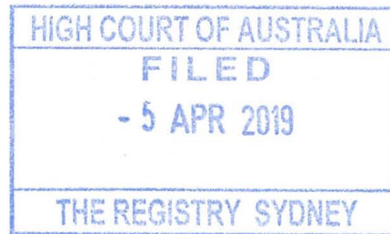
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S43 of 2019
No. S44 of 2019
No. S45 of 2019



BETWEEN:

The Queen
Appellant

10

and

A2
Kubra Magennis
Shabbir Mohammedbhai Vaziri
Respondents

APPELLANT'S SUBMISSIONS

Part I: Certification

20 1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. These appeals raise two issues as to the proper construction of s 45(1)(a) of the *Crimes Act 1900* (NSW):

    i. Do the words "otherwise mutilates" require proof of injury or damage which renders the labia majora, labia minora or clitoris of another person imperfect or irreparably damaged in some way?

    ii. Does the word "clitoris" encompass the clitoral hood or prepuce?

30 **Part III: Section 78B Notice**

3. The appellant does not consider that notice is required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

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Part IV: Judgment below

4. The appellant appeals against part of the judgment of the New South Wales Court of Criminal Appeal (**CCA**) (Hoeben CJ at CL, Ward JA and Adams J) in *A2 v The Queen; Magennis v The Queen; Vaziri v The Queen* [2018] NSWCCA 174.

Part V: Statement of facts

5. By an indictment dated 14 September 2015, A2 and Ms Kubra Magennis (**Magennis**) were charged with having "mutilated the clitoris" of C1 and C2, contrary to s 45(1)(a) of the *Crimes Act* (Joint Core Appeal Book (**AB**) 2-3).[1] The offences against C1 were said to have occurred between 18 October 2009 and 29 August 2012. The offences against C2 were said to have occurred between 1 January 2012 and 29 August 2012. Mr Shabbir Mohammedbhai Vaziri (**Vaziri**) was charged with assisting A2 and Magennis following the commission of those offences (AB 4-5). The respondents pleaded not guilty to the charges (AB 6).

6. In a pre-trial ruling,[2] the trial judge (Johnson J) concluded that "physical injury to [any] extent to the female genital organs, which is done for non-medical reasons, can amount to mutilation for the purposes of s 45" of the *Crimes Act* (AB 41 [110], 86 [258]). His Honour also concluded that the word "clitoris" is capable of referring to the prepuce of the clitoris (AB 89 [270]). The trial proceeded on the basis that the offences could be established by proof, beyond reasonable doubt, of a cut or nick to the clitoral prepuce and the jury would be directed as such (see AB 11 [5]).

7. The evidence at trial was that A1 and A2, respectively the father and mother of C1 and C2, were members of the Dawoodi Bohra community (AB 351 [2]). Vaziri was a spiritual leader of that community (AB 354 [11]). The Crown alleged that members of the Dawoodi Bohra community observe a practice of female genital mutilation known as "khatna", which involves the cutting or nicking of the clitoris of young girls usually around the age of seven (AB 354 [14]). It was alleged that Magennis, who was trained as a nurse and midwife, performed khatna ceremonies for members of the community (AB 354 [11], 371 [75]).

[1] Alternative charges of assault occasioning actual bodily harm, contrary to s 59(2) of the *Crimes Act*, were also included on the indictment.

[2] *R v A2; R v KM; R v Vaziri (No 2)* [2015] NSWSC 1221 (AB 8ff).

8. A2 and Magennis admitted that Magennis had performed an "examination and symbolic ceremony" on C1 and C2 at A2's request which had involved Magennis making some contact with the genital area of each girl (AB 355 [15], 394 [167]). The defence case was that this symbolic ceremony involved "no damage, injury or other physical intervention falling within the relevant statutory" language (AB 394 [166]).

Evidence of C1

9. On 29 August 2012, following an anonymous report to the Department of Family and Community Services, members of a Joint Investigation Response Team (**JIRT**) interviewed C1 and C2 at their primary school (AB 356 [19]-[20]). The recorded interviews were adduced as evidence at trial.[3]

10. In her interview, C1 said, at first, that she did not know what khatna is. She then said she "might know" because "maybe [she] heard of it" at her cultural school (AB 357 [23]). Thereafter, the following exchange occurred (AB 358 [24]):

> "Q Well I heard that it means, um, that it's something that some young girls have, and it's like a type of cutting to the private part.
> A Yeah, it is.
> Q It is. How do you know that?
> A Because it's happened to me."

11. As the CCA observed, although the interviewer introduced the idea of "cutting", C1 volunteered that it had happened to her (AB 358 [25]). C1 recalled that she was seven years old when it happened; that it happened in Wollongong; and that her mother, grandmother (A5) and great aunt (A3) were present (AB 358 [26]-[27]). She said she was "nervous about it". C1 remembered lying on a bed and being told to close her eyes and imagine she was a princess in a garden. Before she did so, she saw "all the people around" her who were there "to just calm [her] down" (AB 358-359 [28]-[29]).

12. Asked what happened when she closed her eyes, C1 said "[i]t hurt … in the private part". Afterwards, C1 drank lemonade and had a shower. She was scared to have a shower because she thought it would hurt, but it did not (AB 359 [30]-[31]).

