

'LISTEN TO US!' FEMALE GENITAL MUTILATION, FEMINISM AND THE LAW IN AUSTRALIA

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[This paper examines various theoretical and legislative perspectives on female genital mutilation, and argues for a contextualised feminist analysis. Such an analysis recognises that the women affected by female genital mutilation are also those who have the answers to eradicating it. The most effective way of eradicating female genital mutilation in Australia will be by education within the affected communities. Female genital mutilation is already illegal in Australia. The call for express legislation on female genital mutilation should be rejected. Instead, resources should be allocated to education campaigns run by the communities themselves. The law in isolation is an inappropriate tool with which to address this problem.]

INTRODUCTION

In November 1993, the practice of female genital mutilation came to public attention in Australia when it was considered in a Children's Court case.¹ Public opinion, as reflected in the media and parliament, condemned the practice. There was a widespread belief that governments should immediately enact legislation imposing criminal sanctions on those who participated in the practice. This public discourse, and the manner in which governments in Australia have responded, provides an insight into wider dilemmas evident in the formulation of legislation and social policy.

In an Australian context, the issue of female genital mutilation raises complex strategic questions for feminists. The response to these questions will be influenced by the extent to which Australian feminists are committed to supporting multi-culturalism within the feminist movement. The increasing internationalisation of feminism means there are a number of possible approaches, and that a feminist perspective should not be purely a white, middle class perspective.² It may, for example, be an Eritrean immigrant woman's perspective. This paper

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¹ Tim Pegler, 'Court told of assault on sisters', *Age* (Melbourne), 2 December 1993; Allison Harding, 'Plea for mutilated girls', *Herald Sun* (Melbourne), 2 December 1993; Rosemary West, 'Agency calls on media to back off on circumcision', *Age* (Melbourne), 3 December 1993. The magistrate ordered a three month interim protection order and the matter was adjourned until February 1994. Identifying information, including the name of the magistrate or hearing venue, cannot be published: Children and Young Persons Act 1989 (Vic) s 26.

² Concetta de Nino, 'Sisterhood is Global?' (unpublished Honours Thesis, Department of History, University of Melbourne, 1990). The thesis focuses on how approaches to female genital mutilation exemplify divisions within the international feminist movement.

argues that the women who are most affected by female genital mutilation must play a key role in determining policy approaches to the issue. Listening to these women may result in supporting views which are critical of some aspects of the culture concerned. This raises the potential conflict between cultural relativism and feminism, a conflict which is especially pertinent in a multi-cultural society such as Australia.

Female genital mutilation is the name given to four types of genital mutilation to which girls are subjected. 'Ritualised circumcision' includes a ceremony where there is a wiping and sometimes the application of substances around the clitoris. It also includes a ritual where the clitoris is scraped or scratched.³ A second type of genital mutilation is 'circumcision' (sunna), the removal of the sheath (prepuce) and the tip of the clitoris. Another kind of genital mutilation is 'excision' (clitoridectomy). This is the removal of the entire clitoris. Usually, parts of the labia minora (small lips surrounding vagina) are also cut away. A fourth category is 'infibulation' (Pharaonic circumcision). This involves the removal of the prepuce, clitoris, labia minora and scraping the flesh from the labia majora and sewing it together. Sometimes flesh is also scraped from the inside of the vagina. A minute opening is left to allow discharge of urine and menstrual blood.

There are severe medical consequences of female genital mutilation ranging from agonising pain to death.⁴ The operation is generally performed prior to puberty.⁵ Female genital mutilation is practised in various parts of Africa, the southern part of the Arab Peninsula and the Persian Gulf.⁶ Female genital mutilation has also been historically documented in Western countries. In the mid nineteenth century it was practiced in Europe and the United States of America for at least fifty years.⁷

In countries such as Australia, the United Kingdom, France, Canada, Belgium, Norway and Sweden, there are immigrants from cultures which traditionally practice female genital mutilation.⁸ The extent of female genital mutilation in

³ Family Law Council, *Report: Female Genital Mutilation* (1994) 5.

⁴ Ibid 19-23; Royal Australian College of Obstetricians and Gynaecologists, *Female Circumcision and Related Practices*, Resource Unit 108 (December 1993).

⁵ Family Law Council, above n 3, 8.

⁶ It also occurs in some regions of India, Indonesia, Brazil and Malaysia: *ibid* 11. Clitoridectomy and excision are practiced in West Africa from Mauritania to Cameroon, across central Africa to Chad, and in the East from Tanzania to Ethiopia and Eritrea. Infibulation is customary in Mali, Somalia, Ethiopia, and Nigeria: Daniel Gordon, 'Female Circumcision and Genital Operations in Egypt and the Sudan: A Dilemma for Medical Anthropology' (1991) 5(1) *Medical Anthropology Quarterly* 3, 8. It is important to note, however, that within these countries, whether female genital mutilation is practiced or not can vary from region to region: Patricia Garcia, [speech at] 'Unanswered Questions on Female Genital Mutilation Conference' (organised by Multilingual Community Education Services, 2 July 1994).

⁷ Dr Isaac Baker Brown, president of the Medical Society of London, published widely on his treating of various kinds of female nervous disease through clitoridectomy: Nancy Scheper-Hughes, 'Virgin Territory: The Male Discovery of the Clitoris' (1991) 5(1) *Medical Anthropology Quarterly* 25, 26.

⁸ Patricia Garcia, 'Female Genital Mutilation — A Health and Human Rights Issue' (paper presented to the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children Conference, Kenya, 1992).

Australia is unknown.⁹ Evidence suggests the incidence of the practice in Australia is likely to be minimal because refugees to Australia from those countries that practise female genital mutilation are a relatively small group.¹⁰

The main reasons for performing female genital mutilation have been identified as tradition, religion, myth, economics and patriarchy.¹¹ Female genital mutilation has also been viewed as a source of cultural and female identity.¹² For instance, in Kenya, Jomo Kenyatta, who became the first President of independent Kenya, championed female genital mutilation as a symbol of resistance to foreign influence.¹³ Although many women believe female genital mutilation is a prerequisite for their Muslim identity, it is not a mandatory Islamic practice.¹⁴ So, whilst Muslim women are permitted by the Qu'ran to undergo female genital mutilation, it is not a prerequisite for their religious identity. In fact, Muslim clerics have spoken out against the belief that female genital mutilation is a necessity for Muslim women.¹⁵ Many female Muslims do not undergo female genital mutilation and the practice is widely acknowledged to predate Islam. Furthermore, female genital mutilation is unknown in eighty per cent of the Arab world.¹⁶

Myths regarding the necessity of female genital mutilation for women abound. For instance, it is said to prevent stillbirth and to give relief from the 'worm' (*el duda*) which midwives sometimes claim to see jumping out when a girl is circumcised.¹⁷ Another explanation for female genital mutilation is economic: women may be economically dependant on finding a husband and without female genital mutilation a woman will not be deemed to be a suitable wife.¹⁸ Anthropologists and feminists have devised further explanations for female genital mutilation. Dr Nawal El Saadawi, who has herself experienced female genital mutilation, has stated:

If you analyse the causes of female circumcision you'll find that it is not related to Islam: it's not related to Africa; it's not related to any colour or any religion.

⁹ The 1991 Census indicated there were 75,968 women in Australia from countries which practise some form of female genital mutilation: Family Law Council, above n 3, 12.

¹⁰ *Ibid* 17.

¹¹ Asma El Dareer, *Women Why Do You Weep?* (1992) 17 cited in Gordon, above n 6, 8; Kristin Magarey and Elizabeth Evatt, 'Genital Mutilation. A Health and Human Rights Issue', *Australian Development Studies Network Briefing Paper No 18* (1980) 4.

¹² Alice Walker and Pratibha Parmar, *Warrior Marks* (1993).

¹³ Sue Armstrong, 'Female Circumcision: Fighting a Cruel Tradition' (1991) 129 (No 1754) *New Scientist* 22, 25.

¹⁴ *Ibid* 8; Magarey and Evatt, above n 11, 3.

¹⁵ Health Department, Victoria, Women's Health Policy and Programmes Unit, *Female Circumcision* (1987) 12; Issa Abdulla, [speech at] 'Unanswered Questions on Female Genital Mutilation Conference', above n 6. Also, at this conference Joseph Wakim, Secretary of the Australian Arabic Council, argued that the media try to write off female genital mutilation as an Islamic practice.

¹⁶ Gordon, above n 6, 8.

¹⁷ El Dareer, above n 11, 9.

¹⁸ Magarey and Evatt, above n 11, 5.

It is related to a patriarchal class system of 5000 years ago when man stated to build a patriarchal family, a patriarchal society.¹⁹

The Legality of Female Genital Mutilation in Australia

1 *Criminal Law*

The common law crime of assault consists of one or more persons directly applying force to the body of another, or threatening to do so. However, if the act of force is 'reasonably necessary for the common intercourse of life' and done solely for that reason, and is proportionate, then it is not assault.²⁰ Assault is also covered by criminal law statutes at state level.²¹ Female genital mutilation is arguably common law assault and also a statutory offence.

