



Australian Government  
Attorney-General's Department

March 2013

# **Review of Australia's Female Genital Mutilation legal framework**

**Final Report**

## Contents

Final Report .....	1
1 Executive Summary.....	3
1.1 Background and Purpose .....	3
1.2 Coverage of existing offences.....	3
1.3 Enforcement issues .....	4
1.4 Commonwealth legislative options.....	4
1.5 Recommendations .....	4
2 Introduction.....	6
2.1 Purpose .....	6
2.2 Background.....	6
2.3 Relationship with broader female genital mutilation work.....	7
3 Existing offences.....	7
3.1 Coverage of existing offences.....	7
3.2 Consistent penalties.....	10
3.3 Consistent age range.....	11
3.4 Consistent extraterritorial application .....	12
4 Enforcement issues .....	14
5 Commonwealth legislative options.....	16
5.1 Law enforcement and prosecution resources and responsibilities .....	17
6 Recommendations.....	19

# 1 Executive Summary

## 1.1 Background and Purpose

On 11 December 2012, the Prime Minister announced that the Minister for Health, the Hon Tanya Plibersek MP, would coordinate efforts across Government to address female genital mutilation (female genital mutilation) in Australia. As part of this, the Prime Minister announced that the Commonwealth Attorney-General would conduct a review of Australia's legislative framework. The review would consider whether existing legislative provisions are effective in comprehensively criminalising female genital mutilation.

The purpose of this Report is to set out the findings of the Commonwealth Attorney-General's Review of Australia's female genital mutilation legal framework, for discussion by the Standing Council of Law and Justice at its meeting on 5 April 2013.

Relevant Commonwealth, State and Territory agencies contributed to the development of this Report through a discussion paper, circulated on 1 February 2013.

## 1.2 Coverage of existing offences

At present, female genital mutilation is criminalised exclusively by State and Territory laws. All States and Territories have passed criminal legislation prohibiting female genital mutilation. Further, in each State and Territory, these laws apply extraterritorially to protect Australian residents from being subjected to female genital mutilation overseas. Accordingly, existing legislation provides extensive criminalisation of female genital mutilation both within and outside Australia.

While existing State and Territory laws comprehensively criminalise female genital mutilation, three areas of inconsistency have been identified that could present opportunities to strengthen Australia's legal framework. These relate to:

- consistency of penalty
- consistency of age coverage, and
- consistent extraterritorial application of offences.

This Report recommends that States and Territories consider amending their laws to address these issues.

In addition, during the review of existing laws, queries were raised about how existing female genital mutilation laws would apply to female genital cosmetic procedures. Such procedures are alleged to be occurring more frequently since the last time model laws were discussed by the jurisdictions. This is a complex issue, which this Report has been unable to fully consider. However, this Report recommends that further work on this issue be progressed.

## 1.3 Enforcement issues

Despite being extensively criminalised for a number of years, feedback from jurisdictions indicates that very few, if any, female genital mutilation offences have been successfully prosecuted in Australian courts. This Report identifies a number of opportunities to improve the detection and enforcement of existing laws. These opportunities could be progressed by cooperative inter-jurisdiction and inter-agency efforts. These include:

- improved information sharing between the health and legal systems
- establishing liaisons with community groups in populations which could be vulnerable to female genital mutilation
- improving access to and willingness of interpreters to assist police to investigate suspected cases of female genital mutilation
- the provision of targeted education programs, and
- improving awareness of Australia's laws overseas.

Many of these initiatives could be progressed through the broader efforts to combat female genital mutilation being led by the Commonwealth Minister for Health.

## 1.4 Commonwealth legislative options

It may also be possible for the Commonwealth to enact female genital mutilation offences, relying on the external affairs power. However, given the extensive coverage of State and Territory legislation, the introduction of Commonwealth female genital mutilation offences would add little value to the protection offered to Australian women and girls by existing legislation. Further, Commonwealth offences would raise a number of complex issues relating to resourcing and responsibilities across various Commonwealth and State and Territory agencies. In light of this, this Report recommends that the Commonwealth continue to monitor existing laws to ensure an effective legal framework is in place.

## 1.5 Recommendations

The Standing Council on Law and Justice will meet to discuss this Report on 5 April 2013. At that meeting, Ministers will be asked to agree to the following recommendations aimed at strengthening the coverage of existing offences in their jurisdictions and improving the detection and enforcement of those laws.

