

# Decoration or Mutilation? Female Genital Piercing and the Law

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## Abstract

This article assesses the legality of Female Genital Piercing (FGP), which refers to the piercing of female genitalia to adorn it with jewellery, for decoration or sexual enhancement. The position in the UK is uncertain because the World Health Organisation regards piercing as a form of FGM, which is a criminal offence in all parts of the UK. After analysing the stance adopted by the international community, the paper examines the legislation that criminalises FGM and considers whether FGP could fall within its scope. The paper concludes that female genital piercings *could* constitute FGM in limited circumstances, but even then, it may not be in the public interest to initiate a criminal prosecution. This lack of certainty is problematic for professional piercers who would welcome legislation providing an express exemption for genital piercings performed on consenting adult women.

## Keywords

Female genital piercing, female genital mutilation, FGM, criminal offence, international, UK

## Introduction

The legality of female genital piercing (FGP), which is defined as ‘the piercing of female genitalia to adorn it with jewellery or other accessories purely for the purpose of personal decoration or in order to enhance the sensation of sexual contact’ has long been ambiguous and despite calls from practitioners to clarify the law in this area, the position remains unclear.<sup>1</sup> As the Association of Professional Piercers has declared: ‘there is a cloud over the legal classification of female genital piercings’ in the United Kingdom and this ‘creates a vast cavity of misinformation available for gross misinterpretation’.<sup>2</sup> The uncertainty surrounding the lawfulness of FGP stems from the fact that the World Health Organisation and other United Nations agencies regard the piercing of female genitalia as a form a female genital

1 Crown Prosecution Service, Female Genital Mutilation Prosecution Guidance (2019) available online at <<https://www.cps.gov.uk/legal-guidance/female-genital-mutilation-prosecution-guidance>> retrieved 15 May 2021.

2 L. Slider, ‘Point 88: Female Genital Mutilation and Piercing in the UK’ (2020) available online at <<https://thepointjournal.org/2020/06/08/point-88-female-genital-mutilation-piercing-in-the-uk/>> retrieved 15 May 2021.

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mutilation (FGM),<sup>3</sup> which is a cultural convention condemned as a violation of human rights and form of gender discrimination. FGM is a criminal offence in all parts of the United Kingdom and although there are differences between FGM and FGP, they are both, potentially, subject to the same legislation.<sup>4</sup> In contrast, there is no legislation that specifically prohibits genital piercings to be performed on men. There is some literature on whether female genital cosmetic surgery (FGCS) falls within the definition of FGM,<sup>5</sup> but little on the practice of female genital piercing for the purpose of personal decoration or enhanced sexual sensation. In addition, the Crown Prosecution Service (CPS) issued guidelines on FGM in October 2019, which has not yet been explored in academic literature, in the context of genital piercings. A detailed consideration of the relevant law is therefore required.

The purpose of this paper is to assess the legality of female genital piercing in the United Kingdom, in particular, whether it falls within the scope of legislation that prohibits FGM. It will touch on the consequences of permitting or outlawing genital piercings, but does not seek to provide an in-depth analysis of whether FGP *should* be lawful.<sup>6</sup>

The article will begin by examining the international stance on female genital mutilation and will explore why United Nations organisations classify piercings as a form of FGM. It does not challenge the approach taken by the international community to FGM itself, nor does it re-examine whether there should be a right to practice genital procedures, including piercings, for cultural reasons, as this has been the subject of much previous research.<sup>7</sup> Next, the motives for undergoing genital piercings, citing psychological and medical literature, will be considered, and similarities and differences between FGP and FGM will be highlighted. The paper will then analyse the Female Genital Mutilation Act 2003 (which applies in England, Wales and Northern Ireland), the Public Health (Wales) Act 2017 and the Female Genital Mutilation (Scotland) Act 2005 and will consider whether performing female genital piercings is a criminal offence and if so, in what circumstances. Reference will be made to the limited case law on FGM and body modifications, the CPS guidelines on female genital piercings and medical research regarding the health implications of piercings.

## The International Position on FGM and Genital Piercing

Female genital mutilation, which is defined by the World Health Organisation as ‘the partial or total removal of external female genitalia or other injury to the female genital organs for non-medical reasons’<sup>8</sup> is described as ‘a critical human rights issue’ due to its harmful consequences and the fact that it is primarily performed on children.<sup>9</sup> Calls to eliminate the practice have been made by the international community since 1990 when the Committee on the Elimination of Discrimination against Women, which upholds the Convention on the Elimination of all Forms of Discrimination Against Women<sup>10</sup> issued General Recommendation No.14.<sup>11</sup> Although FGM is not expressly mentioned in the

3 World Health Organisation, Female Genital Mutilation (2020) available online at WHO, 2020 <<https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>> retrieved 30 May 2021.

4 The Female Genital Mutilation Act 2003 (England, Wales and Northern Ireland) and the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

5 R. Gaffney-Rhys, ‘Female Genital Cosmetic Surgery: Legitimate Refinement or Illegal Mutilation?’ (2021) 28 *European Journal of Health Law* 1.

6 For a feminist discussion of genital piercings see S. Jeffreys ‘Body Art’ and Social Status: Cutting, Tattooing and Piercing from a Feminist Perspective’ (2000) *Feminism & Psychology* 10(4) 409–429.

7 See for example, S. Gordon ‘Reconciling female genital circumcision with universal human rights’ (2017) *Developing World Bioethics*. 1–11.

8 See WHO above n.3

9 United Nations ‘Eliminating FGM – An Interagency statement’ (2008) available online at <[https://www.un.org/womenwatch/daw/csw/csw52/statements\\_missions/Interagency\\_Statement\\_on\\_Eliminating\\_FGM.pdf](https://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf)> retrieved 1 May 2021. p.21.

10 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNTS 1249.

11 CEDAW (1990) General Recommendation No. 14: Female Circumcision. A/45/38

Convention, it is regarded as a form of gender discrimination, violence against women and a harmful customary practice, which *are* prohibited by the Convention and many other international instruments.<sup>12</sup> It is also considered to be a breach of the right to private and family life, the right to health, the right to protection from torture, cruelty and inhuman treatment and in extreme cases, the right to life.<sup>13</sup> Where the victim is a child, many rights contained in Convention on the Rights of the Child are violated.<sup>14</sup>

