



Ontario  
Human Rights Commission  
Commission ontarienne des  
droits de la personne

# Policy on female genital mutilation (FGM)

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## Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.<sup>\*</sup> The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.<sup>\*\*</sup> Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,<sup>\*\*\*</sup> applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.<sup>\*\*\*\*</sup>

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<sup>\*</sup> The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

<sup>\*\*</sup> Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the OHRC.

<sup>\*\*\*</sup> In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4<sup>th</sup> Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

<sup>\*\*\*\*</sup> Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's

## Overview

Female genital mutilation (FGM) refers to the cutting and removal of the female genitalia. FGM is a traditional practice rooted in the political, social, cultural and economic structures of the societies in which it is practised.

FGM is a gender-specific violation of the rights of girls and women to physical integrity.<sup>1</sup> This traditional practice is conducted in many cultures and in many countries. FGM has become recognized not only as a health hazard and a form of violence against women and girls, but also as a human rights issue under international law. Efforts at the international level, particularly by United Nations agencies, have placed FGM on women's health and human rights agendas.

For most Canadians, FGM is a vaguely understood practice usually associated with "distant" and "tradition-bound" cultures. Most people know very little about what is involved in the procedure or about the health and sociological implications for the women and girls who are subjected to it.

The OHRC acknowledges that FGM is an internationally recognized violation against women and girls' human rights. The OHRC has developed this policy to ensure the effective protection and promotion of human rights of women and girls.

The purpose of this document is to outline the policy position of the OHRC with respect to the practice of FGM. This position has been developed within the framework of:

1. female genital mutilation as an internationally recognized human rights issue
2. the domestic implications of Canada's obligations as a signatory to international conventions and treaties which recognize FGM as a human rights violation
3. the mandate and jurisdiction of the OHRC under the Ontario *Human Rights Code* (the *Code*).

## What is female genital mutilation (FGM)?

### ***The practice of FGM***

In 1991, the term "Female Genital Mutilation" was adopted at the Inter-African Committee Regional Conference on Traditional Practices Affecting the Health of Women and Children held in Burkina-Faso.<sup>2</sup> Female genital mutilation (FGM) is the collective term given to several different procedures that involve the cutting of female genitalia and permanently mutilating the sexual organs of young females for non-medical reasons. For the purpose of this paper, FGM refers to the ritualistic or traditional practices involving the cutting and removal of the female sexual organs.

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*Policy and Guidelines on Disability and the Duty to Accommodate*, available at:  
[www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2](http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2)

Over centuries, FGM has been conducted as a ritual intended to prepare a girl for womanhood. Most commonly, girls are subjected to FGM between the ages of four and eight.

The practice is common in certain traditional Islamic communities although some religious experts note that there is no religious basis in the Quran for the practice.<sup>3</sup> While it is true that the practice has its roots in some countries in Africa, the Arabian Peninsula, Asia and South America, global migration patterns have brought the practice to Canada.

Women and girls who undergo FGM routinely experience pain, physical and emotional trauma and health complications as a result of infection to their genitalia and other reproductive organs. In some cases, severe bleeding and infection result in chronic disability or even death.<sup>4</sup> Substantial psychological effects on the self-image and sexual lives of women are also a documented consequence of the practice. The most severe form of FGM, infibulation, which involves removal of the clitoris, results in trauma that is repeated after each childbirth.

Since the sole function of the clitoris is sexual stimulation, the main purpose of the practice is to control female sexuality, ensure chastity until marriage and to render young women more desirable for marriage purposes. Background information for this document, derived from the OHRC's participation on the Ontario Female Genital Mutilation Prevention Task Force, lists a number of reasons for the practice, including: (a) preservation of virginity; (b) control over women's sexuality; (c) cosmetic reasons; (d) class distinction; and (e) cultural identity. Hygienic reasons have also been cited for continuing the practice.

In 1996, the World Health Organization estimated that between 100 and 132 million girls and women have been mutilated, and approximately 2 million girls and young women are at risk globally.<sup>5</sup> Because of the nature of FGM, reliable statistics on the incidence of the practice here in Canada are not available. However, there is sufficient information obtained through discussions with members of at-risk communities to indicate that there is a significant population of women in Ontario and other provinces in Canada who have been subjected to the practice, and whose girl children may be at risk. Although the practice is often referred to as "female circumcision," the term belies the severity of what is actually involved.

