RCNI Response to FGM Bill Consultation

July 2010

Introduction

Rape Crisis Network Ireland welcomes the opportunity to respond to the Consultation regarding new legislative proposals to prohibit Female Genital Mutilation ("FGM"). The forthcoming legislation is needed to protect young women and girls in certain immigrant communities from the adverse effects of FGM, both physical and psychological. While the physical effects of FGM are not our province, we are aware that significant numbers of our clients suffer serious psychological trauma as a result of FGM[1]. We also know that many clients have been and continue to be under pressure from family members and members of their wider community, to make arrangements to have FGM performed on their daughters and other young female relatives[2]. This pressure comes in the form of projected consequences of not having FGM done, such as social ostracism and inability to find a husband, shame being brought on the whole family, and so on.

1. Definitions

1.1 Female Genital Mutilation – A Different Culture?

FGM is unjustifiable intimate gender based violence and a grave abuse of the human rights of the victim, often with devastating consequences for that victim. No matter how normal it may be in certain communities, it cannot be condoned or excused by any justification based on "different culture". "Culture" is no imprimatur for such a serious abuse of human rights.

We do not condone either any modified or symbolic form of FGM, as these forms also amount to assault and abuse.

1.2 Female Genital Mutilation – or Female Ritual Cutting?

Our view is that Female Genital Mutilation is the appropriate term. There is nothing harmless or symbolic about this procedure, and we welcome the decision to keep this term in the forthcoming legislation. To identify this procedure as **mutilation** is to send out a strong signal that this practice, no matter how long-standing, ingrained or traditional as it may be elsewhere, is entirely

[1] These effects include post-traumatic stress disorder, anxiety, depression, memory loss and fear of sexual intercourse: see "Ending Female Genital Mutilation: A Strategy for European Union Institutions", reference at page 6 to an Interagency Statement, 2008, cited in full at page 5 ibid

[2] Note that 2008, 7.4% of our clients were refugees and asylum seekers, but in two centres, Mayo and Galway, the proportion of refugee and asylum seeker clients was 34.5% : see RCNI National Statistics 2008 at www.rcni.ie

unacceptable and repugnant to our law and to our standards of human dignity and respect for bodily integrity.

2. The Need for a Specific Offence of Female Genital Mutilation

The RCNI view is that it is best to have a specific offence of FGM. Not only does this bring as the Consultation Paper says, clarity and certainty, but its very definition as a **crime** with potential grave consequences for a perpetrator, sends out a strong message that such behaviour is completely unacceptable and cannot be tolerated. The potential difficulty we see with the existing general offences of assault as a means to prosecute FGM is that **consent by parents or guardian of minor children to the FGM procedure** could be argued as a defence, and unless the unlawful nature of FGM is put beyond doubt by legislation, the danger is that not only some who contest the allegations of assault but also others who admit to carrying out FGM procedures might not be held accountable for their actions.

3. The Elements of FGM Offences – what should they include?

(i) Comprehensive prohibition of FGM, and comprehensive definition of FGM to include re-infibulation

The definition used should be wide enough to encompass all forms of FGM and should include any form of FGM which involves a **second or subsequent procedure –** often referred to in the literature as **re-infibulation.** The definition used by Senator Bacik in her recent draft Bill is very wide ranging and comprehensive and in our view, would need to be adapted only slightly, thus [our proposed alterations to her draft in italics]:

Section 2 (3) "In this section, "genital mutilation" includes any procedure for the circumcision, excision, infibulation, *re-infibulation*, or any other form of mutilation, in whole or in part, of the external, or vulvar, female genitalia (including the labia majora, labia minora and clitoris) that is calculated or liable to cause, or that causes, *[serious]* disfigurement, or *[substantial]* loss or impairment of any or all of the normal functions of those organs, including functions in relation to urination, menstruation, sexual intercourse and childbirth, or that causes pain, whether in relation to those functions or chronically..."

(ii) Are the qualifications of *serious* disfigurement and *substantial* loss or impairment [of function] really necessary or desirable, if this draft is to be used?

