.** Council notes the international treaties, declarations and statements which are supported by Australia. These instruments and declarations require Australia to work for the eradication of female genital mutilation. Council also notes that the *Declaration on Violence Against Women* urges nations to pursue without delay a policy of eliminating all such forms of violence against women. Australia supported the declaration.

## 5. TRADITIONAL PRACTICES

*Since the earliest of times, humankind has evolved a variety of practices for the promotion of health and prevention of disease...Some of these traditional practices are no doubt useful, others are harmless, and yet others positively dangerous.*

**Report of the UN Working Group on Traditional Practices Affecting the Health of Women and Children**

*[Female genital mutilation] will not be eradicated unless those who are fighting for change understand the deeply held beliefs of the people who practise it.*

**Nahid Toubia in *Female Genital Mutilation: A Call for Global Action*, UN Working Group on Traditional Practices, 1993, page 35.**

*The Government seeks to promote tolerance and acceptance of social and cultural diversity, and encourage every person in Australia to respect and protect every other person's rights.*

***National Agenda for a Multicultural Australia: The Year in Review (1989-90)*, page 11.**

5.01 ***Australia as a multicultural society.*** The *National Agenda for a Multicultural Australia* is a statement of the Federal Government's policy response to the changing ethnic composition of Australian society. For the purposes of the *National Agenda*, multiculturalism is defined as a policy for "managing the consequences of cultural diversity in the interests of the individual and society as a whole." It includes the rights of all Australians, within carefully defined limits, to express and share their individual cultural heritage, including their language and their religion. It also includes the right of all Australians to equality of treatment and opportunity and the removal of barriers of race, ethnicity, culture, religion, language, gender or place of birth.

5.02 As a part of the Government's *National Agenda for a Multicultural Australia*, the Australian Law Reform Commission (ALRC) reviewed Australian family law to ensure that it reflects the whole community which it serves. In that review the ALRC indicated that its preferred approach was that special legislation was not necessary to prohibit female genital mutilation. The ALRC said "the numbers affected are likely to be very small...Generally the Commission favours action in cooperation with the community to assess the extent of the problem and to provide education and counselling directed to particular communities. These communities should be aware that the practice is an offence under the general law and that those who take part may be liable to severe penalties."<sup>50</sup>

5.03 Countries with migrant populations, such as Australia, are enriched by the cultural diversity of persons who become its residents. Many migrants bring their

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<sup>50</sup>ALRC, 1991, *Multiculturalism : Criminal Law*, Discussion Paper 48, May 1991, page 23.

practices and traditions with them and many of those practices and traditions are valued and maintained by ensuing generations. It cannot be said, therefore, that the traditions of other cultures are not acceptable in Australia.

5.04 Council notes that some members of the vulnerable communities see multiculturalism as implying that if a practice is culturally based that is sufficient reason to justify the continuation of the practice in this country.

5.05 However, some respondents made some strong statements on what multiculturalism meant to them. For example, the Women's Electoral Lobby (WEL) said:

*WEL does not believe, and will never accept, that multiculturalism can be in any way used to justify or excuse assaulting and abusing women and girls.*

5.06 The Uniting Church in Australia (NSW Synod) had the following to say:

*Multiculturalism only works when people are sure that there are some clear limits to what they will be asked to tolerate.*

5.07 ***A long-standing practice.*** Female genital mutilation is described as a traditional practice among a number of cultures. In surveys among those who practise it, female genital mutilation is most often attributed to tradition, although other reasons (such as diminishing women's sexual urges, increased sexual performance for men and the health of babies) are also given. The practice has existed for many years - some studies suggest that it may have been practised for as long as 5,000 years in some cultures.

5.08 A study in the Sudan in 1983<sup>51</sup> indicated that almost 83% of women interviewed approved of female genital mutilation regardless of type. At the same time almost 88% of men interviewed endorsed the practice. The main reasons for approval were tradition and religion. Rites and traditions were generally accepted without question.

5.09 It is important to note that the tradition is bound up with the moral code of the community and is an important factor in identification with the whole community. In many underdeveloped countries, a woman must be a virgin to marry and her economic survival can generally only be guaranteed through marriage. In the minds of those who practise female genital mutilation, to be different is apparently to be separated from the community. Also, Eritrean women believe that female genital mutilation protects them from rape. There are, therefore, deep and compelling ties to the tradition among the people concerned and those ties will not easily be broken.

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<sup>51</sup>Slack, Alison T, 1988, "Female Circumcision: A critical appraisal", *Human Rights Quarterly*, 10(1988) 437-486, page 448.

5.10 Many people who practise female genital mutilation see western societies as sexually promiscuous, decadent and in the process of disintegration. They cite female genital mutilation as a defence against such corrupting influences. They also see the attack on female genital mutilation as an attempt to disintegrate their social order and thereby speed up their Europeanisation.

5.11 In a segment of the SBS program titled "Act of Love", a number of Somali women who had migrated to Western Europe, and who still practised or supported the practice of, female genital mutilation expressed the following views:

*"A girl has to be circumcised. And she has to have good manners and be composed. She mustn't be seen flirting with men."*

*"When the girl goes to her husband's relatives she has to be a good girl who's already been circumcised. She must be like she was after her circumcision. She must be closed up like she was at her parents."*

*"[Circumcision] gives girls confidence and a good reputation."<sup>52</sup>*

5.12 On the other hand, there are those who see the women concerned as "prisoners of ritual".<sup>53</sup> For many, female genital mutilation is seen as a means of sexual control of women. There seems to be a belief that a woman's sexuality is irresponsible and must be controlled.<sup>54</sup> Circumcision and excision discourage promiscuity by reducing a woman's sensitivity and desire for sexual intercourse. In the case of infibulation, the main reason seems to be to guarantee a bride's virginity. The tiny opening left after infibulation makes sexual intercourse virtually impossible without reopening the vagina.

5.13 An Egyptian author and doctor, Nawal El Saadawi, who was herself circumcised, has said that:

*If you examine the causes of female genital mutilation you will find that it is not related to Islam; it is not related to Africa; it is not related to any colour or religion. It is related to a patriarchal class system of 5,000 years ago when men started to build a patriarchal family, a patriarchal society.<sup>55</sup>*

5.14 **Family autonomy.** The general right of parents to decide what is best for their children has existed for many years and there is an expectation that the State will not interfere in decisions which are rightly the province of individual families. In effect, the "privacy" of the family has generally been protected by society.

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<sup>52</sup>SBS Television, *The Cutting Edge*, 29 June 1993.

<sup>53</sup>This term is used by Hanny Lightfoot-Klein in, 1989, *Prisoner of Ritual: An Odyssey into Female Genital Circumcision in Africa*.

<sup>54</sup>Lightfoot-Klein Hanny, 1983, "Pharaonic Circumcision of Females in the Sudan", *Medicine and the Law*, 2 (1983) 354.

<sup>55</sup>El Saadawi, Nawal, 1985, "Prisoner of Conscience", *Coming Out! Women's Voices, Women's Lives*, page 84.

5.15 *The right to cultural integrity.* Those who defend the right of parents to have their daughters “circumcised” sometimes refer to their traditional values and their right to cultural integrity without interference from persons who hold different cultural values. Council considers, however, that there is a distinction to be drawn between neo-colonialist attempts to impose western human rights standards on Third World countries and cultural practices which are no different from practices in the West through which women are valued less than men.

5.16 In recent years, however, it has been pointed out that the concept of “family privacy” has sometimes masked abusive and hurtful behaviour in the family, such as domestic violence and child abuse.<sup>56</sup> As a result there are a number of situations where it has been considered inappropriate to defer entirely to the family. Our domestic violence laws and our laws about child abuse are examples of our society not being prepared to leave matters solely to the internal regulation of the family.

5.17 Just as the concept of the “privacy of the family” has come under scrutiny for concealing and, in effect, endorsing, abuses which take place within families, so also has the idea of “culture” come in for criticism when it is used as a defence of practices that we would otherwise condemn. For example, it has been suggested that:

*...the epithet “culture” functions to establish a category in which certain practices are removed from the purview of legitimate western or international scrutiny. The realm of the “cultural” in this way resembles the “private”...To examine culture through the prism of the public/private distinction is to see similarities in the effect of culture in Western and Third World nations. It is to look underneath the terms “cultural practice” or, in the West for example, “domestic violence” and see violence to women simpliciter. Such violence is inexcusable whether in the name of culture, or of privacy; whether in the West or in the Third World.<sup>57</sup>*

5.18 Funder<sup>58</sup> suggests that the link between traditional values and cultural integrity is similar to that made in Western societies “because such values depend upon control over the place and role of women in society.” She further suggests that if female genital mutilation is viewed as a manifestation of a universal cultural practice of valuing women less than men, this may “disabuse well-intentioned non-interventionists from their reluctance to criticise what goes under the label of culture”.<sup>59</sup>

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<sup>56</sup>For a discussion on the role of the public/private distinction in this context, see Katherine O’Donovan, *Sexual Divisions in the Law*, 1985 (Weidenfeld and Nicolson, London).

<sup>57</sup>Funder, Anna, 1993, “De Minimis Non Curat Lex: The Clitoris, Culture and the Law”, *Transnational Law and Contemporary Problems*, Iowa College of Law, Vol.3, No.2, Fall 1993, page 419.

<sup>58</sup>Funder, Anna, *op cit*, page 425.

<sup>59</sup>Funder, Anna, *op cit*, page 426.