### ***Degrees of FGM***

FGM includes any or all of the following: the removal of the hood of the clitoris; the complete removal of the clitoris along with labia minora excisions; the complete removal of the clitoris and surrounding tissues, and suturing of the vaginal opening (infibulation). An opening as small as 3 – 4 millimetres or as large as 1.8 centimetres is maintained to permit urination, menstruation and intercourse. The instruments that are often used include scissors, shards of glass, razor blades, cactus spines

or other rigid plant materials. In most instances it is performed outside of proper health care facilities and without anaesthesia.<sup>6</sup>

FGM can be broadly classified into the following two categories:

**Clitoridectomy** (sometimes known as Sunna circumcision<sup>7</sup>): In this set of operations, one or more parts of the external genitals are removed. The prepuce, or hood of the clitoris, is cut and there is partial or complete removal of the clitoris. Approximately 85% of all women who undergo FGM have clitoridectomies.

**Infibulation** (Pharaonic mutilation): This is the most severe FGM procedure and it is practised widely in countries in the Horn of Africa. The clitoris is removed, some or all of the labia minora are cut off and incisions are made in the labia majora to create raw surfaces. The raw surfaces are either stitched together, or kept in contact by pressure until they heal as a "hood of skin" which covers the urethra and most of the vagina, leaving only a very small opening. This obstruction may lead to urinary and menstrual flow retention, dysmenorrhoea, and infections of the reproductive and urinary systems. An estimated 15% of all women who experience FGM have been infibulated. In some countries, however, 80 – 90% of all FGM cases involve infibulation.<sup>8</sup>

### ***FGM and male circumcision***

FGM is often referred to as female circumcision. This term implies a comparable practice to male circumcision. However, the degree of excision and trauma involved in FGM is generally much more extensive, including the actual removal of genital organs.

Male circumcision involves excision of the foreskin from the tip of the penis. The Canadian Paediatric Society conducted a literature review and concluded that “the overall evidence of the benefits and harms of male circumcision is so evenly balanced,” that “the benefits have not been shown to clearly outweigh the risks and costs” and that male “circumcision for newborns should not be routinely performed.”<sup>9</sup> The Canadian Paediatric Society advises that when parents are making a decision about circumcision, they should be informed with respect to the present state of medical knowledge about its reported benefits and risks.

## **FGM: an internationally recognized human rights issue**

### ***International policy and law***

FGM has been condemned by numerous international and regional bodies, including the United Nations Commission on Human Rights, the United Nations International Children Emergency Fund (UNICEF), the Organization of African Unity and the

World Medical Association. In addition to the broader issues of health and human rights of the child, FGM is gender-specific discrimination related to the historical suppression and subjugation of women that is unique to women and female children.

In various African countries where the procedure is performed, comprehensive action plans were developed by women's groups to attempt to eliminate the practice, but overall, progress has been slow. FGM has been outlawed in Sudan since 1946, but it continues to be widely practised. In Burkina-Faso and Egypt, resolutions were signed by the respective Ministers of Health in 1959, recommending that only partial clitoridectomy be allowed, and decreeing that it be performed only by doctors. In 1978, as a direct result of the efforts of the Somali women's movement, Somalia established a Commission to abolish infibulation.

The issue of FGM was raised at the United Nations for the first time in 1952. However, it took some 20 years before the United Nations began official discussion of the issue. It was not until the 1970s, at the instigation of non-governmental organizations, that United Nations agencies were pushed to address the multitude of problems related to the practice. In July 1980, the World Conference of the United Nations' Decade for Women was held in Copenhagen on the sub-themes of health, education and employment. In 1984, participants from 20 African countries, as well as representatives of international organizations attending a seminar in Dakkar on "Traditional Practices Affecting the Health of Women and Children," recommended that the practice be abolished. States acknowledged that there was a need to establish strong, on-going education programmes for meaningful progress towards elimination of the practice.

FGM was again addressed by the 1993 United Nations World Conference on Human Rights. A Conference declaration stated:

*The World Conference supports all measures by the United Nations and its specialized agencies to ensure the effective protection and promotion of human rights of the girl-child. The World Conference urges States to repeal existing laws and regulations and remove customs and practices which discriminate against and cause harm to the girl-child.*<sup>10</sup>

In 1995, the Platform for Action of the World Conference on Women in Beijing included a section on the girl-child and urges governments, international organizations and nongovernmental groups to develop policies and programmes to eliminate all forms of discrimination against the girl-child including FGM.<sup>11</sup> Canada plays a prominent role in the international arena as a supporter and promoter of women's human rights. In 1995, at the 9th United Nations Congress on the "Prevention of Crime and the Treatment of Offenders," Canada introduced a resolution on the "Elimination of Violence Against Women" (Agenda Item 6: Cairo Egypt, April 29 – May 8, 1995). The resolution, which was passed by the Congress, strongly urged States, among other things, to take measures to:

*... prevent, prohibit, eliminate and impose effective sanctions against rape or sexual assault, sex abuse and all practices harmful to women and girl children, including **female genital mutilation**. [emphasis added].*

International conventions, covenants and declarations that Canada has signed recognize that human beings have the inherent right to life,<sup>12</sup> equality,<sup>13</sup> freedom and security,<sup>14</sup> the right not to suffer discrimination,<sup>15</sup> the right to the best possible state of physical and mental health,<sup>16</sup> and the right not to be subjected to torture or to cruel and degrading punishment or treatment.<sup>17</sup>

### ***FGM and gender discrimination***

FGM has implications for the human rights of women as directly reflected in several international instruments, including the *United Nations Convention on the Elimination of All Forms of Discrimination against Women*.

The *United Nations Declaration on the Elimination of Violence Against Women* defines "violence against women" as encompassing, among other things, "female genital mutilation and other traditional practices harmful to women."<sup>18</sup> In Europe, legislation prohibiting the practice of FGM exists in Sweden, France and Great Britain where the procedure carries a penalty of imprisonment.

The legal obligation to eliminate all forms of discrimination against women is described as a "fundamental tenet of international human rights law."<sup>19</sup> Sex is a prohibited ground of discrimination under the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social, and Cultural Rights*, and three regional human rights conventions: the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *American Convention on Human Rights* and the *African Charter on Human and People's Rights*. The most comprehensive instrument, the *Convention on the Elimination of All Forms of Discrimination against Women*,<sup>20</sup> constitutes an international "bill of rights" for women and sets out an agenda for nations to take action to end discrimination based on sex.

Article 5 of the *Universal Declaration of Human Rights* provides that no one shall be subjected to torture, nor to cruel, inhuman or degrading treatment. However, many signatory countries continue to violate that article through tolerance of the practice of FGM. Renée Bridel, of the Fédération Internationale des Femmes de Carrières Juridiques, noted:

*One cannot but consider Member States which tolerate these practices as infringing their obligations as assumed under the terms of the Charter [of the UN].<sup>21</sup>*

### ***FGM and the rights of the child***

FGM is a violation of the rights of the child guaranteed in treaties adopted by the United Nations and the Organization of African Unity. The *Convention on the Rights of the Child* has direct implications for the human rights of the child. The *Convention* was adopted by the UN General Assembly in 1989 and ratified by Canada in 1990.

That *Convention* asserts that children should have the possibility to develop physically in a healthy and normal way with adequate medical attention, and to be protected from all forms of cruelty. The *Convention* establishes the rights of children to gender equality (Art. 2), to freedom from all forms of mental and physical violence and maltreatment (Art.19.1) and to the highest attainable standard of health (Art. 24.1). Article 24.3 of the *Convention* explicitly requires States to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.

### ***FGM and health rights***

The physical and psychological health complications resulting from genital mutilation of women have been extensively documented. The partial or complete loss of sexual function constitutes a violation of a woman's right to physical integrity and mental health. Health rights are guaranteed by the *International Covenant on Economic, Social and Cultural Rights* (Art. 12), the *Convention on the Rights of the Child* (Art. 2.4) and the *African Charter on Human and People's Rights* (Art. 16). The equal right to health care is further guaranteed by the *Convention on the Elimination of All Forms of Discrimination against Women* (Art.12).

### **FGM in Canada**

For some time now, Canada has experienced immigrant and refugee movements from countries in which FGM is commonly practised. In Toronto, community groups have estimated that there are 70,000 immigrants and refugees from Somalia and 10,000 from Nigeria, countries in which FGM is commonly practised.<sup>22</sup> As already noted, because of the nature of FGM, reliable statistics on the incidence of its practice are not available. However, based on discussions with members of the communities that are at risk, there is some evidence to indicate that FGM is practised in Ontario and across Canada. There is also evidence that suggests that in some cases, families from those communities send their daughters out of Canada to have the operation performed.<sup>23</sup>

There is a growing recognition of FGM as a violation of human rights. Immigrant and refugee movements, governments and advocacy organizations in Canada have acknowledged the need to deal with FGM as an internationally recognized health and human rights concern.

### ***Domestic implications of international human rights law***

Canada is a signatory to over 20 major international conventions and treaties. A significant number of these are based on fundamental human rights principles. Canada's commitment to the development and maintenance of fundamental human rights in the international community and in Canada is therefore a matter of law. Domestic or national courts are required to interpret implementing legislation in conformity with international convention insofar as the domestic legislation permits.<sup>24</sup> In Canada, like other common law countries, the presumption that the State does not intend to breach its international obligations also applies to conventional law. States should implement international laws where there is no obvious inconsistency between the domestic law and the international law.