In our view, it ought not to be possible for the defence to argue, for example, that as the excision in question did not cause and was not calculated or liable to cause, any *serious* disfigurement and/or any *substantial* dysfunction or any pain, it does not come within the statutory definition of FGM and that therefore, a crucial element of the offence is missing. We would recommend that the words describing the effects of FGM are not qualified by adjectives such as *serious* and/or *substantial*. Not only do they make the offence harder to prove, they also open the door to factual dispute about the gravity of the effects on the victim of FGM in each individual case, when the *fact* that FGM has taken place at all,

regardless of its effects, is what ought to constitute the essence of the crime. Such qualifications also allow FGM practitioners a margin of comfort within which they may assume they **can** operate, quite within the law, when the aim of the law is to prevent FGM happening altogether.

(iii) **Extra-territoriality**

To be effective, an anti-FGM law must reach beyond the borders of the State, as many young children and girls are brought abroad to undergo the procedure overseas. RCNI welcomes therefore the Minister's stated intention to extend the scope of the new law beyond our borders, and comments that the inclusion of "ordinary residents" as well as Irish nationals will mean that many more potential perpetrators will become liable to prosecution. We would recommend that the phrase "ordinary resident" should have its usual non-legal meaning, that is, someone who has been living here for most of the prescribed minimum time, regardless of their exact immigration status, as in Senator Bacik's draft Sections 3 (1) and (2):

"3.—(1) Where a person, being a citizen of the State or being ordinarily resident in the State, does an act, in a place other than the State, which, if done within the State, would constitute an offence under *section 2* of this Act, the act shall for the purposes of criminal proceedings be treated as having been committed within the State.

(2) For the purposes of proceedings for an offence to which this section relates, a person shall be deemed to be ordinarily resident in the State if he or she has had his or her principal residence within the State for the period of 12 months immediately preceding the alleged commission of the said offence."

RCNI applauds also the lack of any requirement of double criminality in Senator Bacik's draft, as in several countries where FGM is carried out, there is no such offence as carrying out FGM, or offence of participating in it by counselling, etc.

(iv) **Aiding, abetting, counselling, procuring or inciting, and attempting to carry out, FGM**

The proposals to include a separate provision outlawing the aiding, abetting, counselling, procuring, inciting of FGM, are greatly welcomed by RCNI. Usually, the young child or young woman is sent abroad to undergo the FGM procedure in her relatives' country of origin, and this cannot be done without the involvement of at least one other person in this country, who takes charge of all the travel and other practical arrangements to ensure that the FGM procedure takes place as planned in the overseas country. The proposal to outlaw the **counselling and inciting** of FGM is also very much welcomed, as this brings within the reach of the criminal law those persons whose advice to have FGM performed may sound very compelling to the family members.

4. Defences

(i) "Surgical operation" carried out by "registered medical practitioner" and "honestly believed to be necessary on reasonable grounds to safeguard life or health of the woman or girl concerned, or to correct a genital abnormality or malformation"[3]

This is the only statutory defence outlined in Senator Bacik's draft. While the RCNI is very glad to see that the wording is quite tight and does not include, as in the UK legislation, any reference to "mental health", we wonder whether it would exempt from criminal liability any **midwife** or **nurse** obliged to perform an emergency procedure to de-infibulate an FGM patient on the point of delivery, if there were no doctor present? It seems to us that it would not, and we would therefore recommend that a version of the UK wording on this point be considered instead:

See "Female Genital Mutilation Act 2003" (UK), Section 1(3) (a) and (b), below:

"Section 1 (3)

The following are approved persons—

(a)

in relation to an operation falling within subsection (2)(a), a registered medical practitioner,

(b)

in relation to an operation falling within subsection (2)(b), a registered medical practitioner, a registered midwife or a person undergoing a course of training with a view to becoming such a practitioner or midwife."[4]

5. Definitions of non defences:

- The most important of these is **Consent –** neither the person undergoing FGM (at whatever age) nor her parent or other person acting as her de facto guardian or otherwise in place of her parents, should be able to consent to FGM on her behalf. This principle is expressed in Senator Bacik's draft, at Section 2(2)(a):