The WHO definition of FGM does not initially appear to encompass a genital piercing performed on a consenting adult female for the purpose of adornment, as a piercing does not involve the removal of external female genitalia. However, it could do so, if the piercing caused an injury. Furthermore, genital piercings fall within one of the four categories of FGM identified by the World Health Organisation. Type I is clitoridectomy, which consists of the total or partial removal of the clitoris and/or its prepuce. Excision is Type II and involves the total or partial removal of the clitoris and labia minora, with or without the excision of the labia majora. Type III comprises the narrowing of the vaginal opening by creating a covering seal, which is formed by the cutting and repositioning of the labia and is sometimes performed in addition to Type I. Finally, Type IV 'includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, *piercing*, incising, scraping and cauterizing the genital area'.<sup>15</sup> Piercings have been cited as an example of a harmful procedure to the female genitalia since the World Health Organisation first produced its classification of female genital mutilation in 1995.<sup>16</sup> But other than indicating that 'practices involving the stretching, pricking, piercing, cauterization, scraping or cutting of any part of the external genitalia... should be included in the classification', the report contains no information about pricking and piercing specifically.<sup>17</sup> The classification of female genital mutilation was replicated in the Joint Statement on FGM produced by the World Health Organisation, UNICEF and UNFPA in 1997, and, like the report that preceded it, the statement does not elaborate on the practice of genital piercing.<sup>18</sup> Both documents justify the need to eliminate FGM but the discussion focuses on the harmful consequences of Types I-III: neither document explains the need to include piercing as an example of FGM. A decade later, an updated U.N. Inter-agency Statement was published and although the categories of FGM were modified, piercing remained within the scope of Type IV FGM.<sup>19</sup> However, unlike previous reports, this statement, which was 'based on new evidence and lessons learnt' since 1997, justifies the four classifications and contains specific information on pricking and piercing.<sup>20</sup> Type IV is said to include 'all other harmful, or potentially harmful, practices that are performed on the genitalia of girls and women'.<sup>21</sup> The different practices that are listed, are examples which could be shortened or lengthened as appropriate.<sup>22</sup> Piercings could, potentially, be removed from the list, if it was proper to do so. The statement further indicates that the various practices subsumed under Type IV 'are generally less well known and studied than those under Types I, II and III', hence the lack of information about them in earlier UN reports. Pricking, piercing and incision are defined as 'procedures in which the skin is

12 In relation to harmful practices, see United Nations, 'Good practices in legislation on "harmful practices" against women' Report of the Expert Group Meeting. <[https://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2009/Report%20EGM%20harmful%20practices.pdf](https://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Report%20EGM%20harmful%20practices.pdf)> retrieved 30 April 2022.

13 See UN above n.9

14 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577.

15 See WHO above n.3

16 World Health Organisation 'Female genital mutilation. Report of a WHO technical working group' Geneva, 17–19 July 1996. Geneva, World Health Organization.

17 Above n.16 at 5

18 World Health Organisation, UNICEF, UNFPA 'Female Genital Mutilation. A Joint WHO/UNICEF/UNFPA Statement' (Geneva, *World Health Organisation* 1997) p.3.

19 See UN above n.9

20 See UN above n.9 at 3

21 See UN above n.9 at 26

22 See UN above n.9 at 26

pierced with a sharp object; blood may be let, but no tissue is removed<sup>23</sup> and therefore technically encompasses the practice of genital piercing for personal decoration or sexual enhancement. In fact, the latter will often be more invasive than a symbolic prick or piercing performed for cultural reasons, because it involves the creation of a temporary or permanent hole.<sup>24</sup>

The UN explains that in some countries pricking and piercing are cited as traditional cultural practices. For example, Budiharsana et al found Type IV to be the most common form of FGM in Indonesia, and this included the practice of ‘piercing with a needle or the edge of a knife to extract a single drop of blood’ without excision.<sup>25</sup> The UN also reports that some communities have replaced more serious forms of FGM with pricking or piercing e.g. Njue and Askew’s research based in Nyanza Province, Kenya indicates that pricking the tip of the clitoris, rather than its total or partial removal, is becoming increasingly common and was described by nurses participating in the study as ‘psychological circumcision’ i.e. it complies with cultural norms but does not (usually) involve severe physical harm.<sup>26</sup> A harmful practice is thus repackaged as a ‘more acceptable cultural practice’, but as Unaiza Malik, President of the Muslim Women’s Association, has pointed out ‘nothing is acceptable, not even a symbolic scratch, since that would be the start of a slippery slope’.<sup>27</sup> The United Nations is opposed to FGM, not only because of the physical and psychological harm caused by the more serious forms of the practice, but because of what it represents i.e. ‘society’s control over women’ which ‘has the effect of perpetuating normative gender roles that are unequal and harm women’.<sup>28</sup> Although the reasons why FGM takes place vary, a girl will be regarded as unmarriageable if she has not undergone the required procedure, which is often intended to ensure her chastity at marriage and fidelity during it.<sup>29</sup> For example, in Indonesia, where pricking or piercing is a recognised form of FGM, the practice constitutes ‘an important tradition which is based on the belief that [it] bestows purification on the girl (in part by preventing girls from being over-sexed adults)’.<sup>30</sup> Similarly, Njue and Askew’s study of Nyanza Province in Kenya, where the practice of pricking of the clitoris has increased, found that it was done ‘to control a woman’s sexual desires before marriage’ and as a ‘means to improve the daughter’s marriage prospects’.<sup>31</sup> FGM, including piercing and pricking performed for cultural reasons, therefore ‘reflects deep-rooted inequality between the sexes and constitutes an extreme form of discrimination against women’.<sup>32</sup> The UN is also concerned that pricking and piercing were being used to cover up more harmful procedures. A WHO study of Somalia found that women sometimes claim to have undergone pricking, but when medically examined, it transpires that they had been subjected to a variety of procedures constituting Types I, II and III FGM.<sup>33</sup> Pricking and piercing may be cited as replacements for more serious forms of FGM, but according to the UN, it ‘often involves a change in terminology rather than a change in the actual practice of

23 See UN above n.9 at 26

24 J.W. Marks, ‘Medical Definition of Piercing’(2021) available online at <<https://www.medicinenet.com/piercing/definition>> retrieved 1 June 2021.

25 M. Budiharsana, L. Amaliah and B. Utomo, ‘Female circumcision in Indonesia: extent, implications and possible interventions to uphold women’s health rights’ (2003) Population Council Knowledge Commons Reproductive Health Social and Behavioral Science Research (SBSR) 7

26 C. Njue and I. Askew ‘Medicalization of female genital cutting among the Abagusii in Nyanza Province, Kenya’ cited in UN Interagency Statement, above n.9 at 10.

27 ForwardUK ‘FGM’ (2019) available online at <<https://www.forwarduk.org.uk/wp-content/uploads/2019/06/FGM-DL-Leaflet-2019-Single-Pages-Updated-Branding.pdf>> retrieved 1 July 2021.

28 See UN above n.9 at 5

29 ForwardUK ‘*Female Genital Mutilation: Frequently Asked Questions: A Campaigner’s Guide for Young People*’, London: Foundation for Women’s Health, Research and Development. Available online at <<https://www.forwarduk.org.uk/wp-content/uploads/2019/06/Forward-FAQ-August-2019-New-Branding-WEB.pdf>> retrieved 1 June 2021.

