NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Crimes (Definition of Female Genital Mutilation) Amendment Bill

27/01/2020

Submission on the Crimes (Definition of Female Genital Mutilation) Amendment Bill

Introduction

1. The New Zealand Law Society welcomes the opportunity to comment on the Crimes (Definition of Female Genital Mutilation) Amendment Bill (the Bill).

2. The Bill replaces the definition of "female genital mutilation" in section 204A(1) of the Crimes Act 1961, "to ensure all types of [female genital mutilation] are illegal in New Zealand".[1] Section 204A, which was introduced by the Crimes Amendment Act 1995, makes it an offence punishable by seven years' imprisonment to perform or caused to be performed any act involving female genital mutilation on any other person.

3. The Law Society's submission recommends drafting changes to clarify the scope and terminology of the proposed new definition of female genital mutilation (FGM). Given this is a member's bill, the Attorney-General may wish to consider directing PCO to provide drafting assistance to ensure the Bill's objectives are fully attained.[2]

4. The Law Society seeks to be heard in relation to the submission.

The definition of "female genital mutilation"

5. Section 204A(1) of the Crimes Act currently defines "female genital mutilation" as "the excision, infibulation, or mutilation of the whole or part of the labia majora, labia minora, or clitoris of any person".

6. Clause 4 of the Bill replaces that definition with the following text:

> ***female genital mutilation—***
>
> *(a) means the excision, infibulation, or mutilation of the whole or part of the external female genitalia of any person; and*
>
> *(b) includes, but is not limited to,—*
>
> *(i) the partial or total removal of the clitoris, labia majora, labia minora, or prepuce, or any combination of these:*
>
> *(ii) the narrowing of the vaginal opening by cutting or repositioning the labia majora, or the labia minora, or both:*
>
> *(iii) other harmful procedures intended to alter the structure or function of the female genitalia, such as pricking, piercing, incising, scraping, or cauterising.*

7. The Law Society makes the following comments on the proposed definition.

8. *First*, sub-clause (a) of the definition in clause 4 of the Bill refers to the excision, infibulation, or mutilation of "the external female genitalia". Sub-clause (b) then sets out a non-exhaustive list of examples of the procedures identified in (a), including sub-clause(b)(iii), which refers to other harmful procedures intended to alter the structure or function of "the female genitalia".

9. The Law Society recommends that the phrases "external female genitalia" in sub-clause (a) and "female genitalia" in sub-clause (b), neither of which is defined, should be aligned to ensure consistency within the definition. This could be done by omitting the adjective "external" in sub-clause (a) so that both sub-clauses (a) and (b) simply refer to "female genitalia". This would also ensure that the definition is more closely aligned with the definition of FGM adopted by the

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1 General Policy Statement to the Bill, at p 1.

2 Legislation Act 2012, s 59; Legislation Act 2019, s 130.

World Health Organisation, which encompasses not only "procedures that involve partial or total removal of the external female genitalia", but also any "other injury to the female genital organs for non-medical reasons".[3]

10. *Second*, the Bill's General Policy Statement in the Explanatory Note states that the purpose of the proposed definition is to update the definition of FGM in section 204A by, among other things, ensuring that it covers each of the four types of FGM recognised by the World Health Organisation – and in particular, the fourth type of FGM recognised by the World Health Organisation (i.e., "all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterising the genital area").[4]

11. The proposed definition does this by including as a new sub-clause (b)(iii) the following text: "other harmful procedures *intended to alter the structure or function of the female genitalia,* such as pricking, piercing, incising, scraping, or cauterising" (emphasis added). The italicised words from the Bill's proposed definition are not found in the fourth type of FGM recognised by the World Health Organisation. The phrase was presumably included in the Bill to ensure that the definition of FGM does not capture all procedures, such as those that may only involve minor and/or temporary injury.

12. However, the proposed examples of harmful procedures set out in sub-clause (b)(iii) immediately after that phrase – pricking, piercing, incising, scraping or cauterising – may lead to confusion. The ordinary meaning of subclause (b)(iii) of the proposed definition is that the listed physical acts are examples of procedures that may "alter the structure or function of the female genitalia"; however, procedures such as "pricking" or "piercing" would **not** ordinarily be understood as *always* altering the structure or function of the female genitalia.

