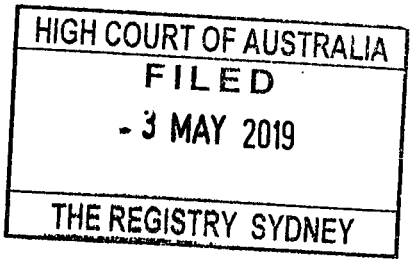
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S 44 of 2019

BETWEEN: The Queen
Appellant

and



Kubra Magennis
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of Issues

2. In the phrase "excises, infibulates or otherwise mutilates" in s45(1)(a) of the *Crimes Act 1900* (NSW) does the term "otherwise mutilates" mean "to injure to any extent" as the jury were directed in this case?
3. Does the term "clitoris" in s45(1)(a) of the *Crimes Act* include the clitoral hood/prepuce?

Part III: Section 78B Notice

4. The respondent does not consider that notice is required pursuant to s78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

5. There is no significant dispute with the evidence as summarised in the Appellant's Submissions ("AS"). The summary is relevant only to the question of whether the Court should order a re-trial. The inability of the evidence to establish beyond

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reasonable doubt that there was even a nick or cut to the clitoris or genital area of C1 or C2 is addressed in further detail at the end of these submissions.

6. The appellant notes that C1 gave evidence that she saw the respondent holding a silver tool that looked like scissors (AS at [15]). The respondent gave evidence that she used forceps to touch the genitalia of C1 and C2 in the symbolic ceremony (Court of Criminal Appeal ("CCA") [306]-[310], Core Appeal Book ("CAB") **431-2**). The CCA considered that there were "obvious similarities" between C1's drawing of the "scissors" (Ex B) and the images of forceps (Ex F and 3) and noted that it was unfortunate neither Ex F nor Ex 3 was shown to C1 for comparison purposes (CCA [624] **CAB 521**).

7. The appellant's summary of C2's evidence must be considered in the context of her inability to identify the "private part" on the body sketch she was given (CCA [39] **CAB 361-2**). The sketch shows the words "tummy" and "knee" with arrows pointing to the private part (CCA [39] **CAB 361-2**). When asked if anyone had done anything to her tummy C2 said no (CCA [39] **CAB 361-2**). She shook her head when asked if anyone had done anything to her knee (CCA [39] **CAB 361-2**).

8. Only the lawfully recorded conversations involving the respondent were admissible against her (AS at [20]-[25]). The conversations referred to at AS [20], [23], and [25] were not admissible against the respondent.

9. Dr Marks' evidence regarding scarring generally was given in respect of "superficial cuts" (CCA [211] **CAB 405**; AS at [27]). Contrary to the appellant's summary at AS [28], Prof Jenkins' evidence that overt changes to a female's anatomy after having undergone female genital mutilation ("FGM") procedures were not obvious was given in respect of the specific procedure involving the cutting off the tip of the prepuce or the clitoris not FGM procedures generally (CCA 233 **CAB 410-1**). Further, Prof Jenkins' evidence was to the effect that a scar would be expected even if it was barely visible (CCA [545] **CAB 500**).

Part V: Argument

10. There are a significant conceptual and procedural problems with the appeal as framed and advanced by the appellant. Success on the appellant's principal ground (2.i) would not achieve the order sought (**CAB 722**). No ground of appeal directly challenges the CCA's ruling on ground 1 or the CCA's decision to order an

acquittal. Ground 2.i alleges the CCA erred in construing the term "otherwise mutilates" as requiring injury or damage that renders the body part in question imperfect or irreparably damaged (**CAB 722**). However, in order to succeed in obtaining a re-trial the appellant must also show that the CCA erred in concluding that the term connotes more than superficial injury such as the shedding of skin cells or a nick or cut that leaves no visible scarring and cannot be seen on medical examination to have caused any damage to the skin or nerve tissue (CCA [515], [521] **CAB 492, 493**). This is because the context in which the construction question arose at trial has significance for the appellant's appeal in this Court. At trial, the Crown case was that the respondent had performed a ceremony called "khatna" which involved a nick or cut to the clitoris of C1 and C2 (CCA [2] **CAB 351**). At the pre-trial hearing, the Crown contended that any physical injury to the female genitalia for non medical reasons can amount to mutilation under s45 of the *Crimes Act* (CCA [362] **CAB 447**). This construction was advanced because neither the medical evidence nor the evidence of the two complainants supported a contention that anything more serious than a nick or cut occurred. That is to say, there was no evidence that suggested something more than bare injury occurred (putting aside Dr Marks' evidence at trial concerning a possible excision which was the subject of fresh evidence on the appeal). The only case which the Crown could present on a re-trial in respect of the s45 of the *Crimes Act* is one based on a nick or cut, that is, bare injury. Success on ground 2.ii alone would not achieve an order for a re-trial.

