D.C. CRIMINAL CODE REFORM COMMISSION

TESTIMONY ON THE "FEMALE GENITAL MUTILATION PROHIBITION ACT OF 2023"

COMMITTEE ON THE JUDICARY & PUBLIC SAFETY HEARING
June 27, 2023

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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Introduction

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the "Female Genital Mutilation Prohibition Act of 2023", held on June 27, 2023. My name is Jinwoo Park and I am the Executive Director of the District's Criminal Code Reform Commission (CCRC). I am presenting testimony today on behalf of the CCRC. The CCRC is a small, independent District agency focused on developing recommendations to reform the criminal statues in the District.

The CCRC takes no position at present on the substantive merits of whether to create a separate offense to specifically address Female Genital Mutilation (FGM) or cutting of persons under care as proposed in the "Female Genital Mutilation Prohibition Act of 2023.". Instead, this testimony analyzes potential ambiguities and questions related to the language of the proposed bill and offers some possible solutions. The CCRC has not fully researched comparable laws in other jurisdictions or explored all constitutional questions related to the bills at this time.[1]

Protections Under Current and Federal Law

The proposed FGM bill seeks to establish criminal liability for female genital mutilation of children involving "persons under care" which, under the bill's current language, includes adults under a guardianship or conservatorships. Although the CCRC found no examples of prosecutions for FGM-type conduct in District case law, the practice of non-consensual FGM on persons under the age of 18[2] and adults under care is likely punishable under District statutes guarding against bodily injury such as the assault, aggravated assault, or cruelty to children.[3] The maximum penalty ranges for those offenses range from 180

[1] The CCRC gave testimony on a prior version of this bill in 2022. A copy of the prior testimony can be found at: https://ccrc.dc.gov/node/1587676

[2] While parents have a large degree of discretion in decision regarding their children, it is well-established that a State may exercise "constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J. R.,* 442 U.S. 584, 603 (1979); s*ee also New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."). The DCCA has also held that the District cruelty to children statute, which criminalizes engaging in conduct that causes or creates a grave risk of bodily injury to a child, does not require malice (acting out of a desire to inflict pain rather than out of genuine effort to correct or care for the child). *Jones v. United States*, 813 A.2d 220, 224 (D.C. 2002).

[3] *See* D.C. Code § 22-404 (assault statute punishing common law assault); D.C. Code § 22-404.01 (aggravated assault statute punishing knowingly or purposely causing "serious bodily injury" to another person); D.C. Code § 22-1101 (cruelty to children statute punishing conduct that creates a grave risk of bodily injury to a child irrespective of malice). A prior version of the federal FGM statue was also struck down in part because the court found that the prohibited practice was a criminal assault and there are at least a few examples of assault statutes being used to criminalize FGM in other states. *See United States v. Nagarwala*, 350 F. Supp. 3d 613, 628 (E.D. Mich. 2018) (striking down a prior version of federal law criminalizing FGM on the grounds that "as despicable as [FGM] may be, it is essentially a criminal assault" prosecutable only by local jurisdictions absent a nexus to Congressional power); *id*. (also stating: "The comparison of FGM to healthcare is unsuitable. FGM is a form of physical assault, not anything approaching a healthcare service.");*Adem v. State*, 300 Ga. App. 708, 708, 686 S.E.2d 339, 340 (Ga. 2009) (affirming convictions of father for first degree cruelty to children and aggravated battery for removing his daughter's clitoris); *Byrd v. State*, 251 Ga. App. 83, 84, 553 S.E.2d 380, 382 (Ga. 2001) (holding severing a portion of the victim's clitoris constituted evidence from which a jury could find serious disfigurement).

days to 15 years in prison depending on the level of bodily injury and whether the actor is charged under an assault statute or the cruelty to children statute. [4] In addition, there is a female genital mutilation offense in federal law applicable to conduct where the jurisdictional nexus is satisfied.[5] The penalty under federal law is 10 years.