### Recommendation 1

*It is recommended that the Commonwealth, States and Territories consider working with communities, experts and other stakeholders to clarify the legal and policy position of female genital cosmetic procedures, with a view to presenting a report to the Standing Council on Law and Justice, or another appropriate ministerial council, if necessary.*

## **Recommendation 2**

*It is recommended that the States and Territories where the maximum penalty for female genital mutilation offences are significantly less than those set out in the Model Laws consider adopting consistent penalties for their female genital mutilation offences, based on those outlined in the Model Laws.*

## **Recommendation 3**

*It is recommended that the States and Territories consider broadening the scope of their legislation to make it an offence to remove any person from the relevant jurisdiction with the intention of having female genital mutilation performed on that person.*

## **Recommendation 4**

*It is recommended that the States and Territories consider broadening the extraterritorial application of their female genital mutilation offences to ensure that both of the following constitute an offence in all Australian jurisdictions:*

- *to perform female genital mutilation on an Australian resident, wherever the operation is performed, and*
- *to remove, or make arrangements to remove, a person from the relevant jurisdiction for the purpose of subjecting them to female genital mutilation.*

## **Recommendation 5**

*It is recommended that the Commonwealth, States and Territories work together to identify potential opportunities for cooperation and improved information sharing between the health and legal systems.*

## **Recommendation 6**

*It is recommended that the Commonwealth, State and Territory governments adopt a cooperative approach and continue to look for opportunities to improve the detection and enforcement of female genital mutilation laws both within and across jurisdictions.*

In addition to agreeing to the above recommendations, Ministers will also be asked to note the following Commonwealth-specific recommendation.

## **Recommendation 7**

*The Commonwealth will continue to monitor existing laws to ensure an effective legal framework is in place.*

## 2 Introduction

### 2.1 Purpose

The purpose of this Report is to set out the findings of the Commonwealth Attorney-General's review of the effectiveness of Australia's legal framework in comprehensively criminalising female genital mutilation (female genital mutilation).

This Report sets out a number of recommendations, with the aim of ensuring that there are no legal loopholes that might allow individuals to escape criminal liability for female genital mutilation.

### 2.2 Background

Female genital mutilation is an abhorrent practice. It intentionally alters and causes harm to female genital organs for no medical reason and can have serious and long-lasting consequences, including infertility, an increased risk of childbirth complications, and maternal and infant mortality during and shortly after childbirth.<sup>1</sup>

The World Health Organisation estimates that female genital mutilation affects about 100-140 million women and girls worldwide, and each year it is estimated that an additional three million girls are at risk of being subjected to the practice globally.

In recognition of the seriousness of female genital mutilation, in December 2012 the United Nations General Assembly unanimously passed a resolution, co-sponsored by Australia, banning the practice of female genital mutilation and encouraging member states to intensify efforts to eliminate this harmful practice. The Prime Minister, the Hon Julia Gillard MP, has indicated that Australia will stand firm with the international community and support all necessary measures to stop female genital mutilation on a global scale.

On 11 December 2012, the Prime Minister announced that the Minister for Health, the Hon Tanya Plibersek MP, would coordinate efforts across Government to address female genital mutilation in Australia. As part of this, the Prime Minister announced that the Attorney-General would conduct a review of Australia's legislative framework to consider whether existing legislative provisions are effective in comprehensively criminalising female genital mutilation.

On 1 February 2013, a discussion paper was circulated to relevant Commonwealth, State and Territory agencies to seek their input to this Report, with particular emphasis on the legislative steps Australian governments could take to ensure Australians are protected from female genital mutilation to the greatest extent possible. This Report builds on the issues raised in that discussion paper, taking into account the various submissions received throughout the consultation process.

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<sup>1</sup> World Health Organisation, *Female Genital Mutilation*, 2012, <<http://www.who.int/mediacentre/factsheets/fs241/en/>>.

The Commonwealth notes that as Western Australia was under caretaker government, it was unable to provide comments on the discussion paper.

## 2.3 Relationship with broader female genital mutilation work

Development of this Report forms part of broader government efforts to end the practice of female genital mutilation in Australia, being led by the Commonwealth Minister for Health. The Minister for Health will be working with State and Territory governments, communities, non-government organisations and individuals, and seeking their cooperation in efforts to support the abandonment of female genital mutilation in Australia. Additional measures being progressed include:

- a national summit in early-2013, bringing together community, health, legal and policing experts to discuss ways of increasing awareness and reducing the incidence of female genital mutilation in Australia
- new research and data collection, and
- \$500,000 in grants to fund organisations to run education and awareness activities and support change within communities.

## 3 Existing offences

The primary purpose of this Report is to examine whether existing legislative provisions are effective in comprehensively criminalising female genital mutilation. The discussion below examines the existing laws which criminalise female genital mutilation, and highlights several opportunities to strengthen Australia's already robust legislative framework.

### 3.1 Coverage of existing offences

At the request of the former Standing Council of Attorneys-General, the Model Criminal Code Officers Committee, consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters, developed a Model Criminal Code for Australian jurisdictions. In September 1998, the Committee published its model laws on female genital mutilation (the Model Laws) as part of this broader process. The Model Laws were drafted after extensive consultation with interested stakeholders and a thorough examination of existing national and international laws criminalising female genital mutilation. The Model Laws are outlined in detail below.