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[3] *Criminal Procedure Act 1986* (NSW), Part 6, Division 3.

13. C1 said they ate lunch at the house of the lady "who did it for [her]" (AB 359 [31]). She said she last saw that lady "when she had to do that thing to my sister". As the CCA noted, the disclosure that the same "thing" had happened to C2 was "unprompted" (AB 360 [34]). C1 provided details of that occasion, including that it occurred at her own home; that she thought it happened that year; that her mother and aunt (A4) were present; and that she (C1) had watched television with the lady's grandson while C2 was upstairs (AB 360 [34]).

14. Finally, C1 was asked to "explain exactly what happens" and she said "they give um, a little cut there ... [i]n your private part". She said she was "not used to talking about it" because A2 told her "not to go around telling everyone" (AB 360 [35]).

15. C1 gave further evidence at trial. She added that, at the time the procedure was performed on her, she saw Magennis holding "a silver toolish thing" that looked a bit like scissors (AB 394 [168]). She also said she did not see any blood (AB 395 [169]). In cross-examination, C1 described that during the procedure she felt "a bit of pain and then a weird sort of feeling" in her private part. She said the pain was "like [she] got a pinching or a cutting". In re-examination, C1 said: "I don't really think it was a pinching, it just felt a bit like it ... I'm not completely sure if it was cut, although it is most likely it was cut" (AB 395 [169]).

Evidence of C2

16. When interviewed by members of the JIRT, C2 was six years old and had been diagnosed with a mild intellectual disability (AB 361 [36]-[37]). C2 shook her head and said "no" when asked whether a lady had come to her home to do something special for her and whether she knew what khatna was. The crucial exchange was as follows (AB 362 [40], [42]):

"Q We heard that you had had a cut on your private parts. Is that true?
A Yes.
Q Yeah. When was that?
A I don't know.
Q You don't know when it was. Where were you when that happened?
A Home.
...
Q ... So what did you feel when it happened?
A Hurting.
Q Hurting. Where did it hurt?
A In my bottom."

17. C2 said that this did not occur on a school day; that it happened in her parents' room; and that she was lying down on cushions which she thought were white (AB 362 [41]-[42]). C2 responded to further questions by saying that she did not know or did not want to talk about it (AB 363 [43]-[44]).

18. C2 also gave oral evidence at trial, by which time she was nine years' old. That evidence was to the effect that she could not recall what happened, or that she did not "want to say" (AB 395-396 [172]-[173]).

19. The CCA concluded, contrary to the trial judge's ruling,[4] that C2 was not competent to give sworn evidence for the purposes of s 13(3) of the *Evidence Act 1995* (NSW) (AB 593 [879]-[880]), but that C2 was competent to give unsworn evidence, if informed of the matters in s 13(5) of the *Evidence Act* (AB 592-593 [877], [881]).[5]

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Lawfully recorded conversations

20. On the afternoon of 29 August 2012, a conversation was recorded between A2 and her daughters. By this time, A2 had been asked to attend an interview with the JIRT (AB 364 [45]). A2 asked what C1 had spoken about with "the lady" at school. A2 said: "you told them everything … Now we are in big trouble … We told you my child this is [a] big secret, never tell anyone" (AB 364 [48]). Later, there was a conversation also involving A1 in which C1 referred to being "cut". A1 insisted that C1 was not cut. In response, C1 said she saw scissors. (This was the first reference to scissors.) The CCA described this conversation as giving "rise to the obvious inference that A1 was attempting to dissuade C1" from her account (AB 368 [62]-[63]).

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21. On the same afternoon, A1 was recorded telephoning Vaziri. A1 said to Vaziri that C1 had told police "everything that circumcision – kharanat [sic] has happened here" (AB 365 [50]). Vaziri and A1 discussed telling police that the family had travelled to Africa and that it might have happened during that trip. This conversation was the genesis of what was described by the CCA as the "Africa checking story" (AB 365 [51]-[53]). Shortly afterwards, A1 telephoned Magennis. A1 said that he would tell police that "they did not perform circumcision … [but that] they went to

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[4] *R v A2; R v KM; R v Vaziri (No 4)* [2015] NSWSC 1306.

[5] Consistent with authority, the differences between sworn and unsworn evidence will not necessarily impact an assessment of the reliability of that evidence: see *The Queen v GW* (2016) 258 CLR 108 at [55]-[57].

Africa where it was possibly done, so they called Magennis to check the complaints, to make sure that nothing had been done to them". Magennis said she was happy for A1 "to go that way" (AB 367 [59]).

22. A1 agreed in evidence at trial that the Africa checking story was fabricated (AB 398 [180]). A2 and Magennis variously adopted that story and the jury was instructed that a consciousness of guilt could be inferred from the advancement of such lies (AB 602 [906], 610 [932]).

23. At around 4:00pm on 29 August 2012, A1 and A2 were recorded having the following conversation in the JIRT office, while waiting to be interviewed (AB 370 [72]):

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> "A1: In us do they cut skin?
> A2: um…
> A1: or do they cut the whole clitoris?
> A2: No they just do a little bit … just little …"

A1's evidence was that this conversation was about the practice of khatna in the Dawoodi Bohra community generally (AB 397 [176], 399 [185]).