Canada's treaty obligations under international instruments can bind the domestic courts if: (1) international law is specifically incorporated in domestic legislation or is incorporated by necessary implication, and (2) where such legislation is itself enacted by the legislature with jurisdiction over the subject matter of the treaty.<sup>25</sup>

In 1976, Canada and the provinces acceded to the *International Covenant on Civil and Political Rights*. It has been argued that this and other instruments to which Canada is a party are incorporated into Canadian law by implication through the *Canadian Charter of Rights and Freedoms* (the *Charter*).<sup>26</sup> The *Charter* is described as implementing legislation that is *supremely authoritative and binding on all Canadian tribunals and institutions*, with governing phrases that are derived from the principles and instruments of the international legal system.<sup>27</sup>

In 1983, Chief Justice Dickson, in his dissenting opinion in *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at pages 348 – 50, positioned the role of international law in *Charter* litigation in the following way.

*... Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretations.*

Chief Justice Dickson reaffirmed this position in a majority decision in *Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. at page 1041, in which he reiterated the importance of Canada upholding its obligations under international treaties to protect rights enshrined therein. He noted that where legislation is interpreted with the same status as an international instrument, either under customary international law or under a treaty to which Canada is a State Party, the objective of the legislation should generally be indicative of a high degree of importance attached to the right at international law.

Because FGM is gender-specific discrimination, internationally condemned and proscribed in international instruments to which Canada is a party, the Province of Ontario would be in compliance with its obligations by taking steps to eradicate this practice. Any such initiatives taken by the Government of Ontario would be reflected in reports to international bodies in compliance with international conventions to which Canada is a signatory.

### ***Criminal law***

The *Criminal Code* of Canada continues to be used as a means to address the issue of FGM. For example, it can be used to control the transportation of female children outside the country for the purposes of obtaining FGM.<sup>28</sup> Canada has recognized fear of gender persecution as a ground for claiming refugee status since the early 1990s. In May 1994, the Immigration and Refugee Board granted refugee status to a woman whose 10-year-old daughter would have been subjected to FGM if she had been forced to return to her country of origin.<sup>29</sup>

As a result of the growing recognition of FGM as a violation of human rights, in October 1994, the then Ministry of the Solicitor General and Correctional Services<sup>30</sup> issued a memorandum to all Chiefs of Police and the Commissioner of the Ontario Provincial Police, explaining that FGM is a criminal offence, and informing them of the investigative and charging procedures for offences related to FGM. The Ministry of the Attorney General also sent a memorandum to all Crown Attorneys on the prosecution of charges related to FGM.

In May 1997, the federal government amended the *Criminal Code* and included the performance of FGM as aggravated assault under section 268(3).<sup>31</sup> Under the *Criminal Code*, any person who commits an aggravated assault is guilty of an indictable offence and is liable to imprisonment for a term not exceeding 14 years.<sup>32</sup> A parent who performs FGM on their child may be charged with aggravated assault. Where the parent does not commit the act but agrees to have it performed by another party, the parent can be convicted as a party to the offence under section 21(1) of the *Criminal Code*.<sup>33</sup>

### ***The Quebec Charter of Human Rights and Freedoms***<sup>34</sup>

In December 1994, the Quebec Commission released a paper in which it states that it considers FGM to be a practice that jeopardizes "the right of women to personal inviolability, equality and non-discrimination."<sup>35</sup> The Quebec *Charter* sets out that the obligation of each person is to respect the rights of others and "any unlawful interference with any right or freedom recognized by this *Charter* entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom."<sup>36</sup>

The report goes on to note that:

*This type of (genital) mutilation is performed exclusively on women, and is **unquestionably a discriminatory interference** with their physical and mental inviolability. The Commission des droits de la personne would therefore have competence to investigate complaints of sexual mutilation and, with the consent of the victim, to take legal action for discriminatory violation of personal inviolability with a view to obtaining civil redress and having the person found guilty condemned to exemplary damages.<sup>37</sup> [Emphasis added]*

The Quebec Commission took the position that it has the jurisdiction to investigate a complaint filed by a woman who has been subjected to FGM, and to institute both civil and criminal proceedings where investigation findings support the allegation that a woman's right has been violated as a result of FGM. The report concludes by indicating that preventative measures, via education and awareness-raising, must be given priority.

