The New South Wales Bar Association

13/155

22 July 2013

The Hon Greg Smith SC MP
Office of the Attorney General
Level 31 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2001

Dear Attorney

Review of law in relation to FGM

Thank you for your letter seeking the Bar Association's views in relation to the laws governing Female Genital Mutilation (FGM).

Section 45 of the *Crimes Act 1900* (NSW) was introduced in 1994 and there has been only one prosecution. The legislation was a response to some ethnic minority cultural practices formerly known by names such as female circumcision and infibulation and which are normally practised upon children.

The section is cast in very wide terms and the only prosecution in New South Wales arose out of a surgical procedure carried out by a gynaecologist for the removal of a pre-cancerous condition of the vulva (surgery alleged not to be medically necessary) with no connection to any ethnic minority custom (*R v Reeves*, District Court of New South Wales, 1 July 2011). The conduct which was sought to be addressed by the legislation was almost certainly unlawful under the general law in any event. However, it is conceded that having a provision such as section 45 may have an educative effect.

Proposed increase in maximum penalty

Whilst uniform penalties across the States and Territories are generally desirable, the Association is concerned that very high penalties may be an additional disincentive for victims of this crime, or those who care for the victims, seeking medical attention in cases of infection or illness arising from the surgery (or indeed for any other gynaecological issue/s). For this reason the Association does not support an increase in the maximum penalty for this offence, and suggests more resources are put into an educational response to the issue.

The introduction of a removal offence

An offence involving removal from Australia for the purposes of FGM is more appropriately the realm of the Commonwealth Legislature.

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Cosmetic genital surgery

The Association notes the dramatic increase in cosmetic genital surgery over the past several years. Many of these procedures involve removal of the same portions of the genitalia as the less severe forms of some of the cultural practices.

Where the motivation for the surgery is not medical, for example aesthetic preference or perceived sexual enhancement, such surgery would appear to be unlawful under the existing section 45. Nevertheless, it is increasingly common and being freely and openly practised. The section is neutral as to motive and there would seem to be no reason to distinguish between ethnic cultural motives and motives derived from popular Western culture including pornography.

Age of alleged victim

It is suggested that any non-medical surgery involving permanent removal of part of the female genitalia ought to be illegal if performed on a child (under the age of 18 years).

However, if cosmetic genital surgery is to be permitted for aesthetic or other non-medical reasons for those over 18 years of age, denying a consenting adult the same physical procedure for cultural reasons would seem to be unjustified and may involve discrimination on the basis of race or religion.

Suggested parameters

Given the rise in cosmetic genital surgery, FGM legislation such as section 45 ought to set clear limits as to exactly what types of surgery may be performed for non-medical reasons and the ages for which prohibitions apply. For example, there does not appear to be any reason why clitoridectomy or infibulation ought ever be permitted.

Removal of all or part of the labia (and even perhaps part of the clitoral hood) might be considered acceptable *if performed on a consenting adult by a medical practitioner in an operating theatre*.

If any non-medical procedures are considered acceptable, then the race of the woman and whether she chooses to undergo the procedure for ethnic minority cultural, religious, aesthetic or even sexual reasons ought to be irrelevant. As in the case of any surgical procedure, particularly one which is irreversible, the medical profession ought to provide education about alternatives and risks and ensure that any consent is informed.

The need for evidence based policy making

The Commonwealth Attorney General's Department report does not provide any evidence of increased FGM in New South Wales since enactment of section 45. There is a suggestion that health workers report higher incidences of such practices than are known to police. It is important to verify and quantify these reports, and to ascertain how and where FGM is occurring. If in fact there is a wider practice in New South Wales than is known to police, this suggests that increasing the ambit of the offence or the maximum penalty is unlikely to have any preventative effect. The Association is strongly of the opinion that criminal law

reform should be based on clear evidence, rather than supposition, and that any changes to FGM offences be postponed until more complete evidence is available.

Conclusion

The existing legislation has, thus far, performed only a symbolic and deterrent function in furthering the purposes for which it was enacted. Before any changes are made to it, careful consideration ought to be given to the issues raised above.

Should you or your officers require any further information, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely

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President