Although the Family Law Council, in its report on female genital mutilation, expressed doubt as to whether female genital mutilation would be an assault,²² the weight of legal opinion suggests that it would be. The Human Rights Branch of the Attorney-General's Department wrote to all states and territories on 1 June 1993 seeking information on the 'adequacy of existing State and Territory laws to deal with [female genital mutilation].'²³ Generally, states and territories replied that their existing criminal laws on assault would be adequate to cover female genital mutilation.²⁴

The Family Law Council was concerned that consent may be regarded as a defence to the crime of assault which would otherwise cover female genital mutilation.²⁵ However, this position conflicts with common law principles. One of these principles is that consent cannot be a defence to grievous bodily harm.²⁶ The other principle is that consent cannot be a defence if it is against the public interest.²⁷ In the United Kingdom, cases such as *Adesanya* support the argument that a child cannot 'consent' to a cultural custom that the law regards as an assault.²⁸ *Adesanya* concerned a mother who was convicted for carrying out ritual scarification of her sons' cheeks. Consent was held to be no defence to the charge. Moreover the Lord Chancellor, Lord Hailsham, stated that in the United Kingdom, female genital mutilation would be regarded as an assault.²⁹

¹⁹ Nawal El Saadawi, 'Prisoner of Conscience' in Julie Riggs and Julie Copeland (eds), *Coming Out! Women's Voices, Women's Lives* (1985) 84.

²⁰ Peter Brett, Louis Waller and Charles Williams, *Criminal Law, Text and Cases* (7th ed, 1993) 47. See also *Bouhey v R* (1986) 161 CLR 10.

²¹ See, eg, Crimes Act 1958 (Vic) ss 16-18.

²² Family Law Council, above n 3, 46.

²³ *Ibid* 45.

²⁴ *Ibid*.

²⁵ *Ibid* 67.

²⁶ *R v Donovan* [1934] 2 KB 498; *Pallante v Stadiums Proprietary Limited [No 1]* [1976] VR 331.

²⁷ *R v Coney* (1882) 8 QBD 534; *Attorney-General's Reference (No 6 of 1980)* [1981] 3 WLR 125.

²⁸ *The Times* (United Kingdom), 16-17 July 1975 in K Hayter 'Female Circumcision — Is there a Legal Solution?' [July 1984] *Journal of Social Welfare Law* 323, 327; R Mackay, 'Is Female Circumcision Unlawful?' [1983] *Criminal Law Review* 717, 720.

²⁹ In England, in the Second Reading of the Private Members Bill designed to prohibit the practice, Lord Hailsham made it clear that the practice of any form of female circumcision is already illegal. On the question of consent, he said that neither parental consent nor the consent of the minor

Extraterritorial legislation is another matter raised by the Family Law Council Report, which notes that it may not be illegal to take a child overseas to have female genital mutilation performed.³⁰ The Report recommends legislation to outlaw this.³¹ However, such legislation would pose significant enforcement problems.³² Would every girl returning to a 'home country' in which female genital mutilation is practiced be subject to a genital examination prior to leaving and on her return? If so, it seems racist to subject certain minority groups to such an examination and moreover it would be an invasion of bodily privacy. On the other hand, if the girls were not examined, the law would be impossible to enforce. Therefore, a better solution might be to encourage parents to believe that their daughters should not be subjected to female genital mutilation in the first place. This is best achieved through education, as discussed below.

2 Child Welfare Law

The Family Law Council argues that female genital mutilation is child abuse.³³ The Federal Health Department views female genital mutilation as child abuse, and therefore as a matter for states.³⁴ State and territory child welfare legislation provides for the intervention of the state in cases of child abuse or ill-treatment.³⁵ As a physical injury, female genital mutilation would constitute child abuse.³⁶

would be any defence at all: House of Lords Debates, vol 441 col 676-7 cited in Mackay, above n 28, 717.

³⁰ Family Law Council, above n 3, 51, 53.

³¹ Canada's Bill C-126, an amendment to the Criminal Code and the Young Offenders Act (Can) covers this type of offence: *ibid* 56-65. It would be possible for Australian laws to cover this offence drawing on the Commonwealth external affairs power (Commonwealth Constitution s 51(xxix)), which could be utilised because Australia is a signatory to the Convention on the Rights of the Child (1989) (see below text accompanying n 48): Family Law Council, above n 3, 48. The Crimes (Child Sex Tourism) Amendment Act 1994 (Cth) is an example of a law prohibiting certain acts which occur outside Australia.

³² In particular, there would be problems with evidence and intention: Family Law Council, above n 3, 52.

³³ *Ibid* 46.

³⁴ South Australian Children's Interests Bureau, *Female Circumcision: Policy Implications for Welfare Departments* (1986).

³⁵ The Family Law Act 1975 (Cth) is also relevant to cases of female genital mutilation in two ways. Firstly, a parent may seek Family Court approval to perform female genital mutilation on their daughter: see Queensland Law Reform Commission, *Female Genital Mutilation: 'Current Working Draft'*, Draft Report (1994) 37. The QLRC concluded the parents would need to seek Family Court approval for female genital mutilation otherwise they would risk criminal charges. However, it is believed this approval would not be given as a result of the principles in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218. Secondly, if female genital mutilation has been performed upon a girl, it may be a relevant consideration in a custody dispute: under s 64 of the Family Law Act there are certain matters that must be taken into account when the court resolves a custody dispute. This includes s 64(1)(bb)(va): 'the need to protect the child from abuse, ill treatment, or exposure or subjection to behaviour which psychologically harms the child.'

³⁶ See, eg, s 63 of the Children and Young Persons Act 1989 (Vic), which defines when a child is in need of protection. This may be the case if: 'The child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type' (s 63(c)); 'The child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care' (s 63(f)). This would cover

3 *Influence of International Law*

Female genital mutilation is increasingly portrayed as a breach of human rights in international law. Although international law is not binding in Australian domestic courts in the absence of corresponding legislation,³⁷ international legal developments may be a source of influence in interpreting the common law, where it is ambiguous or unclear.³⁸

There are a number of relevant international instruments.³⁹ The most specific of these is the Declaration on Violence Against Women, which expressly identifies female genital mutilation as a form of violence against women⁴⁰ that states are called upon to eliminate.⁴¹

Other key instruments support the view that female genital mutilation is prohibited at international law. The Convention on the Elimination of (All Forms of) Discrimination Against Women (CEDAW)⁴² provides for the elimination of discrimination in the field of health care⁴³ and includes measures to eliminate discrimination against women in matters of family relations and marriage.⁴⁴ The Universal Declaration of Human Rights asserts a right to 'security of person'⁴⁵ and prohibits torture and inhuman treatment.⁴⁶ Each of these rights may arguably extend to prohibition of female genital mutilation. It is also arguable that the sub-category of persons having a 'well-founded fear of being persecuted for reasons of ... membership of a particular social group', which is to be found in the definition of 'refugee' in the 1951 Convention Relating to the Status of Refugees, may extend to women fleeing the possibility of female genital mutilation.⁴⁷ Finally, the Convention on the Rights of the Child requires states parties

both female genital mutilation and the probability of female genital mutilation occurring. In these cases the child can be taken into protection by a 'protective intervener' (s 69) or the State.

³⁷ *Polites v Commonwealth* (1945) 70 CLR 60; *Bradley v Commonwealth* (1973) 128 CLR 557. Thus, Australians cannot explicitly rely on international obligations as a basis for prosecution of the practice of female genital mutilation in Australia.

³⁸ *Re Marion* (1991) 14 Fam LR 427 (Nicholson CJ); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J); *Minister for Immigration and Ethnic Affairs v Ah Tin Teoh* (1995) 128 ALR 353. In this last case, the High Court (Mason CJ, Deane, Toohy and Gaudron JJ, McHugh J dissenting) held that the doctrine of legitimate expectation imposed a requirement upon administrative decision makers in some circumstances to consider the terms of international conventions to which Australia was a party. However, the Government has moved to legislate against the effect of this decision: Administrative Decisions (Effect of International Instruments) Bill 1995: see Kristen Walker and Pene Matthew, 'Case Note: *Minister for Immigration v Ah Hin Teoh*' (1995) 20 *MULR* 236, 251.

³⁹ Family Law Council, above n 3, 24-9.

⁴⁰ GA Res 48/104, (85th plen mtg), UN Doc A/Res/48/104 (1994) art 2.

⁴¹ *Ibid* art 4.

⁴² Opened for signature 1 March 1980, 19 ILM 34 (entered into force 1981).

⁴³ *Ibid* art 12(1).

⁴⁴ *Ibid* art 16(1).

⁴⁵ GA Res 217A, 3 UN GAOR 135, UN Doc A/810 (1948) art 3.

⁴⁶ *Ibid* art 5.