## Model Criminal Code Division 9 - Female genital mutilation

### 5.1.33 Female genital mutilation—definition

In this Division, *female genital mutilation* means:

- (a) a clitoridectomy; or
- (b) excision of any other part of the female genital organs; or
- (c) infibulation or any similar procedure; or
- (d) any other mutilation of the female genital organs.

### 5.1.34 Prohibition of female genital mutilation

- (1) A person who intentionally performs female genital mutilation on another person is guilty of an offence.

*Maximum penalty: Imprisonment for 15 years.*

- (2) It is not a defence to a charge under this section that the person on whom the female genital mutilation was performed, or a parent of that person, consented to the mutilation.

### 5.1.35 Removal of child from jurisdiction for genital mutilation

- (1) A person who takes a child from this jurisdiction, or arranges for a child to be taken from this jurisdiction, with the intention of having female genital mutilation performed on the child is guilty of an offence.

*Maximum penalty: Imprisonment for 7 years.*

*Maximum penalty (aggravated offence): Imprisonment for 9 years.*

- (2) In proceedings for an offence against this section, if it is proved that:
  - (a) the defendant took a child, or arranged for a child to be taken, from this jurisdiction; and
  - (b) female genital mutilation was performed on the child while then outside this jurisdiction,it will be presumed, in the absence of proof to the contrary, that the defendant took the child, or arranged for the child to be taken, from this jurisdiction with the intention of having female genital mutilation performed on the child.

### 5.1.36 Exception—medical procedures for genuine therapeutic purposes

- (1) It is not an offence under this Division to perform a medical procedure that has a genuine therapeutic purpose or to take a person, or arrange for a person to be taken, from this jurisdiction with the intention of having such a medical procedure performed on the person.
- (2) The fact that a procedure is performed as, or as part of, a cultural, religious or other social custom is not to be regarded as a genuine therapeutic purpose.

### 5.1.37 Exception—sexual reassignment procedures

- (1) It is not an offence under this Division to perform a sexual reassignment procedure or to take a person, or arrange for a person to be taken, from this jurisdiction with the intention of having such a procedure performed on the person.
- (2) A sexual reassignment procedure means a surgical procedure to give a female, or a person whose sex is ambivalent, the genital appearance of a particular sex (whether male or female).



Female genital mutilation is currently criminalised exclusively by State and Territory laws. An examination of these offences and feedback from relevant agencies indicates that all jurisdictions have passed criminal legislation that is generally reflective of the Model Laws.<sup>2</sup>

In all jurisdictions it is an offence for a person to perform any type of female genital mutilation. Although in some cases different language is used to define female genital mutilation, all definitions essentially cover the same conduct and are consistent with the definition of female genital mutilation accepted by the World Health Organization. Importantly, in all jurisdictions the consent of the victim, or their parent or guardian, is not a defence to female genital mutilation and specific exceptions have been granted for legitimate medical purposes (including those related to child birth and sex reassignment procedures).

All State and Territory offences also operate extraterritorially to protect Australian residents from being subjected to female genital mutilation outside their jurisdiction of residence, including overseas. For example, it is illegal in New South Wales and the Northern Territory to perform female genital mutilation on another person irrespective of where the female genital mutilation occurs, so long as the victim is normally resident in New South Wales or the Northern Territory respectively. Further, in all jurisdictions except New South Wales it is an offence to remove an individual from that jurisdiction with the intention of having female genital mutilation performed on that person.

The broad definition of female genital mutilation and explicit removal of consent as a defence has raised some issues in relation to female genital cosmetic procedures. Anecdotal evidence suggests female genital cosmetic surgery has increased significantly since 1998, when the model legislation (and the majority of State and Territory offences) was drafted. Certainly, there are many examples of surgeons advertising procedures for Australian clients.

While most public discourse distinguishes between female genital cosmetic surgery and female genital mutilation, female genital cosmetic surgery may involve procedures that are technically very similar to those defined in the legislation. The status of these procedures under existing laws is untested. This is a complex issue, which this Report has been unable to fully consider. Further work should be done in close consultation with relevant Commonwealth, State and Territory agencies, communities, experts and other stakeholders to clarify the legal and policy position on female genital cosmetic procedures.

### **Recommendation 1**

*It is recommended that the Commonwealth, States and Territories consider working with communities, experts and other stakeholders to clarify the legal and policy position of female genital cosmetic procedures, with a view to presenting a report to the Standing Council on Law and Justice, or another appropriate ministerial council, if necessary.*

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<sup>2</sup> *Crimes Act 1900 (ACT) s73-77; Crimes Act 1900 (NSW) s45, Criminal Code Act (NT) s186A-186D; Criminal Code 1899 (Qld) s323A-323B; Criminal Law Consolidation Act 1935 (SA) s33-33B; Crimes Act 1958 (Vic) s32-34A; Criminal Code Act 1924 (Tas) s178A, 178B, s389 and The Criminal Code (WA) s306.*

Although existing State and Territory laws comprehensively criminalise female genital mutilation, three areas of inconsistency have been identified that could present opportunities to strengthen Australia's legal framework. These are considered below in further detail, and relate to:

- Consistency of penalty.
- Consistency of age coverage.
- Consistent extraterritorial application of offences.