30 See Budiharsana et al, above n.25 at 40

31 See Njue and Askew, above n.26 at 8

32 See WHO above n.3

33 WHO ‘Female genital cutting in Somalia – Reasons for continuation and strategies for elimination, Hargeisa Somalia (2002) Cited in UN Interagency Statement, above n.9 at 27.

cutting'.<sup>34</sup> The term can 'therefore be used to legitimize or cover up more invasive procedures' which is cause for concern.<sup>35</sup> Having reviewed the academic literature on whether pricking and piercing should remain part of the definition of FGM, the UN agencies concluded that it should<sup>36</sup> and in 2012, the Interagency Statement was acknowledged in the United Nations General Assembly Resolution to intensify efforts for the elimination of female genital mutilation.<sup>37</sup>

## Female Genital Piercing for Decoration

Over two decades ago, body piercing was described by Favazza as an example of 'self-mutilation',<sup>38</sup> and the industry that developed around it, and other forms of body modification, were referred to by Jeffreys as a 'mutilation industry'.<sup>39</sup> Sweetman indicated that, for some, genital piercing was a form of 'anti-fashion'<sup>40</sup> whilst Young et al's research suggested that it was part of a culture that experimented with 'socially provocative'<sup>41</sup> behaviour. But perspectives on body piercings have changed, as values have changed, and more studies have examined the motivations of women (and men) who have their genitals (and other body parts) pierced. According to Stim, genital piercings are performed for 'aesthetic and sexual reasons'.<sup>42</sup> Caliendo et al agree that individuals have genital piercings for reasons of 'uniqueness, self-expression and sexual expression'.<sup>43</sup> This is confirmed by Thomas et al, whose study of 248 women in the United States revealed that 89.9% chose to have a genital piercing to increase 'aesthetic pleasure', whilst 36.3% cited 'increasing sexual pleasure' as a motivation.<sup>44</sup> Other common reasons given were: the desire to have a body piercing that is hidden from others (16.5%), satisfying an addiction to body modification (14.9%) and marking a life event (13.7%). Less popular motives include: sexual pleasure for an intimate partner (10.5%), aesthetic pleasure for an intimate partner (10.1%) and emphasising individuality (6%).<sup>45</sup> James et al have described female genital piercing as part of a continuum of 'female genital fashioning' whereby women negotiate their 'identity, sexuality and femininity'<sup>46</sup> whilst Stim asserts that, in some cases, a piercing can be a form of 'self-healing' i.e. reclaiming a part of the body that has been psychologically separated due to a traumatic experience, such as sexual abuse.<sup>47</sup> Indeed, 3.2% of female respondents in Thomas et al's study said that they had a genital piercing to 'claim or reclaim their genitals'<sup>48</sup> and this reason has also been given by members of the transgender community who have genital piercings.<sup>49</sup>

34 Above n.33

35 See UN above n.9 at 26

36 See UN above n.9 at 27

37 United Nations (2013) General Assembly Resolution 67/146 on intensifying efforts for the elimination of female genital mutilation implores state parties to enact and enforce legislation prohibiting FGM.

38 A.R. Favazza, 'The coming of age of self-mutilation' (1998) 186(5) *J.Nerv Ment Dis* 259.

39 Above n.6 at 409

40 P Sweetman, 'Anchoring the (post modern) selfBody modification, fashion and identity' (1999) 5 *Body Soc.* 51.

41 C. Young, M.L. Armstrong, A.E. Roberta, I. Mello and E. Ange, 'A triad of evidence for care of women with genital piercings' (2010) 22 *J Am Acad Nurse Pract* 70.

42 A. Stim 'Body piercing: medical consequences and psychological motivations' (2013) March *The Lancet* 1 at 9.

43 C. Caliendo, M.L. Armstrong and A.E. Roberts 'Self-reported characteristics of women and men with intimate body piercings' (2005) 49(5) *J Adv Nurs* 474 at 474.

44 J. Thomas, L. Crosby and J. Milford 'Gender differences among self-reported genital piercing stories' (2015) 36(6) *Deviant Behaviour* 441 at 452

45 See Thomas et al above n.44 at 452

46 A. James, J. Power and A. Waling 'Conceptualising the continuum of female genital fashioning practices' (2010) 29(3) *Health Sociology Review* 294.

47 A. Stim, "'My soul is burning in my skin": artistic tattooing and piercing as self-healing acts of traumatised individuals' (2002) 52 *Psychother Psychosom Med Psychol* 119 and A. Stim, 'Trauma and tattoo – piercing, tattooing and related forms of body modification between self-care and self-destruction of traumatised individuals' (2002) 2 *Psychotraumatologie* 45.

48 See Thomas et al above n.44 at 452

49 H. Peterson, 'Motivations, expectations and experiences of genital piercings in the transgender community: an exploratory study' (2018) available online at <<https://core.ac.uk/download/pdf/214128105.pdf>> retrieved 30 May 2021.

Whatever the precise motivation, choosing to have one's genitals pierced can be regarded as an example of exercising one's personal autonomy, which according to Hollingsworth involves the 'freedom to exercise real choice in a way that reflects one's subjective preferences, values and morals' without external constraint.<sup>50</sup> More specifically, FGP can fall within the definition of 'women's autonomy', as discussed by Besera and Roess<sup>51</sup> or the concept of 'genital autonomy', explored by DeLaet.<sup>52</sup>

## FGM and FGP

It is suggested that there are significant differences between FGP and FGM.<sup>53</sup> First, as indicated above, FGP is primarily performed for aesthetic reasons and to increase sexual satisfaction, whereas FGM, including Type IV, is a cultural convention that reflects the deep-rooted inequalities between males and females and is regarded as a form of control over women. The motivations thus differ, however, some feminist writers, such as Jeffreys, dispute this: they criticise western beauty practices, including genital piercings, because they originate in 'women's second-class citizenship [and] their necessity for male approval.'<sup>54</sup> Although there may be some contextual similarities between the two practices, it is suggested that cosmetic genital piercings do not constitute a cultural convention or customary practice, as they are not sufficiently commonplace, nor considered a social necessity. In addition, as Jeffreys points out, rituals that are recognised as harmful cultural practices, such as FGM, have 'long histories', whereas the 'body modification movement is of recent invention'.<sup>55</sup>

Second, FGP is (primarily) performed on consenting adult females, whereas FGM, including Type IV, is usually carried out on children 'between infancy and age 15'<sup>56</sup> many of whom cannot provide free and informed consent.<sup>57</sup> For this reason, the medical liaison officer for the UK Association of Professional Piercers has asserted that national legislation prohibiting FGM should not criminalise cosmetic piercings.<sup>58</sup> It should be noted that some academics contend that adult females should *also* have the right to consent to a cultural genital procedure on the basis of, *inter alia*, the right to private and family life, the right to self-determination and group rights.<sup>59</sup> Based on the work of writers, such as Pollis and Schwab,<sup>60</sup> it is also argued that human rights are culturally relative, rather than universal, and should therefore accommodate cultural practices.<sup>61</sup> But, as Poulter indicates, 'cultural tolerance' cannot become 'a cloak for oppression and injustice'<sup>62</sup> and cannot justify practices that are harmful to young girls.

50 K. Hollingsworth, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76(6) *Modern Law Review* 1046 at 1049.

51 G. Besera and A. Roess, 'The relationship between female genital cutting and women's autonomy in Eritrea' (2014) 126 *International Journal of Gynaecology and Obstetrics* 235.