24. On 30 August 2012, Magennis and A2 spoke about the complainants undergoing a medical examination. Magennis was asked "[i]s there any way they know about it that it happened?" and she replied "No.. Because the way I do no one knows even little bit". Magennis told A2: "No one knows even anything happened here. If they asked. You can say kids are playing on swings, they play in the garden. Graze can happen if they fall" (AB 379 [106]).

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25. At various times, conversations were recorded between A1 and A2 and their family members which included references to khatna (or khatanat) and/or circumcision in relation to C1 and C2 (see AB 369 [69], 370 [70], 373 [82], 375 [91], 391 [153]).[6]

Evidence of family members

26. At trial, A1 gave evidence that A2 had explained to him that the khatna ceremony performed on his daughters involved the "placing [of] forceps in genitalia and some Koranic verses prayed" (AB 396 [175]). A3 gave evidence that she attended the ceremony performed on C1, but did not watch and did not know what it involved

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[6] Evidence was given at trial by interpreters of Gujarati and Lisan-al-Dawat to the effect that "khatna" and "khatanat" refer to circumcision: AB 415-416 [252], [254]-[255].

(AB 400-401 [190], [193]). She said C1 appeared "quite calm" and there was no blood on the bed afterwards (AB 400 [191]). A5's evidence was to similar effect. She described what happened as both a "check-up" and a "symbolic procedure". But she said she did not see or know what happened (AB 401-402 [195], [197], [200], 403 [206]).

Medical evidence

27. Dr Marks examined C1 and C2 on 3 September 2012 at Westmead Children's Hospital (AB 404 [208]). Dr Marks observed that the external genitalia of C1 and C2 appeared normal: there was no evidence of scarring (AB 406-407 [218]-[219]).
10 She noted that she could not visualise the clitoral glans or head. Dr Marks said she would expect the examination findings to be normal because cuts to the skin of the clitoral area can heal without scarring or long-term evidence (AB 405 [211]-[212], 408 [224]). Dr Marks' evidence was that there could have been "a cut to the clitoral hood that had healed and not left a scar, or ... a cut to the clitoral head itself that did not result in any appreciable change" (AB 407 [223]). The examination findings neither confirmed nor disproved the allegation of cutting (AB 408-409 [224], [226], [229]).

28. Professor Jenkins, a specialist obstetrician and gynecologist, gave evidence that, in his experience of examining adult women who have undergone female genital
20 mutilation procedures, overt changes to their anatomy are "broadly speaking, not obvious at all" (AB 410 [233]). He agreed that Dr Marks' observations neither supported nor excluded the happening of female genital mutilation in these cases (AB 411 [234]).

29. Professor Grover, a specialist in paediatric gynaecology, gave evidence that she would expect a cut to the clitoris to be painful and, usually, to bleed. She accepted that the clitoral area heals rapidly, possibly without scarring (AB 413-414 [245]-[247]).

30. Before the CCA, the respondents adduced new medical evidence to establish that, on 8 January 2016, the tip of the clitoral glans or head was visible on examination of
30 each complaint (AB 443-444 [347]-[351]). This evidence excluded the possibility that the tip of the clitoral glans or head had been removed from C1 and/or C2 (AB 444 [352]). Dr Marks had identified this as a possible explanation for why she

could not visualise the clitoral glans or head during the examinations in 2012 (AB 442 [343]). Because one of the bases on which the offences were left to the jury was disproved by the new evidence, the CCA considered that a potential miscarriage of justice had occurred (AB 466 [358]). The appellant does not challenge that conclusion in this Court.

Evidence of Dr X

31. Evidence from Dr X was admitted at trial pursuant to s 79 of the *Evidence Act.*[7] The CCA found that Dr X's evidence as to the hierarchical structure of the Dawoodi Bohra community and the static nature of the practice of khatna in the community[8] should not have been admitted (AB 546 [713]-[714], 549-550 [724]-[725]). This conclusion is not now challenged.

Evidence of Magennis

32. Magennis gave evidence that, when living in England, she had been asked by members of the Dawoodi Bohra community to perform khatna ceremonies, which she understood to involve nicking the skin (AB 430 [304]). (It is relevant in this respect to note also that A2 stated, in her police interview, that the practice in the Dawoodi Bohra community was for "a bit of skin [to be] removed" (AB 372 [76]).) Magennis then described a symbolic form of khatna involving a "ceremony of touching the edge of the genital area of skin allowing the skin to sniff the steel" (AB 431 [305]). She said she did this to C1 and C2 using forceps. She also said that she might have touched C1 "a little harder" because her diabetes caused her hands to tremble (AB 432 [309]-[310]).

Procedural history

33. On 12 November 2015, the jury returned verdicts of guilty to the charges under s 45(1)(a) of the *Crimes Act.* Justice Johnson imposed aggregate sentences of 15 months' imprisonment, with a non-parole period of 11 months, to be served by way of home detention on A2 and Magennis.[9] Vaziri was also sentenced to

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[7] *R v A2; R v KM; R v Vaziri (No 3)* [2015] NSWSC 1264. See AB 526-528 [643]-[649].