## 3.2 Consistent penalties

Under existing State and Territory legislation penalties for female genital mutilation offences vary greatly, ranging from 7 years' imprisonment in some jurisdictions up to 21 years' imprisonment in others.

Improving the consistency of penalties between jurisdictions would have a number of benefits. First and foremost, improved consistency would send a nationally unified message on the seriousness of female genital mutilation. Under the UN resolution on female genital mutilation, all countries are encouraged to complement punitive measures with awareness-raising and educational activities designed to promote a process of consensus towards the elimination of female genital mutilation. Consistent penalties assist in effective messaging towards female genital mutilation being a serious crime that should be eliminated. At a practical level, consistent penalties would also ensure that those wishing to perform or arrange female genital mutilation are not attracted to jurisdictions with lower penalties.

The Commonwealth considers that the penalties set out in the Model Laws provide a useful starting point in determining consistent penalty benchmarks for female genital mutilation offences. This is because those penalties were developed after extensive consultation with interested stakeholders and a thorough examination of existing national and international laws. The Model Laws recommend that the offence of performing female genital mutilation on a person be punishable by a maximum of 15 years' imprisonment and that the offence of removing, or making arrangements to remove, a person from the relevant jurisdiction with the intention of having female genital mutilation performed on that person be punishable by a maximum of 7 years' imprisonment.

While improving penalty consistency would have benefits, some jurisdictions have provided strong justifications to support their existing penalty regimes, while others have noted that governments can still reinforce a strong stance against female genital mutilation regardless of the uniformity of penalties for female genital mutilation offences across Australia.

For example, Tasmania has noted that section 389 of its *Criminal Code Act 1926* sets out a maximum penalty of 21 years imprisonment for all offences in the Code, including female genital mutilation, and specifically states that the particular penalty applied to an offence shall be such as the court thinks fit in the circumstances of each case. This reflects Tasmania's consistent policy since the Code was enacted to leave the setting of penalties entirely to the discretion of the court.

The Northern Territory and Queensland have noted that the maximum penalty of 14 years' imprisonment for the offence of performing female genital mutilation in their jurisdictions was set for consistency with other violent offences against the person contained within their broader

legislative regime. Similarly, Queensland and the Northern Territory have set a maximum penalty of 14 years' imprisonment for the offence of removing a person from their jurisdictions with the intention of subjecting them to female genital mutilation, to reflect the gravity of this type of conduct and for consistency with the penalty that would apply to a person who had actually performed the female genital mutilation procedure, respectively.

The Commonwealth notes that the approach adopted by Tasmania, the Northern Territory, Queensland, Australian Capital Territory, Western Australia and Victoria allows a penalty to be imposed which is similar to or greater than the penalties set out in the Model Laws. The court therefore has the discretion to hand down penalties which are consistent with like cases in other jurisdictions, where this is considered appropriate. In practice, this achieves the benefits associated with consistent penalties set out above, while not requiring legislative change on behalf of those jurisdictions.

One jurisdiction that has lower maximum penalties for female genital mutilation offences than other jurisdictions has indicated a willingness to consider the merits of reviewing its existing penalties. Another jurisdiction has advised that it considers its penalty of 7 years' imprisonment for the performance of female genital mutilation to be appropriate, when considered in the context of its broader legislative framework and noted that 7 years is not an insubstantial period of imprisonment.

The Commonwealth believes there would be value in all jurisdictions with significantly lower penalties than those set out in the Model Laws considering adopting higher penalties for their female genital mutilation offences. However, the Commonwealth recognises that any subsequent legislative action would be a decision for individual jurisdictions to determine according to their own resources, priorities and policy considerations.

## **Recommendation 2**

*It is recommended that the States and Territories where the maximum penalty for female genital mutilation offences are significantly less than those set out in the Model Laws consider adopting consistent penalties for their female genital mutilation offences, based on those outlined in the Model Laws.*

## **3.3 Consistent age range**

At present, in the majority of jurisdictions it is an offence to remove, or make arrangements to remove, a child under the age of 18 years from the relevant jurisdiction with the intention of having female genital mutilation performed on that child. Under Victorian law, this offence is not limited to the removal of children, but applies to the removal of all persons. At present, New South Wales law does not include a 'removal' offence.

Although the World Health Organisation suggests that female genital mutilation is mostly carried out on girls aged between infancy and 15 years, it is foreseeable that adult women could also be forcibly removed or coerced from Australia for the purposes of female genital mutilation.

