

Crimes (Definition of Female Genital Mutilation) Amendment Bill

Member's Bill

As reported from the Health Committee

Commentary

Recommendation

The Health Committee has examined the Crimes (Definition of Female Genital Mutilation) Amendment Bill and recommends that it be passed with the amendments shown.

We also recommend that the Government develop a set of national guidelines and specific policies to deal with female genital mutilation.

Introduction

The Crimes (Definition of Female Genital Mutilation) Amendment Bill is a Member's bill. It is co-sponsored by four members: Jenny Marcroft (New Zealand First Party), Priyanca Radhakrishnan (New Zealand Labour Party), Golriz Ghahraman (Green Party of Aotearoa New Zealand), and Jo Hayes (New Zealand National Party).

The bill seeks to ensure all forms of female genital mutilation are illegal in New Zealand

The Crimes Act 1961 prohibits the practice of female genital mutilation. Section 204A makes it an offence to perform on any person, or cause to be performed, any act involving female genital mutilation. This includes arranging for a child to be sent or taken outside New Zealand with the intent of female genital mutilation being performed. Consent is not a defence to the offence.

Female genital mutilation is defined in section 204A(1) of the Act as the excision, infibulation, or mutilation of the whole or part of the labia majora, labia minora, or clitoris of any person.

This bill would amend that definition to ensure that all types of female genital mutilation are considered illegal in New Zealand. Amending the definition aims to protect women and girls from all forms of female genital mutilation. According to the bill's general policy statement, its other aims are to bring New Zealand into line with international best practice, and ensure that the Crimes Act provisions are relevant and fit for purpose.

The issue of female genital mutilation is complex

Female genital mutilation is a complex and multifaceted practice, which is deeply rooted in historical, cultural, social, and religious beliefs with unclear origins. It has no health benefits, and the health risks increase with the severity of female genital mutilation performed. It is mostly carried out on girls between infancy and adolescence.

We note that some women do not consider the practice to be mutilation, and may have positive experiences from it. However, we believe that the negative implications of female genital mutilation, both physical and psychological, outweigh any positive experiences. Most submitters expressed support for amending the definition of female genital mutilation so that all forms are illegal in New Zealand.

We believe legislative change is important to protect women and girls. Having it clear in law that female genital mutilation is illegal in all its forms would make it easier to educate affected groups on this issue.

The World Health Organization has classified the types of female genital mutilation

The World Health Organization (WHO) has stated that female genital mutilation includes all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.

In 1997, the WHO classified female genital mutilation into four types.¹ The current definition in the Crimes Act does not explicitly refer to practices described in the WHO classification of type four. This type includes all other harmful procedures to the female genitalia for non-medical purposes, including pricking, piercing, incising, scraping, and cauterising the genital area. The bill would explicitly include this type of female genital mutilation in the definition in the Crimes Act.

The bill would retain the exceptions to the offence in the Act

There are exceptions to the offence of female genital mutilation contained in the Act. The bill does not seek to change these.

It is not an offence for a medical practitioner (commonly referred to as a doctor) to perform medical procedures that would meet the definition of female genital mutilation if they did so for the benefit of the person's physical or mental health. This would

¹ <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>

include gender confirmation surgery, and medical procedures performed by a doctor or midwife on a woman who was in labour or immediately after she gave birth. The latter is permitted if it is for the health benefit of the woman or child.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Making the definition fit for purpose

Removal of reference to “external” female genitalia

The WHO has stated that female genital mutilation includes all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.

The bill’s terminology should be consistent with both the Crimes Act and the WHO definition. The bill as introduced would define female genital mutilation in new section 204A(1)(a) as the excision, infibulation, or mutilation of the whole or part of the external female genitalia. This is inconsistent both with proposed new section 204A(1)(b), which would not limit the definition to external genitalia, and the WHO definition. We therefore recommend removing the word “external” from new section 204A(1)(a) so that female genital mutilation is covered in all its forms.

Removal of reference to “altering the structure or function of the female genitalia”

New section 204A(1)(b)(iii), as proposed in the bill as introduced, states that female genital mutilation includes harmful procedures “intended to alter the structure or function” of the female genitalia. However, there are types of female genital mutilation that do not alter the structure or function of the female genitalia, but are still harmful procedures carried out on the female genitalia. The requirement for intent in new section 204A(1)(b)(iii) is also not included in the WHO classifications of female genital mutilation.

We therefore recommend replacing “other harmful procedures intended to alter the structure or function of the female genitalia” with “other harmful procedures carried out on any part of the female genitalia”. This would fit more closely with the bill’s intention of protecting women and girls from all forms of female genital mutilation.