The NSW Court of Criminal Appeal's approach to statutory construction

11. The CCA's approach to statutory construction was consistent with authority in this Court and the CCA did take into account important contextual considerations and the apparent legislative purpose (*SZTAL v Minister for Immigration* (2018) 252 CLR 362 at [14], *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71], *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47], CCA [464]-[473] **CAB 476-9**; cf. AS at [36], [40]). The CCA construed the text of the provision in light of its context and purpose having appropriate regard to the extrinsic materials (CCA [474]-[477], [480]-[493], [497], [511]-[514], [519] **CAB 480-6, 491, 493**). The CCA took into account relevant contextual matters including that the term "otherwise mutilates"

was intended to capture other forms of mutilation that are to be prohibited and that the object of the verb was a sensitive body part (CCA [493]-[495], [519] **CAB 485-6**). The CCA also took into account that the context and purpose of the provision was to prohibit FGM (CCA [480], [510]-[514] **CAB 481, 490-2**; cf. AS at [40]).

12. The CCA considered that regard could be had to the extrinsic material to determine the context and purpose of the provision regardless of whether there was ambiguity in the provision (CCA [477] **CAB 480-1**). This accords with the statement of principle in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. The CCA recognised there was an argument that there was ambiguity in the word "mutilates" and consequently had regard to the extrinsic material pursuant to s34 of the *Interpretation Act 1987* (NSW) (CCA [474] **CAB 480**). The CCA disregarded various extrinsic material which was taken into account by the trial judge (CCA [499]-[509] **CAB 486-90**). The appellant does not suggest the CCA erred in doing so.

13. The CCA's conclusion that the extrinsic materials "*do not permit a construction of "mutilates" that departs from its ordinary meaning*" is simply a conclusion in respect of s34(1)(a) of the *Interpretation Act 1987* (NSW) (CCA [521] **CAB 493**). It also finds support in authority of this Court (*Alcan* at [47]). It does not bespeak error (cf. AS at [36], [37]).

14. Further, for the reasons set out in these submissions the CCA correctly concluded that the trial judge's directions were erroneous and that the term "otherwise mutilates" in s45(1)(a) of the *Crimes Act* requires some form of injury or damage that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion (CCA [521]-[522] **CAB 493-4**). The CCA's construction of the term "otherwise mutilates" confirms that serious or significant injury is captured by s45 of the *Crimes Act* and less serious injuries may be captured by other offences in the *Crimes Act*.

Legislative purpose

The purpose of the provision and its significance

15. The appellant submits that the term "mutilates" in s45(1)(a) of the *Crimes Act* extends to the infliction of injury because the context of the provision is FGM and the purpose of the legislature was to prohibit FGM in all its forms (AS at [42]-

[53]). However, properly analysed, the extrinsic material does not support the contention that the purpose of the enactment of s45 of the *Crimes Act* was to prohibit FGM in all its forms and by reference to definitions of FGM in selected reports and dictionaries (CCA at [512], [514] **CAB 491-2**; cf. AS at [43]-[52]).

16. It is not in dispute that the purpose of s45 of the *Crimes Act* was, and is, to prohibit FGM. So much is evident from the heading of the provision and the long title to the Act which introduced s45 of the *Crimes Act*. This poses the question of what is meant by the term "mutilates" in that context (CCA [480], [494] **CAB 481, 485**). The offence provision itself does not use the term FGM. Rather, what the legislature regards as FGM is that which is prohibited by the provision.

17. Neither the long title of the Act introducing s45 of the *Crimes Act* nor the Explanatory Note to the Bill stated that the object of the provision was to prohibit FGM in all its forms.

18. It is apparent from the second reading speech that the legislature was principally concerned with prohibiting the practice of FGM insofar as it involved removal of all or part of the external female genitalia. The second reading speech commenced as follows: "*This bill will make the practice of female genital mutilation a criminal offence in this State. Female genital mutilation, or FGM, is the term used to describe a number of practices involving the mutilation of female genitals for traditional or ritual reasons. The practice involves the excision or removal of parts or all of the external female genitalia.*"

19. That this was the legislature's principal concern is further supported by the later reference in the Minister's second reading speech to the three forms of FGM: infibulation, clitoridectomy and sunna. These forms of FGM all involve removal of tissue (Family Law Council Report at [2.04]-[2.06]). The Minister said "*The bill seeks to prohibit all of these various methods of FGM*". There is no reference in the second reading speech to ritualised circumcision as so described in the Family Law Council Report (CCA [512], [514] **CAB 491-2**). Nor did the second reading speech indicate that it was implementing the Family Law Council Report's recommendations (cf. AS at [52]). Further, according the Family Law Council Report, NSW had announced a legislative proposal to make the practice of FGM an offence prior to the Report being published (at [6.30]).

