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FEMALE GENITAL MUTILATION

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Queensland Law Reform Commission
December 1993

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RESEARCH PAPER

Queensland Law Reform Commission
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Previous Queensland Law Reform Commission publications on this Reference:
Consent by Young People to Medical Treatment, Information Paper, May 1993.

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1. INTRODUCTION

(a) Terms of Reference

This reference is part of a wider reference given to the Commission by the Attorney-General in its Fourth Programme of work.[1] The full terms of the reference are set out in item 4 of the Programme, namely:

> **"Examine the rights relating to consent to medical procedures by:-**
>
> **(a) children;**
>
> **(b) intellectually disabled adults (including consent to sterilisation)."**

The Commission has divided the terms of reference into two major parts. The first part concerns consent by young people to medical procedures. The second part concerns consent to medical procedures on intellectually disabled adults.[2]

The first part of the reference has also been divided into distinct research projects to enable the Commission to deal with particular issues in detail and to avoid confusion between seemingly disparate matters. The research projects currently being undertaken include:

(i) consent to medical examinations in child abuse cases;

(ii) female genital mutilation;

(iii) male circumcision;

(iv) general legislation on consent to medical treatment of young people;

(v) sterilisation of young people;

(vi) treatment of severely defective neonates.

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1 September 1990.

2 The latter part is being dealt with by the Commission in its forthcoming Report on *Assisted and Substituted Decision-Making.*

This Research Paper concerns item (ii) above.

(b) Consultation

In May and June 1993 advertisements were placed in the Courier-Mail calling for public submissions on Consent by Young People to Medical Treatment. An Information Paper outlining a wide range of issues was available to assist anyone interested in making a written or oral submission. Also, a number of media interviews were given by a member of the Commission to elicit public interest in the matters being dealt with.

Approximately 300 copies of the Information Paper have been distributed and, to date, approximately 160 oral and written submissions have been received. 19 of those submissions relate specifically to female genital mutilation.

In addition, a number of individuals and organisations with a particular interest in female genital mutilation have been approached for information and opinions on relevant matters raised by this reference. The assistance of those who have made submissions and others who provided information and comments to the Commission in the preparation of this paper is greatly appreciated.

(c) The Need for Reform and the Commission's Approach

From the Commission's research to date, female genital mutilation is a very intrusive surgical procedure with no known medical advantage when performed on normal, healthy female genitalia. On the contrary, the adverse health effects are long-term, debilitating and permanent.

This Research Paper has been produced to assist the Commission in understanding the issues surrounding female genital mutilation. It is being circulated to individuals and organisations with an interest or expertise in the issues raised, to verify the accuracy and significance of the information contained in the Research Paper, and to seek suggestions as to the most appropriate approach to adopt.

There will be wider community consultation on female genital mutilation and other matters to be dealt with during the course of this reference, at a later date.

2. MEANING OF FEMALE GENITAL MUTILATION

The term 'female genital mutilation' has been used to describe a variety of ritual practices in certain communities throughout the world.[3] These practices range from a cut to a female's genitals to the removal of a genital organ. There are three main types of female genital mutilation:[4]

* **Circumcision**[5] involves the circumferential excision of the clitoral prepuce or hood.[6] This is the least intrusive procedure.

* **Excision** includes:

    * the excision of the clitoral prepuce; and

    * the removal of the gland of the clitoris or removal of the whole of the clitoris itself; and

    * the removal of all or part of the labia minora.

* **Infibulation or pharaonic circumcision** consists of the excision of the clitoris, labia minora and parts of the labia majora. The two sides of the vulva are then sewn together. A small opening is allowed for the passage of urine and menstrual blood. The legs of the girl[7] are then bound together and she is immobilised for several weeks to ensure the wound heals. This is the most intrusive procedure.[8]

The term 'female circumcision' has also been widely used to describe the genital mutilation of females. However, the Commission uses the term 'female genital mutilation' rather than 'female circumcision'. Factors which

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3 See page 7 of this Research Paper for list of countries where at least one form of female genital mutilation is practised.

4 Hedley R and Dorkenoo E *Child Protection and Female Genital Mutilation* Forward 1992 at 5 and 20.

5 This may also include the removal of the tip of the clitoris.

6 This procedure is known as 'sunna' in Muslim countries.

7 Female genital mutilation is usually performed on young women. See page 5 of this Research Paper.

8 See Appendix A for descriptions of an infibulation.

influenced the Commission to use the former term included:

* 'female genital mutilation' more accurately describes the results of the surgical procedures: the word 'mutilate' means to 'deprive a person of a limb or essential part ... to damage or injure by the removal of an important part or parts';[9]

* 'female genital mutilation' describes all forms of mutilation; 'female circumcision' is commonly used to describe only the first type of mutilation outlined above;

* the term 'female genital mutilation' has gained international acceptance as the more accurate description of the results of the procedures. The term 'female genital mutilation' has been used in the United Nations *Draft Declaration on the Elimination of Violence against Women* Article 2(a) and the United States *Federal Prohibition of Female Genital Mutilation Act* of 1993.

As Gérard Zwang states:

> Any definitive and irremediable removal of a healthy organ is a mutilation. The female external genital organ normally is constituted by the vulva, which comprises the labia majora, the labia minora or nymphae, and the clitoris covered by the prepuce, in front of the vestibule to the urinary meatus and the vaginal orifice. Their constitution in female humans is genetically programmed and is identically reproduced in all the embryos in all the races. The vulva is an integral part of the natural inheritance of humanity. When normal, there is absolutely no reason, medical, moral, or aesthetic, to suppress all or any part of these exterior genital organs.[10]

The practice of female genital mutilation is almost always performed by an older woman or a traditional birth attendant in certain communities.[11] Anaesthetics are rarely used. Instruments used in the procedure include unsterilised knives, razors, broken glass and sharp stones. It is now less common for any traditional ceremony to accompany the operation. In some communities the ceremony has been simplified.[12]

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9 Webster's *Comprehensive Dictionary* (Encyclopedic ed).

10 *Mutilations Sexuelles Féminines*, Techniques et Résultants referred to in Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 7.

11 Some medical personnel in African countries are now performing the operation in hospitals and clinics. Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 28.

12 Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 28.

The age at which these operations are performed varies depending on the custom of the community and "whether legislation against the practice is foreseen or not".[13] Ages range from a few days old to seven years old to puberty. The age at which these operations are being performed is becoming younger.[14]

3. HISTORY

The origin of the practice of female genital mutilation is not known. It is not possible to conclude whether the practice emanated from one region or whether it developed independently in various regions at different times.[15]

Mummies of Egyptian females dating back to 16th Century BC show evidence of excision.[16] Evidence of this practice pre-dates the Islamic religion in different African regions. Hosken[17] notes:

> Circumcision of both boys and girls came into fashion long before Islam, and was practised in many different areas in Africa. The practice was unknown to the Romans until they conquered Egypt and the Middle East. The Copts in Egypt, and the Abyssinians (Ethiopians) have practised circumcision of boys and girls (at a much younger age than the typical puberty rites of Subsaharan Africans) from prehistoric times.