5.19 Council considers that if Australia permits the continuation of female genital mutilation by those for whom it is a traditional practice it will be saying that what we, as a society, find unacceptable for some children in our society, we accept for other children. This discriminates against those children on whom female genital mutilation would be permitted. Also, if we condone the continuation of this tradition among those in our society who feel compelled to follow it, we consent to it and it is done with our complicity.

5.20 The general tenor of views on female genital mutilation, as evidenced in letters, submissions and public comment on the issue, has been against acceptance of the practice in Australia. Some comments to Council in submissions from individual members of the public were:

*[Female genital mutilation] is not acceptable in Australia.*

*The practice of female genital mutilation is one that has no place in our society.*

*I agree with the Council's preliminary conclusion that female genital mutilation is a practice which should not be accepted in Australia.*

*I am surprised at the cautious nature of your statement. The practice is one which has been shown to be harmful to health and life, and in my opinion it is clearly an abuse of the integrity of the female and a violation of her human rights. As such it is totally unacceptable to be carried out in Australia...*

5.21 Some organisations who wrote to Council made the following observations:

*The Australian Education Union welcomes reports that both the Australian Medical Association and the [Family Law Council] have requested that the Federal Government take action to outlaw the "circumcision" of females in Australia.*

*The Ethnic Affairs Commission [NSW] does not believe that female genital mutilation can ever be justified or condoned in our society.*

*The [National Children's and Youth Law] Centre strongly believes that there is no therapeutic purpose for female genital mutilation and thus, there is no justification for such procedures. We believe that the practice of female genital mutilation is a gross violation of human rights and such procedures constitute assault and child abuse.*

*[Defence for Children International - Australia] believes...female genital mutilation is a violation of the child's rights to life, to health, to physical integrity, to self-determination and to protection from cruel and degrading treatment...*

*The [NT Women's Advisory] Council were unanimous in their belief that female genital mutilation should not be allowed to be practised in Australia.*

*As far as human rights go, it is not honourable or logical to accept customs which cause hurt or damage, therefore female genital mutilation would have to be seen as against the rights of the human child/female. [Independent Islamic Sisterhood]*

*Women's Electoral Lobby (NSW) fully endorses the Family Law Council's preliminary conclusion that female genital mutilation is a practice which should not be accepted in Australia.*

5.22 Out of concern for the women and children involved, some submissions addressed the question how the practice was to be eradicated. A number of submissions stressed the need for a primary emphasis on education. This issue is further examined in Chapter 6 (Strategies). The Women's Electoral Lobby Australia (WEL) made the following point:

*WEL is concerned that the criminalisation of female genital mutilation in Australia will punish women who are themselves victims of an oppressive and violent cultural tradition. Legislation is necessary to prevent further occurrences of female genital mutilation from occurring in Australia, and it is important that judges and magistrates are made aware of the undesirability of harshly punishing those women from cultures where female genital mutilation is accepted and practised. The women are already victims. But there must be no more girls and young women made victims in Australia.*

Council endorses this view.

**5.23 Council's conclusion. Council considers that there is wide opposition to the practice of female genital mutilation among Australians and has concluded that female genital mutilation is a practice which should not be accepted in Australia.**

## 6. STRATEGIES

*In Australia, we are free of many malignant cultural practices endured elsewhere - such as the stoning of adulteresses...amputation of the hands of thieves, flogging and caning, the death penalty, polygamy and polyandry, slavery and inherited bonded servitude...If it is necessary to remind parents not to leave their children in locked cars by enshrining this in legislation, why should we not use the same means to remind parents to refrain from mutilating their children in the name of cultural practice?*

**Louise M Steer in a letter to the *Sydney Morning Herald* on 26 February 1994.**

*For them, their female strength and identity may partly come from the pain and difficulty which female genital mutilation causes, making them 'strong' women. One major key to eradicating the practice, then, is to sensitively support women in the communities involved, by understanding their traditions and beliefs. Support is also important for women when they decide not to subject their daughters to female genital mutilation.*

**Department of Immigration and Ethnic Affairs, "Women affected by old custom require sensitive support" in *Post Migration*, No. 94, January 1994, page 8.**

### Introduction

6.01 The main conclusions reached in Chapters 1 to 5 of this report can be summarised as follows:

- Because of its physical, psychological, emotional, sexual and other implications, female genital mutilation is a dangerous practice which also violates women's and children's rights. It should not be accepted in Australia.
- Although it is impossible to get reliable statistics on the occurrence of female genital mutilation in Australia, there is enough evidence to indicate that there is at least a low incidence of the practice in this country at this time. There is no sound evidence to indicate that the extreme form (infibulation) is practised in this country at present.
- For at least one generation, women and children from countries which practice female genital mutilation will be under considerable pressures to continue the practice and this factor is especially relevant in considering the strategies for its elimination.
- Australia has an international obligation to work for the eradication of the practice without delay.

6.02 Council considers that Australia should not only be seen to oppose this practice, but that it should take steps which will result in its elimination, both inside and outside this country. There is wide agreement that the practice should not be accepted in Australia, but in the submissions to Council there is considerable disagreement on how this can be best achieved.

6.03 Council's strategies for the elimination of female genital mutilation, based on the above conclusions, are discussed below.

### **Legislation as a sole solution**

6.04 None of the respondents to Council's discussion paper recommended that legislation alone would result in the successful eradication of the practice of female genital mutilation. At no stage has Council suggested or advocated such an approach.

6.05 There is considerable apprehension in the vulnerable communities that a purely legislative approach will not assist in eliminating the practice, and Council agrees that legislation is not the solution on its own. It is evident that the purpose of legislation will be misunderstood by the people concerned, in the absence of education about the practice and its effects on children.

### **The importance of education**

6.06 Council regards the issue of education as being of pivotal significance. Female genital mutilation is a centuries-old tradition which will be difficult to eradicate and, therefore, education will need to be at the base of any program which seeks to eliminate it.

6.07 Many submissions made in response to Council's discussion paper saw the paramount need as being an effective education program:

*Education of the highest standard is of paramount importance. [National Council of Women of Victoria].*

*It is our view that education of the women and girls is the only worthwhile solution to this problem. [Independent Islamic Sisterhood Inc.]*

*Education will be the central point of any strategy which seeks to eradicate [female genital mutilation]. [Health Department of Western Australia]*

*In my view, the most important thing to be done is not to introduce legislation (because I think the law is clear) but to work with the communities concerned. Education and information about Australia and our society, and about the position of women, information about the health risks of this practice and its rejection by*

*Australians should be disseminated, bearing in mind that this needs to be done, above all, with women who themselves have been subjected to this practice and who may consider it a significant part of their acceptance in the community. This process calls for resources, energy and tact by committed social educators.*

6.08 The following extract from a submission made by the Islamic Society of Victoria Inc. makes a strong and relevant point:

*These practices, however distasteful or unjust they may appear to a western audience, are based on traditions which women have built and created their whole meaning of life and identity, both as individuals and part of their society. For some of these women, their female strength and identity may partly come from the pain and difficulty which [female genital mutilation] causes, making them "strong" and "desirable" women.*

**6.09 Conclusion on the importance of education.** Council has concluded that the strategy for the elimination of female genital mutilation must be based on **education of families from countries which traditionally practise female genital mutilation, as well as professionals and others within the general community.**

#### **The scope and planning of education.**

6.10 Other respondents to the discussion paper focussed on issues relating to the scope of possible education programs and other matters such as planning. Some of the comments made were:

*The AMA considers that the basis of any program to eliminate the practice of female genital mutilation should be the education of those cultural or ethnic groups who practise it, of all health professionals and of the general community. [Australian Medical Association]*

*We believe that education and community awareness campaigns are essential to eliminate female genital mutilation. [Women's Electoral Lobby (NSW)]*

*The issues should be included in health worker education programs. [Australian Nursing Federation]*

**Organisational support.** *Working with organisations such as the Australian Medical Association would be valuable in an education campaign. [Commonwealth - State Council on Non-English Speaking Background Women's Issues]*

**Sensitivity.** *Development of culturally sensitive and appropriate education and counselling programs, placed within the broader context of child health and welfare principles, coordinated at State and Commonwealth level, involving a range of relevant government agencies, and targeted at vulnerable ethnic communities. [Ethnic Affairs Commission NSW]*

*Intending migrants. Information and awareness campaigns on prospective migrants and refugees about existing State and Federal laws on assault, child abuse, child welfare, care and protection of children. [Ethnic Affairs Commission NSW]*

6.11 *First contact with migrants.* Council has considered whether intending migrants should be advised that female genital mutilation is not acceptable in this country. It is important that persons who intend to settle here should, in general, be aware of how resettlement will affect their lives and relationships. However, Council is of the view that if intending migrants are advised that female genital mutilation is not acceptable in Australia there is a danger that this may result in children being genitally mutilated before coming to Australia. In Council's view every effort should be made to prevent female genital mutilation, irrespective of where it occurs. Consequently, Council has concluded that it would be preferable to commence the education process after arrival in this country. In any event, Australia's position is likely to become quickly known through contact by arrivals in Australia with their families at home.

### **The delivery of education programs.**

6.12 Council does not propose to specify full details of an appropriate education program as this must be worked out in cooperation with the relevant communities. However, in Council's view, a successful education program will at least need to have the following features:

#### Target groups

The main target groups would appear to be:

- Women, children and men of specific cultural communities;
- Child protection workers;
- Care providers - including doctors, midwives, nurses, educators, child and ethnic health care workers, social workers, social workers and community workers;
- Police; and
- The Courts and legal profession.