This conclusion is reflected in the scope of the 'performance' offence. In all Australian jurisdictions, the performance of female genital mutilation on any person is criminalised; the offence is not

limited to the performance of female genital mutilation on children. Similarly, the UN resolution on female genital mutilation urges countries to condemn all harmful practices that affect women and girls, in particular female genital mutilation, and to take all necessary measures to protect women and girls from this form of violence. Like the ‘performance’ offence, the UN resolution does not limit the practice by age, and specifically contemplates female genital mutilation performed on women as well as girls.

Accordingly, several jurisdictions have agreed that there may be merit in broadening the majority approach so that it is an offence to remove any person, regardless of age, from the relevant jurisdiction with the intention of having female genital mutilation performed on that person. This would provide more comprehensive protection to all Australian women and girls from female genital mutilation, in line with the purpose of this Report. While other jurisdictions recognise the rationale behind this approach, due to the limited number of female genital mutilation cases detected and prosecuted in Australia to date, they are of the view that legislative change is not warranted in these circumstances.

Some jurisdictions have also suggested that if this type of amendment were adopted consideration should be given to the issue of consent, so far as the offence applies to adult women. While there may be a distinction between an adult woman who is forced or coerced to leave the relevant jurisdiction for the purposes of female genital mutilation and an adult woman who leaves voluntarily, the Commonwealth Attorney-General’s Department notes that reconsideration of the issue of consent as it applies to this offence appears inconsistent with the explicit removal of consent as a defence in relation to existing offences.

### **Recommendation 3**

*It is recommended that the States and Territories consider broadening the scope of their legislation to make it an offence to remove any person from the relevant jurisdiction with the intention of having female genital mutilation performed on that person.*

## **3.4 Consistent extraterritorial application**

All State and Territory female genital mutilation offences operate extraterritorially to protect Australian residents from being subjected to female genital mutilation overseas.

In New South Wales and the Northern Territory, it is an offence to perform female genital mutilation on a person outside the relevant jurisdiction if that person is ordinarily resident in New South Wales or the Northern Territory respectively. Though the Australian Capital Territory has not adopted this approach explicitly, the offence of performing female genital mutilation may have extraterritorial application by virtue of Chapter 2 of the *Criminal Code Act 2002* (ACT) (the ACT Criminal Code). Part 2.7 of the ACT Criminal Code applies Australian Capital Territory offences beyond the territorial limits of the Territory and of Australia where there is a “geographical nexus” between the offence and the Australian Capital Territory. A geographical nexus is established if the offence is committed wholly or partly in the Australian Capital Territory or if it is committed wholly outside the Australian Capital Territory and the offence has an effect in the Territory.

In Tasmania, South Australia, West Australia, the Northern Territory, Queensland and the Australian Capital Territory, it is an offence to remove a child from the relevant jurisdiction, or make arrangements for their removal, with the intention of having female genital mutilation performed on them. In Victoria, it is an offence to remove a person from Victoria, or make arrangements for their removal, with the intention of having female genital mutilation performed on that person.

Although both approaches protect Australian residents from female genital mutilation performed outside the relevant jurisdiction (including female genital mutilation performed overseas), each approach criminalises separate conduct and has its own merits.

For example, while the majority 'removal' approach does not criminalise the actual performance of female genital mutilation outside the jurisdiction, it does criminalise early planning conduct, potentially allowing law enforcement to intervene at an early stage before female genital mutilation has even occurred. This is not possible under the 'wherever performed' approach, unless there is enough evidence available to proceed with a charge of 'attempt'. The 'removal' approach also captures the conduct of family members or other influential persons who may not carry out the female genital mutilation itself, but are instrumental in arranging for it to occur.

On the other hand, the New South Wales and Northern Territory 'wherever performed' approach criminalises the actual performance of female genital mutilation outside the relevant jurisdiction, ensuring that those who carry out female genital mutilation cannot escape criminal liability by performing female genital mutilation outside the relevant jurisdiction. There may be circumstances in which it may be inappropriate for Australian law enforcement agencies to enforce this law extraterritorially - for example in cases where a non-Australian performs female genital mutilation on an Australian resident while she is overseas in a country where female genital mutilation is not prohibited. However, there will be cases where the 'wherever performed' approach would be desirable. For example, an Australian may travel overseas independently and be requested to perform female genital mutilation on an Australian resident during that travel, without any prior arrangements being made by the former for the removal of the latter for the purpose of female genital mutilation. In this situation, the person's conduct may not be captured by the 'removal' offence unless an extension of criminal responsibility (such as complicity) could be proven.

Some jurisdictions have suggested that, although the 'wherever performed' approach offers additional protection to Australian women and girls from female genital mutilation in theory, there would be a number of difficulties with the enforcement of such provisions. It was noted that destination countries may have little interest in cooperating with Australian law enforcement where these types of cases are detected, and that complications could arise in relation to matters such as obtaining evidence and locating and extraditing offenders.