The practice of one form or another of female genital mutilation in certain communities has continued without interruption throughout the centuries. Reasons given for the development of this practice vary. Historically, it has been said that the practice developed as: a method to curb sexual behaviour; proof of virginity on marriage; a cleansing rite based on the belief that a female was polluted; protection of females from rape; a sign of distinction; a method of gaining inheritance rights; and a method of affirming the sex of the child, as the clitoris was regarded as the male element in the female.[18]

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13 Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 7.

14 Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 28.

15 Id at 51.

16 Huber A *Die Weibliche Beschneidung* Tropenmedizin und Parasitologie Vol 20 No 1 Mar 1969 at 3 referred to in Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 54.

17 Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 55.

18 Id at 54 and 55.

The practice of female genital mutilation does not stem from any religious rite. As Hosken[19] observes:

> In all the literature, it is stressed time and again that genital mutilation is not a religious rite, but rather, that it is a custom of the people or certain ethnic groups. It was and is practised by all religious denominations in Africa, including Christians; that is, Copts, Ethiopian Christians, Catholics and Protestants, as well as Animists and Moslems, none of which oppose it at the present time. Neither does the leadership of any of the Christian or Moslem denominations publicly speak against the mutilation of female children. However, some Moslem leaders propagate the operation on girls in the name of religion, especially in West Africa, and have done so throughout the past. Animists often state that the operations are done because it is "the wish of the ancestors".

The Islamic Council of Queensland advised the Commission that it "is not a part of Islamic law, and is not a recommended practice."[20]

The tradition of female genital mutilation has not been limited to Africa and Middle Eastern countries.

In Roman times a (mechanical) form of infibulation was used on female slaves for contraceptive purposes. This method consisted of pushing rings through the labia which were sometimes then closed by a padlock or wire.[21]

In England during the 19th Century the performance of female genital mutilation[22] on women, particularly from the upper class, gained medical acceptance mainly as a cure for masturbation.[23] Masturbation was seen to be the cause of "many of women's diseases such as uterine haemorrhage, falling of the womb, cancer, functional disorders of the heart, spinal irritation, hysteria, convulsions, haggard features - emaciation, debility, mania - many symptoms called nervous ..."[24] Female genital mutilation was also

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19 Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 56.

20 Written submission to the Queensland Law Reform Commission by the Islamic Council of Queensland.

21 Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 53-54. The Crusaders brought to Europe the practice of using chastity belts as a means of ensuring fidelity.

22 The main form of female genital mutilation performed was the removal of the clitoris.

23 Infibulation never gained acceptance and was discarded as a remedy in England.

24 Duffy J *Masturbation and Clitoridectomy: A 19th Century View* Journal of the American Medical Association Vol 186, Oct 19, 1963 at 245-248 referred to in Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 252.

practised in Europe.[25] Around the 1890's the performance of female genital mutilation[26] was taken up by doctors in the United States of America. It was not until the 1930's when the dangers of masturbation were exposed as a myth and mothers rejected the procedure for their daughters that United States doctors no longer recommended the practice.[27]

4. COUNTRIES WITHIN WHICH FEMALE GENITAL MUTILATION IS PRACTISED

Female genital mutilation is estimated to affect 74 million women and children worldwide today. Countries where at least one form of genital mutilation is practised on a traditional basis within certain communities include Somalia, Djibouti, Eritrea (formerly Ethiopia), Mali, Sudan, Sierra Leone, Burkina Faso, Gambia, Ivory Coast, Kenya, Senega, Egypt, Guinea, Guinea Bissau, Nigeria, Mauritania, Central African Republic, Niger, Chad, Benin, Togo, Ghana, Tanzania, Uganda, Zaire, Oman, South Yemen, the United Arab Emirates, Indonesia and Malaysia.[28] Female genital mutilation has occurred in other countries within migrant communities for whom the practice is traditional. Thus, there are reports that such operations, mostly on very young girls, have occurred in the United Kingdom, Sweden, France, Italy, Germany and Australia.[29]

The extent to which any form of female genital mutilation is practised in Australia is not known.[30]

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[25] The main form of female genital mutilation performed was the removal of the clitoris.

[26] Ibid.

[27] Hosken F *The Hosken Report: Genital and Sexual Mutilation of Females* (1982 3rd ed) at 255.

[28] Hosken F *The Hosken Report: Genital & Sexual Mutilation* (1982 3rd ed), UNICEF *State of the World's Children Report* 1992, UNDP *Human Development Report* 1991 and *Third World Guide* 1991-2, Instituto de Tercer Mundo, Uruguay referred to in Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 22 and also see in the same report at 11. It has been reported that Bohra Muslims from India, Pakistan and East Africa practise female genital mutilation. Ghadially Q *All for 'Izzat'; The Practice of Female Circumcision among Bohra Muslims* Manushi No 66 New Delhi, India 1991 referred to in Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 11.

[29] Hosken F *The Hosken Report: Genital and Sexual Mutilation* (1982 3rd ed) at 257.

[30] See National Times April 13 to 19, 1980 *Racist backlash: fear on female circumcision;* The West Australian 4 March 1986 *Circumcisions upset Moslem*; Great Southern Herald 5 March 1986 *Anger over accusations of barbarism*; The Age 19 February 1987 *Female Circumcision is child abuse: policewoman*; The Age 20 February 1987 *AMA agrees, baby girls are being circumcised;* The Age 21 February 1987 *Circumcision of girl babies to be checked*; Daily News 27 February 1987 *Young girls die from mutilation*; The Australian 2 March 1987 *The unspeakable horror of female circumcision*; Health Sharing Women March/April 1991 no 5 *Female Genital Mutilation* at 1-2; The Bulletin August 25 1992 *Customs and excise - What is female circumcision and how common is it in Australia?;* Medical Observer 1 October 1993 *It's official: genital mutilation is here* at 2; The Age 2

5. REASONS FOR THE CONTINUED PRACTICE OF FEMALE GENITAL MUTILATION

The continuation of the practice of female genital mutilation is related to one or more of the social, cultural, economic, traditional and religious values of the communities where it is practised. Many diverse reasons and justifications are given for female genital mutilation. The reasons have commonly been divided into 5 main groups - psycho-sexual, religious, sociological, hygiene and aesthetics, and economics. Each will be discussed in turn below.

A. Psycho-sexual

The mutilation of a woman's genitals is seen as a means of controlling her sexuality.

Some communities believe that a woman must be protected against her "oversexed nature, saving her from temptation, suspicion and disgrace, whilst preserving her chastity."[31] This protection is believed to be achieved by excising the clitoris.