Cosmetic and enhancement procedures excluded

The bill’s main aim is to ensure that all women and girls are adequately protected from all forms of female genital mutilation. However, the bill does not intend to criminalise some cosmetic and enhancement procedures.

New section 204A(1)(b)(iii) would prohibit “pricking, piercing, incising, scraping, or cauterising” the female genitalia. This appears to capture, and therefore criminalise, cosmetic procedures such as genital piercing and tattooing. We recommend amending

the bill to allow for the exception of these sorts of cosmetic procedures. Piercing and tattooing procedures would continue to be regulated under existing frameworks.²

We also note that cosmetic practices performed in the clinical context, such as labiaplasty and clitoral hoodoplasty, are covered by the bill as introduced. These sorts of procedures are performed by doctors for a variety of reasons, such as alleviating physical discomfort, increasing sexual stimulation, or to achieve a desired appearance. Under both the current provisions, and those proposed by the bill, doctors would likely deem these procedures to be beneficial to the patient's mental health, and therefore permitted. However, this has not been tested by the courts (although we acknowledge it is unlikely proceedings would be brought to test this). We want to make it clear that these sorts of procedures would be permitted. We therefore recommend amending the bill to exclude these sorts of procedures from the definition of female genital mutilation.

To achieve both of these aims, we recommend amending clause 4 to insert section 204A(1)(c). New paragraph (c) would state that female genital mutilation "does not include a procedure carried out on female genitalia for cosmetic or enhancement purposes only".

We appreciate the difficulty of providing in legislation a clear outline of what constitutes female genital mutilation, and which specific procedures would be excluded. However, we think it is important that there is some clarity on what procedures are excluded because they are cosmetic or enhancement procedures (such as genital piercing, tattooing, or labiaplasty). We recommend that the Government publish guidelines to help determine whether a procedure carried out on female genitalia is for cosmetic or enhancement purposes. Guidelines, rather than legislation, are flexible and would allow the procedures permitted to be updated over time and stay in line with best health practice.

Extending exclusions to nurses (including nurse practitioners)

The current provisions in the Crimes Act prohibiting female genital mutilation provide exclusions for procedures performed by a doctor for the person's physical or mental health. A doctor or midwife may also perform such a procedure while a person is in labour or immediately after they give birth, if it is for the benefit of their health or the health of their child. These procedures during labour or immediately after birth can also be performed by any other person if no other doctor or midwife is available.

The bill intends to keep these exclusions in the Act. However, by explicitly referring to practices described in the WHO classification of type four female genital mutilation, some procedures performed by a nurse or nurse practitioner could be covered by the definition. This includes, but is not limited to, minor medical procedures on the

² This includes the Consumer Guarantees Act 1993, regional council by-laws, Ministry of Health guidelines, and individual operator policies.

external genitalia such as lancing an abscess or injecting a steroidal treatment. A nurse would potentially be liable under the amended provisions if they performed these procedures.

The bill does not intend to criminalise medical procedures performed for a person's mental or physical health, if carried out by a qualified health practitioner. We believe nurses and nurse practitioners should be included in these exceptions. We therefore recommend amending clause 4 to extend the exclusion for doctors and midwives in section 204A to include nurses (including nurse practitioners). As part of that amendment, we recommend inserting a definition of nurse, which would cover nurse practitioners. A nurse or nurse practitioner would need to be registered with the Nursing Council of New Zealand with a scope of practice that permits the performance of nursing or nurse practitioner functions.

We recommend further non-legislative measures

While it is important to enact legislative change to ensure that all women and girls are protected from all forms of female genital mutilation, more is needed to support this aim. We recommend creating national guidelines and an education programme to further reduce the incidence of female genital mutilation in New Zealand.

National guidelines

There is no national guidance for the Police to respond to or investigate suspected cases of female genital mutilation. Oranga Tamariki has specific guidance for female genital mutilation, but it is not the responsible agency for prosecuting female genital mutilation as a criminal offence. (It is, however, expected to work with the Police to investigate a suspected case.) Female genital mutilation is included in the list of offences in the Crown Prosecution Regulations. However, there is no specific guidance to cover a prosecution for female genital mutilation. Instead, New Zealand has a set of general guidelines that cover all Crown prosecutions.

To ensure a consistent understanding and approach to the law and practice, we recommend that the Government develop a set of national guidelines and specific policies to deal with female genital mutilation. Guidelines would support the Police, and other agencies that deal with female genital mutilation (such as Oranga Tamariki and health agencies), to have a clearer and more consistent basis on which to approach actual or suspected cases appropriately. We note that a similar approach was recently taken in the United Kingdom.