[8] See AB 422 [275]. That the Dawoodi Bohra community is hierarchical seems not to have been disputed by the respondents: AB 354 [13]. There was also other evidence supporting this proposition: see AB 380 [111].

[9] *R v A2; R v Magennis; R v Vaziri (No 23)* [2016] NSWSC 282 at [193]-194], [200]-[201] (AB 271); *R v A2; R v Magennis; R v Vaziri (No 24)* [2016] NSWSC 737 at [122], [126] (AB 311-312).

15 months' imprisonment, with a non-parole period of 11 months. But his Honour declined to order that the sentence be served by way of home detention.[10] Each sentence commenced on 9 June 2016.

34. By notices of appeal dated 15 February 2017, the respondents appealed against their convictions on 11 grounds. Vaziri also sought leave to appeal against his sentence.

35. On 10 August 2018, the CCA quashed the respondents' convictions and entered verdicts of acquittal on all counts.

Part VI: Argument

10 Meaning of "otherwise mutilates" in s 45(1)(a) of *Crimes Act*

36. The CCA reasoned that "mutilates" in "its ordinary meaning connotes injury or damage that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion", and there is nothing in the context of s 45(1)(a) of the *Crimes Act* to justify, warrant or permit a construction of "mutilates" that is broader than its ordinary meaning (AB 486 [495]-[497], 493 [521]). In the appellant's submission, this reasoning bespeaks the error in how the CCA approached the task of construing s 45(1)(a).

37. It is wrong to place upon contextual and purposive considerations the burden of displacing or rebutting what is otherwise thought to be the "ordinary meaning" of the
20 statutory language. As Crennan, Kiefel and Bell JJ said in *Monis v The Queen* (2013) 249 CLR 92 at [309]:[11]

> "[t]he modern approach to interpretation, particularly in the case of general words, requires that the context be considered in the first instance and not merely later when some ambiguity is said to arise [referring to *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J]. Such an approach was confirmed as correct in *Project Blue Sky Inc v Australian Broadcasting Authority* [(1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ]. Whilst the process of construction concerns language, it is not assisted by a focus upon the clarity
> 30 of expression of a word to the exclusion of its context."

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[10] *R v A2; R v Magennis; R v Vaziri (No 23)* [2016] NSWSC 282 at [207]-[208] (AB 272); *R v A2; R v Magennis; R v Vaziri (No 24)* [2016] NSWSC 737 at [130] (AB 313).

[11] See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ, [35]-[37], [40] per Gageler J.

38. The role of context in the modern approach to interpretation was further explained by Edelman J in *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064, where his Honour said (at [64]; emphasis in original):

> "In *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [(2012) 250 CLR 503 at [39]], this Court said that the task of statutory construction must begin and end with the text of the statute. That statement does not mean that the text of a statute must be interpreted only according to the range of semantic meanings of the individual words. It means only that the interpretation of a statute, like any other legal instrument, is an interpretation of its words. Those words are interpreted in their context and in light of their purpose although legal rules can sometimes exclude or restrict the use of some context. In ascertaining the reasonably intended meaning of Parliament *con*text is, literally, those matters to be considered (simultaneously) together with the text."

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39. The jurisprudence of this Court has made clear that, considered in context and in light of the legislative purpose, the language of a particular statutory provision may bear a meaning that differs from its literal meaning or its meaning in common parlance.[12] That does not make the meaning, ascertained by reference to context and purpose, extra-ordinary.[13] Where a statutory provision, read in context, accommodates a "range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural", the constructional choice presented "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies".[14]

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40. Although the CCA recited some relevant statements of principle in this regard (AB 476-477 [464]-[467]), the appellant submits that the CCA's approach to construing s 45(1)(a) of the *Crimes Act* was contrary to the modern approach to interpretation described in decisions of this Court. In the result, important contextual

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[12] See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Project Blue Sky* (1998) 194 CLR 355 at [78] per McHugh, Gummow, Kirby and Hayne JJ; *SZTAL* (2017) 262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ, [38] per Gageler J; *SAS Trustee* (2018) 92 ALJR 1064 at [20] per Kiefel CJ, Bell and Nettle JJ. See also *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ.

[13] See *Interpretation Act 1987* (NSW), s 34(1); *Saraswati v The Queen* (1991) 172 CLR 1 at 21-22 per McHugh J (Toohey J agreeing).

[14] *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [66] per Gageler and Keane JJ; *SZTAL* (2017) 262 CLR 362 at [38] per Gageler J; *SAS Trustee* (2018) 92 ALJR 1064 at [20] per Kiefel CJ, Bell and Nettle JJ.

considerations and the apparent legislative purpose of the provision were not brought to bear in the CCA's analysis.