20. The appellant submits that it is "*undeniable that the general mischief to which s45 of the Crimes Act is directed is the practice of [FGM]*" (emphasis added, AS at [42]). The legislature did not frame the offence in terms of a particular practice. Had the legislature intended to prohibit the practice of FGM there would be no need to provide an exception for medical procedures in s45(3) of the *Crimes Act*. The legislature chose to describe the offence by reference to particular actions. This is no doubt because of the need to provide for certainty in the drafting of criminal offences and the significant difficulty in describing a practice to be prohibited. The express actions prohibited by s45 of the *Crimes Act* should be taken to have been chosen having in mind the otherwise broad application of the offence, namely to all females regardless of age and regardless of consent. As such, an expansive construction of the term "otherwise mutilates" is not justified on the basis of protection of children (cf. AS at [53], [54]). Different policy decisions regarding the female's age and consent may have been made if it was intended that the offence apply to any injury so as to avoid unintended consequences. For example, on the appellant's construction, the offence would capture a bruise or graze even if it was occasioned with an adult woman's consent.

21. The appellant relies on the fact that the term "sunna" is a cultural term and its meaning can vary (AS at [51]). However, there was no ambiguity in what the Family Law Council Report described as sunna (see at [2.04]). The procedures named in the second reading speech (infibulation, clitoridectomy and sunna) correspond to the language of s45(1)(a) of the *Crimes Act* (cf. AS at [51]). These procedures fall under "infibulates" or "excises". The appellant argues that it cannot have been the legislative intention to prohibit only these three procedures because that would leave the term "otherwise mutilates" with no work to do (AS at [50]). This reflects a finding made by the trial judge (see Judgment [248] **CAB 83-4**).

22. However, it is readily apparent from the statutory text that the phrase "otherwise mutilates" was included to ensure that the provision was not limited to practices involving excision or infibulation (see CCA [519] **CAB 493**). In fact, the appellant's construction deprives the words "excises" and "infibulates" of their meaning and significance. The second reading speech does not elucidate the purpose of including the term "otherwise mutilates" in the offence provision. Nor does the second reading speech suggest that it was intended that the meaning of that

term be extended to any injury however small. The appellant appears to accept that the procedures described in the second reading speech "shed no real light" on what other forms of FGM the provision was intended to capture (AS at [51]). It is submitted that inclusion of the term "otherwise mutilates" was to ensure the offence extended to other forms of serious or significant damage to the external female genitalia that do not involve the removal of tissue (cf. AS at [51]).

23. In support of its argument in respect of purpose the appellant relies on the Family Law Council Report using the term "FGM" to include all forms of the practice where tissue damage results (AS [43], [48]). Neither the text of the provision nor the second reading speech used this terminology. Nor was the concept of "tissue damage" endorsed by the Crown at trial. The appellant does not argue that the term "otherwise mutilates" should be construed as "tissue damage" rather the submission is that it should extend to the infliction of injury (see AS at [45], [54]).

24. The appellant places some reliance on the use of the word "incision" in the Explanatory Note, and the use of the word "cutting" in a dictionary definition of FGM (see AS at [44] [52]). In respect of references to incision and cutting, the question for the CCA was the construction of the term "otherwise mutilates" not the means by which the body part in question can be mutilated. A nick or cut to the clitoris could be capable of constituting mutilation if it results in serious damage (CCA [493], [522] **CAB 485, 494**). It would be wrong to construe the term "mutilates" by reference to the means by which that damage *might* be achieved (cf. Judgment at [161] **CAB 53-4**, see also above at [20]). Further, the reference to "incision" in the Explanatory note does not suggest, without more, that the legislature intended to extend the term "otherwise mutilates" to mean the infliction of injury to any extent.

25. The appellant incorrectly suggests that there was some ambiguity or incoherence in the CCA's findings as to the purpose of the provision (AS at [49], [50], [53]). The CCA was not satisfied that the context and purpose of the provision permitted a conclusion that "otherwise mutilates" was intended to encompass all forms of injury or any injury to any extent (CCA [514] **CAB 491-2**; cf. AS at [49], [53]). The CCA considered that there was "some doubt" as to whether ritualised circumcision was intended by the legislature to be captured by the legislation (CCA [512] **CAB 491**; cf. AS at [49], [52], [53]). The CCA did not consider that the

legislature only intended to prohibit the three forms referred to in the second reading speech (cf. AS at [50]). The CCA found that the term "otherwise mutilates" was intended to prohibit other forms of mutilation (CCA [519] **CAB 493**).

26. The CCA said that the legislature recognised the dangers of even ritualised circumcision (CCA at [524] **CAB 494**, see AS at [49]). The CCA's observations in relation to the necessity of legislative amendment was recognition of the Constitutional limits of a purposive construction (as to which see below; CCA at [523]-[524] **CAB 494**). Further, there is no reference in the second reading speech to ritualised circumcision. The Family Law Council Report did not suggest that there were there were significant physical effects in respect of ritualised circumcision. The Report noted that ritualised circumcision "*causes bleeding and may result in little mutilation or long term damage*" and that the adverse effects of ritualised circumcision, sunna and excision tend to be less severe than infibulation but there can still be considerable pain, bleeding and infections (at [2.03], [3.10]). When one compares the health hazards and physical effects described in the second reading speech to the Family Law Council Report it is apparent that the physical effects with which the legislature was concerned were those most commonly associated with infibulation, the most severe form of FGM (Family Law Council Report at [2.05], [3.06], [3.09], [3.12]-[3.14]). As such, it cannot be said that reference to the physical effects (associated with infibulation) in the Explanatory Note to the Bill support the contention that bare injury is sufficient to establish mutilates or that that was the purpose of the provision (cf. AS ta [52]).