Education programme

We also recommend that the Government develop an education programme to support both the legislative changes made and any national guidelines developed. We believe this is the best way to effectively reduce female genital mutilation in practice. Several submitters also recommended developing such a programme.

An education programme should be for communities where female genital mutilation is practised, as well as health professionals, police staff, social services, and legal

practitioners who work with affected communities or encounter female genital mutilation cases.

Matters outside the scope of this bill

Some submitters wanted the bill to address male circumcision and intersex genital mutilation

Male circumcision

Some submitters suggested that the bill be extended to include male circumcision. They argued that male circumcision is also done without consent, is more common in New Zealand, and the reasons for criminalising female genital mutilation also apply to male circumcision.

Intersex genital mutilation

Some submitters suggested that the bill be extended to include intersex genital mutilation. They noted that genital surgery on intersex children is performed without their consent and with no medical reason for the procedure. They said this is a breach of both the child's rights and the New Zealand Bill of Rights Act 1990.

By not addressing intersex genital mutilation, submitters said, the bill does not reflect calls from the United Nations' human rights treaty bodies, nor the United Nations Universal Periodic Review of New Zealand, to create legal protections for all people with intersex variations.

These issues do not fit within the narrow scope of the bill

The scope of this bill is narrow. The bill would update the definition of female genital mutilation to clarify what is included in the associated offence that already exists in the Crimes Act. It would make a minor amendment to a section of the Act that is in line with the pre-existing aim of the section. The bill does not make significant policy changes to the section or its purpose.

Recommending amendments to include male circumcision or intersex genital mutilation would involve amending the purpose of the existing section. This would be a significant policy change that has not been fully considered and that the public has not been able to submit on or be consulted on.

Both these issues would need separate processes to make the changes the submitters are seeking. Non-legislative measures could also be taken to address these issues, such as guidelines on consent to procedures developed by the Ministry of Health. We recommend that the Ministry of Health continue to work with relevant individuals and organisations who have highlighted the issues of male circumcision and intersex genital mutilation and produce evidence for specific legislative reform if this is needed.

While the issues do not fit within the scope of this bill, they are worthy of proper consideration. We thank the submitters for bringing them to our attention.

Appendix

Committee process

The Crimes (Definition of Female Genital Mutilation) Amendment Bill was referred to the committee on 4 December 2019. The closing date for submissions was 27 January 2020. We received and considered 28 submissions from interested groups and individuals. We heard oral evidence from 7 submitters at a hearing in Wellington.

We received advice from the Ministry of Health and the Ministry of Justice.

Committee membership

Louisa Wall (Chairperson)

Hon Maggie Barry

Dr Liz Craig

Matt Doocey

Hon Ruth Dyson

Jenny Marcroft

Dr Shane Reti

Hon Michael Woodhouse

Golriz Ghahraman, Jo Hayes, and Priyanca Radhakrishnan also contributed to this item of business.

**Crimes (Definition of Female Genital Mutilation)
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Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Jenny Marcroft, Priyanca Radhakrishnan, Golriz Ghahraman, and Jo Hayes

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Crimes (Definition of Female Genital Mutilation) Amendment Act **2019**.
- 2 Commencement** 5
This Act comes into force on the day after the date on which it receives the Royal assent.
- 3 Principal Act**
This Act amends the Crimes Act 1961 (the **principal Act**).
- 4 Section 204A amended (Female genital mutilation)** 10
 - (1) In section 204A(1), replace the definition of **female genital mutilation** with:
female genital mutilation—
 - (a) means the excision, infibulation, or mutilation of the whole or part of the ~~external~~ female genitalia of any person; and
 - (b) includes, ~~but is not limited to,~~—

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- (i) the partial or total removal of the clitoris, labia majora, labia minora, or the prepuce, or any combination of these:
- (ii) the narrowing of the vaginal opening by cutting or repositioning the labia majora, or the labia minora, or both:
- (iii) other harmful procedures ~~intended to alter the structure or function of~~ carried out on any part of the female genitalia, such as pricking, piercing, incising, scraping, or cauterising; but 5
- (c) does not include a procedure carried out for cosmetic or enhancement purposes only
- (2) In section 204A(1), insert in its appropriate alphabetical order: 10
- nurse** means a health practitioner who is, or is deemed to be, registered with the Nursing Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of nursing
- (3) In section 204A(3)(a)(ii), after “practitioner”, insert “ or nurse”. 15
- (4) Replace section 204A(3)(b)(iii) with:
- (iii) by a medical practitioner, midwife, nurse, or trainee health professional, or, if the case is urgent and none of them are available, by any other person.

Legislative history

4 December 2019

Introduction (Bill 194–1), first reading and referral to Health Committee