⁴⁷ Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137, art 1 (entered into force 1954). The effect of the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267, art 1 (entered into force 1967) was to remove the temporal and geographic limitations of the Convention. An immigration judge in the United States cancelled the deportation order against Lydia Oluloro on the ground her two daughters would suffer genital mutilation if she returned to Nigeria. However, the Immigration

to 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'⁴⁸ A World Health Organisation Resolution in May 1993 reaffirmed the requirement, calling for the elimination of 'traditional practices affecting the health of women and children.'⁴⁹

Thus, international instruments have condemned the practice of female genital mutilation and may be taken to render it illegal. However, these instruments do not call for express legislation on female genital mutilation, leaving it instead to the states parties to the various instruments to determine the most appropriate means of eliminating the practice. It is notable that the Declaration on Violence Against Women promotes education as a special focus of policy to end violent practices such as female genital mutilation.⁵⁰

4 *Express Legislation in Australia*

As noted above, the issue of female genital mutilation first came before an Australian court in November 1993. (The matter was subsequently heard in February 1994.) The Children's Court in Melbourne examined a matter concerning two girls aged 18 months and 3 years who had been physically abused by their father. The case was initiated because the Department of Health and Community Services was concerned with the issue of physical abuse. The fact that the children had been infibulated was drawn to the attention of the Magistrate and she added the protective concern of infibulation to the other matters raised by the Department.⁵¹ The Magistrate granted *amicus curiae* status to a group of women lawyers who thought that the matter ought to be a protective concern and that the girls who had been subjected to the procedure should be provided with mandatory, ongoing medical supervision.⁵² The parents, the Department of Health and Community Services and the *amicus curiae* agreed to an interim supervision order in which the mother had to ensure the girls attended medical appointments and agree to accept visits from the staff of the Department of Health and Community Services.⁵³

and Naturalisation Service was going to appeal the case: Christopher Reed, 'US Lets Mother In Genital Mutilation Appeal Stay', *Age* (Melbourne), 25 March 1994.

⁴⁸ Opened for signature 26 January 1990, annexed to GA Res 44/25, 44 UN GAOR (61st plen mtg), UN Doc A/Res/44/25 (1989), art 24(3).

⁴⁹ Resolution on Maternal and Child Health and Family Planning for Health, adopted by the 46th World Health Assembly on 12 May 1993 (details provided by UN Information Centre, Sydney). Maurice Lubatti, 'WHO urges end to female genital mutilation', *Australian* (Sydney), 7-8 May 1994 reported that the World Health Organisation 'renewed its appeal yesterday for an end to female genital mutilation, saying between 85 million and 114 million women had been scarred by the practice.' The WHO Director-General Dr Hiroshi Nakajima was reported to have said:

People will change their behaviour only when they themselves perceive the new practices proposed as meaningful. Therefore, what we must aim for is to convince people, including women, that they can give up a specific practice without giving up meaningful aspects of their own cultures.

⁵⁰ Declaration on Violence Against Women, above n 40, art 4(j).

⁵¹ See above n 1. See above n 36 for an explanation of grounds for protection in Victoria.

⁵² Women Lawyers Against Female Genital Mutilation, 'In Response to the Discussion Paper on the Subject of Female Genital Mutilation', Submission to Family Law Council (1994) 3-4.

⁵³ Paul Daley, 'AMA calls for Ban on Female Circumcision', *Sunday Age* (Melbourne), 6 February 1994.

The case generated a large amount of publicity. The press reports were fairly sensationalist in nature; for instance 'The Mutilated Female' was a headline in the *Sunday Age* (accompanied by a drawing of a white female toddler).⁵⁴ Parliamentarians leapt upon the bandwagon.⁵⁵ A NSW politician stated: 'Female genital mutilation is a totally barbaric and outdated ritual that has about as much relevance to the late 20th century as witchcraft.'⁵⁶

The Age reported that the Victorian Attorney-General, Mrs Wade, was considering a ban on female circumcision.⁵⁷ *The Australian* reported that the Health and Community Services Ministerial Council had decided that female circumcision would be made illegal.⁵⁸ Dr Hewson, (the then Leader of the Opposition) asked the Prime Minister, Mr Keating, 'what plans' he had for ending the practice in Australia: 'Will he assure this House that his Government will take all necessary steps to ensure that this barbaric practice is outlawed in Australia?'⁵⁹ As K Hayter wrote in relation to similar types of comments made by parliamentarians in the United Kingdom, 'Clearly emotive and doctrinaire statements of this kind merely cloud the underlying issues relevant to determining whether legal intervention is justified.'⁶⁰

However, the issue of female genital mutilation is not new. The Commonwealth Department of Immigration and Ethnic Affairs has anticipated its emergence as a problem for the courts. It has been monitoring it for the last four to five years⁶¹ and prepared a report in 1991. In September 1993, the Attorney-General asked the Family Law Council to investigate the legal issues surrounding female genital mutilation in Australia.⁶²

⁵⁴ Trish Worth, 'The Mutilated Female', *Sunday Age* (Melbourne), 27 February 1994. *Cleo*, a glossy magazine aimed at young women, featured a closed section on female genital mutilation including close-ups of mutilated genitalia in its February 1994 edition.

⁵⁵ The issue of female genital mutilation was raised during 1994 in the Commonwealth Parliament as well as the South Australian, West Australian and New South Wales Parliaments. For the Commonwealth, see Commonwealth, *Hansard*, House of Representatives, 21 February 1994, 891-9; 3 March 1994, 1739-40. See also Commonwealth, *Hansard*, Senate, 8 February 1994, 525; 2 March 1994, 1212; 14 March 1994, 1495. In NSW, the Crimes (Female Genital Mutilation) Amendment Act was proclaimed on May 5, 1995. See also NSW, *Parliamentary Debates*, Legislative Council, 2 March 1994, 31; 10 March 1994, 463. See also South Australia, *Parliamentary Debates*, House of Assembly, 30 March 1994, 610.

⁵⁶ Mr Cobbs (National Party) in NSW, *Parliamentary Debates*, Legislative Assembly, 21 February 1994, 897.

⁵⁷ Michael Magazanik, 'Wade May Place Ban on Female Circumcision', *Age* (Melbourne), 17 February 1994.

⁵⁸ Joanne Cooper and Mark Irving, 'Ministers to Ban Female Circumcision', *Australian* (Sydney), 22 March 1994.

⁵⁹ Commonwealth, *Hansard*, House of Representatives, 3 March 1994, 1740.

⁶⁰ Hayter, above n 28, 324.

⁶¹ According to Dr Pamela Brown, Director of Women's Affairs, Department of Immigration and Ethnic Affairs. She said the Department was concerned to avoid the situation in France where a case on female genital mutilation took five years in court. Therefore members from relevant Commonwealth government departments, such as Foreign Affairs, Health, Multi-Cultural Affairs, and the Status of Women, began meeting in 1993. Apparently, there were three meetings aimed at educating bureaucrats on the issue. Pamela Brown, [speech at] 'Unanswered Questions on Female Genital Mutilation Conference', above n 6.

⁶² The terms of reference were to examine the adequacy of Australian laws to deal with the issue of female genital mutilation. In particular: the adequacy and appropriateness of existing laws (not just criminal laws but also in child welfare and medical/health areas); consideration of Canada's

On 27 June 1994, the Family Law Council Report was tabled in the Commonwealth Parliament.⁶³ Its recommendations included specific legislation to outlaw female genital mutilation. The Commonwealth Attorney-General, Mr Lavarch, accepted that recommendation and said if the states and territories did not enact legislation stating that female genital mutilation was a criminal offence, then the Commonwealth would use its external affairs power to do so.⁶⁴ Mr Lavarch raised the issue of female genital mutilation at the Standing Committee of Attorney-Generals in Melbourne in November 1994.⁶⁵ He said in Parliament that all states, except Western Australia, were 'very positive' about the development of laws specifically outlawing female genital mutilation.⁶⁶ Mr Lavarch also said that the Commonwealth view, which he thought was 'shared by the states' was that education should precede or accompany these laws.⁶⁷

Victoria has not yet decided whether it will implement express legislation.⁶⁸ The Department of Health and Community Services has prepared a report on female genital mutilation, but it is not publicly available.⁶⁹ Both New South Wales and South Australia proclaimed express legislation against female genital mutilation on 1 May 1995.⁷⁰ The issue is still under consideration in Queensland.⁷¹

It is clear, therefore, that the question of whether there should be express legislation outlawing female genital mutilation, such as that in New South Wales and South Australia, requires urgent consideration. This question raises significant issues about culture and self-determination, both for the women involved and those seeking to protect their interests. In this context, it is useful to consider the issue from a number of theoretical perspectives to determine how best to approach the question.

1993 Bill C-126 (an Act to amend the Criminal Code and the Young Offenders Act) to protect children being removed from Canada with the intention of assault; and whether, in light of the above, more Australian legislation is needed, what should its contents be, and which court(s) should exercise jurisdiction: Family Law Council, above n 3, 1.

⁶³ Commonwealth, *Hansard*, House of Representatives, 27 June 1994, 1984.

⁶⁴ Commonwealth, *Hansard*, House of Representatives, 30 June 1994, 2441.

⁶⁵ Commonwealth, *Hansard*, House of Representatives, 9 November 1994, 2927.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* In October 1994, Commonwealth government representatives met with Ms Berhane Ras-Work, President of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, and offered \$20,000 in aid to this committee which 'concentrates on the education of women'. The government also gave \$240,000 to an Ethiopian hospital which treats fistulas. Fistulas are often caused by female genital mutilation. In the same speech, the Minister for Development Cooperation and Pacific Island Affairs, Mr Bilney, said that 'education is the key to change in this area': see Commonwealth, *Hansard*, House of Representatives, 19 October 1994, 2325-6.