27. The CCA's finding that the purpose of the provision did not extend to prohibiting all forms of female genital mutilation so described in the Family Law Council's Report is well grounded in the text of the provision. The purpose of a provision "*resides in its text and structure*" (*Certain Lloyd's Underwriters v Cross* 248 CLR 378 at [25], *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at [44]). Appropriate regard may be had to selected extrinsic materials (*CIC Insurance Ltd v Bankstown Football Club Ltd* at 408). However, for the reasons above, that material does not support the appellant's construction. The text of the provision is the surest guide to the legislative intention behind it (*Alcan (NT)* at [47]). This is particularly so where the extrinsic material is, at best, ambiguous as to whether it

was the legislative intention to prohibit all forms of FGM so described in the Family Law Council Report.

Other contextual considerations

28. A significant feature of the statutory context of s45(1)(a) of the *Crimes Act* are the words preceding "otherwise mutilates" in that provision namely, "infibulates" and "excises". These terms (including "mutilates") have a common and dominant feature – serious or significant injury. A further feature of the context of the term in s45 of the *Crimes Act* is that it appears in an offence provision (*Alcan* at [57]). The CCA was correct to place some significance on the clear legislative choice to deploy the words "otherwise mutilates" rather than "otherwise injures" or "otherwise damages" (CCA at [495]). This is in contrast with provisions that expressly prohibit the infliction of "any injury" (for example, ss315A, 322, 326, and 545B *Crimes Act*).

Strains the language of the provision

29. The term mutilates, itself, carries with it a strong connotation of very significant or serious injury. In the context of criminal offences, this Court has observed that the language of the provision cannot be strained. In *Grajewski v Director of Public Prosecutions (NSW)* [2019] HCA 8 at [21], "*It strains the language of the provision to interpret the words "destroys or damages" as including conduct which obstructs or renders useless without in any way altering the physical integrity of the property. If the legislature intended to criminalise obstruction of property or the rendering of it useless in s195(1), it is to be expected that it would have so provided*". Similarly, in *Milne v The Queen* (2014) 252 CLR 149 at [38] it was noted "*[p]urposive construction does not justify expanding the scope of a criminal offence beyond its textual limits*".

30. Further, as recognised in *Alcan (NT)* "*Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text*" (at [47], citing *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at [22], *Combet v The Commonwealth* (2005) 224 CLR 494 at [135], *Northern Territory v Collins* (2008) 235 CLR 619 at [99]). In *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 Mason CJ, Wilson and Dawson J said

> "*The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always*

possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the court remains clear. The function of the courts is to give effect to the will of Parliament as expressed in the law." (see also, *Harrison v Melhem* (2008) 72 NSWLR 380 at [12]).

31. If the legislature intended that the offence cover all forms of FGM as described in the Family Law Council Report one would anticipate the offence would be described as "tissue damage". Or had the legislature intended the offence to cover any injury those words could well have been used (*Minogue v Victoria* (2016) 92 ALJR 668 at [43]). The fact that the word "mutilates" has an affinity to the term FGM is no answer to the failure to use these terms. The heading of the provision could still have signaled that the offence was concerned with FGM. It was not necessary or appropriate to use the particular word "mutilates" in the offence provision if lesser injury was intended to be covered.

32. In addition, construing the provision in the manner contended by the appellant pays insufficient regard to s34(3) of the *Interpretation Act*. This requires consideration be given to "*the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made)*".

33. The appellant observes that ascertaining the meaning of a provision by reference to context and purpose does not make that meaning "extraordinary" relying on s34 of the *Interpretation Act* and McHugh J in *Saraswati v The Queen* (1991) 172 CLR 1 at 21-22 (AS at [39]). However, that does not permit the Court to give a term an extraordinary meaning or to strain the language of a provision. The reference to "extraordinary" meaning in *Saraswati* arose in a different way. In *Saraswati* McHugh J quoted from *Cooper (Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 where Mason and Wilson JJ said "*when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred.*" The focus of that passage is not on whether the meaning ascribed to the provision following a purposive construction is extraordinary but whether the statute, when construed in accordance with its

ordinary meaning would have an extraordinary operation such that departure from the ordinary meaning is justified.

Supplanting the language

34. The appellant seeks to use dictionary definitions of the term "FGM" and other descriptions of that practice in selected material to inform and expand what is captured by the term "otherwise mutilates" in s45(1)(a) of the *Crimes Act* (AS at [42]-[45]). This is similar to the approach taken by the trial judge (Judgment at [145], [156]-[162], [243] **CAB 50, 53-4, 82**).