It was also noted that while incidents of Australian girls and women being sent or taken overseas for the purposes of female genital mutilation may have occurred, the nature and circumstances of such acts means that they rarely come to the attention of Australian officials. As such, there is an absence of casework against which the practical application of Australia's current legal framework on female genital mutilation in the extraterritorial context may be assessed.

While these points are valid, the purpose of this Report is to identify legislative steps Australian governments could take to ensure Australian residents are protected to the greatest extent possible

from female genital mutilation in the future. Adopting both the ‘removal’ and ‘wherever performed’ approach to the extraterritorial application of female genital mutilation offences in all Australian jurisdictions achieves this purpose. It achieves a more extensive coverage of criminal conduct under Australia’s legal framework. This would provide law enforcement agencies with a broader range of tools to take action against all culpable individuals where appropriate.

Some jurisdictions have raised concerns regarding the ‘enforceability’ of extraterritorial offences. Broadening the extraterritorial application of State and Territory female genital mutilation legislation in order to ensure consistency across all jurisdictions would also simplify the legal regime surrounding female genital mutilation, making it easier for Australian consular officers and the public to understand the scope and application of Australian female genital mutilation laws. This could improve reporting of suspicious behaviour and increase the detection rates of female genital mutilation offences occurring internationally.

Further, the Department of Foreign Affairs and Trade (DFAT) is currently pursuing measures to improve awareness of existing Australian female genital mutilation laws overseas, to encourage information sharing and public reporting of crimes. This would contribute to overall enforcement while also dissuading perpetrators. These measures include taking steps to provide consular officers with adequate guidance and training on female genital mutilation legislation to ensure that any information relating to a potential case of female genital mutilation involving an Australian victim or perpetrator is promptly reported through the appropriate channels. DFAT will work closely with the Commonwealth Attorney-General’s Department and Commonwealth Department of Health and Ageing in developing these initiatives.

#### **Recommendation 4**

*It is recommended that the States and Territories consider broadening the extraterritorial application of their female genital mutilation offences to ensure that both of the following constitute an offence in all Australian jurisdictions:*

- *to perform female genital mutilation on an Australian resident, wherever the operation is performed, and*
- *to remove, or make arrangements to remove, a person from the relevant jurisdiction for the purpose of subjecting them to female genital mutilation.*

## **4 Enforcement issues**

As highlighted above, although female genital mutilation has been extensively criminalised for a number of years, very few, if any, female genital mutilation offences have been successfully prosecuted in Australian courts. Accordingly, there may be value in identifying and implementing measures to support the enforcement of existing laws.

However, State and Territory law enforcement agencies have noted that given the scarcity of female genital mutilation offences that have been detected or reported in Australia, it is challenging to

identify measures that may be successful in improving the detection and enforcement of these offences.

The Australian Capital Territory has noted the apparent disconnect between the number of female genital mutilation prosecutions across all Australian jurisdictions and the reports of health workers who treat women and children who have undergone female genital mutilation. The Australian Capital Territory has suggested that improving information sharing between law enforcement and health and community workers may lead to increases in the identification of female genital mutilation. The Commonwealth Attorney-General's Department will be working closely with the Commonwealth Department of Health and Ageing over the coming months to identify cross-portfolio opportunities to improve the enforcement of existing female genital mutilation laws, as part of the broader work being led by the Department of Health and Ageing to address female genital mutilation in Australia. The Department of Health and Ageing will also consult with State and Territory governments as part of this work. This engagement could present a valuable opportunity to identify areas of potential cooperation between the health and legal systems.

### **Recommendation 5**

*It is recommended that the Commonwealth, States and Territories work together to identify potential opportunities for cooperation and improved information sharing between the health and legal systems.*

Other opportunities identified by jurisdictions that could assist with the enforcement of female genital mutilation laws, and which could be developed with further cross-jurisdictional and cross-agency cooperation, include:

- establishing liaisons with community groups in populations which could be vulnerable to female genital mutilation
- improving access to and willingness of interpreters to assist police to investigate suspected cases of female genital mutilation,
- the provision of targeted education, and
- raising awareness amongst professionals and communities.

The Commonwealth notes that the Government's response to female genital mutilation includes \$500,000 in grants to support education and awareness raising activities. The Department of Health and Ageing has advised that it considers that funded activities could potentially include a component on legislation, depending on the organisations funded, which may help support detection and reporting of risks or signs of female genital mutilation. The Commonwealth also notes concerns that any further work on the initiatives identified by jurisdictions be informed by an evidence base to ensure selection of target groups is not motivated by unconscious bias, systemic or institutionalised racial discrimination.

