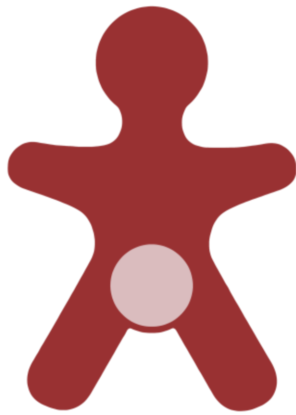

The Australasian Institute for

Genital Autonomy

An Open Future for every Child

SUPPLEMENTARY SUBMISSION TO THE

NATIONAL CHILDREN'S COMMISSIONER :

AUSTRALIA'S OBLIGATIONS UNDER THE UN CONVENTION ON THE RIGHTS OF THE CHILD

"THE CUTTING IS THE HARM"

AFFIRMING THE RIGHT TO GENITAL AUTONOMY OF ALL CHILDREN

AUSTRALASIAN INSTITUTE FOR GENITAL AUTONOMY (INC.)
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MAY 2018
Contact: P Mason, Chair

SUPPLEMENTARY SUBMISSION TO THE NATIONAL CHILDREN'S COMMISSIONER RE AUSTRALIA'S OBLIGATIONS UNDER THE UN CONVENTION ON THE RIGHTS OF THE CHILD

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May 2018

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May 2018

EXECUTIVE SUMMARY

This Supplementary Submission follows the Submission lodged by AIGA on 23 May 2018 ("the Primary Submission").

It deals with two specific issues relating to Child Genital Cutting (CGC) namely:

1. The need for child rights advocates and bodies to resolve the conflict between religious beliefs that CGC of their child is desirable or mandated by a parent's religion and the fundamental rights of children to bodily integrity and their own religious freedom; and
2. Inadequate Constitutional, legislative and policy basis for taxpayer funding of medically unnecessary CGC though the Medicare system (the Health Insurance Act 1973).

AIGA's Objects and Principles are to protect *all children* from medically unnecessary and irreversible genital surgery. Whatever the reason, the anatomical extent or the clinical outcome, the cutting is the harm.

AIGA asserts that the child's rights of bodily integrity, of religious freedom and of protection from violence and harmful traditional practices in a human rights context outweighs the power parents exercise over them.

It would be incorrect to regard the Primary Submission and this Supplementary Submission as an attack on any part of the adult community that wishes to continue these practices. AIGA accepts that the law is a blunt instrument and in the face of parental religious commitment to CGC will be ineffective on its own. To achieve cultural change, what is required is a clear statement of principle from the National Commissioner, from the Committee for the Rights of the Child (CRC) and from the Australian Government that children deserve better than to have their parent's beliefs and aesthetic preferences irreversibly marked in their sexual organs.

In effecting cultural change, one way of changing clinical and parental perceptions about this issue is for Government to send the message that it such practices do not fall within the ambit of Australia's excellent – and expensive – universal health care system, Medicare.

HUMAN RIGHTS FRAMEWORK

As the Commissioner is aware, Art. 2 of the Convention on the Rights of the Child (CROC) provides for the sexual equality of all children without discrimination; while Art. 11 provides that children – not their parents on their behalf – have freedom of thought, conscience and religion, while noting that their parents/guardians have the right to "provide direction", not impose their own religious belief. These two rights of children reflect rights repeated since the UDHR in 1948 (Arts. 2 & 18) and in the ICCPR in 1966 (Arts. 2 & 18) and those rights belong to children as much as to adults, as no age distinction is drawn in those instruments.

Likewise Art. 8 of the CROC relates to the right to "identity, including nationality, name and family relations" as a right of the child not a right of the parent to mark their own identity irreversibly on the body of the child.

On the other hand the UDHR (Art. 18) and the ICCPR (Art. 18) ensure the fundamental human right of all people – including parents - to the freedom of thought, conscience, and religion, the ICCPR stipulating beyond the UDHR that such right incudes the right "to manifest his religion or belief in worship, **observance**, **practice and teaching**".

In 1999 the Convention of the Elimination of Discrimination of All Kinds Against Women (CEDAW) required Member States including Australia to

> take all appropriate measures…to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. (Art. 5)

This Submission urges resolving this apparent conflict between children's and parents' rights.

DOMESTIC LAW

s.51(xxix) (the external affairs power) is Australia's authority to legislate to give effect to our obligations under international human rights instruments. There are two constants of the relevant instruments (the UDHR, the ICCPR, CEDAW and the CRC). The first is the principal of non-discrimination the grounds of sex which is found in each.