In some areas it is a commonly held belief that removing the clitoris of a young female affirms the sex of the child as the clitoris is regarded as the masculine element in the child.[32] Underpinning this mythology is the belief that each child is born with male and female elements.

Some communities believe that the operation will increase a woman's fertility. Others believe that if the clitoris is not excised then it will grow and dangle between the legs like a man's genitals.

Generally, in the communities concerned, an absolute prerequisite for marriage is the virginity of the bride. Infibulation is seen in some groups as a means of ensuring virginity. A factor in determining the brideprice can be the size of the infibulated opening. Women who are not infibulated,

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December 1993 *Court told of assault on sisters*; The Australian 2 December 1993 *Girls circumcised here, court told*; Courier Mail 2 December 1993 *Circumcision Shock*; Herald Sun 2 December 1993 *Plea for mutilated girls*; The Age 3 December 1993 *Agency calls on media to back off on circumcision*; The Age 3 December 1993 *We must set limits, for the sake of little girls*; Herald Sun 3 December 1993 *Doctor calls for circumcision ban*; The Weekend Australian 4-5 December 1993 *Mothers fear action over female circumcision*.

31 Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 13.

32 Likewise, it is believed that the foreskin on the penis which is regarded as the female element in a male should be removed. Hosken F *The Hosken Report:Genital and Sexual Mutilation of Females* (1982 3rd ed) at 31.

regardless of their virginity, have little or no prospects of marrying and may be regarded as prostitutes.[33] In a study of 651 women who had been genitally mutilated, Karim and Amman argue that the mutilation did not decrease a woman's desire for sexual intercourse.[34] As Dorkenoo and Elworthy observed:

> Although the intention of the operation may be to diminish a woman's desire, the facts, from a medical point of view, are that excision of the clitoris reduces sensitivity, but it cannot reduce desire, which is a psychological attribute.[35]

B. Religious

Female genital mutilation is not a religious practice although one form or another of female genital mutilation is practised by people of various religious denominations including Muslims, Copts, Christians, Catholics, Protestants and Animists in the countries concerned.[36] These practices have been traditionally linked with the Islamic religion, even though they pre-date it.[37] There is no clear reference to female genital mutilation in the Koran, although some Muslims may practise this type of mutilation in the belief that it does form part of their Islamic faith, and have done so for centuries.

The Islamic Council of Queensland has advised the Commission that female genital mutilation does not form part of Islamic law.[38]

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[33] Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 13.

[34] Karim M and Amman R *Female Circumcision and Sexual Desire* Ain Shams University Press Cairo 1965 at 36 referred to in Lovejoy F and Harmoun-Khilla M *Female Circumcision in the Sudan: Traditional Practices and Government Policies* at 4.

[35] Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 13.

[36] See page 7 of this Research Paper.

[37] See pages 5-6 of this Research Paper.

[38] Written submission to the Queensland Law Reform Commission by the Islamic Council of Queensland.

C. Sociological

For some communities the practice forms part of an initiation into adulthood. It is seen as a cause for great celebration accompanied by special songs, dances and chants. It is "intended to teach the young girl her duties and desirable characteristics as a wife and mother,"[39] although today in many of the communities concerned the celebrations are disappearing while the operation continues to be performed.

The age of girls being mutilated is becoming younger. Consequently, the practice is moving away from an initiation rite.[40]

Other groups rely on a need to maintain tradition as a reason to continue the practice.

D. Hygiene and aesthetics

Some groups consider a woman to be dirty unless her external genitals are removed. Others regard female genitalia as ugly in their natural state. The removal therefore improves the appearance.

E. Economics

This surgery provides a source of income to the traditional operators performing it, who are usually women. Further assistance from the operators may be needed to permit a woman to have sexual intercourse[41] and to assist her in child birth. Also, some women are reinfibulated after divorce and childbirth or during prolonged absences by the husband. All these attendances provide a source of income to the operator. If the practice were to be abandoned, these women would lose this source of income.[42] Naturally, many exercise their influence to maintain the ritual.

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39 Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 14.

40 Ibid.

41 This assistance is in the form of cutting the infibulated opening wider so as to allow penetration.

42 This may be the only source of income for these women.

6. HEALTH ISSUES

There are no known medical advantages in performing these operations on normal healthy female genitals. The adverse health effects arising from the operation can be divided into two main categories - physical and psychological.

A. Physical

Health complications can arise from any of the three forms of mutilation. However, when infibulation and excision are performed, the complications can be more severe. As outlined on page 4 and in Appendix A of this Research Paper, the operations are usually performed by non-medically trained personnel, in unhygienic conditions using unsterilised instruments, often without anaesthetics.

(i) Short-term complications

Some of the complications include[43] -

* pain;

* haemorrhaging from sections of the pudential artery or of the dorsal artery of the clitoris or severe bleeding;

* septicaemia;

* infections including tetanus;

* accidental cuts to other organs such as the urethra, the bladder (frequently resulting in urine retention and bladder infections), anal sphincter, vaginal walls or the Bartholin

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[43] The Minority Rights Group Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 8 and Slack A *Female Circumcision: A Critical Appraisal* Human Rights Quarterly Vol 10 No 4 at 451.

glands;[44]

* a more severe form of mutilation being performed than was intended;[45]

* death.

Lightfoot-Klein reports that doctors from one African country estimate that the number of deaths resulting from female genital mutilation, especially from infibulation, is "approximately one-third of all girls in areas where antibiotics are not available".[46]

(ii) Long-term complications

More severe long-term health complications usually arise for infibulated women.

Some of the complications include:[47]

* chronic infections including infections of the vagina, uterus and urinary tract;

* time taken and pain associated with urination;[48]

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44 This may be due to the lack of skill of the operator or the degree of resistance exerted by the child.

45 Ibid.

46 Lightfoot-Klein H *Pharaonic Circumcision of Females in the Sudan* Medicine and Law 2 (1983) at 356 referred to in Slack A *Female Circumcision: A Critical Appraisal* Human Rights Quarterly Vol 10 No 4 at 451.

47 The Minority Rights Group Report by Dorkenoo E and Elworthy S *Female Genital Mutilation; Proposals for Change* 1992 at 8-9 and Slack A *Female Circumcision: A Critical Appraisal* Human Rights Quarterly Vol 10 No 4 at 452-454.

48 Lightfoot-Klein reports:

> The average period of time required by a Pharaonically [infibulated] circumcised virgin to urinate is 10 to 15 minutes. She must force the urine out drop by drop. Some women reported requiring up to two hours to empty their bladders.

Lightfoot-Klein H *Pharaonic Circumcision of Females in the Sudan* Medicine and Law 2 (1983) at 356 referred to in Slack A *Female Circumcision: A Critical Appraisal* Human Rights Quarterly Vol 10 No 4 at 452.