35. This does not accord with the conventional approach to statutory construction. A purposive construction does not permit reading the words "FGM" into the provision and then using extrinsic material to define those words in the broadest terms possible. Conventional statutory interpretation requires the text to be construed in context and having regard to purpose. Further, it is not logical to, on the one hand, diminish the significance of dictionary definitions of a word actually used in the offence provision and, on the other hand, favour or adopt dictionary definitions of a formulation of words that was not used in the statute (AS at [41], [43]; Judgment at [146]-[163] **CAB 50-4**). This is particularly so where the definitions relied upon were not referred to in the second reading speech. Similarly, there is no warrant for reading definitions of FGM in selected reports into the provision.

36. The construction urged by the appellant involves a rewording of the provision and gives primacy to (an asserted) purpose beyond that which is permitted by the modern approach to statutory construction. In *Taylor v Owners – Strata Plan 11564* (2014) 253 CLR 531 at [39] the plurality endorsed McHugh J in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113, *"[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances."* (at [39]).

37. The limits on purposive statutory construction are grounded in the *Constitution*. In *Taylor* at [40], the plurality went on to say

> *"Lord Diplock's speech in Wentworth Securities [Wentworth Securities v Jones [1980] AC 74 at 105-106] laid emphasis on the task as construction and not judicial legislation. In Inco Europe [Inco Europe Ltd v First Choice Distribution p2000] 1 WLR 586 at 592] Lord Nicholls of Birkenhead observed that even when Lord Diplock's conditions are met, the court may be inhibited*

from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament: the alteration to the language of the provision in such a case may be "too far reaching". In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the Constitution."

38. Similarly, in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [102] the plurality it was said "*Nor could it be for a court exercising the judicial power of the Commonwealth to supply this connection in deciding litigation said to arise under that law. That would involve the court in the rewriting of the statute, the function of the Parliament, not a Ch III court.*" (at [102], see also *Zheng v Cai* (2009) 239 CLR 446 at [28] citing *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [(2002) 123 FCR 298 at 410-12).

39. The CCA was correct to conclude that the trial judge's approach to statutory interpretation (and the appellant's approach in this Court) was wrong and impermissible (CCA [513]-[514] **CAB 491-2**). The phrase "FGM" cannot be supplanted into the term "otherwise mutilates" in s45 (CCA [513]).

40. The appellant submits that by the time s45 of the *Crimes Act* was enacted there was an awareness and discourse surrounding FGM (AS at [43]). Reference is then made to the meaning ascribed to FGM in the Family Law Council Report, the use of "cutting" in one dictionary definition of the word "FGM", references in the Family Law Council Report and discussion paper to the practice of "cutting" in the Malaysian Community in WA, and a reference in a Report of the Queensland Law Reform Commission which described FGM as including "*circumcision (including the scraping or nicking of the clitoris)*" (AS at [43]-[44]). As set out earlier, the question is the proper construction of the term "mutilates" not the means by which something can be mutilated. To the extent that there is reference to cutting, nicking or scraping in this material, little weight can be placed on it in the constructional exercise.

41. Further, an approach whereby the term "otherwise mutilates" is be understood by reference to definitions of the term "FGM" in selected reports or dictionaries (as opposed to the meaning conveyed by the term "otherwise mutilates") undermines the rule of law and the requirement for legal certainty (s34 *Interpretation Act, Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at [48]; *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408 at [44];

Taikato v The Queen (1996) 186 CLR 454 at 466; see also The Rule of Law is not a Law of Rules, Allsop CJ, Annual Quayside Oration November 2018). This is all the more so in circumstances where the legislature did not adopt such language in the second reading speech.

Constructional Choice

42. Section 33 of the *Interpretation Act* provides "*In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule ... shall be preferred to a construction that would not promote that purpose or object*".

10 43. The focus of this provision is not on the construction which will "best achieve" the statute's purpose *"[r]ather, it is a limited choice between 'a construction that would promote the purpose or object [of the Act] and one 'that would not promote that purpose or object'"* (*Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 262).

44. Section 33 of the *Interpretation Act* does not enable the Court to engage in a process of statutory construction whereby one asks which of the parties' constructions promotes the purpose of the provision (cf. Judgment at [249] **CAB 84**). Nor does s33 of the *Interpretation Act* permit the Court to construe a provision by reference to purpose regardless of the text or permit the Court to redraft the "*legislation nearer to an assumed desire of the legislature*" (*R v L* (1994) 49 FCR

20 534 at 538). It is not for a Court to come to a conclusion about its own idea of a desirable policy and impute that to the legislature and describe it as a statutory purpose (see *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [28]; *Miller v Miller* (2011) 242 CLR 446 at [29], *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26]).

45. It cannot be said that the CCA's construction given to the term "otherwise mutilates" does not promote the purpose of the provision (cf. Judgment at [249] **CAB 84**, AS at [54]). The purpose of the provision is to prohibit FGM. The CCA's construction promotes that purpose in that it prohibits the causing of serious or significant injury to the female genitalia.

