HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No S43/2019

THE QUEEN — APPELLANT

AND

A2 — RESPONDENT

Matter No S44/2019

THE QUEEN — APPELLANT

AND

KUBRA MAGENNIS — RESPONDENT

Matter No S45/2019

THE QUEEN — APPELLANT

AND

SHABBIR MOHAMMEDBHAI VAZIRI — RESPONDENT

The Queen v A2
The Queen v Magennis
The Queen v Vaziri
[2019] HCA 35
16 October 2019
S43/2019, S44/2019 & S45/2019

ORDER

Matter No S43/2019

1. *Appeal allowed.*

2. *Set aside the orders of the New South Wales Court of Criminal Appeal made on 10 August 2018.*

3. *Remit the matter to the New South Wales Court of Criminal Appeal for determination of Ground 2 of the respondent's appeal to that Court according to law.*

Matter No S44/2019

1. *Appeal allowed.*

2. *Set aside the orders of the New South Wales Court of Criminal Appeal made on 10 August 2018.*

3. *Remit the matter to the New South Wales Court of Criminal Appeal for determination of Ground 2 of the respondent's appeal to that Court according to law.*

Matter No S45/2019

1. *Appeal allowed.*

2. *Set aside the orders of the New South Wales Court of Criminal Appeal made on 10 August 2018.*

3. *Remit the matter to the New South Wales Court of Criminal Appeal for determination of Ground 2 of the respondent's appeal to that Court according to law.*

On appeal from the Supreme Court of New South Wales

Representation

D T Kell SC with E S Jones for the appellant in each matter (instructed by Solicitor for Public Prosecutions (NSW))

H K Dhanji SC with D R Randle for the respondents in S43/2019 and S45/2019 (instructed by Armstrong Legal)

T A Game SC with G E L Huxley for the respondent in S44/2019 (instructed by Armstrong Legal)

CATCHWORDS

The Queen v A2
The Queen v Magennis
The Queen v Vaziri

Statutes – Construction – Where s 45(1)(a) of *Crimes Act 1900* (NSW) provides that a person who "excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person" is liable to imprisonment – Where two respondents charged with having "mutilated the clitoris" of each of complainants – Where other respondent charged with assisting those respondents following commission of those offences – Where defence case that procedure performed on complainants merely ritualistic – Where trial judge directed jury that word "mutilate" in context of female genital mutilation means "to injure to any extent" – Where trial judge directed jury that "clitoris" includes "clitoral hood or prepuce" – Whether "otherwise mutilates" should be given ordinary meaning or take account of context of female genital mutilation – Whether "clitoris" includes clitoral hood or prepuce – Whether trial judge misdirected jury as to meaning of "mutilate" and "clitoris".

Appeals – Where s 6(2) of *Criminal Appeal Act 1912* (NSW) provides that if appeal against conviction allowed, subject to special provisions of Act, Court of Criminal Appeal "shall ... quash the conviction and direct a judgment and verdict of acquittal to be entered" – Where s 8(1) provides that on appeal against conviction, Court of Criminal Appeal may order new trial if it considers that miscarriage of justice has occurred and it can be more adequately remedied by order for new trial than any other order – Where Court of Criminal Appeal allowed appeals against convictions based on construction of s 45(1)(a) of *Crimes Act* and on other grounds including that verdicts unreasonable or unsupported by evidence – Whether open to Court to quash conviction and decline to make further order – Whether sufficient evidence to warrant order for new trial – Whether matter should be remitted to Court of Criminal Appeal for redetermination of ground alleging that verdicts unreasonable or unsupported by evidence.

Words and phrases – "child abuse", "clitoris", "context", "de minimis injury", "female genital mutilation", "injury", "khatna", "mischief", "misdirected the jury", "mutilation", "offence provisions", "otherwise mutilates", "purposive construction", "ritualised circumcision", "sufficient evidence", "tissue damage", "umbrella term".

Crimes Act 1900 (NSW), s 45.
Crimes (Female Genital Mutilation) Amendment Act 1994 (NSW).
Criminal Appeal Act 1912 (NSW), ss 6(2), 8(1).

1 KIEFEL CJ AND KEANE J. Section 45 of the *Crimes Act 1900* (NSW) came into effect on 1 May 1995. It was introduced by the *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW). The section is headed "Prohibition of female genital mutilation". At the relevant time, s 45(1) was in these terms:

> "A person who:
>
> (a) excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person, or
>
> (b) aids, abets, counsels or procures a person to perform any of those acts on another person,
>
> is liable to imprisonment for 7 years."

2 The respondents A2 and Ms Kubra Magennis were charged upon indictment with having "mutilated the clitoris" of each of C1 and C2 on separate occasions. They were also charged with an alternative count of assault occasioning actual bodily harm[1]. The respondent Mr Shabbir Mohammedbhai Vaziri was charged with assisting A2 and Ms Magennis following the commission of those offences[2].

3 A2 and her husband, A1, are members of the Dawoodi Bohra community. The members of this community adhere to Shia Islam. Mr Vaziri is the head cleric and spiritual leader of the community in Sydney. Ms Magennis is a member of the community, and a trained nurse and midwife. The Crown alleged at trial that she performed the practice in question for members of the community.

4 The Crown case was that A2 (the mother of C1 and C2) and Ms Magennis were parties to a joint criminal enterprise to perform a ceremony called "khatna", which involves causing injury to a young girl's clitoris by cutting or nicking it. The procedure was said to be intended to suppress the development of a girl's sexuality as she attains puberty. The Crown did not suggest that the procedure has a basis in religion but rather suggested that it is cultural in nature.

5 This procedure was allegedly conducted on each of C1 and C2 in the presence of A2 and other family members. With respect to C1, the procedure was allegedly conducted at the home of A1's aunt when C1 was aged between six

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1 *Crimes Act 1900* (NSW), s 59(2).

2 *Crimes Act 1900* (NSW), s 347.

and eight years of age. C2, the younger of the sisters, was six years old when she was later allegedly subjected to the same treatment.

6 The respondents did not dispute that there had been a procedure performed by Ms Magennis on C1 and C2. The defence case was that it was merely ritualistic and did not involve any nick or cut to the clitoris of either complainant. To rebut this aspect of the defence case, the Crown relied on: the accounts given by C1 and C2, in their recorded interviews with police, of feeling pain; expert evidence tendered in relation to the practice of khatna within the community; and conversations between A2, A1 and others, which were intercepted or recorded via listening devices, as to what was involved in the practice.

7 The respondents also argued that even if there was a cut or a nick (the latter presumably being a lesser version of the former) to the clitoris of either complainant, that would not amount to "mutilation" within the meaning of s 45(1)(a). The trial judge in the Supreme Court, Johnson J, made a pre-trial ruling concerning the words "otherwise mutilates" in s 45(1)(a). His Honour subsequently directed the jury in accordance with that ruling in terms that:

> "The word 'mutilate' in the context of female genital mutilation means to injure to any extent."

8 His Honour then went on regarding the Crown case to direct that:

> "[i]t is not necessary for the Crown to establish that serious injury resulted. In the context of this trial, a nick or cut is capable of constituting mutilation for the purpose of this alleged offence."

9 A written direction in the same terms was provided to the jury.

10 A2 and Ms Magennis were each found guilty by the jury of two counts of female genital mutilation contrary to s 45(1)(a) and Mr Vaziri was found guilty of two counts of being an accessory to those offences. Johnson J sentenced each of the respondents to an aggregate of 15 months' imprisonment with a non-parole period of 11 months and ordered that the sentences imposed upon A2 and Ms Magennis be served by way of home detention. Mr Vaziri was required to serve his non-parole period by way of full-time imprisonment.

11 On appeal, the Court of Criminal Appeal (Hoeben CJ at CL, Ward JA and Adams J) quashed the respondents' convictions and ordered verdicts of acquittal on all counts[3]. Their Honours concluded that the trial judge had misdirected the

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3 *A2 v The Queen* [2018] NSWCCA 174.

jury as to the meaning of "mutilates"[4] and that there had been a miscarriage of justice due to fresh evidence[5]. In their Honours' view, the word "mutilates" should be given its ordinary meaning for the purposes of s 45(1)(a). That meaning "connotes injury or damage that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion"[6].

12 Special leave to appeal was granted by Bell, Gageler and Edelman JJ on two grounds. The first is a matter of general importance respecting the operation of s 45(1)(a). It is that the Court of Criminal Appeal erred in construing "otherwise mutilates" as it did. The second relates to the meaning the Court gave to the term "clitoris", namely that it did not include the clitoral hood or prepuce.

"Otherwise mutilates"

The reasoning of the courts below

13 The essential difference in approach to the meaning of the term "otherwise mutilates" in s 45(1)(a) as between the trial judge and the Court of Criminal Appeal is that, whilst the Court of Criminal Appeal applied the grammatical or literal meaning of the word "mutilates", the trial judge considered that the meaning to be given to that word should take account of the context in which the word is used. In his Honour's view, the word should be understood as part of the broader umbrella term, "female genital mutilation" (or "FGM")[7]. This broader construction, advanced by the Crown, would best promote the purpose or object of prohibiting such procedures generally. This purpose is evident from extrinsic materials and in particular the report published in June 1994 by the Family Law Council with respect to the practice of female genital mutilation in Australia ("the FLC Report")[8].

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4 *A2 v The Queen* [2018] NSWCCA 174 at [521].

5 *A2 v The Queen* [2018] NSWCCA 174 at [589]. See *Criminal Appeal Act 1912* (NSW), s 6(1).

6 *A2 v The Queen* [2018] NSWCCA 174 at [521].

7 *R v A2 [No 2]* (2015) 253 A Crim R 534 at 568 [242]-[244].

8 *R v A2 [No 2]* (2015) 253 A Crim R 534 at 569 [249]; Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994).

14 The Court of Criminal Appeal regarded it as important that the *Crimes Act* does not use the term "female genital mutilation" in describing the elements of the offence in s 45. It uses only the word "mutilates". Although apparently accepting that the term "female genital mutilation" has come to be accepted as a collective name, which is to say a term encompassing all forms of cultural ritual practices of the kind in question, the Court of Criminal Appeal did not consider this to be relevant given the words used in s 45(1)[9].

15 The Court of Criminal Appeal accepted that, regardless of whether there was ambiguity in the text of s 45(1)(a), it was permissible to have recourse to extrinsic materials to determine the context for the offence provision, including its purpose and the mischief it sought to address[10]. The Court accepted that the word "mutilates" should be construed in the context of the FLC Report and that the recommendations contained in it informed the legislature's purpose in enacting s 45. However, their Honours considered that that general purpose cannot extend the scope of the conduct prohibited by the actual words used. The umbrella term "female genital mutilation" was not used in s 45(1), and the phrase cannot supplant the meaning of the words actually used[11].

16 The FLC Report, to which reference will be made shortly in these reasons, refers to four categories of female genital mutilation. The least severe of these practices was referred to as "ritualised circumcision". Both the FLC Report and the World Health Organization ("the WHO") had recommended its inclusion in the forms of female genital mutilation to be prohibited by law, the Court of Criminal Appeal noted[12].

17 That category is relevant to the Crown case because "ritualised circumcision" involves nicking or cutting the clitoris. The Court of Criminal Appeal, however, observed that while the Second Reading Speech of the Bill which became the Act that introduced s 45 contained no disagreement with the recommendation of the Family Law Council that all forms of female genital mutilation be prohibited, it was notable that the speech referred expressly only to the three more severe forms of it[13]. The Court of Criminal Appeal considered this to support the view that s 45(1)(a) requires some more severe form of injury

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9 *A2 v The Queen* [2018] NSWCCA 174 at [494].

10 *A2 v The Queen* [2018] NSWCCA 174 at [474]-[477].

11 *A2 v The Queen* [2018] NSWCCA 174 at [513].

12 *A2 v The Queen* [2018] NSWCCA 174 at [523].

13 *A2 v The Queen* [2018] NSWCCA 174 at [514].

than a nick or a cut that leaves no visible scarring and which cannot be seen on medical examination to have caused any damage (let alone irreparable damage) to the skin or nerve tissue[14].

18 The Court of Criminal Appeal concluded that the term "mutilates" controls the scope of s 45(1)(a). It requires some imperfection or irreparable damage to have been caused. Their Honours accepted that "a cut or nick could, in a particular case, amount to mutilation of the clitoris"[15]. The error that their Honours saw in the direction given by the trial judge was that it included the words "to any extent", because they suggested that a de minimis injury would suffice[16]. Their Honours added[17] that if the legislature intended to encompass all forms of female genital mutilation, legislative amendment would be necessary to expressly incorporate the least severe category of female genital mutilation.

Female genital mutilation and the WHO

19 Early studies and discussion from the late nineteenth century and until the 1980s referred to the customary ritual of some of the practices in question as "female circumcision"[18]. From the late 1970s, support grew for the alternative expression "female genital mutilation" to be used. The WHO has explained that the term "mutilation" was chosen to distinguish the practice from male circumcision, to emphasise the gravity and harm of the act and to reinforce the fact that the practice is a violation of girls' and women's rights and thereby to promote advocacy for its abandonment[19].

20 In 1982, the WHO made a formal statement of its position to the United Nations Commission on Human Rights, that governments should adopt clear national policies to abolish the practice of female genital mutilation and to educate the public about its harmfulness[20]. By this time, four different types of

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14 *A2 v The Queen* [2018] NSWCCA 174 at [515].

15 *A2 v The Queen* [2018] NSWCCA 174 at [522].

16 *A2 v The Queen* [2018] NSWCCA 174 at [522].

17 *A2 v The Queen* [2018] NSWCCA 174 at [524].

18 World Health Organization, *Female Genital Mutilation: An overview* (1998) at 2.

19 World Health Organization, *Eliminating Female genital mutilation: An interagency statement* (2008) at 22 (Annex 1: Note on terminology).

20 World Health Organization, *Female Genital Mutilation: An overview* (1998) at 59-60.

the practice had been identified[21]. In January 1994, the Executive Board of the WHO passed a resolution which urged Member States to "establish national policies and programmes that will effectively, and with legal instruments, abolish female genital mutilation … and other harmful practices affecting the health of women and children"[22]. This resolution was later adopted by the Forty-seventh World Health Assembly[23].

The FLC Report

21 The functions of the Family Law Council include advising and making recommendations to the Commonwealth Attorney-General at the request of the Attorney-General[24]. In September 1993, the Attorney-General asked the Family Law Council to examine the adequacy of existing Australian laws to deal with the issue of female genital mutilation[25]. The Family Law Council issued a discussion paper on 31 January 1994. Its final report to the Attorney-General, the FLC Report, is dated June 1994. It described female genital mutilation as "the collective name" given to several different traditional practices that involve the cutting of female genitals[26]. It said that those who oppose the practice call it "genital mutilation". It advised that the term "female genital mutilation" is used in the report to include all types of the practice where tissue damage results[27].

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21 World Health Organization (Regional Office for the Eastern Mediterranean), *Seminar on Traditional Practices Affecting the Health of Women and Children: Khartoum, 10-15 February 1979* (March 1979) at 14.

22 Executive Board of the World Health Organization (Ninety-third Session), *Maternal and child health and family planning: Current needs and future orientation: Traditional practices harmful to the health of women and children* (25 January 1994).

23 World Health Assembly (Forty-seventh World Health Assembly), *Maternal and child health and family planning: traditional practices harmful to the health of women and children* (10 May 1994).

24 *Family Law Act 1975* (Cth), s 115(3).

25 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 3 [1.01].

26 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 6 [2.01].

27 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 6 [2.02].

22 The first form of female genital mutilation to which the FLC Report referred is the least severe form, namely "ritualised circumcision", which was referred to by the Court of Criminal Appeal as the fourth category. The FLC Report explained that "ritualised circumcision" ranges from a wholly ritualised procedure to the clitoris being "nicked" or scraped. This causes bleeding but may result in "little mutilation or long term damage"[28]. The second form is "clitoral circumcision" or "sunna". It involves the removal of the clitoral prepuce – the outer layer of skin over the clitoris, which is sometimes called the "hood"[29]. The third form is "excision" or "clitoridectomy", which usually involves the removal of the entire clitoris and often parts of the labia minora as well[30]. The fourth and most severe form is "infibulation", which involves removal of virtually all of the external female genitalia and the sewing together of the edges of the labia majora[31].

23 The FLC Report advised that female genital mutilation mostly occurs when a female child is between three and eight years of age[32]. It is not, the report stressed, a religious practice[33]. The practice undoubtedly constitutes child abuse[34]. The report identified a number of international instruments as relevant to the practice of female genital mutilation, including the Convention on the Rights of the Child[35]. Article 24(3) of the Convention requires State parties to

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28 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 6 [2.03].

29 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 7 [2.04].

30 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 7 [2.05].

31 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 7 [2.06].

32 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 9 [2.13].

33 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 9 [2.15].

34 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 50 [6.37].