* keloid scar formation[49] which may make walking difficult;[50]

* sterility;

* dysmenorrhoea, the build-up of menstrual blood which is not allowed to escape, and hematocolpus, the swelling of the abdomen caused by the blockage of the menstrual flow;[51]

* very painful periods;

* painful sexual intercourse;

* childbirth complications including: the necessity to cut the scar left by infibulation to allow the baby passage (if not re-opened in time, tearing of the perineum can result); labour may be long and obstructed, which can lead to foetal death or brain damage to the baby; fistula formation (which can lead to incontinence later); haemorrhaging and infections.

Besides the risks of infection and haemorrhaging, excision results in the development of neuroma[52] at the point of section of the dorsal nerve of the clitoris which makes the area permanently and unbearable sensitive to touch.[53] Vulval abscesses may also develop. After "sunna" circumcision the exposed clitoris may become hypersensitive and painful to touch.[54]

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49 "Keloid" is defined in Butterworth's *Medical Dictionary* (2nd ed) as "the cellular overgrowth of fibrous tissue in a scar at the site of a skin injury."

50 World Health Organisation *A traditional practice that threatens health - Female Circumcision* WHO Chronicle 40 No 1 (1986): 33 referred to in Slack A *Female Circumcision: A Critical Appraisal* Human Rights Quarterly Vol 10 No 4 at 452.

51 Sometimes these symptoms lead the family to believe the girl is pregnant. The girl can be ostracised or, in some cases, killed.

52 "Neuroma" is defined in Butterworth's *Medical Dictionary* (2nd ed) as "a tumour composed of nerve cells and nerve fibres".

53 Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 8.

54 Hedley R and Dorkenoo E *Child Protection and Female Genital Mutilation* Forward 1992 at 6.

Operations resulting in female genital mutilation are often performed with unsterilised instruments which may be used repeatedly for similar operations. These factors may contribute to the spread of infections including the HIV infection.[55]

B. Psychological

There has been scant research undertaken on the psychological effects of these operations on the women concerned. Dr Ba'asher who has treated Egyptian and Sudanese female patients supports the view that these operations would have a psychological effect on the women involved:

> It is quite obvious that the mere notion 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.[56]

7. THE LEGALITY OF FEMALE GENITAL MUTILATION

As noted on page 7 of this Research Paper, the extent to which any form of female genital mutilation is practised in Australia is not known.[57]

There is no legislation in Queensland or any other State or Territory of Australia which specifically prohibits female genital mutilation. The Australian Law Reform Commission believes that there is little doubt that it would be regarded as an assault.[58] As far as the Queensland Law Reform

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[55] Aidsline Citations Search Results: See Extracts from articles: Hardy D *Cultural practices contributing to the transmission of human immunodeficiency virus in Africa* Rev Infect Dis 9 (6) 1987 Nov-Dec PG 1109-19, Latif A *Women at risk - research needs and priorities* Int Conf AIDS 5 1989 Jun 4-9 PG 991 (abstract no Th GO 15), Odero T *The role of herbalists in HIV/AIDS information and prevention in Kenya* Int Conf AIDS 6 (2) 1990 Jun 20-23 PG 280 (abstract no FD 793), Sy A, Etchepare C, Etchepare M, Bacha A, Djigaly L *Impact of cultural aspects on AIDS prevention in Africa* Int Conf AIDS 8(2) 1992 Jul 19-24 PG D472 (abstract no PoD 5514), Mboya T *Traditional behaviour and AIDS..analysis and change through community participation* Int Conf AIDS 8 (2) 1992 Jul 19-24 P6 D505 (abstract no PoD 5697).

[56] Ba'asher T *Psychosocial Aspects of Female Circumcision* a paper presented to the Symposium on the Changing Status of Sudanese Women referred to in Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 10.

[57] See footnote 30 above.

[58] Australian Law Reform Commission *Multiculturalism: Criminal Law* (Discussion Paper 48) 1991 at paragraph 2.35.

Commission is aware, there have been no criminal prosecutions for female genital mutilation in Queensland or elsewhere in Australia.

It is considered by the Commission that the principal criminal offences under the Queensland *Criminal Code* that female genital mutilation would fall within are unlawful wounding[59] and grievous bodily harm.[60] Although a person may consent to such a procedure, arguably consent provides no defence to these criminal offences.[61]

As consent is not an element to either of these offences, the consent of a parent or of a child who is old enough to understand the nature and consequences of the procedure is immaterial.

A person who unlawfully wounds another is liable to a maximum period of imprisonment of seven years.[62] To constitute a wounding the true skin of the victim must be broken.[63] This would be an obvious result to the child in all three forms of female genital mutilation outlined on page 3 of this Research Paper.

For a person to be found guilty of grievous bodily harm, which may be punishable by imprisonment for life, the elements contained in section 317 of the Queensland *Criminal Code* must be satisfied:

> Any person who, with intent to maim, disfigure, or disable, any person, or to do some grievous bodily harm to any person... unlawfully wounds or does any grievous bodily harm to any person by any means whatever... is guilty of a crime.

Female genital mutilation may result in maiming (permanent injury), disfigurement (detracting from personal appearance), and disablement (creating a permanent disability).

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59 Section 323 of the Queensland *Criminal Code*.

60 Sections 317 and 320 of the Queensland *Criminal Code*.

61 See *R v Raabe* (1985) 1 Qd R 115; *R v Watson* (1987) 1 Qd R 440 and *Lergesner v Carroll* (1991) 1 Qd R 206.

62 Section 323 of the Queensland *Criminal Code*.

63 A break in the outer skin would not be sufficient and an injury is unlikely to be a 'wound' unless it bleeds. *R v Devine* (1983) 2 A Crim R 45.

"Grievous bodily harm" is defined in section 1 of the Queensland *Criminal Code* as meaning:

> Any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health.

Because of the nature of female genital mutilation it could be regarded as an act endangering life or causing permanent injury to health.

Grievous bodily harm without intent is also an offence which may be punishable by imprisonment for 14 years.[64]

A person who performs these operations may seek the protection afforded by section 282 of the Queensland *Criminal Code*:

> **Surgical Operations.** A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable having regard to the patient's state at the time and to all the circumstances of the case.[65]

In Queensland there is no statutory definition of "surgical operation", nor is there any statutory restriction on who can perform a surgical operation.

The operations are normally carried out within the communities concerned by older women who are not medically qualified. This may also be the situation in Australia.[66]

Section 282 of Queensland's *Criminal Code* will protect a non-medically qualified person who performs an operation on a child provided the operation is for the child's benefit, and is reasonable having regard to the child's state at the time and to all the circumstances of the case.

A non-medically qualified operator may argue that the operation was for the child's benefit for one or more of the reasons outlined on pages 8-10 of this Research Paper.

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[64] Section 320 of the Queensland *Criminal Code*.