Constructional choice

41. As the CCA accepted, there are a "range of meanings ... attributable to the verb [mutilate]" (AB 480 [476]). Dictionary definitions of the verb range from those that refer to removal or irreparable damage, thereby importing a "degree of permanence or quality of irreplaceability", to those that refer to rendering imperfect by "some act of destruction" (AB 483 [488]). Because of the "breadth of meanings there encompassed", the CCA considered that such dictionary definitions offered "limited assistance" (AB 483-484 [489]-[490]). Nonetheless, the CCA was of the view that the use of the verb "mutilates" in s 45(1)(a) of the *Crimes Act* suggests that "more than the causing of an injury is required" (AB 486 [495]). The CCA reached that view by reference to "the ordinary meaning of 'mutilates'" and/or its use in "ordinary parlance" (see AB 486 [495], [497]).[15]

42. It is undeniable that the general mischief to which s 45 of the *Crimes Act* is directed is the practice of female genital mutilation.[16] Excision and infibulation are recognised forms of female genital mutilation and the words "otherwise mutilates" are an "umbrella term" intended to capture other forms of the practice (AB 493 [519]). The notion of "mutilates" in s 45(1)(a) – referring, as it does, to an act of mutilating another person's labia majora, labia minora or clitoris – has an obvious affinity with female genital mutilation. It is necessary, then, to ask "what is meant by 'mutilation' in that context" (AB 481 [480]).

43. By the time of the enactment of s 45 of the *Crimes Act* in 1994,[17] an awareness of and discourse surrounding female genital mutilation had developed.[18] Mutilation, in

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[15] That view was consistent with the respondents' submissions: see AB 458 [400]-[401].

[16] See, for example, the heading to s 45 ("Prohibition of female genital mutilation") and the long title to the Act which introduced s 45 (*Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW)): "An Act to amend the *Crimes Act 1900* to prohibit female genital mutilation."

[17] The Crimes (Female Genital Mutilation) Amendment Bill 1994 (NSW) was introduced into the Legislative Council on 4 May 1994. The Bill passed the Legislative Council on 10 May 1994 and the Legislative Assembly on 22 September 1994. It received assent on 5 October 1994 and commenced on 1 May 1995.

[18] See, for example, Australian Law Reform Commission, *Multiculturalism: Criminal Law*, Discussion Paper No 48 (May 1991) at [2.34]-[2.41]; United Nations General Assembly, Declaration on the Elimination of Violence against Women (A/Res/48/104), 20 December 1993, Art 2(a); Commonwealth House of Representatives, *Hansard*, 21 February 1994 at 891-892 (debating a motion to recognise that female genital

the context of female genital mutilation, connoted – and continues to connote[19] – injury or damage, usually involving cutting, to female genitalia inflicted intentionally and for non-medical reasons. For example, in June 1994, the Family Law Council's Report to the Commonwealth Attorney General on Female Genital Mutilation said (at [2.01]-[2.02]; citations omitted):

> "Female genital mutilation 'is the collective name given to several different traditional practices that involve the cutting of female genitals'. ... In this paper when the term 'female genital mutilation' is used it is meant to embrace all types of the practice where tissue damage results; for example,
10 damage manifested by bruising, contusion or incision."

44. Certainly, there could be no doubt that mutilation, in the context of female genital mutilation, includes the cutting or nicking of female genitalia.[20] Both the Discussion Paper and the Report of the Family Law Council referred to anecdotal evidence "on the incidence of female genital mutilation in Australia" as including, *inter alia*, accounts that "[c]utting the clitoral hood is practised in the Malaysian community in WA".[21] A report by the Queensland Law Reform Commission on female genital mutilation, released in September 1994, also described "the scraping or simple nicking of the clitoris" as a form of female genital mutilation.[22]

45. Thus, if the word "mutilates" in s 45(1)(a) of the *Crimes Act* is to be understood in
20 the context of female genital mutilation, the word permits of a potential meaning that extends to the infliction of injury. Relevantly for present purposes, that meaning would encompass cutting or nicking that does not render the genitalia imperfect or irreparably damaged. This gives rise to a constructional choice that requires an evaluation of the statutory objects and policies from which the intended meaning of the provision may be ascertained.

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mutilation occurs in Australia and to call for legislation to outlaw the practice); New South Wales Legislative Council, *Hansard*, 10 March 1994 at 463-465 (debating a similar motion).

[19] See, for example, World Health Organisation, *Female genital mutilation: A joint WHO/UNICEF/UNFPA statement* (1997) at 3; World Health Organisation, *Eliminating female genital mutilation: An interagency statement* (2008) at 1; World Health Organisation, *Fact Sheet: Female genital mutilation* (2018).

[20] For example, from 1979, *Black's Law Dictionary* contained a definition of "female genital mutilation" as follows: "**1.** Female circumcision. **2.** The act of cutting, or cutting off, one or more female sexual organs."

[21] Family Law Council, *Female Genital Mutilation: Discussion Paper*, 31 January 1994 at [2.30]; Family Law Council, *Report on Female Genital Mutilation*, June 1994 at [2.41].

[22] Queensland Law Reform Commission, *Female Genital Mutilation*, Report No 47 (September 1994) at 7. This Report referred to "three main types of female genital mutilation": circumcision (including the scraping or nicking of the clitoris); excision; and infibulation.