35 And also the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Declaration on

(Footnote continues on next page)

take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. Australia is a party to the Convention, the FLC Report observed[36].

24 Although it was not possible to ascertain with accuracy the incidence of the practice of female genital mutilation in Australia, the FLC Report concluded that even a low incidence could not be disregarded and it might be expected that, with the increase of migrants to Australia, it would increase[37]. The Family Law Council considered there to be a need for special legislation to clarify the legal position relating to female genital mutilation in Australia. This was for reasons including that "[t]here should be no doubt in any person's mind that all forms of female genital mutilation are offences under Australian law"[38]. It concluded that there should be special legislation which makes it clear that the practice is an offence in Australia[39] and recommended[40] that, to be fully effective, legislation should put beyond doubt "that female genital mutilation, in all of its forms, is a criminal offence" and that it constitutes child abuse under Australian child protection legislation[41].

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the Elimination of Violence Against Women, and the 1951 Convention and 1967 Protocol relating to the Status of Refugees: Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994).

36 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 29 [4.07].

37 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 18 [2.52].

38 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 50 [6.37].

39 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 52 [6.41].

40 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 63 [6.80].

41 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 63 [6.80].

The Explanatory Note and the Second Reading Speech

25 The Explanatory Note which accompanied the *Crimes (Female Genital Mutilation) Amendment Bill 1994* (NSW) referred to "[p]rocedures involving the incision, and usually removal, of part or all of the external genitalia of young females" as being practised as a matter of custom or ritual[42]. The object of the Bill was to make it an offence to mutilate external female genitalia or to aid, abet, counsel or procure such mutilation.

26 The Second Reading Speech of the Bill was given in the Legislative Council of the New South Wales Parliament on 4 May 1994. It refers to the "detailed report" of the Family Law Council and its recommendations with respect to the practice of female genital mutilation. It does not refer to the earlier discussion paper. Although the published FLC Report bears the date June 1994, it may be taken as likely that advance copies were available to those responsible for drafting the Bill and the Second Reading Speech.

27 The Minister giving the Second Reading Speech said at the outset that "[f]emale 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"[43]. He said that "[t]his bill will make the practice of female genital mutilation a criminal offence in this State". The Minister used the term "the practice" throughout the speech to refer to female genital mutilation.

28 The practice, he said, had been condemned at an international level and the WHO had recommended that governments adopt clear national policies to abolish it. Some countries had already moved to prohibit it specifically, he observed. The Family Law Council in its "recently released ... detailed report ... strongly recommended the introduction of legislation to make clear that FGM constitutes a criminal act and a form of child abuse"[44]. The Bill, the Minister went on to say, "has its roots in the protection of children"[45].

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42 New South Wales, Legislative Council, *Crimes (Female Genital Mutilation) Amendment Bill 1994*, Explanatory Note at 1.

43 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1859.

44 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1859.

45 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1860.

29 It is the following description of the provisions of the Bill by the Minister which was influential to the Court of Criminal Appeal's reasoning. The Minister said that "[i]t will be an offence for anyone to perform FGM in this State"[46]. He went on to say that "[t]he three forms of FGM in order of severity are infibulation, clitoridectomy and sunna"[47]. The Bill, he said, "seeks to prohibit all of these various methods of FGM"[48]. The point made by the respondents, and by the Court of Criminal Appeal, is that the Minister did not expressly refer to ritualised circumcision as the FLC Report had done. The question is whether the words "or otherwise mutilates" can be taken to refer to ritualised circumcision.

30 In the concluding remarks of the speech, the Minister stressed that in passing a law against female genital mutilation, the Government was not seeking to attack the values of any particular group in the community[49]. However, the practice could not be tolerated, not least because it involved the rights of young children. The Minister said that "[a]s responsible members of the community, we should place our condemnation of FGM beyond doubt".

Construction – method

31 At issue in these appeals is the scope and operation of s 45(1) and in particular whether the words "otherwise mutilates" may be taken as intended to encompass the procedure upon which the Crown case was based.

32 The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable[50], has long been eschewed by this Court. It is now accepted that even words having an apparently

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46 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1860.

47 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1860.

48 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1860.

49 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1860.

50 See, eg, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*") (1920) 28 CLR 129 at 162 per Higgins J; [1920] HCA 54.

clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete[51]. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision[52].

33 Consideration of the context for the provision is undertaken at the first stage of the process of construction[53]. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy[54]. "Mischief" is an old expression[55]. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied[56]. The mischief may point most clearly to what it is that the statute seeks to achieve.

34 This is not to suggest that a very general purpose of a statute will necessarily provide much context for a particular provision or that the words of the provision should be lost sight of in the process of construction. These considerations were emphasised in the decisions of this Court upon which the Court of Criminal Appeal placed some weight.

35 The joint judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[57] rejected an approach which paid no regard to the words of

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51 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

52 Bennion, *Statutory Interpretation*, 3rd ed (1997) at 343-344, referred to in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

53 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

54 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

55 *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

56 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591 at 614; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 509; [1978] HCA 30; *Wacando v The Commonwealth* (1981) 148 CLR 1 at 17; [1981] HCA 60.

57 (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

the provision and sought to apply the general purpose of the statute, to raise revenue, to derive a very different meaning from that which could be drawn from the terms of the provision. The general purpose said nothing meaningful about the provision, the text of which clearly enough conveyed its intended operation[58]. Similarly, in *Saeed v Minister for Immigration and Citizenship*[59] the court below was held to have failed to consider the actual terms of the section. A general purpose of the statute, to address shortcomings identified in an earlier decision of this Court, was not as useful as the intention revealed by the terms of the statute itself. In *Baini v The Queen*[60], it was necessary to reiterate that the question of whether there had been a "substantial miscarriage of justice" within the meaning of the relevant provision required consideration of the text of the provision, not resort to paraphrases of the statutory language in extrinsic materials, other cases and different legislation.

36 These cases serve to remind that the text of a statute is important, for it contains the words being construed, and that a very general purpose may not detract from the meaning of those words. As always with statutory construction, much depends upon the terms of the particular statute and what may be drawn from the context for and purpose of the provision.

37 None of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed[61]. They do not deny the possibility, adverted to in *CIC Insurance Ltd v Bankstown Football Club Ltd*[62], that in a particular case, "if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance". When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart

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58 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-48 [47]-[53].

59 (2010) 241 CLR 252 at 265 [32]-[34]; [2010] HCA 23.

60 (2012) 246 CLR 469 at 476 [14]; [2012] HCA 59.

61 See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].

62 (1997) 187 CLR 384 at 408.

from the literal meaning[63]. A construction which promotes the purpose of a statute is to be preferred[64].

The mischief and the purpose of s 45

38 Section 45 was the first provision of its kind enacted in Australia[65]. Its terms reflect those of ss 1 and 2 of the *Prohibition of Female Circumcision Act 1985* (UK)[66] ("the UK Act"). The side note (the use of which preceded that of section headings) of s 1 was "Prohibition of female circumcision". At the time that s 45 was passed there was no case law regarding the scope of those provisions[67].

39 Whilst s 45 picked up the words of ss 1 and 2 of the UK Act, neither the title of the Act which introduced it nor the heading to s 45 refers to the older terminology, "female circumcision". The heading to s 45, and the immediate context for the words "otherwise mutilates", is "[p]rohibition of female genital mutilation".

40 A modern approach to statutory construction may take account of headings[68]. Whilst headings of a provision are not always reliable and do not form part of a statute[69], and so may not govern what follows in the provision, headings may be used in a similar way to extrinsic materials[70]. They may point

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63 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321; [1981] HCA 26.

64 *Interpretation Act 1987* (NSW), s 33.

65 See *Crimes (Amendment) Act (No 3) 1995* (ACT), s 5; *Criminal Code Amendment Act (No 2) 1995* (NT), s 3; *Statutes Amendment (Female Genital Mutilation and Child Protection) Act 1995* (SA), s 4; *Criminal Code Amendment Act 1995* (Tas), s 5; *Crimes (Female Genital Mutilation) Act 1996* (Vic), s 4; *Criminal Law Amendment Act 2000* (Qld), s 19; *Criminal Code Amendment Act 2004* (WA), s 22.

66 Which was later replaced by the *Female Genital Mutilation Act 2003* (UK).

67 *Re B and G (Children) [No 2]* [2015] 1 FLR 905 was decided later, contains no detailed reasons and is inconclusive on the matter.

68 Bennion, *Bennion on Statutory Interpretation*, 5th ed (2008) at 745-747; *R v Montila* [2004] 1 WLR 3141; [2005] 1 All ER 113.

69 *Interpretation Act 1987* (NSW), s 35(2).

70 *Interpretation Act 1987* (NSW), ss 34(1), 35(5).

the way towards and be used to identify the mischief to which the provision is directed and its purpose. The heading of s 45 does just that.

41 The possible gap or defect in the law which the Attorney-General had asked the Family Law Council to consider was that relating to female genital mutilation. The term, it may be observed, by this time had acquired a broad and purposive meaning in many of the reports and discussions concerning the various practices accounted for as female genital mutilation. But it is not necessary to go further than the meaning which the FLC Report gave to the term. It is that meaning which identifies the mischief which needed to be addressed by legislation. The mischief is the practice of female genital mutilation in its various forms.

42 The FLC Report used the term "female genital mutilation" as a collective name to refer to all ritual practices carried out on female children which had no medical benefit and involved tissue damage. It advised the Attorney-General that there was a need for special legislation to make it plain that female genital mutilation, in all its forms, should be an offence.

43 Consistently with its use of the term "female genital mutilation", the FLC Report referred to its various forms collectively as "the practice". The Second Reading Speech adopted the terminology of the FLC Report. In the speech it was said that the practice should be condemned and the practice should not be tolerated. The Second Reading Speech as a whole conveys acceptance of the FLC Report and an intention to implement it.

44 So understood, the mischief to which s 45 is directed is a gap in the law concerning the practice of female genital mutilation in all its forms which are productive of injury. Its immediate purpose is to criminalise the carrying out of that practice on female children. Its wider purpose may be taken to be its cessation.

A narrower scope?

45 The Court of Criminal Appeal[71] rejected an argument that "otherwise mutilates" should be read in the context of the words preceding it ("excises" and "infibulates"), so as to import a common requirement of severe damage and injury of a high order. There is no notice of contention which takes issue with that approach. Nevertheless the Court of Criminal Appeal considered that the

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71 *A2 v The Queen* [2018] NSWCCA 174 at [517]-[519].

words "otherwise mutilates" import a requirement that permanent disfigurement or obvious damage result from what is done[72].

46 The Court of Criminal Appeal was of the opinion that the Minister's speech bears this out: that the Minister can be understood to say that it was intended to prohibit the three most severe forms, but not the fourth, which involves a lesser form of injury. The problem with that approach is that it is inexplicable and improbable. It is inexplicable given the obvious acceptance of the recommendation of the FLC Report to prohibit all four forms of female genital mutilation there expressly identified. It is improbable because there is nothing to suggest that a lesser form of injury to a child was considered to be acceptable or, at the least, not warranting condemnation. The Bill which became the Act that introduced s 45, after all, was said by the Minister to address what amounts to child abuse and the FLC Report had said that female genital mutilation in all its injurious forms was child abuse as understood in child protection laws.

47 The Court of Criminal Appeal did not explain why the term "otherwise mutilates" may have been intended to have a narrower, more literal meaning, one which denies its application to the cutting or nicking of a female child's clitoris. Although the Court accepted that cutting or nicking could in a particular case amount to mutilation, on its construction of "mutilates" in s 45(1) as bearing its ordinary meaning that could only be where some lasting damage had been inflicted.

48 Difficulties would also attend this construction in practice. The medical evidence at trial was that a superficial cut, or incision, of the clitoris would heal well, sometimes bearing little or no evidence of what had occurred. On the Court of Criminal Appeal's construction, it may be taken as intended that even if a child might suffer a painful and distressing experience, no offence is committed unless some defect or damage is apparent. This in turn might require the prosecution to have been brought immediately.

49 The respondents also contended that if "otherwise mutilates" has the extended meaning provided by the term "female genital mutilation", s 45(1) would make it an offence to carry out a cosmetic procedure undertaken by some adult women, such as that which involves the piercing of the genitals. The answer to the argument is that no such problem would arise if "otherwise mutilates" is taken to refer to practices to which female genital mutilation refers.

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72 *A2 v The Queen* [2018] NSWCCA 174 at [521].

Section 45(3)

50 The respondents also pointed to s 45(3) in aid of the construction for which they contended. Sub-section (3) provides, in relevant part, that it is not an offence against s 45(1) to perform a surgical operation if it is necessary for the health of the person and it is performed by a medical practitioner. It is most clearly protective of beneficial medical procedures such as may be necessary during or following childbirth or to correct or repair some of the effects of forms of female genital mutilation such as infibulation.

51 The point made by the respondents respecting s 45(3) is that it would be redundant if the section proscribed the practice of female genital mutilation, which is necessarily for non-medical purposes. However, s 45(3), commencing with the words "It is not an offence against this section ...", is properly read as a clarification inserted for the avoidance of doubt, and not as an exception to s 45(1).

Offence provisions

52 A statutory offence provision is to be construed by reference to the ordinary rules of construction. The old rule, that statutes creating offences should be strictly construed, has lost much of its importance[73]. It is nevertheless accepted that offence provisions may have serious consequences. This suggests the need for caution in accepting any "loose" construction of an offence provision[74]. The language of a penal provision should not be unduly stretched[75] or extended[76]. Any real ambiguity as to meaning is to be resolved in favour of an accused. An ambiguity which calls for such resolution is, however, one which persists after the application of the ordinary rules of construction[77].

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73 *Beckwith v The Queen* (1976) 135 CLR 569 at 576; [1976] HCA 55. See also *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 145; [1983] HCA 44; *Waugh v Kippen* (1986) 160 CLR 156 at 164; [1986] HCA 12.

74 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 211 [45]; [2005] HCA 58.

75 *Allan v Quinlan; Ex parte Allan* [1987] 1 Qd R 213 at 215, referred to in *Milne v The Queen* (2014) 252 CLR 149 at 164 [38]; [2014] HCA 4.

76 *Beckwith v The Queen* (1976) 135 CLR 569 at 576.

77 *Barker v The Queen* (1983) 153 CLR 338 at 355; [1983] HCA 18; *Chew v The Queen* (1992) 173 CLR 626 at 632; [1992] HCA 18.

53 The meaning to be given to "otherwise mutilates", as referable to practices falling within the umbrella term "female genital mutilation", does not involve any artificial or unexplained extension. There is no ambiguity as to its meaning after it is considered in its context and by reference to the mischief to which it is directed and its purposes. The word "mutilates" in its ordinary usage is simply displaced in order to give effect to the purpose of s 45, to prohibit the practice of female genital mutilation on female children in order to achieve its cessation. So understood, "otherwise mutilates" is to be taken to refer to female genital mutilation in all its injurious forms.

54 Cases such as *Milne v The Queen*[78] do not avail the respondents. There, the construction for which the respondent contended was not borne out by the text of the provision, and its purpose, evident from extrinsic materials, did not require it. In *SAS Trustee Corporation v Miles*[79], it was said that a court should construe a statute according to its terms rather than preconceptions about policy[80], but here there is no question of any preconception. The policy of s 45 is stark. The joint judgment in *Grajewski v Director of Public Prosecutions (NSW)*[81] adopted the ordinary meaning of the word "damage", but that was in large part because there was no support for any other meaning and the legislative history did not support an extended meaning[82].

55 A broad construction of an offence provision may be warranted in a particular case. This may be when its purpose is protective. In *R v Sharpe*[83], McLachlin CJ of the Supreme Court of Canada construed offence provisions relating to child pornography broadly in a number of respects. Her Honour interpreted the provisions in accordance with Parliament's main purpose in creating those offences: to prevent harm to children through sexual abuse. A similar purposive approach was taken by the Court of Appeal of the Supreme Court of Victoria in *Clarkson v The Queen*[84] in rejecting an argument that

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78 (2014) 252 CLR 149.

79 (2018) 92 ALJR 1064; 361 ALR 206; [2018] HCA 55.

80 *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at 1074 [32]; 361 ALR 206 at 218.

81 (2019) 93 ALJR 405; 364 ALR 383; [2019] HCA 8.

82 *Grajewski v Director of Public Prosecutions (NSW)* (2019) 93 ALJR 405 at 408 [13]; 364 ALR 383 at 386.

83 [2001] 1 SCR 45 at 77 [38], 79 [43].

84 (2011) 32 VR 361.

"apparent or ostensible consent" could be a mitigating factor in sexual offences relating to underage sex.

56 A construction which gives a broader scope to s 45 is consistent with its wider purpose, to prohibit completely female genital mutilation practices injurious to female children. That purpose is consistent with Australia's obligations under the Convention on the Rights of the Child, to which the FLC Report drew attention.