[65] There would also be a duty imposed by reason of having control of a dangerous thing (scalpel, razor or other instrument used for female genital mutilation) under Section 288 of Queensland *Criminal Code*.

[66] See footnote 30 above.

However, the medical profession in Australia strongly condemns the practice of these types of mutilation except for recognised medical procedures. The Australian Medical Association is of the view that there is "no place for ritual female circumcision (which really is in the nature of genital mutilation) for traditional, non-medical reasons."[67] The Royal College of Obstetricians and Gynaecologists regards the procedure as "unethical if performed for other than genuine medical reasons".[68] A recognised medical procedure would obviously include genital reconstruction surgery to correct a birth abnormality.

Given this strong medical opposition to female genital mutilation for traditional purposes, in the Commission's view, no Australian court would find that such an operation is for the child's benefit. Thus, the Commission believes that no person (irrespective of medical qualifications) performing these operations would have his or her conduct excused under section 282 of the Queensland *Criminal Code*.

A person performing the operation may argue that he or she was acting according to his or her cultural tradition. This is not a recognised defence under the Queensland *Criminal Code*.[69]

There may also be other parties involved with the procedure to whom criminal liability attaches. Under the Queensland *Criminal Code*, a person who assists another person to commit an offence or procures the commission of an offence may be charged with the actual offence.[70] For example, a parent who arranges for, gives consent to or assists with the operation may be criminally liable.

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67 Letter from the Australian Medical Association to the Queensland Law Reform Commission dated 5 October 1993.

68 Letter from the Royal Australian College of Obstetricians and Gynaecologists to the Queensland Law Reform Commission dated 12 October 1993.

69 In its Report No 57 *Multiculturalism and the Law* 1992 at para 8.13, after commenting on the list of factors which the court must take into account for sentencing federal offenders the Australian Law Reform Commission states-

> The decision what sentence to impose on an offender involves a delicate balancing of these and other factors. It seems that, both at general law and under this provision, cultural considerations can be and sometimes are taken into account on sentencing.

70 Section 7 of the Queensland *Criminal Code*.

8. CONSENT BY YOUNG PERSON OR SUBSTITUTED CONSENT

As female genital mutilation is usually performed on women under the age of eighteen years, the ability of a young person or a parent or guardian to consent to the procedure and the effect of such consent need to be examined.

(i) Criminal liability

A person performing an operation on a patient under 18 years of age avoids criminal liability for a simple assault if the young person has sufficient intelligence and understanding to enable him or her to make the treatment decision for himself or herself.[71] However, it is unlikely a young person can ever consent to criminal acts which result in grievous bodily harm or unlawful wounding. As outlined on page 15 of the Research Paper, the Commission is of the view that female genital mutilation would be classified as an act causing grievous bodily harm or unlawful wounding.

Parental consent may not relieve someone performing the operation from criminal liability if the procedure is "invasive, irreversible and major surgery",[72] and if there is a "significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent, and secondly, because the consequences of a wrong decision are particularly grave".[73] In these instances the approval of the Family Court would most likely be required.[74] The Honourable Justice Nicholson has expressed concern that without the need for court approval, parental consent might be used to justify the surgical removal of a girl's clitoris (one form of female genital mutilation).[75] The Commission agrees with His Honour's concern. The Commission is of the view that any form of female genital mutilation required as a matter of

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71 See *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 *(Gillick's case)* for the common law on a young person's ability to consent to medical treatment. The High Court in Australia in *Secretary Department of Health and Community Services v JMB* (1992) 175 CLR 218 (Re Marion) said that the law as stated in *Gillick's* case reflects the common law in Australia.

72 *Re Marion* (1992) 175 CLR 218 at 250.

73 Ibid.

74 *Re Marion (1992)* 175 CLR 218.

75 *Re Jane (1988)* 85 ALR 409 at 435.

custom or ritual would require the Family Court's authorisation.[76] It is highly unlikely that a parent seeking the Family Court's approval for an operation resulting in female genital mutilation required as a matter of custom or ritual would gain such an approval as the operation would not be regarded as being for the benefit of the child.[77]

(ii) Civil Liability

The consent of a parent for an operation resulting in female genital mutilation to his or her child can only relieve the person performing the operation from civil liability if it is in the best interests of the child. [78] In the Commission's view, female genital mutilation would never be regarded by the courts as being in the best interests of the child.

9. OVERSEAS LEGISLATION AND INITIATIVES

There is widespread international support for the elimination of the practice of female genital mutilation. Some countries have specifically prohibited the practice.[79] The World Health Organisation and United Nations support its prohibition and eradication. Some countries regard it as a child protection issue.

(i) Legislation prohibiting female genital mutilation

As early as 1906 in Kenya, the Church of Scotland through its missionaries tried to discourage and thereby eliminate female genital mutilation. In 1946 the Sudanese Legislative Assembly passed

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[76] The Family Court has recently given its approval for a 14 year old child to undergo gender reassignment by the construction of male sexual organs. At birth, the child had been diagnosed as a female child with masculinisation of the genitalia. The child had undergone genital reconstruction to give her a feminine appearance but received inadequate hormone replacement treatment. Recurrent masculinisation of the child's physical structures had occurred with a change in mental behaviour and attitude. The child wanted to undergo the reassignment procedure but in this case the Court held that the child was not mature enough to understand the nature and consequences of the procedure. As the procedure would require invasive, irreversible and major surgery, the child's parents could not consent - and Family Court approval was required. *Re A* (1993) 16 Fam LR 715.

[77] *Re Marion (1992)* 175 CLR 218 at 239-240.

[78] *Re Marion* (1992) 175 CLR 218.

[79] The United Kingdom, Sweden and the United States of America (refer to footnote 96 below) have specifically prohibited female genital mutilation. See Appendices B and C for the United Kingdom and United States of America legislation.

legislation prohibiting all forms of female genital mutilation except the less invasive procedure of "sunna". The law was later modified to allow the removal of the free and projecting part of the clitoris.

The Sudanese legislation was introduced by the British colonial administration in an effort to eliminate the practice. The general Sudanese population was not prepared for the change, particularly as it was introduced by a foreign ruler. Consequently, both the Kenyan and the Sudanese attempts to prevent the practice failed. As Ras-Work states:

> Legislation can be effective only if there is a general consensus among the population concerned. For such an agreement to be reached, tactful sensitization is needed.[80]

Many African countries[81] are participating in educational projects and programs aimed at eliminating the practice of female genital mutilation. Some of the programs include:[82]

* training in hospitals, nursing and medical schools on the medical complications and consequences of female genital mutilation;

* retraining traditional operators in alternative endeavours so that they will be able to maintain similar incomes;

* use of the mass media for information campaigns to prevent female genital mutilation;

* education through schools, colleges, women's groups, work places etc;

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80 *Inter-African Committee* Newsletter 2 July 1986 at 4-5 referred to in Magarey K and Evatt E *Genital Mutilation A Health and Human Rights Issue* Australian Development Studies Network (ANU) Briefing Paper No 18 October 1990 at 5.