52 D.L. De Laet, 'Genital Autonomy, children's rights and competing rights claims in international human rights law' (2012) 20 *International Journal of Children's Rights* 554.

53 B. Kelly and C. Foster, 'Should female genital cosmetic surgery and genital piercing be regarded ethically and legally as female genital mutilation?' (2012) *International Journal of Obstetricians* 389.

54 See Jeffreys above n.6 at 425

55 See Jeffreys above n.6 at 425

56 See WHO above n.3

57 D. T. Meyers, 'Feminism and Women's Autonomy: The Challenge of Female Genital Cutting' (2000) 31(5) *Metaphilosophy* 469 and S.B. Jungari, 'Female Genital Mutilation is a Violation of Reproductive Rights of Women: Implications for Health Workers' (2016) 41(1) *Health and Social Work* 25.

58 See Slider above n.2

59 See R Gaffney-Rhys 'Female genital mutilation: the law in England and Wales viewed from a human rights perspective' (2019) 24(4) *International Journal of Human Rights* 451.

60 A. Pollis and P. Schwab, 'Human Rights: A Western Construct with Limited Applicability' in A Pollis and P. Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (1979) Praeger. For the arguments in favour of universal human rights, see J. Donnelly 'Universal Human Rights in Theory and Practice' (20014) 3rd Ed (Cornell University Press).

61 See Gordon above n.7

62 Poulter, S. 1986. *English criminal law and ethnic minority customs*. London, Butterworths, 593

FGM can have serious health consequences, such as severe pain, post-traumatic stress disorder, sexual phobia, pelvic infections, renal failure and post-partum complications, which is partly why it is condemned by the international community.<sup>63</sup> In contrast, Kelly and Foster argue that there are 'no medical or ethical objections to FGP that are remotely comparable with the objections to FGM' - it should not, therefore 'be regulated by criminal law'.<sup>64</sup> However, the most serious health problems are associated with Types II and III FGM, and Kelly and Foster were not specifically comparing FGP with Type IV FGM. The practice of pricking or piercing female genitals for cultural reasons is sometimes less invasive than a genital piercing with jewellery, which can result in health complications. Caliendo et al found that the majority of those with genital piercings reported health concerns, such as skin sensitivity, skin irritation and infection, but most sought non-medical advice i.e. from the piercer.<sup>65</sup> Not seeking medical advice can be problematic as Carmen et al indicate that a bacterial infection, if not addressed, can lead to soft tissue infection, sepsis and toxic shock syndrome.<sup>66</sup> Bone et al's study of bodily piercings confirmed that medical problems are not unusual and revealed that 'the assistance of health services are often required'.<sup>67</sup> In addition, they found that, although genital piercings are less common than other piercings, the chances of a complication occurring are much higher: approximately half of the participants in their study who had undergone a genital piercing, required medical assistance. In contrast, only 6.9% of women in Thomas et al's study reported complications with their genital piercing.<sup>68</sup> However, the health issues associated with genital piercings do not always arise in the weeks or months following the procedure. Lee et al state that there is a higher risk of STIs amongst women with genital piercings and that additional complications can arise during pregnancy: removing the piercing can introduce bacteria into the piercing tract, but retaining it could, theoretically, hinder childbirth.<sup>69</sup>

It can be argued that to permit genital piercings for personal adornment, but not piercing for cultural reasons, when the former may have more serious consequences than the latter, is discriminatory. This argument has been made in relation female genital cosmetic surgery (FGCS), for example, Essen and Johnsdotter indicate that migrants from Africa are 'tacitly accused of being trapped in primitive culture and pictured as potential mutilators in public discussions' whilst 'genital alterations in non-African women seem to be widely accepted': they refer to this as a 'double standard of morality'.<sup>70</sup> The legality of genital piercings is thus a complex issue that is not easy to resolve.

The next section of the paper will consider the approach taken in the United Kingdom i.e. whether legislation can be construed as permitting or outlawing female genital piercings for decoration or sexual enhancement.

## The Female Genital Mutilation Act 2003 – England, Wales and Northern Ireland

In England, Wales and Northern Ireland the Prohibition of Female Circumcision Act 1985 made certain genital procedures a criminal offence. The Act was replaced by the Female Genital Mutilation Act 2003,

63 See FORWARD above n.29

64 See Kelly and Foster, above n.53 at 391

65 See Caliendo et al, above n.43

66 R.A. Carmen, A. E. Guitar and H.M. Dillon, 'Ultimate Answers to Proximate Questions: The Evolutionary Motivations Behind Tattoos and Body Piercings in Popular Culture' (2012) 16(2) *Review of General Psychology* 134 at 136.

67 A. Bone, F. Ncube, T. Nichols and N.D. Noah, 'Body piercing in England: a survey of piercing at sites other than earlobe' (2008) 336(7658) *BMJ* 1426.

68 See Thomas et al above n.44 at 452

69 B. Lee, R. Vangipuram, E. Petersen and S.K. Tyring, 'Complications associated with intimate body piercings' (2018) 24(7) *Dermatol Online J* 13030.

70 B. Essen and S. Johnsdotter, 'Female Genital Mutilation in the West: traditional circumcision versus genital cosmetic surgery' (2004) 83 *Acta Obstetricia et Gynecologica Scandinavica*, 611 at 611.

s.1(1) of which provides that ‘a person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl’s labia majora, labia minora or clitoris’. S.6(1) indicates that the word ‘girl’ includes ‘woman’: it is therefore no defence to state that the procedure was performed on an adult, however, as discussed below, the age of the person undergoing a piercing *is* important.

## Actus Reus

The actus reus of the offence is the excision, infibulation or mutilation of a girl or woman’s genitalia. The language utilised in the legislation reflects the WHO FGM classifications, but as the CPS has pointed out, they have not actually been incorporated into domestic legislation, although prosecutors should be aware of them as they are used by investigators and experts.<sup>71</sup> At the time of writing, only four cases had reached the criminal courts, and none had been subject to an appeal. Consequently, there is no binding judicial precedent on the definition of the terms that make up the actus reus. The CPS guidelines indicate that ‘excise’ means ‘to cut out/off, cut away, extract or remove’ whilst ‘infibulate’ means ‘to close off or obstruct’.<sup>72</sup> This is consistent with the WHO definitions and encapsulates Types I-III FGM. In relation to ‘mutilation’, the CPS guidelines refer to the Oxford English Dictionary definition of ‘to mutilate’ which means ‘to deprive of the use of a limb or bodily organ, by dismemberment or otherwise; to cut off or destroy (a limb or organ); to wound severely; or to inflict violent or disfiguring injury on.’ This echoes the statement made by Sir James Munby, President of the Family Division of the High Court, several years earlier in *Re B and G (Children)(No2)*, which concerned an unsubstantiated allegation of FGM on a young girl in the context of care proceedings.<sup>73</sup> The President declared that Type IV FGM (including piercings) can only be considered a criminal offence if it falls within the definition of ‘mutilation’, citing the Oxford English Dictionary definition.