#### Contents of education programs

- It is clear that members of the relevant communities concerned will need to be involved in the planning of education programs.
- Special education programs will need to be devised for different groups and needs. For example, in addition to the relevant community programs, it is apparent that there will need to be different types of education programs for intending migrants, for professionals and other target

groups and for the general community. Women, children and men within the vulnerable communities should all be covered by education programs.

- Programs should inform people, including vulnerable women and children, of notification provisions of State child protection legislation and of other forms of counselling and advice.
- The education programs must be sensitive, understandable, appropriate and positive.

## Educators

- In most communities the best educators will be women from the community who oppose the practice and who can work within their communities for its eradication.
- Men should not be excluded from the education program. Female genital mutilation is not just a women's problem.
- Health workers and other professionals will need to play a supporting role in the education process.

### **Involvement of the relevant communities.**

6.13 There is clearly a need to work in cooperation with the vulnerable communities which are going to be directly affected by government policy in this area. A number of respondents stressed this. For example:

*We believe the ethnic community must be enlisted to develop the education campaigns and disseminate the information in an acceptable format out into the migrant community. [Women's Electoral Lobby (NSW)]*

*...it is apparent that State/Territory based inter-agency working groups need to be established to cooperate with the communities concerned, to develop an education and information strategy for health, welfare, education and legal professionals who may encounter cases of [female genital mutilation] in their work and those specific groups who may practise [female genital mutilation]. [SA Children's Interests Bureau]*

*We believe there should be endorsement of the work of existing groups...Careful attention should be given to who the educators should be. [Women's Electoral Lobby (NSW)]*

### **Funds for education.**

6.14 A number of submissions stressed the need for adequate funding to be provided to ensure that proper education is carried out. The ACT Women's Health Network Inc. put the matter in the following terms:

*[W]e would like you to stress in your final report that the Australian community must ensure that adequate funds are provided by the Health and/or Community Services portfolios for the required community education campaigns.*

## **Recommendation 1      Education**

**6.15 Council agrees that education must be a first priority in any program for the elimination of female genital mutilation. To this end it recommends that:**

- (a) A national communication and education program on female genital mutilation be developed by the Commonwealth Department of Human Services and Health, in consultation with the States and Territories and the relevant communities, and that the campaign be integrated with Australia's health advancement and child value and protection agendas;**
- (b) The education program's primary focus be on members of vulnerable communities coming from countries where female genital mutilation is practised and that wherever possible these education programs should be conducted by members of the communities themselves with the assistance of others, such as health workers;**
- (c) It is essential that vulnerable communities be involved in planning, as well as delivering education programs, and that adequate funds be provided for education.**
- (d) Other target groups for education include child protection workers, care providers (including doctors, midwives, nurses, educators, child and ethnic care workers, social workers and community workers), police and the Courts and legal profession.**
- (e) The Commonwealth Department of Immigration and Ethnic Affairs cooperate in the development and delivery of an effective information program for newly arrived migrants from countries which practice female genital mutilation ; and**
- (f) The Commonwealth Government provide adequate funds for community education.**

### **The role of legislation**

**6.16 *Will education alone result in the elimination of female genital mutilation?*** Others seem to suggest that the problem can be eradicated by education alone and that legislation tends to be counter productive in such situations. For example, in a recent article a Melbourne gynaecologist is reported as saying:

*The best way to stop the practices continuing among migrants is through education, not laws. She believes legislation may alienate the women involved and make them fearful of approaching doctors in case they are accused of child abuse..."*

*We must change their attitude through education - it won't take more than one generation" she said...<sup>60</sup>*

6.17 ***The best interests of children.*** Adult members of the vulnerable communities, especially those who are already working for the elimination of the practice, have made a plea that education be the first priority. The adult members of the relevant communities concerned have to be convinced that this practice is not acceptable in Australia. They have also made it clear that strong legislation, on its own, could be counter productive.

6.18 There is a concern, however, that adults are working out with adults what is best for adults. Does an emphasis on the adult sensitivities involved operate against the best interests of children who may be genitally mutilated while adults are sensitively convinced of the need to stop this practice? Just as warnings have been sounded against an undue emphasis on legislation, is there a need to be cautious about too little emphasis on legislation?

6.19 Who is speaking for the children concerned? The children being mutilated are not being consulted and it is therefore necessary to ask: Where do their best interests lie? Australia is bound by the *Convention on the Rights of the Child* to "take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children". Additionally it is well established in Commonwealth family law that the best interests of the child are the paramount consideration; paramount, that is, over the interests of the parents.

6.20 Sensitive assistance to the relevant communities concerned through a properly funded and well prepared and delivered education program is essential in the interests of the adults involved. However, in the interests of children this must, in Council's view, go hand in hand with strong laws which are backed up, when necessary, by strong action. Anything less does not give paramount consideration to the best interests of the children concerned.

6.21 Council is not convinced that education alone will eliminate this practice for the following reasons:

- Education has been operating in a number of countries for some time and to date there is no evidence that education alone is achieving significant changes in attitude. Equally, legislation has existed and has not succeeded in eradicating the practice.
- The aim of education is to change attitudes by raising awareness about the issue. It is a fact of life that not all people's attitudes will be changed by education alone.

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<sup>60</sup>Department of Immigration & Ethnic Affairs, 1994, "Women affected by old custom require sensitive support" in *Post Migration*, Number 94, January 1994, page 7.

- A major thrust of education programs is to convince people that female genital mutilation is a dangerous practice on health grounds. It is evident that some members of the communities do not accept that all types of female genital mutilation are dangerous.
- Education can lead to friction between family members (for example, between mothers and daughters). This, in turn, can lead to antagonism against the education program in parts of the communities concerned and has already been the cause of some people withdrawing from those programs.
- Education programs are not compulsory and do not, therefore, provide a guarantee that all sections of all of the communities involved will be reached.

**6.22 Council's conclusion.** Council has concluded that legislation is necessary because education alone will not result in the elimination of female genital mutilation, at least in an acceptable time frame.

#### **The purpose of legislation.**

6.23 The objections of those who oppose legislation are based on the following:

- The existing criminal laws are adequate to cope with the practice;
- Legislation will drive the practice underground;
- Legislation will make people afraid to go to doctors; and
- Special legislation is not warranted when the incidence of the practice is low.

6.24 The comments opposing legislation included the following:

***Drive underground.** ...rushing legislation through may cause more harm and conflict as it may alienate the communities involved, particularly the women, and make them fearful of seeking any medical treatment or intervention in the event that they may be accused of child abuse. [Working Group on Female Circumcision]*

***Legislation not warranted where practice is minimal.** The enactment of special legislation to cover a practice involving a minute proportion of the population places the practice rather sensationally in the criminal sphere. It is also unlikely to assist in eliminating the practice. [Tasmanian Council of Social Service Inc]*

6.25 In its submission the Eritrean Community in Australia (ECA) concludes:

*...the ECA is of the firm view that it will be education rather than legislation which will eradicate female genital mutilation.*

However, the submission goes on to add:

*...the two strategies are not mutually exclusive, in fact the two strategies could complement each other if implemented appropriately. It is the ECA's position that the community education aspect requires the greater emphasis.*

Council supports these statements.

6.26 The Family Law Council considers that full and clear legal support should be available for those within the affected communities who wish to oppose the practice. Council is of the view that the law and education are both essential tools in the eradication of female genital mutilation in this country - the law for the protection and support it offers to the women and children who want to resist the practice and education because people need to be informed of the law relating to the practice, the dangers of the practice and the support and assistance available to them.

6.27 In Council's view education without the law favours those who wish to continue the practice over those who wish to resist it. If there is no law there is no real deterrent against those who want the practice to continue.

### **Are existing laws otherwise adequate?**

6.28 Some respondents to Council's discussion paper considered that existing laws were adequate to cope with female genital mutilation. For example:

*[National Council of Women of Victoria] is of the opinion that there are adequate laws in Australia. These should deter anyone from causing [female genital mutilation] to be performed...*

*Priority and resources would be better placed in providing information and training health workers who come into contact with families where [female genital mutilation] has occurred, to ensure that they deal with the family in an informed and sensitive manner. [Islamic Society of Victoria]*

*It would seem there are laws in force which cover occasions of physical, mental and/or sexual abuse of children, as well as assault. If these laws are adequate then is there any logical reason to legislate against this particular practice definitively? [Independent Islamic Sisterhood]*

6.29 It has been suggested by the Australian Law Reform Commission that female genital mutilation would constitute an “assault” under statute law.<sup>61</sup> In Australia, laws dealing with offences against the person largely fall within the domain of the State and Territory Governments.

6.30 A number of States are known to be looking into the issue of female genital mutilation at the present time. Council was advised by the NSW Attorney-General’s Department that the Attorney-General recently announced a legislative proposal to make the practice of female genital mutilation a criminal offence by amendment to the (NSW) *Crimes Act 1900*. The South Australian Minister for Family and Community Services advised Council in his submission that his State “will as a matter of urgency, examine the range of options, including State legislation, to eliminate the practice of female genital mutilation”.

6.31 The Queensland Law Reform Commission released a research paper on female genital mutilation in December 1993. The paper indicates that the Commission is considering recommending that specific legislation be introduced. Council notes that in its submission the WA Department of Health suggests that unless legislation applies equally to males and females it “may be viewed as sexually discriminatory”. Council notes the substantial disagreement which exists on the issue of whether male circumcision can be equated with female genital mutilation. However, Council considers that the issue of female genital mutilation should not be compromised or delayed while the debate on this issue is resolved.