30 46. The appellant states that the CCA accepted that there were a range of meanings attributable to mutilates (AS at [41]). The appellant contends that this give rise to a "constructional choice" which, after regard is had to definitions of FGM in select material, indicates that mutilates in the context of FGM extends to the infliction of

injury. However, the definitions of "mutilates" referred to by the CCA all suggested some form of serious or irreparable damage or destruction (CCA [488]-[490] **CAB 483-4**). The CCA was correct to conclude that more than the infliction of injury is required to establish mutilation (CCA [495] **CAB 486**).

47. Section 33 of the *Interpretation Act* has no work to do given that the CCA's construction promotes the purpose of the provision. Section 33 of the *Interpretation Act* does not permit purpose to be enlisted to support the framing of a term in a criminal offence in the broadest possible way. It can only operate where two constructions are otherwise properly open (*R v L* at 538).

Perceived evidentiary difficulties

48. Perceived evidentiary difficulties in proving offences under s45 of the *Crimes Act* do not support expanding the scope of the term "otherwise mutilates" to mean "any injury to any extent" (CCA [496] **CAB 486**, cf. AS at [54]). It is not an inconvenient or improbable result that a person may be acquitted of an offence under s45 of the *Crimes Act* where there is no evidence to support a finding of a result which contravenes the prohibition in s45(1)(a) (cf. AS at [54]). Parliament can, and often does, provide "deeming" provisions where there is a perceived difficulty in proof of an offence (see, for example, s29 of the *Drug Misuse and Trafficking Act 1986* (NSW)).

49. The appellant notes the difficulty in obtaining evidence of potential nerve damage as supporting its construction that any injury is sufficient to establish the offence (AS at [54]). However, the evidence adduced at the trial was not that every nick or cut to the clitoris would necessarily result in nerve damage. The CCA noted Dr Marks' evidence that a cut to the clitoral head could potentially have effects on future sexual functioning and if the nerve tissue of the clitoral head was cut that could lead to a loss of sensation, reduced sensation or altered sensation (CCA at [214] **CAB 406**). Further, the offence provision refers not only to the clitoris but also the labia majora and labia minora. As the CCA recognised, while "*the clitoral head may be more readily impaired or rendered imperfect due to the concentration of nerve tissue, the same may not be true of the clitoral hood (or prepuce), the labia majora and labia minora*" (CCA [497] **CAB 486**). The evidence of nerve disruption and possible effects of nerve disruption was given in respect of the clitoral head (not the prepuce) which, Dr Marks said, consisted of dense nerve

tissue (CCA at [213] **CAB 405**). Dr Marks, in re-examination confirmed that the clitoris is different tissue to the clitoral hood (or prepuce), which is skin (CCA [209] **CAB 404**). Dr Jenkins' evidence was that both the clitoris and the prepuce have quite a rich nerve supply, however the clitoris has a "*much more rich nerve supply than the prepuce*" (CCA [235] **CAB 411**). This is significant given that the appellant also contends that the CCA erred in finding that the term "clitoris" in s45 of the *Crimes Act* did not include the clitoral hood (or prepuce).

Directions to the jury on "mutilates"

50. The appellant contends that the trial judge's directions to the jury on the question of "mutilates" were not erroneous (AS at [55]-[59]). This submission is premised on the Court adopting the appellant's construction of the term "mutilates" which, for the reason above, should not be accepted. The appellant makes a further submission, namely that including the words "to any extent" after "injure" was not erroneous (AS at [59]). It is submitted that even if this Court is satisfied that the term "mutilates" extends to the infliction of injury the direction given by the trial judge was erroneous because it suggested de minimis injury was sufficient to establish the offence (cf. AS at [59]; CCA at [522] **CAB 494**). Describing an offence "de minimis" creates difficulties of its own (*Williams v The Queen* (1978) 10 CLR 591 at 597-598). Such a direction was particularly problematic in the respondent's case given the evidence concerning removal of skin cells (CCA [210], [490], [498] **CAB 404-5, 484 486**).

The CCA did not err in construing 'clitoris' s45(1)(a) of the *Crimes Act*

51. The CCA was correct in holding that the learned trial judge erred in construing the term '"clitoris" in s45(1)(a) of the *Crimes Act* as including the clitoral hood (prepuce). The respondent respectfully submits that the CCA's approach, in giving the term 'clitoris' in s45(1)(a) of the *Crimes Act* its anatomical meaning was correct (CCA [526] – [527] **CAB 495**). The construction adopted by the CCA is supported by medical evidence of one of the Crown witnesses at trial, Dr Marks (cf. AS at [60]; CCA [525] **CAB 494-5**). Dr Marks' evidence that the clitoral hood was not part of something else, the clitoral head and clitoral hood are closely physically related but they are different tissue and are not the same thing (CCA [209] **CAB 404**). The appellant's reliance on the perceived evidentiary difficulties concerning proving nerve damage in its argument with respect to "otherwise mutilates" makes

it particularly important to differentiate between the anatomical structures in question.