57 In *R v Wei Tang*[85], which concerned the offence of slavery in s 270.3 of the *Criminal Code* (Cth), it was argued that the term "slavery" was confined in its meaning to the exercise of powers consistent with rights of ownership, or "chattel slavery". Gleeson CJ observed that although the definition of slavery in s 270.1 was not identical to that in the International Convention to Suppress the Slave Trade and Slavery of 1926, the s 270.1 definition was clearly enough derived from the Convention[86]. The purpose, context and text of the Convention did not limit slavery to its de jure status. The Convention was directed to "the complete abolition of slavery in all its forms", and reflected a purpose of bringing about the abolition of the de facto condition of slavery[87]. Accordingly, his Honour held that it would be inconsistent with the considerations of purpose, context and text to read "slavery" in ss 270.1 and 270.3 as limited to "chattel slavery".

58 A purposive approach of this kind does not suggest that the language of a statutory provision is to be ignored. It is rather that a broader meaning of the language is to be preferred over its ordinary or grammatical meaning. It is necessary to do so to give effect to the provision's purpose. That purpose is evident from the use of the term "female genital mutilation" in the heading and extrinsic materials. The word "mutilates" is to be understood as a term of condemnation of any of the practices referred to in the FLC Report injurious to a female child. It follows that an injury such as cutting or nicking the clitoris of a female child cannot be said to be de minimis.

Injury – to any extent?

59 It also follows that the trial judge did not misdirect the jury in summing up that the word "'mutilate' in the context of female genital mutilation means to injure to any extent". The Court of Criminal Appeal, it will be recalled, considered that those words would convey to a jury that a de minimis injury

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85 (2008) 237 CLR 1; [2008] HCA 39.

86 *R v Wei Tang* (2008) 237 CLR 1 at 16 [21].

87 *R v Wei Tang* (2008) 237 CLR 1 at 17-18 [25]-[27].

would be sufficient for the offence. But the trial judge's direction was legally correct as consistent with the FLC Report and it provided the necessary explanation of the issue before the jury.

60 The function of a summing up is to provide information to a jury to assist it to carry out its task having regard to the particular circumstances of the case[88]. The particular issue here in question was whether what occurred involved no injury at all. It was the defence case that the khatna ceremony was partly symbolic and involved merely the placing of a surgical instrument on the vulva of the complainants. It was described as "skin sniffing the steel", and as involving no nicking or cutting and therefore no damage or injury to the complainants. The Crown submitted that this concept was bizarre and implausible.

61 Against this background and in light of the defence submissions concerning the meaning of "mutilates", it is apparent that the purpose of the trial judge's direction that injury "to any extent" was sufficient was to emphasise that some injury was necessary but that a threshold of serious injury was not required. His Honour, correctly, was concerned to disabuse the jury of the notion that "mutilates" bears its ordinary meaning.

Meaning of "clitoris"

62 The indictment charged the respondents with the mutilation of the clitoris of each of C1 and C2. The trial judge directed the jury that "what the Crown has to prove, for you to convict Kubra Magennis on this count, is that she performed an act which mutilated the clitoris. The clitoris … includes the clitoral hood or prepuce. So this charge is one that requires identification of a particular part of the anatomy."[89]

63 The defence had pointed to a number of dictionary definitions, including medical dictionary definitions, which suggested that the prepuce is part of the labia minora[90]. The trial judge considered that the issue was capable of being moot to an extent, given that the definitions and medical evidence demonstrate

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88 *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3; *Darkan v The Queen* (2006) 227 CLR 373 at 394 [67]; [2006] HCA 34.

89 *A2 v The Queen* [2018] NSWCCA 174 at [456].

90 *R v A2 [No 2]* (2015) 253 A Crim R 534 at 571-572 [263].

that if the prepuce is not part of the clitoris, it is part of the labia minora. But if that were the case it might have been necessary to amend the indictment[91].

64 His Honour construed "clitoris" broadly, having regard to the context and purpose of s 45(1). He observed that female genital mutilation procedures are not carried out by surgeons[92]. Although the legislature had identified three particular areas and had not used a broader term such as "genital area", his Honour was satisfied that, as a matter of construction, "the clitoris and the prepuce of the clitoris are so closely interrelated that the prepuce may be regarded as part of the clitoris although, for technical purposes, it may also be regarded as part of the labia minora"[93].

65 It does not appear to have been contended by the parties that the word "clitoris" has a technical meaning which invites recourse to expert evidence[94]. Nevertheless, the Crown adduced evidence from medical experts as to its meaning. Dr Susan Marks, a specialist at the Westmead Children's Hospital, gave evidence that the clitoral anatomy includes its hood, because they are closely physically related to each other, although the clitoris and its hood are different tissue. Professor Gregory Jenkins, a specialist gynaecologist, gave evidence that he would see the clitoris and prepuce as separate structures, but observed that they are very close together. Professor Sonia Grover, the director of the Department of Paediatric and Adolescent Gynaecology at the Royal Children's Hospital, described the word "clitoris" as a global term which included structures such as the clitoral ridge, the clitoral hood, the shaft of the clitoris, the clitoral glans and the prepuce.

66 Reviewing the medical evidence, the Court of Criminal Appeal observed that the fact that Professor Jenkins considered the clitoris and prepuce to be separate structures "would not detract from the proposition that together they might be viewed as forming part of the clitoris as a whole"[95]. Nevertheless the Court found that the medical dictionary definitions differentiated between the clitoris and prepuce. It said that where the legislature has identified separate anatomical parts of the genital area with some precision it must be taken to be

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91 *R v A2 [No 2]* (2015) 253 A Crim R 534 at 572 [267].

92 *R v A2 [No 2]* (2015) 253 A Crim R 534 at 572 [268].

93 *R v A2 [No 2]* (2015) 253 A Crim R 534 at 573 [270].

94 *The Australian Gas Light Co v The Valuer-General* (1940) 40 SR (NSW) 126 at 137.

95 *A2 v The Queen* [2018] NSWCCA 174 at [525].

distinguishing between them. It held that "[g]iven that this is a penal statute, precision in identifying the relevant body part is important"[96]. The Court of Criminal Appeal concluded that the trial judge had been in error in this aspect of his summing up[97].

67 The approach of the trial judge to the construction of s 45(1)(a) is to be preferred as one which promotes the purpose of s 45(1)[98]. As explained above, that purpose was to prohibit all forms of injurious female genital mutilation, procedures which, the FLC Report had observed[99], are not generally carried out by surgeons or with any precision. This context and purpose does not suggest an intention that any narrow or technical meaning be applied so as to exclude anatomical structures that are closely interrelated with the labia majora, labia minora or clitoris.

Relief

68 It follows, in our view, that the appeals should be allowed. It remains to determine the nature of the relief that is appropriate in the circumstances.

69 Section 37 of the *Judiciary Act 1903* (Cth) provides that this Court, in its appellate jurisdiction, may give such judgment as ought to have been given in the first instance and, if the cause is not pending in this Court, may remit the cause to the court from which the appeal was brought. This directs attention to the powers of the Court of Criminal Appeal on the appeals to that Court, in light of the judgment of this Court in these appeals.

70 Subject to the proviso, s 6(1) of the *Criminal Appeal Act 1912* (NSW) ("the CA Act") relevantly provides that the Court of Criminal Appeal shall allow an appeal from a conviction on indictment[100] where it is of the opinion that the verdict of the jury is "unreasonable, or cannot be supported, having regard to the evidence, or ... that on any other ground whatsoever there was a miscarriage of justice". Section 6(2) of the CA Act governs the consequential orders.

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96 *A2 v The Queen* [2018] NSWCCA 174 at [526].

97 *A2 v The Queen* [2018] NSWCCA 174 at [527].

98 *Interpretation Act 1987* (NSW), s 33.

99 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 6 [2.01]-[2.02], 8 [2.11], 21 [3.02].

100 Brought pursuant to s 5(1) of the CA Act.

71 The Court of Criminal Appeal allowed the respondents' appeals against their convictions on various grounds. The determination of two of those grounds depended upon the Court of Criminal Appeal's erroneous construction of s 45(1)(a) of the *Crimes Act*. Other successful grounds were, however, independent of the substantive issues on these appeals. Those grounds turned instead upon conclusions that evidence had improperly been admitted at the respondents' trials[101]; that the trial judge had erred in ruling that C2 was competent to give sworn evidence[102]; and that there had been a miscarriage of justice on account of the absence from the trial of medical evidence which, by the time of the appeals, had become available[103].

72 The first such error concerned the evidence of Dr X. The Crown tendered evidence at trial through Dr X as to the practice of khatna in the Dawoodi Bohra community in India in a period up to 1991. Dr X's knowledge was based on her personal experience of having a procedure undertaken on her genital area in 1950 or 1951, and on sociological studies based largely on anecdotal accounts from persons whom she interviewed. Her evidence was to the effect that the practice of khatna is static and non-ritualistic.

73 The Court of Criminal Appeal held that the evidence adduced from Dr X was partly speculative and was not derived from any area of specialised knowledge. It was not admissible under s 79(1) of the *Evidence Act 1995* (NSW), which relates to expert evidence, and should not have been admitted[104]. The appellant does not now challenge that conclusion.

74 The third error concerned new medical evidence which was adduced before the Court of Criminal Appeal. It is not necessary to detail it. It had the effect of excluding the possibility that the tip of the clitoral head or glans had in fact been removed from C1 and C2. That possibility had been left before the jury, in light of the evidence of one of the expert medical witnesses that she could not see the clitoral glans of either C1 or C2 during her examinations of them. Again, the appellant does not challenge the conclusion of the Court of Criminal Appeal that a potential miscarriage of justice thereby occurred.

75 In light of those concessions the appellant also concedes that, if its appeals to this Court are successful, this Court should leave undisturbed the Court of

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101 *A2 v The Queen* [2018] NSWCCA 174 at [1090].

102 *A2 v The Queen* [2018] NSWCCA 174 at [850].

103 *A2 v The Queen* [2018] NSWCCA 174 at [358].

104 *A2 v The Queen* [2018] NSWCCA 174 at [713]-[714].

Criminal Appeal's orders allowing the respondents' appeals to that Court and quashing their convictions. But what the appellant did ask this Court to do if its appeals were allowed was to set aside the Court of Criminal Appeal's consequential orders entering verdicts of acquittal and, in their place, order that new trials be had. The respondents argued that, if the appeals were allowed, this Court should set aside the orders entering the verdicts of acquittal and make no orders for new trials. In the alternative, it was said to be open to this Court to allow each appeal but leave undisturbed the Court of Criminal Appeal's orders entering verdicts of acquittal.

Sections 6(2) and 8(1) of CA Act

76 Section 6(2) of the CA Act provides that if an appeal against conviction is allowed, the Court of Criminal Appeal "shall ... quash the conviction and direct a judgment and verdict of acquittal to be entered". The sub-section is subject to other provisions of the CA Act and, in particular, s 8(1), which provides that on an appeal the Court may order a new trial if it considers that a miscarriage of justice has occurred and that, having regard to all the circumstances, the miscarriage can be more adequately remedied by an order for a new trial than by any other order which the Court is empowered to make. The orders sought by the respondents seem contrary to the terms of s 6(2). Here context provides little assistance in the construction of s 6(2) except that, taken with s 8(1), it appears to provide only a binary choice. The terms of s 6(2) appear to require an order for entry of acquittal unless the Court's other powers, such as that to order a retrial, are exercised. The premise of s 6(2), in a case such as this, is that, if a retrial is not ordered, the person whose conviction has been set aside is entitled to an acquittal.

77 It may be observed that in *Jiminez v The Queen*[105], where it was not considered appropriate to order a retrial, this Court ordered the entry of a verdict of acquittal. The reasons in *Jiminez* did not discuss the option here suggested and no other decision of this Court appears to have discussed the question in any detail. In these circumstances the parties provided further written submissions at the request of the Court.

78 In their joint submissions the respondents argued that it is open to the Court to quash the conviction and decline to make a further order. They pointed to a number of cases where this has occurred. None of these cases explains how this choice was seen to be open as a matter of the construction of ss 6(2) and 8(1).

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105 (1992) 173 CLR 572; [1992] HCA 14.

79 Some cases to which the respondents referred are explicable on another basis. Cases such as *Maher v The Queen*[106] stand for the proposition that there is no need to enter a verdict of acquittal where it has been held that the trial itself is a nullity, or where the indictment is invalid. In *R v Swansson*[107], Simpson J pointed out that the inevitable consequence of allowing an appeal is the quashing of the conviction. The dilemma, her Honour noted, was how the Court could then declare the trials to be a nullity – never to have taken place – and yet order new trials to be had. In that circumstance, her Honour opined, the Court should merely quash the conviction. Whatever be the correct approach in cases of this kind, these cases do not support the proposition that it is open to the Court to quash a conviction but not order a retrial or enter a verdict of acquittal.

80 It is true that there are some cases where this Court has simply made an order quashing a conviction[108], but, as they do not contain any discussion of whether a verdict of acquittal ought to be entered in circumstances where the Court determined not to order a retrial, the omission of an order entering a verdict of acquittal may have been the product of oversight.

81 In *Gerakiteys v The Queen*[109], upon which the respondents relied, it was held that the applicant's conviction on a broad conspiracy charge could not be supported by the evidence and therefore should be quashed. For the same reason, it was not considered to be appropriate to order a retrial. Gibbs CJ discussed whether it was appropriate to order a retrial and concluded[110] that the appropriate course was simply to quash the conviction and leave it to the Crown to decide whether to prosecute in respect of one or other of the more limited conspiracies which could be supported by the evidence. His Honour did not discuss the entry of a verdict of acquittal. None was sought. Each of Murphy J[111] and Deane J[112]

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106 (1987) 163 CLR 221; [1987] HCA 31. See also *R v Brown* (2004) 148 A Crim R 268; *R v Halmi* (2005) 62 NSWLR 263; *R v Swansson* (2007) 69 NSWLR 406.

107 (2007) 69 NSWLR 406 at 435 [179]-[180].

108 *Callaghan v The Queen* (1952) 87 CLR 115; [1952] HCA 55; *Croton v The Queen* (1967) 117 CLR 326; [1967] HCA 48; *Timbu Kolian v The Queen* (1968) 119 CLR 47; [1968] HCA 66; *Whitehorn v The Queen* (1983) 152 CLR 657; [1983] HCA 42.

109 (1984) 153 CLR 317; [1984] HCA 8.

110 *Gerakiteys v The Queen* (1984) 153 CLR 317 at 321-322.

111 *Gerakiteys v The Queen* (1984) 153 CLR 317 at 322.

112 *Gerakiteys v The Queen* (1984) 153 CLR 317 at 336-337.

expressed the view that the applicant was in the circumstances entitled to an acquittal.

82 In *Pedrana*[113], Ipp A-JA, referring to ss 6(2) and 8(1), said that these provisions "do not empower the court to order that no new trial should be held. Nor do they empower the court to quash the conviction and make no other order." The view that these provisions present the only alternatives where an appeal against conviction on indictment is allowed is consistent with statements by members of this Court in *R v Taufahema*[114] that "[t]he question is whether an order for a new trial is a more adequate remedy for the flaws in that trial than an order for an acquittal" and in *Spies v The Queen*[115] that "[i]f this Court were now to refuse to order a new trial of that charge, the appellant would be acquitted of all charges".

83 It follows in our view that it is not open to construe ss 6(2) and 8(1) of the CA Act as permitting the Court of Criminal Appeal in a case such as the present to quash the respondents' convictions but neither order a new trial nor enter verdicts of acquittal. That is sufficient to dispose of the respondents' primary contention.

A new trial?

84 As to the respondents' alternative contention, unless the interests of justice require the entry of a verdict of acquittal, an appellate court would ordinarily order a new trial where there is sufficient evidence to support a conviction[116].

85 It is well settled that provisions such as s 8(1) confer a discretion to order a new trial[117]. There may be factors which suggest that such an order is not appropriate[118]. In the present case there are some such factors. C1 and C2 were children when they were interviewed by police and when they gave evidence at a

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113 (2001) 123 A Crim R 1 at 11 [71].

114 (2007) 228 CLR 232 at 255 [51]; [2007] HCA 11.

115 (2000) 201 CLR 603 at 638 [103]; [2000] HCA 43.

116 *Spies v The Queen* (2000) 201 CLR 603 at 638 [103]-[104].

117 *Peacock v The King* (1911) 13 CLR 619; [1911] HCA 66; *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630; [1984] HCA 48.

118 *Jiminez v The Queen* (1992) 173 CLR 572 at 584-585, 590-591; *R v Taufahema* (2007) 228 CLR 232 at 256-257 [55].

trial which took place in 2015. The trial judge, in considering whether C1 and C2 were compellable to give evidence against their mother, accepted that there was a likelihood that psychological harm might be caused to them. There could be little doubt that a second trial would compound that distress. Unlike cases involving sexual offences, C1 and C2 would be required to give evidence at a new trial. The provision of the *Criminal Procedure Act 1986* (NSW) that protects vulnerable witnesses[119] does not permit the tender of a complainant's original evidence at a retrial of offences contrary to s 45 or s 59 of the *Crimes Act*. Additionally, A2 and Ms Magennis have served the sentences imposed on them, and Mr Vaziri served three months of his sentence in full-time imprisonment and was then subject to strict bail conditions for a period of more than 13 months.