The second is that there is no *lower* age limit to which each instrument provides its protections. The criminalisation of Female Genital Cutting (FGC) does not limit the requirement, but exemplifies it. The Sex Discrimination Act 1984 prohibits discrimination on the grounds of sex by direct discrimination that treats "the aggrieved person less favourably than the discriminator treats a person of a different sex" (s.5(1) and indirect discrimination that "has or is likely to have the effect of discriminating a person of the same sex as the aggrieved person" (s.51(2)). The Racial Discrimination Act 1975 declares unlawful discrimination against children "based on race, colour, descent or national or ethnic origin". Neither Act excludes children from these protections. Thus in particular it protects the children of Muslim and Jewish parents from unnecessary and irreversible surgery on their genitals because of their ethnic and community identity and the religion of their parents.

Most discussions about religious freedom rights focus ultimately on the rights of adults and the rights of children are simply (and easily) ignored. Children and babies have no voice and this is one of the responsibilities of Children's Commissioners in Australia.

ISSUE 1 – CHILD RIGHTS IN CONFLICT WITH PARENTS' RIGHTS - CROC Arts 14, 19 and 24: Child's rights to religious freedom, and to protection from all forms of violence and from harmful traditional practices (HTPs).

The conflict of parents' and children's rights over genital cutting is analogous with the conflict of rights over corporal punishment of children for religious reasons.

In 2008 the UN Child Rights Committee issued General Comment No. 8 on Art. 19 and the Corporal Punishment of Children for the guidance of all member States and identified all forms of corporal punishment in the home as an unacceptable violence against children. At para 29 it considered Member State objections that

> 29. Some raise faith-based justifications for corporal punishment, suggesting that certain interpretations of religious texts not only justify its use, but provide a duty to use it. Freedom of religious belief is upheld for everyone in the International Covenant on Civil and Political Rights (art. 18), but practice of a religion or belief must be consistent with respect for others' human dignity and physical integrity. Freedom to practise one's religion or belief may be legitimately limited in order to protect the fundamental rights and freedoms of others. In certain States, the Committee has found that children, in some cases from a very young age, in other cases from the time that they are judged to have reached puberty, may be sentenced to punishments of extreme violence, including stoning and amputation, prescribed under certain interpretations of religious law. Such punishments plainly violate the Convention and other international human rights standards, as has been highlighted also by the Human Rights Committee and the Committee against Torture, and must be prohibited.

The GC#8 condemns *all* forms of physical punishment of children for the religious beliefs of their parents, not just these most extreme forms. In this the CRC itself has concluded that the proper resolution of the conflict between the parent's religious freedom and the child's right to bodily integrity is to give priority to the child's rights as the more vulnerable group.

2013 The Special Rapporteur to the Secretary General (SRSG) on Religious Freedom Heiner Bielefeldt referred to HTPs in his Report to the General Assembly at par 23 [i]

> Whether such harmful practices have any religious rationale remains more than dubious. Be that as it may, freedom of religion or belief can never be legitimately invoked to justify the infliction of grave and often traumatic violations of a person's physical and psychological integrity.

In 2014 the Committee on the Elimination of Discrimination against Women (EDAW) and the Committee on the Rights of the Child (CRC) issued a Joint Recommendation/Comment [ii] on "gender-based violence" in which they said in context of FGC:

> 4. Moreover, the Committees recognize that boys are also the victims of violence, harmful practices and bias and that their rights must be addressed for their protection and to prevent gender-based violence and the perpetuation of bias and gender inequality later in their lives. Accordingly, reference is made herein to the obligations of States parties to the Convention on the Rights of the Child regarding harmful practices stemming from discrimination that affects boys' enjoyment of their rights.
>
> 15. Harmful practices are persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.:
>
> 31. Furthermore, the obligation of States parties to pursue such targeted policies is of an immediate nature and States parties cannot justify any delay on any grounds, including cultural and religious grounds.

In 2015 the International NGO Council on Violence Against Children in their Report on HTPs [iii] included Male Genital Cutting (MGC) as another example of a "harmful traditional practice " with Art. 24.3:

> But a children's rights analysis suggests that non-consensual, non-therapeutic circumcision of boys, whatever the circumstances, constitutes a gross violation of their rights, including the right to physical integrity, to freedom of thought and religion and to protection from physical and mental violence. When extreme complications arise, it may violate the right to life.

As noted in AIGA's Primary Submission, Australian Federal and State and Territory Governments have taken legislative and other health steps to safeguard the bodily integrity of girls through FGM/C legislation and health education policy. Cutting girls for the religious beliefs of the parents is as illegal as cutting for family, cultural reasons or for "improving" cosmetic appearance. In this way when the fundamental human right of parents to freedom of religious practice and belief clashes with the fundamental human right of girl children to bodily integrity, the latter prevails over the former.