Bill Does Not Apply to Children

Based on the tolling provision under subsection (e) it appears the intent of the bill is to cover protect children and persons under guardianship. However, the bill as written would *not apply to children*. Rather, the FGM bill proposed here would establish an additional, new offense applicable only to actors: (1) who knowingly perform FGM on "a person under care"; (2) who, as guardians, knowingly consent to, permit, or otherwise facilitate FGM on a "person under care"; or (3) who knowingly remove or facilitate the removal of a "person under care" for the purpose of facilitating FGM. The term "person under care" is defined as an "individual under a conservatorship or guardianship." The bill defines the terms "conservatorship" and "guardianship" by cross referencing Title 21, but Title 21's definitions *only apply to adults*.[6] Under the cross-referenced definitions, a minor cannot qualify as a "person under care."

If the Committee intends for the bill to cover cases in which the victim is a minor, the statute could be re-written to separately include children under the definition of "persons under care."

With respect to cases involving guardians or conservators, it should be noted that current District law explicitly limits the authority of court appointed guardians to consent to certain procedures absent court approval including to the "removal of a bodily organ" (e.g., the clitoris).[7] Neither the current D.C. Code nor District case law expressly address if and when a person charged with an offense may defend against criminal charges on the grounds that they were acting lawfully as a court appointed guardian. Thus, beyond criminalizing performing, facilitating, or consenting to the performance of FGM on a person under care, this bill would clarify when a guardian could lawfully authorize or facilitate FGM on a person under care and would clearly establish that guardianship or the effective consent of a guardian is not a defense to FGM. However, a person acting without court approval in providing consent for certain procedures would clearly be acting beyond their authority under current law.

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[4] The recommendations in the Revised Criminal Code would have similarly criminalized the practice of non-consensual forms of FGM under the RCCA's assault, criminal abuse of a minor, criminal neglect of a minor, criminal abuse of a vulnerable adult or elderly person, and criminal neglect of a vulnerable adult or elderly person statutes. The maximum penalties for conduct constituting FGM under the RCCA ranged from 1 year to 12 years, again depending on the statute, age of the victim, and level of injury. *See* RCCA § 22A-1202 (assault); RCCA §§ 22A-1501, 1504 (Abuse and Neglect of Vulnerable persons). Although the RCCA penalties appear to be somewhat lower than those in the current D.C. Code, this difference may have reflected the different way the RCCA and the current D.C. Code calculate "back up time". The RCCA penalties did not include the additional years of back up time, while the current D.C. Code penalties do include backup time. (Compare RCCA § 205(b) with D.C. Code § 24–403.01(b-1).) Functionally, the 12 year statutory maximum under the RCCA (with an additional 3 years backup time) was equivalent to a current 15 year statutory maximum under the D.C. Code (from which the 3 years backup time must be subtracted to determine the maximum a judge may impose at sentencing).

[5] 18 U.S.C. § 116. Prosecutorial authority for both the proposed offense and the federal offense rests with the Office of the United States Attorney for the District of Columbia.

[6] D.C. Code § 21-2401.02. ("'Conservator'" means a person appointed by the court to administer the property of *an adult*, including a person appointed under §§ 21-2001 to 21-2077." "'Guardian'" means a person appointed by the court to make decisions regarding the person of *an adult*, including a person appointed under §§ 21-2001 to 21-2077) (emphasis added).

[7] *See e.g.*, D.C. Code § 21-2047.01 (a)(1).

Notably, while current statutes and case law do not discuss guardianship in relation to assaultive conduct such as FGM, the RCCA proposed a new Special Responsibility for Care, Discipline, and Safety Defense, that clarifies when a parent or guardian may use parenthood or guardianship as a defense to any offense committed against a person or any property offense.[8] Pursuant to the proposed statute, a guardian defense would *not* be available if the conduct exceeds the authority of the actor's guardianship over a complainant, *as determined under civil law*. Consequently, under the RCCA proposal, a guardian could not defend against an assault, an abuse of a vulnerable adult charge, or a neglect of a vulnerable adult charge based on FGM on the grounds that they had guardianship over the person unless their conduct was otherwise authorized by civil law. Further, the RCCA's guardian defense is not available unless: (1) the conduct is done with the intent to safeguard or promote the welfare of the complainant; (2) the conduct is reasonable under all the circumstances; *and* (3) the conduct either does not create as substantial risk or, or cause death or serious bodily injury or is the performance or authorization of a lawful cosmetic or medical procedure.[9] These provisions would preclude a court appointed guardian from using guardianship as a defense to authorizing or performing FGM on a person under care under the circumstances this bill seeks to criminalize. A combination of assault offenses and limitations to any applicable defenses could adequately criminalize FGM and related conduct.