86 These factors might be thought to point against an order for new trials. The dilemma which it might create for a court is that a verdict of acquittal does not seem appropriate either. It was, in part, to this difficulty that the parties' arguments concerning ss 6(2) and 8(1) were addressed. It seems to us that, in the special circumstances of this case, there may be another course open. It is to order a new trial and leave the question whether one be had to the discretion of the Crown.

87 There is, however, a question which is necessarily antecedent to considerations of this kind. It is that mentioned earlier, whether there is sufficient evidence to warrant an order for a new trial.

The test of sufficiency

88 The question of whether there is sufficient evidence to support a conviction is ordinarily to be determined in accordance with the test adopted[120] in *Doney v The Queen*:

> "[I]f there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

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119 Section 306B(1).

120 (1990) 171 CLR 207 at 214-215; [1990] HCA 51; see also at 212-213, approving *R v Prasad* (1979) 23 SASR 161 at 162, *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410 and *R v R* (1989) 18 NSWLR 74 at 77. See and compare *R v Galbraith* [1981] 1 WLR 1039 at 1042; [1981] 2 All ER 1060 at 1062.

89 The test in *Doney* stands in contrast to the test in *M v The Queen*[121] that is applied in the determination of whether a verdict is unreasonable or unsafe and unsatisfactory:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."[122]

90 Although consideration of the "interests of justice" may accommodate or require the application of this more stringent standard of review[123], at the first stage of the analysis consideration of the sufficiency of the evidence invokes the lesser standard identified in *Doney*. Thus, in *Peacock v The King*[124], Barton J described[125] the question as being whether the evidence is "capable of the inference of guilt, albeit some other inference or theory be possible [and, if so] it is for the jury ... to say ... whether the inference ... overcomes all other inferences or hypotheses, as to leave no reasonable doubt of guilt in their minds". In *Director of Public Prosecutions (Nauru) v Fowler*[126], Gibbs CJ, Murphy, Wilson, Dawson and Deane JJ posed the question in terms of whether "the admissible evidence given at the original trial was sufficiently cogent to justify a conviction". In *Spies v The Queen*[127], Gaudron, McHugh, Gummow and Hayne JJ stated the test in terms of whether "there is evidence to support the charge".

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121 (1994) 181 CLR 487; [1994] HCA 63.

122 *M v The Queen* (1994) 181 CLR 487 at 493 (footnotes omitted).

123 See *JB v The Queen [No 2]* [2016] NSWCCA 67 at [135].

124 (1911) 13 CLR 619.

125 *Peacock v The King* (1911) 13 CLR 619 at 651-652; see also at 675.

126 (1984) 154 CLR 627 at 630.

127 (2000) 201 CLR 603 at 638 [104].

91 Application of the *Doney* test requires assessment of the sufficiency of the evidence taking the prosecution evidence (including the answers of prosecution witnesses to cross-examination) at its highest and drawing all inferences favourable to the prosecution case that are reasonably open[128]. If the case is circumstantial, it is not to the point that the court may consider an hypothesis consistent with innocence to be reasonably open on the evidence[129]. The question is whether a jury, taking the evidence at its highest and drawing all reasonably open inferences that are most favourable to the Crown, *could* rationally exclude that hypothesis[130]. Subject to contrary statutory provision, the court does not need to consider evidence that contradicts, qualifies or explains the prosecution's case or that supports the accused's case[131]. That requires consideration of the evidence.

The evidence

i) Admissions and matters not in dispute

92 At trial, the respondents defended the charges on a narrow basis. They did not dispute (and, in the case of A2 and Ms Magennis, formally admitted in their Notices of Defence Response) that A2 was present in a room with the complainants on the relevant occasions while Ms Magennis examined and made contact with the complainants' genitalia during a "symbolic ceremony" that involved the placing of forceps on the vulva (not the clitoris) of the complainants without cutting them. This procedure was described as "skin sniffing the steel". Though Mr Vaziri was not present during the procedures, his defence was, in effect, common to that of A2 and Ms Magennis, because he did not dispute that he had assisted in covering up their actions.

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128 *Doney v The Queen* (1990) 171 CLR 207 at 213-214; *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410 at 415 and *R v R* (1989) 18 NSWLR 74 at 81, both citing *Haw Tua Tau v Public Prosecutor* [1982] AC 136 at 151.

129 *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410 at 415-416.

130 *Director of Public Prosecutions v Iliopoulos (Ruling No 3)* [2016] VSC 132 at [8]-[9].

131 *Doney v The Queen* (1990) 171 CLR 207 at 214-215; *R v R* (1989) 18 NSWLR 74 at 81, 82; see also Glass, "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 *Australian Law Journal* 842 at 845-846.

ii) C1's evidence

93 C1's evidence was adduced in the form of a recorded interview conducted by two members of the Joint Investigation Response Team ("the JIRT") on 29 August 2012 and supplemented by her oral testimony at trial. During the interview, C1 was asked about "khatana [sic]". When asked what the procedure involved, she stated that "[w]ell, they give um, a little cut there", by which she meant "[i]n your private part". It is, as the Court of Criminal Appeal noted[132], to be observed that the concept of "cutting" was first introduced by the interviewer, as was the concept of "cutting to the private part". Nevertheless, C1 explained that she knew what "khatana" was "[b]ecause it's happened to me". She said that when she was seven years old she had had her private part cut by an unknown female at her grandmother's sister's house. She told investigators that "my mum tells me not to go around telling everyone that much".

94 At trial, C1 said that during the procedure she had seen a "silver toolish thing" and that it looked a bit like scissors: "it had sort of a point, a roundish stick sort of thing and two finger-holes I think. I'm not sure." C1 drew the implement and the drawing was tendered on the trial as Exhibit B.

95 Thereafter, C1 was told to close her eyes. Consequently, she did not see the procedure occur. But she knew something had happened because she felt "a bit of pain and then a weird sort of feeling" in her private parts. She was unsure of the nature of the pain, describing it as like "a pinching or a cutting, I'm not sure", and, in re-examination, she said that "I don't really think it was a pinching, it just felt a bit like it. ... I'm not completely sure if it was cut, although it is most likely it was cut". There was no lasting pain. She saw no blood at that, or any other, time.

96 C1 also stated that while the procedure was being performed there were a number of women, including A2 (her mother), A5 (her paternal grandmother), A3 (her paternal grandaunt) and another unknown female (on the Crown case, Ms Magennis) surrounding her to "calm [her] down".

iii) C2's evidence

97 Like C1, C2's evidence was adduced in the form of a recorded interview conducted by the same two members of the JIRT on 29 August 2012 and supplemented by her oral testimony at trial. C2 had an intellectual disability and, as we have observed, on that and other bases the Court of Criminal Appeal

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132 *A2 v The Queen* [2018] NSWCCA 174 at [25].

allowed a ground of appeal alleging that she was not competent to give sworn evidence[133].

98 Nevertheless, in her JIRT interview C2 was asked the (admittedly leading) question, "[w]e heard that you had had a cut on your private parts. Is that true?" C2 answered, "[y]es". When further questioned, C2 told the JIRT members that she remembered an occasion when she had been lying down on cushions in her parents' home and felt "[h]urting". When asked where it hurt, she said "[i]n my bottom". C2 was unable to identify "the private part" on a "body sketch", tendered as Exhibit C. The Court of Criminal Appeal described the sketch as showing that the words "tummy" and "knee" were written with an arrow pointing to those parts of the body. This Court has not been provided with a copy of that exhibit.

99 When asked whether she knew what khatna was, C2 indicated that she did not know. When asked who else was home during the procedure, C2 said, "I don't want to tell you".

100 C1 also provided some limited evidence regarding the alleged offence against C2. She said that the last time she saw the woman who had performed the procedure on her was "when she had to do that thing to my sister".

iv) Evidence of conversations recorded by listening device and telephone intercepts

101 There was a large body of covertly recorded evidence of conversations between A2, Ms Magennis, Mr Vaziri and other, uncharged persons such as A2's husband (A1), A1's aunt (A3), and a religious authority. In brief, it consisted of evidence that was said to demonstrate that the respondents had an awareness of the practice of khatna and that they understood it to involve cutting[134]; and evidence said to demonstrate a consciousness of guilt (most notably concerning the "Africa checking story"[135] and A2's admonishment of the complainants,

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133 *A2 v The Queen* [2018] NSWCCA 174 at [881].

134 The Court of Criminal Appeal described the "high point" of this evidence to be a conversation between A1 and A2 during the course of which A1 asked "[i]n us do they cut skin … or do they cut the whole clitoris?" and A2 responded, "[n]o they just do a little bit … just little". There was debate as to whether this was a reference to what had happened to C1 or C2, or what happened in the wider Dawoodi Bohra community: *A2 v The Queen* [2018] NSWCCA 174 at [72], [630].

135 One recorded telephone conversation tended to prove that Mr Vaziri had encouraged A1 to falsely tell police that he and A2 had arranged for Ms Magennis

(Footnote continues on next page)

following their interviews, for revealing "a big secret"). It will be necessary to say something more of that evidence later in these reasons.

v) Medical evidence

102 As noted earlier, expert medical evidence was given by Dr Marks, who clinically examined C1 and C2 in 2012, and Professors Jenkins and Grover, who interpreted Dr Marks' clinical findings and made other relevant observations. In substance, their evidence fell into three broad categories: evidence interpreting Dr Marks' inability to visualise the clitoral glans (the possibility of excision of the glans versus innocent possibilities, such as difficulty visualising the glans for ordinary developmental reasons)[136]; evidence regarding the degree of pain, bleeding and scarring one would anticipate if the clitoris or prepuce had been cut; and evidence regarding the anatomy of the clitoris and, specifically, whether the prepuce forms a part of the clitoris.

vi) The evidence of Dr X

103 Dr X was a retired professor who had taught in Mumbai for 36 years in the areas of psychology and women's studies. Her evidence regarding the practice of female genital mutilation within the Dawoodi Bohra community was based on a combination of academic research, interviews with participants in female genital mutilation procedures, and personal knowledge derived from her membership of the Dawoodi Bohra community and the experience of having been the victim of female genital mutilation as a child. She gave evidence to the effect that the practice of khatna within the Dawoodi Bohra community in India involved the excision of a part of the clitoris or prepuce and that the practice within that community was "static", in the sense that it neither changed over time nor varied depending on the location of the community. As has been seen, the Court of Criminal Appeal partially upheld a ground concerning the admissibility of Dr X's evidence, and the appellant did not seek to impugn that holding in this Court. That eliminates the capacity of Dr X's evidence to prove what procedure was conducted.

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to attend and examine the children out of a concern to ensure that they had not been circumcised on a recent African holiday.

136 This evidence falls away in view of the fresh evidence, admitted by the Court of Criminal Appeal, which demonstrated that upon subsequent examination the clitorises were capable of being seen.

vii) Miscellaneous exculpatory evidence

104 The Court of Criminal Appeal noted the existence of numerous items of, at least arguably, exculpatory evidence. They included representations recorded in the surveillance material which were consistent with discussion by the respondents of a symbolic ceremony; evidence of A3, that on the day of C1's procedure A2 had told her she wanted to conduct a "symbolic khatna" and that A3 had heard Ms Magennis tell C1 words to the effect of, "it won't hurt you. I'm just going to touch you"; and evidence of Ms Magennis, who positively asserted the defence hypothesis. In answer to C1's evidence of experiencing some transient pain during the ceremony, Ms Magennis gave evidence that she, Ms Magennis, was an insulin-dependent diabetic, that she had performed the procedure when she had not eaten, that she was, therefore, probably hypoglycaemic, and that her hands had been shaking, so as to suggest in effect that she, Ms Magennis, might have pinched or pressed against C1's genital area, thereby causing pain accidentally.

Evidence sufficient to convict

105 Taking the prosecution cases in relation to C1 and C2 at their highest, and drawing all inferences most favourable to the Crown, the evidence supports inferences that C1 and C2 were both subjected to a procedure that involved a cut or nick to their clitoris or closely interrelated tissue. A jury would be entitled to accept C1's evidence that she felt pain and that the pain felt most like a cut and did not feel like pinching. So, too, would the jury be entitled to accept C2's evidence that she had experienced pain and, despite her statement that the pain was in her "bottom", to conclude that C2 was describing pain in her genitals. That arises as a rational inference from the combination of A2's and Ms Magennis' admissions that an implement had been placed on that location and the evidence which demonstrated that C2's descriptions of her body parts were imprecise.

106 It would further be reasonably open to a jury to infer, on balance, that C1 recalled seeing a pair of scissors. Such an inference would rationally be supported by the description C1 gave of the implement in her interview ("a silver toolish thing"); C1's subsequent statement to A1 that "yes, once [the interviewers] asked for scissors ... I saw scissor ... [t]hey do something with scissors?"; and the fact that during the interview no reference had been made to scissors. Those considerations permitted the inference that C1's description was unprompted by anything said by the investigators. If a jury inferred from these or other matters that C1 recalled seeing scissors, it would be rationally open to the jury to accept that C1's recollection was correct.

107 Furthermore, even if a jury were to take into account evidence which was exculpatory (and for the purposes of this exercise that possibility can be

excluded), a rational jury could discount the significance of the medical evidence that there was no visible damage to the relevant body parts on the basis of the medical evidence that "the genital region heals rapidly and very well, typically without leaving a scar", and, therefore, that any injury caused by a cut or a nick might be "not obvious at all". Similarly, a jury could rationally conclude that it was immaterial that neither complainant reported seeing blood: the blood might have been overlooked.

108 It would also be reasonably open to a jury, on balance, to infer from the body of covertly recorded evidence, including, particularly, the conversations between A1 and A2, and between A1 and A2 and A1's mother and aunt (A5 and A3, respectively), on 29 August 2012, that A2 and A1 had an awareness of the practice of khatna and that they understood that practice to involve circumcision. It would be open to a jury to infer from A2's response to A1's questions on that day ("[i]n us do they cut skin? ... or do they cut the whole clitoris?") that "[n]o they just do a little bit ... just little" that A2 understood circumcision in this context to involve the cutting of the skin of, or tissue closely related to, the clitoris. It would be open to infer from the use of the word "us" that this question and answer concerned, at least, the practice in the local Dawoodi Bohra community, of which A2 and her family were members, if not the practice within A1 and A2's immediate family.

109 In a similar fashion, the covertly recorded telephone call between A2 and Ms Magennis on 30 August 2012 would be rationally capable of supporting the inference that some minor injury was caused to the complainants' genitals. In substance, that conversation was that when told that the children were going to be examined at Westmead Hospital, Ms Magennis said, "[n]o ... No... Because the *way* I do no one knows even little bit." She later said, "[i]f they asked. You can say kids are playing on swings, they play in the garden. *Graze* can happen if they fall". On balance, it is open to infer from the expression "the *way* I do" (compared to, say, "I didn't do anything"), as well as the reference to a "graze", that Ms Magennis was describing a procedure that involved some minor or transient injury to the genitals which should not be apparent to the examining professionals but, if it were, could be explained on the basis of a playtime injury. Similarly, a jury might rationally conclude that Ms Magennis' reference to there being "no scar or anything there" was more probably premised on an understanding that there had been some injury but that, because of the "way" Ms Magennis had performed the procedure, the injury would not have been long-lasting.

110 More generally, the jury would be entitled to regard this body of evidence as tending to prove, on balance, that the respondents had lied to the police, encouraged others to do so, or admonished one or other of the complainants for speaking about the procedure, and, in particular, might infer on balance from the evidence that it tended to prove that the respondents had lied regarding their

understanding of khatna as a practice that involves cutting, and that the respondents were conscious that they were guilty *because* the procedures had involved cutting or nicking.

111 Taken as a whole, these intermediate findings, including, specifically, the fact that C1 and C2 had experienced pain in their genital areas; the fact that A2 had requested that Ms Magennis perform the procedure and had been present during the procedure; the fact that A2 understood khatna "in us" to involve a "little" cut to the clitoris; the evidence of lies, general and specific; and the fact that the recorded statements, which demonstrated A2's understanding of the nature of the practice, occurred in the immediate context of conversations regarding the ongoing police investigation into procedures at that time suspected to have *been performed on C1 and C2*, would be capable of supporting the rational conclusion beyond reasonable doubt that the procedure performed on C1 and C2 involved a cut or nick.

The matter should be remitted to the Court of Criminal Appeal

112 In the Court of Criminal Appeal, each of the respondents pressed grounds alleging that the verdicts were unreasonable. Those grounds were allowed but only on the basis that the expression "otherwise mutilates" necessitates that the relevant body part be rendered "imperfect or irreparably damaged in some fashion"[137] and that the word "clitoris" does not include the prepuce. The Court of Criminal Appeal concluded[138] that, upon that construction of the legislation, the verdicts on the s 45(1) counts were unreasonable or unsupported by the evidence.