Australia's laws prohibiting FGC, to the extent that they apply to parents who believe the practice is religiously recommended, desirable or mandatory, appear to conflict with the rights of parents in Australia to freedom of thought, conscience and religion including "observance and practice".

If children's rights to protection from corporal punishment "trump" their parent's religious beliefs, how can it be that their rights to protection from medically unnecessary cutting of their genitals – "minor" or "major" - are "trumped" by their parent's religious beliefs? And how can it be that the rights of girls trump their parent's religious beliefs but the rights of boys do not?

One simple solution is to extend the legislative protection given to girls to boys. Another is to encourage religious parents to conduct a symbolic, non-invasive ceremony in childhood, recommended by the Belgian Government's Advisory Committee on Bioethics in 2017 [iv].

Another is to defer the cutting ceremony until the child is capable of giving fully informed consent to cutting what is the most intensely private part of their sexual and physical identify. Another suggestion has been to exempt CGC when undertaken for parental religion, but if cutting boys is thus exempted, so too must be cutting girls, as secular Governments cannot rule one religion in, and one religion out, nor determine whether a parental belief on a given day is "genuinely" religious or not.

FGM/C scholar Sara Johnsdottir, Professor in Health & Society/Medical Anthropology at Malmo University, in a November 2017 paper *"Girls and boys as Victims: asymmetries and dynamics in European public discourses on genital modifications in children."* [v]

She opens with the scope of the paper:

> This paper starts with a discussion about the symmetrical aspects of circumcision of girls and circumcision of boys. In a brief overview of historical changes in the discourses on circumcision, especially regarding girls, we can see how a conceptual asymmetry was created through the activist claim, introduced in the early 1980s and prominent since then, that one of the phenomena, in whatever form, was to be labelled "mutilation" the other as "harmless".

And closes with a dramatic challenge to policymakers and lawmakers across the world:

> Sooner or later, European societies need to respond to the following questions, which, in reality, are one and the same question formulated from different perspectives:
>
> - Why should girls not enjoy the same opportunities as boys to be incorporated into cultural and religious communities through a ritual involving minor cutting of their genitals?
>
> - Why should boys not have the same legal protection as girls against non-medically motivated alterations of their genitals?

RELIGIOUS FGC IN AUSTRALIA & OUR NEAR NEIGHBOURS

AUSTRALIA

R v A2; R v Magennis; R v Vaziri (No. 23) [2016] NSWSC 282 (18 March 2016) [vi]was the first and only FGM/C criminal prosecution conducted to a complete jury trial in Australia.

C1 was a girl aged about 7 at the time of an alleged offence in 2009; C2 was her younger sister aged the same in about 2012. They lived with their Mother and Father in suburban Sydney who with their Maternal Grandmother were immigrants who had arrived from Kenya, where there is a considerable community of Dawoodi Bohra Muslims. This community follows the teachings of Abu Dawud Sulaymān ibn al-Ash'ath al-Azdi as-Sijistani (d.889) who compiled the third of the six "canonical" *hadith* collections (roughly "parables" of the Prophet Mohammad PBUH) recognised by Sunni Muslims, the *Sunan Abu Dāwūd*. Other Islamic scholars have agreed, Abu Zakarya Yahha al-Nawawi writing that "As regard females, it is obligatory to cut off a small part of the skin in the highest part of the genitalia".

Bohras belong to the Sunni sect of Islam and originated in Kerala, India. Guided by their Imam, this family **believed** – the critical word in this discourse - that it was a religious *requirement* of Allah that they arrange for their daughters' genitals to be cut in childhood. In other words, that they or the girls were likely to suffer some spiritual or cultural disadvantage if they did not.

There were *no* objective signs of injury to either girl on forensic examination, either at the time of investigation or at the time of sentencing. This criminal form of FGC had none of the drastic effects on the children's future sexual and child-birthing experience often relied on to condemn FGC. Rather the crime was the breach of the girls' human rights.

Upon conviction, in the case of each Offender, an aggregate sentence was imposed of 15 months' imprisonment with a non-parole period of 11 months. Mum and the Midwife served their term by

home detention but the Imam did time, 11 months, mainly because he adhered to his own belief in the Islamic obligatory nature of kahfd/khatna.[vii]

RELIGIOUS FGC IN INDONESIA AND MALAYSIA

There are about 73,000 adults of Indonesian and about 138,000 adults of Malaysian descent in Australia.[viii] Both are Muslim-majority communities and of course Indonesia is the most populous Muslim nation on Earth.

INDONESIA

In 2006 Director-General of Public Heath issued a directive (Circular Letter) following Indonesia's acceptance of WHO advice that FGC should not be done at all and prohibiting health professionals from dong it.