Legislative purpose and intended meaning

46. Section 45 of the *Crimes Act* was enacted to prohibit the practice of female genital mutilation. This is clear from the heading to s 45 ("Prohibition of female genital mutilation").[23] It is also clear from the long title to the *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW): "An Act to amend the *Crimes Act 1900* to prohibit female genital mutilation". The Second Reading Speech for the Bill which became the abovementioned Act recorded that the Bill would "make the practice of female genital mutilation a criminal offence in this State".[24] Reference was made to the World Health Organisation's recommendation that countries "adopt clear national policies to abolish the practice" and the Family Law Council's recommendation that legislation be introduced "to make clear that FGM constitutes a criminal act". It was said that the offence provision, which became s 45 of the *Crimes Act*, "aims to prevent FGM from being practised at all in this State" and to "place our condemnation of FGM beyond doubt".[25]

47. Notwithstanding the breadth of these statements of purpose, the CCA considered that "there remains some doubt as to whether the fourth form of female genital mutilation [recognised by the Family Law Council] (encompassing wholly ritualised circumcision) was intended by the legislature to be included in the legislation" (AB 491 [512]; see also AB 480 [475]). That doubt was said to arise from the following passage in the Second Reading Speech:[26]

> "It will be an offence for anyone to perform FGM in this State. The three forms of FGM in order of severity are infibulation, clitoridectomy and sunna. The bill seeks to prohibit all of these various methods of FGM."

48. By contrast, the Family Law Council stated that female genital mutilation can involve one of *four* kinds of procedures: (i) infibulation; (ii) clitoridectomy or

[23] *Interpretation Act 1987*, ss 34(1), (2)(a), 35(5).

[24] New South Wales Legislative Council, *Hansard*, 4 May 1994 at 1859.

[25] New South Wales Legislative Council, *Hansard*, 4 May 1994 at 1859-1860

[26] New South Wales Legislative Council, *Hansard*, 4 May 1994 at 1860. Notwithstanding these comments of the Minister introducing the Bill, other members of the legislature referred to ritualised circumcision as a form of female genital mutilation in the course of debating the Bill: see New South Wales Legislative Assembly, *Hansard*, 15 September 1994 at 3129; New South Wales Legislative Assembly, *Hansard*, 22 September 1994 at 3639

excision; (iii) sunna or clitoral circumcision; and (iv) ritualised circumcision.[27] (To the extent that the CCA emphasised that this fourth category involves "wholly ritualised circumcision", it should be noted that the Family Law Council made clear that, for the purposes of its recommendations, it was referring to practices resulting in incision or tissue damage.[28]) The Family Law Council recommended that all kinds of female genital mutilation – expressly including ritualised circumcision[29] – be proscribed because "in reality the distinction between the types of circumcision ... depends on the sharpness of the instrument used, the struggling of the child and the skill and eyesight of the operator".[30] There would, therefore, be an arbitrariness to allowing one kind, and not another. For example, ritualised circumcision which involves cutting the clitoral hood could quite easily become an instance of sunna involving the excision of the clitoral hood.[31]

49. The CCA accepted that there was no indication in the Second Reading Speech of disagreement with the Family Law Council's recommendation that all forms of female genital mutilation be prohibited (AB 491 [514]). Indeed, the CCA observed that "[w]hen passing the legislation introducing s 45, the legislature clearly recognised the dangers involved in even ritualised circumcision" (AB 494 [524]). But the CCA was either not persuaded that the legislature, in fact, intended to prohibit all forms of female genital mutilation, having regard to the passage from the Second Reading Speech set out at [47] above; or, alternatively, the CCA was not persuaded that the language of s 45(1)(a) could carry such a purpose into effect, even if it were the legislature's intention (see AB 491 [513]). The first proposition, relating to legislative purpose, will be examined further below. The second proposition is erroneous for the reasons developed earlier (see [42]-[45] above) that, understood in context, the word "mutilates" in s 45(1)(a) permits of a construction that extends to the causing of injury.

[27] Family Law Council, *Discussion Paper*, 31 January 1994 at [2.03]-[2.06]; Family Law Council, *Report*, June 1994 at [2.03]-[2.06].

[28] See Family Law Council, *Discussion Paper*, 31 January 1994 at [2.01]; Family Law Council, *Report*, June 1994 at [2.02]. Cf AB 486 [498].

[29] Family Law Council, *Discussion Paper*, 31 January 1994 at [5.22]

[30] See Family Law Council, *Discussion Paper*, 31 January 1994 at [2.02]; Family Law Council, *Report*, June 1994 at [2.01].

[31] See also Family Law Council, *Report*, June 1994 at [2.04].

50. It is possible to argue, as the respondents did below (AB 462 [415]), that the passage from the Second Reading Speech extracted in [47] above evinces a legislative intention to prohibit only infibulation, clitoridectomy and sunna; that is, to prohibit most, but not all, of the practices recognised by the Family Law Council as constituting female genital mutilation. But this understanding of the legislative purpose is very difficult to reconcile with the CCA's preferred construction of "mutilates" in s 45(1)(a). The CCA accepted that a "cut or nick could, in a particular case, amount to mutilation" for the purposes of s 45(1)(a), provided some imperfection or irreparable damage could be shown (AB 494 [521]-[522]). But a cut or nick would not, in the usual case, constitute infibulation, clitoridectomy or sunna. The CCA cannot, therefore, have considered that the legislative intention was to prohibit only those three procedures named in the Second Reading Speech. Since the CCA also recognised that its preferred construction did not accord with a legislative intention to prohibit all forms of female genital mutilation (AB 494 [523]), it is, with respect, not entirely clear what legislative purpose the CCA ascribed to s 45.[32]

51. Further, the categories of infibulation, clitoridectomy and sunna do not correspond to the language of s 45(1)(a). There is little reason to think that such categories assist in ascertaining (or confining) the intended meaning of the word "mutilates". Because "sunna" is a cultural term, its meaning can vary.[33] The Family Law Council referred to sunna in the context of procedures involving the removal of the clitoral prepuce. In the language of s 45(1)(a), such procedures would be caught by the verb "excises". The procedures named in the Second Reading Speech shed no real light on what other forms of the practice of female genital mutilation the verb "mutilates" was intended to capture.