6.32 The WA Attorney-General advised Council in her submission that she has raised the question whether this matter should be included on the agenda for the next meeting of the Standing Committee of Attorneys-General, which is due to be held in Brisbane on 8 July 1994.

6.33 The Human Rights Branch of the Attorney-General’s Department wrote to all States and Territories on 1 June 1993 seeking information on “the adequacy of existing State and Territory laws to deal with [female genital mutilation]”. In general, the States and Territories said that their existing criminal laws on assault would be adequate to cover any instance of female genital mutilation. Relevant State and Territorial criminal laws are briefly summarised at Appendix B along with some overseas laws of relevance.

6.34 In its discussion paper, Council said that without better knowledge of the incidence of female genital mutilation, it is difficult to conclude that existing mechanisms are adequate to deal with the problem. One submission made the following comment:

*I am doubtful about the conclusion expressed here. The adequacy of the law has never been tested, because as far as I know there has never been any case where a*

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<sup>61</sup>See, for example, Australian Law Reform Commission, *Multiculturalism: Criminal Law*, ALRC DP 48, May 1991 at paragraph 2.35, page 22.

*prosecution has been seriously considered. In other words, there is no available evidence of anyone doing it in Australia, which could even be considered to support a prosecution...*

6.35 Council, in fact, had in mind existing mechanisms which were available for identifying occurrences of the practice and for bringing matters before the Courts. What Council was suggesting was that if no one had specific responsibility for “policing” the matter in a pro-active way, it is perhaps not surprising that there have been no prosecutions.

6.36 It is assumed by some that child abuse is intentional, whereas female genital mutilation is said to be done with loving intent and so child protection measures are inappropriate. Fear that the child will be removed from her family is widespread in the communities concerned. However, the use of child protection mechanisms does not necessarily mean that the child will be removed from the family. Indeed, the focus of child protection legislation is to ensure the safety of the child and the provision of supports which are considered necessary to ensure the child’s safety.

6.37 Council considered whether there is a need for special legislation to clarify the legal position in relation to female genital mutilation in this country. There are several reasons for special legislation. These are:

- There are some doubts about the adequacy of the existing criminal laws to ensure that female genital mutilation will, in all circumstances, be regarded as “assault” under existing laws;
- There is also what one submission described as “the logical, if not legal, inconsistency in focussing on the practice as ‘assault’ or ‘child abuse’ when it is recognised that the intent of the act is quite dissimilar from that of usual assault or child abuse”. Council points out that its aim is to bring the children concerned within the ambit of the State child protection mechanisms. Having in mind the patriarchal basis for female genital mutilation and the effects discussed in chapter 3 of this report, Council considers that the practice undoubtedly constitutes child abuse;
- Having a clear statement of the law on the issue will be a necessary part of community education about the practice;
- There should be no doubt in any person’s mind that all forms of female genital mutilation are offences under Australian law; and
- It is most important that there be visible laws against the practice of female genital mutilation, both as a deterrent to would-be perpetrators and as a protection and support for women and children who wish to resist the continuation of the practice. Such laws would

also assist health workers and others in refusing to take part in such practices.

6.38 A number of respondents to the discussion paper supported the need for special legislation which clarified the law in relation to female genital mutilation. Some of the comments made to Council by individual members of the public were:

*Consideration should be given to legislating specifically to ban the practice and to publicise, both within the community, and particularly within the communities where it is likely to be practised, and amongst the medical profession, that the practice is not permitted in any form and that the penalties for those involved in it would be severe.*

*I...make the following recommendation...Specific legislation against non-medical female genital mutilation practices involving minors and unconsenting adults be inserted in the criminal code of all States and Territories in Australia...*

*...the law should be strengthened with appropriate penalties to eliminate such violence...*

6.39 A number of organisations also supported specific legislation being passed. Comments made included the following:

*The [NT Women's Advisory] Council supports your recommendations...that the law should be clarified to make it clear that all forms of female genital mutilation are a crime and that female genital mutilation constitutes child abuse in Australia.*

*It is apparent that if Australia does not take some stand on this matter then families will continue to migrate here without understanding the practice is specifically condemned, and Australia may inadvertently contribute to the continuance of the practice by appearing to provide a legal haven or shelter for the practitioners of this mutilation. [Women Lawyers Against Female Genital Mutilation]*

*The [National Children's and Youth Law] Centre therefore supports the position of the Family Law Council...*

*...the law should be clarified to make it clear that female genital mutilation is a crime and constitutes child abuse. [Reproductive Technology Working Group, ACT Women's Health Network Inc.]*

*The Women's Electoral Lobby (NSW) fully endorses the Family Law Council's preliminary conclusion that the law should be clarified to make it clear that female genital mutilation is a crime and that it constitutes child abuse in Australia.*

6.40 Council does not agree with the arguments against special legislation and considers that legislation is necessary for the reasons stated in paragraph 6.37 above. While the current legal situation may well be clear to lawyers and judges, it is not clear within the general community and there are those who believe that as there is no specific law against female genital mutilation in Australia, the practice is permitted here. The law needs to be made clear.

**6.41 Council's conclusions.** Council considers that because of: (a) doubts about the adequacy of the existing laws, (b) the desirability of having a clear legislative statement on the issue, (c) existing doubt within the general community about the status of the practice in this country, and (d) the need to give the protection and support of the law to women and children who wish to resist the practice within their communities, there should be special legislation which makes it clear that female genital mutilation is an offence in Australia. One member dissented from Council's conclusion on the basis that she considers introduction of special legislation as not the most effective way of discouraging the practice and takes no account of the historical and cultural context of the practice and the likelihood of its being sent underground. Women in the affected communities are themselves taking action to eradicate the practice. This member sees legislation as a form of cultural imperialism which does not allow the affected communities to take responsibility for the elimination of female genital mutilation.

#### **Section 116 of the Commonwealth Constitution.**

6.42 Council has concluded, from the available evidence, that female genital mutilation is not supported by any of the major religions, although there is some evidence that some people who follow the tradition may regard the practice as a religious one. Council is not aware of any sound evidence that ties the practice directly to the teachings of any religion. In the circumstances, on the available evidence, Council does not consider that section 116 of the *Commonwealth Constitution* needs to be further considered. That provision states:

*116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

6.43 None of the submissions on the discussion paper opposed Council's conclusion on this matter, although the Uniting Church in Australia (NSW Synod) made the following observation:

*...even were there some religious groups which support the practice, religious freedom is within the framework of law which must be obeyed by all groups in society in order to best preserve the human rights of all. In this case, the basic rights of all women and children not to be mutilated takes precedence over the rights of any particular religious group.*

## Who should legislate?

6.44 There are two main legislative options. Existing State and Territory laws could be amended to give effect to the proposals set out earlier in this paper. This option would involve amendments to the eight criminal codes and the various State/Territory child protection statutes. The second option would be for the Commonwealth to pass legislation under its external affairs power to meet Australia's international obligations, especially under Article 24(3) of the *Convention on the Rights of the Child*, but also under the *Convention on the Elimination of All Forms of Discrimination Against Women* and other international instruments.

6.45 The State and Territorial Governments have established facilities for reporting and investigating allegations of child abuse and for the general protection of children from abuse. It is important, in Council's view, that use be made of these existing services and that duplications be avoided. Any legislative proposal, therefore, should make use of the current mechanisms.

6.46 Since Council's discussion paper was released Council has become aware that the issue of female genital mutilation has been raised in State and Territory legislatures and that in some States legislation on the issue is being considered. There would appear to be a view among Australian Members of Parliament generally that legislation should be passed banning the practice of female genital mutilation in this country.

6.47 Council considers that the Commonwealth Parliament has constitutional power to pass legislation under its external affairs power and for legislation to be effective it should cover those elements contained in recommendation 2 below. Commonwealth legislation could be a model for Australian legislation and, by virtue of section 109 of the *Commonwealth Constitution*, Commonwealth legislation would provide full protection for all Australians by prevailing over any State legislation which does not provide the protections of the Commonwealth legislation.