The Crown Prosecution Service has indicated that a female genital piercing ‘as commonly understood and practised, is unlikely to involve excision, infibulation or mutilation’ and would not, therefore, normally constitute FGM.<sup>74</sup> An allegation founded on genital piercing is unlikely to meet the evidential stage required for a prosecution under the 2003 Act.<sup>75</sup> This seems to be consistent with earlier Home Affairs Select Committee Reports on FGM which, other than listing piercing as an example of Type IV FGM, make no reference to genital piercings. In contrast, both reports contain a brief discussion of whether female genital cosmetic surgery constitutes female genital mutilation.<sup>76</sup> This omission may therefore signify that genital piercing for adornment or to improve sexual satisfaction is not regarded as mutilation *or* that it was simply overlooked, as the focus of both reports was, naturally, the harmful cultural practice of FGM. The declaration made by the CPS has been taken to mean that genital piercings are *always* legal as illustrated by a headline that appeared in the Guardian Online: ‘*Vaginal surgery and piercings are not FGM, says CPS guideline*’.<sup>77</sup> However, the CPS has not ruled out a prosecution, declaring that ‘each case must be considered on its own facts and merits and the medical evidence carefully considered’. It is clear that a genital piercing will only amount to FGM if it causes an injury or disfigurement. As explained earlier, numerous studies have considered the risks associated with genital piercings, which include bacterial infection, risk of STI and problems with childbirth. Whether the complication

71 See CPS, above n.1

72 See CPS, above n.1

73 *Re B and G (Children)(No2)* [2015] EWFC 3

74 See CPS, above n.1

75 See CPS, above n.1

76 Home Affairs Committee ‘Second Report Female genital mutilation: the case for a national action plan’ (2014) and ‘Female genital mutilation: abuse unchecked Ninth Report of Session 2016–17 HC 390 (2016)

77 O. Bowcott, ‘Vaginal surgery and piercings are not FGM, says CPS guideline’ (2019) available online at <<https://www.theguardian.com/society/2019/oct/17/vaginal-surgery-and-piercings-are-not-female-genital-mutilation-fgm-crown-prosecution-service>> retrieved 15 May 2021.



amounts to a mutilation will depend on its severity: if it does, will the fact that the recipient consented to the piercing make a difference? The Female Genital Mutilation Act 2003 contains no explicit defence of consent: lack of consent is not therefore part of the *actus reus* of the offence. But the CPS guidance indicates that it would be available if ‘good reason’ is established, citing *R v Brown*<sup>78</sup> and *R v BM*.<sup>79</sup> In *Brown*, the House of Lords declared that the consent of an individual to injury does not provide a valid defence to the person who inflicts the injury if it causes actual bodily harm or more serious injury, but stated that there are circumstances when there is ‘good reason’ to accept consent as a defence e.g. surgery. *BM* concerned consent to bodily modifications, such as nipple and ear removal and in this case, the Court of Appeal would not place bodily modifications in a special category that is exempt from the general rule. However, the Court suggested that there *is* ‘good reason’ to accept consent as a defence in relation to bodily piercings because ‘there is a need to reflect the general values of society which have long accepted tattooing and piercing (not just of ears) as acceptable’.<sup>80</sup> Although genital piercings are not explicitly mentioned, given their popularity and acceptance at the point the case was decided, it is assumed that they are included. It should be stressed that a woman requesting FGM consents to a piercing, which, due to changing values, is no longer, of itself, regarded as harm. The complications that may ensue *do* fall within the definition and the woman may consent to take such risks, if she is aware of them, but this is not the same as consenting to harm itself.

The CPS has declared that ‘where a woman agrees by choice to a genital piercing, and has the freedom and capacity to make that choice, an assault charge is unlikely to be appropriate’, although it has not been ruled out.<sup>81</sup> ‘Conversely, an assault charge should be considered where the evidence demonstrates an absence of consent.’ Here, the use of the word ‘woman’ is significant: the CPS guidance provides that ‘prosecutors should challenge any claim that there is “good reason” for consent to apply as a defence in relation to a girl under 18 years of age as opposed to a woman’<sup>82</sup> and, as discussed later, the defence of consent is not available under Welsh legislation on intimate piercings if performed on a child.

S.1(2) of the act provides an explicit defence: no offence is committed if an approved person i.e. a medical professional, performs a surgical operation necessary for the woman’s mental or physical health. Even if it could be argued that a piercing was necessary for a woman’s health e.g. to improve sexual satisfaction, the defence would not normally be available as a piercing is not generally regarded as a surgical operation and a piercer would not usually be a registered medical practitioner.

## Mens Rea

S.1 of the Female Genital Mutilation Act 2003 makes no express reference to *mens rea*, but based on the principles articulated by Lord Scarman in *Gammon*, it is presumed that *mens rea* is required because the offence is statutory; truly criminal, rather than regulatory; and may result in the imposition of a serious penalty.<sup>83</sup> Due to the lack of case law, it is not obvious what the *mens rea* for the offence actually is and the only conviction under s.1 sheds little light on the subject. The mother of a three-year-old girl, who suffered significant injuries to her genitals, claimed that her daughter had fallen on a metal object, but expert evidence suggested that three cuts had been deliberately inflicted on the girl’s genitals using a sharp object.<sup>84</sup> Intention to apply a sharp object was thus present and so it is uncertain whether anything less will suffice. This is not problematic in relation to cosmetic genital piercings, as the piercer will not

78 *R v Brown* [1994] 1 AC 212

79 *R v BM* [2018] EWCA Crim 560

80 Above n.79 at para 39

81 See CPS, above n.1

82 See CPS, above n.1

83 1985 AC 1. Discussed in K. Reid ‘Strict Liability: Some Principles for Parliament’ (2008) 29(3) *Statute Law Review* 173–194.

84 <<https://www.judiciary.uk/wp-content/uploads/2019/03/r-v-n-female-genital-mutilation-sentencing-remarks-whipple-j.pdf>> retrieved 20 April 2022.

dispute intention to perform the procedure. However, it is unclear whether mens rea is required in relation to the result element of the offence, which in the case of a genital piercing, is an injury or disfigurement. The CPS guidelines cite incompetence, failure to follow guidelines and performance by an unqualified or inexperienced piercer as factors in favour of a prosecution: it therefore seems that an offence may be committed where a piercer does not intend to cause harm, but does so through negligence.

Mens rea must be distinguished from motive. In most cases, FGM is performed to maintain a cultural tradition, which reflects the inequalities that exist between men and women and constitutes a form of societal control. The CPS guidelines make it clear that the prosecution does not have to prove motive: indeed, the only person to have been convicted for FGM was not part of a community that practiced it. At trial, it was suggested that the woman had cut her daughter, either, in order to cleanse her or as part of a witchcraft ritual.<sup>85</sup> Similarly, Dr Dhanuson Dharmasena (a junior registrar in obstetrics and gynaecology) who was prosecuted having stitched a woman who had previously undergone type III FGM in Somalia, did so to stop her bleeding during child birth, not to maintain a harmful cultural practice.<sup>86</sup> Dr Dharmasena was acquitted, but the fact that he was prosecuted at all, indicates that the CPS deemed all elements of the offence to be present. The prosecution was justified by Alison Saunders, the Director of Public Prosecutions at the time, who asserted that the evidence 'was carefully reviewed at every stage' of the case and that the Code Tests were fully satisfied.<sup>87</sup> It therefore seems that intention to perform the procedure was considered sufficient (although the jury did not appear to agree). The prosecution was subject to much criticism<sup>88</sup> and the CPS guidelines on FGM, which were subsequently issued, state that evidence may 'be sought, as appropriate, as to why FGM was (or might have been) performed'. This may imply a new reluctance to prosecute those (including professional piercers) who lack harmful motives.