113 Given the view which this Court takes of the meaning of "otherwise mutilates" and "clitoris", it now remains to determine whether the jury's verdict was, even so, unreasonable according to the test in *M v The Queen*. That necessitates a full review of the evidence led at trial, and, allowing for the advantages enjoyed by the jury, the determination of whether there is no reasonable possibility that the complainants' clitorises (or any closely interrelated tissue) were not injured "to any extent".

114 The judgment of the Court of Criminal Appeal implies that their Honours had doubts about the sufficiency of the evidence to prove the alternative counts. Read in context, those doubts appear as directed to the physical element that an assault charged under s 59 of the *Crimes Act* occasioned "actual bodily harm"[139].

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137 *A2 v The Queen* [2018] NSWCCA 174 at [521].

138 *A2 v The Queen* [2018] NSWCCA 174 at [521].

139 *A2 v The Queen* [2018] NSWCCA 174 at [632]-[634].

On the question of whether the alleged *conduct* had occurred, the Court of Criminal Appeal concluded[140] that "it would be open to a jury to reject the defence case that a 'skin sniffing the steel' ritual was performed in this matter, given the covertly recorded conversations and the admitted lies told regarding the Africa checking story"[141]. To so conclude, however, did not require application of the standard of review identified in *M v The Queen*.

115 It is neither practical nor appropriate for this Court to undertake a full review of the evidence. It is not practical because this Court does not have access to the whole of the record. The only record of the evidence at trial is that which is contained, in summary form, in the judgments below; and, as has consistently been held in this Court, it is not appropriate for this Court to consider the sufficiency of the evidence when that task has not been undertaken by the court below[142]. In those circumstances, the appropriate order is that each matter be remitted to the Court of Criminal Appeal for determination of Ground 2 of each respondent's appeal to that Court in light of the proper construction of s 45(1)(a).

Orders

116 These appeals should be allowed and the orders of the Court of Criminal Appeal be set aside. Each matter should be remitted to the Court of Criminal Appeal for determination of Ground 2 of each respondent's appeal to that Court according to law.

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140 *A2 v The Queen* [2018] NSWCCA 174 at [632].

141 Given their Honours' indication of the particulars of the alleged conduct against which they were to judge the sufficiency of the evidence, that conclusion appears to amount to an acceptance that the evidence was sufficiently cogent as to enable a rational jury to infer that there "had been a cut or nick to the clitoris".

142 *Miller v The Queen* (2016) 259 CLR 380 at 411 [82]; [2016] HCA 30, citing *Cornwell v The Queen* (2007) 231 CLR 260 at 300 [102]; [2007] HCA 12; see also *R v Hillier* (2007) 228 CLR 618 at 640 [54]; [2007] HCA 13.

117 BELL AND GAGELER JJ. The facts and procedural history are set out in the joint reasons of Kiefel CJ and Keane J and need not be repeated save to the extent that is necessary to explain these reasons. The principal issue in the appeals is the legal meaning of the words "otherwise mutilates" in s 45(1)(a) of the *Crimes Act 1900* (NSW) ("the Act"). The s 45(1)(a) offences with which the respondents were charged were alleged to have been committed between 18 October 2009 and 9 October 2012. At all material times, s 45(1)(a) provided that "[a] person who ... excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person" is liable to imprisonment for seven years[143].

118 It was the prosecution case that Kubra Magennis was the principal in the first degree and A2 the principal in the second degree in relation to each offence and that Shabbir Vaziri was an accessory after the fact to each offence. The indictment contained alternative counts alleging the aggravated assault occasioning actual bodily harm of C1 and C2[144]. The counts charging the s 45(1)(a) offences averred that A2 and Kubra Magennis "mutilated the clitoris" of C1 and C2 respectively. On the trial of each respondent for the s 45(1)(a) offences, it was incumbent on the prosecution to prove that Kubra Magennis' act resulted in the mutilation of the clitoris of C1 and C2, as the case may be.

119 The jury was directed that:

> "The word 'mutilate' in the context of female genital mutilation means to injure to any extent. It is not necessary for the Crown to establish that serious injury resulted. In the context of this trial, a nick or cut is capable of constituting mutilation for the purpose of this alleged offence."

120 In upholding the respondents' challenge to this direction, the Court of Criminal Appeal of the Supreme Court of New South Wales said that the superficial shedding of skin cells as the result of a nick or cut that leaves no visible scarring, and that on medical examination is not found to have occasioned damage to the skin or nerve tissue, does not amount to mutilation of the clitoris within the meaning of s 45(1)(a)[145]. Their Honours held that, while a cut or nick

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143 The maximum penalty for the offence was increased to 21 years by the *Crimes Amendment (Female Genital Mutilation) Act 2014* (NSW), Sch 1 [2].

144 *Crimes Act 1900* (NSW), s 59(2).

145 *A2 v The Queen* [2018] NSWCCA 174 at [515].

might result in the mutilation of the clitoris, the words "to any extent" wrongly conveyed that a *de minimis* injury would suffice to establish the offence[146].

121 The evidence before the Court of Criminal Appeal established that C1's external genitalia were normal and there was no evidence of any scarring or previous trauma to the clitoral glans or clitoral hood. The evidence with respect to C2 was to the same effect. The Court of Criminal Appeal allowed the respondents' appeals, quashed their convictions and entered verdicts of acquittal. For the reasons to be given, we consider that the Court of Criminal Appeal's interpretation of the words "otherwise mutilates" in s 45(1)(a) is correct and, in light of the evidence, including the fresh evidence received on the appeals, that the Court of Criminal Appeal was right to enter verdicts of acquittal on the s 45(1)(a) counts. (The appellant does not challenge the Court of Criminal Appeal's orders entering verdicts of acquittal on the alternative counts). It follows that we would dismiss the appeals.

122 Section 45(1)(a) of the Act is modelled on s 1(1)(a) of the *Prohibition of Female Circumcision Act 1985* (UK), which made it an offence for any person to "excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person". Section 45 was inserted into the Act by the *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW) ("the Amending Act"), the long title of which is "An Act to amend the Crimes Act 1900 to prohibit female genital mutilation". The heading of s 45 is "Prohibition of female genital mutilation".

123 The appellant accepts that, as a matter of ordinary English, the word "mutilates" connotes "a higher level of injury" than an injury "to any extent". The appellant contends that the Court of Criminal Appeal erred in construing the offence created by s 45(1)(a) by giving the verb "mutilates" its ordinary meaning[147]. In this statutory context, so the argument goes, the verb "mutilates" takes its meaning from the collective phrase "female genital mutilation" and, so understood, extends to ritualised practices that occasion any transient damage to the tissue of the clitoris, labia majora or labia minora (collectively, "labia").

124 The principles of interpretation were not in issue on the hearing of the appeals. In assigning legal meaning to the words of a provision, the court starts with consideration of the ordinary and grammatical meaning of the words taking into account both context and legislative purpose[148]. Consideration of context in

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146 *A2 v The Queen* [2018] NSWCCA 174 at [522].

147 *A2 v The Queen* [2018] NSWCCA 174 at [521].

148 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41;

(Footnote continues on next page)

its widest sense and the purpose of the statute informs the interpretative task throughout[149]. That consideration, and the consequences of giving a provision its literal, grammatical meaning, may lead the court to adopt a construction that departs from the ordinary meaning of the words[150]. Purposive construction, however, does not extend to expanding the scope of a provision imposing criminal liability beyond its textual limits[151].

125 This is not a case in which the words of the provision accommodate a range of meanings including the meaning for which the appellant contends[152]. This Court is asked to depart from the ordinary meaning of the language of the offence-creating provision and to extend its reach by recourse to a collective phrase used in the heading, which does not form part of the provision[153]. The appellant maintains that, when regard is had to the extrinsic material, it is clear that the object of enacting s 45 was to prohibit the practice of female genital mutilation in all its forms, including ritualised practices in which the clitoris is nicked leaving no scar or other detectable damage ("ritualised practices"). To give the words "otherwise mutilates" their ordinary meaning on this analysis is to produce a result that is manifestly absurd or unreasonable[154]. The appellant's argument invokes s 33 of the *Interpretation Act 1987* (NSW), which requires the court to prefer a construction which promotes the purpose or object of the Act.

Australian Education Union v Department of Education and Children's Services (2012) 248 CLR 1; [2012] HCA 3; *Roadshow Films Pty Ltd v iiNet Ltd [No 2]* (2012) 248 CLR 42; [2012] HCA 16.

149 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2.

150 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

151 *Milne v The Queen* (2014) 252 CLR 149 at 164 [38] per French CJ, Hayne, Bell, Gageler and Keane JJ; [2014] HCA 4.

152 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 557 [66] per Gageler and Keane JJ; [2014] HCA 9; *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at 1071-1072 [20] per Kiefel CJ, Bell and Nettle JJ; 361 ALR 206 at 215; [2018] HCA 55.

153 *Interpretation Act 1987* (NSW), s 35(2)(a). See also Bennion, *Bennion on Statutory Interpretation*, 5th ed (2008) at 745-747.

154 *Interpretation Act 1987* (NSW), s 34(1)(b)(ii).

126 Recognition that the object of enacting s 45 was the prohibition of "female genital mutilation" says nothing as to the conduct that the legislature is to be taken to have intended to fall within the scope of the prohibition. At least that is so unless that collective phrase can be said to have had a settled meaning at the date the Amending Act was enacted. Critical to acceptance of the appellant's submission is the contention that, at that date, there could be no doubt that the expression "female genital mutilation" had a meaning which included ritualised practices. The submission instances *Black's Law Dictionary* ("Black"):

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

127 The reliance on Black is misconceived. The 5th edition of Black, published in 1979, did not contain a definition of the collective phrase "female genital mutilation". In the 9th edition, published in 2009, the editors introduced a convention of recording in parentheses the date of the first known use of defined terms. The 9th edition contained a definition of "female genital mutilation" and recorded in parentheses the first known use of the expression as having been in 1979. It is likely that the reference is to a seminar held in association with the World Health Organization ("the WHO") in 1979 in Khartoum ("the Khartoum seminar") in which a session was devoted to the topic of female circumcision.

128 The trial judge's analysis suffered from a similar misconception. His Honour said that the word "mutilates" was to be understood as taking its meaning from the expression "female genital mutilation", which had "become a type of term of art or catch-all term, describing a range of conduct extending from ... cutting (including a nick) to ... infibulation and clitoridectomy". His Honour referred in this connection to the online version of the *Macquarie Dictionary*, which defines "female genital mutilation" in terms that include a "ritualistic nick". In the Court of Criminal Appeal, the appellant acknowledged "that there is some difficulty in relying on a dictionary definition that may not have been in existence" at the date of the enactment of s 45. The concession was well made. It appears that a definition of the collective phrase "female genital mutilation" first appeared in the 2013 edition of the *Macquarie Dictionary*.

129 In this Court, the appellant's principal reliance is on references in the Minister's second reading speech on the Bill for the Amending Act ("the Minister's speech") to the recommendations of the WHO and the Family Law Council of Australia with respect to the prohibition of the practice of female genital mutilation[155]. In particular, the appellant relies on the definition of

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155 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1859-1860.

"female genital mutilation" adopted by the Family Law Council as supporting its contention that, at the date of the enactment of the Amending Act, the collective phrase had the settled meaning for which it contends. As will appear, the contemporary materials to which this Court was taken do not establish that this is so.

130 In January 1994, the Family Law Council issued a Discussion Paper on the topic of female genital mutilation ("the Discussion Paper")[156]. The expression "female genital mutilation" was used in the Discussion Paper to "embrace all types of circumcision, other than mere ritual, where an incision is made in the girl's genital area"[157]. The practice of female genital mutilation was described as involving any one of four procedures, in order from least to most severe, as follows: (i) ritualised circumcision, involving cleaning and/or application of substances around the clitoris and, in some instances, the scraping or nicking of the clitoris causing bleeding but resulting in little mutilation or long-term damage[158]; (ii) sunna, involving the removal of the clitoral prepuce[159]; (iii) clitoridectomy, involving the removal of the glans of the clitoris and, usually, the entire clitoris and often parts of the labia minora[160]; and (iv) infibulation, involving the removal of virtually all of the external female genitalia[161].

131 It will be observed that categories (ii), (iii) and (iv) involve injury to the clitoris, or the labia, which, as a matter of ordinary English, may be described as mutilating the whole or part of those structures. By contrast, conduct within category (i), involving cleaning of, or the application of substances to, the clitoris, or scraping or nicking the clitoris in circumstances in which the scrape or

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156 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 6-7 [2.01]-[2.06].

157 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 6 [2.01].

158 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 6 [2.03].

159 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 7 [2.04].

160 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 7 [2.05].

161 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 7 [2.06].

nick does not result in any scarring or detectable damage, does not, as a matter of ordinary English, amount to mutilating the clitoris.

132 In June 1994, the Family Law Council published its Report to the Attorney-General on Female Genital Mutilation ("the Report")[162]. In the Report, the Family Law Council recommended that the Commonwealth Parliament enact legislation to make clear that female genital mutilation is a criminal offence and that it constitutes child abuse under Australian child protection laws. The Report adopted the Discussion Paper's classification of the four categories of female genital mutilation[163]. The Report treated as within category (i) any practice that occasions tissue damage to the female genitalia including bruising, contusion or incision.

133 The Minister's speech was made on 4 May 1994. Relevantly, the Minister stated[164]:

> "This bill will make the practice of female genital mutilation a criminal offence in this State. … *The practice involves the excision or removal of parts or all of the external female genitalia*. The procedure is usually performed on girls of tender age. …
>
> The World Health Organisation has recommended that governments adopt clear national policies to abolish the practice. …
>
> The Family Law Council of Australia recently released a detailed report on FGM. The council strongly recommended the introduction of legislation to make clear that FGM constitutes a criminal act and a form of child abuse. …
>
> I turn to the provisions of the bill. *It will be an offence for anyone to perform FGM in this State. The three forms of FGM in order of severity are infibulation, clitoridectomy and sunna. The bill seeks to prohibit all of these various methods of FGM*. … The bill follows legislation in place in the United Kingdom and the United States which are careful not to interfere with legitimate forms of surgery." (emphasis added)

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162 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994).

163 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 6-8 [2.01]-[2.06].

164 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1859-1860.

134 As the reasons of Kiefel CJ and Keane J note, the Minister's reference to the Family Law Council's recommendation suggests that advance copies of the Report were available to the Parliament. Notably, despite the Family Law Council's adoption of the classification of four categories of female genital mutilation including category (i), the Minister described "the practice" as involving the excision or removal of parts of or all of the external genitalia, a description that is confined to categories (ii), (iii) and (iv). And the Minister identified the object of the Bill as the prohibition of *three* forms of female genital mutilation, namely, infibulation, clitoridectomy and sunna. The stated intention to implement the recommendation of the Family Law Council does not support an inference that the mischief to which the Amending Act was directed was the prohibition of conduct falling within category (i).

135 The Minister did not identify the source of the WHO recommendation that "governments adopt clear national policies to abolish the practice [of female genital mutilation]". On the hearing of the appeals, the parties were given leave to file supplementary submissions outlining relevant recommendations of the WHO as at May 1994. The appellant's submission set out "[a]ctions of [the WHO] in relation to female genital mutilation". These commenced with the Khartoum seminar in 1979, which had as its subject "traditional practices affecting the health of women and children". As earlier noted, one session was concerned with "female circumcision". Two papers were presented on this topic. The first paper addressed female circumcision in Egypt, which was described as involving three forms: (a) sunna type, in which the clitoris is snipped; (b) second type, in which the labia minora and part of the clitoris are removed; and (c) total removal of the clitoris and labia[165]. The second paper addressed female circumcision in Somalia, which was described as involving four forms: (a) mild sunna; (b) modified sunna; (c) partial or total clitoridectomy; and (d) infibulation (Pharaonic female circumcision)[166]. The Khartoum seminar resulted in a recommendation for the adoption of clear national policies to abolish female circumcision.

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165 Dr Afaf Attia Salem, Director, General Directorate Maternity and Child Health, Ministry of Health, Cairo, "The Practice of Circumcision in Egypt", in World Health Organization, *Seminar on Traditional Practices Affecting the Health of Women and Children, Khartoum, 10-15 February 1979* (1979) at 10.

166 Mrs Edna Ismail, WHO Temporary Advisor and Director, Department of Training, Ministry of Health, Somalia, "Female Circumcision – Physical and Mental Complications", in World Health Organization, *Seminar on Traditional Practices Affecting the Health of Women and Children, Khartoum, 10-15 February 1979* (1979) at 14.