The Department of Foreign Affairs and Trade (DFAT) is also pursuing measures to improve awareness of Australian female genital mutilation laws overseas, with the aim of contributing to overall enforcement by encouraging information-sharing and public reporting of crimes, while also dissuading potential perpetrators. As part of these efforts, DFAT will consult with like-minded

countries to discuss approaches to enforcing female genital mutilation laws overseas and opportunities for future collaboration. DFAT is also looking for opportunities to strengthen links with non-governmental actors who are active in relation to health and/or women's issues in countries with high rates of female genital mutilation. By liaising with these groups, DFAT hopes to improve understanding of local female genital mutilation practices and legal frameworks, while fostering information sharing regarding incidents of female genital mutilation involving Australians. These measures would complement recent Commonwealth Government efforts to ensure that Australian consular posts are aware of their responsibilities and what to do in the event cases of female genital mutilation come to their attention.

### Recommendation 6

*It is recommended that the Commonwealth, State and Territory governments adopt a cooperative approach and continue to look for opportunities to improve the detection and enforcement of female genital mutilation laws both within and across jurisdictions.*

## 5 Commonwealth legislative options

In addition to legislative reform of existing State and Territory offences, it may also be possible to enact Commonwealth laws in this area relying on the external affairs power. If this option were pursued, care would need to be taken to ensure that the Commonwealth did not unintentionally cover the field in this area.

There are several treaty obligations which could support the enactment of the Model Laws at a Commonwealth level. These include the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, the right to health, and the right to freedom from discrimination against women. These rights are variously reflected in the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup>, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>4</sup>, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>5</sup> and the Convention on the Rights of the Child (CRC).<sup>6</sup>

While Commonwealth legislation could provide consistent and comprehensive criminalisation of female genital mutilation at a national level, the Commonwealth Attorney-General's Department recognises that it would also raise a number of complex issues, particularly in relation to:

- the application of laws to female genital cosmetic surgery
- law enforcement and prosecution resources and responsibilities, and
- support for victims.

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<sup>3</sup> [1980] ATS 23, in force generally 23 March 1976, and for Australia, 13 November 1980.

<sup>4</sup> [1983] ATS 9, in force generally 3 September 1981, and for Australia, 27 August 1983.

<sup>5</sup> [1976] ATS 5, in force generally 3 January 1976, and for Australia, 10 March 1976.

<sup>6</sup> [1991] ATS 4, in force generally 2 September 1990, and for Australia, 16 January 1991.



The enactment of Commonwealth laws in this area was not supported by any jurisdiction or the Australian Federal Police in their response to the discussion paper circulated on 1 February 2013.

## **5.1 Law enforcement and prosecution resources and responsibilities**

Given the extensive coverage of State and Territory legislation, at this stage, the introduction of Commonwealth female genital mutilation offences would add little value to the protection offered to Australian women and girls by existing legislation.

However, the enactment of Commonwealth legislation would provide a basis for federal law enforcement and prosecution agencies to take action where appropriate. This may be of particular benefit in cases where female genital mutilation has occurred against an Australian resident overseas or there is another international or cross-jurisdictional element to the crime.

In relation to this, the Australian Federal Police (AFP) has advised that it already provides support to State and Territory police where there may be evidence of an offence located overseas, or where the cooperation of foreign law enforcement could assist in the resolution of a case. The provision of this assistance is not predicated on the existence of a Commonwealth offence; the AFP is already able to provide international assistance through its International Network and INTERPOL channels.

It should also be noted that the enactment of Commonwealth level female genital mutilation offences would not overcome the challenges faced by law enforcement when investigating offences which involve offending overseas. The AFP does not have the jurisdiction to use its investigative powers to collect evidence located overseas, and any operational activities undertaken by the AFP outside of Australia can only be done with the consent of the foreign jurisdiction, in accordance with local laws and procedures and Australian law. Obtaining evidence must be done pursuant to formal mechanisms for international crime cooperation (mutual legal assistance) to ensure that the evidence gained is admissible in Australian courts.

Further, the creation of Commonwealth-level female genital mutilation offences may result in an unnecessary duplication of effort between Commonwealth and State and Territory agencies. For example, given their experience in the areas of violent crimes against the person, it is likely that State and Territory police forces would already have skills and resources in place for dealing with specific issues involving female genital mutilation. While the AFP and CDPP have specialised capability in relation to limited categories of Commonwealth crimes against the person, including child victims of sexual exploitation and victims of human trafficking, this has required specialised training for officers assigned to those crime types. The implementation of Commonwealth female genital mutilation offences may require further subject matter and cultural training for officers, with associated impacts on resourcing and priorities.

Finally, given the overlap between Commonwealth and State and Territory offences, it may be difficult to clarify how responsibility for investigation and prosecution would be allocated between the Commonwealth and States and Territories. However, the AFP has noted that it would be

possible to settle protocols which govern when Commonwealth, State or Territory investigative and prosecutorial agencies should take the lead on particular female genital mutilation matters.