⁶⁸ However, the Victorian Attorney-General, Mrs Wade is reported to have pledged to work with the Federal Government to develop a policy to combat female genital mutilation in Victoria: 'Genital mutilation may become criminal offence', *Age* (Melbourne), 28 June 1994.

⁶⁹ The Government is awaiting reports from other government departments such as the Department of Justice (Office of Women's Affairs). It will then compile a response. I received this information from Department of Health and Community Services (telephone conversation 12 April 1995).

⁷⁰ Crimes (Female Genital Mutilation) Amendment Act 1994 (NSW); Female Genital Mutilation and Child Protection Act 1995 (SA).

⁷¹ Discussions with Queensland Law Reform Commission (telephone 3 May 1995).

THEORETICAL APPROACHES TO FEMALE
GENITAL MUTILATION IN AUSTRALIA

A Cultural Relativist Perspective

Cultural relativist theorists argue that because all cultures are different, a person outside a particular culture cannot judge it. That is, ethics are relative to culture.⁷² With regard to female genital mutilation, cultural relativists argue that the communities concerned have the 'right of cultural self-determination to carry on this tradition. They believe it is wrong for those who disapprove of the practice, particularly those from foreign cultures, to attempt to abolish it.'⁷³

Josiah Cobbah argues from a radical stream of cultural relativism, which holds that culture is the sole source of the validity of a moral right or rule.⁷⁴ His central argument is that Africans value communitarian rights above individual rights,⁷⁵ and that the African concept of human rights is quite different from the Western concept of human rights.⁷⁶

In contrast, 'weak' cultural relativism perceives culture only as one important source of the validity of a moral right or role.⁷⁷ Jack Donnelly argues that this position permits limited deviations from a 'universal' human rights standard. These deviations primarily occur in the *form* in which particular human rights are implemented and the *interpretation* of individual rights.⁷⁸

From a radical cultural relativist perspective, then, it would be wrong to prohibit female genital mutilation, as it is a cultural practice of a minority culture in Australia. However, from a weak cultural relativist perspective, female genital mutilation can be viewed as contrary to a 'universal' standard because it violates

⁷² As Katherine Brennan has explained:

Cultural relativists criticize the current international human rights system because, in its search for potential human rights violations, it looks at cultural practices which have been condoned for centuries by the societies which engage in them.

Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7 *Law and Inequality* 368.

⁷³ Alison Slack, 'Female Circumcision: A Critical Appraisal' (1988) 10 *Human Rights Quarterly* 437, 462.

⁷⁴ I have adopted the categorisation used by Donnelly here: Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400.

⁷⁵ 'The African worldview is not grounded in self-interest but in social learning and collective survival.' Cobbah develops his argument claiming, 'throughout his life the African expresses his humanity in terms of his society': Josiah Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 309, 325. One may query whether Cobbah's use of the male pronoun is indicative of the fact that women are not included in this vision of society.

⁷⁶ Indeed, the differences are expressed in regional treaties. For instance, the Organisation of African Unity members are party to the Banjul Charter on Human and Peoples' Rights (Done at Nairobi, June 24-7 1981) (1982) 21 ILM 58. Art 1 recognises the 'rights, duties and freedoms' (my emphasis) of people. This may be compared with the European Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome, 4 November 1950, 213 UNTS 221 (1955). Art 1 of this convention recognises the 'rights and freedoms' of people. Thus the Banjul Charter places an emphasis on the community, with it acknowledging that whilst individuals have rights within a community, they also have responsibilities. The European Charter focuses on the prevention of State abuse of individual rights.

⁷⁷ Donnelly, above n 74, 401.

⁷⁸ Ibid 401-2.

human rights conventions.⁷⁹ The problem with a cultural relativist position of any type, however, is that it can ignore how cultural practices may oppress women.⁸⁰

A Feminist/Human Rights Perspective

Cultural relativism has been the subject of substantial criticism by some feminists who argue from a human rights perspective. They argue that there is a universal standard of human rights and that those who suffer most from human rights abuses are women. Female genital mutilation is seen as an example of a human rights abuse.⁸¹

In particular, Anna Funder perceives a link between cultural autonomy and the autonomy of men to control women.⁸² Funder berates Westerners who do not criticise a particular cultural practice because they do not want to be labelled imperialists.⁸³ She criticises Cobbah on the basis that groups/communities function to serve male interests better than female ones. Arguments about the priority of group needs over individual needs therefore favour men over women.

Funder draws an analogy between the public/private dichotomy and cultural relativism.⁸⁴ She argues that the liberal notion of individual rights translates into rights for males only. This is because the liberal rhetoric of non-intervention in the private sphere (traditionally the 'woman's place') results in the denial of individual rights for women. Therefore supporting individual rights is actually supporting men's rights because it supports rights in the public sphere alone. Individual rights in the private sphere are rendered invisible. Funder maintains that Cobbah's arguments for communitarian rights are like those for cultural rights which delineate an area where rights-claims are irrelevant. Claims made for cultural rights are made on behalf of those in power within that community. The remainder of the community is an area in which rights claims are irrelevant. That area may be compared to the 'private' sphere in Western liberal thinking, in which 'public' law is supposedly absent. Feminists have exposed this public/private dichotomy as a sham.⁸⁵

⁷⁹ Katherine Brennan's article on the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (a United Nations body) and how it has dealt with female genital mutilation is an example of the influence of weak cultural relativism. In practice, the Sub-Commission has supported local attempts to eradicate female genital mutilation through education rather than treating female genital mutilation as a human rights abuse to be loudly condemned by the international community: Brennan, above n 72.

⁸⁰ This is discussed in detail in text accompanying nn 82-95.

⁸¹ This is evident in the Declaration on Violence Against Women, above n 40, art 2(a).

⁸² Anna Funder, 'De Minimis Non Curat Lex: The Clitoris, Culture and the Law' (1993) 3 *Transnational Law and Contemporary Problems* 417.

⁸³ 'This is strategic misnaming; a cultural practice is in fact a culturally specific variant of the universal exercise of autocratic (that is, patriarchal) power which holds sway in spheres of life where civil and political rights, and equivalent standards of justice to those in civil society, do not apply': *ibid* 440.

⁸⁴ 'Liberal individualism's hidden premise is that access to the free and equal rights differs depending on whether one is male or female. This premise is hidden by the dichotomy between a private world and public one': *ibid* 454.

⁸⁵ See, eg, Katherine O'Donovan, *Sexual Divisions in Law* (1985); Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 30-9. This dichotomy has been utilised in a patriar-

Funder examines cultural relativism using this analogy and reasons that Third World claims of autonomous culture are in fact arguments against the inclusion of women in the public sphere.⁸⁶ The effect of this is that Third World women are excluded from claiming rights, rather than possessing rights which are of a different nature to the rights of First World women. Funder argues that Cobbah 'mistakes rights for descriptors of social science'⁸⁷ when he claims that different societies have different concepts of rights. This is in contradistinction to her own view that '[r]ights are not things *found* in a culture or society, but things *claimed* from it.'⁸⁸

Funder also criticises Donnelly for trying to find a universal human rights standard that allows limited deviations, arguing that it would be impossible to draw the line where deviations are unacceptable. Moreover, Funder argues the 'truth' of cultural norms is not discoverable through human rights standards because they are standards, and therefore are indeed relative. A weak cultural relativism is therefore not workable. Funder argues that Western values cannot be proven wrong and therefore may be used to justify intervention in the name of upholding them. Thus Funder's position on female genital mutilation and cultural relativity is as follows:

Culture may be considered as a set of rules and practices which delineate social roles and demarcate the sexes (this involves the separation of public from private). Accordingly, a realignment of the public/private division, for instance by making female genital mutilation a matter of national or international concern, as opposed to keeping it 'all in the family', is perceived by some Third World commentators as a threat to cultural integrity.⁸⁹

Funder's argument can be read as another rationale for Westerners to impose their values upon others. Although she denies that she is being imperialist, the implications of her argument suggest otherwise. It justifies the intervention of a hegemonic culture into the cultural practices of a minority culture. For instance, Funder's argument could be read as supporting legislation against female genital mutilation in Australia. One reason for this view would be that female genital mutilation is a cultural practice that oppresses women. Secondly, it has been the subject of international conventions which have either expressly stated or implied that female genital mutilation is a breach of human rights. Such an analysis however, ignores the complexity of the problem. It is also paternalistic. Female genital mutilation is a breach of human rights, but this does not justify Western intervention. Direct Western intervention in female genital mutilation may be argued against on the grounds that it is more effective and less ethnocentric to leave it to the women directly affected by the practice to fight it, and to provide

chal society to perpetuate women's oppression. For instance, through non-intervention in domestic violence and the lack of recognition of the value of work that women do in the home. Hilary Charlesworth has demonstrated this dichotomy is perpetuated in international law: Hilary Charlesworth, 'Women and International Law' (1994) 19 *Australian Feminist Studies* 115.

⁸⁶ Funder, above n 82, 449.

⁸⁷ Ibid 451.

⁸⁸ Ibid.