## Public Interest

Even if the evidential stage of the Crown Prosecution Service test is met, the piercer will only be prosecuted if the public interest stage is also satisfied i.e. the public interest factors in favour of prosecution outweigh those tending against it.<sup>89</sup> If the recipient was under the age of eighteen at the time of the piercing, 'a prosecution is highly likely to be in the public interest'.<sup>90</sup> It should be noted that regulated professionals e.g. healthcare or social workers, who discover that an act of FGM appears to have been carried out, have a duty to notify the chief police officer of the area in which the girl resides.<sup>91</sup> Genital piercings of girls under the age of eighteen may therefore come to the attention of the CPS.

If the recipient is an adult, the prosecutor will consider other factors, including those listed in guidance that specifically relate to piercings (and cosmetic surgery). Factors tending in favour of a prosecution are that: the victim supports a prosecution; the procedure is relatively severe and invasive; the victim suffered significant physical/mental harm; there is a real risk of future harm; there is a real impact on the victim's quality of life; there are no medical benefits; performance was incompetent; the piercer was not qualified or experienced and did not follow guidelines; there is no or a lack of evidence of the victim's capacity to consent and/or fully informed consent; there is no, or a lack of documented evidence that the risks were fully explained before consent was given; there is evidence of advertising to women or inaccurate claims

85 Ibid

86 Sandra Laville 'Dr found not guilty of FGM on patient at London hospital' *The Guardian* 4 February 2015. <<https://www.theguardian.com/society/2015/feb/04/doctor-not-guilty-fgm-dhanuson-dharmasena>>

87 UK Parliament (2015) 'Female Genital Mutilation: Follow-up – Home Affairs – Prosecuting FGM' <<https://publications.parliament.uk/pa/cm201415/cmselect/cmhaff/961/96105.htm>> retrieved 25 April 2021.

88 See Laville, above n.86

89 CPS Crown Prosecution Service 'Code for Crown Prosecutors' (2018) available online at <<https://www.cps.gov.uk/publication/code-crown-prosecutors>> retrieved 15 May 2021.

90 See CPS, above n.1

91 S.5B Female Genital Mutilation Act 2003, inserted by The Serious Crime Act 2015, s.74

and there is evidence of a financial benefit. If a piercing is performed by someone who is inexperienced, has not registered themselves or their premises with the local authority, does not follow guidelines or use suitable equipment, the risks were not explained to the woman, there is a lack of documented evidence of her capacity and fully informed consent and the piercing causes the woman an injury, a prosecution would arguably be justified. Furthermore, the fact that a piercing provides no medical benefit, the piercer may have advertised their services and receives a financial benefit for performing the piercing will contribute to the argument that a prosecution is in the public interest. Cases where all the factors tending in favour of a prosecution are present, are likely to be extremely rare, but may be referred to the CPS if the recipient makes a complaint.

Factors tending against a prosecution are that: the victim does not support it; the procedure is non-severe/invasive; the victim suffered limited physical or mental harm; there is a negligible risk of future harm; there is a negligible impact on the victim's quality of life; there is some medical benefit; the procedure was performed competently, by a qualified / experienced practitioner using suitable equipment in a suitable location; guidelines were followed; there is documented evidence of the victim's capacity to consent and fully informed consent; there is documented evidence that the risks were fully explained before consent was given; there was no advertising to women or inaccurate claims and no evidence of a financial benefit. If these factors exist, a prosecution would not be in the public interest: indeed, the piercing is unlikely to come to the attention of the CPS in the first place.

In some instances, there will be certain factors that support a prosecution and others tending against it. The former will be need to be weighed against the latter, but it is likely that the CPS would decline to prosecute in all but the most extreme cases. Even so, the process of investigation will be stressful for the piercer and may affect their business. As Slider has indicated, an investigation can be 'career ending'.<sup>92</sup>

## Alternative Charges and the Purposes of Criminal Law

If the recipient of a genital piercing suffers physical harm and the public interest test is satisfied, the CPS may choose to prosecute as an offence against the person e.g. common assault or battery,<sup>93</sup> assault occasioning actual bodily harm (ABH),<sup>94</sup> grievous bodily harm (GBH) or wounding,<sup>95</sup> rather than under the Female Genital Mutilation Act 2003. In fact, the CPS guidance refers to 'an assault charge' when discussing the issue of consent, which might suggest that it considers this to be preferable to a prosecution under the FGM Act 2003 and may reflect a desire to separate female genital piercing from female genital mutilation. It should be noted that there are key differences between offences against the person and genital mutilation offences. First, the maximum prison sentence differs: it is six months for common assault and battery, five years for ABH, GBH and wounding and fourteen years for a genital mutilation offence<sup>96</sup>. However, in practice a court is highly unlikely to impose a prison sentence of more than five years for a genital piercing that constitutes a mutilation. Second, the Female Genital Mutilation Act 2003 contains specific supplementary offences e.g. failing to protect a girl under the age of 16 from a genital mutilation offence,<sup>97</sup> although it is difficult to envisage circumstances in which this would apply in the context of a genital piercing for adornment. Third, as explained above, regulated professionals have a duty to report FGM performed on a child: no such obligation applies to offences against the person, but standard safeguarding procedures would apply. These factors would be taken into account by the CPS when making a prosecution decision, but perhaps the most important consideration is whether FGP *should* be regarded as

92 See Slider above n.2

93 The Criminal Justice Act 1988, s.39

94 The Offences Against the Person Act 1861, s.47.

95 The Offences Against the Person Act 1861, s.20

96 The Female Genital Mutilation Act 2003, s.5

97 The Female Genital Mutilation Act 2003, s.3A

FGM. Ashworth refers to ‘the principle of fair and representative labelling’ and criticises the branding of ‘offenders as serious when their offenses are relatively minor’.<sup>98</sup> Based on this principle, it can be argued that piercers, even those who are negligent and cause harm to a female’s genitals, should not be labelled as having committed the offence of FGM. The principle of fair and representative labelling is associated with the central function of the criminal law, which, according to Ashworth, is ‘the declaration of forms of wrongdoing that are serious enough to justify the public censure inherent in conviction and punishment.’<sup>99</sup> It is difficult to assert that cosmetic genital piercings performed on consenting women is a sufficiently serious practice to warrant criminal intervention. As Feinberg contends, there are moral limits of the legitimate power of the state to establish criminal prohibitions: it can be argued that the criminalisation of cosmetic genital piercings exceeds this limit.<sup>100</sup> The secondary function of the criminal law is the prevention of conduct that poses a significant risk to an interest protected by law.<sup>101</sup> Although genital piercings can result in health complications, treating the practice as FGM, which is punishable by up to fourteen years in prison, seems disproportionate to the risks posed. The third function of the criminal law is the reinforcement of the regulation of certain activities and in such cases, use of the criminal law should be the last resort.<sup>102</sup> At present, this function of the criminal law is not applicable to the practice of body piercings, as the industry is unregulated. If the industry became regulated, the activities of professional piercers could be controlled and supervised, and specific regulatory offences could be created and utilised (as a last resort) to sanction those who do not meet the required standards. This approach should therefore be considered by the legislature.