Specific Considerations Regarding Bill Language

The Bill May Improperly Infringe on Bodily Autonomy of Persons Under Care

The proposed bill may not adequately protect the First Amendment and Due Process rights of an adult person under care. Insofar as it provides an exception for persons under care who request a sex reassignment procedure, the proposed bill recognizes that persons deemed incapacitated under guardianship statutes have and retain substantive and procedural due process rights with respect to bodily autonomy even when placed under guardianship. District law also generally presumes that persons under a guardianship are capable of making health-care decisions absent an additional certification of incapacity.[10]

The bill may improperly criminalize an array of elective cosmetic and medical procedures. The bill permits acts constituting FGM in instances that would protect the physical health of the person under care, including sex reassignment procedures. However, because the bill defines "FGM" broadly to include "pricking" and "piercing" this would exclude a number of cosmetic procedures. For example, consensual genital piercing would constitute a crime under this bill, as piercings do not protect physical health.[11] The bill makes exceptions for certain types of medical procedures that are "*necessary* to preserve or protect the physical health of the patient[.]". Under the text of this statute, an *elective* cosmetic procedure, even when

[8] *See* RCCA § 22A-408. Special Responsibility for Care, Discipline, or Safety Defenses.

[9] If it is unclear whether various types of FGM procedures constitute a "lawful cosmetic or medical procedure" the Special Responsibility for Care, Discipline, and Safety Defense, or commentary accompanying the statute, could be re-drafted to clarify that certain FGM procedures are *not* lawful.

[10] *See* D.C. Code § 21-2203. Presumption of capacity. ("An individual shall be presumed capable of making health-care decisions unless certified otherwise under § 21-2204. Mental incapacity to make a health-care decision shall not be inferred from the fact that an individual: [] (3) Has a conservator or guardian appointed pursuant to § 21-1501 et seq. or § 21-2001 et seq.").

[11] Notably, clitoral hood piercing for non-medical and non-religious purposes is not uncommon but falls within the definition of FGM in the FGM bill. Categorical prohibition and criminalization of such a piercing of a person under care, without any due process protections, may implicate the due process right to privacy in addition to the First Amendment's guarantee of freedom of religion. Similarly, a prohibition related to acts labeled FGM but not practices such as penile circumcision for non-medical reasons may constitute grounds for an equal protection challenge.

performed by a licensed medical professional, could constitute FGM. For example, if person has a deformity of their genitalia that does not cause any adverse health effects, a cosmetic procedure is not necessary to protect the patient's health, and would constitute a crime under this bill.

To address these concerns and still accomplish the bill's purpose of prohibiting a guardian from imposing FGM on a person under care who may be incapable of meaningful consent, the Council may wish to consider revising the civil laws related to the powers and limitations of guardians in Title 21 of the District Code.[12] By clarifying guardian authority with respect to FGM in the statutes addressing guardianship and providing persons under care an opportunity to be heard by a court, the Council would also be clarifying the applicability of a guardian-type defense to the assault and other relevant statutes absent passage of a defense such as the former RCCA's Special Responsibility for Care, Discipline, or Safety Defense statute while protecting the rights of persons under care. Additionally, the Council may consider broadening the exceptions contained in paragraph (d) of the FGM bill text to include procedural protections such as allowing a person under care to petition a court for permission to undergo an elective procedure.

The proposed bill may unconstitutionally prohibit interstate travel or unintentionally support interjurisdictional abortion restrictions.