136 It may be accepted, as the appellant submits, that during the 1980s the WHO endorsed the recommendation of the Khartoum seminar with respect to female circumcision. This acceptance does not shed light on the scope of the conduct that was sought to be prohibited. The appellant points to the resolution passed at the 47th WHO Assembly, adopting a resolution recommended by the Executive Board on 10 May 1994, urging member States to establish national policies and programs to effectively abolish female genital mutilation. Again, acknowledgment of the WHO resolution does not assist in resolving the question of the scope of the conduct that member States were being urged to proscribe.

137 In 1986, an article published under the auspices of the WHO made reference to "three main types of female circumcision" of which "[c]ircumcision proper, known in Muslim countries as sunna ... is the mildest … form", involving "the removal only of the clitoral prepuce"[167]. The following year, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, in cooperation with the WHO, offered a definition of female circumcision as "the partial or complete removal of the female external genitalia"[168]. In 1992, a further article authored by a Joint Task Force between the WHO and the International Federation of Gynecology and Obstetrics (FIGO) was published in two journals[169]. The article described "female circumcision" as having three forms[170]:

> "In its mildest form, female circumcision involves only the removal of the foreskin of the clitoris. But in the majority of cases the clitoris itself is removed, together with all or part of the labia minora and in the most severe form the labia majora."

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167 World Health Organization, "A traditional practice that threatens health – female circumcision" (1986) 40(1) *WHO Chronicle* 31 at 32.

168 World Health Organization, *Report on the Regional Seminar on Traditional Practices Affecting the Health of Women and Children in Africa, 6-10 April 1987, Addis Ababa, Ethiopia* (1987) at 12.

169 Joint Task Force of the World Health Organization and the International Federation of Gynecology and Obstetrics (FIGO), "Female circumcision" (1992) 45 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 153; Joint Task Force of the World Health Organization and the International Federation of Gynecology and Obstetrics (FIGO), "Female Circumcision" (1992) 37 *International Journal of Gynecology & Obstetrics* 149.

170 Joint Task Force of the World Health Organization and the International Federation of Gynecology and Obstetrics (FIGO), "Female circumcision" (1992) 45 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 153 at 153.

138 At the date of the Minister's speech, the WHO had not adopted a uniform definition or classification of female genital mutilation. In January 1994, the Director-General of the WHO stated[171]:

> "Female genital mutilation is a collective name given to a series of traditional surgical operations performed on female genitals in several countries in the world. ... Its physical and psychological effects on girls and women, particularly on normal sexual function, affect their reproductive health in a way which lasts all their lives, since none of the procedures are reversible. In all types of female circumcision part or the whole of the clitoris is removed."

139 More than a year after the enactment of the Amending Act, a WHO Technical Working Group met in Geneva with the object of recommending the adoption of standard definitions and a classification for the different types of female genital mutilation. In its report, the Technical Working Group noted that the classification of female genital mutilation then in current use generally distinguished three main types: excision of the prepuce and clitoris; excision of the prepuce, clitoris and labia minora; and infibulation. The Technical Working Group recommended that "other practices involving the stretching, pricking, piercing, cauterization, scraping or cutting of any part of the external genitalia or the insertion of herbs or any other substances ... should also be included in the classification"[172].

140 The extrinsic material does not support the appellant's contention that the collective phrase "female genital mutilation" had acquired a meaning encompassing ritualised practices at the date of the enactment of the Amending Act. The Court of Criminal Appeal was correct to hold that it is unclear that it was the legislative intention that ritualised practices were to fall within the proscription of s 45(1)(a).

141 The construction for which the appellant contends was squarely based on demonstrating that "female genital mutilation" was understood in each of the four ways described in the Family Law Council's Report at the date the Amending Act was enacted. Correctly, in our view, the appellant did not invoke the principle that a statute is "always speaking" in support of its argument. It is one thing to recognise that the application of a statutory word or phrase may change over

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171 World Health Organization, *Maternal and Child Health and Family Planning: Current Needs and Future Orientation – Report by the Director-General* (12 January 1994) at 8 [21].

172 World Health Organization, *Female Genital Mutilation: Report of a WHO Technical Working Group, Geneva, 17-19 July 1995* (1996) at 5.

time, particularly in light in advances in science and technology. It is another thing to contemplate that the meaning of statutory language creating an offence can expand etymologically such that conduct that is not proscribed at the date of the enactment of the offence may come to fall within the proscription at some undefined time thereafter. That is because, accepting that the fixity or variability through time of the content of any statutory language is a question of interpretation, statutory language which creates a criminal offence is to be interpreted in light of the fundamental principle that a criminal norm should be certain and its reach ascertainable by those who are subject to it[173].

142 We do not read the joint reasons in *Aubrey v The Queen*[174] to suggest the contrary. The question in *Aubrey* was whether grievous bodily harm may be *inflicted* upon another person by the reckless transmission of a sexual disease contrary to s 35(1)(b) of the Act. The provision can be traced to s 20 of the *Offences against the Person Act 1861* (UK) ("the 1861 Act"). In *R v Clarence*, the Court for Crown Cases Reserved, by majority, held that the infliction of grievous bodily harm for the purposes of s 20 of the 1861 Act required proof of an assault or battery productive of immediate physical injury[175]. The joint reasons held that *R v Clarence* should no longer be followed[176]. Consideration of the legislative history led their Honours to reject the submission that "inflicts" in this statutory context has a narrower meaning than "causes"[177]. The rejection of each of these planks of Mr Aubrey's argument removed the obstacle to finding that the reckless transmission of the human immunodeficiency virus to his sexual partner amounted to the infliction of grievous bodily harm within the ordinary meaning of the statutory language.

143 In *R v Ireland*, Lord Steyn described the 1861 Act as a statute of the "always speaking" type[178]. The joint reasons in *Aubrey* commented that, if

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173 *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408 at 424 [44] per French CJ, Gummow, Kiefel and Bell JJ; [2011] HCA 43; *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at 479 [48] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; [2013] HCA 20.

174 (2017) 260 CLR 305; [2017] HCA 18.

175 (1888) 22 QBD 23 at 41 per Stephen J.

176 *Aubrey v The Queen* (2017) 260 CLR 305 at 319 [18] per Kiefel CJ, Keane, Nettle and Edelman JJ.

177 *Aubrey v The Queen* (2017) 260 CLR 305 at 322-323 [31]-[32].

178 *R v Ireland* [1998] AC 147 at 158.

his Lordship meant by this statement that the language of the 1861 Act was adaptable to new circumstances, it was an approach that accorded with the approach adopted in this country[179]. Their Honours observed that there may be differing views as to his Lordship's intended meaning[180], noting that Mr Aubrey had not developed his argument on the "always speaking" approach to statutory construction[181].

144 In *R v G*[182], a case in which the meaning of the word "reckless" in s 1(1) and (2) of the *Criminal Damage Act 1971* (UK) was the issue, Lord Bingham of Cornhill explained the approach to construction in this way: "[s]ince a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change"[183]. The starting point, his Lordship said, was what the Parliament meant by "reckless" in 1971[184]. So, too, here the starting point is what the Parliament meant by its use of the words "otherwise mutilates" in enacting s 45 in 1994.

145 Section 45 of the Act creates a serious, indictable criminal offence. The choice to use the words "otherwise mutilates", and not a formulation such as "otherwise injures", tells against finding that the objective legislative intention was to include within the reach of the prohibition conduct occasioning no more than transient injury. Giving the words "otherwise mutilates" their ordinary meaning cannot be said to produce a result that is manifestly absurd or unreasonable; these words serve to extend the prohibition to conduct resulting in the mutilation of the clitoris or labia in ways that may not involve the removal of the whole or a part of either structure (excision) or the stitching together of the labia (infibulation). The command of s 33 of the *Interpretation Act* is to prefer a

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179 *Aubrey v The Queen* (2017) 260 CLR 305 at 322 [30] per Kiefel CJ, Keane, Nettle and Edelman JJ, citing *R v Ireland* [1998] AC 147 at 158-159.

180 *Aubrey v The Queen* (2017) 260 CLR 305 at 322 [30], noting, in fn 82, *Yemshaw v Hounslow London Borough Council* [2011] 1 WLR 433 at 442-443 [26]-[27] per Baroness Hale of Richmond JSC, with whom Lords Hope of Craighead DPSC and Walker of Gestingthorpe JSC agreed (Lord Rodger of Earlsferry JSC agreeing at 446 [38]); [2011] 1 All ER 912 at 922-923, 926.

181 *Aubrey v The Queen* (2017) 260 CLR 305 at 322 [30] per Kiefel CJ, Keane, Nettle and Edelman JJ.

182 [2004] 1 AC 1034.

183 *R v G* [2004] 1 AC 1034 at 1054 [29].

184 *R v G* [2004] 1 AC 1034 at 1054 [29].

construction that promotes the purpose or object underlying the statute over a construction that would not promote that purpose or object. A construction that gives the words "otherwise mutilates" their ordinary meaning cannot be said to be one that does not promote the purpose or object of the Act[185]. The Court of Criminal Appeal did not err in finding that the words "otherwise mutilates" in this statutory context bear their ordinary meaning. It is a conclusion that accords with the object of proscribing the three forms of female genital mutilation that were identified in the Minister's speech.

146 As the respondents rightly submit, the prohibition in s 45(1)(a) is on conduct that *results* in mutilation as distinct from the means by which any injury is inflicted. It was for the jury, giving the word "mutilates" its ordinary meaning, to determine whether Kubra Magennis' act resulted in the mutilation of C1's or C2's clitoris. The Court of Criminal Appeal was right to hold that superficial tissue damage which leaves no visible scarring and which on medical examination is not shown to have caused any damage to the skin or nerve tissue is not in law capable of amounting to mutilation for the purposes of the provision[186]. It follows that the evidence, including the fresh evidence adduced in the Court of Criminal Appeal, was not capable of supporting the respondents' convictions for offences contrary to s 45(1)(a) of the Act. This conclusion makes it unnecessary to address the appellant's second ground of challenge.

147 For these reasons we would dismiss the appeals.

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185 *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 262 per Dawson, Toohey and Gaudron JJ; [1990] HCA 41.

186 *A2 v The Queen* [2018] NSWCCA 174 at [515].

148 NETTLE AND GORDON JJ. We agree with the orders proposed by Kiefel CJ and Keane J and agree generally with their reasons. We wish to say something more, however, about the construction of s 45(1)(a) of the *Crimes Act 1900* (NSW).

149 Section 45 was enacted in 1994 by the *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW) ("the 1994 FGM Act"). The long title of that Act was "[a]n Act to amend the Crimes Act 1900 to prohibit female genital mutilation". Section 45 itself is headed "[p]rohibition of female genital mutilation" and, at the relevant time, was in these terms:

> "(1) A person who:
>
> (a) excises, infibulates or *otherwise mutilates* the whole or any part of the labia majora or labia minora or clitoris of another person, or
>
> (b) aids, abets, counsels or procures a person to perform any of those acts on another person,
>
> is liable to imprisonment for 7 years.
>
> (2) An offence is committed against this section even if one or more of the acts constituting the offence occurred outside New South Wales if the person mutilated by or because of the acts is ordinarily resident in the State.
>
> (3) It is not an offence against this section to perform a surgical operation if that operation:
>
> (a) is necessary for the health of the person on whom it is performed and is performed by a medical practitioner ...
>
> (4) In determining whether an operation is necessary for the health of a person only matters relevant to the medical welfare of the person are to be taken into account.
>
> (5) It is not a defence to a charge under this section that the person mutilated by or because of the acts alleged to have been committed consented to the acts.
>
> (6) This section applies only to acts occurring after the commencement of the section.
>
> ..." (emphasis added)

150 An issue in the Court of Criminal Appeal of the Supreme Court of New South Wales was the meaning of the phrase "otherwise mutilates" in s 45(1)(a). The Court of Criminal Appeal interpreted the phrase as requiring the imposition of some permanent impairment, injury or imperfection, in the sense of irreparable damage of the labia majora, labia minora or clitoris. Consistent with that view, the Court held that a superficial nick or a cut (which necessarily leads to the destruction of those skin cells which are cut) could be a "mutilation" of the relevant body part, but only if some injury or imperfection is proved and that injury or imperfection has some permanent quality.

151 As these reasons will demonstrate, the phrase "otherwise mutilates" in s 45(1)(a) means any physical injury to the whole or any part of the labia majora, labia minora or clitoris, which is done for non-medical reasons. It is not necessary to demonstrate that the physical injury lasted beyond the time it took for that immediate injury to heal or that there was any permanent disfigurement, alteration or loss of function, of the whole or any part of the labia majora, labia minora or clitoris.

152 The starting point is the words of the offence created by s 45(1)(a): that a person who "excises, infibulates or *otherwise mutilates* the whole or *any part* of the labia majora or labia minora or clitoris of another person" is guilty of an offence (emphasis added). It is not: "excises, infibulates or otherwise mutilates *by irreparably impairing or rendering imperfect* the whole or any part of the labia majora or labia minora or clitoris of another person".

153 Second, it is significant that, relevantly, the offence is "otherwise mutilates ... *any part* of the ... clitoris" (emphasis added). It directs attention to the clitoris, a sensitive organ – the mutilation of *any part of which* is forbidden. It is a vanishingly subtle distinction between the removal of a "lentil" sized amount from the clitoris, which the Court of Criminal Appeal would categorise as an "excision", and a "cut" or a "nick" to the clitoris. There is no meaningful textual basis to conclude that while the former kind of conduct would be caught by the word "excises" in s 45(1)(a), a cut or nick, absent permanent damage, would not be caught by the phrase "otherwise mutilates".

154 Third, the phrase "otherwise mutilates ... any part of" indicates that the legislature intended to protect against any kind of invasive contact to the labia majora, labia minora or clitoris. That is reflected in the fact that the provision gives examples of invasive conduct – excision and infibulation – and then uses the catch-all phrase "otherwise mutilates" to capture other kinds of female genital mutilation involving invasive physical contact. Excluding conduct which constitutes a nick or cut from the operation of the provision would deprive the words "otherwise mutilates" and "any part" of any meaningful work to do.

155 This construction of the provision is reinforced by the four categories of female genital mutilation mentioned in the Family Law Council Discussion Paper[187], and in the subsequent Family Law Council Report[188], both of which Parliament had available to it at the time of the introduction of the 1994 FGM Act[189]. Three categories, namely, sunna or circumcision, involving removal of the clitoral hood; clitoridectomy; and infibulation[190], may be seen as covered by the words "excision" or "infibulation". The remaining category mentioned in the Discussion Paper and the Report was the least serious form of female genital mutilation, "ritualised circumcision"[191]. The Discussion Paper came to the preliminary conclusion that "all types of circumcision, other than mere ritual, where an incision is made in the girl's genital area" should be considered criminal acts[192]. The Report recommended prohibiting "all types of the practice where tissue damage results"[193]. That left that remaining category – ritualised circumcision where it entails physical injury – to be captured by the phrase "otherwise mutilates". Thus, an intention *not* to prohibit that least severe form of female genital mutilation should not be extrapolated from the second reading speech which accompanied the introduction of s 45[194]. That the legislature

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187 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994).

188 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994).

189 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1859-1860; New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 10 May 1994 at 2145-2146, 2149.

190 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 7 [2.04]-[2.06]; Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 6-8 [2.04]-[2.06]. See reasons of Kiefel CJ and Keane J at [21]-[24].

191 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 6 [2.03]; Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 6 [2.03].

192 Family Law Council, *Female Genital Mutilation: Discussion Paper* (31 January 1994) at 6 [2.01], 28 [5.22].

193 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (June 1994) at 6 [2.02], 63 [6.80].

194 See reasons of Kiefel CJ and Keane J at [45]-[46].

intended to prohibit any kind of physical injury to the labia majora, labia minora or clitoris is further reinforced by the heading[195] of s 45 as well as the long title to the 1994 FGM Act, which inserted the provision in the *Crimes Act*.

156 By importing a requirement of permanent impairment, injury or imperfection, the Court of Criminal Appeal created an additional hurdle which not only is not sourced in the text of s 45 but also fails to have regard to the nature and function of the labia majora, the labia minora and the clitoris. The evidence was that the genital region heals rapidly and very well, typically without scarring. For example, Dr Marks gave evidence that it "is very common for the genital examination findings to be normal following past injury to the genital region". Similarly, Dr Jenkins gave evidence that in his experience of adult women who had undergone female genital mutilation procedures, any overt change in their anatomy was "broadly speaking, not obvious at all". Dr Marks also gave evidence that a cut to the clitoral head could affect future sexual function. If the cuts are inflicted upon children, the effects on sexual function may not emerge until they start being sexually active, years later.

157 Furthermore, the requirement that there be permanent impairment, injury or imperfection would give rise to the odd result that whether or not a procedure gives rise to criminal liability under the "otherwise mutilates" limb of s 45(1)(a) would depend on the extent to which the body part repaired itself and, therefore, in some cases, the period of time that elapsed before the person subjected to the procedure, or someone else, reported the fact of the procedure. The longer the period, the less likely that liability would be established. These are strong indicators that the phrase "otherwise mutilates" does not require permanent impairment, injury or imperfection.