6.48 A number of submissions simply endorsed Council's preliminary conclusions on the question of who should legislate and others did not address the question of whether there should be State or Commonwealth legislation. Those who did make specific comment were divided on the issue. Comments from organisations included the following:

- *The Australian Education Union...has requested that the Federal Government take action to outlaw the "circumcision" of females in Australia.*
- *It is imperative these become Federal laws. Legislation not uniform throughout the country would encourage 'forum shopping' and cultural enclaves for the worst possible reasons. [Humanist Society of Victoria Inc.]*

- *The [National Children's and Youth Law] Centre strongly believes that the most efficient method of achieving this is through Commonwealth legislation which would hopefully build on existing State legislation and services.*
- *National legislation should take the form of either (i) Commonwealth legislation implementing international conventions or (ii) model, uniform State/Territory legislation. Consultation is required on the preferable option, particularly with the Standing Committee of Attorneys-General. [Children's Interests Bureau SA]*
- *Additional legislation merely requires additional bureaucracies, police and our increasingly expensive legal system to enforce the law. [The Islamic Society of Victoria]*
- *The Department [of Community Services NSW] is not opposed to the Commonwealth using its external affairs powers to create legislation to prohibit the practice in order to achieve conformity throughout the States.*

6.49 However, Council notes the comments of a number of State Ministers and is also aware that the issue of female genital mutilation was discussed at the Commonwealth and State Health Ministers conference in Perth on 21 March 1994. The official record of the meeting records that:

*Ministers affirmed that female genital mutilation is a totally unacceptable practice in Australia and noted that the Family Law Council had issued a discussion paper proposing Federal legislation in this area and has invited submissions by 31 March 1994.*

*Ministers agreed that all States, Territories and the Commonwealth take whatever steps are necessary to put an end to the practice of female genital mutilation. Ministers also endorsed the view that legislation in itself is insufficient to put an end to the practice of female genital mutilation and supported each State and Territory implementing community consultation and education programs.*

6.50 The Health and Community Services Ministerial Council subsequently issued a press statement stating that:

*"female genital mutilation was totally unacceptable in Australia and agreed that the Commonwealth/State Governments would take whatever steps were necessary to put an end to the practice..."*

6.51 In his submission in response to the Family Law Council's discussion paper, the South Australian Minister for Family and Community Services, the Hon David Wotton MP, said:

*Decisions regarding the issue of whether federal legislation should be enacted to make female genital mutilation a criminal offence, is a matter for the Federal government although South Australia has some reservations about this approach. At the Joint*

*Health and Community Services Ministerial Council in Perth, March 21st 1994, it was resolved that the Commonwealth and State/Territory governments would take whatever steps necessary to put an end to this practice. This State strongly supports this resolution and will as a matter of urgency, examine a range of options, including State legislation, to eliminate the practice of female genital mutilation.*

6.52 In her submission the WA Attorney-General, the Hon Cheryl Edwardes MLA, said that Commonwealth legislation is not appropriate because “criminal law is a matter within State power and authority”. Mrs Edwardes suggested that the question of uniformity of legislation could be considered by the Standing Committee of Attorneys-General. She also said that existing State law may already be adequate to deal with offences beyond the boundaries of one State:

*For example, section 14 of the WA Criminal Code makes it an offence to procure the doing of an act outside Western Australia which if done within Western Australia would be an offence.*

6.53 Council considers that special legislation on female genital mutilation is required in Australia and that the Commonwealth Parliament should pass that legislation. The following are the main reasons why Council has reached this conclusion:

- Legislation will be the first step in the educative process.
- Legislation is necessary to meet Australia’s international obligations.
- Australia should be seen to condemn the practice. As the NSW Department of Community Services said in its submission: “failure to condemn the practice will simply perpetuate the abuse”.
- There is a need to prevent ‘forum shopping’, which could result if different laws applied in different States and Territories.
- There is a need for uniformity. In its submission the Young Lawyers Section of the Law Institute of Victoria made the following comment:

*If a single set of provisions regulated the issue throughout Australia, the perpetrators of female genital mutilation would be prevented from taking advantage of discrepancies between the legislation in different States. Thus a perpetrator would be unable to avoid a prohibition on a particular practice in one State simply by taking the person involved across a State border into a jurisdiction where that practice might be permitted. It allows standard prohibitions to be enforced more effectively throughout the Commonwealth. Further, a uniform law would assist education on the issue by creating only a single set of provisions to be taught and disseminated.*

6.54 There is some uncertainty whether State/Territory legislation will be required if the Commonwealth were to introduce uniform legislation. This is a matter which might be discussed by the Standing Committee of Attorneys-General, but is ultimately an issue for the States/Territories to decide.

### **Children taken outside Australia for the purposes of female genital mutilation.**

6.55 Council has considered whether the law is adequate to deal with those instances where a child is taken outside Australia for the purposes of female genital mutilation. In this regard Council notes the current law in the United Kingdom and legislation passed by the Canadian Parliament earlier this year. Extracts from the legislation of both countries are set out at Appendix B. Council considers that the following inadequacies exist in Australian law:

- Existing Australian laws do not appear to prevent a person from taking a child, normally resident in Australia, outside Australia for the purposes of having the procedure performed on that child, even if the authorities are aware, or reasonably convinced, of the person's intention.
- On return to Australia of a person who has taken a child overseas for the purposes of having the child genitally mutilated, there is doubt that the person responsible could, at present, be prosecuted under Australian law.

6.56 Most respondents to Council's discussion paper did not oppose Council's preliminary conclusion that legislation should be passed with a view to preventing international offences by Australian residents. Some respondents who were generally opposed to legislation on female genital mutilation may have been indicating opposition to extra territorial legislation also. A few respondents were pessimistic about practical aspects of legislation designed to stop international offences.

6.57 Comments by individual respondents included:

*I agree that it should be an offence to take a child abroad for the purpose of violating the rights of the child. I would put it as broadly as that.*

*I agree with the Council's preliminary conclusion that legislation should be passed to make it quite clear that any person responsible for taking a child overseas for the purpose of genital mutilation commits an offence and this should be extended to cover persons who assist in the process, including any parent or relative who permits a child to be taken overseas.*

*Legislation should also empower Federal Police to prevent the removal of a child where it is reasonably suspected that the child is being taken from Australia for a purpose which includes female genital mutilation.*

6.58 Comments by organisations on the issue included the following:

*Australian legislation should also provide a means of preventing anyone from taking a child overseas in order to have her operated on. [Defence for Children International - Australia]*

*Women's Electoral Lobby (NSW) fully endorses the Family Law Council's preliminary conclusion that legislation should be passed to put the issue of taking children outside Australia for the purposes of female genital mutilation beyond doubt.*

*Legislation to protect children resident in Australia from being taken overseas for genital operations, perhaps along the lines of the recent Canadian legislation, should be developed. [Commonwealth-State Council on Non-English Speaking Background Women's Issues]*

*Commonwealth legislation should be passed to prevent girls from being taken out of Australia to be mutilated. [ACT Women's Health Network]*

*...I would like to ask our Government to implement a law...to confiscate the passport(s) of any person attempting to take a young girl out of Australia to have such an operation done. [North Adelaide Multicultural Services]*

6.59 Council does not underestimate the range of problems which will militate against the success of legislation which aims at preventing children from being taken overseas for the purposes of female genital mutilation. The question of intention will be a major problem. As the National Council of Women of Victoria (NCWV) said in its submission:

*NCWV feels that it would be almost impossible to police any law prohibiting female children from being sent to their country of origin to have [female genital mutilation] performed. Many families visit their home countries for a genuine holiday and while there [female genital mutilation] is performed on the children without the knowledge or consent of the parents...*

6.60 Evidential problems will also be a factor. However, Council is of the view that the legislation could be made clear to persons by authorities when passports and visas are sought. The legislation may tend to prove somewhat cosmetic in practice but it should have some successes (and hence save some children from mutilation) and it may, in the long term, have some deterrent effect. Council considers, therefore, that legislation in this area is better than no

legislation and would indicate Australia's seriousness about carrying out its international treaty obligations.

6.61 Council draws attention to the Crimes (Child Sex Tourism) Amendment Bill 1994 which was introduced in the House of Representatives by the Minister for Justice, the Hon Duncan Kerr MP on 23 march 1994. Council considers that some of the difficulties it envisages in relation to evidence and intention are addressed in that Bill.

6.62 Council does not support legislation which cuts across other legislation concerning passport issue and migration status. Public interest criteria, including criminal conviction, are already covered by the *Migration Act 1958*.

6.63 Council wishes to make it clear that it is not proposing that where children are taken out of Australia for the purpose of visiting a country which practices female genital mutilation, they should not be subject to search or checking by officials, unless there are sound reasons for taking such action.

**6.64 *Council's conclusions.* There are doubts about the capacity of the present law to cope with international offences against the rights of the child. In the circumstances, and having in mind the serious consequences for the children concerned in relation to matters such as female genital mutilation, Council has concluded that legislation should be passed to put these issues beyond doubt and to provide as much protection as possible for the children and women concerned.**

## **Recommendation 2 Commonwealth/State legislation**

6.65 Council recommends that:

- (a) In order to achieve uniform legislation without delay, the Commonwealth Parliament immediately pass legislation making it clear that the practice of female genital mutilation is a criminal offence and also that it constitutes child abuse under Australian child protection legislation;**
- (b) The Commonwealth pass legislation which provides children taken out of Australia with the same protections from female genital mutilation as they would have in Australia;**
- (c) The Standing Committee of Attorneys-General consider whether State/Territory legislation may also be necessary. Ultimately the matter is one for the States/Territories;**
- (d) Legislation cover those matters identified in Recommendation 4 below.**

### **The question of timing**

6.66 The question of the timing of education programs and of any legislation is of considerable importance to the communities involved. The persons involved are mainly refugees (with all of the attendant problems such as language and employment difficulties) and many of them are recent arrivals in Australia. These people have been confused and bewildered by media reports about female genital mutilation and have been subject to stereotyping in the press. In many respects they are the most vulnerable people in the community. The media treatment of female genital mutilation has left the communities confused, fearful and angry and this needs to be taken into account.

6.67 Council has concluded that the vulnerable communities' discussions on female genital mutilation are not at an advanced level at this stage. There are substantial cultural, gender and language barriers which are only now being addressed.

6.68 Timing of education and legislation has become a very important issue as a result of submissions and discussions with the relevant communities. The Ecumenical Migration Centre said in its submission:

*There is an extraordinary silence about the practice...While it is very clearly women's business, it is not a subject freely or openly talked about in those countries where it is practised. The significance of this needs to be taken seriously by those considering legislative responses...The realisation that circumcision is not a requirement of Islam is quite shocking to many of the communities. The historical silence surrounding this issue means that the first time many of these women have been called upon to talk on the issue is in relation to its criminalisation in Australia.*

6.69 There is a need to find a compromise which will not result in delaying action but which accommodates the communities' current situation and their state of mind; that is, there is a need to find a satisfactory balance.