In 2008 the lead Indonesia Ulema Council (**Majelis Ulema Indonesia or MUI**) released a *fatwa* or Islamic legal edict/opinion (No. 9A/2008) that said "*FGM should not be prohibited because it is part of Islam.*" The *fatwa* argued it was *makrumah* or "honorable" for Muslim women and distinguished between different types of FGM/C, namely the common form and "excessive" forms, providing clinical guidance about correct and incorrect surgical procedure. MUI recommended the refined *fatwa* become Government policy and urged the Government to revoke the former Directive. Midwives in Government employ were in a dilemma.

Accordingly in 2010 the Ministry of Health (MOH) issued a formal Regulation [ix]on "correct" FGM/C procedures, essentially medicalising it, with the primary requirements being medical staff in a sterile environment and only a small cut without removing any tissue. Like the *fatwa* the Regulation distinguishes between different types of FGC, namely the common (acceptable) form and (unacceptable) excessive forms.[x]

In 2014 following outrage from women's groups and international pressure the MOH revoked the 2010 Regulation – leaving the practice entirely unregulated by secular government.

MALAYSIA

In May 2009 the Malaysian Fatwa Committee of the National Council of **Islamic Religious Affairs** (**JAKIM**) introduced a *fatwa* declaring FGC to be *wājib* – rather is not just permitted or optional, but obligatory for all Muslim women in Malaysia. The 1990s and this century have seen an upwelling of conservative Islamic practice in all of SE Asia and this apparent shift to an earlier or more Arabian interpretation of FGM/C fits with that.[xi]

RESOLUTION OF CONFLICT: CHILD'S RIGHTS vs. PARENT'S RIGHTS?

If a parent believes that to cut their girl child's genitals with no medical necessity is either a preferred or even mandatory observance of their own religion regardless of the rights of the child, then in Australia that parent's religious observance is discriminated against by anti-FGC laws. A policy decision has been made to prefer the rights of children over the rights of parents.

On the other hand as AIGA's Primary Submission noted, there is no restriction on medically unnecessary Male Genital Cutting (MGC) for religious reasons, for parental aesthetic reasons or for any other reason, including no reason at all. If there are marginal future benefits for a child in having non-therapeutic genital surgery, it is the responsibility of parents to safeguard the child's bodily integrity until they are old enough to decide for themselves.

There can be no doubt that circumcision of boys both medically indicated and otherwise is a "significant harm" and anatomically more damaging than most Types I & IV FGC, a fact observed in a UK FGC case by Sir James Munby, President of the UK Family Court, in a 2015 judgment. [xii]

AIGA does not for one minute suggest that the prohibition on unnecessary FGC as it applies to children be relaxed, but notes that there is scant evidence for its continuance for a number of

cultural and law-enforcement reasons. It would be unwise to assume that because there has been only one conviction that there has only been one incident.

In R. v. Magennis et al the trial Judge in his final sentencing remarks [xiii] found that

> "After the conviction edicts issued from Dawoodi Bohra Trusts in Australia, Sweden, and 6 sites in the UK warning adherents that "***as a result [of the decision] Kahfd is illegal***, *whether it is carried out within any of the States of Australia or overseas"*. *"All parents and guardians are hereby directed in the strictest terms not to carry out kahfd under any circumstances".*

Without wishing to be disrespectful of others' beliefs, this appears to mean that the practice was a clear obligation to G*d (*wājib*) before the Sydney jury deliberated on Thursday 12 November 2015, after which it was not merely *sunnah* (recommended but not obligatory), but *haram* or forbidden. The Dawoodi Bohra community simply accepted the precedence of local secular law

Islamic scholarship remains divided on whether FGC is mandatory (*wajib*) commendable (*sunnah*) or a religious duty (*makrumah*) based on one *ahaditha* of the Prophet Mohammed PBUH who is authoritatively reported to have approved of the practice in the following terms:

> "Cut off only the foreskin (the prepuce or outer fold of skin over the clitoris) and do not cut off deeply (not cutting the clitoris itself), for this is brighter for the face (of the girl) and more favourable with husband."

Those who do support FGC for religious reasons in Islam in SE Asia frequently point out that here it seems only WHO/UNICEF Types I & IV are performed on girls not the more extreme Types II & III. Studies show that the practice varies from a snip of the very tip – sometimes said to be the size of a grain of rice" – of the clitoral glans, to cutting a tiny part off the clitoral prepuce, to scraping inside the prepuce, to wiping it with a piece of cloth.