## Wales

In Wales, female genital piercings are subject to Welsh legislation, as well as the Female Genital Mutilation Act 2003. S.95 of the Public Health (Wales) Act 2017 makes it an offence for a person in Wales ‘to perform an intimate piercing on a person who is under the age of 18’ or ‘to make arrangements to perform an intimate piercing, in Wales, on a particular person who is under the age of 18.’ An intimate piercing is defined ‘as a body piercing performed on an intimate body part’ which includes female genitalia, ‘where performed otherwise than in the course of a medical procedure’.<sup>103</sup> The term ‘body piercing’ means ‘the perforation of an individual’s skin or mucous membrane with a view to enabling a) jewellery or b) an object of a description prescribed in or under regulations to be attached to, implanted in, or removed from the individual’s body’.<sup>104</sup> The explanatory memorandum that accompanied the Bill indicated that ‘other objects’ would include beads, which made it clear that the legislation was designed to regulate intimate piercings performed for reasons of adornment.<sup>105</sup> Indeed, the Public Health Division of the Health and Social Services Group declared that the legislation (as originally enacted) *only* applied to ‘intimate piercings involving items of jewellery’.<sup>106</sup> The memorandum to the Bill explained that the purpose of the Welsh legislation ‘is very different to those covered by the Female Genital Mutilation Act 2003:’ there was thus an attempt to separate piercings performed for decoration from piercings performed for cultural reasons.<sup>107</sup> However, given that the intention

98 A. Ashworth ‘Conceptions of Overcriminalisation’ (2008) 5(407) *Ohio State Journal of Criminal Law* at 424.

99 Ashworth, above n. 98 at 408-9

100 J. Feinberg. *The Moral Limits of the Criminal Law*. Volume 4: Harmless Wrongdoing. (OUP 1990).

101 Ashworth, above n.98 at 424

102 Ashworth, above n.98 at 417

103 The Public Health (Wales) Act 2017, s.96(1)

104 The Public Health (Wales) Act 2017, s.94(1)

105 Welsh Government ‘Public Health (Wales) Bill Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes’ (2016) available online at <<https://senedd.wales/media/0tcfho4/pri-ld10224-em-r-e.pdf>> para 142 retrieved 1 July 2021.

106 Senedd ‘Explanatory Memorandum to the Prescribed Objects for Intimate Piercing (Wales) Regulations 2019’ available online at <<https://senedd.wales/laid%20documents/sub-ld12575-em/sub-ld12575-em-e.pdf>> para 2 retrieved 20 July 2021.

107 See Welsh Government, above n.105

was ‘to protect children and young people from the potential health harms from an intimate piercing’,<sup>108</sup> it was necessary to expand the definition. The Prescribed Objects for Intimate Piercing (Wales) Regulations 2019 bring within the scope of the offence, intimate piercings involving ‘any object that is not jewellery’<sup>109</sup> because ‘the policy objective is to prohibit completely all intimate piercings in a person under 18 years of age...save where the intimate piercing is performed in the course of a medical procedure.’<sup>110</sup>

Although the offence is strict, a due diligence defence is available to the accused if they believed that the person was aged 18 or over and took reasonable steps to establish the person’s age or ‘nobody could reasonably have suspected from that person’s appearance that the person was under the age of 18.’<sup>111</sup> Reasonable steps involves asking for evidence of age and that evidence could have convinced a reasonable person.<sup>112</sup> Consent is not a defence: as the Welsh Government guidance indicates, ‘the fact that a person under the age of 18 may have given their consent, or that a parent or guardian may have consent on their behalf, does not matter’.<sup>113</sup> This is because the purpose of the legislation is not only to protect children from the risks associated with intimate piercings but ‘to avoid circumstances where children and young people are placed in a potentially vulnerable situation’ e.g. being coerced by an adult to have a piercing.<sup>114</sup>

Although the policy objectives of the legislation are commendable, its existence adds to the ambiguity surrounding female genital piercings specifically. The fact that legislation was enacted to prohibit intimate piercings *on children* might be construed to mean that genital piercings *on adult women* are lawful. As explained earlier, the explanatory memorandum to the Bill draws a distinction between piercings performed for cultural reasons and cosmetic piercings, thereby implying that the latter is not a criminal offence (provided that free and full consent is given). The guidance produced by Welsh Government for Enforcement Officers makes no reference to the Female Genital Mutilation Act 2003 at all: this is because it is aimed at local authority enforcement officers who have responsibility for implementing the Public Health (Wales) Act 2017, but not the 2003 Act. However, the guidance is publicly available online and may therefore be interpreted by piercers, as a green light to adult piercing. The Welsh legislation and accompanying memoranda and guidance, thus contribute to the uncertainty regarding the legality of female genital piercings, rather than achieving ‘greater clarity and consistency in the law’ as the memorandum claims.<sup>115</sup> Furthermore, the only penalty that can be imposed under the Public Health (Wales) Act 2017 is a fine,<sup>116</sup> the effect of which is to diminish the perceived gravity of intimate piercings, including female genital piercings, performed on children. As discussed above, the CPS guidance on FGM makes it clear that a prosecution under the Female Genital Mutilation Act 2003 for a piercing that constitutes a mutilation is far more likely if the victim is a child i.e. it is regarded as more serious.

## Scotland

S.1(1) of the Prohibition of Female Genital Mutilation (Scotland) Act 2005 makes it an offence to ‘perform an action’ i.e. excision, infibulation or mutilation, ‘in relation to the whole or any part of the labia majora, labia minora, prepuce of the clitoris, clitoris or vagina of another person’. The wording

108 Welsh Government ‘Public Health (Wales) Act 2017 Guidance for Enforcement Officers on the implementation of Part 5 – Intimate Piercings’ (2019) available online at <<https://gov.wales/sites/default/files/publications/2019-08/guidance-for-enforcement-officers-on-the-implementation-of-part-5-intimate-piercing.pdf>>, para 2. retrieved 20 June 2021.

