



THE LAW SOCIETY
OF NEW SOUTH WALES

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5 July 2018

Commissioner Megan Mitchell
National Children's Commissioner
Australian Human Rights Commission
Level 3, 175 Pitt Street
SYDNEY NSW 2000

By email: kids@humanrights.gov.au

Dear Commissioner,

Reporting to the United Nations on Children's Rights

Thank you for the opportunity to provide a submission supplementary to the submission provided by the Law Council of Australia. This supplementary submission focuses on one matter relevant to Article 24(3) of the Convention on the Rights of the Child (CRC), that States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. The Law Council's submission otherwise reflects the other concerns raised by the Law Society of NSW in respect of the rights of the child.

We note the clusters of rights which all reports to the UN Committee on the Rights of the Child ("UN Committee") are to adhere to in structure,¹ and note that in respect of violence to children and the highest attainable standard of health, the issue of female genital mutilation ("FGM") is noted as relevant to Article 24(3) of the CRC.

In this regard, we note that in NSW, the *Crimes Act 1900* (NSW) establishes a clear prohibition on FGM in section 45:

- (1) 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, or
 - (b) aids, abets, counsels or procures a person to perform any of those acts on another person, is liable to imprisonment for 21 years.

The Law Society has also advocated for better resourcing of community education and awareness initiatives, particularly in communities where FGM may continue to be a cultural practice.

¹ Australian Human Rights Commission, *Call for submissions – Children's Rights*, 1 May 2018, available at: <https://www.humanrights.gov.au/our-work/childrens-rights/projects/call-submissions-childrens-rights>.

However, the *Crimes Act 1900* (NSW) is otherwise silent on the legal status of acts of male circumcision which may involve the whole or partial excision of healthy foreskin from an incapable minor for non-therapeutic purposes. We also note that the issue of male genital mutilation (“MGM”) (that is, non-therapeutic circumcision (“NTC”)) is not included in the Children’s Commissioner’s discussion in respect of Article 24(3).

For the reasons set out below, we suggest that the Children’s Commissioner consider the human rights implications of MGM. We request that the issue be included in the Australian Human Rights Commissioner’s report to the UN Committee, or in the follow up report on children’s rights in Australia, if the Children’s Commissioner’s consideration leads to the conclusion that the practice of MGM is likely to violate the rights of children.

1. Australian review – Tasmania Law Reform Institute recommendations

In 2012, the Tasmania Law Reform Institute (“TLRI”) prepared a final report on its comprehensive review of NTC,² and made a number of recommendations, attached in full at **annexure “A”** for the Law Council’s consideration. The issue was referred to the TLRI by Mr Paul Mason, the former Tasmanian Commissioner for Children. Mr Mason was a member of the Council of Obstetric and Paediatric Mortality and Morbidity at the time of his referral of the matter to the TLRI.

We suggest that the Children’s Commissioner consider the position that the practice of MGM should be subject to regulation consistent with the recommendations made by the TLRI.

2. Human rights perspective

2.1. Relevant principles

The following human rights principles³ may be relevant to the issue of MGM:

- The right to highest attainable standard of health.⁴
- The right to security of the person (or bodily integrity),⁵ autonomy and self-determination.⁶
- The right to protection from physical injury or abuse.⁷
- The right to equality and non-discrimination.⁸
- The right to protection of status as a minor without discrimination as to sex.⁹
- The right to be free from torture and all other cruel, inhuman or degrading treatment.¹⁰
- The right to private life, family life.¹¹
- The right to freedom of religion.¹²
- The right to take part in cultural life.¹³

² Tasmania Law Reform Institute, *Non-Therapeutic Male Circumcision*, August 2012, available at: http://www.utas.edu.au/_data/assets/pdf_file/0006/302829/Non-Therapeutic-Circ_Final-Report-August-2012.pdf.

³ A comprehensive table of human rights issues raised by male circumcision can be found here: <http://arclaw.org/human-rights-violations-table>.

⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(1) (‘ICESCR’); *CRC* art 24.

⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3 (‘UDHR’); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 (‘ICCPR’).

⁶ *ICCPR* art 1(1).

⁷ *CRC* art 19(1).

⁸ *ICCPR* art (26).

⁹ *Ibid* art 24(1); *CRC* art 19.