The Court should not order a re-trial

52. Even if the appellant successfully establishes that the trial judge's directions were correct (i.e. that ground 1 of the respondent's appeal in the court below should not have been upheld), it is submitted that the Court would not order a re-trial (s37 *Judiciary Act* and s8 *Criminal Appeal Act 1912* (NSW)). Not only does the evidence not support a case against the respondent on the basis that she performed a cut to the clitoris (or genital area) of C1 or C2, there are also compelling discretionary reasons as to why a retrial would not be ordered (CCA [635]-[637] **CAB 524-5**).

53. First, the evidence does not support a case against the respondent on the basis that she performed even a nick or cut to the clitoris (or genital area) of either C1 or C2. In considering whether to order a re-trial on the alternate counts of assault occasioning actual bodily harm contrary to s59 of the *Crimes Act*, the CCA considered the respondent's liability on the basis that there had been a nick or cut to the genital area, including, possibly, the clitoris (the case that would be presented on a re-trial) (CCA [614] **CAB 518**). The CCA declined to order a retrial on the alternate counts after carefully examining all of the evidence that would be available (CCA [638] **CAB525**). The appellant does not contend that this conclusion or the findings upon which it is based were erroneous. Verdicts of acquittal were entered on all counts.

54. The alleged offences came to the attention of the authorities due to an anonymous tip off (CCA [19] **CAB 356**). The evidence that there had been a cut to the private parts of C1 and C2 came about as a result of a series of leading questions (CCA at [23]-[25], [40], [626] **CAB 357-8, 362, 521-2**). The CCA considered that the high point of the evidence in support of the offence of assault occasioning actual bodily harm in relation to C1 was her evidence (CCA [621] **CAB 520**). However, the CCA concluded that C1's evidence that "*she thought she had been cut (or pinched) [was] to be viewed in the context of there being no lasting pain, no blood nor any other evidence of injury. She did not see the procedure and was describing what it felt like*" (CCA [625] **CAB 521**). Earlier, the Court observed that it was of "some

significance" that C1 was ultimately not able to describe what it was that caused her pain (CCA [621] **CAB 520**).

55. C2 was unable to identify her private parts on the body sketch (CCA [39] **CAB 361-2**). C2's account lacked any of the detail in C1's account (CCA [626] **CAB 521-2**). The CCA observed that "*[t]he evidence in her JIRT interview relevant to an allegation of actual bodily harm did not go any higher than the fact that after a number of leading questions she volunteered ... that she had "hurt" in her "bottom""*" (CCA [626] **CAB 521-2**). There were no other details in C2's account that would advance a case that actual bodily harm (on the Crown case a nick or cut) had been inflicted on her (CCA [626] **CAB 521-2**). The CCA concluded that C2's evidence, without any other evidence as to the procedure performed on her, could not support an allegation of actual bodily harm "*especially given the lack of any physical evidence of harm*" (CCA [628] **CAB 522**).

56. The medical evidence was, at best, neutral for the Crown case in relation to a nick or cut to the clitoris. The medical evidence as to whether an injury had been inflicted on the genitalia of the complainants rose no higher than a possibility. Examination of the girls revealed that the external female genitalia were normal in each girl (CCA [218]-[219] **CAB 406-7**). The prepuces of C1 and C2 were normal (CCA [218]-[220], [222] **CAB 406-7**). There was no evidence of scarring on either complainant (CCA [218]-[219] **CAB 406-7**). The medical evidence suggested that a cut to the clitoris would cause pain and be painful for a period of time after (CCA [213], [215], [235]-[236] **CAB 405-6, 411**). However, no bleeding nor significant/sustained pain was reported by the complainants (CCA [30], [31], [42], [169], [621], [625] **CAB 359, 362-3, 394-5, 520-2**).

57. Dr X's evidence was described as "important" given that neither complainant gave direct evidence that her clitoris had been cut or nicked (CCA [616] **CAB 519**). However, in assessing whether these charges could be established the CCA put Dr X's evidence regarding the static nature of khatna, the reasons the ceremony was performed and the lack of a ritualised procedure to one side because her opinions were not admissible under s79(1) of the *Evidence Act* (see CCA [616]-[618] **CAB 519**; a finding which is not now challenged). The CCA found that Dr X's remaining opinions did not advance the Crown case as to what procedure was actually performed on C1 or C2 and whether it went beyond a ritualised procedure

given the temporal and geographical limitations of her expertise (CCA [619] **CAB 520**). Further, Dr X's evidence was that the procedure involved an excision not a nick or cut (CCA [620] **CAB 520**).

58. The CCA assessed the case against the respondent in respect of C1 separately to the cases in respect of C2 (CCA [629] **CAB 522-3**). The CCA found that in the absence of the "bridging" evidence of Dr X, the evidence of each complainant did not have significant probative value as tendency or coincidence evidence in relation to the other complainant (CCA [629] **CAB 522-3**).