109 The Prescribed Objects for Intimate Piercing (Wales) Regulations 2019 No.1120 (W.194), s2

110 See Senedd, above n.106 at para 3

111 The Public Health (Wales) Act 2017, s.95(3)

112 The Public Health (Wales) Act 2017, s.95(4)

113 See Welsh Government, above n.108 at para 3

114 See Welsh Government, above n.108 at para 2

115 See Welsh Government, above n.105 at para 150

116 The Public Health (Wales) Act 2017, s.95(2)

differs slightly from s.1 of the Female Genital Mutilation Act 2003, but essentially the offences are the same, with identical penalties.<sup>117</sup> Based on the discussion relating to the Female Genital Mutilation Act 2003, a female genital piercing could fall within the scope of the Scottish offence if it constitutes a mutilation. This was confirmed by the Scottish Police, who responded to a question from the medical liaison officer for the UK Association of Professional Piercers regarding the application of the Scottish legislation to FGP. They stated that ‘under the Prohibition of FGM (Scotland) Act 2005, genital piercing could be covered in terms of mutilation. Until a legal precedent has been set or there is an update to the legislation in terms of exemptions [we are] not in a position to advise if any offence has been committed or not.’<sup>118</sup> Despite this uncertainty, a Consultation Paper published by the Scottish Government in 2018 explicitly declared that ‘cosmetic genital piercings are not prohibited under FGM legislation’<sup>119</sup> and in 2019 the Times reported that a spokesperson for the Scottish Government had announced that ‘genital piercings are not prohibited in Scotland’.<sup>120</sup> The headline proclaimed that: ‘intimate piercings win legal all-clear after FGM muddle’,<sup>121</sup> but the statement in the Consultation Paper and the declaration from the Government spokesman do not constitute legal precedent or an update to legislation. The announcement may have been a reaction to the feedback from many respondents to the consultation who consider piercings to be a ‘matter of consent’ and ‘personal choice’, with few suggesting that ‘the government should intervene in relation to consenting adults’ seeking genital piercings.<sup>122</sup> The FGM (Protection and Guidance) (Scotland) Act 2020 implemented some of the consultation findings (e.g. by introducing FGM protection orders), but it does not amend the definition of FGM or provide an express exemption for genital piercings, despite having the opportunity to do so. It is therefore argued that the legal position in Scotland remains, as articulated by the Scottish police i.e. a piercing *could* constitute mutilation (as it can in England and Wales). Until the courts set a precedent on the definition of mutilation or an amendment is made to the legislation, the position is unclear.

## Conclusion

This paper has demonstrated why the international community regards piercing as a form of female genital mutilation and why it is unlikely to modify its stance. Pricking and piercing are traditional practices in some communities, whilst in others, they have recently been adopted as replacements for more serious forms of FGM or are being used to cover up more harmful types of genital mutilation. It would be dangerous for the WHO to remove pricking and piercing from Type IV FGM, as this would condone practices that symbolise ‘society’s control over women’.<sup>123</sup> The WHO classifications have not been incorporated into UK law: whether a cosmetic piercing breaches UK law is therefore dependent on the interpretation of domestic legislation. The Female Genital Mutilation Act 2003, which applies in England, Wales and Northern Ireland and the Prohibition of Female Genital Mutilation (Scotland) Act 2005 potentially criminalise performing female genital piercings, because both prohibit mutilation: a piercing will constitute a mutilation if it results in an injury or disfigurement. However, there is little case law

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117 14 years – The Prohibition of Female Genital Mutilation (Scotland) Act 2005, s.5

118 See Slider above n.2

119 Scottish Government ‘Strengthening Protection from Female Genital Mutilation (FGM) A Scottish Government Consultation’ (2018), available online at <<https://www.gov.scot/publications/strengthening-protection-female-genital-mutilation-fgm/pages/6/>> p.23. retrieved 1 June 2021.

120 M. Horne ‘Intimate piercings win legal all-clear after FGM Muddle (2019) available online at <<https://www.thetimes.co.uk/article/intimate-piercings-win-legal-all-clear-after-fgm-muddle-x679b6275#:~:text=It%20prompted%20health%20services%20in,under%20existing%20anti%2Dmutilation%20legislation>> retrieved 1 July 2021.

121 Above n.120

122 Scottish Government ‘Strengthening Protection from Female Genital Mutilation (FGM) Analysis of Consultation Responses’ (2019), available online at <<https://www.gov.scot/publications/strengthening-protection-female-genital-mutilation-fgm-analysis-consultation-responses/>> p.26. retrieved 15 June 2021.

123 See UN above n.9 at 5

on the definition of a mutilation and none on genital piercings specifically. Furthermore, the mens rea requirement is not specified in the legislation: the law is thus ambiguous, which is problematic for professional piercers. Judicial or legislative guidance is therefore required.

Even if a genital piercing results in an injury or disfigurement and the necessary mens rea is established, it may not be in the public interest to prosecute. This may be of little comfort to piercers who will be affected, personally and professionally, by a police or CPS investigation (Crown Office and Procurator Fiscal Service in Scotland).

The ambiguity surrounding the legality of female genital piercings has been exacerbated by the introduction of Welsh legislation that prohibits intimate piercings on children (but not adults) and statements from the Scottish Government that FGP is not FGM. The latter has not been confirmed by case law or encapsulated into statute law, even though legislation (the FGM (Protection and Guidance) (Scotland) Act 2020) was passed soon after the statements were made. This article thus concludes that the law remains unclear and that FGM legislation could potentially be applied in a cosmetic piercing context, albeit in extreme and limited circumstances. There is much opposition to this (e.g. from the Association of Professional Piercers) and much support for the explicit removal of genital piercings from the scope of FGM legislation for several reasons.<sup>124</sup> First, it would provide clarity for professional piercers, the police and prosecutors. Second, it would result in more accurate recording of FGM performed for cultural reasons, because at present, NHS data on FGM includes cosmetic piercings, which undermines the harmful impact of the practice.<sup>125</sup> Third, it would ensure that professional piercers, even those who are negligent and cause harm, are not labelled as a more serious offender than their behaviour warrants. Finally, it would create parity between men and women in terms of access to genital piercings, for there is no specific legislation that prohibits the performance of a genital piercing on a man. But as indicated earlier, it can be argued that to allow genital piercing for decoration or sexual enhancement (which often results in complications), but not for cultural reasons, when the latter may be less invasive than the former, is racial discrimination. The health risks associated with cosmetic genital piercings could be minimised by regulating the profession, but this would not address the allegation that the law is discriminatory. The issue is not, therefore, easy to resolve, which is perhaps why UK legislative bodies have avoided attempting to do so. Nonetheless, it is one that should be considered.

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124 UKAPP 'Why female genital piercing is NOT "female genital mutilation"' (2018) available online at <[http://www.ukapp.org.uk/wp-content/uploads/2019/06/UKAPP\\_FGM-brochure\\_print.pdf](http://www.ukapp.org.uk/wp-content/uploads/2019/06/UKAPP_FGM-brochure_print.pdf)> retrieved 15 May 2021. See also responses to the Scottish Consultation, above n.108

125 NHS Digital 'FGM Enhanced Datasets – Clinical Audit Platform Operational Guidance' (2016) available online at <<https://digital.nhs.uk/data-and-information/clinical-audits-and-registries/female-genital-mutilation-datasets/health-professionals-and-nhs-organisations#what-data-is-being-collected>> p.19. retrieved 15 July 2021.