"(2) In a prosecution for an offence under *subsection (1)*—

(*a*) it shall not be a defence to prove that a consent (including, where relevant, a consent of a parent, guardian or other person having responsibility in relation to a person who has not attained the age of 16 years) was given by or on behalf of a woman or girl to her genital mutilation;"

[3] This is a paraphrase of course of Senator Bacik's Section 2(2) (i) and (ii) (cumulative conditions)

[4] Sections 2(a) and 2(b) refer to surgical operations and obstetric procedures respectively

RCNI recommends strongly that either this wording or a very similar one, is adopted in the new legislation, to ensure that the defence of consent cannot be argued. Our view is that any such "consent" if it emanates from the prospective victim must be tainted by pressure from family and others to conform to external oppressive traditional values which our law has no business to uphold. The law must be quite clear that it is not possible to consent to FGM.

- Likewise, **Culture and tradition, custom and ritual** should be explicitly named as non-defences to FGM in the legislation, in our view. No barbaric and inhumane practice constituting a grave breach of a person's human rights becomes acceptable and defensible simply by being part of a culture for a long time.

6. Evidence:

In France, FGM may be proved by production in a criminal court of a doctor's examination certificate, stating that he/she has found evidence of FGM on examination of the complainant. The doctor does not have to attend court in person to give evidence, and no other evidence is necessary to prove that the complainant has undergone FGM[5]. This may explain at least in part, France's impressive criminal conviction rate for FGM[6]. The RCNI view is that a similar statutory provision in this jurisdiction might also make the new offences of FGM easier to prosecute here. Of course, it would only be feasible if some appropriate professional training or standard for the examining doctors were specified as requirements before such a certificate could be admitted into evidence.

7. Prospective Remedies:

Where it comes to the attention of any authority or organisation with a child protection role that an FGM procedure has been arranged, it should be possible to invoke the civil powers of the Court to restrain named persons from taking specific steps in order to carry out the procedure. In the UK in the Family Law Courts, for example, it is possible for an individual or a local authority to apply for a Prohibited Steps Order, quite quickly and simply.[7]Such a system would enable the HSE and/or the Gardai and other individuals or organisations with a child protection role, to apply to the Court for an order restraining someone from acquiring and retaining a passport for a dependent child, for example.

RCNI recommends that serious consideration be given to including such preventative powers in the forthcoming legislation, as they could be used to **pre-empt** rather than punish FGM, surely a more desirable outcome for both family and public policy reasons.

8. Criminal Sanctions:

- **FINES –** These should be as large as possible, depending on the means of offender, and consideration should be given to a system whereby the money can be borrowed

[5] Page 48, "**Combating Female Genital Mutilation in Europe:** A Comparative Analysis of Legislative and Preventative Tools in the Netherlands,France, the United Kingdom, and Austria," **Sophie Poldermans**, 2006
[6] Annex 3, **Poldermans**, op cit

[7] see Section 8, Children's Act (UK) 1989

immediately from the State, but will be recouped later, where the offender has very slender means. The Poldermans EU comparative study recommends their use as an important sanction for FGM, for this reason: fines will "bite" on the family and friends overseas as well as on the family in this country, as many if not most, immigrants send money back to their families of origin regularly[8]. As the pressure to conform to traditional norms by carrying out FGM emanates at least in part from the family overseas, the consequences in the form of reduced income will quickly be brought home to them. RCNI recommends that consideration should be given to providing for a **minimum fine** for FGM offences, and to a **higher minimum fine** for those who carry out FGM as a business in this country.

- **Compensation:** RCNI recommends that compensation orders for the victim be considered upon conviction in every case.

- **Immigration consequences –** A criminal conviction, even a minor one, will have a negative impact on most immigration decisions, other than that to recognize a person as a refugee, in any event. While there is a real danger that FGM crimes would not be reported to the Guards by their victims or other witnesses, if there were a duty on (for example) the Courts Service to notify all FGM convictions to the Department of Justice and Law Reform, the immigration consequences of FGM crimes for their perpetrators will deter at least some from committing them.