## **Ontario**

### **FGM Prevention Task Force**

In the early 1990s, an increasing number of women who had been subjected to FGM began seeking medical assistance.<sup>38</sup> The Canadian Centre for Victims of Torture, working with women from at-risk communities, family physicians and the Department of Health established the first mutual support outreach group for women who had been subjected to FGM. Since then, a number of other initiatives have been developed.

As there were no co-ordinated efforts between various professionals and institutions, and no consistent policy in Canada regarding FGM, members of affected communities requested that the Minister Responsible for Women's Issues establish an Ontario FGM Prevention Task Force. The Task Force, an inter-ministerial/agency/community initiative, was mandated to develop and recommend strategies and policies designed to provide support for girls and women who have been subjected to FGM, to prevent the practice, and to support community work by, and for women affected by genital mutilation.<sup>39</sup>

### **FGM and the duty to report**

In Ontario, a duty to report FGM exists under the policy of the College of Physicians and Surgeons of Ontario (CPSO) and under the *Child and Family Services Act*.

Under the CPSO policy, the performance of female circumcision, excision, infibulation and/or reinfibulation by a physician licensed in Ontario, unless

medically indicated, would be regarded as professional misconduct.<sup>40</sup> The CPSO also requires that:

*Any physician who becomes aware of a procedure of this nature being performed by another physician should, in accordance with the Code of Ethics, bring this information to the attention of the College at the earliest opportunity. Since the performance of circumcision, excision and/or infibulation on any female child by any person may constitute child abuse, the Children's Aid Society and appropriate police agencies must be notified.<sup>41</sup>*

Under Ontario's *Child and Family Services Act*,<sup>42</sup> there is a duty to report information with respect to a child who is in need of protection. This duty exists despite the provisions of any other Act. If a person has reasonable grounds to suspect that a child is or may be in need of protection, (e.g., from physical harm such as FGM), the person is obliged to report the suspicion to appropriate authorities. The duty to report under this *Act* applies to all members of the public and those who perform professional or official duties with respect to children.<sup>43</sup>

## **The Ontario *Human Rights Code***

The Ontario Human Rights Code recognizes the inherent worth and dignity of every person in Ontario. The Preamble makes particular reference to the Universal Declaration of Human Rights and the inherent principles of dignity and equal and inalienable rights of the person. The creation of a society in which all persons can live and work in an environment that is free from discrimination is central to the policy objectives of the OHRC by virtue of the *Code*. The OHRC thus recognizes that FGM violates the basic human rights and human dignity of women and girl children.

In Ontario, evidence indicates that FGM is practised within certain immigrant groups.<sup>44</sup> There are new immigrants to Canada who may not be aware that some of their traditional or culturally rooted attitudes and values may result in practices that are clearly in conflict with Canadian law, including the Ontario *Human Rights Code*. The Ontario Children's Aid Society, in its Policy on Female Genital Mutilation (April 1995) notes that most families who seek out this procedure do not consider the mutilation of female genitalia as a form of physical or sexual abuse. The Society also stresses the need to understand the socio-cultural context in the development of strategies to stop the practice.

The OHRC recognizes the need for public sensitivity, awareness and understanding in dealing with culturally rooted practices which may conflict with the principles and provisions of the *Code*. At the same time, the OHRC has a dual responsibility under its mandate to enforce the provisions of the *Code* and educate the public on human rights issues.

## ***Interpretation***

The practice of FGM in Canada raises human rights issues as well as health, social and criminal law concerns. The international community, including Canada, has condemned FGM as a human rights violation. This has implications for the *Code* with respect to matters within provincial jurisdiction.

The OHRC acknowledges the complex social and cultural roots of FGM and the need for dialogue and education initiatives within the at-risk communities in Ontario and across Canada. However, it is the OHRC's view that arguments based on a defence of cultural or religious values should not be accepted as justification for the practice, nor for discriminating against women who have been subjected to, or perceived to have been subjected to, genital mutilation.

The OHRC has a responsibility to ensure that the fundamental human rights principles enshrined in the international conventions and treaties to which Canada is a signatory, and which are protected in the *Code*, are respected and upheld in Ontario.

It is the OHRC's position that the practice of FGM is contrary to the *Criminal Code* and public policy in Ontario. The practice offends the inherent dignity of women and infringes their rights as set out in the *Code*. It is the OHRC's position that the Human Rights Tribunal of Ontario should deal with applications involving FGM filed by victims of the practice or their legal guardians. Under the *Code*, an allegation of discrimination must be based on a prohibited ground of discrimination in relation to an identified social area.