¹⁰ *UDHR* art 5; *ICCPR* art 7; *CRC* art 37.

¹¹ *ICESCR* art 10; *ICCPR* art 17; *CRC* art 16.

¹² *CRC* art 14; *ICCPR* art 18.

- The right to identity.¹⁴

2.2. International human rights commentary

The UN Committee, which receives reports and comments filed by States Parties to the Convention, recognises that the CRC grants children a right to physical integrity.¹⁵

It is widely accepted that FGM practices are a violation of a number of human rights of children, including the right to physical integrity.

In 2014, the UN Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child (“UNCRC”) released a joint statement highlighting the need to prevent harmful practices against women and girls:

It is time to examine harmful practices from a human rights perspective. Children have a right to be protected from practices that have absolutely no health or medical benefits but which can have long-term negative effects on their physical or mental well-being.¹⁶

The same argument might be applied to incapable minors of all sexes. We note that there is commentary that contemplates that the human rights implications of MGM should, at least, merit further consideration. For example, in its *Concluding Observations on the Second to Fourth Periodic Reports of Israel, adopted by the Committee at its sixty-third session*, the UNCRC expressed concern about some traditional male circumcision practices and recommended that Israel “undertake a study on the short and long-term complications of male circumcision.”¹⁷

International children’s rights organisations have expressed stronger views in respect of the human rights compliance of MGM. For example, in 2012 the Council on Violence Against Children examined harmful practices based on tradition, culture and religion, and stated that:

a children’s rights analysis suggests that non-consensual, non-therapeutic circumcision of boys, whatever the circumstances, constitutes a gross violation of their rights, including the right to physical integrity, to freedom of thought and religion and to protection from physical and mental violence.¹⁸

Further, Child Rights International Network argues that:

Male circumcision is an irreversible operation; to argue that parents’ freedom of religion enables them to consent to the irreversible cutting of their child for religious reasons negates the child’s freedom to consent or refuse consent to such an action once they have the capacity to make an informed decision.

¹³ ICESCR art 15(1)(a).

¹⁴ CRC art 8.

¹⁵ See UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Canada*, 20 June 1995, CRC/C/15/Add.37 para 25; UN Committee on the Rights of Child, *Concluding Observations on Report by United Kingdom of Great Britain and Northern Ireland* CRC/C/15/Add.34, 15 February 1995 para 6.

¹⁶ Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *UN Human Rights experts set out Countries’ Obligations to Tackle Harmful Practices such as FGM and Forced Marriage*, 5 November 2014.

¹⁷ UN Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations: Israel*, 14 June 2013, CRC/C/ISR/CO/2-4, [41]-[42].

¹⁸ International NGO Council on Violence against Children, *Violating Children’s Rights: Harmful Practices Based on Tradition, Culture, Religion or Superstition* (2012), 22, available at: http://srsq.violenceagainstchildren.org/sites/default/files/documents/docs/InCo_Report_15Oct.pdf.

consistent with the evolving capacities of the child". In this way the Convention makes clear that these parental rights and duties to provide "direction" relate to the child's right to freedom of religion: such "direction" plainly cannot justify a serious irreversible operation. Some argue that to be circumcised is part of the child's right to identity (CRC article 8) – but having a circumcised penis is a mark of the parent's religion, not of the child's freely chosen religion. And any assumption that a child will follow his parents' religion conflicts with his independent freedoms.

Indeed, the Committee on the Rights of the Child has condemned the use of religion as a justification for overruling the child's right to refuse consent to practices that affect a child's physical integrity, through a negative interpretation of children's best interests, both in its General Comment No. 14 on best interests and General Comment No. 8 on the right of the child to protection from corporal punishment.¹⁹

As well as representing the considered views of a peak international children's rights NGO, these comments foreground the application of proportionality when balancing parental rights against a child's right to bodily integrity, especially in the context of a stark imbalance in agency. According to leading human rights practitioners and authors, Lord Lester and David Pannick, the right to security of the person has been connected with freedom from interference with bodily integrity.²⁰ Further, ethics scholars have also argued that:

Male genital mutilation should not be considered in isolation from...female genital mutilation. From a human rights perspective, both male and female genital mutilation, particularly when performed on infants or defenceless small children...can be clearly condemned as a violation of children's rights.²¹