⁸⁹ Ibid 423.

support upon their request.⁹⁰

Funder bases her arguments on the views of theorists such as Mary Daly and Fran Hosken.⁹¹ Both Daly and Hosken have been criticised by other women as being ethnocentric,⁹² and their work has resulted in considerable antagonism between women from cultures which practice female genital mutilation and those from cultures which do not.⁹³ Evidently, some people will not listen to those directly affected by the practice.⁹⁴

The views of feminists who adopt a human rights perspective are well-meant but too simplistic. A human rights perspective will not be the most successful method of preventing female genital mutilation.⁹⁵ It may be useful to recognise that female genital mutilation is a breach of human rights in order to generate international assistance for those women working within their cultures against the practice. However, a human rights perspective does not provide a sufficiently comprehensive foundation for a campaign for eradication of the practice.

A Liberal Feminist Perspective

A liberal feminist approach would treat female genital mutilation as a breach of human rights.⁹⁶ From this perspective, it is a barbaric practice which the law must condemn: the focus is on the domestic application of this belief. Liberal feminists in Australia argue that legal intervention is the best method of preventing female genital mutilation. Franca Arena MP, for example, called on the New South Wales Legislative Council to introduce legislation to ban female genital mutilation.⁹⁷ The Australian Council of Trade Unions supports express legisla-

⁹⁰ Instances of unsuccessful Western intervention includes colonial legislation in Africa that outlawed female genital mutilation (which continued regardless of its illegal status): Kay Boulware-Miller, 'Female Circumcision: Challenges to the Practice as a Human Rights Violation' (1985) 8 *Harvard Women's Law Journal* 155, 158.

⁹¹ Funder, above n 82, 425, 434.

⁹² See Concetta De Nino, above n 2, 18-19.

⁹³ In an international conference in 1980 in Copenhagen, two non-African women chaired a discussion on female genital mutilation. As Boulware-Miller, above n 90, 171-2 recalled:

Many African women boycotted their presentation, disagreeing with their approach to female circumcision as a human rights violation and condemning the legitimacy of the discussion since neither had lived in an African country. African women felt that in their presentation the two non-African women exploited and sensationalized an intimate and complex African practice by displaying photographs of circumcised women in order to advocate their feminist principles.

⁹⁴ For instance, at the 1975-1985 Decade of Women Conference in Nairobi, Kenya in 1985, as Franca Arena MP recalled (NSW, *Parliamentary Debates*, Legislative Council, 10 March 1994, 464):

Many women from those countries did not want us white, middle-class, feminists interfering with their old traditional customs. They told us in no uncertain terms that it was a problem they would deal with themselves. I could never agree with this proposition as it was evident from all the discussions that it was women who were perpetrating and imposing this barbaric practice on other women.

⁹⁵ See below text accompanying nn 117-41.

⁹⁶ I am labelling these feminists 'liberal feminists' because their main argument is that legislation is necessary to combat female genital mutilation. Thus they see legal change as a necessary catalyst for substantive change: see Elizabeth Sheehy, 'Personal Autonomy and the Criminal Law: Emerging Issues for Women' in Graycar and Morgan, above n 85, 40.

⁹⁷ NSW, *Parliamentary Debates*, Legislative Council, 10 March 1994, 463.

tion.⁹⁸ Similarly, 'Women Lawyers Against Female Genital Mutilation' called for legislation in its submission to the Family Law Council.⁹⁹ The main arguments these groups have for express legislation are contained in the Women Lawyers Against Female Genital Mutilation submission to the Family Law Council.¹⁰⁰

The Women Lawyers Against Female Genital Mutilation submission argues that there is some confusion as to the legality of female genital mutilation, and the applicability of child welfare procedures. This group believes parents may argue female genital mutilation is not 'child abuse'. Also, it claims that magistrates, lawyers and social workers would be assisted by a 'clarification' of the Children and Young Persons Act. The problem with this 'clarification' argument is that it has not been well researched. The Department of Health and Community Services clearly regards female genital mutilation as falling within s 63, and its new policy guidelines will most likely specifically state this.¹⁰¹ On the issue of consent, it has already been argued that the judiciary would be unlikely to accept this defence. Thus female genital mutilation is already illegal.

Another argument Women Lawyers Against Female Genital Mutilation use is that express legislation will mean that communities that engage in female genital mutilation must realise it is 'child abuse, a very serious assault, and further an abuse of their daughters' human rights.'¹⁰² Further, the submission argues that prospective migrants should know this before arrival in order to prevent legal uncertainty.¹⁰³ If Australia has no express legislation it may provide a 'legal haven' for those who engage in the practice.¹⁰⁴

These arguments fail to take into account the attitudes and characteristics of the communities involved. For example, my discussions with the Eritrean Community Women's Group and attendance at two of their training sessions¹⁰⁵ indicate relevant communities are aware that the practice is illegal. Moreover, the law has never held that ignorance is a defence. Why should it be a defence here?¹⁰⁶

Perhaps most distressingly, the arguments ignore the fact that communities in

⁹⁸ 'Action on Female Genital Mutilation' (1994) 1(10) *Australian Nursing Journal* 9.

⁹⁹ However, in informal discussions with a member from Women Lawyers against Female Genital Mutilation I was given to understand that their submission to the Family Law Council did not necessarily reflect the views of all members of their group. Moreover, the member in fact felt the media has polarised the debate on legislation by putting Women Lawyers Against Female Genital Mutilation on one side of the debate and community groups on the other.

¹⁰⁰ Women Lawyers against Female Genital Mutilation, above n 52, 8.

¹⁰¹ The Department of Health and Community Services presentations to the Eritrean Community Women's Group 28 May 1994 and 25 June 1994. See above n 36 for details on s 63.

¹⁰² Women Lawyers Against Female Genital Mutilation, above n 52, 5.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* 7.

¹⁰⁵ See below text accompanying nn 136-9.

¹⁰⁶ Certainly, relevant English authority indicates that it is no defence even if ignorance is due to a non-English origin or different cultural norms: see Sebastian Poulter, 'The significance of ethnic minority customs and traditions in English criminal law' (1989) 16 *New Community* 121, 122 noting that 'In determining the question of guilt English judges have decided to apply a uniform standard to all-comers, regardless of their origins, their cultural mores or their ignorance of English law.'

Australia affected by female genital mutilation are overwhelmingly *refugee* communities.¹⁰⁷ They are not *migrant* communities. They have usually had no choice as to which country gives them asylum; the very definition of refugee reflects a lack of choice.¹⁰⁸ Therefore there is no danger of Australia becoming a 'legal haven'.

The argument that legislation will have a deterrence value must be seriously questioned in light of overseas experience, particularly in Africa,¹⁰⁹ England and Wales¹¹⁰ and France.¹¹¹ Experiences in these countries suggest that legislation has not stopped the practice of female genital mutilation.

Also dubious is the claim in the Women Lawyers Against Female Genital Mutilation submission that an express prohibition on female genital mutilation will assist in education about female genital mutilation. Whilst this is possible, it is certainly unnecessary. Education about female genital mutilation can occur without legislation. In fact it may foster a better educative program if there is no express legislation because there would be less fear of the law amongst the affected communities, and less publicity.¹¹²

Similarly, the submission argues that if parents or the child herself do not wish

¹⁰⁷ The Ecumenical Migration Centre submission to the Family Law Council discusses this fact and its ramifications: Ecumenical Migration Centre, *Response to Family Law Council, Discussion Paper on Female Genital Mutilation/Circumcision* (1994) 3.

¹⁰⁸ See art 1 of both the Convention and the Protocol Relating to Status of Refugees, above n 47, which define a 'refugee' as 'any person who ... owing to a well-founded fear of being persecuted ... is outside the country of his [sic] nationality and is unable or, owing to such fear, is unwilling to avail himself [sic] of the protection of that country; or ... is unable or, owing to such fear, is unwilling to return to it.'

¹⁰⁹ Legislation outlawing female genital mutilation in Africa was unsuccessful: Boulware-Miller, above n 90, 158.

¹¹⁰ In relation to female genital mutilation, England and Wales passed express legislation: Prohibition of Female Circumcision Act 1985 (Eng). The London Black Women's Health Action Project reported that from 1985 to 1990 about 3,000 girls had been taken overseas where female genital mutilation was performed upon them. However the London Black Women's Health Action Project rejected proposals to amend the Act to make it illegal to take daughters abroad to undergo female genital mutilation. The London Black Women's Health Action Project believes 'the real solution seems to lie in education'. The group also note the 'conflict between health and civil liberties': London Black Women's Health Action Project and Tower Hamlets Health Promotion Service, *Silent Tears: Female Circumcision and the Law* (1990). Some commentators in the UK thus believe express legislation against female genital mutilation has driven the practice underground: see, eg, Julie Flint, 'Putting Rites to Wrong', *Guardian Weekly* (Manchester), 22 May 1994.