6.70 No amount of delay is going to overcome the problem that irrespective of when legislation comes into effect there will be others who arrive in this country after that legislation comes into operation. Future migrants should be made aware of this country's laws and attitude on female genital mutilation as soon as they arrive in this country.

6.71 In Council's view, however, the proposed education program should be in place as soon as possible and prior to the legislation coming into effect. Council's report should be the first step in the education process. (Consideration needs to be given to translating it into some of the relevant languages, including Eritrean and Somali. This should be discussed with the communities.) In the meantime, any extreme cases requiring legal intervention could be handled under existing legislation if this is necessary.

6.72 Council considers that precipitate and non-consultative legislation could have negative repercussions.

### **Recommendation 3 Timing of education and legislation**

**6.73 Council recommends that:**

- (a) Immediate steps be taken to implement an education program along the lines proposed in recommendation 1; and**
- (b) Criminalising aspects of the legislation should not become operative until the education program is satisfactorily established and operating.**

### **The contents of legislation**

6.74 Council's discussion paper suggested that legislation should cover the following matters:

- (a) It should put the issue beyond doubt that female genital mutilation, in all of its forms, is a criminal offence;
- (b) It should be made clear that female genital mutilation, in all of its forms, constitutes child abuse under Australian child protection legislation;
- (c) There should be appropriate sanctions for professionals who perform female genital mutilation;
- (d) Appropriate sanctions should apply to non-professionals who perform the procedure and on those who aid and abet such persons as well as those who arrange for their children to be genitally mutilated;
- (e) There should be mandatory notification to State/Territory authorities of prospective or actual incidences of female genital mutilation; and
- (f) There should be legislation making it an offence to take, or to propose to take, a child outside Australia to be genitally mutilated.

6.75 Two of these issues require comment: penalties and mandatory notification of instances of female genital mutilation. These issues are further considered below.

6.76 *Penalties.* If legislation is to be effective, it will need to contain penalties which are relevant to the seriousness of the offence. With this in mind, Council is of the view that the law should distinguish between the following categories of offender:

#### Parents

The best interests and protection of the child should be important factors in determining appropriate penalties for parents who arrange for their children to be genitally mutilated. For instance, if the child's protection can be assured it may be that depriving the child of her parents may not be in her best interests.

Where parents, in full knowledge of the law or in reckless disregard for the law, offend or where they offend more than once, there should be appropriate penalties, including, as a last resort, imprisonment. However, if the education program is properly carried out this should minimise the need for extreme action.

Council regards it as generally inappropriate to imprison people who are loving and caring parents.

#### Professionals

Council is of the view that severe penalties, including imprisonment, should apply to any professionals who perform, or assist in the performance of, the procedure.

The AMA has advised that a doctor who performs female genital mutilation, other than a recognised medical procedure, would be liable to be deregistered.

#### Non-Professionals

Council is of the view that severe penalties, including imprisonment, should apply to non-professionals (including relatives) who perform the procedure.

#### Institutions

Institutions, such as hospitals and clinics, in which the procedure is carried out should, on conviction, be fined. It is noted that such matters would no doubt be considered by government in licensing and accreditation decisions.

6.77 Council stresses that there will be a need to balance the best interests of the child with any proposal to separate the child from its parents. In all cases it will also be necessary to take into account the type of procedure involved, but it should be clearly accepted that all forms of female genital mutilation constitute an offence.

6.78 **Notification.** Legislation should build upon existing arrangements for notification under child protection legislation. It is Council's view that notification of instances of genital mutilation, and of fears or suspicion of genital mutilation, should be mandatory and that the list of persons required to notify instances, or suspicion, of female genital mutilation should be as wide as possible. Council is aware that, while the legislation of most States/Territories make notification mandatory, in two States/Territories notification is voluntary. Provisions for

notification and access to counselling and other forms of assistance should be covered in education programs.

6.79 Council stresses that mandatory reporting would apply only to children; that is, persons under 18 years of age. The requirement would not operate in respect of women who are 18 years of age or more. In Council's view, the special needs which apply in relation to children are not present so far as adults are concerned.

## **Recommendation 4          Contents of legislation**

**6.80 Council recommends that to be fully effective legislation should cover the following matters:**

- (a) It should put the issue beyond doubt that female genital mutilation, in all of its forms, is a criminal offence;**
- (b) It should be made clear that female genital mutilation, in all of its forms, constitutes child abuse under Australian child protection legislation;**
- (c) The law should take into account the best interests, and protection, of the child in relation to imposing penalties on parents who allow this procedure to be carried out on their children. Other relevant factors should include whether the parent has offended previously, whether the parent acted in knowledge of the law and the type of procedure performed on the child;**
- (d) There should be severe penalties, including imprisonment, for professionals who perform female genital mutilation;**
- (e) There should be severe penalties, including imprisonment, for non-professionals (including relatives) who perform the procedure and for those who aid and abet such persons, including those who arrange for children to be genitally mutilated;**
- (f) Appropriate sanctions should apply to institutions at which female genital mutilation is carried out. Officers of the institution should be liable for criminal prosecution;**
- (g) Mandatory notification should apply to State/Territory child protection authorities of prospective or actual incidences of female genital mutilation. Ideally, subject to Constitutional power, the widest possible list of persons required to notify should apply;**
- (h) Legislation should make it an offence to take, or to propose to take, a child outside Australia to be genitally mutilated. The legislation should be based on the Canadian model; and**
- (i) The legislation should acknowledge the importance of education programs and of counselling and other forms of assistance.**

### **Child Protection Protocols**

6.81 Because of the cultural nature of female genital mutilation and because the practice has a number of differences in relation to other offences against children, it is likely that special arrangements may be necessary for dealing with the matter. The South Australian Child Protection Council recommended the development of:

*...a national practice paper on a set of standard procedures and guidelines to be used by Health and Community Service professionals when dealing with cases that come to their attention.*

6.82 In Council's view there is a need for special child protection protocols to be developed for the specific purpose of dealing with the question of female genital mutilation. In Council's view, the appropriate body to examine this question would be the Joint Health and Community Services Ministerial Council.

## **Recommendation 5            Child Protection Protocols**

**6.83 Council recommends that the Joint Health and Community Services Ministerial Council be asked to develop protocols specifically for the purpose of dealing with instances of female genital mutilation.**

### **Reconstructive surgery**

6.84 In its discussion paper Council considered a number of aspects of the question of reconstructive surgery especially those relating to the consent. The general feeling of respondents was for minimal involvement by the Courts. Most respondents who addressed this issue said that, except for emergency situations, the children or their parents should decide on reconstructive surgery.

6.85 Some of the responses made included the following:

*Every effort should be made to facilitate reconstructive surgery, [Humanist Society of Victoria Inc.]*

*Children are operated on for numerous conditions including corrective surgery for congenital abnormalities and after accidents with just the parents or guardians permission. Intervention by the court is only warranted where parents refuse to allow reconstructive surgery when it is deemed essential for the health and well being of the child. ... In Melbourne young adult women have requested reconstructive surgery prior to commencing a family.*

*DCI-Australia believes that any operation to repair a previous circumcision should be done only with the child's informed consent when she is old enough to understand the process. The child has a right to be protected from any further traumatic intrusions into her body until she is ready for it. The only exception should be when there is an immediate medical reason for treatment. [Defence for Children - Australia]*

*Women's Electoral Lobby (NSW) is of the view that the young woman herself, and/or her parents should be the only ones to authorise reconstructive surgery on her body.*

*An external arbiter may be necessary where there is a conflict between the child's wishes and those of the parents.*

*Consent to reconstructive surgery would only be an issue where the child was below the age of consent and there were conflicting views between parents or guardians and the child. [SA Child Protection Council]*

6.86 Council considers that existing Medicare arrangements are adequate to cover reconstructive procedures. Council also agrees that the question of reconstructive surgery should be one for the child herself when she is old enough to make an informed judgment about the medical procedure which she will need to go through. Much of the damage done by female genital mutilation is not reversible. Reconstructive surgery will not be of any value in relation to clitoral circumcision or excision. In the case of infibulation, surgery will mainly enable the vagina to be reopened, but will not repair other damage.

6.87 Two problems arise. The first relates to cases where a medical emergency develops and corrective surgery needs to be done immediately. In Council's view existing arrangements on consent to medical procedures would be adequate to deal with such matters. The second problem would arise where there was a conflict between the parents and the child about reconstructive surgery. Again, Council considers that existing arrangements would be adequate to cope with such cases.

## **Recommendation 6            Reconstructive surgery**

**6.88 Council is of the view that further legislation is not necessary to enable young women to have reconstructive surgery where they so desire.**

### **Counselling and support services.**

6.89 Council has a major concern relating to the women and children who refuse the practice of female genital mutilation. There is a distinct fear that this may, in some instances at least, lead to their ostracism by their communities. Women and children in this position will need considerable support and assistance. While education will play an important part in assisting the women concerned, they will need to have access to counselling, advisory and other support services on a range of matters, including reconstructive surgery. Again, the importance of education in confronting such deeply felt views is underlined and the essential role of education is stressed.