### **Primary prohibited ground – sex**

International law and human rights law in particular have identified FGM as a gender issue. Genital mutilation is reported to be used as a means of social control over women in affected communities.<sup>45</sup> The OHRC's *Policy on Sexual Harassment and Inappropriate Gender-Related Comment and Conduct* refers, at page 2, to the imbalance of power and authority as a policy consideration in reviewing behaviours that result in discrimination based on sex. The Policy reads in part:

*... unequal treatment based on gender typically, but not exclusively, involves the abuse of male power and authority over women, resulting in the reinforcement of a woman's subordinate status in relation to men*

### **Other prohibited grounds**

Although the most likely prohibited ground of discrimination on which an application might be based is sex, particular facts relating to a specific application could also involve other prohibited grounds of discrimination. For example, the facts relating to a particular allegation of discrimination could lead to "place of origin" being cited

as a ground in the application, if the alleged discriminatory treatment is clearly linked to FGM as a practice that only occurs in immigrant communities from specific countries.

"Disability" or "perceived disability" may be relevant in situations in which women who have been subjected to the procedure are treated differentially in respect of services or employment, subject to health considerations.<sup>46</sup>

## **Social areas**

### ***Services, goods and facilities (section 1)***

Women who have been subjected to the procedure visit health care practitioners who have rarely treated FGM patients. The *Code* protections may be applied to prevent discrimination against women (and girls, where applicable) who:

1. have undergone FGM, to ensure that they receive adequate and appropriate medical treatment without differential treatment, except as required for health reasons; or
2. refuse to be reinfibulated, but whose wishes are opposed by another family member.

The performance of FGM, including infibulation or reinfibulation by a physician licensed in Ontario, would also be regarded as professional misconduct according to the CPSO's policy, and may give rise to criminal charges of assault.

### ***Employment (section 5)***

Women who have been subjected to FGM, or who may be perceived to have been subjected to FGM because of their creed or place of origin, may experience discrimination in employment. The OHRC is aware through the Ontario FGM Prevention Task Force that employment-related discrimination involving FGM and perceptions relating to the practice has occurred.<sup>47</sup>

Discrimination may take the form of harassment by co-workers or management about the practice, or denial of employment because of the perception that women who have been subjected to FGM will have health complications resulting in high absenteeism rates.

## **Public education**

The OHRC is mandated to undertake public education activities directed at promoting a greater understanding of human rights principles and voluntary compliance with the provisions of the *Code*.

The OHRC recognizes the benefits to be gained towards the eradication of the practice of FGM through public education. Therefore, the OHRC is committed

to working with members and organizations of the at-risk communities, as well as with other agencies in the public sector, within the boundaries of its mandate and resources, in developing public education initiatives around FGM. The efforts of the OHRC, together with those of the affected communities and concerned organizations, can help to create an environment in which people are encouraged to eradicate the practice, without imposing a threat to the dignity and cultural identity of the affected communities.<sup>48</sup>

A further document, *Know Your Rights: Female Genital Mutilation and the Ontario "Human Rights Code"* is available on the OHRC website at [www.ohrc.on.ca/en/resources/Guides/FGMandHRCode/pdf](http://www.ohrc.on.ca/en/resources/Guides/FGMandHRCode/pdf).

## **For more information**

For more information about the OHRC or this policy statement, please visit our website at [www.ohrc.on.ca](http://www.ohrc.on.ca) .

Please visit [www.ontario.ca/humanrights](http://www.ontario.ca/humanrights) for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: [www.hrto.ca](http://www.hrto.ca)

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: [www.hrlsc.on.ca](http://www.hrlsc.on.ca)

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<sup>1</sup> "Female genital mutilation involves the use of dangerous and frightening weapons, causes permanent physical damage and sometimes death, and is targeted in the most gender specific way possible at the female genitalia." Fitzpatrick, "International Norms and Violence Against Women" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives*, (Philadelphia: University of Pennsylvania Press, 1994) at 11.

<sup>2</sup> UN Doc. E/CN.4/Sub.2/1991/48 para. 136 (5)(1001).

<sup>3</sup> See, Gloria Jacobs, *Female Genital Mutilation: A Call for Global Action* (New York: Women, Ink., 1993) at 5.

<sup>4</sup> The physical effects on women and children include immediate complications such as haemorrhaging, acute infections, bleeding of adjacent organs, violent pain, and may sometimes lead to death. Later complications include so-called vicious or keloid scars which considerably shrink the genital apertures with attendant consequences; chronic infections which can lead to infertility; haematic complications (inability of menstrual blood to exit) and obstetric complications. Cutting and restitching performed on infibulated women can result in subsequent health risks.

As well, psychological complications often develop, including functional psychiatric manifestations.