158 What s 45(1)(a) does require is some form of female genital mutilation procedure performed for non-medical reasons[196] which inflicts physical injury to the whole or any part of the labia majora, labia minora or clitoris. The nature of that physical injury will, of course, vary from case to case. And, given the passage of time, there may, on occasion, be no direct physical evidence of the physical injury sustained at the time of the procedure. Nonetheless, there may be evidence capable of satisfying a jury beyond reasonable doubt that, at the relevant time, a procedure was carried out on a person and that the procedure caused physical injury to the whole or any part of the labia majora or labia minora or clitoris of that person.

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195 *Interpretation Act 1987* (NSW), ss 34(1), 35(2), 35(5).

196 *Crimes Act*, s 45(3).

159 It follows that the trial judge did not misdirect the jury about the proper construction of "otherwise mutilates" in s 45(1)(a).

EDELMAN J.

The essential statutory meaning and application of s 45(1)(a)

"Otherwise mutilates" means all other types of the practice of female genital mutilation

160 The offence in s 45 of the *Crimes Act 1900* (NSW) carries the heading[197]: "Prohibition of female genital mutilation". The offence is committed when any person "excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person"[198]. Sections 45(2) and 45(5), which clarify aspects of the operation of the offence, speak of "the person mutilated".

161 The Court of Criminal Appeal of New South Wales correctly noted that the breadth of the dictionary definitions of "mutilate" meant that dictionaries were of "limited assistance"[199]. The Court of Criminal Appeal also observed that the verb "mutilates" "suggests that more than the causing of an injury is required"[200]. In contexts other than female genital mutilation this is often the case. But, with respect, the context and purpose of s 45 of the *Crimes Act* require that "mutilates" be given the meaning of the *practice* of female genital mutilation rather than the connotation of "mutilates" in other contexts.

162 The respondents correctly point out that s 45(1)(a) says "otherwise mutilates" and does not refer expressly to the practice of female genital mutilation. But in light of the context and purpose of s 45 the words must reasonably be understood to refer to that practice, thus having the meaning "otherwise engages in the practice of female genital mutilation". The most immediate matters of context are the heading to the section, "Prohibition of female genital mutilation", and the long title of the Act which inserted s 45[201], "An Act to amend the Crimes Act 1900 to prohibit female genital mutilation". Other matters of context referred to in the other judgments are the Explanatory Note, the Second Reading Speech and the inutility of the words "otherwise mutilates" unless the compound expression "excises, infibulates or otherwise

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197 See *Interpretation Act 1987* (NSW), ss 34(1), 35(2), 35(5).

198 *Crimes Act 1900* (NSW), s 45(1)(a).

199 *A2 v The Queen* [2018] NSWCCA 174 at [489].

200 *A2 v The Queen* [2018] NSWCCA 174 at [495].

201 *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW).

mutilates" is understood as a reference to the practice of female genital mutilation.

163 To allow the context and purpose of a purely criminal provision to give a word a meaning that it would not bear in other contexts is no different from the role that context and purpose play in the interpretation of statutes that concern civil law, or both civil and criminal law. In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[202], Mason and Wilson JJ observed that "[i]n earlier times" an anxiety about judicial intrusion into the legislative sphere sometimes led courts to adopt literal constructions of provisions that diverged from the meaning that any reasonable person would have understood Parliament to have intended. But it is well established that courts no longer interpret civil statutes that way[203]. Nor do courts employ a different regime of interpretation or construction of statutory words merely because conduct is proscribed as an offence[204]. In any instance of interpretation of intended meaning, the process "must begin with a consideration of the text itself"[205] but, since the intended meaning of words can never be acontextual, the process must also "begin by examining the context"[206].

164 When this Court said in *Milne v The Queen*[207] that "[p]urposive construction does not justify expanding the scope of a criminal offence beyond its textual limits" it was not suggesting the existence of a separate principle of interpretation for criminal statutes that circumscribed the role of purpose or context to operate only within the covers of the dictionaries of the time.

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202 (1981) 147 CLR 297 at 319; [1981] HCA 26.

203 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; [1990] HCA 24; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

204 *Aubrey v The Queen* (2017) 260 CLR 305 at 325-326 [39]; [2017] HCA 18. See also *R v Adams* (1935) 53 CLR 563 at 567-568; [1935] HCA 62; *Beckwith v The Queen* (1976) 135 CLR 569 at 576; [1976] HCA 55; *R v Lavender* (2005) 222 CLR 67 at 96-97 [93]-[94]; [2005] HCA 37.

205 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41.

206 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

207 (2014) 252 CLR 149 at 164 [38]; [2014] HCA 4. See also *Krakouer v The Queen* (1998) 194 CLR 202 at 223 [62]-[63]; [1998] HCA 43.

The point being made by this Court was that once courts have interpreted the meaning of the words of a provision they cannot expand that meaning in an attempt to give the words a wider effect. It is not open to courts, independently of their interpretation of the statutory words, to "suppose the law-maker present, and that you have asked him this question: Did you intend to comprehend this case?"[208]. As McHugh J said in *Krakouer v The Queen*[209], a decision cited with approval in *Milne*[210]:

> "If conduct of a particular kind stands outside the [meaning of the] language of a penal section, the fact that a Court takes the view that it is through inadvertence of the Legislature that it has not been included does not authorise it to assume to remedy the omission by giving the penal provision a wider scope than [the meaning of] its language admits."

165 There might sometimes be a fine line between asking: "In light of its legislative purpose, what would Parliament have intended in these circumstances?" and asking: "Does the intended meaning of the words used by Parliament extend to these circumstances?" But the proper question to ask in statutory interpretation is always the latter. Where the relevant meaning of the words of a statute concerns a criminal offence it is particularly important to respect the difference between the two questions, lest the judiciary create, and apply retroactively, a new criminal offence. However, for the reasons above, an interpretation of "otherwise mutilates" to mean "otherwise engages in the practice of female genital mutilation" is an interpretation of the meaning of the words of s 45(1)(a) rather than an application of Parliament's purpose beyond the meaning of the words used.

The essential meaning and the application of the practice of female genital mutilation

166 Since the context and purpose of s 45(1)(a) reveal the intended meaning of its words as a proscription of the practice of female genital mutilation, there remain the questions of what is the essential meaning, and what is encompassed within the application, of the practice of female genital mutilation. The respondents' submission was to interpret the meaning of the statutory expression at a level of particularity that was designed to freeze its application only to those practices said to exist in 1994. The respondents relied upon what they submitted were the only three practices contemplated by Parliament when

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208 Compare *Riggs v Palmer* (1889) 22 NE 188 at 189.

209 (1998) 194 CLR 202 at 223 [62], quoting *Ex parte Fitzgerald; Re Gordon* (1945) 45 SR (NSW) 182 at 186.

210 (2014) 252 CLR 149 at 164 [38], fn 39.

the offence was enacted in 1994[211], and derived a meaning from those practices requiring female genital mutilation to involve "serious or significant damage to the external female genitalia". The respondents submitted that "[w]hat is being referred to throughout is the practice in the invasive, destructive sense that the Second Reading Speech began with". The Second Reading Speech began as follows[212]:

> "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. The procedure is usually performed on girls of tender age. It has been estimated that FGM occurs in more than forty countries, and tradition is the major factor which contributes to its continuation. While the practice is often linked to certain religious communities, this view is in fact mistaken. The origins of the practice pre-date most major religions."

167 In the Second Reading Speech, the Minister also referred to three forms of female genital mutilation, "in order of severity", as "infibulation, clitoridectomy and sunna" and then said that the "bill seeks to prohibit all of these various methods of FGM"[213]. Additionally, earlier articles published by the World Health Organization[214] in 1986 and 1992 referred to these three forms of "female circumcision". These three forms did not, and do not, encapsulate all practices, "as a matter of custom or ritual"[215], involving tissue damage to the external genitalia of young females. Relevantly to these appeals, these three forms did

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211 *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW).

212 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1859.

213 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1860.

214 World Health Organization, "A traditional practice that threatens health – female circumcision" (1986) 40(1) *WHO Chronicle* 31 at 32; Joint Task Force of the World Health Organization and the International Federation of Gynecology and Obstetrics (FIGO), "Female circumcision" (1992) 45 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 153; republished as Joint Task Force of the World Health Organization and the International Federation of Gynecology and Obstetrics (FIGO), "Female Circumcision" (1992) 37 *International Journal of Gynecology & Obstetrics* 149.

215 New South Wales, Legislative Council, *Crimes (Female Genital Mutilation) Amendment Bill 1994*, Explanatory Note at 1.

not include a "nick or a cut", which might be argued, at the time of any trial, to involve no long-term physical injury.

168 It might be doubted whether the Minister's comments in the Second Reading Speech should be best understood to have been suggesting that the practice of female genital mutilation in 1994 was limited only to these three forms. But even if that were the Minister's understanding, and even if it were also the earlier understanding of the World Health Organization, those understandings of the forms of the practice should not conclusively define the scope of s 45(1)(a), which is not expressly confined to any particular forms of female genital mutilation but appears, instead, by the catch-all "or otherwise mutilates" to be intended to encompass any type of the practice.

169 Where legislation does not expressly delimit the scope of its application then its scope is usually to be determined by the contemporary application of its essential meaning that will best give effect to the legislative purpose. This is what is meant by statutes "always speaking". In *Aubrey v The Queen*[216], this Court considered the meaning of the phrase "[w]hosoever maliciously by any means ... inflicts grievous bodily harm" in s 35(1)(b) of the *Crimes Act*, as it was then. One submission in that case was that the reckless transmission of sexual diseases did not, at the time that the provision was enacted, fall within the ordinary understanding of "inflicting" harm. In a joint judgment, a majority of this Court said that even if this were correct (which it was not)[217]:

> "subsequent developments in knowledge of the aetiology and symptomology of infection have been such that it now accords with ordinary understanding to conceive of the reckless transmission of sexual disease by sexual intercourse without disclosure of the risk of infection as the infliction of grievous bodily injury".

170 In *Aubrey*, the generality of the language of s 35(1)(b) of the *Crimes Act*[218], applied consistently with the legislative purpose that was particularly evident in the use of the words "by any means"[219], required the word "inflicts" to be interpreted with an essential meaning cast at a high level of generality. So even if the submission about the ordinary understanding of "inflicts" in 1900 were correct, the Court would not have been constrained by that limited understanding. Instead, the essential meaning of the provision was to be applied

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216 (2017) 260 CLR 305.

217 (2017) 260 CLR 305 at 320 [24].

218 (2017) 260 CLR 305 at 326 [40].

219 (2017) 260 CLR 305 at 323-324 [34].

to give best effect to the purpose of the provision consistently with contemporary knowledge and understanding. The essential meaning would not, and does not, change[220]. But its application can change. As Lord Bingham of Cornhill colourfully expressed this point[221]:

> "There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now."

171 It is, therefore, vital to express the essential meaning at the proper level of generality, having regard to statutory purpose. Properly characterised, the essential meaning of the practice of female genital mutilation captured by the words "otherwise mutilates" in s 45(1)(a) is all actions involving a practice of causing tissue damage to the genitals of female children. The purpose of s 45(1)(a) was to proscribe any forms of that practice. It was not to proscribe only some forms of the practice. Nor was it only to proscribe the particular forms of the practice that were best known in 1994. Indeed, since 1982, the World Health Organization had been advocating for governments to "adopt clear national policies to abolish the practice of female genital mutilation"[222] and was "committed to the abolition of all forms of female genital mutilation"[223]. The World Health Organization in 1998 adopted a classification that covered all those forms including a type that it described as "[u]nclassified: includes pricking, piercing ... stretching ... cauterization by burning ... scraping of tissue"[224].

172 The Family Law Council Report, a draft of which was before Parliament at the time the *Crimes (Female Genital Mutilation) Amendment Bill 1994* (NSW) was debated, had also recommended prohibition of all female genital mutilation, describing it as involving "all types of the practice where tissue damage

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220 Compare *Yemshaw v Hounslow London Borough Council* [2011] 1 WLR 433 at 443 [27]; [2011] 1 All ER 912 at 923.

221 *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at 695 [9].

222 See World Health Organization, *Female genital mutilation: An overview* (1998) at 59-60.

223 World Health Organization, *Female genital mutilation: An overview* (1998) at 5.

224 World Health Organization, *Female genital mutilation: An overview* (1998) at 6.

results"[225]. The Family Law Council had quoted from a report published in *New Scientist* which said that[226]:

> "[i]n reality the distinction between the types of circumcision is often irrelevant since it depends on the sharpness of the instrument used, the struggling of the child, and the skill and eyesight of the operator".

173 Against this background, the Minister's remarks in the Second Reading Speech concerning proscribing the practice, which "has no physical benefits and is associated with a number of health hazards"[227], are remarks that reveal a purpose extending beyond any particular or common forms of the practice to any example of the practice that involves tissue damage to the genitals of female children. Whatever the understanding of the Minister or others about the particular existing forms of the practice of female genital mutilation, and whether or not any new or unforeseen forms of the practice arise, the purpose of s 45(1)(a) was likewise intended to extend to every form of the practice of female genital mutilation, namely any actions which result in tissue damage to the genitals of female children.

174 The approach of the Court of Criminal Appeal implicitly, and correctly, recognised that the practice of female genital mutilation, described in s 45(1)(a) by the verbs "excises", "infibulates", and "otherwise mutilates", was not confined to the three categories described by the Minister in the Second Reading Speech. The Court of Criminal Appeal applied the meaning of female genital mutilation as encompassing any "injury or damage that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion"[228]. With respect, however, this does not sufficiently apply the legislative purpose. Instead, it confines the proscribed practices by references to criteria that might be difficult to apply, including thresholds of "superficial" and "irreparable damage" or "imperfection". To conform with the legislative

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225 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (1994) at 6 [2.02]. See also Family Law Council, *Female Genital Mutilation: Discussion Paper* (1994) at 28 [5.22], 31 [6.05(b)].

226 Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (1994) at 6 [2.01], quoting Armstrong, "Female circumcision: fighting a cruel tradition" (2 February 1991) *New Scientist* 22 at 22.

227 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 4 May 1994 at 1859.

228 *A2 v The Queen* [2018] NSWCCA 174 at [521].

purpose, the prohibition on all forms of the practice of female genital mutilation must extend to all actions involving tissue damage to the genitals of female children. The trial judge therefore did not err when directing the jury that "mutilate" in s 45(1)(a) means "to injure to any extent".

Can a conviction be quashed with no further order made?

175 I agree with Kiefel CJ and Keane J, for the reasons that their Honours give[229], that the appropriate order on these appeals is that each matter be remitted to the Court of Criminal Appeal for determination of Ground 2 of each respondent's appeal to that Court according to law. Strictly, it is therefore not necessary for this Court to resolve the dispute between the parties about the orders that can be made in the Court of Criminal Appeal in light of the success of other grounds of appeal in the Court of Criminal Appeal that were not in issue in this Court. That dispute arose in this Court because the Crown submitted that the Court of Criminal Appeal was confined to making either of two sets of orders: (i) orders quashing the conviction and directing a judgment and verdict of acquittal to be entered, or (ii) orders quashing the conviction and directing that a new trial be had. In contrast, the respondents submitted that another alternative was (iii) to quash the conviction but to make no further order.

176 Although it is not strictly necessary to determine this point, it is a point that is a matter of considerable importance. It could affect the orders of the Court of Criminal Appeal on remitter. This Court has also previously made orders quashing a conviction without any further order on numerous occasions without apparently considering whether it had power to do so[230]. It is therefore appropriate to explain in detail why I have concluded that there is no power for the Court of Criminal Appeal to quash the conviction without either directing a judgment and verdict of acquittal or ordering a new trial.

177 The Crown's submission is based in the text of ss 6(2) and 8(1) of the *Criminal Appeal Act 1912* (NSW). Each of those sub-sections is enlivened where the Court of Criminal Appeal allows an appeal under s 6(1). Section 6(2) is a default provision because it is subject to "the special provisions of this Act". If the appeal is allowed, the default provision in s 6(2) requires the Court to quash the conviction and to direct a judgment and verdict of acquittal. However,

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229 At [112]-[115].

230 *Callaghan v The Queen* (1952) 87 CLR 115; [1952] HCA 55; *Croton v The Queen* (1967) 117 CLR 326; [1967] HCA 48; *Timbu Kolian v The Queen* (1968) 119 CLR 47; [1968] HCA 66; *Calabria v The Queen* (1983) 151 CLR 670; [1983] HCA 33; *Whitehorn v The Queen* (1983) 152 CLR 657; [1983] HCA 42; *Gerakiteys v The Queen* (1984) 153 CLR 317; [1984] HCA 8; *Maher v The Queen* (1987) 163 CLR 221; [1987] HCA 31.

one of the special provisions to which s 6(2) is subject is s 8(1), which permits the Court to:

> "... order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order *which the court is empowered to make*." (emphasis added)

178 The question raised by the Crown's submission is therefore whether an order that the conviction be quashed, without any further order, is an order "which the court is empowered to make". There is no express power to make only that order. Such a power, if it exists, must be an implied power, an inherent power in the sense of part of "the well of undefined powers" beyond its constitution[231] or a power "inherited"[232] by the Supreme Court of New South Wales and which s 3(1) of the *Criminal Appeal Act* preserves when the Supreme Court is constituted as the Court of Criminal Appeal.