52. In the appellant's submission, the purpose of the legislature in enacting s 45 of the *Crimes Act* was to prohibit female genital mutilation in all of its forms and thus to implement the recommendation of the Family Law Council. This submission is

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[32] By contrast, the trial judge considered that the essential difference between the appellant's and the respondents' arguments on the question of construction was the extent to which each would serve to promote the purpose or object of the provision: see AB 84 [249].

[33] See Family Law Council, *Report*, June 1994 at [2.04]. See also, generally, S Elmusharaf, N Elhadi and L Almroth, 'Reliability of self reported form of female genital mutilation and WHO classification: Cross sectional study', (2006) 333 *British Medical Journal* 124.

supported by the unconditional statements of purpose set out in [46] above. It is also supported by the Explanatory Note to the Bill, which recorded that:

> "[p]rocedures involving the incision, and usually removal, of part or all of the external genitalia of young females are practised by some groups as a matter of custom or ritual. The practice can lead to infection, haemorrhaging, dysuria (painful urination) and dysmenorrhea (painful mensuration) due to pelvic congestion and complications during labour.
>
> The object of this Bill is to amend the Crimes Act 1900 to make it an offence punishable by a maximum of 7 years imprisonment to mutilate external female genitalia".

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The reference to an incision to part of the genitalia, and to complications including infection and dysuria, do not suggest a requirement of serious injury, imperfection or irreparable damage.

53. It is not coherent to accept that the legislature was concerned to prohibit all forms of female genital mutilation in New South Wales, but also intended "mutilates" in s 45(1)(a) to convey only its literal meaning. The CCA accepted that its preferred construction, based on the "ordinary meaning" of "mutilates", did not accord with a legislative intention to proscribe all forms of female genital mutilation (AB 494 [523]-[524]). Their Honours observed that:

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> "[t]he potential evidentiary difficulties which might be faced in cases where, for example, there is concern as to potential nerve damage due to a cut to the clitoral glans or the clitoral hood leading to potential loss of sensitivity or hypersensitivity but no visible scarring ... if what is necessary is the demonstration to a criminal standard of proof of permanent damage or serious injury, clearly illustrate the need for legislative amendment (if our construction be correct) to make clear that the fourth category of female genital mutilation is within the terms of the offence."

54. In circumstances where female genitalia is understood to heal quickly, such that there may be no scarring visible upon inspection, and where it may be difficult to assess, or obtain evidence of, potential nerve damage (either in the nature of a loss of sensitivity or hypersensitivity) caused to the genitalia of a prepubescent girl, the construction of s 45(1)(a) preferred by the CCA – which requires proof of the genitalia being rendered imperfect or irreparably damaged – is improbable and inconvenient, and cannot be said to reflect the meaning of the provision intended by

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the legislature.[34] In the appellant's submission, it is contrary to the statutory object and policy for the application of s 45 to depend, in effect, on whether, for example, a scar remains visible; whether a cut has healed; or whether a complainant is able to articulate a 'before and after' difference in sensation caused by the alleged offence. The alternative construction advanced by the appellant, of "mutilates" in s 45(1)(a) encompassing the infliction of injury, should be preferred.[35]

Directions to jury

55. The relevant ground of appeal upon which the respondents succeeded before the CCA complained that the trial judge erred in his directions to the jury in relation to
10 the meaning of "otherwise mutilates" in s 45(1)(a) of the *Crimes Act* (see AB 318).

56. His Honour had directed the jury that (AB 99):

> "The word 'mutilate' in the context of female genital mutilation means to injure to any extent. It is not necessary for the Crown to establish that serious injury resulted. In the context of this trial, a nick or cut is capable of constituting mutilation for the purpose of this alleged offence.
>
> So for this offence to be proved, the Crown does not need to prove that something was cut off. If something was cut off, you may think that would demonstrate or make out a mutilation. If there is a nick or a cut, that would be sufficient in law to constitute a mutilation."

20 57. The CCA dealt with this ground of appeal on the basis that there were "separate complaints subsumed" within it: a complaint as to the trial judge's pre-trial ruling and a complaint as to the direction itself (AB 447 [360]). As discussed above, the CCA concluded that the trial judge misconstrued the meaning of "mutilates" in his pre-trial ruling, because "mutilates" in s 45(1)(a) bears 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" (AB 493 [521]). The error identified in the direction given to the jury was that "it included the words 'to any extent' insofar as it suggested that a *de minimis* injury would suffice" (AB 494 [522]).