- **Imprisonment –** RCNI welcomes Senator Bacik's maximum penalty, which is fixed at 14 years, and also her decision to identify it as a crime on indictment only – see Section 2 (1) of her draft. Our view is that these two things mark the seriousness of FGM. A term of imprisonment without any period of suspension is in our view often the right approach in the case of an FGM **practitioner.**

- **Suspended sentences and partially suspended sentences upon conditions:**

  RCNI recommends that a sentencing Court should give first consideration to suitable conditions upon which a term of imprisonment may be suspended, particularly in a case where there are other minor siblings at risk of FGM. Suspended sentences offer a means of prevention of future harm backed up by the threat of imprisonment, which will enable parents to stay with their children **on condition that they do not carry out any steps to "aid, abet, counsel, or procure" any further FGM procedure.** They also allow the recipient to remain within the community, and thus to pay any fine or compensation order.

9. Statutory duty on specified health professionals to report FGM carried out on minors to the HSE?

One of the greatest obstacles to the prevention and detection of FGM is the culture of secrecy and denial in which it is planned and carried out. It might seem appropriate, therefore, to impose a clear statutory duty on health care professionals who discover that their minor client

[8] page 82 , **Poldermans**, op cit

has undergone FGM, to report that fact to the Guards and/or the HSE. However, the potential risks to the life and health of minors who have undergone FGM may well outweigh the benefits of increased detection and prosecution of FGM offences, as their families might be tempted to deny them necessary medical treatment in order to avoid such detection and prosecution.

RCNI recommends that serious consideration is given to finding some effective means of reporting incidences of FGM to the HSE, particularly but not exclusively in the case of minor victims. One way forward in the case of minors is to include references in the latest version of the Children First Guidelines, to FGM as one more issue whose presence or reasonably suspected presence or imminence, should trigger consideration of a formal report to the HSE. In addition, the upcoming revised version of the SATU[9] guidelines will include references to FGM and key information on diagnosis and treatment for health professionals.

Another possibility, relevant to adults and older children who have undergone FGM, or in the case of children, know that they are at risk of undergoing it, is to provide and advertise a helpline staffed by trained volunteers which would provide expert advice on rights and on support systems available to them. This line could also help provide much-needed data on the incidence of FGM in Ireland.

Other extra-legal issues

10. Training of professionals to enable them to recognise and treat appropriately both child and adult victims of FGM

RCNI expects that the HSE already recognizes the need for appropriate training of health care professionals, particularly front-line GPs and A&E staff, to enable them to recognize and treat the various forms of FGM and also to recognize its negative medical side-effects. Such specialised training is imperative for those GPs whose GMS lists include significant numbers of women from African and Middle Eastern countries. We would add that in our view, any such training should also include training on the **psychological effects of FGM**, which in our experience are varied, often serious, and often long-lasting.

11. Specialised FGM clinics

RCNI recommends that a specialised FGM clinic be established in each HSE area, and that its services are promoted in the relevant immigrant communities by local HSE staff, such as Public Health Nurses, working in partnership with local immigrant and/or women's NGO's.

12. Building trust between our own statutory agencies and authority figures, and our immigrant communities is the way forward on prevention of FGM

We are fortunate in this country to have Akidwa, the national African women's organisation, as an outstanding leader in the struggle to prevent FGM happening in the first place, and also in our efforts to identify it and punish it where it does happen. We need to help provide information and support where needed to Akidwa and other immigrant groups, especially those like Akidwa which are immigrant-led, and this information and support can perhaps be best provided by an **integrated**

[9] Sexual Assault Treatment Unit

multi-agency approach. Perhaps we also need to listen, and to address the cry from many immigrant families that if their daughters are known not to have undergone FGM, they will be unmarriageable outcasts who bring shame on their families, and/or labelled as unclean and unchaste.

RCNI recommends therefore that **high profile and influential immigrant-led community groups**, including those which are male-dominated, such as local Mosques, Christian churches and secular associations, are very much included in any such multi-agency approach and eventual strategy. These are the people whom both the statutory and non-statutory agencies must seek to convince of the evils of FGM, as where they lead, the whole of their community is likely to follow.

RCNI LPD

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