6.90 The Office of Multicultural Interests (WA) drew attention to the need for practical assistance in the form of support services for those who are pressured to have the procedure done. The Office said:

*We feel strongly that irrespective of whether mandatory notification is introduced, a "hot line" or other accessible service should be set up for mothers who are pressured to*

*have the procedure performed on their daughters, to enable them to get immediate assistance. Education of the mothers must be accompanied by practical assistance if they are to resist pressure (which will amount to challenging the power structures within the family and community).*

Council agrees with this comment and adds that such services should be available to the children involved as well as the mothers.

## **Recommendation 7      Counselling and support services**

**6.91 Council considers that provision must be made for counselling and support services for women and children, including those who reject the practice of female genital mutilation.**

### **Jurisdiction**

6.92 *Which court(s) should deal with female genital mutilation?* Council sees no need for special legislation covering the issue of jurisdiction. Criminal offences should be a matter for the appropriate State Court and matters relating to the care and protection of children should be handled by the same Courts as currently deal with such matters.

6.93 A few respondents suggested that the Family Court should have jurisdiction to determine the matter and others suggested that the State Courts should have jurisdiction. Council does not see any strong reason to amend the existing jurisdictional arrangements. Council also notes that its Medical Powers Committee is currently looking into the issue of medical procedures on children.

## **Recommendation 8      Jurisdiction**

**6.94 In Council's view there is no need for special legislation on the jurisdiction of the courts in relation to female genital mutilation. However, Council is of the view that proceedings relating to female genital mutilation should be conducted in a closed Court.**

### **International action**

6.95 It is important that Australia participate in international forums on female genital mutilation and that it continues to be involved in work on international instruments designed to eradicate female genital mutilation globally. In this regard, Council notes the work which was done in Australia on the *Declaration on Violence Against Women*. Some respondents to Council's discussion paper supported Australia taking an active role at an international level:

*It is vital that Australia participate in international forums aimed at eliminating [female genital mutilation] internationally. [National Council of Women of Victoria Inc.]*

*[The Uniting Church in Australia (NSW)] ...support...the need to work at an international level.*

*The AMA considers that international medical bodies, legislators, judiciary and police should cooperate in eradicating the practice of female genital mutilation world-wide. [Australian Medical Association]*

*It is also essential that funds are provided through Australia's overseas aid program to support indigenous organisations which are working to eliminate the practice. [Defence for Children International - Australia]*

## **Recommendation 9            International action**

**6.96 Council urges the Government to participate in international forums and by other means to take part in the international campaign against female genital mutilation.**

## APPENDIX A

## PERSONS AND ORGANISATIONS MAKING SUBMISSIONS

ACT Health  
 ACT Women's Consultative Council  
 Advisory and Coordinating Committee on Child Abuse (WA)  
 Angelo, Professor A H  
 Arena AM MLC, The Hon Franca  
 Attorney-General's Department (NSW)  
 Australian Education Union  
 Australian Medical Association  
 Australian Nursing Federation  
 A woman whose name and address have been withheld  
 Blue Mountains Community Legal Centre Inc.  
 Bowra, Ms Carolyn  
 Catholic Community Services, Archdiocese of Sydney  
 Charlesworth, Professor Hilary  
 Child Protection Council (NSW)  
 Child Protection Council (SA)  
 Children's Interests Bureau (SA)  
 Commonwealth-State Council on Non-English Speaking Background Women's  
 Issues  
 Department of Community Services (NSW)  
 Department of Family Services and Aboriginal and Islander Affairs (Queensland)  
 Ecumenical Migration Centre (Victoria)  
 Edwardes MLA, The Hon Cheryl - Attorney-General (WA)  
 Eritrean Community in Australia (Victoria)  
 Evatt AO, The Hon Justice Elizabeth  
 Family Planning Australia Inc.  
 Feminist Lawyers (Victoria)  
 Ford, Mr T  
 Garcia, Ms Patricia D  
 Health Department of Queensland  
 Health Department of WA  
 Hedgcock, Mr R I  
 Humanist Society of Victoria Inc.  
 Immigrant Women's Speakout Association of NSW Inc.  
 Independent Islamic Sisterhood Inc.  
 International Women's Development Agency  
 Islamic Society of Victoria  
 Law Institute of Victoria  
 Law Society of NSW  
 Legal Services Commission of South Australia  
 Lotus Counselling Services (WA)  
 Mulder, Ms Beryl  
 National Children's and Youth Law Centre

National Council of Women of Australia Inc Ltd  
 National Council of Women of Victoria Inc.  
 National Organisation of Circumcision Resource Centres  
 Newman, Mrs E M  
 North Adelaide Multicultural Services Inc.  
 NSW Nurses Association  
 Office of Multicultural Interests (WA)  
 Office of the Status of Women, Tasmania  
 Owen, Mrs Shirley  
 P.E.E.R Institute Perth  
 Reproductive Technology Working Group, ACT Women's Health Network Inc.  
 Robertson, Mr and Mrs D  
 Shanahan, Mr John  
 Sisters in Law (NSW)  
 Stevens, Ms Sacha (Qld)  
 Tasmania Council of Social Service  
 Theobald, Mr Philip R (Qld)  
 Tonti-Filippini, Mr Nicholas  
 Uniting Church in Australia, Queensland Synod  
 Uniting Church in Australia, NSW Synod  
 Victorian Bar Council  
 Victorian Secular Society  
 Watson MLA, Dr Judyth (WA)  
 Williams, Dr George L  
 Women's Advisory Council (NT)  
 Women's Electoral Lobby Australia Inc.  
 Women's Electoral Lobby, Cairns, Queensland  
 Women's Electoral Lobby (NSW)  
 Women Lawyers Against Female Genital Mutilation  
 Working Group on Female Circumcision

- African Information Network
- Australian Oromo Community
- Eritrean Community Association
- Eritrean Women's Group
- Ethiopian Women's Association
- Islamic Call Society of Australia
- Islamic Society of Victoria
- Oromo Community Association
- Somalia Community in Victoria
- Somali Land Women's Group
- Ecumenical Migration Centre
- Ethnic Communities Council of Victoria

Wotton MP, The Hon David, Minister for Family and Community Services (SA)

## APPENDIX B

## BRITISH AND CANADIAN LEGISLATION

UNITED KINGDOM PROHIBITION OF FEMALE CIRCUMCISION ACT  
1985

The (UK) *Prohibition of Female Circumcision Act 1985* includes the following provisions:

- 1(1) Subject to section 2 below, it shall be an offence for any person -
  - (a) to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person; or
  - (b) to aid, abet, counsel or procure the performance by another person of any of those acts on that other person's own body.
- (2) A person guilty of an offence under this section shall be liable -
  - (a) on conviction on indictment, to a fine or to imprisonment for a term not exceeding five years or to both; or
  - (b) on summary conviction, to a fine not exceeding the statutory maximum (as defined in section 74 of the *Criminal Justice Act 1982*) or to imprisonment for a term not exceeding six months, or to both.

Section 2 of the Act makes it clear that the Act does not render unlawful a surgical operation which is necessary for the physical or mental health of the person on whom it is performed. In determining whether the operation is necessary for the mental health of a person, no account is to be taken of any belief of that person or any other person that the operation is required as a matter of custom or ritual.

## CANADA BILL C-126

This legislation is an Act to amend the (Canada) Criminal Code and the Young Offenders Act.

The problem of female genital mutilation has surfaced in recent years as an issue in Canada, and prompted a review in 1992 by the Canadian Department of Justice. That review concluded that such practices were clearly against several provisions of the Canadian Criminal Code. However, the review also raised concerns that the law did not prohibit the removal of a child from Canada for the purposes of having

genital mutilation performed on that child. Bill C-126 was drawn up in response to those concerns.

The following provision in Bill C-126 is particularly relevant to female genital mutilation:

- 273.3 (1) No person shall do anything for the purpose of removing from Canada a person who is ordinarily resident in Canada and who is
- (a) under the age of fourteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 151 or 152 or subsection 160(3) or 173(2) in respect of that person;
  - (b) over the age of fourteen years but under the age of eighteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 153 in respect of that person; or
  - (c) under the age of eighteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 155 or 159, subsection 160(2) or section 170, 171, 267, 268, 269, 271, 272 or 273 in respect of that person.

Section 273 refers to two age limits, which reflect the age limits of the domestic offences against children. For example, sexual interference (section 151) and invitation to sexual touching (section 152) are offences if committed against those under 14, while sexual exploitation is an offence committed against anyone under the age of 18 years by a person in a position of trust or authority.

The new offence is a domestic offence, in the sense that it prohibits conduct occurring in Canada; that is, it prohibits the doing of anything for the purposes of removing from Canada a young person with the intent of committing outside Canada an act that would be one of the enumerated offences if committed in Canada. There is, therefore, in law no element that must exist or occur outside Canada in order for the offence to exist.

## AUSTRALIAN AND OTHER LAWS OF RELEVANCE

### AUSTRALIAN LAW

1. **Assault.** Any intervention that interferes with a person's bodily integrity through the use of force, no matter how small, is, in law, a trespass to the person. A trespass to the person is either a crime (called "an assault") that can be punished under State and Territory criminal laws, or it can be a tort or civil wrong (assault and/or battery), for which, under State and Territory laws, the person injured can claim damages or compensation from the person who committed the trespass. Most trespasses committed intentionally - for example, where a person deliberately punches another - are both crimes and civil wrongs.