We note that the practice of FGM is criminally sanctioned in NSW, but the practice of MGM remains legal. While we acknowledge that there are different types of FGM, there is at least one type of FGM, known as Type II,²² which may be considered anatomically congruent to the procedure undertaken during MGM.²³ Given this, we suggest further consideration of the different treatment of FGM and MGM, both in NSW and across all Australian jurisdictions, in relation to whether it would constitute discrimination in breach of Australia's obligations under Art. 19 of the CRC and the Convention on the Elimination of All Forms of Discrimination. Indeed, we note that in South Australia, the *Criminal Law Consolidation Act 1935* (SA) is express in its differential treatment of FGM and MGM²⁴:

¹⁹ Child Rights International Network, *Call for Adequate Recognition of Children's Right to Freedom of Religion or Belief*, November 2015, 5, available at: https://www.crin.org/sites/default/files/attachments/call_for_adequate_recognition_of_childrens_right_to_freedom_of_religion_or_belief.2.pdf.

²⁰ Lord Lester and David Pannick (eds) *Human Rights Law and Practice* (2nd ed, 2004) 528; See also J Steven Svoboda, 'Circumcision of male infants as a human rights violation' (2013) *J Med Ethics*.

²¹ SK Hellsten, 'Rationalising circumcision: from tradition to fashion, from public health to individual freedom' (2004) *Journal of Medical Ethics* 30, 248-252.

²² End FGM European Network, *What is FGM*, <http://www.endfgm.eu/female-genital-mutilation/what-is-fgm/>. According to 'End FGM European Network', FGM Type II is commonly known as excision, whereby the clitoris and labia minora are partially or totally removed, with or without excision of the labia majora. In anatomical terms, both Type II FGM and MGM involve the partial or whole removal of healthy, functional tissue known as the prepuce.

²³ See M. Benatar & D. Benatar, 'Between Prophylaxis and Child Abuse: the Ethics of Neonatal Male Circumcision', in *Cutting to the Core: Exploring the Ethics of Contested Surgeries*, ed. D. Benatar, 2006, Rowman & Littlefield at 36.

²⁴ This is a legal approach which is not endorsed by the Law Society of NSW. Conversely, compare Article 2(2) of the German constitution which enshrines the same basic constitutional right to physical integrity for both boys and girls. Article 3(3) of the German constitution provides that no person should be "favoured or disfavoured" due to a number of grounds, including sex. Arguably, reading Articles 2(2) and 3(3) together would protect German boys and girls equally from non-therapeutic genital cutting.

Section 22—Conduct falling outside the ambit of this Division

- (1) This Division does not apply to the conduct of a person who causes harm to another if the victim lawfully consented to the act causing the harm.
- (2) A lawful consent given on behalf of a person who is not of full age and capacity by a parent or guardian will be taken to be the consent of the person for whom the consent was given.
- (3) A person may consent to harm (including serious harm) if the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community.

Examples—

- 1 A person may (within the limits referred to above) consent to harm that has a religious purpose (eg male circumcision but not female genital mutilation).

3. The perspective of health authorities

Medical authorities in comparable jurisdictions do not recommend the routine circumcision of every newborn male. The Law Society is of the view that there should be consideration of the benefits, disadvantages and ethical issues.

The Royal Australasian College of Physicians (“RACP”) policy document on the circumcision of infant males states:

Ethical and human rights concerns have been raised regarding elective infant male circumcision because it is recognised that the foreskin has a functional role, the operation is non-therapeutic and the infant is unable to consent.

After reviewing the currently available evidence, the RACP believes that the frequency of diseases modifiable by circumcision, the level of protection offered by circumcision and the complication rates of circumcision do not warrant routine infant circumcision in Australia and New Zealand.²⁵

In this document, the RACP cites the British Medical Association statement on the Law and Ethics of Male Circumcision that:

if it was shown that circumcision where there is no clinical need is prejudicial to a child's health and wellbeing it is likely that a legal challenge on human rights ground would be successful. Indeed if damage to health was proven there may be obligations on the State to proscribe it.²⁶

Similarly, the Canadian Paediatric Society “does not recommend the routine circumcision of every newborn male.”²⁷

It is worthwhile noting that in 2013, a Joint Statement by the Nordic Ombudsmen for Children and paediatric experts stated “Circumcision, performed without medical indication, on a person who is incapable of giving consent, violates fundamental medical-ethical principles, not least because the procedure is irreversible, painful and may cause serious

²⁵ The Royal Australasian College of Physicians, *Circumcision of infant males*, September 2010, 5, available at: <https://www.racp.edu.au/docs/default-source/advocacy-library/circumcision-of-infant-males.pdf>.