In addition to criminalizing FGM within the District, the proposed bill criminalizes knowingly removing or facilitating the removal of a person under care from the District for the purpose of facilitating female genital mutilation of the person under care. The bill does not define the term "remove" and it is not clear what the scope of covered conduct is under this provision. Prohibitions that restrict travel to another state may raise constitutional issues given that at least some of the conduct falling under the definition of FGM in the proposed bill could be lawful in other jurisdictions. For example, the District prohibits body piercing of persons under the age 18 with the exception of ear piercing. Another state may permit a minor to obtain a genital piercing with or without parental consent. Under the proposed bill, "removing" or "facilitating the removal" of the minor from the District for the purpose of allowing them to get a piercing lawful under the laws of another state would be a 10 year felony under the proposed bill. This could implicate the constitutional right to interstate travel. Although the District has an interest in the health and welfare of its citizens, the Supreme Court has said "a State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[13]

It is unclear whether or to what degree, a jurisdiction can criminalize conduct or attempted conduct in another jurisdiction when that conduct is *legal in that jurisdiction*. For example, Justice Breyer noted in his dissenting opinion in *Dobbs v. Jackson Women's Health Org.*[14], which struck down *Roe v. Wade*, that *Dobbs* would create significant questions about interstate conflicts. He wrote:

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[12] *E.g.*, D.C. Code § 21-2047.01 places other limitations on guardians such as limiting the power "to consent to an abortion, sterilization, psycho-surgery, *or removal of a bodily organ* except to preserve the life or prevent the immediate serious impairment of the physical health of the incapacitated individual, unless the power to consent is expressly set forth in the order of appointment or after subsequent hearing and order of the court." D.C. Code § 21-2047.01(a)(1). Although this provision already limits the power of a guardian to consent to some of the conduct under the bill's definition of FGM, the Council could amend this statute to include further limitations on the power of a guardian, specifically with respect to conduct falling under the definition of FGM.

[13] *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

[14] 142 S. Ct. 2228 (2022).

> "Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions."[15]

Although non-consensual FGM and abortion care are not comparable, the District's criminalization of the "removing or facilitating the removal" of a person under care from the District for the purpose of facilitating a procedure that may be deemed legal and consensual in another jurisdiction may unintentionally undermine the District's attempt to make the District a sanctuary for safe and legal abortions as well as gender-affirming care. By criminalizing removal or facilitation of removal of a person for FGM, the Council could unintentionally provide legal support for the attempts of other jurisdictions to criminalize abortion care, gender-affirming care, or other conduct performed legally in the District on residents of another state.

Additional textual considerations

First, the FGM bill uses unnecessarily gendered language in the introduction and text of the bill. The practice of FGM is not limited to women and girls as transgender men and boys as well as non-binary persons with vulvas could be subjected to the practice. For transgendered or non-binary victims subjected to mutilation of the vulva, referring to *female* genital mutilation in a prosecution of the persons responsible could be an additional indignity that compounds the trauma and/or discourages victims from coming forward. While it seems likely the purpose of using the term "female" rather than simply referring to "genitallia" is to exclude circumcision of the penis from the proscribed conduct, the Council could avoid labeling genitalia as female or male by substituting the term "vulva" or a list of the specific parts of the genitalia that the bill aims to protect, *i.e.*, the clitoris, the prepuce, the labia minor, labia majora, vaginal orifice, mons pubis, perineum, or any other part of the vulva.

Second, the rationale for inclusion of the term "conservator" appears unclear. Pursuant to D.C. Code § 21-2401.02(2), a "conservator" is "a person appointed by the court to administer the property of an adult, including a person appointed under §§ 21-2001 to 21-2077." Because a conservator has power over property and does not have power or duties over the person or health care decisions, it is not clear that a conservator could have legal custody or control of a "person under care" stemming from the conservatorship. Notably, the proposed language defines "conservator" but does not otherwise use the term "conservator" in the statute. The Council could delete the references to "conservator" as well as the term "person under care" and use the phrase "person under care of guardian" in the text of the statutes. Subsection (a)(1) could be amended to read: "Knowingly performs female genital mutilation on a *person under care of a guardian or under 18 years of age.*" Since "guardian" is also a defined term that carries the same meaning as provided in D.C. Official Code § 21-2401.02(3), this language would be sufficient to cover adults under court-ordered guardianship.

