Female Genital Mutilation and Statutory Construction

Cecilia Curtis reports on *The Queen v A2; The Queen v Kubra Magennis; The Queen v Shabbir Mohammedbhai Vaziri* [2019] HCA 35

Arising from the first prosecution of its kind in Australia ([2019] HCATrans016), the High Court held in *The Queen v A2; The Queen v Kubra Magennis; The Queen v Shabbir Mohammedbhai Vaziri* [2019] HCA 35 that for the purposes of the crime of female genital mutilation under s 45(1) of the Crimes Act 1900 (NSW):

- the word 'mutilates' does not carry its ordinary meaning but, rather, means to injure to any extent; and
- the word 'clitoris' includes the clitoral hood or prepuce.

Three judgments constituted the majority of the Court (Kiefel CJ and Keane J; Nettle and Gordon JJ; and Edelman J). Nettle, Gordon and Edelman JJ agreed with the judgment of Kiefel CJ and Keane J and provided some additional reasons for preferring the construction of s 45(1) advanced by the Crown. Bell and Gageler JJ dissented. The decision of the majority turned on taking a purposive approach to statutory construction.

Background

In 1994 the *Crimes (Female Genital Mutilation) Amendment Act* 1994 (NSW) was passed. It created a specific offence of female genital mutilation. That offence is contained in section 45(1) of the *Crimes Act* 1900, which renders any person who *'excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person'* liable to imprisonment.

The three defendants were tried on an indictment charging them with offences under that section. All of the charges arose out of allegations that two girls, C1 and C2, had been subjected to a ceremonial procedure known in the Dawoodi Bohra community as 'khatna', which procedure involved the 'cutting' or 'nicking' of the clitoris. Kubra Magennis was a nurse who was alleged to have actually carried out the procedure. A2 is the mother of the girls. The Crown case was that Magennis and A2 were in a joint criminal enterprise to perform the procedure. Vaziri was a spiritual leader

within the community who was charged with being an accessory after the fact.

The Crown case was that the procedure that had been carried out involved a 'cut' or a 'nick' to the clitoris or the clitoral hood (or prepuce). The defendants were convicted by a jury, having been directed that the word 'mutilate' means 'injure to any extent' and includes a 'cut' or a 'nick'. On appeal, the NSW Court of Criminal Appeal (*A2 v R; Magennis v R; Vaziri v R* [2018] NSWCCA 174) quashed the convictions on the basis (inter alia) that:

- the word 'mutilates' should be given its ordinary meaning of 'injury or damage that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion'; and
- the term 'clitoris' did not include the clitoral hood or prepuce.

The Crown appealed to the High Court.

The three majority judgments

Kiefel CJ and Keane J said that although statutory construction 'commences with a consideration of the words of the provision itself', it 'does not end there' and that the taking of a literal approach to statutory interpretation has 'long been eschewed by this Court' (at 10). Their Honours said that the ordinary meaning of a word may, by its context, have a different legal meaning (at 11). Context involves a consideration of the mischief which the provision in question sought to remedy and its purpose (at 11).

Their Honours held that the heading of the provision ('Prohibition of female genital mutilation') and the Second Reading Speech identified the mischief the provision was designed to address and its purpose. The Second Reading Speech, in particular, indicated that the provision was intended to implement the recommendations of a report on female genital mutilation published by the Family Law Council (the FLC report). That report referred to four categories of 'female genital mutilation' and recommended that all four be outlawed. Those four categories included, in ascending order of seriousness, 'ritualised circumcision' (purely ritual or involving a 'nick' or scrape to the clitoris), 'sunna' (removal of the clitoral prepuce or hood), 'clitoridectomy' (removal of the entire clitoris) and 'infibulation' (removal of all external genitalia and the sewing together of the labia majora).

Their Honours concluded that the ordinary meaning of the term 'mutilates' had to be displaced by a broader meaning in order to give effect to the purpose of s 45, being the outlawing of 'female genital mutilation in all its injurious forms' (at 17 and 18). It therefore means to injure to any extent.

As to the meaning of 'clitoris', their Honours held that, taking a similarly purposive approach to the provision, it had to be understood as including the clitoral hood or prepuce (at 21).

Nettle and Gordon JJ agreed with Keane CJ and Kiefel J and but added that there were other considerations militating in favour of the broad construction of the term 'mutilates', including (at 49-50):

- the terms of the section itself do not speak of the infliction of irreparable damage;
- the section proscribes mutilation of 'any part' of the clitoris and there is no textual basis to make the 'vanishingly subtle distinction' between the 'excision' of a part of the clitoris (which would fall within the terms of the section on the Court of Criminal Appeal's construction) and its 'cutting' or 'nicking'; and
- excluding conduct which constitutes a 'cut' or a 'nick' from the provision would

deprive the words 'otherwise mutilates' and 'any part' of 'any meaningful work to do'. The terms 'excises' and 'infibulates' capture the last three forms of female genital mutilation referred to in the FLC report (namely 'sunna', 'clitoridectomy' and 'infibulation'). The first form, on the other hand, is captured by the term 'otherwise mutilates'.

Edelman J agreed with the reasons of both of the other majority judgments but also specifically rejected the argument that the words 'female genital mutilation' should be regarded as 'frozen in time' such that they could only bear the meaning available when the provision was enacted. His Honour relied on the principle of statutes 'always speaking', meaning that '[w]here legislation does not expressly delimit the scope of its application then its scope is usually to be determined by the contemporary application of its essential meaning that will best give effect to its legislative purpose' (at 57). His Honour said that no matter what was understood about the practice of female genital mutilation as expressed in the Second Reading Speech, the essential meaning of 'otherwise mutilates' captures any tissue damage to the genitals of female children. This was an argument that had not been advanced by the Crown (see judgment of Bell and Gageler JJ at 44).

Bell and Gageler JJ dissented, concluding that the extrinsic material did not support the contention that the expression 'female genital mutilation' had acquired a meaning that encompassed ritualised practices as at the date of the Amending Act (at 140). Their Honours rejected the proposition that the principle that an Act is 'always speaking' contemplates that conduct that did not give rise to an offence at the time the offence was enacted could become an offence (at 141). Their Honours held that giving the words 'otherwise mutilates' their ordinary meaning could not be said to not promote the purpose or object of the Act (at 145), since it proscribed the three forms of female genital mutilation identified in the Minister's Second Reading speech. BN