²⁶ British Medical Association, ‘The Law and Ethics of Male Circumcision: Guidance for Doctors’ (2004) *Journal of Medical Ethics*.

²⁷ Canadian Paediatric Society, ‘Neonatal circumcision revisited. Fetus and Newborn Committee’ (1996) *Canadian Medical Association Journal*.

complications.”²⁸ Further, the Royal Dutch Medical Association (KNMG) regards NTC of male minors as a violation of physical integrity.²⁹

We note that the TLRI stated in its final report on NTC that “No authoritative health policy maker in any jurisdiction with a frequency of relevant health conditions as low as that in Australia recommends circumcision as an individual or public health measure.”³⁰

Opponents of NTC note that because incapable minors lack capacity to consent to circumcision, only a parent or guardian can do so and only when there is immediate and clear medical necessity. Undertaking the procedure in other circumstances constitutes a criminal assault and battery to which a parent or guardian cannot consent, even on traditional or religious grounds.

4. Relevant case law

4.1. Australian jurisprudence

In general, the question of parental capacity to consent to a non-therapeutic treatment has been considered by the High Court of Australia in *Department of Health and Community Services v JWB and SMB*³¹ (*Marion's case*). In 1993, the Queensland Law Reform Commission (“QLRC”) considered male circumcision in light of this case, summarising the ratio decidendi as follows:

... if the nature of the proposed treatment is invasive, irreversible and major surgery and for non-therapeutic purposes, then court approval is required before such treatment can proceed. The court will not approve the treatment unless it is necessary and in the young person's best interests. The basis of this attitude is the respect which must be paid to an individual's bodily integrity.³²

The issue has also been considered by the Family Court of Australia. See for example *K & H* [2003] FamCA 1364, in which the court also found in favour of a secular mother and upheld the best interests of the child to determine whether to undertake the procedure later in life.

4.2. International jurisprudence

In the United Kingdom in 2015, in a case involving FGM, a British judge found that non-therapeutic circumcision of male children is considered “significant harm”.³³

Another notable case is *Re J*³⁴ which concerned the need for parental consensus rather than the legality of the procedure itself. In that case, the court balanced a Muslim father's right to perpetuate his religious belief by having his son circumcised against the mother's right to resist the procedure on the basis of the best interests of the child. In deciding J's best interests, the court weighed up the father's religious motivations against J's secular upbringing and environment, ultimately finding that in the absence of clearly demonstrable religious benefits

²⁸ S Todd Sorokan, Jane C Finlay, Ann L Jefferies, 'Newborn male circumcision' (2015) *Paediatric Child Health*, 20(6) 311 – 315.

²⁹ KNMG, 'Non-therapeutic circumcision of male minors', *KNMG Viewpoint*, May 2010, available at: <https://www.knmg.nl/web/file?uuid=4f46a948-1a37-4ee4-95be-976b541ec6ee&owner=5c945405-d6ca-4deb-aa16-7af2088aa173&contentid=286&elementid=1992842>

³⁰ Tasmania Law Reform Institute, *Non-Therapeutic Male Circumcision*, August 2012, 13, available at: http://www.utas.edu.au/data/assets/pdf_file/0006/302829/Non-Therapeutic-Circ_Final-Report-August-2012.pdf.

³¹ (1992) 175 CLR 218.

³² Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper (1993) 38.

³³ *B and G (Children) (No 2) v Leeds City Council* [2015] EWFC 3 (Fam).

³⁴ [2000]1 FCR 307.

and with no parental consensus, an irreversible surgery like circumcision should not be allowed.³⁵

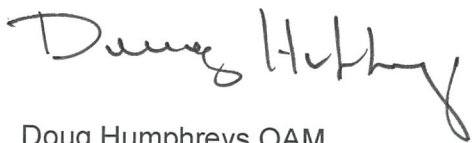
Importantly, in balancing competing human rights, the court held on appeal that “the newborn does not share the perception of his parents or of the religious community to which the parents belong.”³⁶

In 2012, a German court held that NTC constitutes criminal assault by causing bodily harm and denying a child’s right to physical integrity (although the decision was later reversed by the introduction of legislation).³⁷

A comprehensive analysis of the human rights, legal, religious and medical implications of neonatal male circumcision can be found in an article by Australian lawyer Ranipal Narulla entitled “Circumscribing Circumcision: traversing the moral and legal ground around a hidden human rights violation.”³⁸

Thank you for the opportunity to raise this issue. Any questions may be directed at first instance to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0254.