81 These countries include Egypt, Sudan, Somalia, Kenya, Nigeria, Kenya and Burkina Faso.

82 See the Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 24 -34.

* organisation of local discussion groups;

* encouraging leaders to speak out publicly against the practice;

* undertaking research projects in this area.

In 1985 the United Kingdom enacted legislation[83] making it illegal, subject to certain exceptions, to perform a surgical operation resulting in female genital mutilation.[84] An offence is not committed if the operation is necessary for the physical or mental health of the woman and is performed by a registered medical practitioner; is performed on a woman who is in any stage of labour or has just given birth for purposes connected with the labour or birth and is performed by certain health professionals.[85] In determining whether the operation

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83 The *Prohibition of Female Circumcision Act 1985* (UK) is set out in Appendix B of this Research Paper.

84 Section 1(1) of the *Prohibition of Female Circumcision Act 1985* (UK) states-

> 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.

A person convicted on indictment is liable to a fine or to imprisonment for a term not exceeding five years or both. On summary conviction a person is liable to a fine not exceeding the statutory limit or to imprisonment for a term not exceeding six months or both. Section 1(2) of the *Prohibition of Female Circumcision Act 1985* (UK) states-

> 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.

85 Section 2(1) of the *Prohibition of Female Circumcision Act 1985* (UK) states-

> Subsection (1)(a) of section 1 shall not render unlawful the performance of a surgical operation if that operation-
> (a) is necessary for the physical or mental health of the person on whom it is performed and is performed by a registered medical practitioner; or
>
> (b) is performed on a person who is in any stage of labour or has just given birth and is so performed for purposes connected with that labour or birth by-

is necessary for the mental health of the woman, no account is to be taken of the effect of any belief that the operation is required as a matter of custom or ritual.[86]

While the United Kingdom Parliamentary Debates on the *Prohibition of Female Circumcision* legislation show that Parliament was aware that female genital mutilation is a cultural practice within some communities, it was acknowledged that it is not an acceptable practice which should be allowed in Britain. As Mr Kenneth Clarke, the then Minister for Health, stated during the debates on the legislation:

> Although we believe that female circumcision has been carried out in only a handful of cases in this country, it does not mean that there are not compelling reasons for legislation to make sure that there are no more such operations here. The mutilation and impairment of young girls and women have no part in our way of life.[87]

The debates also highlighted the importance of education and counselling[88] being made available within communities in which female genital mutilation is traditional.[89]

Despite legislative intervention prohibiting female genital mutilation, it appears the practice is still continuing underground in the United

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(i) a registered medical practitioner or a registered midwife; or

(ii) a person undergoing a course of training with a view to becoming a registered medical practitioner or a registered midwife.

"Health professionals" include only a registered medical practitioner or registered midwife or a person undergoing training to become a medical practitioner or midwife. Section 2(1)(a) and (b) of the *Prohibition of Female Circumcision Act* 1985 (UK).

86 Section 2(2) of the *Prohibition of Female Circumcision Act 1985 (UK)* states-

> In determining for the purposes of this section whether an operation is necessary for the mental health of a person, no account shall be taken of the effect on that person of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.

87 House of Commons *Parliamentary Debates* 19 April 1985 at 586.

88 See for example the recent United Kingdom developments in child protection strategies for young girls who may be at risk of female genital mutilation as outlined on pages 25-27 of this Research Paper.

89 See for example the House of Lords Parliamentary Debates on the *Prohibition of Female Circumcision Bill* 15 May 1985 at 1224 and 18 June 1985 at 219-224.

Kingdom -

> There is evidence to show that if doctors or midwives cannot be found in the UK, families bring traditional circumcisors from abroad, or take their daughters abroad to have the operation performed.[90]

In 1982 Sweden prohibited female excision, regardless of whether consent was given or not.[91] Belgium has banned the practice.[92] In 1985 Norwegian hospitals were alerted to the practice.[93] Under Article 312-3 of the French *Penal Code* female genital mutilation may be prosecuted as a criminal offence.[94] Prosecutions have been successful.[95] The United States of America has introduced legislation specifically prohibiting female genital mutilation.[96]

(ii) World Health Organisation

In 1984 the World Health Organisation released a position statement on female genital mutilation:

> WHO support the recommendations of the Khartoum Seminar of 1979 on Traditional Practices Affecting the Health of Women. These were that governments should adopt clear national policies to abolish female circumcision, and to intensify educational programmes to inform the public about the harmfulness of female circumcision. In particular, women's organisations at local levels are encouraged to be involved, since without women themselves

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[90] Hedley R and Dorkenoo E *Child Protection and Female Genital Mutilation* 1992 at 8.

[91] Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 11.

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] In France in 1989 a mother who paid a traditional operator to excise her week old daughter was given a three year suspended sentence; a traditional operator was gaoled for five years in 1991 - Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 11.

[96] *Federal Prohibition of Female Genital Mutilation Act of 1993* introduced as part of *Women's Health Equity Act: Section 262 Title 18 Amendment* referred to in *Women's International Network News* 19-4 Autumn 1993 at 36. The *Federal Prohibition of Female Genital Mutilation Act of 1993* is set out in Appendix C of this Research Paper.

> being aware and committed, no changes are likely. In areas where female circumcision is still being practised, women are facing many other problems of ill health and malnutrition, lack of clean water, death in childbirth, overburden of work. These occur in extremely adverse social and economic circumstances. Surveys carried out recently with WHO support, also point to the continuing cultural and traditional pressures which perpetuate the practice...
>
> WHO, together with UNICEF, has assured governments of its readiness to support national efforts against female circumcision, and to continue collaboration in research and dissemination of information...
>
> WHO has consistently and unequivocally advised that female circumcision should not be practiced by any health professional in any setting - including hospitals or other health establishments...[97]

(iii) United Nations

Genital mutilation is usually performed on young females. Article 24(3) of the *United Nations Convention on the Rights of the Child* provides that "state parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children". Member states of the United Nations whose communities practise the tradition of female genital mutilation should therefore take active steps to discourage and thereby eliminate this practice.

Although Australia is a party to this Convention,[98] ratification of an International Convention by the Australian Government does not thereby incorporate the rights and obligations contained in that Convention into Australian law. Mason CJ and McHugh J in a joint judgment in a 1992 High Court decision explained the relevant common law:

> Ratification of the ICCPR (International Convention on Civil and Political Rights) as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific

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[97] World Health Organisation *Female Circumcision Statement of WHO Position and Activities* 1984.

