

BETWEEN:

The Queen  
Appellant



and

Magennis  
Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

**Part I:**

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

**Part II: Construction of "otherwise mutilates" in s45(1)(a) of the *Crimes Act***

2. Statutory construction requires a Court to construe the text of a provision in light of its context and purpose having appropriate regard to extrinsic materials (*SZTAL v Minister for Immigration* (2018) 252 CLR 362 at [14] Joint Book of Authorities ("JBA") 459; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] JBA 60-1).

20 How the case was left and ground 1 of the appeal

3. The jury were directed that "mutilates" means "to injure to any extent" and this could include a nick or cut (Core Appeal Book ("CAB") 99, Respondent's Further Materials ("RFM") 9). Ground 1 of the appeal in the Court of Criminal Appeal ("CCA") alleged this direction was erroneous and the CCA held that it was (CCA [528] CAB 495).

Text and immediate context of s45(1)(a) of the *Crimes Act*

4. The offence proscribes conduct with an identifiable result (JBA 13, Respondent's Submissions ("RS") [20], [24]; cf. Appellant's Submissions ("AS") [42], [44], Appellant's Reply ("AR") [9]). It does not describe a practice.
5. Specific defining and limiting terms are used (RS [28]). Specific conduct is prohibited.  
30 Specific parts of the female genitalia are described.
6. "Excises, infibulates or otherwise mutilates" all connote serious or significant injury (RS [28]; cf. AR [8]). The term "otherwise mutilates" extends the offence to other forms of mutilation (RS [22]; cf. AR [5], [8]).

7. The exception in s45(3) for identified surgical procedures would not be necessary if the provision proscribed “female genital mutilation” (“FGM”) because FGM is a cultural practice for non medical purposes (RS [20]).
8. The offence applies regardless of age (s45(1)(a)) and consent (s45(5) RS [20]).
9. Subsections (2) and (5) refer to a “person mutilated by or because of the acts”.
10. On the appellant’s construction the offence would extend to very minor events, including consensual ones, done to adult women (such as bruising or piercing). This is clearly not part of the discourse of “FGM”.

#### Context

- 10 11. Section 45 appears in Division 6 “Acts causing danger to life or bodily harm”, Part 3 “Offences against the person” of the *Crimes Act* (s35(1) *Interpretation Act 1987* (NSW) **JBA 39**).
12. The heading of the provision and the long title of the amending Act are not part of the Act; however they can be considered as extrinsic aids (ss34(2)(a), 35(2) *Interpretation Act* **JBA 37-9**; CCA [480] **CAB 481**; Judgment [142]-[145] **CAB 50**; RS [16]-[17]).

#### Purpose and other aids to interpretation

13. The provision is to be construed “in accordance with its terms rather than according to preconceptions about underlying policy” (*SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at [32] **JBA 421**). To construe “otherwise mutilates” as “to injure to any extent” extends the offence beyond its textual limits (*Milne v The Queen* (2014) 252 CLR 149 at [38], *Grajewski v DPP (NSW)* (2019) 93 ALJR 405 at [21], RS [29]-[33]; CCA [513] **CAB 491**).
14. No constructional choice arises under s33 *Interpretation Act* (RS [42]-[47]; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 262; cf. s15AA *Acts Interpretation Act 1901* (Cth)). The trial judge’s approach was erroneous (Judgment [249] **CAB 84**).
15. Extrinsic materials provide little support for the appellant’s construction and the trial judge’s approach (RS [15], [27]). The CCA correctly rejected or placed very little weight on most of the extrinsic material relied on by the trial judge: including, dictionary definitions of “FGM” (CCA [494] **CAB 485**); the FGM community education program material (CCA [501] **CAB 487**); the Attorney General’s Department 2013 review of Australia’s FGM legal framework (CCA [502] **CAB 487-8**); the subsequent amending legislation (CCA [503]-[509] **CAB 488-490**).
- 30 16. The Explanatory Note suggests serious or significant injury is required (**JBA 721** RS [17], [24]).

17. The principal concern of the legislature was to prohibit excision (clitoridectomy and sunna) and infibulation (Second Reading Speech **JBA 762-763**; Family Law Council Report **JBA 646-7**; RS [18]-[19], [21]-[23], [26]; cf. AS [46]-[53], AR [4]-[5]). It was not implementing the Family Law Council Report recommendations. The provision enacted was derived from the UK provision introduced in 1985 (**JBA 710**).
18. The CCA placed some (appropriately qualified) weight on the dictionary definitions of “mutilates” (CCA [484]-[489], [521] **CAB 482-4, 493**; Judgment [152]-[155] **CAB 51-2**). More than mere injury was required (CCA [495]-[496], [513]-[515], [521]-[522] **CAB 486, 491-4**).
- 10 19. The trial judge erroneously supplanted the term “FGM” into the provision and construed that term (Judgment [243] **CAB 82**, see also [151]-[161] **CAB 52-3**; CCA [513]-[514] **CAB 491**; RS [34]-[41]).
20. The trial judge’s construction involved the Court assuming jurisdiction beyond the reach of legislation (RS [34]-[39]; CCA [523]-[524] **CAB 494**).

#### Clitoris

21. It was erroneous for the trial judge to direct the jury that the clitoris included the prepuce (SU 9 **CAB 100**; CCA [527] **CAB 495**; RS [51]; cf. AS [60]-[65]). Medical dictionaries differentiate between the anatomical structures (CCA [526] **CAB 495**). As Dr Marks made clear, they are made up of different tissue (CCA [209] **CAB 404**). The distinction had real significance given the alternative counts (CCA [614] **CAB 518**).
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#### Orders sought by the appellant

22. To obtain a re-trial the appellant must first show that the trial judge’s directions on the subject of ground 1 were correct (RS [10]). In upholding ground 1 the CCA explicitly rejected that the offence applied to minor injuries (CCA [495], [515] **CAB 486, 492**).
23. Secondly, the appellant would need to establish that the CCA’s reasons for not ordering a re-trial on the alternative counts under s59 of the *Crimes Act* were erroneous. The CCA addressed that issue by reference to a nick/cut to any part of the female genitalia (including the clitoris) and on the assumption that a nick or cut could amount to actual bodily harm (CCA [613]-[634], [638] **CAB 518-25; RFM 43**; RS [53]-[60]).
- 30 24. There are significant discretionary considerations under s8 of the *Criminal Appeal Act* (see CCA [636]-[637] **CAB 524-5**; RS [61]-[65]; s37 *Judiciary Act*).

Dated: 12 June 2019

  
Tim Game

  
Georgia Huxley