¹¹¹ France has no specific legislation outlawing female genital mutilation. Female genital mutilation is considered a mutilation for the purposes of art 312 of the Penal Code which penalises those who inflict violence upon children. France has utilised art 312. By 1993, ten cases relating to female genital mutilation had been dealt with in French courts. France is the only country in the world to imprison parents and excisers charged with voluntary mutilation of minors. However, the unfriendly reception by earlier immigrants from Mali living in France of Aminata Diop, who fled from her native country, Mali, to escape female genital mutilation, provides reason to believe that members of affected communities believe that female genital mutilation is indeed a central part of their culture. The implication of this is that they will avoid French law by taking their daughters back to Africa to be mutilated. This demonstrates that jailing offenders may not in fact eradicate the practice of female genital mutilation: see Walker and Parmar, above n 12, 261.

¹¹² The sensationalisation of female genital mutilation has had a negative impact on the education program that was occurring: Rosemary West, 'Agency Calls on Media to Back Off Circumcision', *Age* (Melbourne), 3 December 1993; Ecumenical Migration Centre, *Female Circumcision/Female Genital Mutilation: Information, Issues and Concerns* (December 1993) 3.

to proceed with female genital mutilation, then legislation will provide a network of protection. Legislation alone, however, cannot do this and will perhaps be used as an excuse to justify government inaction in this regard because it will be a cheaper and easier option than education programs. Moreover, the most supportive network is not going to centre around a government department.¹¹³ As the Ecumenical Migration Centre submission explains, many members of the relevant communities are fleeing from repressive regimes and are thus very wary of the state. Networks within the actual communities themselves will probably provide most support. These communities are already building such networks, as the example of the Eritrean Community Women's Group demonstrates.¹¹⁴

Finally, the Women Lawyers against Female Genital Mutilation submission argues that Australia's international obligations, such as CEDAW, require the express prohibition of female genital mutilation. Australia is party to various international instruments, which apply to female genital mutilation.¹¹⁵ It has been argued that these obligations make it necessary for Australia to press ahead with the prohibition.¹¹⁶ Australia is party to many conventions, most of which are not the subject of express legislation. CEDAW itself is one example. If this argument is applied, Australia also needs express legislation on paid family leave, violence against women, and children's rights. This is, among other things, a strategic argument that is not consistent with Australia's previous national policy. Moreover, many other countries are party to these conventions and have not felt it necessary to enact legislation in response to them on a domestic level.

Thus it seems that Women Lawyers Against Female Genital Mutilation and other liberal feminists advocating legislation are taking an overly simplistic approach to female genital mutilation. In order to eradicate female genital mutilation it is necessary to closely examine the context in which it occurs and listen to the women who are most affected by the practice.

A Contextualised Feminist Perspective

In Catharine MacKinnon's seminal work *Feminism Unmodified*,¹¹⁷ she articulates a 'subordination' approach as a tool to judge whether a law is beneficial for women. This 'subordination' principle has been used by many feminists as a tool of analysis, especially in relation to thorny legal questions. If applied to the dilemma about female genital mutilation and legislation, the subordination principle would pose the question 'how would legislation expressly prohibiting

¹¹³ Camilla Fawzi El-Solh, "'Be True to Your Culture": Gender Tensions among Somali Muslims in Britain' (1993) 12(1) *Immigrants and Minorities* 21. The author argues that government interference in the UK in the issue of female genital mutilation has sharply divided the community. The role that the Government has played has been one that has created distrust towards the Government amongst many Somalis.

¹¹⁴ See below text accompanying nn 136-9.

¹¹⁵ See above text accompanying nn 40-50.

¹¹⁶ A spokeswoman from the Department of Immigration and Ethnic Affairs raised this international obligation as necessitating legislation on female genital mutilation in an informal discussion with the author on 28 May 1994.

¹¹⁷ Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987).

female genital mutilation affect women?’

However, in applying MacKinnon’s approach, it is important not to overlook claims that her work is not sufficiently cognisant of differences among women. Angela Harris, for example, accuses MacKinnon of espousing a feminist essentialism.¹¹⁸ She argues MacKinnon universalises women’s experiences and does not recognise that women of different races experience their oppression differently. Harris claims that feminist essentialism paves the way for unconscious racism, and she accuses MacKinnon of not applying the subordination principle to her own work.¹¹⁹

But in a spirited defence of MacKinnon, e christi cunningham demonstrates how the subordination principle (and MacKinnon’s work) is not just applicable to white women.¹²⁰ She argues that male dominance is not just a ‘white’ thing. This domination does, however, take different forms.¹²¹ Accordingly, the subordination principle may be tentatively endorsed, taking account of the criticism that it must be sensitive to differences amongst women. I have labelled this qualified use of the subordination principle a ‘contextualised feminist approach’. The answers to the question posed under this approach — what impact on women would express legislation prohibiting female genital mutilation have — are, of necessity, dependent on context. Thus I will examine the women affected by the practice in Australia and question whether an express prohibition on female genital mutilation is empowering or oppressive.¹²² This contextualised approach avoids the charge of paternalism by drawing heavily on the views of those women who are part of the cultures that practice female genital mutilation. In fact, the conclusions of this approach build upon the initiatives the women in these communities have already taken.¹²³ The premise is that the women who have been most affected by the practice have the answers on how best to eradicate the practice.

Mari Matsuda has argued that in order to include the perspective of the subordinated the question needs to be asked: ‘who is not in this room, and why are they not here?’¹²⁴ In relation to female genital mutilation, we need to ask: ‘where are the voices of the women affected by the practice?’ The question has a disturbing answer because these women have been largely absent from the

¹¹⁸ Angela Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 581.

¹¹⁹ Marlee Kline has also criticised MacKinnon’s work for the lack of effect that ‘race specificities’ had in her work. Kline concludes: ‘MacKinnon’s focus on the experiences of white women would not be so problematic if she did not present her views as inclusive of the experiences and interests of *all* women’: Marlee Kline, ‘Race, Racism, and Feminist Legal Theory’ (1989) 12 *Harvard Women’s Law Journal* 115, 143.

¹²⁰ e christi cunningham, ‘Unmaddening: A Response to Angela Harris’ (1991) 4 *Yale Journal of Law and Feminism* 155.

¹²¹ *Ibid* 157.

¹²² Incidentally, it is also a method of examining claims that express legislation will be beneficial for the women affected by the practice.

¹²³ See below text accompanying nn 142-50.

¹²⁴ Matsuda points out that we ask this question both literally and intellectually: Mari Matsuda, ‘Pragmatism Modified and the False Consciousness Problem’ (1990) 63 *Southern California Law Review* 1763, 1765.

debate. This was perhaps most obvious in the preparation of the Family Law Council Discussion Paper in English when most of the affected women speak Arabic as their first language.¹²⁵

The Ecumenical Migration Centre's submission to the Family Law Council is an appropriate starting place for the application of such a contextualised feminist approach.¹²⁶ The Ecumenical Migration Centre has a close relationship with the Eritrean Community Women's Group. The Eritrean Community Women's Group has developed and conducted a community education project regarding female genital mutilation. This has mainly involved women from the Horn of Africa, notably Eritrean women.

The submission provides important background information on the women affected by the practice of female genital mutilation in Australia.¹²⁷ As stated previously, they are women who have migrated to Australia through the refugee and humanitarian program, mostly from the Horn of Africa region (Eritrea, Somalia, Ethiopia, Sudan). They have usually lived in Australia for five years or less and have fled from persecution in their country of origin. Some have been homeless for up to 20 years and many are now adjusting to a radically different culture in Australia. As a result, the women from communities affected by female genital mutilation are amongst the most marginalised in Australia.

The submission argues that the invisibility of these women has characterised the debate on the legislation. Many of them have had their first experience of the law in Australia through the debate on female genital mutilation.¹²⁸ Traditionally, it is a matter not openly discussed in their communities. To rush consultation or legislation will prejudice further discussion.¹²⁹

The submission discredits some of the attitudes underlying the immediate push for implementation of legislation to criminalise female genital mutilation. For instance, the belief that the law is the best vehicle for social change is disputed. The Ecumenical Migration Centre claims that overseas experience has demonstrated that legislation will not stop the practice. Sanctions would only punish women who have themselves undergone female genital mutilation.¹³⁰ It is vital to remember in the debate that female genital mutilation is a practice women do to other women. Thus 'perpetrators' are also 'victims'.

Another attitude the Ecumenical Migration Centre highlights is that proponents of legislation believe that Australians should stamp out the practice now and in their own way. There has been no recognition of the women's work, although greatly under-resourced, in their own communities to eradicate female genital mutilation. There is also the assumption that all women affected by

¹²⁵ It epitomises the complaint of Kline, above n 119, that:

[w]hite feminist legal scholars often tend to overlook the racial identity of the women whose experiences we are examining, analyzing or discussing, with the result that the specific experiences of women of colour are often rendered invisible in particular analyses.

¹²⁶ Ecumenical Migration Centre, above n 107.

¹²⁷ *Ibid* 3.

¹²⁸ *Ibid*.

¹²⁹ *Ibid* 4.

¹³⁰ *Ibid* 6.

female genital mutilation believe it should continue. This ignores the example of groups such as the Eritrean Community Women's Group and programmes conducted by women affected by the practice in Africa.