The key to any culturally sensitive resolution lies in recognising certain human rights axioms

- children are more vulnerable than parents and babies are more vulnerable than older children.
- the general and fundamental rights of general application in the UDHR and ICCPR apply without discrimination to children and adults, and to boys as well as girls.
- the specific Child Rights Convention was created, signed and acceded to by Australia for that very reason, as with the specific purposes of the CEDAW.
- both parents and children have equal rights to religious freedom.
- if a parent's religious freedoms can be constrained by a girl's fundamental right to genital autonomy, there is no obstacle to constraining those freedoms in the case of boys.
- prioritising the religious freedom rights of their parents over the genital autonomy rights of their children necessarily discriminates in favour of children of families from one religious grouping over children from another.
- children do develop and grow up, and when sexually aware (not necessarily active) will in time be old enough to fully understand the benefits and disadvantages of consenting or withholding consent to genital cutting.
- whatever marginal health, spiritual or cultural benefits may accrue to the child, the incision is permanent and irreversible.

ISSUE 2. AUSTRALIAN TAXPAYER FUNDING OF UNNECESSARY/COSMETIC CHILD GENITAL CUTTING

AIGA requests the National Children's Commissioner to submit that the Australian Government's funding of medically unnecessary/non-therapeutic child genital cutting be discontinued.

HEALTH INSURANCE ACT & CLINICAL NECESSITY

Until 1 November 2016 the Health Insurance Commission (Medicare) Medicare Benefits Schedule include four items relating to CGC:

- Item No 30653 “Circumcision of a male under 6 months of age
- Item No 30656 “Circumcision of a male under 10 years of age but not less than 6 months of age.
- Item No 30659 “Circumcision of a male 10 years of age or over, performed by a General Practitioner."
- Item No 30660 “Circumcision of a male 10 years of age or over, performed by a specialist”

After 1 November 2016 these were reduced to two

- Item 30654 “Circumcision of the penis (other than a service to which Item 30658 applies)” [i.e. *without* anaesthesia]
- Item 30658 “Circumcision of the penis when performed [with anaesthesia]”

The age and gender of patients funded under these items is available by generating online statistical reports. In the latest calendar year 2017, 7,299 taxpayer-subsidised circumcisions were performed with anaesthesia (Item 30658) on children 0-14 years, while 10,379 were performed *without* anaesthesia (Item 30654) a combined total of 17,678 [xiv]. Of Item 30654 non-anaesthetised circumcisions 9,905 or 91.7% were on children 0-4 and 472 or 4.3% on children 4-10.

The statistics have some bizarre anomalies, not least is that in 2016-2017 111 anesthetised and 275 non-anaesthetised “Circumcision of the penis” were funded for female patients, 85 and 23 respectively, with more over 15 years and over.

Another anomaly is that before the new Schedule, when figures for circumcision 10 and over by GP (Item 30659) 15 were a separate Item, circumcision for those boys show a threefold increase in the month of January of each year, which cannot be explained by clinical necessity [Appendix 2]. Were these religiously-motivated non-medical circumcisions, or a statistical error?

Demonstrating that these procedures are routinely attended by complication, Medicare has also before and after 2016 funded two clinically relevant items:

- Item No 30649 “Haemorrhage, arrest of, following circumcision requiring general anaesthesia on a person under 10 years of age” (10 on boys in 2017)
- Item No 30663 “Haemorrhage, arrest of, following circumcision requiring general anaesthesia on a person 10 years of age or over” (4 on boys 0-14 in 2017 plus 6 on males 15-24)

There is no regulated requirement that practitioners certify to Medicare that any of these procedures are medically indicated, rather than cosmetic, that is performed for the aesthetic or religious or cultural preferences of parents. They are certainly performed without the direct informed consent of the patient themselves. This complete lack of certification contrasts with the requirement for medically necessary genital surgery “professional services” namely vulvoplasty and labiaplasty rendered for female patients [xv], including children, which do require practitioner certification, including prior approval by the Medicare Claims Review Panel

> “accompanied by sufficient clinical evidence to enable the Department of Human Services to determine the eligibility of the service for the payment of benefits. Evidence should include a detailed clinical history outlining the functional impairment and the medical need for reconstructive surgery of the vulva and/or labia. Photographic evidence may not be required for this item.”

In 2011 then Minister for Health the Hon. Senator Nicola Roxon in response to a query from a now Board Member of AIGA about the “clinical relevance” of male circumcision services for which benefit was claimed replied as follows:

> "Where parents request circumcision for their child, medical practitioners must assess the clinical need for the medical service using their professional clinical judgment [sic]. Where Medicare Australia suspects that doctors are providing services that are not clinically relevant, it can review the matter through the Practitioner Review Program. If not satisfied, it may refer the practitioner to the Professional Services Review (PSR).[xvi]

AIGA asks the Commissioner to raise with the CRC

- whether prior approval and clinical evidence should be supplied for MGC as for FGC; and
- whether Australia lacks Constitutional Power to fund doctors for performing CGC with no medical indication.