Yours sincerely,



Doug Humphreys OAM
President

³⁵ *Re J* [1999] 2 FCR 34 per Wall J at 367-69.

³⁶ *Re J* [2000] 1 FCR 307 per Thorpe LJ at [15].

³⁷ Wendy Zeldin, *Germany: regional court ruling criminalizes circumcision of young boys*, 2 July 2012, Global Legal Monitor, available at: <http://www.loc.gov/law/foreign-news/article/germany-regional-court-ruling-criminalizes-circumcision-of-young-boys/>.

³⁸ Volume 12(2), *Australian Journal of Human Rights*, 2007, available at: <http://www.austlii.edu.au/au/journals/AJHR/2007/24.html>.

“A”

The recommendations of the Tasmania Law Reform Institute report on circumcision are as follows.

1. The Institute supports the enactment of legislation to reform the law governing circumcision.
2. The Institute recommends reform to provide a clear legislative basis for the legality of circumcision performed at the request of an adult or capable minor.
3. The Institute recommends the enactment of a new and separate offence generally prohibiting the circumcision of incapable minors in Tasmania. The new legislation ought to create an exception for the performance of some well-established religious or ethnicity motivated circumcision on incapable minors.
4. The Institute recommends the enactment of legislation to require joint parental authorisation for the circumcision of an incapable minor.
5. The Institute recommends the enactment of a law to require court authorisation for a circumcision whenever parents disagree about the desirability of performing a circumcision.
6. The Institute does not recommend the enactment of legislation mandating court authorisation for the circumcision of minors.
7. The Institute recommends the enactment of a law to require that all circumcisers provide accurate information as to:
 - the financial cost of the procedure;
 - the non-therapeutic nature of the operation;
 - the purpose and function of the foreskin;
 - the procedure itself;
 - the procedure's effect on the functioning of the penis;
 - the risks of the procedure;
 - the nature and significance of the evidenced prophylactic benefits of circumcision in an Australian context;
 - the potential for children to grow up into adults who resent their circumcision (this may include a discussion of the common rationales and prevalence of circumcision);
 - the availability of the procedure in adulthood;
 - the legality of the procedure.
8. The Institute recommends that health policy, community and industry leaders use non-legislative avenues of reform to improve the dissemination of accurate information on the known and potential effects and significance of circumcision.
9. The Institute recommends the enactment of a criminal law that sets general principles against which to judge the acceptability of a circumciser's practice. These principles should set minimum standards that all circumcisers of incapable minors must meet in the provision of their service. Parliament should give an existing health regulatory body the responsibility of

formulating regulations to qualify the general standards set in statute. The Institute recommends the setting of standards as to matters such as:

- the pain relief provided;
- the instruments used;
- the skill of the person performing the operation;
- the skill with which the procedure is performed;
- the adequacy of the wound care and post-procedure monitoring.

The standards set by statute and in regulations ought to reflect the minimum standards the community would expect circumcisers to meet at the time of the operation in the circumstance in which they are operating. In particular, the standards should ensure that no minor be put at a needlessly high risk of pain or complication from a circumcision.

10. The Institute recommends further investigation into whether the law governing the use and sale of human tissue would benefit from reform.

11. The Institute does not recommend reform to the law regulating the commercial aspects of a circumciser's service.

12. The Institute recommends the enactment of reform to create a uniform period in which individuals harmed by a circumcision as a minor may bring an action against their circumciser. This period should extend for an appropriate time after the harmed person has reached the age of majority. This new limitation period should be enacted in a provision in a new Circumcision Act.

13. The Institute recommends the enactment of legislation to require circumcisers to transmit information relevant to actions that may be brought for harm they cause to a minor to an appropriate government authority.

14. The Institute does not recommend the enactment of a no-fault compensation scheme for harm caused by a circumcision performed upon an incapable minor.