Another report in which the voices of women concerned can be heard is the Minority Rights Group report: 'Female Genital Mutilation: Proposals for Change', edited by Efua Dorkenoo and Scilla Elworthy.¹³¹ Dorkenoo is also the Director of FORWARD, which is a group working to promote good health amongst African women, with special emphasis on education against female genital mutilation. She is originally from Ghana. The Minority Rights Group Report is thus co-authored by an African woman with considerable experience in the campaign against female genital mutilation. The Report calls for 'education and persuasion of families and communities where female genital mutilation has been practiced' and views legal measures as a last resort.¹³²

The London Black Women's Health Action Project is even more strident in its opposition to legislation on female genital mutilation. It believes 'legislation alone cannot change people's minds about circumcision'.¹³³ Moreover if laws are 'seen as unjust and racist then groups like ours which are trying to initiate debate and to educate people about the dangers of the practice will be seen as attacking the communities and it will make our task all the harder.'¹³⁴ This is a view supported by Camilla Fawzi El-Solh's study of Somali Muslims in Britain.¹³⁵

My own observations and discussions with women who have experienced female genital mutilation and are living in Melbourne leads me to believe that an express prohibition on the practice will have a negative effect on these women. These observations, discussed below, come from two training sessions held by the Eritrean Community Women's Group.¹³⁶ The training sessions provided arguments against female genital mutilation from religious, health, and legal

¹³¹ The Minority Rights Group is a non-government organisation based in London.

¹³² Efua Dorkenoo and Scilla Elworthy (eds), *Female Genital Mutilation: Proposals for Change* (3rd ed, 1992) 39 ('Minority Rights Group Report').

¹³³ London Black Women's Health Action Project, above n 110.

¹³⁴ *Ibid.* The London Black Women's Health Action Project was to hold a conference 'Change without Denigration' in June 1994. The Government refused to fund the conference although it was the first time a Muslim leader (in this case Dr Zaki Badawi) in London had been convinced to deliver an address emphasising female genital mutilation had no foundation in Islam. As Sadia Ahmed claimed: 'Governments should put enough resources into educating people, without pointing fingers or putting them on the defensive There will be a time for punishment. But now is not the time. You don't use the stick without the carrot first. Most Somalis here are on income support, not sure of their status': Flint, above n 110.

¹³⁵ El-Solh, above n 113, 21. At 41-2 she comments:

All these gender tensions [within the Somali community] will tend to come to a head over the issue of eradicating infibulation [The task of groups working to eradicate it] has, not surprisingly, been rendered even more difficult by the statutory authorities' attempt to associate this ritual with child abuse and by the social services' decision to separate verified cases from their families and place them in foster care ... this subject continues to divide the Somalis.

¹³⁶ I realise that some writers have pointed out that Eritrean women are inclined to be more opposed to the practice than other African women because of the opposition of the Eritrean People's Liberation Front Army. The large number of girls in the army has been attributed to girls' running away from forced marriages and the 'knife': see, for instance, Boulware-Miller, above n 90, 167-8. The fact that Eritrea has now become independent will have interesting ramifications on the practice of female genital mutilation in Eritrea.

perspectives rather than a rights perspective. This approach was more concrete, and something the women could relate to. It was quite shocking for some women to realise that their religion does not require them to be circumcised.¹³⁷

The women involved in the training sessions were wary of express prohibition. Ms Meriem Idris said she believes that the criminalisation of female genital mutilation will mean that daughters will view their mothers and grandmothers as criminals.¹³⁸ This only serves to divide families. It also penalises women who are themselves victims of female genital mutilation. Another question that came up at the training sessions, and was further commented upon by Ms Munira Adam, was the fear of taking circumcised daughters to doctors for unrelated illnesses in case they were reported to the police or child welfare authorities. At both training sessions, the overwhelming concern by the women was that they would lose their daughters to welfare authorities.

These questions and answers (detailed below) are a result of my personal observations at two training sessions (28 May 1994, 25 June 1994). The questions were addressed to a representative from the Child Protection Department (Victorian Department of Health and Community Services). 'Q' indicates a question asked by an Eritrean or Somali woman, and the Department's answer follows on the next line. During the training sessions Ms Adam and Ms Idris translated the questions, which were in Arabic, into English.

In the first session, involving about 30 women, the room was fairly sharply divided in half. On one half sat the younger women dressed in Western clothing, and some other Western observers. On the other half of the room sat the majority of participants, who tended to be older and dressed in traditional Somali/Eritrean clothes. Most of the questions came from the younger women. In the second session, involving about 20 women, this changed. All of us sat in a circle and questions seemed to come from a wider group of the audience.

The following questions and answers from the training sessions reveal that the approach taken by the Department is redolent of liberal feminist attitudes, with legislation being used as a coercive mechanism. The Department also has a Eurocentric perspective, highlighted in its failure to consider the prospect of African foster families for African children. As a consequence of the Department's attitude, the women in the training sessions had very real fears about their daughters being taken away from them.

Q: 'By taking the child away from her family, are you protecting or punishing them?'

The Department's representative answered that removing a child from their

¹³⁷ On the '7.30 Report' (ABC TV, Melbourne, 28 June 1994) Ms Habon Sudi (Somali woman infibulated) said it was a 'shock' to realise that female circumcision is not a Muslim requirement. The International Women's Development Agency which has been heavily involved with African women campaigning against female genital mutilation in Africa also endorses the health approach: Keith Edwards, 'Campaign Against Genital Mutilation Heats Up', *Medical Observer*, 4 February 1994, 4.

¹³⁸ 'Genital Mutilation May Become Criminal Offence', *Age* 28 June 1994; also Evening News (ABC TV, Melbourne, 25 June 1994). Ms Idris is an Eritrean woman who is a project worker on the campaign against female genital mutilation being run by the Eritrean Community Women's Group.

family is a last resort. It is only when the child's safety cannot be guaranteed by the family. On these occasions it is better for the child to be removed, as it is protection of the child.

Q: 'Once you have taken the child, how is the child being protected when it is acting after the event?'

The Department's representative answered that nothing is finalised and this was only proposed policy which must be finally approved by the Minister. The Department's representative then proceeded to discuss mandatory reporting.

Q: 'When someone goes to the doctor they're seeking treatment not protection against the law. Firstly, the doctor should not be responsible for protection — they are a doctor, not the police. Secondly, the doctor should give treatment in health. So why should the doctor report? What is the point of mandatory reporting?'

The Department's representative answered that mandatory reporting did not relate only to female circumcision.

Q: 'What do you mean by protection? Who will it cover?'

The Department's representative answered that it would cover a child already circumcised who goes to the doctor and if there is some medically related problem that the mother does not follow up on, for example giving the child antibiotics, the doctor may then believe the child is in need of protection. The doctor needs to ring the department when as a result of that circumcision the child is in need of protection.

Q: 'Why have new legislation [mandatory reporting] when it [female genital mutilation] is already illegal?'

The Department's representative answered that mandatory reporting does not just apply to female circumcision.

Q: 'How would you prevent circumcision?'

The Department's representative answered that they would be relying on people and educating them that it is illegal in Australia, and that it is harmful. Their goal would be to work hard with the family, and rely on the family's own community to educate them about female circumcision.

Q: 'What if there is no co-operation?'

The Department's representative answered that whether it was female circumcision or another harm, if there is no co-operation and a serious risk, they have authority to take the matter to the Children's Court — but that this only happens with about five per cent of the children they are working with.

Q: 'Under child protection, is that removal of a child from the home?'

The Department's representative answered that they only remove a child from the home if the situation is very serious. If so, they go to court the next day. The magistrate then decides whether the child goes back or stays out for a short period of time.

Q: 'Has Community Services a clear understanding of cultural values and background people came from and the relationship of a child with its mother?'

The Department's representative answered that Australia still has lots to learn. The Department has to keep learning and if they do take the child they do try and make it as easy as possible with the parents visiting as often as possible. The children are usually placed in foster care.

Ms A: 'Is it possible to place children in African [foster] families? Do you have any African families?'

The Department's representative replied that they could not answer how many African families they had as foster families.

Ms A: 'Do parents or child have a choice [of foster family]?''

The Department's representative answered that there was very little choice, but that it was the best they could get. It might not be an African family.

Ms A: 'But this is not good [to be placed] with European family and culture.'

The Department's representative replied it was usually very short term — from one day to three weeks. If it was a long term placement they would work hard to get a family religiously and culturally appropriate and work hard within the African community.

In a discussion on legislation:

Ms A: 'Before implementation of the law, is there going to be a campaign so everyone is 100 per cent aware [of the illegality of female genital mutilation]?''

The Department's representative answered that female genital mutilation is a new issue for Health and Community Services as well. When the policy is finalised they will have a comprehensive package for mandatory notifiers. They are close to finalising the policy. Over the next month to six weeks, the policy will be finalised. There is limited opportunity for consultation prior to policy-making.

Q: 'If this is based on limited consultation how can it be good policy?'

The Department's representative replied that it was important to distinguish between law and policy. They were talking about child protection policy. The law has existed for a long time. They were not talking about a new Act.

Q: 'We are refugees and need time to solve our old problems, not [deal with] new problems.'

The Department's representative answered that their job was to look at risk issues to children. One question would be how long they could wait for other problems to be sorted out? It was a difficult issue.

Q: 'Why do we need new legislation in Australia if it is already illegal?'