CONSTITUTIONAL AUTHORITY

There is no proper Constitutional basis for the expenditure of taxpayer funds outside a source of power located within s.51 Constitution of Australia (Williams v Commonwealth 2012 and 2014)[xvii]. s.51(xxxix) (the ancillary power) is not an independent head of Commonwealth power that can justify an expenditure not otherwise within power under the Constitution.

s.51(xxiiiA) of the Constitution includes

> "the provision of…sickness and hospital benefits, medical…services (but not so as to authorize [sic] any form of civil conscription)…".

In order for the Commonwealth to legislate for the expenditure of public funds, the expenditure must provide "medical services". The Parliament employs the Medicare Benefits Scheme under the Health Insurance Act 1973 as the means of administering its Constitutional health power.

The starting point is that the HIA refuses any funding for "cosmetic procedures" that are not "clinically relevant". The next point is that cosmetic (non-indicated) genital surgery on patients under 10 years is necessarily performed without fully informed consent *from the patient* or a public authority with power to give that consent. Whether the consent of a parent for cosmetic genital surgery is a valid consent on behalf of a child is currently undetermined at law.[xviii]

There is a complete lack of certification that these were "clinically relevant" within the meaning of Section 3 of the HIA:

- ***"professional service "*** means (a) a service (other than a diagnostic imaging service) to which an item relates, being a clinically relevant service that is rendered by or on behalf of a medical practitioner;
- ***"clinically relevant service "*** means a service rendered by a medical… practitioner… that is **generally accepted in the medical, dental or optometrical profession (as the case may be) as being necessary for the appropriate treatment of the patient to whom it is rendered.** [Emphasis added]

Not a single national medical or paediatric body anywhere in the world recommends routine circumcision, with most taking a firm position against the practice [Appendix I] so it is hard to see how non-medical circumcision can be "generally accepted…as necessary for the appropriate treatment of the patient" - for therapy - as opposed to the cultural or spiritual needs of a parent.

Australian health authorities have firmly and consistently recommended against the routine (not indicated) practice since 1971. In 1985 the Australian Federal Health Minister removed the rebate for newborn circumcision from the Medical Benefits Schedule as a direct result of the 1983 recommendations of the Australian National Health and Medical Research Council which found ritual circumcision was unnecessary and hazardous. A 2012 *Australian Doctor* survey [xix]showed 51% of respondents believed that "circumcision of newborns is tantamount to child abuse and should never be performed", with 74% believing circumcision should not be routinely offered in the public system (all states had ended the practice in public hospitals by 2007).

While Medicare statistics suggest the parameters of the practice, it is likely that there is additional privately funded CGC by medical practitioners as well as by lay religious practitioners. Medicare funding implies tacit Australian Government endorsement and encourages private health insurers to fund the practice. The removal of Medicare funding would send a positive signal to parents, insurers and the relatively few doctors who participate (around a quarter of one percent of Australian doctors) that the community does not support unnecessary genital harm to children unable to consent, to protest or to refuse.

SUMMARY

Human Rights advocacy consists in establishing standards, which will be sometimes followed and something rejected by nations, cultures and religious groups around the world. Here is a schedule of options to show that this is not a simple matter of "banning" or "permitting" CGC.

1. Criminalise with penalty ("Any person who does x shall/may be fined/imprisoned")
2. Criminalise with no penalty ("It is an offence to do x")
3. Legislate to withdraw specified defence (as an amendment to the Criminal Code/Act)
4. Declare and criminalise up to an age of informed consent (18? 16? 14?)
5. Declare the child's right with no legislation, as in any proposed Charter of Rights.

   The Global Initiative to End All Corporal Punishment of Children [xx] records that of the 55 countries that have "prohibited" all corporal punishment, at least 6 simply upgraded the human rights of children to general statements of right in their Constitutions or in superior Court rulings, rather than legislate directly to revoke the defence of reasonable parental discipline or penalise
6. Reinforce with other laws, e.g.
   a. require clinical standards (as in Indonesia 2010, Germany 2012, Sweden)
   b. enforce ethical standards of medical professionals to protect rights of patient, i.e. Beneficence. Non-Maleficence, Justice and Autonomy;
   c. end taxpayer funding of practices in public health;
   d. regulate insurance to expose professionals to risk;
   e. implement age limits – lower and upper (Germany 2012);
   f. require joint parental consent and a "best interests of child" (this situation applies to MGM/C in Germany after 2012);
   g. fund organisations which promote a culture of genital autonomy for all children
   h. work with peak religious and community bodies to explain how CGC is a "traditional practice harmful to children" within UNCROC Article 24.3.

In the face of rigid religious intransigence the policy purpose will be to educate not to convince. The fact that some parents will continue to follow their religious dictates is no reason for a secular pluralistic democracy to avoid the fundamental issue at stake.