59. The CCA accepted that certain statements made by the respondent in intercepted telephone conversations were either exculpatory or, if not exculpatory, amenable to an explanation inconsistent with guilt (CCA [631] **CAB 523**). The evidence of A1, A3 and A5 did not advance the Crown case (CCA [633] **CAB 523**).

60. It is submitted that the evidence adduced on the appeal excluded a finding that there had been a nick/cut to the clitoral head of either complainant. At trial, Dr Marks gave evidence that a possible reason she could not clearly visualize the clitoral head on either C1 or C2 was because of the tightness of the clitoral hood, which in small girls can be due to developmental reasons (CCA [340] **CAB 442**, see also Prof Jenkins CCA [341] **CAB 442**). In order to see the clitoral head the clitoral hood has to be pulled back, sometimes quite forcibly, which can be painful (CCA [339] **CAB 442**). In her report admitted on the appeal, Professor Grover stated that "*an inability to retract the clitoral hood or prepuce does impact on what could be done to the clitoral tip/glans, as the structure is thus obscured/hidden and inaccessible to direct contact*" (p.2 Prof Grover Report 3 April 2017). In the post-trial examination, the clitoral head on both C1 and C2 could be clearly visualized and the clitoral hood could be retracted (CCA [348]-[351] **CAB 443-4**). The clear inference is that the reason the clitoral head could not be clearly visualized was due to the tightness of the clitoral hood at the time of Dr Marks' pre-trial examination in September 2012. If the clitoral hood prevented the clitoral head from being accessed on either complainant at the time of Dr Marks' examination then this same inability to access the clitoral head would have prevented the respondent from inflicting a cut or nick to the clitoral head on either complainant. Thus, the suggestion that any nick or cut to the clitoral head may be sufficient to fall within

s45(1)(a) because of the particular sensitivity and potential for damage of that area, does not advance the case for conviction on the facts here.

61. Second, the respondent was sentenced to 15 months imprisonment with a non-parole period of 11 months to be served by way of home detention. Her sentence expired on 8 September 2017.

62. Third, the complainants have been interviewed once, subjected to two medical examinations and given evidence at trial (CCA [637] **CAB 524-5**). The events the subject of the charges occurred in 2009 and 2012 (CCA [637] **CAB 524-5**). The trial occurred in late 2015. While their recorded JIRT interviews could be played under the vulnerable witness provisions in the *Criminal Procedure Act 1986* (NSW), C1 and C2 would still need to give evidence at a re-trial as provisions permitting the tender of a complainant's original evidence on any re-trial do not apply to trials of offences contrary to s45 or s59 of the *Crimes Act* (ss 3 and 306B *Criminal Procedure Act*, CCA [637] **CAB 524-5**). Any new trial would involve the complainants giving evidence at least four years after they first gave evidence, and in C1's case in the order of 10 years after the event.

63. In considering whether C1 and C2 were compellable to give evidence against their mother, A2, the trial judge accepted that there was a likelihood that psychological harm might be caused to C1 and C2 and their relationship with their mother if they were called to give evidence (*R v A2; R v KM; R v Vaziri (No 4)* [2015] NSWSC 1306 at [152]). Evidence tendered on that question indicated that such harm included emotional and psychological harm and could impact other areas of C1 and C2's development and behaviour (ibid at [148]-[151]). A re-trial would occasion further (and unnecessary) distress to the complainants in giving evidence against their mother a second time.

64. Fourth, the trial (including pre-trial arguments) and sentencing proceedings occupied a significant amount of court time and the appeal involved consideration of a voluminous amount of material (CCA [636] **CAB 524**).

65. Finally, in the event a re-trial were ordered the respondents would raise before the new trial judge certain evidentiary issues in respect of which the respondents were unsuccessful on appeal. The respondents contend that the trial judge erred in ruling C2 competent to give evidence (both at trial and at the time of the JIRT interview) (see CCA [767]-[770], [779], [784]-[785] **CAB 560-1, 564-5**). The respondents

also contend that the trial judge erred in granting leave to permit the asking of leading questions in the JIRT interview of C1 and C2 which constituted their evidence in chief, and which elicited the evidence on which the prosecution relied at trial. The respondent's further contend the trial judge erred in disallowing the defence from asking leading questions in cross-examination of C1 and C2 (CCA [810]-[811], [825]-[833] **CAB 572, 576-8**). In particular, the respondents contend that the rulings of the trial judge on this subject was contrary to the accusatorial system of justice. The respondents will also object to the evidence of Dr X if the prosecution seeks to rely on it. Dr X was not qualified to give evidence as to her opinions of the static nature of khatna (CCA [714] **CAB 546-7**). Her opinion as to the khatna procedure was based on her own experience in 1950/1951 in India and her study in 1990-1991 in India (CCA at [713] **CAB 546**). Her opinion was not capable of affecting the assessment of the probability of whether the clitorises of C1 or C2 had been nicked or cut in 2009 and 2012 in NSW.

Part VI: Cross Appeal/Notice of Contention N/A

Part VII:

66. It is estimated that the respondent's oral argument will take 1 hour to present.

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