The Department answered that one school of thought believed new legislation would make it clear that it was an unacceptable practice in Australia. So they were looking at the notion of specific legislation. But, also, it would be consistent with international treaties. A representative from the Department of Immigration and Ethnic Affairs at the workshop added that it was to clarify the law about whether the practice was illegal.

Ms C: 'Is there any privacy in the home? If protective services comes do we have to answer the door?'

The Department replied no. They are not the police and cannot force their way into your house. But if there was information about something serious occurring then they can have the help of police and/or courts to go into the house. But usually it is worked out by negotiation, working together.

Ms D asked me: 'If the Department [Department of Health and Community Services] finds out that a girl has been circumcised do they have to tell the police?'

Ms E, the oldest woman present in the June session, made only one remark, which was at the conclusion of the session, also the conclusion of the training program: 'We've done enough of this stuff [female circumcision] back home. We're not going to circumcise any more children in Australia.'

Participants and workers at the program felt that it was a success. As Ms Adam said: 'When we began the women asked why we needed to do this. Now they are saying they won't circumcise their daughters.' The sessions also combat the problem of girls being taken back to their country of origin to be circumcised because their mothers no longer believe that the practice should continue.

One of the difficulties of a contextual approach is that the differences amongst the women who have undergone female genital mutilation must themselves be acknowledged. There are not just differences between women from different countries, but also differences amongst women from different regions. One of the most frustrating things for some of these women is being typecast as '*the African woman*'. For instance, footage on ABC News had Eritrean women talking about female genital mutilation whilst news footage used a 'file tape' of Somalis undergoing female genital mutilation.¹³⁹

A contextualised examination of the issue highlights the need for education and the dangers of laws expressly prohibiting female genital mutilation. In terms of education, the most successful program will tie in health and religious aspects of female genital mutilation, as the Eritrean Community Women's Group program has. As Kay Boulware-Miller notes, the health approach 'is likely to have the most success because it considers the practice from the perspective of Africans.'¹⁴⁰

The endorsement of education empowers the women affected by the practice. It does this by building on the initiatives that women opposing the practice in those communities have already taken. However, the education approach also recognises that the practice has been harmful to women, and therefore needs to be discontinued. This may be compared with a 'legislation' approach which would in fact disempower women, in the most severe cases by removing girls from their families and jailing parents.

A contextualised approach also raises serious doubts about whether the inter-

¹³⁹ Evening News (ABC TV, Melbourne, 25 June 1994). Some of the Eritrean women seemed angry at this, others were more bemused by the evidence of the ignorance about their customs.

¹⁴⁰ Boulware-Miller, above n 90, 176. She critically analyses the human rights approach and its problems in eradicating female genital mutilation; at 165-72. She then examines the 'right to health' approach; at 172-6. One problem with the latter approach is that female genital mutilation can be 'hospitalised' and therefore done 'surgically'. However this can be overcome by the education of professionals, who should realise the long-term health complications of the procedures.

vention by Women Lawyers Against Female Genital Mutilation in the Children's Court case was the appropriate strategy. The group should have first consulted with community groups, such as the Eritrean Community Women's Group, before giving statements to the media. At a recent conference, there was a workshop on female genital mutilation and legislation. This descended into an argument between the Women Lawyers against Female Genital Mutilation spokeswoman and members of the Eritrean and Somali communities. In exasperation at being ignored, an Eritrean woman implored; 'Listen to Us!'¹⁴¹ If we listen to the women in the communities affected, Australians can learn how to combat female genital mutilation here.

FUTURE DIRECTIONS

Legislation outlawing female genital mutilation in Australia is unnecessary. The extension of criminal laws is unwarranted because existing laws cover female genital mutilation. Moreover, the state should not even utilise criminal law in relation to female genital mutilation until educational campaigns directed at those communities affected by the practice have had sufficient opportunity to take effect. This is because the enforcement of criminal sanctions against those who practice female genital mutilation in Australia will not eradicate the practice. This position is supported by the Ecumenical Migration Centre and others.¹⁴² K Hayter has raised some of the problems with the Prohibition of Female Circumcision Act 1985 (Eng). Hayter's arguments are based on the fact that the legislation is directed towards a minority group, and is therefore inherently problematic.¹⁴³ His criticisms could also be applied to the New South Wales and South Australian Acts which are very similar to the English Act.

Funding should be given to community health centres and relevant ethnic women's groups to conduct educational campaigns.¹⁴⁴ The Ecumenical Migration Centre suggests the government allocate resources to continue and expand existing community education programs and establish new ones. In order to be effective, the programs need to be formulated by, and focus on, women affected by the practice.

¹⁴¹ 'Unanswered Questions on Female Genital Mutilation Conference', above n 6. The woman who made this statement, Ms B, has herself undergone excision and was unable to read out a statement she had written for this workshop. She had helped to organise the workshop and has been working within her community against female genital mutilation. The workshop was chaired by a spokeswoman from Women Lawyers Against Female Genital Mutilation.

¹⁴² For example, the Chairman of the Ethnic Affairs Commission of NSW, Mr Stepan Kerkyasharian, 'said rushing to ban FGM [female genital mutilation] was not the solution': Helen Signy, 'The Unkindest Cut', *Sydney Morning Herald* (Sydney), 26 February 1994.

¹⁴³ See Hayter, above n 28, 325, 332.

¹⁴⁴ The Family Law Council Report concludes that education must be the first priority: Family Law Council, above n 3, 40-1. The success of the legislation, in the long-term, will depend upon Recommendation 1 (education). If this recommendation is to be followed by the government it must be implemented rather than remaining a statement of policy. That is, it needs government commitment supported by adequate resources. The danger is that the simpler and quicker 'solution' (legislation) may be the only recommendation accepted.

There should be a national strategy/policy.¹⁴⁵ This would allow the Australian states to have a uniform approach, co-ordinated at the national level. Health Departments on a federal and state level should have policy statements (preferably uniform) on female genital mutilation. They should state that female genital mutilation does not constitute the sexual abuse of children.¹⁴⁶ At present, state intervention under child welfare legislation is mostly counter-productive. It tends to punish the victim (by isolating her from her family), rather than the offender. The only basis for intervention should be that it is probable that female genital mutilation is going to occur, and the parents refuse to rule out this possibility. All possible information should be made available to the parents about the harmful consequences of female genital mutilation.¹⁴⁷ The Ecumenical Migration Centre has requested that women from the relevant communities be consulted about relevant child protection issues prior to any child protection policy or legislation being formulated.¹⁴⁸

There should be training for professionals who deal with women affected by female genital mutilation, such as health workers, immigration officers, teachers and lawyers.¹⁴⁹ Also, funding needs to be given to programmes for those women who have undergone female genital mutilation and wish to seek assistance 'including gynaecological/psycho-sexual help, together with individual and community counselling.'¹⁵⁰

CONCLUSION

The issue of female genital mutilation in Australia presents state and federal governments with an opportunity to listen to the voices of women in a minority culture in a supposedly multi-cultural country. Female genital mutilation also gives the feminist movement here a chance to demonstrate that feminism is not ethnocentric, and may truly embrace women of all cultures. Silencing women

¹⁴⁵ The Family Law Council also recommended the development of child protection protocols by the Joint Health and Community Services Ministerial Council: *ibid* 58.

¹⁴⁶ Female genital mutilation does not fit into the definition of sexual abuse: 'Sexual abuse is defined as the involvement of dependent, developmentally immature children and adolescents in sexual activities which they do not comprehend, to which they are unable to give informed consent and which violate social taboos or family roles': K Kempe and R Kempe, *Child Abuse* (1978) quoted in Margaret Moody, 'Child Sexual Abuse: What's it all about?' (1988) 10(3) *Law Society Bulletin* 73. Moreover, female genital mutilation does not seem to fit into other behavioural norms of child sexual abuse as described by Moody.

¹⁴⁷ The issue of female genital mutilation and child welfare legislation is a complex one and could be the subject of further research. It is important, however, to note that there are alternatives to removing a child from their home, such as mandatory counselling or mandatory medical checks on those considering female genital mutilation.

¹⁴⁸ Consultation should especially occur on the consequences of mandatory reporting, the notion of consent, the issue of de-infibulation, and state intervention.

¹⁴⁹ Since the Eritrean Community Women's Group has begun training sessions on female genital mutilation, it has been inundated with requests from professionals on information pertaining to female genital mutilation. The group has requested more funding in order to be able to put together kits for these professionals. The Ecumenical Migration Centre currently has information kits available on female genital mutilation.

¹⁵⁰ Dorkenoo and Elworthy, above n 132, 39. The Family Law Council Report also recommended there be provision must for counselling and support services: Family Law Council, above n 3, 60.

from those cultures which practice female genital mutilation because they have been 'oppressed' is tantamount to paternalism. As Kay Boulware-Miller has pointed out:

Although Western women often view female circumcision as a blatant violation of women's rights, many African women value the practice as an important cultural tradition. Because African women practice, defend, and perpetuate female circumcision, a campaign to eradicate it must consider their views to be successful.¹⁵¹

A contextualised feminist approach recognises that the women affected by the practice also hold the key to eliminating it. Such an approach leads to the conclusion that Australia should endorse the education option and reject express legislation on female genital mutilation.

¹⁵¹ Boulware-Miller, above n 90, 155.