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[34] See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321 per Mason and Wilson JJ; *CIC Insurance* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

[35] *Interpretation Act 1987*, s 33; *SZTAL* (2017) 262 CLR 362 at [39] per Gageler J.

58. In the appellant's submission, it cannot follow from the CCA's reasoning on the question of construction that the simple omission from the direction given of the words "to any extent" would have resulted in the jury being properly instructed. On the question of the reasonableness of the jury's verdicts on the charges against s 45(1)(a), the CCA said (AB 509 [586]; see also AB 510 [590]):

> "although we are satisfied that a cut or nick to the clitoris could well amount to mutilation in some circumstances, the medical evidence would need to establish that there had been injury or damage which rendered the clitoris imperfect or irreparably damaged in some way. We have concluded that in
10 the absence of any medical evidence of such injury or damage, an offence contrary to s 45(1)(a) of the *Crimes Act* could not be established."

If evidence is needed to establish injury or damage rendering the clitoris imperfect or irreparably damaged, it would seem necessary, at least in a usual case, for a trial judge to instruct the jury that they must be satisfied that injury or damage of the relevant kind is made out on the evidence.

59. In the appellant's submission, mutilation, for the purposes of s 45(1)(a) of the *Crimes Act*, can be established by proof of injury and it is not necessary for the Crown to prove serious injury. In directing the jury, the trial judge referred to injury "to any extent" to emphasise that injury less than serious injury is sufficient. His Honour did
20 not err in directing the jury in that way.

Meaning of "clitoris" in s 45(1)(a) of the *Crimes Act*

60. The CCA concluded that the trial judge erred in ruling, and directing the jury, that the word "clitoris" in s 45(1)(a) of the *Crimes Act* "included not only the clitoral head but also the clitoral hood (or prepuce)" (AB 495 [527]). That conclusion was not supported or required by the medical evidence at trial (AB 494 [525]). Instead, it appears to have been based only on various definitions in medical dictionaries (AB 495 [526]).

61. Dr Marks' evidence at trial was that the clitoral anatomy includes both the clitoral head and the clitoral hood, because they are "closely physically related to each
30 other", albeit separate or different tissue (AB 404 [209]). Professor Grover considered the word "clitoris" to be a "global term which included structures such as: the clitoral ridge; the clitoral hood; the shaft of the clitoris; the clitoral glans; and the prepuce" (AB 412 [240]). Professor Jenkins' evidence was that the prepuce and the

clitoral head are "separate structures" (AB 410 [231]). But, as the CCA observed, this evidence "would not detract from the proposition that together they might be viewed as forming part of the clitoris as a whole" (AB 495 [525]).

62. It is relevant also to note that the Family Law Council described the practice of removing the prepuce of the clitoris as *clitoral* circumcision.[36]

63. The clitoral prepuce exists at the fusion of the labia minora and the clitoral glans, as the two unite over the glans to create a hood. In those circumstances, and taking into account the protective purpose of the provision, the word "clitoris" should be understood in its global sense as including the clitoral hood.

10 64. If the hood or prepuce is not understood to form part of the clitoris, it must then form part of the labia minora. There can be no doubt that mutilation of the clitoral hood or prepuce falls within the scope of the offence contained in s 45(1)(a). As such, there is no imperative to construe the word "clitoris" narrowly or strictly, so as to avoid broadening the scope of the offence.

65. The word "clitoris" in s 45(1)(a) is naturally understood as referring to the clitoral anatomy, which, as Professor Grover attested to at trial, is made up of a number of structures, including the shaft, glans and hood. There was no error in the trial judge directing the jury that mutilation of the clitoral hood or prepuce was sufficient to make out the offence as charged (see AB 100).

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Part VII: Orders

66. The appellant submits that the Court should make the following orders in each appeal:

    i. Appeal allowed.

    ii. Set aside order 3 made by the CCA on 10 August 2018 and, in its place, order that a new trial be had.

67. This Court has jurisdiction to make such orders as the Court below should have made.[37] The Court is thus empowered by s 8(1) of the *Criminal Appeal Act 1912* (NSW) to order a new trial if satisfied that, "having regard to all the circumstances",

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[36] Family Law Council, *Report*, June 1994 at [2.04].

[37] *Judiciary Act 1903* (Cth), s 37; *State of NSW v Kable* (2013) 252 CLR 118 at [71] per Gageler J.

such miscarriage of justice as has occurred "can be more adequately remedied by an order for a new trial". In the appellant's submission, this Court would exercise the power to order a new trial because there is evidence to support the charges and the interests of justice do not require the entry of verdicts of acquittal.[38]

Part VIII: Time Estimate

68. The appellant estimates that 2.5 hours will be required for the presentation of its oral argument, including its submissions in reply.

10 Dated: 5 April 2019

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[38] See *Spies v The Queen* (2000) 201 CLR 603 at [104] per Gaudron, McHugh, Gummow and Hayne JJ; *The Queen v Taufahema* (2007) 228 CLR 232 at [49]-[51] per Gummow, Hayne, Heydon and Crennan JJ; *Sio v The Queen* (2016) 259 CLR 47 at [75]-[81].