While the above resourcing and responsibility issues could be partially addressed by limiting the application of Commonwealth offences to those committed overseas, this is likely to be of little utility given the comprehensive extraterritorial application of existing State and Territory offences.

## 5.2 Support for victims

The enactment of Commonwealth legislation would also raise issues associated with the provision of support to individual victims, both within and outside proceedings.

Within proceedings, consideration would need to be given to mechanisms which could assist victims to give evidence. Commonwealth legislation currently provides protections for child witnesses in proceedings for sexual offence matters<sup>7</sup> and overseas witnesses in child sex tourism and child pornography matters.<sup>8</sup> There are currently no other Commonwealth protections that apply specifically to vulnerable witnesses. While State and Territory provisions relating to vulnerable witnesses and manner of testimony are in place and may apply to Commonwealth proceedings via section 68 of the *Judiciary Act 1903*, there are distinctions in practices and powers between and within jurisdictions.

If Commonwealth female genital mutilation offences are enacted, it may be preferable to ensure that courts exercising Commonwealth criminal jurisdiction have clear powers to protect individual victims during the judicial process. These powers would be designed to ensure that victims are in a position to give the best possible testimony to a court, free from concerns of personal safety or undue public embarrassment. This could include Commonwealth-level powers preventing the names and identifying details of victims being published and allowing victims to give evidence in a non-standard manner, in addition to existing protections available through applicable State and Territory legislation.

Victims of female genital mutilation are also likely to need significant support through the investigation and prosecution process, given that there is likely to be a number of factors which mean that these victims are particularly vulnerable. As noted by New South Wales, a better supported victim may be able to participate in the judicial process more effectively, improving the number of successful female genital mutilation prosecutions. While victim support programs to assist victims in the judicial process are already in place at a State, Territory and Commonwealth level, again given the overlap of offences it may be difficult to clarify where responsibility for victim support should fall, noting there could be significant resource implications in providing this assistance.

Finally, the enactment of Commonwealth legislation would also raise issues related to child protection and welfare outside of any criminal proceedings. The Commonwealth Attorney-General's Department notes that welfare issues – including those for all minors – generally fall within the area

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<sup>7</sup> *Crimes Act 1914* (Cth), Part IAD.

<sup>8</sup> *Criminal Code Act 1995* (Cth), Divisions 272 – 273.

of State and Territory responsibility. Due to the lack of data in this area, it is difficult to determine the specific implications for support programs and child protection services associated with any potential Commonwealth legislation and the needs of individual victims of female genital mutilation.

Given the number of practical concerns associated with a Commonwealth legislative response, and noting the comprehensive coverage of existing State and Territory female genital mutilation offences, the Commonwealth will continue to monitor the existing laws, but focus its efforts on improving awareness and understanding of existing laws.

#### **Recommendation 7**

*The Commonwealth will continue to monitor existing laws to ensure an effective legal framework is in place.*

## **6 Recommendations**

The Standing Council on Law and Justice will meet to discuss this Report on 5 April 2013. At that meeting, Ministers will be asked to agree to the following recommendations aimed at strengthening the coverage of existing offences in their jurisdictions and improving the detection and enforcement of those laws.

#### **Recommendation 1**

*It is recommended that the Commonwealth, States and Territories consider working with communities, experts and other stakeholders to clarify the legal and policy position of female genital cosmetic procedures, with a view to presenting a report to the Standing Council on Law and Justice, or another appropriate ministerial council, if necessary.*

#### **Recommendation 2**

*It is recommended that the States and Territories where the maximum penalty for female genital mutilation offences are significantly less than those set out in the Model Laws consider adopting consistent penalties for their female genital mutilation offences, based on those outlined in the Model Laws.*

#### **Recommendation 3**

*It is recommended that the States and Territories consider broadening the scope of their legislation to make it an offence to remove any person from the relevant jurisdiction with the intention of having female genital mutilation performed on that person.*

#### **Recommendation 4**

*It is recommended that the States and Territories consider broadening the extraterritorial application of their female genital mutilation offences to ensure that both of the following constitute an offence in all Australian jurisdictions:*

- *to perform female genital mutilation on an Australian resident, wherever the operation is performed, and*
- *to remove, or make arrangements to remove, a person from the relevant jurisdiction for the purpose of subjecting them to female genital mutilation.*

#### **Recommendation 5**

***It is recommended that the Commonwealth, States and Territories work together to identify potential opportunities for cooperation and improved information sharing between the health and legal systems.***

#### **Recommendation 6**

*It is recommended that the Commonwealth, State and Territory governments adopt a cooperative approach and continue to look for opportunities to improve the detection and enforcement of female genital mutilation laws both within and across jurisdictions.*

In addition to agreeing to the above recommendations, Ministers will also be asked to note the following Commonwealth-specific recommendation.

#### **Recommendation 7**

*The Commonwealth will continue to monitor existing laws to ensure an effective legal framework is in place.*