[98] Australia ratified this convention on 17 December 1990.

legislation is passed implementing the provisions. [99]

The preamble to the Queensland *Anti-Discrimination Act 1991* supports the Commonwealth's ratification of certain international instruments including the *Convention on the Rights of the Child*. This instrument may assist in the interpretation of the provisions contained in the *Anti-Discrimination Act 1991.* There is nothing, however, in the *Anti-Discrimination Act* 1991 which specifically prohibits female genital mutilation.

Article 2(a) of the United Nations *Draft Declaration on the Elimination of Violence against Women* specifically refers to female genital mutilation as a form of violence against women. It is anticipated that this Declaration will soon be adopted by the General Assembly.

(iv) Child Protection

The United Kingdom has had legislation prohibiting female genital mutilation since 1985.[100] Since then female genital mutilation has also been recognised as a child protection issue in relation to girls who may be at risk of genital mutilation. The first *United Kingdom National Conference on Female Genital Mutilation* was held at London in 1989. The conference reached the following agreement:[101]

i. The terminology female circumcision should be avoided and be replaced by female genital mutilation.

ii. Female genital mutilation is cruel and outmoded....

iii. Female genital mutilation constitutes child abuse. In this context however it does not constitute child sexual abuse.

iv. Although female genital mutilation does constitute child abuse, it was acknowledged that the label child abuse has unnecessary

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[99] *Dietrich v The Queen* (1992) 67 ALJR 1 at 6. The joint judgement referred with approval to *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v Macphee* (1982) 148 CLR 636 at 641-4; *Kioa v West* (1985) 159 CLR 550 at 570-1.

[100] See pages 21-22 of this Research Paper for further details in relation to the legislation.

[101] Report on the *First National Conference on Female Genital Mutilation* 1989 at 3.

pejorative connotations and use may be counterproductive.[102]

v. Female genital mutilation is a denial of a child's basic human rights.

A number of practical strategies were also developed at the conference to deal with cases or potential cases of female genital mutilation:[103]

i. that the DHSS (now the Department of Health) should alert local authorities and social services to the existence of female genital mutilation and seek to educate their workers about the practice.

ii. that the DHSS guidelines which list six categories which merit registration of a child on the "at risk" register should be increased so that risk of female genital mutilation would appear as a seventh category.

iii. that social workers, teachers, police, lawyers, judges and most critically the educators of these groups be educated about female genital mutilation.

iv. that a consultative body within social services departments incorporating black community members be set up to bridge the community and profession so that there can be community cooperation with respect to this issue.

v. that the wardship jurisdiction[104] is perhaps the most appropriate legal strategy where a child is truly at risk. Wardship freezes the situation, the child is not necessarily removed from the home, but all decisions concerning the child are made by the court.

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[102] Hedley R and Dorkenoo E note:

> There are still people who are sensitive to the use of the term 'child abuse'. This, however, is not without precedent. It took ten years to achieve consensus on the use to the term 'Female Genital Mutilation' rather than 'Female Circumcision' as a more accurate definition of the phenomenon. Thus the current reservations should not be allowed to impede efforts to deepen the understanding of the term 'child abuse' in relation to sexual mutilation of girls and to promote its wider acceptance and usage. *Child Protection and Female Genital Mutilation* 1992 at 12.

[103] Report on the *First National Conference on Female Genital Mutilation* 1989 at 3 and 4.

[104] A "prohibited steps order" contained in Section 8 of the *Children Act 1989* now replaces wardship in this context. A "prohibited steps order" is an order that no steps which could be taken by a parent in meeting his or her parental responsibility for a child and which is of a kind specified in the order, shall be taken by any person without the consent of the court.

vi. educational programmes concerning the practice that are currently available be expanded and made as widespread as possible.

vii. groups like Forward ... who are in the forefront of the campaign be supported financially and in all other ways so as to advance the campaign.

viii. sub-groups should be set up at local level to sensitise and counsel parents on the ill-effects of female genital mutilation and to support parents who might be thinking of refraining from it.

ix. a conference/seminar should be convened .... to bring the issue of female genital mutilation to the attention of the wider black community in order to enlist their greater involvement in the campaign.

x. health workers (particularly school nurses, health visitors, general practitioners, midwives) and school teachers should integrate health promotion and counselling against female genital mutilation in their work.

xi. health training material be prepared for the use of grassroots workers.

xii. articles should be placed in medical journals and other professional journals to raise the awareness and to attract the interest and involvement of health workers.

The Commission believes that female genital mutilation would be regarded as a child protection matter in Queensland.

10. CONCLUSION

Female genital mutilation is a very intrusive procedure surgically performed on young women, usually under the age of eighteen years. It developed as a cultural - not a religious - practice over two thousand years ago in a number of countries, mainly in Africa.[105] The practice has spread to other countries with migrant communities within which the practice is traditional.

The practice is seen by some to be a control over a woman's sexuality, fertility, marriageability, hygiene and appearance, while others see it as an

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[105] See page 7 of this Research Paper for a list of countries where at least one form of female genital mutilation is practised.

initiation into adulthood. It is also a source of income to traditional operators.

There are no known medical advantages in performing female genital mutilation on normal healthy female genitalia. On the contrary, the adverse health effects are long-term, debilitating, permanent and, in some cases, fatal.

There is a strong argument that all forms of female genital mutilation, except for recognised medical procedures, such as genital reconstruction surgery to correct a birth abnormality, would constitute an illegal act under Queensland's *Criminal Code*. However, the relevant Queensland *Criminal Code* provisions have never been tested by any Queensland court in these circumstances.

It is apparent that, with increased immigration to Australia from countries in which female genital mutilation is a strongly held and actively practised tradition, female genital mutilation, if not practised already in Australia, will most likely be practised in the foreseeable future.[106] This has been the experience of other Western countries such as the United Kingdom and France.

The Commission believes that female genital mutilation is a practice which is totally unacceptable to the Australian community. Although Australia is a multicultural society which recognises that an individual's own cultural values should be respected to the greatest extent possible, there are some practices that are so abhorrent to the wider Australian community that they should not be tolerated. For example, Australians have never tolerated the Indian practice of women throwing themselves on their husband's funeral pyre or Chinese child footbinding. Female genital mutilation is such a practice and its condemnation should be placed beyond doubt.

11. RECOMMENDATIONS

As there may be doubt that the criminal law in Queensland prohibits all forms of female genital mutilation, consideration should be given to specifically outlawing this practice.

The Commission considers it important that a strong statement be made clarifying what are unacceptable practices in this State. This would make it obvious to new residents that certain specific customary practices must be

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[106] For Australia in 1992-1993 7.3% of the total refugee intake was from Africa (excluding North Africa); 68.8% of the total refuge intake was from South-East, North-East and Southern Asia, and 3.9% of the total refugee intake was from the Middle East and North Africa. Federal Race Discrimination Commissioner *State of the Nation A Report on People of Non-English Speaking Background* 1993 at 184.

abandoned in this State.

The Commission will therefore consider recommending that specific provisions be inserted in the *Criminal Code* prohibiting female genital mutilation except for recognised medical procedures.