Third, the meaning and scope of "consents to, permits, or otherwise facilitates" is unclear, especially in light of the lack of nexus between the guardian and person under care. Although "consent"

[15] *Id.* at 2337.

and "otherwise facilitate" appear to require some affirmative action on the part of the guardian or parent, "permits" appears to punish a failure to block the actions of another without limitation. Additionally, as written, the text applies to a guardian who consents to, permits or otherwise facilitates female genital mutilation of a person under care but does not specify that the person under care be under the guardianship of that particular guardian. In other words, a parent or guardian of person X would seemingly be liable for consenting, permitting, or otherwise facilitating FGM of person Y even though their guardianship powers were irrelevant to person Y and their consent would carry no legal significance. To clarify the action required, the Council may consider striking the term "permit" and clarifying that person be under the care of the guardian who consents or otherwise facilitates the FGM of the person under care.

Fourth, the proposed statue may benefit from grading to distinguish different levels of harm. The proposed statute covers multiple types of conduct, all defined as FGM, which could result in drastically different levels of harm. For example, the removal of the clitoris would result in permanent disfigurement and bodily disfunction,[16] whereas a ritual pricking[17] could be extremely mild and not cause any lasting or serious bodily injury. Should FGM conduct be prosecuted as assault or cruelty to children, the potential punishment would vary depending on the severity of the conduct in order to provide a more proportionate penalty. For example, forms of FGM such as removal of the clitoris or labia that cause "serious bodily injury"[18] would fall under the aggravated assault statute and be punishable by up to 10 years imprisonment while conduct such as ritual pricking which did not cause "significant bodily injury"[19] or "serious bodily injury" would fall under the simple assault statute and be punishable by 180 days imprisonment. If the Council does not wish to rely on assault offenses to criminalize FGM, it may consider similarly grading this new offense based on the level of bodily injury rather than treating a ritual pricking the same as permanent removal of the bodily organ. Treating a person who knowingly engages in conduct designed to avoid serious bodily injury as less culpable than a person who knowingly causes serious bodily injury is consistent with the goal of ensuring proportionality in the criminal code.

[16] The removal of the clitoris would constitute "serious bodily injury" and create liability under the current aggravated assault statute. *See* D.C. Code § 22-404.01. Similarly, the removal of the clitoris would constitute destroying, amputating, or permanently disabling a member or organ of a person's body and qualify as first degree assault in the RCCA. *See* RCCA § 22A-1202.

[17] *See* L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision,* 47 CASE W. RES. L. REV. 275, 288 (1997) (stating: "The ritualized marking of female genitalia begins with the mildest forms of the procedures, where the clitoris is barely nicked or pricked to shed a few drops of blood. This procedure is innocuous and has a strictly symbolic connotation."). Some scholars have also noted that permitting "symbolic nicking of the clitoral tissue . . . so that the children can be part of the tradition which practices FC without undergoing a full genital surgery" may be more effective in persuading persons to abandon the practice of FGM than criminal laws. Holly Maguigan, *Will Prosecutions for "Female Genital Mutilation" Stop the Practice in the U.S.?*, 8 TEMP. POL. & CIV. RTS. L. REV. 391, 408–09 (1999) (stating; "The countries which have achieved greatest success with education and outreach are those in which there has been a tradition of female genital surgeries and which do not criminalize all forms of female genital surgeries.").

[18] "Serious bodily injury" means an "injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss or impairment of a bodily member or function." *Jackson v. United States*, 970 A.2d 277, 279 (D.C. 2009).

[19] "Significant bodily injury" means an injury that requires hospitalization or immediate medical attention. D.C. Code. § 22-404(a)(2). Assaultive conduct that causes "significant bodily injury" is punishable as felony assault which is a 3-year felony. *Id.*