RECOMMENDATIONS

AIGA respectfully requests the National Commissioner for Children to bring these two issues to the attention of the CRC in the 2018 Reporting Cycle for Australia and as the Committee to require action by the Australian Government to:

1. Advise the Australian Government to investigate and determine data of the true incidence of medically unnecessary CGC on all children, including lay practices, complications and adverse events (morbidities).
2. Advise the Australian Government to insist on the same prior approval including practitioner submission of clinical evidence for medically necessary genital surgery on all children without distinction on grounds of sex.
3. Advise the Australian Government to discontinue Medicare taxpayer funding for medically unnecessary CGC.

4. Advise the Australian Government to undertake steps to educate parents, the medical profession and religious communities of the above, and discourage private health insurance for medically unnecessary CGC.
5. Itself declare that medically unnecessary CGC is a breach of the child's fundamental human rights to bodily integrity, to protection from violence, to having a say in matters that irreversibly affect the child, and to the child's freedom of thought, conscience and religion both in infancy and childhood.

AIGA Board of Directors

Per

Paul Mason, AIGA Chair

Former Commissioner for Children, Tasmania

APPENDIX 1: STATEMENTS ON NON-THERAPEUTIC CIRCUMCISION OF MALE MINORS FROM MEDICAL ASSOCIATIONS AND CHILDREN'S OMBUDSMEN

British Medical Association (2006)

The BMA considers that the evidence concerning health benefits from non-therapeutic circumcision is insufficient as a justification for doing it. It suggests that it is "unethical and inappropriate" to circumcise for therapeutic reasons when effective and less invasive alternatives exist.[xxi]

Royal Dutch Medical Association (KNMG) (2010)

The KNMG states "there is no convincing evidence that circumcision is useful or necessary in terms of prevention or hygiene." It regards the non-therapeutic circumcision of male minors as a violation of physical integrity, and argues that boys should be able to make their own decisions about circumcision.[xxii]

Royal Australasian College of Physicians (2010)

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

American Academy of Pediatrics (AAP) and U.S. Centers for Disease Control (CDC) (2012)

AAP Policy Statement: "The benefits of newborn male circumcision outweigh the risks." but "… the health benefits are not great enough to recommend routine circumcision for all newborns…"[xxiv]

CDC Statement: "Delaying circumcision until adolescence or adulthood enables the male to participate in – or make – the decision."[xxv]

German Association of Pediatricians (BVKJ) (2012)

In testimony to the German legislature, the BVKJ President stated, "there is no reason from a medical point of view to remove an intact foreskin from …boys unable to give their consent." It asserts that boys have the same right to physical integrity as girls under German law, and, regarding non-therapeutic circumcision, that parents' right to freedom of religion ends at the point where the child's right to physical integrity is infringed upon.[xxvi] [xxvii]

Nordic Ombudsmen for Children and pediatric experts (2013)

As Ombudsmen for Children and pediatric experts we are of the opinion that circumcision without medical indications in conflict with Article 12 of the Convention on the Rights of the Child, which addresses the child's right to express his/her own views in all matters affecting him/her, and Article 24, point 3, which states that children must be protected against traditional practices that may be prejudicial to their health.[xxviii]

Canadian Paediatric Society (CPS) (2015)

The CPS does not recommend the routine circumcision of every newborn male. It further states that when "medical necessity is not established, …interventions should be deferred until the individual concerned is able to make their own choices."[xxix]

Danish Medical Association (2016)

"Circumcision of boys without a medical indication is ethically unacceptable when the procedure is carried out without informed consent from the person undergoing the surgery. Therefore, circumcision should not be performed before the boy is 18 years old and able to decide whether this is an operation he wants."[xxx]

APPENDIX II: Clinically anomalous annual (January) elevation of MBS Item 30659 "circumcision of penis 10 years and over" – before new Schedule Nov 2017

Requested Medicare Items processed from January 2005 to December 2017

SERVICES

MONTH OF PROCESSING

Item Number 30659

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[i] Mission to Republic of Sierra Leone, Human Rights Council, 25th Session, 23 December 2013, UN Document A/HRC/25/58/Add.1

[ii] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, 14 November 2014 UN Doc CEDAW/C/GC/31-CRC/C/GC/18

[iii] "Violating Children's Rights: Harmful practices based on tradition, culture, religion or superstition", p.21-22, accessed at http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/InCo_Report_15Oct.pdf

[iv] Belgian Advisory Cttee of Bioethics, "Opinion No. 70 of 8 May 2017 on the ethical aspects of nonmedical circumcision" accessed at https://www.health.belgium.be/en/opinion-no-70-ethical-aspects-nonmedical-circumcision
"The Committee unanimously proposes reflection on how to transcend the controversies. The best way forward would be to strive for a symbolic practice, in which physical integrity would be respected (in other words, no cutting of the flesh). In this way, all religious sensitivities would be respected, without transgressing anyone's physical integrity"

[v] Chapter 5 in "FGM/C: From Medicine to Critical Anthropology", Jan 2018 op.cit.