<sup>5</sup> *Female Genital Mutilation: PREVALENCE AND DISTRIBUTION*, World Health Organization, August 1996, [www.who.int/frh-whd/FGM/infopack/English/fgm\\_infopack.htm#PREVALENCE AND DISTRIBUTION](http://www.who.int/frh-whd/FGM/infopack/English/fgm_infopack.htm#PREVALENCE AND DISTRIBUTION) (8 December 2000).

<sup>6</sup> See further *Working Group on Traditional Practices Affecting the Health of Women and Children*, Report of the UN Economic and Social Council, Commission on Human Rights, First Session, March 18 – 22, 1985; *Female Genital Mutilation: Information Kit*, Division of Family Health World Health Organization, Geneva, July 31, 1994; *Human Rights are Women's Rights* (London: Amnesty International), 1995.

<sup>7</sup> "Sunna" refers to any practice required of Muslims. Yet, there are no direct references to FGM in the Quran and religious leaders generally remain silent on the practice. See further note 32.

<sup>8</sup> Nahid Toubia, *Female Genital Mutilation* in Julie Peters and Andrea Wolper, eds., *Women's Rights Human Rights* (New York: Routledge, 1995) at 227.

<sup>9</sup> Neonatal Circumcision Revisited. Fetus and Newborn Committee, Canadian Paediatric Society (CPS). Approved by the CPS Board of Directors in 1996, *Canadian Medical Association Journal* 1996; 154(6): 769-780. Reference No. FN96-01.

<sup>10</sup> *Declaration and Program of Action* adopted in Vienna on June 25, 1993, the World Conference on Human Rights, quoted in *Human Rights Are Women's Rights* (London: Amnesty International, 1995) at 132.

<sup>11</sup> *Female Genital Mutilation: UNITED NATIONS ACTION*, World Health Organization, August 1996, [www.who.int/frh-whd/FGM/infopack/English/fgminfopack.htm#PREVALENCE AND DISTRIBUTION](http://www.who.int/frh-whd/FGM/infopack/English/fgminfopack.htm#PREVALENCE AND DISTRIBUTION) (8 December 2000).

<sup>12</sup> *International Covenant on Civil and Political Rights*, Art.6; *International Convention on the Elimination of all Forms of Racial Discrimination*, Art. 2.

<sup>13</sup> *International Covenant on Civil and Political Rights*, Art. 26.

<sup>14</sup> *Universal Declaration of Human Rights*, Art. 3; *International Covenant on Civil and Political Rights*, Art. 9; *International Convention on the Elimination of all Forms of Racial Discrimination*, Art. 5(b).

<sup>15</sup> *International Covenant on Civil and Political Rights*, Art. 26.

<sup>16</sup> *International Covenant on Economic, Social and Cultural Rights*, Art. 12.

<sup>17</sup> *Universal Declaration of Human Rights*, Art. 5; *International Covenant on Civil and Political Rights*, Art. 7; *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.

<sup>18</sup> *Declaration of the United Nations General Assembly on the Elimination of Violence Against Women*, Plenary Session A/Res./48/104, December 20, 1993.

<sup>19</sup> Cook, *Introduction: The Way Forward*, in Cook, ed., *supra*, note 1 at 10.

<sup>20</sup> Ratified by Canada on December 10, 1981; date of entry into force in Canada, was January 10, 1992. There are several provisions of the *Convention* which require States parties to take action against such practices as FGM, namely:

- i. to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (Art 2.f.)
  - ii. to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (Art. 5.a.)
  - iii. States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care to ensure, on a basis of equality of men and women, access to health care services including those related to family planning (Art. 12).
- <sup>21</sup> See E. Dorkenoo, *Female Genital Mutilation: Proposals for Change* (1992) *Minority Rights Group Report* at 16, Renée Bridel, *L'enfant Mutilé*, presented on behalf of the *F.I.F.C.J.* to the U.N., Geneva, 1978.
- <sup>22</sup> Omayma Gutbi, *Preliminary Report on Female Genital Mutilation (FGM)* (Ontario Violence Against Women Prevention Section of the Ontario Women's Directorate, 10 April 1995) [unpublished].
- <sup>23</sup> *Ibid.* at 8.
- <sup>24</sup> *Op. cit.* note 1, *General Approaches to Domestic Application of International Law*, Cook, ed., at 364.
- <sup>25</sup> Maxwell Cohen and Ann F. Bayefsky, "The Canadian *Charter of Rights and Freedoms* and Public International Law" (1983) 61 *Canadian Bar Review* 265 at 288.
- <sup>26</sup> *Ibid.* at 267. Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c.11 [1985, Appendix II, No. 44].
- <sup>27</sup> *Ibid.*
- <sup>28</sup> Section 273, *Criminal Code*, R.S.C. 1985, c. C-46, as am. S.C. 1993, c. 45, s. 3, as am. S.C. 1997, c. 18, s. 13.
- <sup>29</sup> *Minister of Employment and Immigration v. Farah* (I.R.B. Toronto, Doc. 93-2198, May 10, 1994).
- <sup>30</sup> In June 1999, the Ministry of the Solicitor General and Correctional Services was divided to form two ministries: the Ministry of the Solicitor General and the Ministry of Correctional Services.
- <sup>31</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.268, as am. S.C. 1997, c.16, s. 5:  
 "(3) For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where (a) surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or (b) the person is at least eighteen years of age and there is no resulting bodily harm.
- <sup>32</sup> *Ibid.* s.268 (2).
- <sup>33</sup> *Ibid.* s.21.
- <sup>34</sup> R.S.Q., c. C-12. In Quebec, no social area is required to file a complaint. The Quebec *Charter* protects fundamental rights, political rights and judicial rights. FGM would be framed as a complaint under "the right to integrity" under fundamental rights. Note that under section 136 of the Quebec *Charter*, civil and criminal proceedings may be instituted by the Commission against any person who contravenes the Quebec *Charter*. To date, no complaints based on FGM have been filed.
- <sup>35</sup> Maurice Drapeau and Hailou Wolde-Giorghis, *Sexual Mutilation: Unlawful Interference with Personal Inviolability* (The Quebec Commission des droits de la personne, December 21, 1994). Adopted in resolution COM-388-6.1.5. The Quebec *Charter of Human Rights and Freedoms*, section 1, "Every human being has a right to life, and to personal security, inviolability and freedom."
- <sup>36</sup> *Ibid.*
- <sup>37</sup> *Supra*, note 34 at 6.
- <sup>38</sup> *Female Genital Mutilation Prevention/Eradiation Strategies*, Draft Paper (Ontario FGM Prevention Task Force for Ontario Women's Directorate, Violence Against Women Prevention Unit, June 1995) at 4.
- <sup>39</sup> *Ibid.*
- <sup>40</sup> *The Regulated Health Professions Act*, 1991, S.O. 1991, c.18. s. 85, as am. S.O.1993, c. 37, s. 23.
- <sup>41</sup> The College of Physicians and Surgeons of Ontario, College Notice No.25 published in March 1992.
- <sup>42</sup> *The Child and Family Services Act*, R.S.O. 1990, c. C.11. s. 72, as am. S.O. 1999, c. 2, ss. 22 (1), 38.

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<sup>43</sup> The Ontario Association of Children's Aid Societies has a policy that supports the duty to report and the protection of the rights of children. In March 1992, the Ontario Association of Children's Aid Societies issued the following statement on FGM: "The performance of female circumcision, excision or infibulation on a child meets the definition of child abuse in the *Child and Family Services Act* of 1984."

<sup>44</sup> *Supra*, note 21.

<sup>45</sup> *Ibid.*

<sup>46</sup> FGM would appear to fall under the ground of "disability" under section 10. As previously noted, the health complications arising from FGM are many and can manifest themselves at different times.

<sup>47</sup> Such a situation involved an employment interview, where a human resources representative who was aware of the practice of FGM allegedly inquired as to the applicant's place of origin with a view to eliciting information about the applicant's long-term health as potentially unpredictable and her eventual reliability as an employee.

<sup>48</sup> At the June 1995 CASHRA (Canadian Association of Statutory Human Rights Associations) Conference, the Commission tabled the following resolution which was unanimously passed:

*INTERNATIONAL HUMAN RIGHTS AND THE PROTECTION OF WOMEN*

*WHEREAS Canada is a party to international instruments that provide for the respect and protection of the fundamental human rights of women and children; and*

*WHEREAS Canada is participating in an international initiative to eradicate the practice of female genital mutilation; and*

*WHEREAS Canadians are concerned that women and girls who are ordinarily resident in Canada are being subjected to the practice of female genital mutilation;*

*BE IT RESOLVED that CASHRA recommend to the Minister of Employment and Immigration that all prospective immigrants be provided with information setting out Canada's commitment to upholding international human rights instruments; emphasizing that the protection and respect of human rights is a cornerstone of Canadian society and extends to the protection of women and children against any acts which would cause grave interference with their personal inviolability, including female genital mutilation; and advising that practices such as female genital mutilation are deemed to be a criminal activity under the Canadian Criminal Code.*