No implied power to quash a conviction without further order

179 Of necessity[233], there is an implied power, upon which s 8(1) relies, for an appellate court to make an order quashing a conviction. An order quashing a conviction is logically anterior to the power in s 8(1) to order a retrial. But there is no necessity to imply a power to make an order quashing the conviction without either ordering a retrial or ordering an acquittal. There are no gaps in the remedial scheme of the *Crimes Act* that would reasonably require such a power. First, if a retrial is not appropriate then an order for acquittal can be made even if the appellate court considers that the appellant is probably guilty. Secondly, a retrial can be ordered or an acquittal entered even if the conviction arose from a trial that might attract the description of a "nullity".

180 As to the first point, s 6(2) of the *Criminal Appeal Act* was modelled on the relevantly identical s 4(2) of the *Criminal Appeal Act 1907* ("the 1907

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231 *Grassby v The Queen* (1989) 168 CLR 1 at 16; [1989] HCA 45.

232 Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 *Law Quarterly Review* 120 at 122. See also *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7, "the power which a court has simply because it is a court of a particular description"; [1972] HCA 34.

233 *Byrnes v The Queen* (1999) 199 CLR 1 at 20 [32]; [1999] HCA 38; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452 [51]; [1999] HCA 19.

English Act")[234]. As Professor Kenny observed of the direction to enter a judgment and verdict of acquittal in s 4(2) of the 1907 English Act, "a New Trial, unfortunately, cannot be ordered; even though the prisoner be obviously guilty"[235]. Despite the contradiction involved in declaring a person who is believed to be obviously guilty to be not guilty when the person's conviction is quashed, the purpose of the power was to vindicate the principle against multiple exposure to jeopardy[236]. Subject to statutory provisions to the contrary, this principle was vindicated in a court of record by an order for acquittal, which would permit a plea of autrefois acquit in a subsequent prosecution of the accused for the same offence[237].

181 In a number of judgments of the Court of Criminal Appeal of England and Wales, English judges lamented that after a miscarriage of justice the acquittal of those who might be guilty could mean that "crimes go unpunished"[238]. The Lord Chief Justice said that a power to order a new trial was needed as a matter of "absolute necessity"[239], although he remarked in another case that such a power "would naturally be rarely exercised"[240], perhaps reflecting a view held at that time that punishment of the guilty was generally a lesser concern than successive exposures of a person to the prospect of conviction[241]. The gap that was perceived by the Court of Criminal Appeal of England and Wales after the enactment of the 1907 English Act was the lack of a power to order a new trial. It was not the lack of a power to quash a conviction with no order for acquittal. In 1912, in New South Wales, the *Criminal Appeal Act* filled that gap by including the power in s 8(1) to order a new trial, paying heed to the lamentations

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234 7 Edw VII c 23.

235 Kenny, *Outlines of Criminal Law*, 4th ed (1909) at 493, fn 1.

236 *Gerakiteys v The Queen* (1984) 153 CLR 317 at 322.

237 *Pearce v The Queen* (1998) 194 CLR 610 at 627-628 [61]; [1998] HCA 57; see also at 617 [22]. See also *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 at 336 [15]; [2006] HCA 30.

238 *Joyce* (1908) 1 Cr App R 142 at 143. See also *Hampshire* (1908) 1 Cr App R 212 at 213.

239 *Stoddart* (1909) 2 Cr App R 217 at 245.

240 *Joyce* (1908) 1 Cr App R 142 at 143.

241 See *Pearce v The Queen* (1998) 194 CLR 610 at 614 [10], quoting *Green v United States* (1957) 355 US 184 at 187-188. Compare *R v Taufahema* (2007) 228 CLR 232 at 254-255 [49]-[51]; [2007] HCA 11.

of the Court of Criminal Appeal of England and Wales and also to the position in Canada[242].

182 As to the second point, an implication of power to quash a conviction without further order was considered necessary by the Supreme Court of Canada in the limited circumstance where the trial is found to have been a mistrial, so that the trial was a "nullity". Speaking of the provision applicable in Canada in 1923 empowering orders of acquittal or the grant of a new trial[243], Fateux J, with whom the rest of the Supreme Court of Canada agreed on this point, said[244]:

> "That there will be cases where the Court of Appeal will not order one or other of the alternatives is certain. Thus a conviction on an indictment signed by an unauthorized person cannot be sustained and must be quashed. And in such a case, an order, either directing a verdict of acquittal to be entered or a new trial, would be meaningless and senseless. It cannot, therefore, be stated that this further authority is given with respect to trials affected with such complete and fatal nullity."

183 With respect, the direction of a verdict of acquittal when a trial is found to be a mistrial and a "nullity" is not necessarily meaningless or senseless. Whatever might be meant in this context by the concept of a "nullity", an issue considered later in these reasons, the trial was a real event and prior to the quashing of the conviction there was nevertheless a conviction recorded. The recorded conviction was a fact which provided a sufficient basis for an appeal to be brought[245]. Equally, a recorded acquittal could be a meaningful fact, not least as vindication to the appellant.

184 Subject to statutory exceptions, one reason that a recorded acquittal is meaningful even in cases of "nullity" is that a defence of autrefois acquit should apply to preclude a subsequent trial where an acquittal is entered by an appellate court. Historically, this defence was not available when the acquittal was entered by the court at which the trial was a "nullity". This was said to be based upon a

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242 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1911 at 2307-2308.

243 *An Act to amend the Criminal Code*, 13-14 Geo V, c 41, s 9.

244 *Welch v The King* [1950] SCR 412 at 425.

245 *Russell v Bates* (1927) 40 CLR 209 at 213-214; [1927] HCA 56; *Calvin v Carr* [1979] 1 NSWLR 1 at 8-9. See also *Crane v Director of Public Prosecutions* [1921] 2 AC 299 at 319.

supposition that in hindsight the accused had "never been in actual jeopardy"[246]. Yet, as Coleridge J recognised, notwithstanding any defect in the trial the accused remained liable to a conviction, which, unless reversed, would put him "in so much jeopardy literally that punishment may be lawfully inflicted on him". The other rationale was that "[t]he judgment reversed is the same as no judgment"[247]: reasoning that should apply to any conviction that is set aside, whether the trial is characterised as a "nullity" or not[248]. Just as a conviction is sufficient to enable an appeal to be brought whether or not the trial was a mistrial, an acquittal entered by the appellate court after setting aside the conviction should be sufficient for the purpose of raising a defence of autrefois acquit upon a subsequent prosecution whether or not the trial was a mistrial[249].

185 It is also neither meaningless nor senseless for an order for a new trial to be made even if the first trial might be described as a "nullity". The power in s 8(1) for the Court of Criminal Appeal to order a new trial "in such manner as it thinks fit" might require particular orders to be made such as that the trial be on a new indictment or before a different judge.

No inherent or inherited power to quash a conviction without further order

186 In *Crane v Director of Public Prosecutions*[250], the majority of the House of Lords held that a pre-existing power of the Court of Crown Cases Reserved, preserved when the Court of Criminal Appeal of England and Wales was created, empowered the Court of Criminal Appeal to make orders for a new trial where the first trial was a mistrial or "nullity". This power to order a venire de novo (a new hearing)[251] had been a power possessed by the Court of Crown Cases

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246 Coke, *The Third Part of the Institutes of the Laws of England* (1644) at 214; Chitty, *A Practical Treatise on the Criminal Law* (1816), vol 1 at 756. See also *Conway v The Queen* (2002) 209 CLR 203 at 209-210 [9]; [2002] HCA 2.

247 *R v Drury* (1849) 3 Car & K 190 at 199 [175 ER 516 at 520].

248 See also Friedland, "New Trial after an Appeal from Conviction – Part II" (1968) 84 *Law Quarterly Review* 185 at 188-189.

249 Cooke, "Venire de Novo" (1955) 71 *Law Quarterly Review* 100 at 119-120.

250 [1921] 2 AC 299 at 319, 324, 330, 333. See also *R v Granberg* (1973) 11 CCC (2d) 117 at 121.

251 See *R v Yeadon and Birch* (1861) Le & Ca 81 [169 ER 1312]. See also *R v Mellor* (1858) Dears & B 468 [169 ER 1084].

Reserved, which was formally created in 1848[252]. The venire de novo was granted by the Court of Crown Cases Reserved only when the first trial was found to be a "nullity". As the King's Bench had described the order, it was "not to be considered in the nature of a new trial, but the first trial is to be considered a mis-trial, and therefore a nullity"[253].

187 The power to order a venire de novo after a mistrial was inherited by Supreme Courts in Australia. It was described in 1915 by Isaacs J as "well established", although Griffith CJ described it as "now almost obsolete"[254]. In *Crane*, the majority of the House of Lords relied upon s 20(4) of the 1907 English Act to hold that this power was vested in the Court of Criminal Appeal of England and Wales[255]. Section 20(4) vested in the Court of Criminal Appeal all the jurisdiction that had been vested in the Court of Crown Cases Reserved by the *Crown Cases Act 1848*[256].

188 The House of Lords in *Crane* was concerned only with the existence of a power which, upon a mistrial, permitted only the quashing of a conviction and order for a retrial. But the Court of Crown Cases Reserved also had the power to quash a conviction and to make no further order. Indeed, unlike the power to grant a venire de novo, which was not expressly contained in the *Crown Cases Act* and whose existence had divided the members of the Court of Crown Cases Reserved[257], s 2 of the *Crown Cases Act* had conferred an express power "to avoid such Judgment, and to order an Entry to be made on the Record, that ... the Party convicted ought not to have been convicted". Hence, the Court of Criminal

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252 *Crown Cases Act 1848* (11 & 12 Vict c 78), s 2. Compare *R v Parry, Rea and Wright* (1837) 7 Car & P 836 at 841 [173 ER 364 at 367]. See also *Conway v The Queen* (2002) 209 CLR 203 at 210 [10], fn 38.

253 *R v Fowler and Sexton* (1821) 4 B & Ald 273 at 276 [106 ER 937 at 939], quoted in *Conway v The Queen* (2002) 209 CLR 203 at 209 [9].

254 *R v Snow* (1915) 20 CLR 315 at 324, 351; [1915] HCA 90.

255 [1921] 2 AC 299 at 324, 332, 337-338.

256 11 & 12 Vict c 78. The powers conferred by the *Crown Cases Act* had been transferred to the High Court of Justice by s 47 of the *Supreme Court of Judicature Act 1873* (36 & 37 Vict c 66).

257 See *R v Mellor* (1858) Dears & B 468 [169 ER 1084].

Appeal of England and Wales also had power, after a mistrial, to quash the conviction and make no further order[258].

189 If the powers of the Court of Crown Cases Reserved were also inherited by the Court of Criminal Appeal in New South Wales as appeal powers, due to being preserved by the *Criminal Appeal Act*, then there would be a strong argument that the power to quash a conviction without making any other order should be generally applicable. It would be difficult to see why that power, as part of a generalised appellate power, should be confined only to mistrials. To confine the power in that way would treat as immutable the reception of "a procedure which, with the exception of a few cases, has not been in use for over one hundred years and was probably never really understood even when it was in use"[259]. The distinction between mistrials where a conviction is quashed as a "nullity" and other trials where a conviction is quashed, sometimes described in contrast as an "irregularity", has been attempted to be justified in different ways[260]. None is satisfactory or clear[261]. At best, "the line is very thin"[262], with the older decisions on nullity perhaps seen today as comparable with some instances of lack of authority and possibly also some serious errors within authority. At worst, it is not a principled distinction in the context of an appeal from a trial in a superior court[263]. In both instances, the verdict and judgment will have been quashed by the Court of Criminal Appeal, leaving them without effect: "The effect of the reversal of a conviction by proceedings in error has

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258 *Golathan* (1915) 11 Cr App R 79 at 80; *King* (1920) 15 Cr App R 13 at 14; *McDonnell* (1928) 20 Cr App R 163 at 164; *Wilde* (1933) 24 Cr App R 98 at 99; *Olivo* (1942) 28 Cr App R 173 at 176; *Field* (1943) 29 Cr App R 151 at 153; *R v Heyes* [1951] 1 KB 29 at 30. See Cooke, "Venire de Novo" (1955) 71 *Law Quarterly Review* 100 at 118-120.

259 Friedland, "New Trial after an Appeal from Conviction – Part I" (1968) 84 *Law Quarterly Review* 48 at 63 (footnote omitted).

260 *Munday v Gill* (1930) 44 CLR 38 at 60-62; [1930] HCA 20; *R v Middlesex Quarter Sessions (Chairman); Ex parte Director of Public Prosecutions* [1952] 2 QB 758 at 769; *R v Neal* [1949] 2 KB 590 at 599; *In re Pritchard, decd* [1963] Ch 502 at 523-524; *Strachan v The Gleaner Co Ltd* [2005] 1 WLR 3204 at 3211-3212 [25]-[26].

261 See Cooke, "Venire de Novo" (1955) 71 *Law Quarterly Review* 100; Friedland, "New Trial after an Appeal from Conviction – Part I" (1968) 84 *Law Quarterly Review* 48.

262 *Plowman v Palmer* (1914) 18 CLR 339 at 348; [1914] HCA 41.

263 *R v Swansson* (2007) 69 NSWLR 406 at 417 [76]; see also at 420 [95], 424 [119]; compare at 435 [179]-[180], 437 [191]. See also *Deveigne v Askar* (2007) 69 NSWLR 327 at 343 [82]; see also at 331 [8].

long been settled, and the same effect is produced by quashing it, or setting it aside upon a statutory appeal."[264] And in both instances, the orders are valid until set aside[265].

190 However, the issue of whether a distinction should be drawn between powers concerning mistrials and powers concerning irregularities need not be resolved on these appeals because in New South Wales the *Criminal Appeal Act* did not preserve, for appeals, the jurisdiction of the Court of Crown Cases Reserved to quash a conviction without further order. Like s 20 of the 1907 English Act, in New South Wales s 23 of the *Criminal Appeal Act* abolished "[w]rits of error, and the powers and practice now existing in the Supreme Court in respect of motions for new trials, and the granting thereof in criminal cases". But the *Criminal Appeal Act* had, and has, no equivalent to s 20(4) of the 1907 English Act, upon which the majority of the House of Lords in *Crane* relied for the preservation of the venire de novo and associated powers.

191 Section 12 of the *Criminal Appeal Act*, entitled "Supplemental powers of the court", provides in sub-s (1) that the Court of Criminal Appeal "may, if it thinks it necessary or expedient in the interests of justice", exercise specific procedural powers and may also "exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters". Section 12(1) is similar to s 9 of the 1907 English Act. But it is not an acknowledgement of any inherent jurisdiction of the Court of Criminal Appeal, nor does it permit a cross-pollination of the considerations concerning a venire de novo from civil proceedings to criminal proceedings. As Dixon J said in *Grierson v The King*[266]:

> "The jurisdiction is statutory, and the court has no further authority to set aside a conviction upon indictment than the statute confers. The *Criminal Appeal Act of* 1912 (NSW) is based upon the English Act of 1907. It does not give a general appellate power in criminal cases exercisable on grounds and by a procedure discoverable from independent sources ... No considerations controlling or affecting the conclusion to be deduced from these provisions are supplied by analogous civil proceedings."

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264 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225; [1935] HCA 45.

265 *New South Wales v Kable* (2013) 252 CLR 118 at 129 [21]; [2013] HCA 26. See also *Bounds v The Queen* (2006) 80 ALJR 1380 at 1383 [10]; 228 ALR 190 at 193; [2006] HCA 39.

266 (1938) 60 CLR 431 at 435-436; [1938] HCA 45.

192 In New South Wales, the dissenting reasoning of Viscount Finlay in *Crane* must apply: "we must now look only to the provisions of the present Act if there is anything that requires to be set right"[267]. Indeed, the New South Wales Parliament was cognisant that this would be the case. During debate, one member, Mr Garland KC, after referring to the power to grant a new trial after a mistrial, said that he supported "the proposal that the Appeal Court in their wisdom, when they consider justice would be best served by granting a new trial, shall have power to grant it"[268].

Conclusion

193 For these reasons, in addition to those of Kiefel CJ and Keane J and those of Nettle and Gordon JJ, I agree with the orders proposed by Kiefel CJ and Keane J.

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267 *Crane v Director of Public Prosecutions* [1921] 2 AC 299 at 318.

268 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1911 at 2312.