13. The Law Society therefore recommends that: (a) the phrase "intended to alter the structure or function of the female genitalia" be deleted from sub-clause (b)(iii) of the proposed definition; and (b) a separate sub-section be included to clarify the threshold at which certain procedures should be deemed FGM.

14. The importance of clarifying the scope of the proposed definition is underscored by recent litigation in Australia. In *The Queen v* A2,[5] the High Court of Australia considered whether the phrase "otherwise mutilates" in section 45(1) of the Crimes Act 1900 (NSW), which criminalises FGM in the State of New South Wales,[6] was intended to criminalise conduct occasioning no more than transient injury such as ritualised nicking or piercing. The High Court of Australia held (by a majority of 5:2) that the trial judge in the Supreme Court of New South Wales had correctly directed the jury that "mutilate" in the context of FGM means injury to any extent; the High Court thus overturned the ruling of the New South Wales Criminal Court of Appeal, which had ruled that "mutilates" should be given its ordinary meaning, which "connotes injury or damage

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3 See https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation (last visited on 21 January 2020).

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5 *The Queen v A2, The Queen v* Magennis, The *Queen v Vaziri* [2019] HCA 35, 16 October 2019 (S43/2019; S44/2019 & S45/2019) (*The Queen v A2*).

6 At the relevant time, section 45(1) of the Crimes Act 1900 (NSW) provided that "[a] person who: (a) excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person … is liable to imprisonment for 7 years".

that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion".[7]

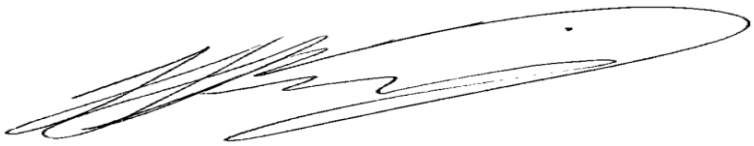
15. It is unclear whether the construction adopted by the majority of the High Court of Australia would prevail in New Zealand, for at least two reasons:

    a) the majority relied on extrinsic evidence, including a report on FGM by the Family Law Council, specific to the introduction of the offence in the State of New South Wales; and

    b) neither Australia nor the State of New South Wales has enacted equivalent legislation to the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), which requires that "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".[8]

16. *Third,* and related, the Bill's General Policy Statement also states that the proposed definition "seeks to ensure that other practices, like elective cosmetic piercings, are excluded as this is not a type of FGM". The current drafting does not appear to achieve that objective. As currently drafted, sub-clause(b)(iii) does not distinguish between different types of piercing. Rather, it lists the physical act of "piercing" as an example of a "harmful procedure intended to alter the structure or function of the female genitalia" and therefore deemed to be FGM. Indeed, on its ordinary meaning, the proposed definition appears to capture not only elective cosmetic piercing but other types of elective cosmetic medical or surgical procedures too. Although section 204A(3) excludes any medical or surgical procedures performed on any person for that person's physical or mental health from the offence, this would not cover elective procedures for purely cosmetic purposes. In the light of the indication in the Bill's General Policy Statement that "other procedures, like elective cosmetic piercings" are not FGM, the Law Society recommends that the proposed definition clarify whether some or all purely elective cosmetic procedures are excluded from the definition of FGM.

17. *Fourth*, as a general comment, the Law Society notes that in formulating any threshold separating minor and/or temporary injuries from FGM, it will be necessary to take into account New Zealand's international human rights obligations, as well as the potential for the proposed definition in the Bill to engage the rights affirmed in the Bill of Rights Act. In particular, consideration should be given to whether the proposed definition engages one or more of sections 13 (freedom of thought, conscience and religion), 14 (freedom of expression), 15 (manifestation of religion or belief), 19 (freedom from discrimination on a prohibited ground) religion or belief), and 20 (rights of minorities), and if one or more of those rights is engaged, the extent to which any limit on those rights may be justified in accordance with section 5 of the Bill of Rights Act.



Herman Visagie
Vice President
27 January 2020

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7 *The Queen v A2*, at [7]-[11] citing the reasoning of the New South Wales Criminal Court of Appeal in *A2 v The Queen* [2018] NSWCCA 174, at [521].

8 Bill of Rights Act, section 6.