2. **Current State/Territory laws of relevance.** Based on advice received from the States and Territories, the following summarises the current position under the criminal laws of Australia. In the case of WA additional information about the Criminal Code was supplied in the submission from the WA Attorney-General:

**New South Wales .** The following provisions of the *Crimes Act 1900* (NSW) are relevant: section 61 (common assault), section 59 (assault occasioning actual bodily harm) and section 35 (malicious wounding or inflicting grievous bodily harm).

**Victoria.** Opinion at officer level in the Justice Department and the Department of Health and Community Services in Victoria is that existing laws on assault would cover the situation in that State.

**Queensland.** The *Criminal Code* (Queensland) contains a number of provisions of relevance including section 245 (definition of assault), section 246 (Assaults unlawful), section 335 (common assault) and section 320 (grievous bodily harm). Section 1 of the *Criminal Code* contains definitions of "bodily harm" and "grievous bodily harm".

**South Australia.** The South Australian criminal law contains "the usual array of non-fatal offences against the person and sexual offences against minors."

**Western Australia.** Section 222 of the *Criminal Code* (WA) provides that any application of force to the person of another without that person's consent is assault and any assault (unless authorised, justified or excused by law) is unlawful and constitutes an offence. Apart from the general provisions in Chapter 5 of the Code relating to criminal responsibility, various circumstances in which an assault will be lawful are set out in the

Code. For example, section 257 provides that it is “lawful for a parent or person in the place of a parent to use by way of correction towards the child...under his care, such force as is reasonable in the circumstances”.

The WA Code defines “bodily harm” as “a bodily injury which interferes with health or comfort”. “Grievous bodily harm” means any bodily injury of such a nature as to endanger life or to cause, or be likely to cause, permanent injury to health.

*Tasmania.* Tasmania expressed the view that “a surgeon who performed genital mutilation on a girl would be guilty of an assault under section 184 of the *Criminal Code* unless that surgeon’s conduct was covered by section 51 of the Code.” Section 51 of the Code relates to consent to medical procedures on children. (The Tasmanian respondent made no reference to the situation where female genital mutilation is performed by elder women or “midwives”.)

*Northern Territory.* Assault is dealt with in sections 186, 187 and 188 of the *Criminal Code* (Northern Territory). Section 187 defines “assault” as “the direct or indirect application of force to the person without his consent or with his consent if the consent is obtained by force..” Section 186 states that any person who unlawfully causes bodily harm to another is guilty of a crime and is liable to imprisonment for 5 years or, upon summary conviction, to imprisonment for 2 years. Section 188(2) states that if a person is assaulted under 16 years of age and the offender is an adult, the offender is guilty of a crime and is liable to imprisonment for 5 years or, upon summary conviction, to imprisonment for 2 years. The NT respondent said that under NT laws “it may be difficult to succeed in an assault charge where there was consent.”

*Australian Capital Territory.* The ACT said that, as elsewhere in Australia, existing criminal law in the ACT would apply to the practice of female genital mutilation.

3. *The common law.* At common law some trespasses are not crimes or civil wrongs as the law regards them as justified. This will be the case where, for example, a valid and effective consent to the trespass has been given by a person whom the law regards as competent to give consent.
4. In 1989 the Commonwealth Government (at that time responsible for criminal law in the ACT) produced a working paper containing proposals to reform ACT criminal legislation, specifically in relation to offences against the person. Included in that working paper was a specific recommendation to prohibit female circumcision. However, responsibility for criminal legislation in the ACT fell to the ACT Government before the proposal was implemented.

5. ***Child Welfare legislation.*** All States and Territories have child care and protection legislation which authorises State/Territory authorities to intervene where a child is at risk of abuse or ill-treatment. Sections 4, 10 and 11 of the *Community Welfare Act* (NT), for example, empower the authorities to take a child “in need of care” into custody.
  
6. Section 71 of the *Children’s Services Act 1986* (ACT) defines the circumstances for intervention by the ACT Family Services Branch, the Community Advocate or the Court when a child is in need of care. One of the circumstances is where the child has been, or is likely to be, physically injured. Children may also be considered in need of care where they have suffered psychological damage of such a kind that their emotional or intellectual development has, or will be, endangered. Section 139 of the *Children’s Services Act 1986* (ACT) creates offences involving ill-treatment of a child. The Act provides protections for medical practitioners, police officers and welfare authorities to take such steps as are considered necessary for the immediate safeguarding of the a child who has been ill treated.
  
7. In the case of child abuse allegations made by parties to applications under the *Family Law Act*, for example, the actual investigation of the allegations is carried out by State authorities which have the expertise and the personnel, supported by legislation, to do such investigations. Council notes that there are requirements for the reporting of abuse or suspected abuse and that child welfare authorities are the appropriate bodies for referral of allegations of abuse under the *Family Law Act*.
  
8. ***Civil actions.*** In addition to female genital mutilation being an assault, for which criminal sanctions might be imposed, it would also constitute a civil wrong - a trespass to the person (assault and battery) for which personal injury damages might be available. And, under State and Territory criminal injury compensation legislation, a person who has had the procedure performed on her may seek compensation for the injuries she has suffered.

## THE LAWS OF SOME OVERSEAS COUNTRIES

9. A number of overseas countries, including countries which have migrant populations, have already confronted this issue have done so in a variety of ways. The position of some overseas countries is therefore briefly examined below.
  
10. ***United Kingdom.*** The *Prohibition of Female Circumcision Act 1985* (UK) prohibits female genital mutilation in the UK. Extracts from this Act are set out in Appendix A. The Act is supplemented by the *Children Act 1989* which provides for the investigation of suspected violations of the female genital mutilation prohibition and enables the removal of the child from her home where this is the only way her protection can be guaranteed. The *Children Act* also empowers the courts to prohibit

parents from removing their children from the country to have the operation done elsewhere.

11. **Canada.** Canada's 1993 Bill C-126 to amend the Criminal Code and Young Offenders Act received Royal Assent on 23 June 1993. Clause 3 of the Bill creates section 273.3 of the *Criminal Code* which is designed to extend domestic protection to children who are normally resident in Canada, from their removal from Canada with the intention of committing assault causing bodily harm, aggravated assault or any sexual offence. While having general application, the offence was initially developed in response to a concern that Canadian domestic law did not provide sufficient protection against the practice of female genital mutilation. Further details of Bill C-126 are provided in Appendix A.

12. The offence applies to anyone engaging in the prohibited conduct in Canada. Additionally, its protection extends to all children ordinarily resident in Canada, whether citizens or landed migrants.

13. The offence has general application, but was initially developed in response to a concern that Canadian domestic law did not provide sufficient protection against the practice of female genital mutilation. Action was seen as necessary in conformity with Article 24(3) of the *Convention of the Rights of the Child*, which provides: "State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."

14. Section 273.3 is preventive in nature as it allows for intervention before harm is done to the child. However, it is acknowledged that it will not prevent abuse in all cases and this remains an issue of concern. The Canadian view is that further steps require an international convention to establish principles on which States will protect children subject to abuse beyond their borders.

15. Work is currently under way with the Canadian Medical Association and the relevant immigrant associations to provide education on the health and legal aspects of the practice of female genital mutilation. The College of Physicians and Surgeons of Ontario has declared that any doctor performing female genital mutilation could be guilty of professional misconduct.

16. **France.** In France<sup>62</sup> female genital mutilation is not specifically penalised by French law but is actionable as a mutilation under Article 312 of the Penal Code which punishes violence against children. Under this Article, a penalty of 10-20 years imprisonment is imposed. Where the mutilation is carried out by a parent or guardian, a life sentence is imposed. Generally professional persons who perform female genital mutilation, and are solicited by the parents, are treated more harshly than the parents of the child, who can often rely on such matters as respect for customary law and social pressures.

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<sup>62</sup>The brief outline of the position in France is based on information provided in a cablegram from DFAT Paris.

17. The Medical Ethics Code 1979 forbids the practice of female genital mutilation except where medically required. The French Medical Board is not aware of any breaches of the Code. Furthermore, where a doctor observes that a child under the age of 15 years has been the victim of maltreatment or neglect, the doctor is required to alert the authorities.

18. *Europe.* The Council of Europe has not specifically addressed the question of female genital mutilation. It is understood the position in several countries is similar to France<sup>63</sup>. Sweden was one of the first countries to specifically condemn female genital mutilation. It banned health professionals from performing the operation in 1982.

19. *African countries.* In 1982 Kenyan President Moi condemned female genital mutilation and called for prosecution of those who practised it. Kenya passed legislation banning female genital mutilation in 1990, but various forms of female genital mutilation are still practised there. In Sudan the Ministry of Health launched a campaign against female genital mutilation in 1946 and succeeded in getting a law passed prohibiting infibulation but allowing sunna. The law was primarily a response to pressure by British colonial powers and little action was taken to enforce it. Burkina Faso has incorporated into its draft constitution a prohibition on female genital mutilation. In 1991 the Cote D'Ivoire (Ivory Coast) advised the United Nations that existing provisions of the nation's criminal code could be used to prohibit the practice.

20. The position in Egypt is not clear. The educated community regard the practice as having been banned by President Nasser in 1958. Others say that partial clitoridectomy is allowed, but because of the confusion excision and infibulation are both still practised in Egypt. For the most part legislation has not been effective in eliminating or reducing the practice of female genital mutilation in Africa, but this appears to have been due to problems of enforcement.

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<sup>63</sup>The information on the position in Europe is based on a cablegram from DFAT Paris.

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