Education campaigns should accompany any prohibition of female genital mutilation. The education should be culturally and linguistically appropriate. It may be appropriate for Commonwealth immigration authorities to clarify the new laws in Queensland to all immigrants.

The Commission also considers it appropriate that the relevant State government departments have resources available to assist women who have already undergone female genital mutilation - such assistance to include gynaecological and psycho-sexual help.

The Commission will therefore consider recommending that culturally and linguistically appropriate educational campaigns accompany any legislative prohibition and appropriate assistance be provided to women who have already undergone female genital mutilation.

The Commission will also be considering arguments for and against prohibiting the removal of a child from Queensland for the purposes of having female genital mutilation performed on the child elsewhere.

APPENDIX A

Descriptions of an infibulation

An infibulation has been described as:

> the cutting of the clitoris, labia minora and at least the anterior two-thirds and often the whole of the medial part of the labia majora. The two sides of the vulva are then pinned together by silk or catgut sutures, or with thorns, thus obliterating the vaginal introitus except for a very small opening, preserved by the insertion of a tiny piece of wood or a reed for the passage of urine or menstrual blood. [107]

In a cultural context, an infibulation has been described by Mustafa[108] as:

> The ... girl, ... , is immobilised in the sitting position on a low stool by at least three women. One of them with her arms tightly around the little girl's chest; two others hold the child's thighs apart by force, in order to open wide the vulva. The child's arms are tied behind her back, or immobilised by two other women guests.
>
> The traditional operator says a short prayer: ... Then she spreads on the floor some offerings ... Then the old woman takes her razor and excises the clitoris. The infibulation follows: the operator cuts with her razor from top to bottom of the small lip and then scrapes the flesh from the inside of the large lip. This nymphectomy and scraping are repeated on the other side of the vulva.
>
> The little girl howls and writhes in pain, although strongly held down. The operator wipes the blood from the wound and the mother, as well as the guests, "verify" her work, sometimes putting their fingers in. The amount of scraping of the large lips depends upon the "technical" ability of the operator. The opening left for urine and menstrual blood is minuscule.
>
> Then the operator applies a paste and ensures the adhesion of the large lips by means of an acacia thorn, which pierces one lip and passes through into the other. She sticks in three or four in this manner down the vulva. These thorns are then held in place either by means of sewing thread, or with horse-hair. Paste is again put on the wound.
>
> But all this is not sufficient to ensure the coalescence of the large lips; so

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[107] Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 7.

[108] This description is cited in Dr A David's Thesis No 131 *Infibulation en République de Djibouti* Université de Bordeaux publ en 1978 par L'Amicale des Etudiants en Médecine de Bordeaux referred to in Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 7 and 8.

> the little girl is then tied up from her pelvis to her feet: strips of material rolled up into a rope immobilise her legs entirely. Exhausted, the little girl is then dressed and put on a bed. The operation lasts from 15 to 20 minutes according to the ability of the old woman and the resistance put up by the child.

Lantier[109] describes the post wedding experience of a woman from one community, after the husband has opened his wife's vagina with a dagger, as:

> According to tradition, the husband should have prolonged and repeated intercourse with her during eight days. This "work" is in order to "make" an opening by preventing the scar from closing again. During these eight days, the woman remains lying down and moves as little as possible in order to keep the wound open. The morning after the wedding night, the husband puts his bloody dagger on his shoulder and makes the rounds in order to obtain general admiration.

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[109] Lantier J *La Cité Magique* Editions Fayard 1972 (transmitted by Scilla McLean) referred to in Minority Rights Group International Report by Dorkenoo E and Elworthy S *Female Genital Mutilation: Proposals for Change* 1992 at 8.

APPENDIX B

United Kindom Legislation Prohibition of Female Circumcision Act 1985

1985 CHAPTER 38

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

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.

2.-(1) Subsection (1)(a) of section 1 shall not render unlawful the performance of a surgical operation if that operation-

(a) is necessary for the physical or mental health of the person on whom it is performed and is performed by a registered medical practitioner; or

(b) is performed on a person who is in any stage of labour or has just given birth and is so performed for purposes connected with that labour or birth by-

(i) a registered medical practitioner or a registered midwife; or

(ii) a person undergoing a course of training with a view to becoming a registered medical practitioner or a registered midwife.

(2) In determining for the purposes of this section whether an operation is necessary for the mental health of a person, no account shall be taken of the effect on that person of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.

3.-(1) Offences under section 1 shall be included-

(a) in the list of extradition crimes contained in Schedule 1 to the Extradition Act 1870; and

(b) among the descriptions of offences set out in Schedule 1 to the Fugitive Offenders Act 1967.

(2) In paragraph 1 of the Schedule to the Visiting Forces Act 1952 (offences against the person in the case of which a member of a visiting force is in certain circumstances not liable to be tried by a United Kingdom court), at the end of paragraph *(b)* there shall be inserted, appropriately numbered, the following paragraph-

'( ) section 1 of the Prohibition of Female Circumcision Act 1985.'

4.-(1) This Act may be cited as the Prohibition of Female Circumcision Act 1985.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(3) This Act extends to Northern Ireland.

APPENDIX C

UNITED STATES OF AMERICA LEGISLATION

Federal Prohibition of Female Genital Mutilation Act of 1993 introduced as part of Women's Health Equity Act

SEC. 262 TITLE 18 AMENDMENT:

(a) IN GENERAL - Chapter 7 of title 18. United States Code, is amended by adding at the end the following new section:

116. FEMALE GENITAL MUTILATION

(a) Except as provided in subsection (b), whoever knowingly circumcises, excises. or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.

(b) A surgical operation is not a violation of this section if the operation is-

(1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or

(2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife.

(c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.

(d) Whoever knowingly denies to any person medical care or services or otherwise discriminates against any person in the provision of medical care or services, because-

(1) that person has undergone female circumcision, excision, or infibulation; or

(2) that person has requested that female circumcision, excision, or infibulation be performed on any person;

shall be fined under this title or imprisoned not more than one year, or both."

(b) CLERICAL AMENDMENT - The table of sections at the beginning of Chapter 7 of title 18, United States Code, is amended by adding at the end the following new item:

116. Female genital mutilation.

SEC. 263 EDUCATION AND OUTREACH

The Secretary of Health and Human Services shall carry out appropriate education, preventive, and outreach activities in communities that traditionally practice female circumcision, excision, or infibulation, to inform people in those communities about the health risks and emotional trauma inflicted by those practices, and to inform them and the medical community about the provisions of section 262.

SEC. 264 EFFECTIVE DATES

Section 263 shall take effect immediately, and the Secretary of Health and Human Services shall commence carrying out not later than 90 days after the date of the enactment of this Act. Section 262 shall take effect 180 days after the date of the enactment of this Act.