[vi] R v A2; R v Magennis; R v Vaziri (No. 23) [2016] NSWSC 282

[vii] R v A2; R v Magennis; R v Vaziri (No. 24) [2016] NSWSC 737

[viii] https://en.wikipedia.org/wiki/Demography_of_Australia

[ix] 1636/MENKES/PER/XI/2010

[x] Andree Feillard & Lies Marcoes 1998 "Female Circumcision in Indonesia : To" Islamize" in Ceremony or Secrecy" Archipel, volume 56, 1998. L'horizon nousantarien. Mélanges en hommage à Denys Lombard (Volume I) pp. 337-367; https://doi.org/10.3406/arch.1998.3495; Darwin, Muhadjir, Faturochman, Ptranti, Dyah, Basilica, Purwatiningsih, Sri, & Isaac Tri, Octaviatie (2002). "Male and female genital cutting among Yogyakartans and Madurans". accessed at http://www.hawaii.edu/hivandaids/Male%20and%20Female%20Genital%20Cutting%20Among%20Yogyakartans%20and%20Madurans.pdf; Hidayana et al "FGM in Indonesia – Between Policy and Practice", MAP-FGM (Multisectoral Academic Program to Prevent and Combat FGM/C"), Rome, November 2017 accessed at https://mapfgm.eu/wp-content/uploads/2018/03/Fusaschi-Cavatorta_ISBN_9788864840321_web-COP-1.pdf

[xi] Mary Ainslie, The 2009 Malaysian Female Circumcision Fatwa: State ownership of Islam and the current impasse, Women's Studies International Forum 52 (2015) 1–9

[xii] http://www.judiciary.gov.uk/wp-content/uploads/2015/01/BandG_2_.pdf

[xiii] R v A2; R v Magennis; R v Vaziri (No. 24) [2016] NSWSC 737

[xiv] Item 30658: http://medicarestatistics.humanservices.gov.au/statistics/do.jsp?_PROGRAM=/statistics/mbs_item_age_gender_report&VAR=services&STAT=count&PTYPE=calyear&START_DT=201701&END_DT=201712&RPT_FMT=by+state&GROUP=30658; Item 30654 http://medicarestatistics.humanservices.gov.au/statistics/do.jsp?_PROGRAM=/statistics/mbs_item_age_gender_report

&VAR=services&STAT=count&PTYPE=finyear&START_DT=201607&END_DT=201706&RPT_FMT=by+time+period+and+state&GROUP=30654

[xv] Medicare Benefits Schedule November 2017, Items 35533 and 35534 Vulvoplasty and Labioplasty.

[xvi] Personal communication; full source available on request

[xvii] Williams v Commonwealth of Australia [2012] HCA 23; Williams v Commonwealth [2014] HCA 23

[xviii] High Court of Australia, Secretary, Dept of Health & Human Services v. JWB. and SMB. (Marion's Case) [1992] HCA 15; (1992) 175 CLR 218

[xix] https://www.australiandoctor.com.au/news/strong-opposition-newborn-circumcision

[xx] http://www.endcorporalpunishment.org

[xxi] https://www.bma.org.uk/advice/employment/ethics/children-and-young-people/male-circumcision

[xxii] https://www.doctorsopposingcircumcision.org/wp-content/uploads/2016/09/knmg-non-therapeutic-circumcision-of-male-minors-27-05-2010.pdf

[xxiii] https://www.racp.edu.au/docs/default-source/advocacy-library/circumcision-of-infant-males.pdf

[xxiv] http://pediatrics.aappublications.org/content/early/2012/08/22/peds.2012-1989

[xxv] http://www.cdc.gov/nchhstp/newsroom/docs/factsheets/mc-factsheet-508.pdf

[xxvi] http://arclaw.org/sites/default/files/BVKJ_Statement_Official_Translation.pdf

[xxvii] http://www.dgkic.de/index.php/menu_dgkch_home/menu_pressestelle/33-pressemitteilung-2012-10

[xxviii] http://lapsiasia.fi/en/tata-mielta/aloitteet/aloitteet-2013/joint-statement-from-the-nordic-ombudsmen-for-children-and-pediatric-experts/

[xxix] http://www.cps.ca/documents/position/circumcision

[xxx] Found at https://www.bellybelly.com.au/baby/one-countrys-entire-medical-board-finds-circumcision-unethical/